CONSTITUTIONAL IDEALS

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Development and Realisation Through Court-Led Justice

Edited by

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Foreword by

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DAKSH

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Foreword

Our Constitution has undergone more than a hundred amendments over the years, beginning from the first year of its existence. While some amendments were necessitated with the passage of time and are, in a sense, not of considerable significance, others have been wide-ranging and extensive. Except for the dark period during the internal emergency (1975–1977) the amendments have been positive and have furthered the rights of citizens. In its turn, the Supreme Court has cemented the rights of citizens through a dynamic interpretation of the Constitution while portraying it as a living document. This has been particularly so in respect of the fundamental rights guaranteed by Part III of the Constitution.

Constitutionalism has engaged judges, lawyers, and academics over the years and this collection of well-researched and scholarly essays has the potential of firing the imagination of legal researchers to study and reflect on themes peripherally touched upon by the contributors. I believe that such reflective writing is necessary because our Constitution is the fulcrum that regulates and governs the lives of diverse communities, cultures, and peoples in a sub-continent of nearly 150 crores. Essays such as these, which make up this compendium, point us not only in the direction of an evolving constitutional jurisprudence but also its larger impact on society and justice seen through the lens of the courts.

The carefully selected themes in the compendium cover a broad range of identities. First, the individual and the rights of individuals. The Supreme Court reminds us time and again that life is more than animal existence. While it is well-nigh impossible to identify all the constituents of 'life', there are some basics that we recognise and which differentiate us as humans from animals. The essays on some of the more important facets of individual rights lay the foundation for a seamless journey into group and community rights and the deprivation of rights through historical wrongs and how the courts are attempting to correct the balance.

The theme on constitutional procedures is of considerable relevance today, with Speakers of Legislative Assemblies and Governors of States sparring with constitutional conventions and morality. The essays in this section make for interesting reading and throw light on the gaps that need to be filled for the effective working of the Constitution.

The final theme deals with constitutional values. Have we somehow lost our way in understanding the Constitution? How have the courts repeatedly reminded us of our constitutional ethos? These are some critical questions that this section delves into, and the answers provided compel us to introspect.

I hope this compendium generates interest in legal literature and stimulates greater participation by scholars in our understanding of the rule of law and constitutionalism.

New Delhi

Justice Madan B. Lokur
Former Judge
Supreme Court of India

Preface

It is clichéd to state that the Indian Constitution is a living document, but in the 72 years of its existence, it has proved to be remarkably resilient and a source of empowerment for Indian citizens. As the longest-surviving constitution in a post-colonial country, it has been marshalled by Indian citizens and groups to redress their grievances and protect their rights. The judiciary has been called upon to interpret the rights of the citizen with regularity. Constant political, social, and religious upheaval, combined with the executive's quest for industrial development and globalisation, as well as rapid scientific and technological changes, have meant that there are always new challenges posed to the existing meaning of rights and attempts made to refashion rights to fit the dominant ideology's worldview. From time to time, a weak executive has resulted in the judiciary dealing with questions that go beyond hard law, in the realm of political, economic, and social policy, and occasionally, religion. At other times, the judiciary has deferred to the executive and legislature more than it ought to have and has either failed to consider in time, or refused to consider at all, pleas for intervention. Effectively, the Indian Constitution was produced and reproduced in the everyday encounters of the Indian citizen with the State, as Rohit De describes in his book *A People's Constitution*. Citizens' political action, especially in the form of public interest litigation, has influenced the courts and led to significant interpretations of the Constitution.[1] It, therefore, becomes necessary to study the work of the judiciary regularly and understand the manner in which the courts respond to various assertions of rights in the face of constant change.

DAKSH works in the area of judicial processes, delays, and access to justice. Our previous publications have largely been in those areas. It is not possible, however, to study judicial processes, delays, and access to justice in isolation. Understanding the societal and institutional context as well as the performance of the judiciary in its entirety is a necessary background. A study of the judiciary's performance, particularly a fact-based analysis, as the arbiter and protector of people's rights is essential to properly understanding judicial processes, delays, and access to justice and vice versa.

In this curated volume of chapters by various contributors, we attempt to survey the ways in which the judiciary has interpreted and given meaning to the Constitution in various political, social, and economic circumstances. Each of these chapters throws light on different aspects of our Constitution and the manner in which our judiciary has dealt, and continues to deal, with those aspects.

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1. Rohit De. 2018. *A People's Constitution: The Everyday Life of Law in the Indian Republic*. Princeton University Press, p. 3.

The first theme in the volume, titled 'The Individual within the Constitution: Demonstrating Citizen-Centric Justice', addresses the dignity and freedom of the individual. Recognised as one of the most significant features of the Constitution, they represented a radical break from India's past. Vikram Aditya Narayan's chapter examines the use of 'dignity' as an aspirational value in constitutional judicial reasoning in India. He notes the modest role accorded to the concept of dignity in the text of the Indian Constitution and then traces how it has been expanded and moulded by judges over time to expand and enforce rights. He also interrogates subjectivity in the use of dignity in judicial reasoning. Anindita Pattanayak and Harish Narasappa explore judicial interpretations of 'equality' in their chapter. Given that it is a fundamental constitutional value and a foundation for several other rights, equality is a multi-layered concept. Considering that it is a complex social question outside the constitutional framework and with the judiciary's limited sphere of influence on social life, the courts are only called upon to decide the validity of the actions of the *State* that are allegedly incompatible with equality as a constitutional right; the courts are therefore not always equipped to find the right answers to questions posed to them. The authors explore how Indian courts have turned to more fundamental values, such as constitutional morality, distributive justice, and dignity, to reach equitable outcomes that focus on equality as the recognition of the intrinsic worth of individuals.

Anagha Sarpotdar's article explores the development of the jurisprudence around workplace sexual harassment in India, focusing on five judgments of the Delhi High Court. Sexual harassment law is an exciting area of constitutional inquiry because it is a domain where courts evolved redressal mechanisms even in the absence of enabling legislation. Sarpotdar traces the evolution of this area of law from the *Vishaka* judgment to the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

The right to free speech is a significant site of contestation between the citizens and the State and among different groups of citizens. Leah Verghese examines the right to speech and expression as it applies to books and movies in the background of rising acceptance of the heckler's veto. She examines the escalating aggrandisement of the executive and the use of prior restraints. The law of contempt of court also being increasingly used as a tool to curb inconvenient speech and expression. M.V. Sundararaman and Varsha Manoj examine the ambiguous judicial interpretations of the law governing contempt of court in India. The authors explore the scope and ambit of criminal contempt and how courts have balanced it with the right to freedom of speech and expression.

The second theme explored in this volume is 'Group Identities: Balancing Rights in a Diverse Society'. In their chapter, Prannv Dhawan and Jwalika Balaji handle the subject of the abolition of untouchability in the Indian Constitution. They examine certain judgments on untouchability to explore the issue of caste sensitivity in

judicial reasoning and the manner in which courts have expanded the understanding of caste-based atrocities using Article 17 of the Constitution.

Religious practices and conflicts are increasingly being contested in courts. Sandhya P.R. analyses how courts have balanced individual and institutional rights while dealing with access to places of worship with a focus on women's access. She examines how courts have used tests, such as the essential religious practices test and the anti-exclusion test, to determine thorny issues of religious customs and practices. In recent times, issues arising out of environmental litigation in the Supreme Court have had wide-ranging effects, given the interconnectedness of the environment with economic development, planning, and public health. Justice G.R. Swaminathan's article is an overview of how the Supreme Court has expanded the right to life through its environmental jurisprudence. Although environmental protection was not foremost in the minds of the framers of the Constitution, he notes that the courts have filled the lacunae in existing law by borrowing from principles in other jurisdictions and being flexible on the *locus standi* of the petitioners in public interest litigations.

The third theme is titled 'Systemic Conundrums: Reimagining Rights' and studies procedural conundrums related to the Constitution. Constitutionalism depends on procedures as much as it does on the substantive provisions of the Constitution. In his chapter, Prashanto Sen examines how a more participatory form of democracy can help prevent democratic backsliding in India. He studies the courts' engagement with participatory democracy and asks whether there is scope for further judicial engagement with the concept given the contours of the Constitution. Nikhil Majithia takes a fresh look at the principle of separation of powers between the Parliament and the judiciary and the question of whether courts are overstepping their limits. He examines this issue by looking at the involvement of courts in government formation after elections, functioning of the Parliament, expulsion of members of legislative bodies, and money bills. Umakanth Varottil and Rahul Sibal review the constitutional jurisprudence evolved by the Indian Supreme Court in the context of the Insolvency and Bankruptcy Code. Despite corporate bankruptcy and insolvency not being a traditional site for constitutional litigation, the Supreme Court has actively determined how equities amongst various stakeholders will be decided using constitutional values. The authors explore how the Court has balanced its judicial review function with deference to the Parliament's wisdom in the economic sphere. Sithara Sarangan and Anindita Pattanayak study how the judiciary has engaged with preventive detention, which the Constitution sanctions, as a powerful weapon in the executive's hands to curb dissent by placing people in custody even before an offence is committed. It is entrenched in the law enforcement machinery of the union and state governments through legislation. They explore the judiciary's deference towards the executive in such cases in the context of challenges to other laws restricting free speech.

The fourth theme examined in this volume is titled 'Institutional Responses: Constitutional Values in Flux'. Although the drafting of the Constitution was completed in a certain post-colonial era, the values it espouses were intended to stay relevant over time and under changing circumstances. Aakanksha Mishra examines fundamental rights in the context of globalisation by exploring challenges to the liberalisation of the Indian economy and increasing privatisation. She explores trends in the horizontal application of fundamental rights against private parties in the context of the growing power of large corporations and the private sector.

The criminalisation or de-criminalisation of certain acts, omissions, or transactions reflects a great deal about a society's values and perception of the criminal justice system's goals. Shraddha Chaudhary looks at the process of criminalisation or de-criminalisation by courts in India to discern if there is a uniquely Indian way to approach such questions. Courts need to examine these questions through a constitutional lens because the process of criminalisation expands the power of the state and law enforcement agencies and is thus fundamentally connected to the rights of citizens.

Two chapters included in this section examine the functioning of courts during an unprecedented public health emergency, the COVID-19 pandemic. Sharada Naganand and S.S. Naganand examine the judiciary's role in upholding constitutional values during the trying times of the pandemic. They do this by conducting a comparative analysis of the functioning of constitutional courts in India before and during the pandemic. They find the courts' extension of the right to life during this time, while adapting to the changing circumstances during various lockdowns, to be noteworthy. Varsha Mahadeva Aithala and Siddharth Peter de Souza examine the judiciary's work performance during the COVID-19 pandemic by reviewing the impact of administrative planning on access to justice in exceptional circumstances. They draw lessons from how virtual systems should be designed to ensure access to justice and fairness that will be useful in designing frameworks for virtual administration of justice.

Each of the chapters highlights that the judiciary is increasingly being asked to decide contested concepts in the background of intensely complex political, economic, and social conflicts. Interpreting constitutional rights is an arduous task even in the best of times. The difficulties are more pronounced in societies that are struggling with multi-dimensional conflicts. Judicial interpretation of constitutional rights has the capacity to determine the direction of political, economic, or social change in the background of such conflicts. Conversely, such conflicts also influence judicial interpretation. This volume highlights this symbiotic and dynamic relationship and its impact on rights jurisprudence in India.

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This book would not have been possible without the unique perspectives and expertise of our contributors. We thank all the contributors to this volume for their patience and commitment.

Shruti Vidyasagar, Sandhya P.R.,
Anindita Pattanayak and Harish Narasappa

About DAKSH

DAKSH is a Bengaluru-based non-profit founded in 2008. We undertake research and activities to promote accountability and better governance in India. Since 2015, we have primarily focused on studying the problem of pendency of cases in the Indian legal system, with the aim of suggesting sustainable solutions based on quantitative research and empirical legal methods. Our research approaches judicial reforms from the perspectives of principles, data, efficiency, process, technology, and administration. To centre the judicial reforms discourse on data, we maintain India's largest and only public database that enables a study of the day-to-day functioning of the judiciary in India.

DAKSH is uniquely placed at the intersection of law, policy, and technology, following an evidence-based approach to tackling justice system reforms. With a team of lawyers, technologists, and data analysts, we are actively involved in research, implementation of solutions, and advocacy relating to judicial reforms. Our activities include data-based research to promote accountability, reform-oriented advisory services, community building, and catalysing solution-centred conversations between institutions to address impediments to access to justice.

Our flagship reports on the 'State of the Indian Judiciary' allowed us to embark on a journey in which we analyse the justice system holistically, using insights from a range of stakeholders. We take a step further with this volume, where we focus on the values and principles that equally define our Constitution and justice system.

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THE INDIVIDUAL WITHIN THE CONSTITUTION: DEMONSTRATING CITIZEN-CENTRIC JUSTICE

1

The Indian Supreme Court's Use of Dignity In Constitutional Reasoning

Vikram Aditya Narayan*

Introduction

The use of human dignity as a constitutional value in judicial reasoning has sharply risen across jurisdictions in the last few decades,[1] and India is no exception to the general trend.[2] Reliance on dignity is prevalent across theology, moral philosophy, legal theory, and bio-ethics with debates from each occasionally travelling across and challenging disciplinary boundaries. In the last decade especially, many scholars, particularly from the field of comparative constitutional law, have examined whether the concept is understood in similar ways across legal cultures,[3] and if so, in determining the degree of overlap.[4] While some suggest that the broad reliance on the concept is indicative of a 'global model of constitutional rights',[5] others argue that the term is an 'empty shell' of little conceptual value due to the prevalence of diverse and contradictory meanings across courts.[6]

This chapter examines the Indian Supreme Court's (hereinafter referred to as 'the Court') judgments on dignity as a constitutional value and a fundamental right to gauge what conception(s) of dignity are at play in Indian constitutional jurisprudence. Building on previous work that demonstrates the lack of clarity over

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 26 April 2022.

1. Jacob Weinrib. 2016. *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law*. Cambridge University Press; Klaus Mathis and Paolo Becchi (eds.). 2019. *Handbook of Human Dignity in Europe*. Springer.
2. Upendra Baxi. 2014. 'The Place of Dignity in the Indian Constitution', in Marcus Düwell et al. (eds.). *The Cambridge Handbook of Human Dignity*. Cambridge University Press.
3. Henk Botha. 2009. 'Human Dignity in Comparative Perspective', *Stellenbosch Law Review*, 2: 171-220.
4. Adeno Addis. 2015. 'Human Dignity in Comparative Constitutional Context: In Search of an Overlapping Consensus', *Journal of International and Comparative Law*, 2(1): 1-28.
5. Kai Möller. 2012. *Global Model of Constitutional Rights*. Oxford University Press.
6. Christopher McCrudden. 2008. 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law*, 19(4): 655-724.

the content of dignity in the Indian context,[7] it proceeds from the premise that in order to understand dignity in Indian constitutional adjudication we must examine how the Court has explained the concept, and often more importantly, how it has *used* the concept in diverse ways.

This chapter proceeds to briefly examine the references to dignity in the text of the Indian Constitution with the aim of presenting the starting point for the Court's interpretation of the concept. The chapter goes on to analyse the development of different understandings and uses of dignity across its jurisprudence. Futher, the chapter discusses the Court's dignity jurisprudence through two broad phases—before and after 'the right to live with dignity' was held to be a facet of Article 21—and examines differences in the way the Court has derived the contents of dignity in its jurisprudence since the 1980s, which is concluded by surveying some recent judgments of the Court invoking dignity to expand and enforce rights, while also highlighting how persistent ambiguities in the understanding of the concept raise serious concerns for the future of India's fundamental rights jurisprudence.

Dignity in the Indian Constitution

Dignity does not feature prominently in the Indian constitutional text. While the Indian Constitution uses the term in three places, none is found in the chapter on Fundamental Rights. The first usage of 'dignity' in the Indian Constitution is in the Preamble, which declares:

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity; and to promote among them all
>
> FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation...

It is worth noting that the link between fraternity and dignity may be interpreted in numerous ways. For example, it could be argued that the focus here is on pursuing a particular conception of fraternity that preserves the dignity of individuals or it could be argued that the pursuit of the collectivistic value of

7. Pritam Baruah. 2021. 'Human Dignity in Indian Constitutional Adjudication', in Jimmy Chia-Shin Hsu (ed.), *Human Dignity in Asia: A Dialogue Between Law and Culture*. Cambridge University Press.

fraternity is to be reconciled with the value of each individual's dignity. Scholars and judges alike have frequently read the Preamble as enshrining fraternity and dignity as two distinct, albeit occasionally related, values.[8] Regardless of which way we view the fraternity–dignity relationship, the text of the Preamble appears to suggest that the concept of dignity is rooted in the individual.[9]

The second and third usages of 'dignity' were inserted by the 42nd Amendment to the Indian Constitution, passed in 1976 during the Emergency declared by the Indira Gandhi–led government. As a later insertion, these usages of dignity in the constitutional text are of limited value in seeking to understand how the framers of the Indian Constitution conceptualised dignity. They are, however, relevant for the purpose of understanding the text that the judiciary works with while construing the concept. Thus, these usages are relevant to the extent that judges have sought to derive or construe the scope and meaning of the concept based on this text.

The second usage is found in Article 39(f), which provides that 'the State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment'. Article 39(f) is found in Part IV of the Constitution, which lays down the Directive Principles of State Policy. Notably, an earlier provision in this Part clarifies that the Directive Principles 'shall not be enforceable by any court'.[10]

The third usage may be found in Article 51A(e). Article 51A inserts the concept of fundamental duties, and 51A(e) declares that 'it shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women'. As Pritam Baruah argues, this usage, speaking of promoting brotherhood and eliminating practices contrary to the dignity of women in one breath, appears to reflect the link between fraternity and the dignity of the individual emphasised in the Preamble.[11]

This brief analysis indicates that the Indian judiciary would be expected to provide a justification for substantively invoking dignity while evaluating claims concerning violations of fundamental rights. Undoubtedly, the use of dignity in the

8. Akash Singh Rathore. 2020. *Ambedkar's Preamble: A Secret History of the Constitution of India*. Penguin Random House. The Supreme Court's understanding of dignity is analysed later in the chapter.
9. Baruah, 'Human Dignity'.
10. Article 37, Constitution of India, 1950.
11. Pritam Baruah. 2020. '(De)valuing Dignity', *Economic and Political Weekly*, 55(31): 33-38.

Preamble lays the groundwork for dignity to be invoked as a constitutional value.[12] However, the absence of dignity from the explicitly enforceable fundamental rights provisions is noteworthy. In this regard, the Indian Constitution may be compared and contrasted with several other constitutions under which dignity has come to play a central role in adjudicating rights claims. Well-known examples include the German and South African Constitutions, where dignity is expressly recognised as a constitutional value *and* a constitutional right.[13] Even some constitutions in South Asia, such as those of Pakistan[14] and Nepal,[15] recognise dignity as a constitutional right.

In the following section I discuss how, despite this limited textual foundation, the Court gradually changed its approach to adjudicating rights claims under the Constitution so as to accord an increasingly central role to dignity as both a value and a right in Indian constitutional jurisprudence.

Development of Dignity Jurisprudence in India

The Court's jurisprudence on dignity can be divided into two phases: before and after dignity was recognised as a facet of the right to life and personal liberty under Article 21. The following part surveys the different ways in which the Court has used dignity in its jurisprudence across and within these two broad phases.

First Phase (1950–1970s)

This phase of the Court's jurisprudence is often overlooked in studies of the Court's use of dignity. This oversight may be attributed to the fact that the Court's later use of dignity is more substantive and vastly outshines the brief references made to dignity in this phase. However, tracking the use of dignity in this early phase is helpful to get a sense of how the Court's approach to employing dignity changed. This is also of relevance for understanding some of the concerns emerging from the Court's more recent jurisprudence.

The first case to invoke dignity was in fact the first fundamental rights case adjudicated by the Court: *A.K. Gopalan* v. *State of Madras*.[16] This case is famous for holding that fundamental rights provisions cannot be read together, and was

12. Liav Orgad. 2010. 'The Preamble in Constitutional Interpretation', *International Journal of Constitutional Law*, 8(4): 714-738.
13. Articles 1 and 2 of the Basic Law of Germany, 1949 and Sections 1, 7 and 10 of the Constitution of South Africa, 1996.
14. Article 15, Constitution of Pakistan, 1973.
15. Article 16, Constitution of Nepal, 2015.
16. AIR 1950 SC 27.

ultimately overruled on this count over 20 years later.[17] Notwithstanding this, Justice Patanjali Sastri's use of dignity sheds light on how the concept was understood in the early years. Referring to the Preamble, Justice Sastri explained that 'the people of India have … adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality'.[18] Here, dignity was clearly understood as a value that could be used to ensure that constitutional interpretation was directed at the evolution and expression of individuals' personalities.

The Court referred to the concept of dignity twice in 1958 while reviewing the constitutional validity of legislation. In *Express Newspapers Pvt. Ltd* v. *Union of India*,[19] the Court held that the wording of a statute governing the wages to be paid to journalists should be interpreted as requiring wages to be above the level required for minimal sustenance, and enough for employees 'to live decently and with dignity'. A challenge to the validity of the statute on the ground that it violated the fundamental right to engage in the business of players in the newspaper industry was thus rejected, with the Court noting that Press Commission had expressed its view that 'if a newspaper industry (sic) could not afford to pay to its employees a minimum wage which would enable them to live decently and with dignity, that newspaper had no right to exist'.[20] In *Kerala Education Bill, 1957, In re,*[21] the Court's opinion was sought by the President under Article 143 on whether a Bill passed by the Kerala Legislative Assembly seeking to drastically reorganise the education sector violated the fundamental rights provisions. In its opinion, the Court referred, *inter alia*, to the concept of dignity in the Preamble to explain that the broad purpose of the Constitution is to 'secure to all its citizens the liberty of thought, expression, belief, faith and worship'.[22] The Court then proceeded to read the fundamental rights provisions collectively as seeking to serve that purpose. This approach to reading the Constitution is worth noting because it enables the Court to highlight the importance of education for the fulfilment of fundamental rights, and it also suggests a link between the Fundamental Rights and the Directive Principles in indicating that both require the State to ensure equality of opportunity in pursuing education.

17. *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248, relying on *R.C. Cooper* v. *Union of India*, (1970) 1 SCC 248.
18. Para 122.
19. AIR 1958 SC 578.
20. Para 42. Interestingly, the Court relied on the Press Commission's Report rather than tracing the source of the concept of dignity to the Preamble of the Constitution.
21. AIR 1958 SC 956.
22. Para 5.

Although the use of dignity in these two cases is noteworthy, the concept does not play a substantial role in the Court's reasoning until 1967 where it was employed in a dissenting judgment by Chief Justice B.P. Sinha in *Sardar Syedna* v. *State of Bombay*.[23] In this case, the head of the Dawoodi Bohra community challenged the constitutional validity of the Bombay Prevention of Excommunication Act, 1949 on the ground that it violated the community's rights to freedom of religion guaranteed under Articles 25 and 26 by interfering with their ability to control membership of their community. While a majority struck down the Act, Chief Justice B.P. Sinha focused on the effects of excommunication on a person's civil rights and traced the history of the statute to identify it as social reform legislation, the kind of which is envisaged under Article 25(2)(b) of the Constitution.[24] He reasoned that the Act was necessary to penalise actions that had 'the effect of depriving a person of his human dignity and rights appurtenant thereto', and that it ought to be upheld as it was aimed at ensuring dignity and gave 'full effect to modern notions of individual freedom to choose one's way of life'.[25]

A few years later, dignity emerged as a significant concept influencing the views of the Court on the scope of the power to amend the Constitution in the landmark cases of *I.C. Golaknath* v. *State of Punjab*[26] and *Kesavananda Bharati* v. *State of Kerala*.[27] In *Golaknath*, Chief Justice K. Subba Rao used dignity in two senses. First, while discussing the 'unequal dignity' of legislation and constitutional amendments.[28] Second, and in more depth, he used dignity to outline the inherent limits on the power of the Parliament to amend the Constitution. Taking a historical view of the drafting of the Indian Constitution, Chief Justice K. Subba Rao, writing for the majority, reasoned that the idea of dignity and liberty of the individual was at the heart of the Constitution and that any amendment curtailing the Fundamental Rights would thus be unconstitutional.[29]

As is now well known, in 1973, in *Kesavananda Bharati*, the Court over-ruled *Golaknath* on the scope of limits on amending power, holding that while the Fundamental Rights chapter may be amended and curtailed, the basic structure of the Constitution could not. To arrive at the 'basic structure doctrine', the judges forming

23. AIR 1962 SC 853.
24. Article 25(2)(b) limits the scope of the right to freedom of religion by clarifying: 'Nothing in this article shall affect the operation of any existing law or prevent the State from making any–
…(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus'.
25. Para 11.
26. AIR 1967 SC 1643.
27. (1973) 4 SCC 225.
28. Para 132.
29. Paras 140-146. Conclusion at para 194.

the majority partially relied on a 'structural interpretation' of the constitutional text,[30] reading the Preamble, the Fundamental Rights, and the Directive Principles as a 'structured totality'[31] to identify a set of norms forming the unamendable core of the Constitution. Through this interpretive exercise, the judges arrived at different, but partially overlapping lists of features and values comprising the basic structure of the Indian Constitution. Pertinently, Chief Justice S.M. Sikri's judgment identified the basic structure as including (a) the supremacy of the Constitution; (b) the republican and democratic form of government; (c) the secular character of the Constitution; (d) the separation of powers between the legislature, executive, and the judiciary; and (e) the federal character of the Constitution, and held that this 'structure is built on the basic foundation i.e. the dignity and freedom of the individual'.[32] Justices Shelat and Grover found 'dignity of the individual' to be one of the basic features and held that it was sought to be secured by Parts III and IV of the Constitution.

Although the Court did not always flesh out its conception of dignity in these cases, it is quite evident that the Court was using the concept as a constitutional value. Broadly understood, constitutional values are concepts that shape how a constitution is to be interpreted, applied, and made operational.[33] Arguments based on constitutional values 'assert claims about what is good or bad, desirable or undesirable, as measured against some standard that is independent of what the constitutional text requires'.[34] In this early phase, the Court, while sometimes tracing the source of the value of dignity specifically to the Preamble,[35] and sometimes identifying it as underlying multiple parts and provisions of the Constitution,[36] repeatedly relied on dignity as an interpretive aid to expound and expand on the meaning of the constitutional text. This phase of the Court's use of dignity is characterised by the constrained approach towards invoking it in judicial reasoning,

30. Sudhir Krishnaswamy. 2011. *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*. Oxford University Press.
31. As per such an approach, 'the meaning of the whole has to be derived from its individual elements, and an individual element has to be understood by reference to the comprehensive, penetrating whole of which it is a part'.—Emilio Betti cited in Peter Goodrich. 1985. 'Legal Hermeneutics: An Essay on Precedent and Interpretation', *The Liverpool Law Review*, VIII(2): 99-155, at 118.
32. Paras 292 and 293.
33. Francois Venter. 2001. 'Utilizing Constitutional Values in Constitutional Comparison', *Potchefstroom Electronic Law Journal*, 4(1): 1-22.
34. Richard Fallon. 1987. 'A Constructivist Coherence Theory of Constitutional Interpretation', *Harvard Law Review*, 100(6): 1189-1286.
35. *A.K. Gopalan* v. *State of Madras,* AIR 1950 SC 27; *Sardar Syedna* v. *State of Bombay,* AIR 1962 SC 853.
36. *Kerala Education Bill, 1957, In re* AIR 1958 SC 956; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225.

both in terms of the number of cases it is invoked in and the way in which it is employed within the Court's reasoning.

Second Phase (1970–present)

As Upendra Baxi has argued, a 'paradigm shift'[37] in the Court's approach to using dignity occurred in 1978 with the judgment of *Maneka Gandhi* v. *Union of India,*[38] authored by Justice P.N. Bhagwati. In this case, the Court, through a series of steps, developed a novel approach to interpreting the Constitution expansively with a particular emphasis on Article 21. These steps are worth identifying separately as each has caused ripple effects in Indian constitutional jurisprudence and has played an important role in the rise of the Court's subsequent use of dignity.

First, the Court expressly overruled *A.K. Gopalan*, to hold that the fundamental rights provisions 'are all parts of an integrated scheme' that collectively pursue the objects set out in the Preamble of the Constitution.[39] Second, the Court observed that the fundamental rights are of the nature of 'basic values', and 'are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent'.[40] Third, the Court, using the example of the right to a free press,[41] elucidated the concept of unenumerated rights, clarifying that it was within the judiciary's power to derive implied rights from express rights by reading them individually or collectively. Fourth, the Court noted that even though Article 21 was framed negatively to guarantee that 'no person shall be deprived of his life or personal liberty except by procedure established by law', this must be read as conferring 'the fundamental right to life'—a right aimed at ensuring 'the happiness, dignity and worth of the individual'.[42] Finally, the Court read the fundamental rights provisions together to hold that laws curtailing the rights guaranteed under Article 21 cannot passed by the legislature, but they must be 'fair, just and reasonable, not fanciful, oppressive or arbitrary'.[43]

Curiously, *Maneka Gandhi* was actually concerning 'the right to go abroad',[44] and despite developing this expansive approach to interpreting the Constitution, the Court did not ultimately grant a remedy to the petitioner in the case. To that extent, it is

37. Upendra Baxi, 'The Place of Dignity'.
38. AIR 1978 SC 597.
39. Para 202. The Court also held that 'isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection'.
40. Para 4.
41. Para 29.
42. Para 5.
43. Para 85.
44. Paras 5, 8, and 35.

possible to argue that many of the observations discussed above did not constitute a *ratio* that would operate as precedent in future cases. However, these observations, combined with observations made by the same judge (Justice Bhagwati) in *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*[45] and *Bandhua Mukti Morcha* v. *Union of India*[46] a few years later upon the scope of Article 21, in many ways formed the bedrock of the Court's subsequent jurisprudence on 'the right to live with dignity'. In *Francis Coralie Mullin*, the Court explained:

> [T]he right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.… Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.[47]

In *Bandhua Mukti Morcha*, the Court dealt with a petition letter seeking redressal of the inhuman working conditions of a large number of employees in stone quarries. Notably, the Court negated the argument that no fundamental right had been violated in this case, reasoning that Article 21 guarantees the right to live with human dignity including freedom from exploitation and that this right was violated by the miserable conditions in which the employees were forced to work. The Court explained that the right to life 'derives its life breath from the Directive Principles of State Policy' and therefore it 'must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief'.[48]

The story of how the Court gradually developed 'the right to live with dignity' has been told numerous times, and is often described as capturing the rise of 'judicial activism' or 'PIL jurisprudence'.[49] This is arguably the most studied and celebrated aspect of the Court's jurisprudence.[50] My aim here is not to recapitulate

45. (1981) 1 SCC 608.
46. (1984) 3 SCC 161.
47. Para 8.
48. Para 10.
49. S.P. Sathe. 2003. *Judicial Activism in India: Transgressing Borders and Enforcing Limits*. Oxford University Press; Upendra Baxi. 1980. *The Indian Supreme Court and Politics*. Eastern Book Company; Upendra Baxi. 1985. *Courage, Craft and Contention: The Indian Supreme Court in the Eighties*. N.M. Tripathi. For a critical perspective, see Anuj Bhuwania. 2017. *Courting the People: Public Interest Litigation in Post-Emergency India*. Cambridge University Press.
50. Id.

this well-known story, but to analyse the manner in which the Court used the concept of dignity from the 1970s to the present, with a particular focus on the Court's more recent jurisprudence on dignity.

The first point to note in this regard is that the Court has invoked and used dignity in a wide set of contexts to achieve diverse purposes, and the connections between the Court's invocations of dignity across these cases are not immediately clear. For example, the source of dignity as a legally relevant concept for the purpose of constitutional adjudication has been traced differently across cases—sometimes based on natural law theory, the Preamble, Article 14, Article 21, and various provisions of Part IV of the Constitution, and sometimes through a collective reading of multiple Parts of the Constitution. Further, dignity has been used for a variety of purposes in these cases, including to recognise unenumerated rights,[51] to identify social welfare legislation as advancing the purpose underlying the Constitution and accordingly interpret them expansively,[52] to emphasise the positive duty of the State to protect rights,[53] to issue comprehensive guidelines to fill a legislative void,[54] and to enter into dialogue with the executive on the capacity to raise the fulfilment of socio-economic rights.[55]

In light of the variety of ways in which dignity has been invoked and applied after the 1970s, any neat classification of the Court's dignity jurisprudence is fraught with danger. However, this section establishes the argument that it is possible to sustain a loose classification of these cases based on the approach taken by the Court to derive the specific contents of the meaning of dignity. In my view, focusing on this aspect of the Court's reasoning with dignity enables us to distinguish between cases where the Court has relied on the text of the Directive Principles to elucidate the meaning of dignity and cases where the Court has asserted the meaning based on the notion of the intrinsic worth of human beings. I further argue that the Court's recent jurisprudence on dignity can be considered a separate category because of the robustness of the conception of dignity employed therein and because of the way in

51. *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666; *Unni Krishnan* v. *State of Andhra Pradesh*, (1993) 1 SCC 645.
52. *Kapila Hingorani (I) v. State of Bihar*, (2003) 6 SCC 1 at para 34; *Revanasiddappa v. Mallikarjun*, (2011) 11 SCC 1 at para 40. This judicial approach to reading social welfare statutes has been analysed in detail in Madhav Khosla. 2010. 'Making Social Rights Conditional: Lessons from India', *International Journal of Constitutional Law*, 8(4): 739-765.
53. *M. Nagaraj* v. *Union of India,* (2006) 8 SCC 212; *Nandini Sundar* v. *State of Chhattisgarh*, (2011) 7 SCC 547.
54. *Vishakha* v. *State of Rajasthan*, (1997) 7 SCC 384; *D.K. Basu* v. *State of West Bengal,* (1997) 1 SCC 41.
55. See, for example, the many orders passed by the Supreme Court in *PUCL* v. *Union of India*, Writ Petition (Civil) No. 196 of 2001. A compilation of these orders are available online at: <http://www.righttofoodcampaign.in/legal-action/supreme-court-orders>.

which the Court derives the content of dignity through its relationship with other constitutional values, rights, and concepts.

Directive Principles and Dignity

In one set of cases, the Court has relied heavily on the text of the Directive Principles to explain the scope of the right to live with dignity. This includes the landmark cases where the Court expanded the scope of the rights to education, food, and health as forming a part of the right to live with dignity. Some examples of this approach to using dignity are discussed below.

In *Mohini Jain* v. *State of Karnataka*,[56] the Court observed that the objective underlying the values in the Preamble and the objective underlying the Directive Principles are the same[57] and that the Directive Principles 'have to be read into the fundamental rights'.[58] Thereafter, relying on *F.C. Mullin* and *Bandhua Mukti Morcha*, the Court held that the 'right to life' covered all rights that are 'basic to the dignified enjoyment of life' and included 'the right to education'.[59] Similarly, in *Unni Krishnan* v. *State of Andhra Pradesh*,[60] the Court affirmed *Mohini Jain* to the extent that it recognised the right to education as implicit within the right to live with dignity, and then explained that the content of the right needs to be determined in light of the Directive Principles. By reading the right to live with dignity along with Articles 41, 45, and 46 of the Constitution, the Court arrived at the conclusion that each citizen shall have a right to free education until the age of 14.

In *Chameli Singh* v. *State of Uttar Pradesh*,[61] the Court read Article 21 with the Directive Principles generally to hold that the right to life guaranteed under the Indian Constitution extends to the right to food, water, decent environment, education, medical care, and shelter.[62] The Court explained that the right to shelter includes 'adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc.', and held that the lack of a decent residence would frustrate the objects of the Constitution which were to ensure, *inter alia*, the 'dignity of person'.[63] In *Vincent Panikurlangara* v. *Union of India*,[64] the Court relied on

56. (1992) 3 SCC 666.
57. Para 8.
58. Para 9.
59. Para 12.
60. (1993) 1 SCC 645.
61. (1996) 2 SCC 549.
62. Para 8.
63. *Ibid*.
64. (1987) 2 SCC 165.

Bandhua Mukti Morcha to explain that the right to live with dignity guaranteed under Article 21 when read with the Directive Principles, and particularly Article 47, must be understood as obligating the State to improve public health.[65] Similarly, in *Kapila Hingorani (I)* v. *State of Bihar*,[66] the Court read Article 21 with Article 47 to emphasise that the right to live with dignity included the 'right to food'.

Occasionally, the Court also relies on the Directive Principles that expressly mention dignity to explain its meaning. For example, in *Revanasiddappa* v. *Mallikarjun*,[67] the Court was asked to consider the scope of limits on the inheritance rights of children born within a void or voidable marriage as per Section 16(3) of the Hindu Marriage Act in light of previous judgments that held that such children would only be entitled to the self-acquired property of the parents but not their ancestral property. Notably, the Court found that the previous judgments were flawed because they failed to appreciate the constitutional value of 'individual dignity' while interpreting the statute. Relying on the Preamble and Article 39(f) of the Constitution, the Court held that a child born within a void or voidable marriage 'is innocent and entitled to all the rights which are given to other children born in a valid marriage'.[68] These kinds of cases, however, form a minuscule percentage of the cases where dignity has been invoked by the Court.

There is a paradox inherent in this strain of the Court's dignity jurisprudence. On the one hand, the extensive reliance on constitutional text to explain the meaning of dignity can be used to suggest that the Court's conception of dignity in these cases is derived through a legitimate judicial exercise of constitutional interpretation. On the other hand, the Court's justification for drawing on the Directive Principles despite the bar on their judicial enforceability[69] is a rather weak one, relying on a connection between the 'right to life' and the Directive Principles that is typically asserted more than it is explained. Dignity plays an important role in sustaining this paradox, as the Court typically identifies dignity as the common value underlying the Fundamental Rights and the Directive Principles. In this way, the concept of dignity absorbs the tensions between the Fundamental Rights and the Directive Principles, only for the tensions to resurface as questions over the meaning of dignity.[70]

65. The Court made a similar observation in *State of Punjab* v. *R.L. Bagga,* (1998) 4 SCC 117.
66. (2003) 6 SCC 1.
67. (2011) 11 SCC 1.
68. Para 39.
69. Article 37, Constitution of India, 1950.
70. This tension resurfaces now and then, and is perhaps most clearly identifiable in the Supreme Court's judgment in *K.S. Puttaswamy* v. *Union of India,* (2019) 1 SCC 1 (commonly referred to as the AADHAAR case). The tensions in the Court's dignity jurisprudence are also considered.

Dignity as the Intrinsic Worth of the Human Being

Another strand of the Court's jurisprudence on dignity, although largely relying on the same set of foundational cases for the proposition that Article 21 includes the right to live with dignity, has explained the implications of the concept without relying on the Directive Principles, but by deriving its meaning from philosophical texts, natural law theory, and the semantic meaning of the term—typically as it is understood in international human rights discourse. These cases use the terms 'dignity of the individual', 'individual dignity', 'human dignity', and 'intrinsic worth' in a seemingly interchangeable way, often tracing the concept to a particular fundamental right.

One of the first among these was the case of *Nandini Sathpathy* v. *P.L. Dani*,[71] where the Court considered the scope of the right against self-incrimination guaranteed under Article 20(3).[72] Aside from describing Article 20(3) as 'a guarantee of dignity and integrity and of inviolability of the person',[73] this case is important because of its explanation of how dignity may be used to evaluate the legality of actions taken within India's criminal justice system. As the Court explained:

> The first obligation of the criminal justice system is to secure justice by seeking and substantiating truth through proof. Of course, the means must be as good as the ends and the dignity of the individual and the freedom of the human person cannot be sacrificed by resort to improper means, however worthy the ends. Therefore, 'third degree' has to be outlawed and indeed has been. We have to draw up clear lines between the whirlpool and the rock where the safety of society and the worth of the human person may co-exist in peace.[74]

Though the Court does not explicitly refer to Kant's moral philosophy, it is clear that the judicial formulation of what dignity entails as expressed here closely resembles the Kantian notion of individuals having intrinsic worth.[75] In other cases, the Court has shown an inclination towards a more theological conception of dignity, such as in *Mohd. Giasuddin* v. *State of Andhra Pradesh*,[76] where it is suggested that the constitutional conception of dignity may be traced from the notion that 'there is divinity in every man'.[77] In a sense, these cases are outliers among this strand of the Court's dignity jurisprudence because they attempt to flesh out the content of dignity before applying it to the facts of the case. In a majority of

71. (1978) 2 SCC 424.
72. Article 20(3) reads, 'No person accused of any offence shall be compelled to be a witness against himself'.
73. Para 34.
74. Para 29.
75. Immanuel Kant. 1785. *Groundwork of the Metaphysic of Morals*. at p. 429: 'So act that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means'.
76. (1977) 3 SCC 287.
77. Para 3.

the cases that form this strand, the Court proceeds directly to using dignity as an evaluative criterion in its judicial reasoning without discussing in detail what the concept of dignity entails.

A prominent case of this kind is *Sunil Batra* v. *Delhi Admin.*,[78] wherein the Court considered the constitutionality of prolonged solitary confinement and the continued use of bar fetters on prisoners. The Court, noting that it must test the law on a broader basis following *Maneka Gandhi,* read down the statute in question to exclude the use of such punitive techniques. Here, the Court declared that punishments in civil society may not be permitted to degrade the dignity of human beings. Similarly, in another landmark case, *D.K. Basu* v. *State of West Bengal*,[79] the Court held that 'custodial torture' constituted a 'naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality'.[80] This notion of human dignity as the intrinsic worth of the human being has since been extended and applied to numerous aspects of the criminal process in judgments reviewing police behaviour,[81] granting compensation to victims of custodial violence,[82] and affirming that a speedy and fair trial are necessary concomitants of the right to live with dignity guaranteed under Article 21.[83] Recently, the Court applied this notion of 'intrinsic worth of human beings' to review the manner in which death sentences are carried out, holding that executions 'carried out in an arbitrary, hurried and secret manner without allowing the convicts to exhaust all legal remedies' would violate the 'right to dignity'.[84]

It is worth noting here that this conception of dignity has not only played a role in the realm of criminal law but also has shaped the Court's view on when civil proceedings may validly curtail the liberties and livelihoods of individuals. In *Jolly George Verghese* v. *Bank of Cochin*,[85] for example, the Court arrived at the conclusion that judgment-debtors should not be detained unless there is proof of wilful failure to pay in spite of sufficient means, noting that 'the high value of human dignity and the worth of the human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and

78. (1978) 4 SCC 494.
79. (1997) 1 SCC 416.
80. Para 11.
81. *In Re Inhuman Conditions In 1382 Prisons*, (2016) 3 SCC 700; *Ritesh Sinha v. State of Uttar Pradesh*, (2013) 2 SCC 357. For an extensive survey of the Court's dignity jurisprudence on this count, see K.I. Vibhute. 2016. 'Right to Human Dignity of Convict under Shadow of Death and Freedom Behind the Bars in India: A Reflective Perception', *Journal of the Indian Law Institute,* 58(1): 15-54.
82. *Mehmood Nayyar Azam* v. *State of Chhattisgarh,* (2012) 8 SCC 1.
83. *Brij Mohan Lal* v. *Union of India*, (2012) 6 SCC 502.
84. *Shabnam* v. *Union of India*, (2015) 6 SCC 702 at paras 14-15 and 20.
85. (1980) 2 SCC 360.

reasonable in its procedural essence'.[86] Another example in this regard is *Olga Tellis* v. *Bombay Municipal Corporation*,[87] widely known for reading Article 21 along with various Directive Principles to declare that the right to life included 'the right to livelihood'. In this case, the Court notably rejected an argument that trespassers may be evicted for encroaching on public properties without being given notice by observing that people had a right to be heard which was grounded in 'human dignity'. In a passage underlining the link between dignity, justification for State action and justice, the Court explained:

> [A] hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be consulted about what is done with one.… At stake here is not just the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically significant, the very *essence* of justice.[88]

From this discussion on how the Court has used the notion of dignity as intrinsic worth, it is clear that there is scope for variance in how the contours of this conception of dignity are derived and in how it is then used. Broadly, however, it appears that many of these usages of dignity as intrinsic worth of the human being arise in the context of harms or potential harms to a person's bodily integrity or livelihood. Interestingly, in many of these cases, the Court uses the expansive interpretation of Article 21 brought about through *Maneka Gandhi* as an entry point to rely on international human rights instruments to explain the meaning of dignity, and to rely on American case law on the meaning of 'due process' and 'cruel and unusual punishment' to explain when the intrinsic worth of the individual is violated. While the conception of dignity as intrinsic worth appears rather robust, this is ultimately a feature of the Court's jurisprudence that can be gleaned more easily by looking at how the concept is used than from how it is explained by the Court. As I argue in the next section, in recent years, the robustness of the conception of dignity in Indian constitutional jurisprudence is also more evident in the Court's explanation of the meaning of the term.

Recent Developments in Dignity Jurisprudence

In many ways, the Court's recent jurisprudence on dignity represents continuations and extensions of the two strands of dignity jurisprudence identified above.

86. Para 10.
87. (1985) 3 SCC 545.
88. Para 47 (emphasis in the original).

However, amidst the continuities, it is also possible to identify small shifts in how the Court invokes and employs dignity, which is what I seek to capture in this section. As opposed to many prior cases where the content of dignity was derived based on the Directive Principles or based on its relation to bodily integrity, several recent judgments derive dignity's meaning and significance by exploring and analysing its relation to other constitutional concepts. This includes concepts expressly recognised in the Constitution, such as equality and liberty, as well as concepts seen to underlie the constitutional text, such as autonomy, privacy, and identity.

One of the earlier cases in this regard is *Selvi* v. *State of Karnataka*,[89] where the Court considered the constitutionality of the use of narcoanalysis, polygraph tests, and brain electrical activation profile (BEAP) tests in criminal investigations. In this case, the Court built on observations made in *Nandini Satpathy*, noting that aside from Article 20(3), the right against self-incrimination was also a component of the rights to personal liberty and privacy guaranteed under Article 21. Through this collective reading of Articles 20 and 21, the Court re-framed the issue as one concerning personal autonomy, holding that 'an individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties'.[90] The Court ultimately prohibited the use of the tests, finding that 'a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty'.[91]

K.S. Puttaswamy v. *Union of India*[92] is perhaps one of the most prominent contributions to the Court's dignity jurisprudence. As some scholars point out, this judgment, recognising that the fundamental right to privacy is an unenumerated right guaranteed under the Indian Constitution, in many ways points to a new beginning in Indian constitutional jurisprudence—one that places the dignity of the individual at the centre.[93] Notably, all six of the opinions authored in this unanimous verdict draw heavily on the concept of dignity while justifying privacy as a right and explaining its scope and its relationship with other rights. Justice Chandrachud, for example, explained as follows:

> Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a

89. (2010) 7 SCC 263.
90. Para 225.
91. Para 244.
92. (2017) 10 SCC 1.
93. Shreya Atrey and Gautam Bhatia. 2020. 'New Beginnings: Indian Rights Jurisprudence After *Puttaswamy*'. *University of Oxford Human Rights Hub Journal*, 3(2): 1-14.

> constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life.[94]

Justice Nariman similarly relied on the constitutional value of dignity as protecting the development of individuals to their fullest potential while reasoning that such development can only be achieved 'if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information'.[95]

The right to freely make fundamental personal choices as one of the facets of a dignified life is now a settled aspect of Indian constitutional jurisprudence. In *Suchita Srivastava* v. *Chandigarh Administration*,[96] the Court held that protecting the right to personal liberty entailed respecting women's privacy, dignity, and bodily integrity. In this case, this combination of values was relied upon to uphold the 'right to make reproductive choices'.[97] In *Shakti Vahini* v. *Union of India*,[98] the Court, while issuing extensive directions to the State to prevent instances of violence against inter-caste and inter-religious couples, emphasised that the right to marry a person of one's choice 'is an inextricable part of dignity'.[99] This was affirmed in *Shafin Jahan* v. *Asokan K.M.*,[100] where the Court noted that the Constitution recognises the liberty and autonomy inherent in each individual, explaining that this included 'the ability to take decisions on aspects which define one's personhood and identity' and specifically the right to choose a partner 'whether within or outside marriage'.[101]

The Court has also explored the relationship between dignity and autonomy in the context of equality and non-discrimination claims. In *NALSA* v. *Union of India*,[102] the Court held that 'the fundamental right to dignity' included the right of a person to choose their gender identity[103] and issued several directions to safeguard

94. Para 298.
95. Para 525.
96. (2009) 9 SCC 1.
97. Para 22.
98. (2018) 7 SCC 192.
99. Para 45.
100. (2018) 16 SCC 368.
101. Para 84.
102. (2014) 5 SCC 438.
103. Paras 74 and 106.

transgender persons from discrimination by the State and within society.[104] In *Jeeja Ghosh* v. *Union of India*,[105] the Court held that persons with disability were 'equal in dignity and entitled to enjoy the same human rights and freedoms as others',[106] and found a private airline liable to pay damages to an individual for violating her dignity by discriminating against her on account of her disability.

Perhaps more instructive are the cases of *Joseph Shine* v. *Union of India*[107] and *Navtej Johar* v. *Union of India*,[108] where the Court considered the constitutionality of provisions criminalising adultery[109] and consensual sexual acts between persons of the same sex,[110] respectively. In *Joseph Shine*, it was contended, *inter alia*, that the provision criminalising adultery was unconstitutional as it was premised on the view that women were their husband's property and thus violated their fundamental right to equality. While striking down the provision, Justice Chandrachud noted that it was based on an understanding of marriage that 'submerges the identity of the woman', and held that the values of liberty, dignity, and equality on which the Indian Constitution is based could not allow such a view of marriage to subsist.[111] Similarly, in *Navtej Johar*, Justice Chandrachud found that sexual orientation was integral to a person's identity, 'intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy' and ultimately held that to affirm the values of the Indian Constitution, the decriminalisation of consensual sexual acts between adults of the same sex is required so that they may find fulfilment in their personal choices and 'lead a life of freedom from fear'.[112] In both these cases, the framing of constitutional issues through the language of dignity and autonomy helped the Court move away from the formal conception of equality prevalent through its previous decisions[113] and move towards a substantial conception of equality that was sensitive to the impact, including symbolic impact, of State action on persons as moral equals in society. As the Court explained in *Joseph Shine*, substantive equality is 'directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society'.[114]

104. Paras 135.1 to 135.9.
105. (2016) 7 SCC 761.
106. Para 43.
107. (2019) 3 SCC 39.
108. (2018) 10 SCC 1.
109. Section 497, Indian Penal Code, 1860.
110. Section 377, Indian Penal Code, 1860.
111. Para 168.
112. Paras 610 and 612.
113. Gautam Bhatia. 2017. 'Equal Moral Membership: *Naz Foundation* and the Refashioning of Equality', *Indian Law Review*, 2(1): 115-144.
114. Para 171.

The Court's recent dignity jurisprudence is particularly fascinating because of the rich conception of dignity at play, which appears to enjoy an increasingly central role in constitutional reasoning. In quantitative terms, the Court demonstrates a tendency to invoke dignity more frequently and often describes its role in constitutional jurisprudence at more length than in its dignity judgments delivered between the 1970s and 2000s. For example, in *Puttaswamy*, *Navtej Johar,* and *Joseph Shine*, the Court invoked dignity 211, 209, and 129 times, respectively, in its reasoning. These numbers are staggering when compared to *Maneka Gandhi* and *Francis Coralie Mullin*, where the Court referred to dignity 10 and 6 times, respectively. This may be partially attributed to the fact that in recent years the Court has begun writing longer judgments than it used to in earlier decades. However, this is not the only factor. It is clear that, in many judgments, the Court devotes more attention and space to explain the concept of dignity, often with long sub-sections exclusively pertaining to the 'jurisprudence on dignity'[115] and the 'perspective of human dignity'.[116]

At a qualitative level, in many of these cases, the relationship between various fundamental rights provisions and the concepts embedded in them are increasingly seen through the prism of dignity. It would be incorrect to suggest that a fixed understanding of dignity is employed to make sense of other concepts (like equality and autonomy). Instead, it appears that the judiciary is incrementally fleshing out the meaning of dignity, as both a constitutional value and a right, while using it to explain the meaning of other concepts. In many of the recent judgments discussed above, the concept of dignity has been used to emphasise or reinforce the ideas of individual autonomy and moral worth.[117]

However, it would also be incorrect to suggest that a clear and coherent conception of dignity can be excavated from this incremental process of reasoning. Much like its constitutional jurisprudence in general, the Court's jurisprudence on dignity is fraught with inconsistencies and ambiguities that make it difficult to pin down the exact conception at play. This ambiguity in the Court's understanding of dignity may be partially attributed to the Court's general shift away from interpreting the text of the Constitution towards relying on ratio and obiter from its previous judgments to derive the meaning of the Indian Constitution from constitutional values and concepts underlying the text. Due to the gradual breakdown of the doctrine of precedent across India's jurisprudence over the last few decades,[118] this self-referential system that is not

115. Justice Chandrachud in *Puttaswamy* – paras 108-119.
116. Justice Dipak Misra in *Navtej Johar* – paras 137-150.
117. Baruah, 'Human Dignity'.
118. A. Lakshminath. 1989. *Precedent in the Indian Legal System*. Eastern Book Company (tracing the gradual breakdown of the doctrine of precedent in India); Madhav Khosla and Ananth Padmanabhan. 2017. 'The Supreme Court and India's Judicial System', in Pratap Bhanu Mehta and Milan Vaishnav (eds.), *Rethinking Public Institutions in India*. Oxford University Press.

necessarily tethered to any fixed textual basis has given rise to a situation where, combined with India's multi-bench judicial structure and the vast discretionary powers of the Chief Justice, individual judicial philosophies combine to create a heavily fractured image of Indian constitutional law.[119]

Amidst this polyvocality and general ambiguity in constitutional doctrine, there have been several instances where the Court's use of dignity appears to be in tension with other strands of the Court's jurisprudence. A prominent example of this is the judgment authored by Justice A.K. Sikri in *K.S. Puttaswamy* v. *Union of India*,[120] where the Court employed the concept of dignity to reject challenges to provisions of the AADHAAR Act that enabled the State to effectively make AADHAAR cards mandatory for availing of social-welfare schemes. In this case, the petitioners argued that alternative forms of identification were equally effective without giving rise to the same degree of harm to the right to privacy. Notably, the petitioners relied on several cases elucidating upon the concept of dignity to argue that facets of privacy related to dignity, autonomy, and liberty were unreasonably curtailed by the Act. Based on these grounds, the petitioners argued that the measure failed to pass the proportionality test, and was therefore unconstitutional. In response, the government relied on cases where the Court had read the Fundamental Rights along with the Directive Principles as representing the concept of human dignity, and on socio-economic rights cases arising under Article 21 to argue that the use of AADHAAR cards for social security benefits was constitutionally valid because it was aimed at the realisation of human dignity.

The majority judgment authored by Justice Sikri clubs together multiple, seemingly conflicting, conceptions of dignity in a long section entitled 'principles of human dignity'[121] before ultimately upholding the State's contention while purportedly

119. Nick Robinson. 2013. 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts', *The American Journal of Comparative Law*, 61(1): 173-208; Chintan Chandrachud. 2016. 'Constitutional Interpretation', in Sujit Choudhry *et al.* (eds.), *The Oxford Handbook of the Indian Constitution*. Oxford University Press; Jahnavi Sindhu and Vikram A. Narayan. 2018. 'Institution Matters: A Critical Analysis of the Role of the Supreme Court and the Responsibilities of the Chief Justice', *Verfassung und Recht in Übersee / World Comparative Law*, 51(3): 290-331.

120. (2019) 1 SCC 1.

121. Paras 122-146. In this section, the Court states that autonomy is an attribute of dignity *and* that human dignity 'is based on [the] right to autonomy and right of choice', that dignity is based on the intrinsic worth of the individual *and* that it entails the idea of communitarianism. For critiques of the Court's reasoning on this aspect, see Baruah, '(De)valuing Dignity' and Pritam Baruah and Vikram A. Narayan. 2018. 'Defining Dignity', *Indian Express,* October 8: <https://indianexpress.com/article/opinion/columns/defining-dignity-supreme-court-constitution-5392693/>.

carrying out a proportionality analysis.[122] At this stage, the Court equates the aims of the AADHAAR Act with the benefits to social welfare that could potentially be pursued through these aims, finding that 'there needs to be balancing of two fundamental rights, right to privacy on the one hand and right to food, shelter and employment on the other' since 'both the rights are founded on human dignity'.[123] The Court relies on the case law expansively construing Article 21 as including the right to live a dignified life and deriving socio-economic rights from that, discusses several foreign case laws on balancing of rights, and then concludes that because 'the Act aims at efficient, transparent and targeted delivery of subsidies, benefits and services', 'this technology becomes a vital tool of ensuring good governance in a social welfare state', and therefore the Act 'meets the test of balancing'.[124]

In the process of framing the issue as one involving balancing fundamental rights, the Court overlooked the evidence adduced to contest the efficacy of the AADHAAR Act, while also overlooking the fact that the cases where Article 21 was expanded were those where aggrieved persons, often belonging to vulnerable sections of society, had demonstrated violations of their right to live a dignified life due to State inaction, negligence, or incapacity. By treating the State as representing the rights of socio-economically weaker sections of society, the Court in one move displaced the petitioners' claims that represented those persons and changed the nature of the issue from one of right versus State restriction (seen through the lens of the evidence-based proportionality test) to one of balancing competing rights through an abstract notion of dignity. A similar use of dignity in judicial reasoning may be found in *Subramanian Swamy* v. *Union of India*,[125] where the Court rejected a challenge to the constitutionality of the criminal defamation provision in the Indian Penal Code. In this case, the petitioners contended that the provision was arbitrary and excessive, and amounted to an unreasonable restriction on the right to free speech. Writing for the Court, Justice Dipak Misra categorised the case as one involving a clash of rights, and held that the right to free speech must be limited by the right to reputation and dignity which was protected by the criminal defamation provision.[126]

122. 'Purportedly' because even though this part of the reasoning may be found under a heading suggesting that the Court is carrying out a proportionality analysis, the majority judgment overlooks the petitioner's submissions on the necessity step of the proportionality test, and it uses the abstract communitarian notion of dignity as a substitute for explaining how the limitation of the right to privacy was proportionate in the facts and circumstances of the case.
123. Para 339. This is repeated in Para 511.9.
124. Para 511.10.
125. (2016) 7 SCC 221.
126. For a more detailed critical analysis of this judgment, see Gautam Bhatia. 2016. 'The Supreme Court's Criminal Defamation Judgment: Glaringly Flawed', *Indian Constitutional Law and Philosophy*, 13 May: <https://indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed/>.

In both these cases, the lack of clarity over the conception of dignity applicable under the Indian Constitution as well as the muddled relationship between dignity and other fundamental rights enabled the use of dignity as a substitute for a more nuanced justification for upholding the constitutional validity of restrictions imposed on rights.[127] To be sure, this use of dignity as a smokescreen for judicial reasoning is not special to India. Scholars have documented how the vagueness of the concept of dignity leads to it being easily invoked on both sides of an argument, and how courts across the world have relied on this vagueness to selectively use it in a paternalistic way, negating individual autonomy.[128] However, in the Indian context, concerns over the indeterminacy of dignity are enmeshed with concerns arising from the general decline of the doctrine of precedent, the prevalence of judicial polyvocality, and the vast discretionary power vested in the office of the Chief Justice to select benches. Thus, the general proliferation in the use of dignity and its increasing centrality in Indian constitutional jurisprudence is a matter to be viewed with equal doses of optimism and scepticism.

Conclusion

This chapter began by noting the rather modest role accorded to the concept of dignity in the text of the Indian Constitution, before tracing the developments in the Indian Court's construction and application of the concept in the realm of constitutional law. The chapter shows how the content of the concept of dignity has been derived by the Court in different ways while relying on a variety of sources, such as different parts of the Constitution (including the Preamble, the Fundamental Rights, and the Directive Principles), natural law theory, and even texts on theology and philosophy. While at one level, the chapter highlights the increasing centrality and significance of dignity in Indian constitutional jurisprudence, at another level, it emphasises ambiguities embedded in judicial reasoning resulting from the loose invocation of dignity across a wide range of contexts combined with the multi-bench structure of the Court. This seemingly paradoxical development in the use of dignity in constitutional reasoning holds both promises and potential risks for the future of rights jurisprudence in India. On the

127. Notably, a key aspect of this lack of clarity appears to be the confusion over when dignity is understood as a constitutional value aiding in the interpretation of a right, and when it is viewed as an independent right.

128. David Feldman. 1999. 'Human Dignity as a Legal Value: Part I'. *Public Law*, 682-702; Christopher McCrudden, 'Human Dignity and Judicial Interpretation'; Conor O'Mahoney. 2012. 'There is no such thing as a right to dignity', *International Journal of Constitutional Law*, 10(2): 551-574; Jeff McMahan. 2017. 'Human Dignity, Suicide, and Assisting Others to Die' in Sebastian Muders (ed.), *Human Dignity and Assisted Death*. Oxford University Press.

one hand, the Court's 'uninhibited theorising'[129] on dignity increases the chances of judicial subjectivity and judicial inconsistency, which jeopardises fundamental rights.[130] On the other hand, viewing rights claims through the prism of dignity appears to enable judges to construe rights in a more robust form,[131] and to move beyond deferential doctrines based on a conservative approach to interpreting the Constitution.[132] Accordingly, the future of Indian rights jurisprudence depends partly on how well the Court answers questions over the status of dignity under the Indian Constitution, the relationship between dignity and (other) fundamental rights and particularly the relationship between dignity and the autonomy of individuals, and the standard of review applicable when dignity is threatened.

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129. Pritam Baruah, '(De)valuing Dignity'.
130. Harish Narasappa. 2018. *Rule of Law in India: A Quest for Reason*. Oxford University Press, p. 182: 'The emphasis on reason by the Supreme Court time and again disappears when we study the inconsistent approaches of the various judges. The inconsistency can only be explained by accepting that there is a lack of internalization of the primacy of rights by the judiciary'; Raju Ramachandran. 2019. 'Supreme Court's Inconsistent Stand on Civil Rights Gives States a Window to Defeat Them', *The Print*, 23 September: <https://theprint.in/opinion/supreme-courts-inconsistent-stand-on-civil-rights-gives-state-a-window-to-defeat-them/295378/>.
131. Baxi, 'The Place of Dignity'; Bhatia and Atrey, 'New Beginnings'.
132. K.G. Kannabiran. 2004. *Wages of Impunity: Power, Justice and Human Rights*. Orient Blackswan; Gautam Bhatia. 2019. *The Transformative Constitution: A Radical Biography in Nine Acts*. HarperCollins India.

2

Judicial Conceptualisation of Equality

Anindita Pattanayak and Harish Narasappa*

Introduction

Equality is an avowed fundamental goal in India.[1] This chapter will explore the constitutional value of 'equality' as Indian courts have interpreted it and juxtapose it against the multitude of normative principles and social practices that also claim to constitute or achieve equality. The primary focus of equality jurisprudence in India has been the interpretation of three fundamental rights guaranteed under the Indian Constitution. They are Article 14 (equality before law), Article 15 (prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth),[2] and Article 16 (equality of opportunity in matters of public employment),[3] together referred to as the 'Equality Code'.[4] Article 14, the core of equality jurisprudence, states:

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* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 29 April 2022.

1. See Preamble, Articles 14-18, Articles 38-39A, Articles 41-44, Article 46, Articles 330-342, Constitution of India, 1950.
2. Article 15, Constitution of India, 1950 states, inter alia:
   (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
   (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to–
      (a) access to shops, public restaurants, hotels and palaces of public entertainment; or
      (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
   (3) Nothing in this article shall prevent the State from making any special provision for women and children.
   (4) Nothing in this article … shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
3. Article 16, Constitution of India, 1950 states, inter alia:
   (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
   (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.

(Footnote No. 3 contd.)

> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

These fundamental rights are enforceable by courts. This means that a legislative or executive action can be challenged by citizens as being unconstitutional if it violates the rights guaranteed under these provisions. It is usually through such challenges that courts have developed the scope of 'equality' as a concept. Over a period of time, courts evolved judicial tests to apply the concept of equality in particular cases to determine if there has been a violation of equality. Inherently, such an exercise is retrospective and only tests state action allegedly breaching equality.

The first is the Classification Test, according to which, Article 14 forbids legislation or other forms of State action that treat different classes of people differently, except if the classification is made on the basis of an 'intelligible differentia' that separates one group from the rest upon clearly identifiable criteria, and the said intelligible differentia has a rational nexus with the object of the legislation. The traditional Classification Test requires the judiciary to conduct this assessment without passing any judgement on the object of the legislation itself.[5] More recently, the Classification Test has been expanded to include a more rigorous standard of scrutiny where courts can, in some cases, assess the legitimacy of the object of the law as well.[6]

This was followed by the Arbitrariness Test, applying which, the judiciary examines if the impugned law treats persons in an arbitrary manner where the expression 'arbitrarily' means 'in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in

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(**Footnote No. 3 contd.**)

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State ...

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

4. Article 17, which prohibits the practice of untouchability, forms a part of the broad right to equality in the Constitution. However, it focuses on a specific type of discrimination.
5. This is because the purpose of the law and the means to achieve it are within the exclusive domain of the legislature. The doctrine of separation of powers requires that the judiciary does not step into this role.
6. See *Anuj Garg* v. *Hotel Association*, (2008) 3 SCC 1; *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1; *Dr Subramanian Swamy* v. *CBI*, 2005 CriLJ 1413; Raag Yadava. 2010. 'Taking Rights Seriously – The Supreme Court on Strict Scrutiny', *National Law School of India Review*, 22(2): 147-169.

the nature of things, non-rational, not done or acting according to reason or judgment, depending on will alone'.[7] This has further developed into the concept of 'manifest arbitrariness' which is 'something done by the legislature capriciously, irrationally and/or without adequate determining principle'.[8]

Both these tests and sometimes a combination of them, are used by the judiciary to effectuate Article 14. However, each is critiqued as being inconsistent and limited in scope.[9] There is considerable debate amongst scholars and judges alike as to whether these tests are exclusive of each other, can be applied together, are adequate, or are limited in addressing issues of inequality.[10]

The limitations of these tests stem from equating them with the concept of equality itself. Judicial tests of this nature can only be designed and employed correctly when the conceptual understanding of their goal is clear. In this chapter, we limit ourselves to treating the tests as indicative of the concept trying to be achieved without delving into how effective the tests are at achieving it. At times, the failure of the tests is telling of the lack of conceptual clarity through their misapplication with respect to the meaning of equality sought to be achieved, rather than a lacuna of the tests themselves.

Another error, in our view, in trying to understand the constitutional value of equality from the prism of Article 14 alone is that the value itself extends far beyond the rights framework in Part III of the Constitution. While 'equality' is seen to be

7. *Sharma Transport* v. *Government of Andhra Pradesh*, (2002) 2 SCC 188, para 25.
8. *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1, para 101.
9. For a critique of the Classification Test, see Tarunabh Khaitan. 2015. 'Equality: Legislative Review Under Article 14', in Sujit Choudhry *et al.* (eds.), *The Oxford Handbook of Indian Constitutional Law*, pp. 699-719, draft version of the chapter available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605395 (accessed on 22 April 2022).
   For a critique of the Arbitrariness Test, see Gautam Bhatia. 2017. 'Equal Moral Membership: Naz Foundation and the Refashioning of Equality under a Transformative Constitution', *Indian Law Review*, 1(2): 115-144, draft version of the article available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2980862 (accessed on 22 April 2022); Shankar Narayanan. 2017. 'Rethinking 'Non-Arbitrariness'', *NLUD Student Law Journal*, 4: 133-143, available online at https://vidhilegalpolicy.in/wp-content/uploads/2019/05/Shankar_Article_NLUD.pdf.
10. For example, there is a body of opinion that the arbitrariness is a fuller version of the rationality prong of the Classification Test, obfuscating the difference between the two; see Narayanan, 'Rethinking 'Non-Arbitrariness''. Another example of inconsistency is the uncertainty regarding whether the Arbitrariness Test is alone enough to strike down a legislation. While the Supreme Court in *Rajbala* v. *State of Haryana*, Writ Petition (Civil) No. 671 of 2015, (decided by the Supreme Court on 10 December 2015, in para 69) held that a legislation cannot be struck down on the ground of arbitrariness alone, the Supreme Court in *Joseph Shine* v. *Union of India,* (2019) 3 SCC 39, (decided by the Supreme Court on 27 September 2018), held that manifest arbitrariness is a sufficient ground to strike down legislation as unconstitutional.

enforced as a fundamental right (and has often been equated to a formal legal equality), its scope and contours are influenced by other provisions in the Constitution that indicate the constitutional value that our evolving nation wishes to espouse.

For example, the Preamble expressly envisages a State that secures for its citizens, 'quality of status and of opportunity … assuring the dignity of the individual'. The Supreme Court in *Indra Sawhney* v. *Union of India* found the goal of the right to equality to be 'equality of status and of opportunity' as envisioned in the Preamble.[11] The Directive Principles of State Policy (DPSP) also envision certain conceptual aspects of equality.[12]

Before we delve further into the Indian judicial understanding of equality, it is important to understand, more generally, what this concept entails. The second section gives a brief explanation of the dominant theories of equality that readily lend themselves to judicial reasoning. The third Section explores how Indian Courts have developed the concept of equality, most recently through 'dignity', and their links with these theories. The fourth Section analyses Indian dignity jurisprudence in understanding equality.

Conceptualising Equality

Equality is a difficult concept to capture in words, especially because it does not exist in nature. Justice Bose grappled with this in *State of West Bengal* v. *Anwar Ali Sarkar*[13] as early as 1952 when he pondered, 'What does "equality" mean? All men are not alike. Some are rich and some are poor. Some by the mere accident of birth inherit riches, others are born to poverty. There are differences in social standing and economic status. High sounding phrases cannot alter such fundamental facts'.[14]

Equality understood as 'same-ness' can mean little unless we ask 'between what?' and 'in what context?'[15] Despite this, it is a powerful and uniting concept that often

11. AIR 1993 SC 477, para 4. 1992 Supp SCC 217, paras 412, 420-421, 480.
12. See *Consumer Education and Research Centre* v. *Union of India*, AIR 1995 SC 922 for judicial application of these principles.
13. 1995 SCC (3) 42, para 20. In this case, a legislation providing for shorter trials for certain classes of criminal offenders without all the protective features of a fair trial available to others, was challenged as violating the right to equality.
14. *Sarkar*, para 83.
15. Many philosophers and social scientists concede that concept of equality is vague and requires contextualisation to bring practical meaning to the theory. See Amartya Sen, 'Equality of What?', at The Tanner Lecture on Human Values, Stanford University (22 May 1979), available online at https://www.ophi.org.uk/wp-content/uploads/Sen-1979_Equality-of-What.pdf (accessed on 22 April 2022); Stefan Gosepath. 2015. 'The Principles and the Presumption of Equality', in Carina Fourie *et al* (ed.), *Social Equality: On what it Means to be Equals*, p. 167. Oxford University Press, available online at https://core.ac.uk/download/pdf/187116187.pdf (accessed on 22 April 2022); Williams Bernard. 1973. *The Idea of Equality*. Cambridge University Press.

takes on the flavour of the historical and social context it is championed in. For instance, 'equality' was a cornerstone of the French Revolution in 1789 against the prevalent socio-economic structures of feudalism and class atrocities of 17th century Europe. The slogan of this revolution, 'liberty, equality, fraternity', however, took on a life of its own and even finds mention in our Constitution despite it being framed under very different circumstances. In order to encapsulate how this term maintains a basic consistency in its meaning across contexts, it is crucial to be aware of its power to evoke a deep sense of justice and morality that can be intrinsically grasped by humankind in general. Nonetheless, to guarantee it as a right in a modern democracy, the judiciary has to find a way to make it tangible and enforceable while also attempting to uphold its moral value.

It helps to turn to the study of egalitarianism, justice, and equality to see how centuries of thought have shaped the idea. Since antiquity, equality has been considered an ideal to be strived for as a constitutive feature of justice.[16] An early understanding involves 'fairness' in treatment by treating 'like cases alike'.[17] A corollary is that differential treatment to persons that are unequal or different in some respect is just only if the difference in treatment is proportional to these factors of difference. Some version of this understanding lives on through the Classification Test, which allows different classes to be treated differently. However, this understanding does not assume that all persons are equal. It merely asserts that there should be consistency in treatment depending on similar traits, such as social status and race.[18] Some have treated this as an application of rational thought because it is irrational to treat similar cases differently without sufficient reason.[19]

In time, there evolved the idea that all human beings had inherent equal worth. According to this idea, everyone deserves the same dignity and respect.[20] It is now

16. For a historical account of the evolution of the concept and its interplay with justice in western thought, see George L. Abernethy. 1959. *The Idea of Equality: An Anthology*. John Knox Press, available online at https://archive.org/details/ideaofequalityan00aber/page/n5/mode/2up (accessed on 22 April 2022). See also Stanley I. Benn. 22003. 'Egalitarianism and the Equal Consideration of Interests', in Peter Vallentyne (ed.), *Justice and Equality*, p. 23. New York: Routledge.
17. Aristotle, *Nicomachean Ethics*, 5.1131a10–B15 translated by W.D. Ross. 1925. Oxford University Press. For a modern application of the theory, Kenneth I. Winston. 1974. 'On Treating Like Cases Alike', *California Law Review*, 62(1): 1-39.
18. For a critique of the principle of treating like cases alike to ensure equality, see Peter Westen. 1982. 'The Empty Idea of Equality', *Harvard Law Review*, 95(3): 537-596.
19. Richard Wollheim and Isiah Berlin. 1955. 'Equality', *Proceedings of the Aristotelian Society*, 56: 284.
20. Immanuel Kant. 1797. Reprinted 2017. *The Metaphysics of Morals*. Oxford University Press, p. 230. Kant's theories have their limitations, the primary one being that intrinsic moral value is ascribed only to individuals capable of making dutiful decisions. For an evolution of Kantian ethics and a modern version applicable to our discussion, see Ben Bradley. 2006. 'Two Concepts of Intrinsic Value', *Ethical Theory and Modern Practice*, 9(2): 111-130.

the widely held conception of substantive, universal, moral equality—the principle that human beings, despite their differences, are regarded as one another's equals.[21] According to it, equality is not 'same-ness' and differences in people require thoughtful treatment, not necessarily the same treatment, from the State to ensure their basic moral worth is respected.[22]

This is an account of western philosophical thought and the nature and chronology of the development of eastern thought, especially Indian, on equality, is beyond the scope of this chapter. However, it is important to note that the basic idea of equal intrinsic human worth was well-established in philosophical studies from the Indian subcontinent such as those of the Bhakti Movement[23] and its region-specific development, for example, Basaveshwara[24] in modern-day Karnataka

21. Ronald Dworkin. 2000. *Sovereign Virtue – The Theory and Practice of Equality*, Harvard University Press, p. 4-7; Ian Carter. 2011. 'Respect and the Basis of Equality', *Ethics*, 121(3): 538-571; Will Kymlicka. 1990. 'Two Theories of Justice', *Inquiry*, 33(1): 99-119.
22. This thought process also has a basis in Christian religious thought. For a description of the various bodies of thought that come to a similar conclusion, see Nicholas Kirby. 2017. 'Two Concepts of Basic Equality', *Res Publica*, 24: 299-302. See also Catharine A. MacKinnon. 2020. 'Equality', *Daedalus* 149(1): 213-221.
23. The movement consisted of various sub-cultures and was led by numerous poets and thinkers throughout the sub-continent, but a unifying trend was the rejection of caste hierarchies and respect for individual human worth on the ground of devotion to a personal god—where devotion is an equalising factor. See John Keune. 2021. *Shared Devotion, Shared Food*, Oxford University Press; Walter Fernandes. 1992. 'Bhakti and Liberation Theology for India', in Felix Wilfred (ed.), *Leave the Temple: Indian Paths to Human Liberation*, pp. 47-63. Wipf and Stock; Rekha Pande. 1987. 'The Bhakti Movement—An Interpretation', *Proceedings of the Indian History Congress*, 48: 214-221; Divya Jyoti. 2018. 'The Problem of Caste: Bhakti and Equality in Kabir', *Sambhāṣaṇ*, 2(1): 125-145.
24. Basava advocated for equal access to spirituality, a privilege in the caste system which systematically denied this basic good through gatekeeping by higher castes. Along with this, he evolved nuanced arguments for gender equality and dignity of labour based on the moral worth of every individual regardless of the nature of work they did (which at the time was the primary marker of social status), equitable access to means of generating material wealth (a type of equality of opportunity in western thought), and distribution of wealth (equality of outcome). See Prakash S. Desai. 2017. 'Exploring the Modern in Medieval: Political Ideas of Basava', in Himanshu Roy and Mahendra Prasad Singh (eds.), *Indian Political Thought*, pp. 67-74. Pearson; K. Ishwaran. 1981. 'Bhakti Tradition and Modernization: The Case of Lingayatism', in Jayant Lele (ed.), *Tradition and Modernity in Bhakti Movements*, p. 72-82. Brill Publishing; Dr Nalini A. Waghmare. 2013. 'Basaveshwara and Dr B.R. Ambedkar's Views on Eradicating Untouchability', *Basava Journal*, 42(2): 13-21, available online at http://210.212.169.38/xmlui/bitstream/handle/123456789/4045/Basaveshwara%20and%20Dr.%20B%20R%20Ambedkar%27s%20views%20on%20eradicating%20the%20untouchability.pdf?sequence=1&isAllowed=y (accessed on 24 April 2022). For a translation of some of his works, see Githa Hariharan. 2018. 'The Spark in their Words', *Indian Cultural Forum*, 20 April, available online at https://indianculturalforum.in/2018/04/20/the-spark-in-their-words/ (accessed on 24 April 2022).

and the Sudramunis[25] in modern-day Odisha. This version of equality, therefore, has an intrinsic and universal human value.

The next question to be addressed is—what is the consequence of the presumption that all individuals are morally equal?

1. Does it mean they are all entitled to the same benefits and equal distribution of material goods? Not exactly. The conception of 'simple' equality, where everyone gets the same level of material benefits, is generally rejected as untenable and is blind to differences that exist between people because the same benefits could still result in disparate impacts owing to the differential requirements of people. Nonetheless, we strive to achieve 'distributive justice'—a fair distribution of benefits such as wealth, goods, and services amongst all while trying to achieve 'equality of outcome'. Models of distributive justice usually combine this with the more achievable ideal of 'equality of opportunity'[26] where all persons are enabled with equal opportunities to achieve the advantages of superior positions and posts based on their merits and qualifications. Here, strict outcome of equality is still not achieved but differences appear to be justified rather than being a matter of luck.

2. Does it mean that the previous principle of like should be treated alike is not valid? No, but the principle should be utilised in a manner that focuses on the inherent equality of persons rather than mere consistency in treatment. Recognising that human beings are all equal does not mean treating them uniformly in any respects other than those in which they clearly have a moral claim to be treated alike. This understanding requires

25. They emphasised equality in access to spiritual and intellectual wealth, by translating religious texts into accessible languages and encouraging relational equality through conscious changes in language and terms of address. See Basanta Kumar Malik. 2007. 'Emergence of The Sudra to Subaltern Consciousness in Medieval Orissa (C. A.D. 1450-1600)', *Proceedings of the Indian History Congress*, 68(1): 303-312; Dr Rashmi Prava Panda. 2019. 'Contributions of Panchasakha Literature to the Socio-Cultural Life of Odisha', *The Journey of Indian Languages: Perspectives on Culture and Society*, 2: 303-308, available online at http://gyansampada.baou.edu.in:8080/jspui/bitstream/123456789/507/1/English%20Volume-2-303-308.pdf (accessed on 24 April 2022).

26. A well-accepted normative theory in this context is the Rawlsian Difference Principle found in John Rawls. 1972. *A Theory of Justice*. Oxford University Press. According to Rawls,
    1. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.
    2. Social and economic inequalities are to satisfy two conditions: (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and (b), they are to be to the greatest benefit of the least advantaged members of society'.

something more than uniform treatment. It forces us to ask what a moral claim is and whether to impose positive duties on the State to remove material or social differences that are at odds with our inherent moral equality.

3. Does it imply relational equality? Yes, there is a more recent understanding of equality that asserts that equal moral worth is best established when persons receive dignity and respect from their peers.[27] This understanding goes beyond the traditional frameworks of distributive justice that focus on material goods and the elimination of luck. It focuses, rather, on the perception of individuals by others. Factors such as the distribution of material goods, public offices, and treatment of the individual by the State can affect this perception but status in society is the goal and the factors mentioned above are mere means to achieving that status rather than it being goals themselves. Viewed in these terms, first, certain political goods such as voting rights, the right to hold public office, speak freely, etc., are crucial for every individual to participate equally, and therefore be accorded a respectable and equal societal status.[28] Second, the State should eliminate social hierarchies and cultural imperialism that impede relational equality.[29] Third, basic material conditions that enable people to enjoy respect in society—adequate nutrition, shelter, education, and medical care—have to be assured.[30]

This is not to say that every set of facts in the cases before courts will lend itself to the application of any one clear conception of equality. Nonetheless, clarity regarding the various goals an *equal* nation presents helps contextualise the nature of the rights guaranteed.

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27. David Miller. 1998. 'Equality and Justice', in Andrew Mason (ed.), *In Ideals of Equality*, p. 32. Blackwell; Carina Fourie. 2012. 'What is Social Equality? An Analysis of Status Equality as a Strongly Egalitarian Ideal', *Res Publica*, 18: 107-120, available online at https://core.ac.uk/download/pdf/159153218.pdf (accessed on 24 April 2022).
28. Rawls, p. 53.
29. Elizabeth S. Anderson. 1999. 'What is the Point of Equality?', *Ethics*, 109(2): 287-337, available online at https://www.philosophy.rutgers.edu/joomlatools-files/docman-files/4ElizabethAnderson.pdf (accessed on 24 April 2022); Niko Kolodny. 2014. 'Rule Over None II: Social Equality and the Justification of Democracy', *Philosophy and Public Affairs*, 42(4): 287-330, available online at https://www.ceu.edu/sites/default/files/attachment/event/12567/kolodny-rule-over-none-social-equality-and-justification-democracy.pdf (accessed on 24 April 2022).
30. Gideon Elford. 2017. 'Survey Article: Relational Equality and Distribution', *Journal of Political Philosophy*, 25(4): e80-e99.

Judicial Conceptualisation of Equality

The Role of Courts in Realising Equality

The constitutional guarantee of equality was crafted amidst severe discrimination and injustice—both from colonial forces and from long-standing hierarchical cultures that did not recognise equal moral worth.[31] Equality, as a concept, was therefore integral in the very formation of the new nation. While the legislature and executive are burdened with the task of proactive action towards achieving equality for its citizens, it has often fallen to the courts to shape the contours of this concept. Being the primary enforceable right relating to equality, Article 14, has been stretched to simultaneously accommodate various aspects of equality described in the previous section. However, the right to equality under Article 14 is somewhat limited in its realisation of this ideal as it is burdened with the constraint of being realistically enforceable and primarily comes before the courts as a challenge to State action. The judiciary has struggled with the task of balancing enforceable legal equality with the lofty ideal of moral equality, that is, equal worth and dignity for all individuals despite their differences.

'Equality' as Protection of the Individual Against the Mighty State

All that Article 14 guarantees is equal general rights and duties of citizens, grounded in general laws that apply to all equally—this is the postulate of legal equality on a bare reading of the text.[32] It governs State interaction with citizens (not directly the way they interact with one another) and ensures that no individual or group receives any favour or special treatment over another. This principle is basic to the Rule of Law, a driving force of early equality jurisprudence in India. By aiming at vertical equality, that is, equality in the treatment of citizens by the State, the Constitution guards against hubris and abuse by those exercising State power to claim superior status and against the use of the State's power to dominate individuals.

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31. *Indian Young Lawyers Association* v. *The State of Kerala*, (2019) 11 SCC 1, para 20 states that 'the task which the framers assumed was infinitely more sensitive. They took upon themselves above all, the task to transform Indian society by remedying centuries of discrimination against Dalits, women and the marginalised. They sought to provide them a voice by creating a culture of rights and a political environment to assert freedom. Above all, placing those who were denuded of their human rights before the advent of the Constitution-whether in the veneer of caste, patriarchy or otherwise-were to be placed in control of their own destinies by the assurance of the equal protection of law. Fundamental to their vision was the ability of the Constitution to pursue a social transformation. Intrinsic to the social transformation is the role of each individual citizen in securing justice, liberty, equality and fraternity in all its dimensions'.
32. Courts have interpreted Article 14 to mean much more but we are, for now, stating the bare textual meaning of it. This concept merely means the law will apply equally to everyone. It does not necessarily mean the State will actively eliminate unfair divisions, discrimination, etc.

The Arbitrariness Test is rooted in this understanding of equality as a check on excessive State power. Some consider the judgment in *E.P. Royappa* v. *State of Tamil Nadu*[33] in 1973 to be the origin of the test.[34] An oft-quoted section of the judgment states that, 'equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the *rule of law* in a republic while the other, to the *whim and caprice of an absolute monarch*'.[35] Here, equality is understood as the protection of ordinary citizens from arbitrary and capricious state power, reminiscent of the type of whimsical royal powers that the principle of Rule of Law was evolved to destroy.

Before *Royappa*, arbitrariness was not as clearly equated to inequality. In *Sarkar*, for instance, arbitrariness arising from an excessive delegation of legislative powers and infringement of Article 14 were considered two separate grounds to challenge the impugned legislation.[36] At the time, Article 14 was viewed primarily through the prism of the Classification Test which required comparison between groups.[37] A significant advantage of the Arbitrariness Test is that it enabled arbitrary State action itself to be declared unequal without correlation to a similarly circumstanced person or group.[38]

Nonetheless, the idea of equality as a corollary of the Rule of Law existed prior to *Royappa*.[39] In *S.G. Jaisinghani* v. *Union of India*,[40] the Supreme Court observed that

33. 1974 4 SCC 3.
34. Catherine A. MacKinnon. 2006. 'Sex Equality under the Constitution of India: Problems, Prospects, and 'Personal Laws'', *International Journal of Constitutional Law*, 4(2): 188, available online at https://academic.oup.com/icon/article-pdf/4/2/181/2141343/mol001.pdf (accessed on 24 April 2022); Shivam. 2016. 'Arbitrariness Analysis under Article 14 with Special Reference to Review of Primary Legislation', *ILI Law Review*, Summer Issue: 184, available online at https://www.ili.ac.in/pdf/paper11.pdf (accessed on 24 April 2022).
35. *Royappa*, para 85.
36. *Sarkar*, para 29.
37. Justice B.K. Mukherjea in *Sarkar* mentioned, while fashioning Article 14 in the mould of the Equal Protection Clause in the American Constitution, that 'the entire problem under the equal protection clause is one of classification or of drawing lines'. See *Sarkar*, para 44.
38. This was the deciding factor for the Supreme Court while determining the validity of an administrative action in *D.S. Nakara* v. *Union of India,* AIR 1983 SC 130. The logic was extended to the assessment of legislations by the Supreme Court in *A.L. Kalra* v. *Project and Equipment Corporation of India Limited*, (1984) 3 SCC 316 where in para 19 it held that, '[o]ne need not confine the denial of equality to a comparative evaluation between two persons … an action per se arbitrary itself denies equal protection by law'.
39. Siddharth R. Gupta and Kerti Sharma. 2021. 'Article 14 and Arbitrariness vis-à-vis Legislative Action', *SCC Online Blog*, 11 October, available online at https://www.scconline.com/blog/post/2021/10/11/article-14-and-arbitrariness-vis-a-vis-legislative-action/ (accessed on 17 April 2022); Narayanan, p. 135.
40. AIR 1967 SC 1427. In this case, the court was tasked with determining whether certain recruitment rules were in violation of the Equality Code.

'the absence of *arbitrary power* is the first essential of *the rule of law* … discretion, when conferred upon executive authorities, must be confined within clearly defined limits'.[41] The judgment even referred to American and British sources that herald the idea of the modern legal system as freedom from despotic monarchical power.[42] Again in, *State of Mysore* v. *S.R. Jayaram*, the Supreme Court used Article 14 to counter 'arbitrary power of patronage'[43] granted to the executive in government appointments. The case of *Indira Nehru Gandhi* v. *Raj Narain*, which tackled power retention tactics by the then Prime Minister of India, saw an exposition of the guarantee of equality as an aspect of the Rule of Law.[44] These early cases that laid the foundation for the Arbitrariness Test dealt with fact situations where the State was accused of having wielded its powers in an irrational or whimsical manner rather than on any discernible discriminatory or deliberate exclusionary basis. It is no surprise, therefore, that the essence of this test is limited in scope. Inequity and discrimination come in various forms and often have socio-cultural or economic bases that do not always stem from excessive State powers or personal feuds of those in power. Despite this, the judiciary has used the Arbitrariness Test repeatedly even in situations that demand a different approach to the extent that it has now lost its meaning and has itself become the very thing it was designed to prevent—arbitrary.[45]

The Supreme Court in *Madras Bar Association* v. *Union of India* took a welcome step away from over-reliance on this test. In this case, the petitioners challenged an ordinance that made sweeping changes to the administrative set-up of various tribunals, resulting in arbitrary changes to the terms of employment of tribunal members. The Supreme Court characterised this executive intrusion into judicial functioning as a violation of the doctrine of separation of powers. It correctly identified the separation of powers as a facet of the Rule of Law and, through this conceptual link, found the doctrine of separation of powers to be 'a consequence'[46]

41. *Jaisinghani*, para 14.
42. *Jaisinghani*, para 14. Among other sources, the Court quoted the American judgment in *United States* v. *Wunderlich*, 342 U.S. 98 that 'law has reached its finest moments when it has freed man from the unlimited discretion of some ruler ... where discretion is absolute, man has always suffered'.
43. AIR 1968 SC 346, para 15.
44. AIR 1975 SC 865, para 343.
45. M.P. Singh. 1987. 'The Constitutional Principle of Reasonableness', *SCC Journal*, 3: 31-48; Gautam Bhatia. 2019. 'Equality Before Law: *Naz Foundation* and Equal Moral Membership', *The Transformative Constitution*, p. 48. Harper Collins.
46. 2021 SCC OnLine SC 463, para 22 states that '[a]ny … encroachment by the legislature would amount to violating the principles of separation of powers, judicial independence and the Rule of law. Independence of courts from the executive and the legislature is fundamental to the Rule of law and one of the basic tenets of the Indian Constitution. Separation of powers between the three organs, i.e., the legislature, the executive and the judiciary, is a consequence of the principles of equality as enshrined in Article 14 of the Constitution'.

of the right to equality under Article 14 as Article 14 is grounded in the Rule of Law. Thus, it did not rely on either judicial test to assess the fact situation before it, taking instead a principled approach by linking the concept of the doctrine of separation of powers directly to the achievement of equality.[47]

Equality as Non-Discrimination

As seen in the previous section, protection from capricious and unpredictable exercise of power is one facet of equality. There exists, however, a more visceral violation of inherent moral worth in all humans—systematic and deliberate discrimination[48] against persons for inherent traits or for belonging to a group as a tool to perpetuate oppressive social regimes. In such an environment, the oppressed are seen as having less worth than others—the antithesis of equality. It is culturally sought to be justified in a multitude of ways—inherent evilness (criminal tribes); pollution, inviting feelings of disgust (certain castes, sex workers, menstruating women); inherently diminished capabilities (certain castes, women); religious loyalty; or othering of the less understood (tribal, LGBTQ+ persons).

Prejudice is built through complex psychological and sociological processes that cannot easily be addressed through State action. Nonetheless, Indian courts have at times attempted to grasp the injustice of these systems[49] and dismantle them through the constitutional ideal of equality.

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47. The judgment does employ the Classification Test to some extent to assess the permissibility of an age limit for judges but the main aspect of executive interference in the judiciary is not subject to any judicial test.
48. Sometimes, the term 'discrimination' is used by the judiciary loosely to mean other kinds of injustices. For example, in *Union of India* v. *Tulsiram Patel*, (1985) 3 SCC 398, the Supreme Court equated it to arbitrariness. In para 95, it described discrimination to mean 'violation of a rule of natural justice results in arbitrariness which is the same as discrimination; where discrimination is the result of state action, it is a violation of Article 14: therefore, a violation of a principle of natural justice by a state action is a violation of Article 14'. However, in this chapter, discrimination means the deliberate othering of a person due to social stigmas.
49. For example, see *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1, decided by the Supreme Court on 6 September 2018, para 3 where the Supreme Court was faced with legislation discriminatory to non-heterosexual orientations and observed, – 'The…ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings … has eluded certain sections of our society who are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes, parochial mindset and bigoted perceptions. Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by individuals…. We have to bid adieu to the perceptions, stereotypes and prejudices deeply ingrained in the societal mindset so as to usher in inclusivity in all spheres and empower all citizens alike without any kind of alienation and discrimination'. Available online at https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf (accessed on 19 April 2022).

Looking beyond the Limited 'Grounds' of Article 15

Article 15(1) forbids the State from discriminating on the grounds only of religion, race, caste, sex, place of birth, or any of them.[50] Article 16(2) forbids the State from discriminating on grounds only of race, caste, sex, descent, place of birth, residence, or any of them with respect to employment by the state. Article 15(2) forbids persons (and not only the State) from subjecting citizens to restrictions in access to public spaces and amenities.[51] As part of the Equality Code, these Articles are a significant indicator that one facet of 'equality' in our Constitution is non-discrimination.

However, non-discrimination jurisprudence is still far from sophisticated. The judiciary has had to grapple with the contention that, because the prohibited grounds of discrimination are specified in Articles 15(1) and 16(2), discrimination on other grounds is permissible. Moreover, Article 15 is criticised for being limited in addressing intersectional or multi-ground discrimination.[52] Nonetheless, Article 14 and the general concept of equality have increasingly been invoked to deal with cases of discrimination grounded in social biases.[53]

In some cases, Article 14 has been invoked to expand the scope of the existing grounds in Article 15. In *National Legal Services Authority* v. *Union of India*, the Supreme Court found that the ground 'sex', as specified in Articles 15 and 16, includes gender identity.[54]

In other cases, Article 14 has been directly relied on to expose intersectional discrimination.[55] For example, in the recent case of *Vikash Kumar* v. *UPSC*, the Supreme Court identified the intersectional nature of discrimination that differently-abled persons face as a problem to be addressed by the State in fulfilling

50. Article 15 (1), Constitution of India, 1950.
51. Article 15(2), Constitution of India, 1950.
52. Shreya Atrey. 2016. 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15', *The Equal Right Review*, 16: 160-185, available online at https://www.equalrightstrust.org/ertdocumentbank/Through%20the%20Looking%20Glass%20of%20Intersectionality%20Making%20Sense%20of%20Indian%20Discrimination%20Jurisprudence%20under%20Article%2015.pdf (accessed on 19 April 2022).
53. Article 15 is an instance and particular application of the right of equality provided for in Article 14. While Article 14 guarantees the general right, Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances. See *Gazula Dasaratha Rama Rao* v. *State of Andhra Pradesh*, AIR 1961 SC 564.
54. Writ Petition (Civil) No.400 of 2012, decided by the Supreme Court on 15 April 2015, para 59-61, available online at https://main.sci.gov.in/jonew/judis/41411.pdf (accessed on 20 April 2022).
55. For example, see *Danial Latifi* v. *Union of India*, (2001) 7 SCC 740. In this case, the discrimination in question was against Muslim women on account of them being both Muslim and women.

the guarantee under Article 14.[56] Here, direct reliance on Article 14 was required because the physical ability is not an identified ground of discrimination under Articles 15 or 16.

In a bold move, the Delhi High Court in *Naz Foundation* v. *Government of NCT Delhi*, recognised grounds other than those explicitly mentioned by holding that discrimination on grounds 'analogous' to those in Article 15 also violates the guarantee of equality.[57] This judgment, which struck down the interpretation of Section 377 of the Indian Penal Code (IPC) that criminalised homosexual intercourse, looked beyond the seemingly innocuous letter of the law that criminalised all 'unnatural' acts of sex, to its discriminatory impact against homosexual persons.[58] This judgment was notable for considering the impact of the legislation rather than mere intent and situating the legislative impact within a social context to assess discrimination.

Attacking Prejudice at Its Roots

A glaring and much-discussed[59] example of judicial insensitivity to discriminatory social beliefs is the case of *Air India* v. *Nergesh Meerza*[60] decided in 1981. In that case, Air India service conditions that afforded superior pay and promotional avenues for male flight attendants as compared to female flight attendants were challenged as being discriminatory on the grounds of sex. The Supreme Court applied the Classification Test and found the division of the flight attendants into Pursers (male flight attendants) and Hostesses (female flight attendants) to be based on rational differentia, that is, sex. It further upheld provisions discriminatory to

56. *Vikash Kumar* v. *Union Public Service Commission*, (2021) 5 SCC 370, para 65 ('*Vikash*').
57. 2009 SCC OnLine Del 1762, paras 99-104. See Pritam Baruah. 2009. 'Logic and Coherence in Naz Foundation: The Arguments of Non-discrimination, privacy and dignity', *NUJS Law Review*, 2(3): 511, 514, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1505294 (accessed on 20 April 2022); Khaitan, 'Equality', pp. 424-425.
58. For a more detailed analysis on how these judgments enhanced equality jurisprudence, read Gauri Pillai. 2019. 'Naz to Navtej: Navigating Notions of Equality', *NUJS Law Review*, 12(3-4), available online at http://nujslawreview.org/wp-content/uploads/2020/02/123-4-Gauri-Pillai.pdf (accessed on 20 April 2022).
59. Shreya Atrey and Gauri Pillai. 2021. 'A feminist rewriting of *Air India v Nergesh Meerza* AIR 1981 SC 1829: proposal for a test of discrimination under Article 15(1)', *Indian Law Review*, 5(3): 338-357; Aparajita Anand. 2020. 'The Curious Case of Anti Stereotyping – A Form of Stereotyping in Itself?', *White Black Legal*, 1(8): 8-10, available online at https://www.whiteblacklegal.co.in/wp-content/uploads/2020/02/Vol-1-Issue-8-APARAJITA-ANAND.pdf (accessed on 20 April 2022); Gautam Bhatia. 2015. 'Sex Discrimination and the Constitution – VI: The Discontents of Air India v Nargesh Mirza', *Indian Constitutional Law and Philosophy,* 12 August, available online at //indconlawphil.wordpress.com/2015/08/12/sex-discrimination-and-the-constitution-vi-the-discontents-of-air-india-v-nargesh-mirza/ (accessed on 20 April 2022).
60. (1981) 4 SCC 335.

pregnant women accepting the rationale that women's presence at the home after becoming a mother was crucial to the stability of the family while no similar burden was placed on men. The Court upheld the gender stereotype that the burden of bringing up children fell on women alone. This is an example of how the Classification Test was used to fit discriminatory practices into existing social hierarchies rather than challenging them.

However, the subsequent celebrated case of *Anuj Garg* dissuaded gender stereotypes.[61] It embraced a higher standard of scrutiny by assessing the objective of the legislation itself to uncover inequitable agendas. In this case, a rule restricting the working hours of women in establishments serving alcohol, purportedly for their own safety, was challenged. The Supreme Court questioned the belief that the burden of protecting women is discharged by restricting their movements and insisted, instead, that the work environment should be made safer to enable women's agency. This was a significant shift from understanding equality through platitudinous statements to articulating the exact nature of prejudice the marginalised group, in this case, women, faces. Another example of this can be seen in *Sabarimala,*[62] a case that tackled the practice of preventing entry of menstruating women into the Sabarimala temple. The Supreme Court examined the notions of pollution associated with menstruation and the purity accorded to sacred spaces that are notionally defiled by biological traits. The Court, thus, examined the very nature of discrimination itself to uphold the concept of equality.

Constitutional 'Equality' to Bolster Social Justice Legislation

The State proactively makes laws to encourage relational equality by prohibiting discriminatory practices. An example of such State action to regulate how human beings interact is the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SC/ST Act), which penalises degrading and ostracising caste discrimination practices against fellow citizens.[63] The role of the courts here is to interpret the provisions of these statutes in such a way that it leads to as full a realisation of the constitutional ideal of equality as possible. Courts can play this part only when such laws or their implementation become a matter of dispute. These cases can be decided by restricting oneself to statutory provisions without resorting to fundamental rights. Nonetheless, the Courts have, in many instances, referred to the fundamental right of equality to justify expansive interpretations of such legislations, elevating Article 14 from a negative right to moral duty upon the state.

61. *Anuj Garg*, paras 42-51: See also *Githa Hariharan* v. *Reserve Bank of India*, AIR 1999 SC 1149.
62. *Indian Young Lawyers Association* v. *The State of Kerala,* (2019) 11 SCC 1.
63. Other examples include the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act of 2006 and Transgender Persons (Protection of Rights) Act, 2019.

In *State of Karnataka* v. *Appa Balu Ingale*,[64] the Supreme Court had to decide whether to believe certain Dalit witnesses' accounts of prohibited caste-based atrocities to determine the punishment of the perpetrators under the Protection of Civil Rights Act, 1955 (predecessor of the SC/ST Act). The matter was limited to the quality of evidence and therefore, there was no need to refer to any fundamental rights. Accordingly, Justice Kuldeep Singh confined himself to 'the merits of the appeal' while, on the other hand, Justice K. Ramaswamy went into 'sociological and constitutional angulations at great length',[65] including Article 14. The object of the SC/ST Act was to punish 'preaching and practice of Untouchability'. He found this object to be an extension of the constitutional scheme designed to dismantle discriminatory social systems and realise the concept of 'equality' as guaranteed by Article 14, thus linking non-discrimination with equality.[66] Notably, his judgment also relied on the motivations behind the Preamble to visualise the goal of equality.[67]

Similarly, in *Vikash*, the Supreme Court used principles of equality under Article 14 to actualise the provisions of the Rights of Persons with Disabilities Act, 2016 (RPwD Act). In a semantic anomaly, the obligation of the State to provide an enabling environment for persons with disabilities to participate equally in public life was seen to be something more than non-discrimination.[68] According to this judgment, *non-discrimination* is limited to prohibiting prejudicial treatment while affirmative action by the State is a step above and beyond non-discrimination.[69] This kind of logic takes a step back from the development discussed later, where decades of jurisprudence have come to the conclusion that positive actions by the State to ensure equality is itself a facet of equality and, thus, non-discrimination. A conclusion of this line of thinking is that a State that does not take positive actions towards creating an enabling environment for its marginalised sections is itself a discriminatory regime. However, according to *Vikash*, a State that prevents active prejudice against marginalised groups has already fulfilled the goal of non-discrimination but not equality, creating conceptual inconsistency in non-discrimination jurisprudence.[70]

64. 1995 Supp (4) SCC 469.
65. *Ingale*, para 6.
66. *Ingale*, para 11.
67. *Ingale*, para 10.
68. *Vikash*, para 60 states that 'in seeking to project these values as inalienable rights of the disabled, the RPwD Act, 2016 travels *beyond being merely a charter of non-discrimination*. It travels beyond imposing restraints on discrimination against the disabled'.
69. *Vikash*, para 60 also states, 'In order to enable persons with disabilities to lead a life of equal dignity and worth, it is not enough to mandate that discrimination against them is impermissible. That is necessary, but not sufficient. We must equally ensure, as a society, that we provide them the additional support and facilities that are necessary for them to offset the impact of their disability.'
70. *Vikash*, para 52 states that 'the RPwD Act 2016 goes beyond a formal guarantee of non-discrimi-nation by casting affirmative duties and obligations on government to protect the rights recognised'.

Equality as the Fair Distribution of Benefits

Models of distributive justice are essential to the Indian equality framework. In her study of Canadian jurisprudence on equality, Réaume points out that '[m]uch of what government does is to distribute goods: rights, powers, immunities, opportunities, benefits, etc. and thus also duties, liabilities, burdens, etc.'.[71] This rings true in India as well, where the government enacts several schemes for fair distribution of benefits with the aim of achieving some sort of equality—both in outcome and opportunity. One such prominent measure is affirmative action for elected posts, recruitment in government jobs, admission to government colleges, etc. for persons who face a social setback. This is both to enable adequate representation of various classes[72] (equality of outcome) and to create a level playing field for persons to compete for these benefits (equality of opportunity).

The Supreme Court in *Union of India* v. *Rakesh Kumar* articulated this link between equality and distributive justice in reference to affirmative action—'It is a well-accepted premise in our legal system that ideas such as "substantive equality" and "distributive justice" are at the heart of our understanding of the guarantee of "equal protection before the law".'[73]

Thus, cases regarding reservations became fertile ground within which to shape the concept of equality. One of the most significant developments in equality jurisprudence has been the way Article 15(4) and Article 16(4), which provide for affirmative action and 'special provisions' by the State for groups that have been historically disadvantaged, are viewed within the Equality Code. Initially, the two were seen as permissible departures from the formal equality where every person had to compete for benefits without any favourable treatment by the State regardless of the differential conditions of the person.[74] It supposes a default state of equality in the world that merely has to be maintained, rather than acknowledge that many people are already at a disadvantage and require correctional beneficial treatment for equality in outcome.[75]

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71. Denise Réaume. 2013. 'Dignity, Equality, and Comparison', in Deborah Hellman *et al.* (eds.), *Philosophical Foundations of Discrimination Law*, p. 6. Oxford University Press, penultimate draft available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307169 (accessed on 20 April 2022).
72. For example, Article 14(4) of the Constitution enables affirmative action for employment in public posts for classes that are 'not adequately represented in the services under the State'.
73. (2010) 4 SCC 50, para 37.
74. *Government of Andhra Pradesh* v. *P.B. Vijayakumar*, AIR 1995 SC 1648, para 14. See also *Yusuf Abdul Aziz* v. *State of Bombay*, 1954 SCR 930; *G.M. Southern Railway* v. *Rangachari*, AIR 1962 SC 36; *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649; *Triloki Nath* v. *State of Jammu and Kashmir*, AIR 1969 SC 1; *State of Andhra Pradesh* v. *U.S.V. Balram*, (1972) 1 SCC 660.
75. MacKinnon, 'Equality'.

However, subsequent judicial reasoning did not mischaracterise them as exceptions to equal treatment. Instead, they recognised these provisions as instrumental in achieving equality.[76] In *Vikas Sankhala* v. *Vikas Kumar,*[77] the Supreme Court recognised that

> 'Our Constitution envisages equal respect and concern for each individual in the society and the attainment of the goal requires special attention to be paid to some ... giving ... concessions to the reserved category persons … ensures equality as a levelling process. At jurisprudential level, whether reservation policies are defended on compensatory principles, utilitarian principles, or on the principle of distributive justice, fact remains that the very ethos of such policies is to bring out equality'.[78]

Here, the reasoning attempts to base affirmative action on the individual worth inherent in each person by emphasising respect and concern. It avoids identifying the exact philosophical basis for this finding, but the connection is an important development. Equality is sought to be achieved through the redistribution of benefits not merely in a fair way but also through a powerful acknowledgement of the disadvantage faced by marginalised groups.

Equality as a Guarantee of Human Dignity

Recent Indian jurisprudence has come even closer to the conceptual understanding of equality as equal moral worth by linking equality with human dignity. Unlike other jurisdictions, such as South Africa,[79] the right to dignity is not clearly identified in the Indian Constitution. Dignity finds a place in the Preamble, guiding the interpretation of other constitutional provisions. Though the Indian judiciary

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76. The majority of a seven-judge bench of the Supreme Court, in *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310, held that Articles 15(4) and Article 16(4) are not exceptions to Articles 15(1) and 16(1) respectively. See also *Dr. Pradeep Jain* v. *Union of India* (1984) 3 SCC 654, para 13 and more recently *B.K. Pavitra* v. *Union of India*, (2019) 16 SCC 129, para 112, where the Supreme Court held: 'For inequality to be truly effective or substantive, the principle must recognise existing inequalities in society to overcome them. Reservations are, thus, not an exception to the rule of equality of opportunity. They are rather the true fulfilment of effective and substantive equality by accounting for the structural conditions into which people are born'.
77. (2017) 1 SCC 350. In this case, a central body that conducts examinations to determine eligibility for the post of teachers prescribed a minimum pass mark but allowed for state governments to relax the pass mark for certain backwards sections, Scheduled Castes, and Scheduled Tribes according to that state government's 'extant' policy. When the Rajasthan government allowed for relaxation of the pass mark, the contention raised by the general category candidates was that this was invalid because the Rajasthan government did not have any applicable existing reservation policy at the time and there was, thus, no 'extant' policy. The Supreme Court rejected this argument finding it to be against the general spirit of affirmative action to achieve equality.
78. *Sankhala*, para 67.
79. The Constitution of South Africa recognises 'Human dignity' and 'the achievement of equality' as founding values under Clause 1 and dignity is one of the basic rights protected as a part of the bill of rights under Clause 7.

used dignity to interpret fundamental rights several years ago,[80] there is a recent increase in reliance on dignity as a decisive factor in discerning the contours of existing fundamental rights, especially equality. Linking dignity and equality, the Supreme Court observed in *Sabarimala* that '[h]uman dignity postulates an equality between persons. The equality of all human beings entails being free from the restrictive and dehumanizing effect of stereotypes and being equally entitled to the protection of law'.[81]

This flows from the theory that dignity is a foundational value from which human rights arise.[82] In fact, the preamble of the International Covenant on Civil and Political Rights (ICCPR) states that the rights it contains 'derive from the inherent dignity of the human person'. The very first article of the Universal Declaration of Human Rights states all to be 'equal in dignity and rights'.[83] Indian courts have espoused this theory by recognising dignity as a foundational value for human rights or finding that human rights are designed to protect human dignity.[84] This has played a significant role in developing unenumerated rights like the right to privacy.[85]

80. See *D.K. Basu* v. *State of West Bengal*, AIR 1997 SC 610; *Sunil Batra* v. *Delhi Administration*, (1978) 4 SCC 409.
81. Sabarimala Case, para 233.
82. This is an extension of the Kantian philosophy that humans have an inherent moral worth and dignity simply by virtue of being human. See Alan Gewirth. 1981. 'The Basis and Content of Human Rights', *Human Rights*, 23: 119. A more nuanced understanding of 'status-dignity' and its basis of a source of human rights can be found in Jeremy Waldron. 2013. 'Is Dignity the Foundation of Human Rights?', *NYU School of Law*, *Public Law & Legal Theory Research Paper Series*, Working Paper No. 12-73 available online at https://ssrn.com/abstract=2196074 or http://dx.doi.org/10.2139/ssrn.2196074 (accessed on 20 April 2022).
83. Article 1, Universal Declaration of Human Rights, 1948 available online at https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (accessed on 20 April 2022).
84. For example, in *Valsamma Paul* v. *Cochin University*, (1996) 3 SCC 545, para 26, the Supreme Court observed that, 'human rights are derived from the dignity and worth inherent in the human person'. In the landmark case of *Maneka Gandhi* v. *Union of India*, para 29, it observed that 'fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual' and in *Common Cause* v. *Union of India*, Writ Petition (Civil) No. 215 of 2005 (Supreme Court of India) decided on 9 March 2018, para 86, observed that 'dignity is the expression of a basic value accepted in a broad sense by all people, and thus constitutes the first cornerstone in the edifice of human rights. Therefore, there is a certain fundamental value to the notion of human dignity, which some would consider a pivotal right deeply rooted in any notion of justice, fairness, and a society based on basic rights', available online at https://main.sci.gov.in/supremecourt/2005/9123/9123_2005_Judgement_09-Mar-2018.pdf (accessed on 20 April 2022). More recently, in *Sabarimala*, in para 192, the Supreme Court observed that 'dignity of the individual is the unwavering premise of the fundamental rights'.
85. See *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*, Writ Petition (Civil) No. 494 of 2012 decided by the Supreme Court on 24 August 2017, available online at https://main.sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf (accessed on 25 April 2022).

The concept of human dignity is linked closely with equality as both flow from the idea of each human being having inherent moral worth.[86] Some thinkers assert that human dignity is inherent in every human being, equating it to a sort of moral worth.[87] To help illustrate this point, we can consider Denise Réaume study of the concept of equality in Canadian jurisprudence.[88] She found that the concept of dignity helped elevate the understanding of equality from terms of comparison to ensuring an enabling environment for all. In her paper, she studied cases where the Canadian judiciary assessed the criteria for distribution of benefits by the State against their equality guarantee. She identified the familiar problem with judging claims of this kind—the court often compares the aggrieved claimant with the group that has the benefit and judges whether the difference justifies the denial of the benefit to the claimant, similar to our Classification Test. She found such an exercise limited in ensuring justice.[89] This is true of Indian equality jurisprudence as well,[90] for example, in *Nargesh Meerza* discussed previously.

In her paper, she highlighted that a dignity-based construction of equality, however, changed the way the judiciary approaches the problem of equitable distribution. The idea of a dignified individual whom she described as having a 'secure sense of identity', 'the satisfaction of basic material needs', and 'a set of empirical qualities having to do with self-control, invulnerability, and self-assuredness', provides better direction for fair distribution to ensure this sort of security for every person.[91] Thus, equality breaks out of the trappings of 'sameness' and instead transcends into an assurance of respect and inclusivity.

86. For an assessment on the way the American constitution connects the two principles, see *Harvard Law Review*. 2019. 'Note: Equal Dignity - Heeding Its Call', *Harvard Law Review*, 132: 1323, available online at https://harvardlawreview.org/2019/02/equal-dignity-heeding-its-call/ (accessed on 20 April 2022).
87. Kant, The *Metaphysics of Morals*; Waldron, 'Is Dignity the Foundation'.
88. Réaume, 'Dignity, Equality, and Comparison'.
89. Réaume, 'Dignity, Equality, and Comparison' p. 9: 'This tendency to require close likeness between claimant and existing beneficiaries indicates reliance on a background distributive principle that is taken to be constitutionally acceptable. The implication of that reference point is often negotiated through the language of comparison of one group of people to another, rather than through a direct examination of the purpose and criteria for eligibility themselves. However, comparison to others should be merely an indirect means of assessing the claimant according to the relevant criteria for distribution of the benefit itself. This indirect comparison often obscures this central question and usually results in comparing the claimant to the legislature's standard of relevance for purposes of eligibility for the disputed benefit, whatever they may be. This amounts to the de facto ratification of that standard without subjecting it to any scrutiny at all.'
90. See Khaitan, 'Equality'.
91. Réaume, 'Dignity, Equality, and Comparison' p. 19.

A similar development is taking place in Indian equality jurisprudence. As an example, we analyse the recent judgment of the Supreme Court in *Vikash*[92] in more detail. The Union Public Service Commission (UPSC), an independent government body, conducts written examinations for appointment to central government posts. The UPSC provided a scribe for candidates with a 'benchmark' disability, that is, impairment of 40 per cent or more. In this case, the aggrieved party required a scribe but had only 6 per cent demonstrable impairment caused by dysgraphia. The UPSC, relying on a positivist approach to the rule, denied his request. The aggrieved party then lay claim to the equality guarantee on the ground that the denial of a scribe was insensitive to the nature of his disability and disallowed him a fair chance at the exam. The Supreme Court accepted this relatively straightforward claim and used it as an opportunity to address the equality issue in a more nuanced way using the concept of dignity.[93]

The Court characterised this individual grievance as reflective of 'the aspirations of a whole class of persons whose daily engagement with physical disability defines their continuing quest for dignity'.[94] It applied the provisions of the RPwD Act to this case which mandates that 'the … Government shall ensure that the persons with disabilities (PwD) enjoy the right to equality, life with dignity and respect for his or her integrity equally with others'.[95] The Court first held that the RPwD Act is one of the measures undertaken by the State to fulfil the guarantee of equality under Article 14 and should be applied and interpreted in the 'ethos of inclusion and acceptance'. It then clearly linked dignity to the idea of equality as recognition of the inherent moral worth of every human by stating that 'individual dignity undergirds the RPwD Act….Intrinsic to its realisation is recognising the worth of every person as an equal member of society'.[96]

It went on to use this framework to make some notable observations—

First, it used dignity to promote inclusiveness[97] and indirectly endorsed relational equality because inclusivity and respect come from acceptance by other human beings. The judgment is comfortable departing from the conceptualisation of equality bound by 'same-ness' and, instead, embraces one that nurtures diversity. The Court observed that,

92. *Vikash Kumar* v. *Union Public Service Commission*, (2021) 5 SCC 370.
93. See Matthew S Smith and Michael Ashley Stein. 2021. 'Vikash Kumar: Dignity and Disability Rights at the Indian Supreme Court', *Oxford Human Rights Hub*, 17 December, available online at https://ohrh.law.ox.ac.uk/vikash-kumar-dignity-and-disability-rights-at-the-indian-supreme-court/ (accessed on 20 April 2022).
94. *Vikash*, para 1.
95. Section 3, RPwD Act.
96. *Vikash*, para 60.
97. *Vikash*, para 60 – 'Exclusion results in the negation of individual dignity and worth or they can choose the route of reasonable accommodation, where each individual's dignity and worth is respected'.

> The RPwD Act … is fundamentally premised on the recognition that there are many ways to be, none more 'normal' or 'better' than the other. It seeks to provide the disabled a sense of comfort and empowerment in their difference … the RPwD Act ... aims to provide them an even platform to thrive, to flourish and offer their unique contribution to the world…. The Act tells them that they belong, that they matter, that they are assets, not liabilities and that they make us stronger, not weaker.[98]

Second, it widened the scope of duties of the State in realising the goal of equality as recognition of inherent moral worth by adopting the principle of reasonable accommodation. The Court stated that 'in order to enable persons with disabilities to lead a life of *equal dignity and worth*, it is not enough to mandate that discrimination against them is impermissible. That is necessary, but not sufficient. We must equally ensure … that we provide them the additional support and facilities that are necessary for them to offset the impact of their disability'.[99] Thus, the Court moved from a positivistic rule-led legal framework to a value-led solution-centric demand from the executive.

Third, it changed the way we engage with questions of inequality from comparative terms and judicial tests to identify the nature of hurt and discrimination. The Court's analysis begins with trying to identify the particular type of barrier that is faced by persons with disabilities instead of generalising problems of access faced by marginalised groups.[100] The judgment enabled the law to change its view of physical impairment from a medical perspective to a social perspective,[101] by encouraging an intersectional approach to addressing problems of inequality and demonstraing an understanding of the various marginalising factors that a person faces and their varying contribution to that person's marginalisation.[102]

The Value of Dignity in Equality Jurisprudence

Problems with the Dignity Narrative

Despite its contribution to equality jurisprudence, this rise of the dignity narrative in the Indian human rights jurisprudence has its drawbacks. The assumption that dignity is the foundation for equality and other basic human rights is itself under

98. *Vikash*, para 55.
99. *Vikash*, para 67.
100. *Vikash*, para 43.
101. See Dr Sanjay Jain. 2021. 'USPs of the Supreme Court's judgment in Vikash Kumar: Some Reflections', *Bar & Bench*, 21 February, available online at https://www.barandbench.com/columns/usps-of-the-supreme-courts-judgment-in-vikash-kumar-some-reflections (accessed on 20 April 2022).
102. *Vikash*, para 65.

question,[103] which leaves the exact link between dignity and equality unclear. Further, there is a concern, both in India[104] and elsewhere,[105] that *equality*, which itself is a developing concept in jurisprudence, may just be replaced with the equally amorphous concept of *dignity*. Its interpretation and application would still depend on the personal experiences and understandings of the judges concerned.

The vagueness of dignity can, and has, provided a foil for collective morality to drown individual autonomy. For example, in the *Indian Hotel and Restaurant Association* v. *State of Maharashtra*,[106] the Bombay High Court accepted government restrictions on erotic dancers against their wishes on the ground that such regulation helps protect the 'dignity' of women.[107] There is considerable development in Indian jurisprudence recognising that government regulation of this kind endorses state paternalism based on gender stereotypes.[108] However, the State objective of regulating women's autonomy on the plank of dignity remains unquestioned.

Similarly, the Karnataka High Court in *Resham* v. *State of Karnataka* recently affirmed that the prescription of uniforms in educational institutions that prevents Muslim women from wearing the hijab to be in pursuance of the object of protecting the dignity of women.[109] In other words, the hijab was seen to be a practice derogatory

103. Conor O' Mahony. 2011. 'There Is No Such Thing as a Right to Dignity', *International Journal of Constitutional Law*, 10(2): 551, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856003; see also Baruah 'Logic and Coherence in Naz Foundation'..

104. Baruah 'Logic and Coherence in Naz Foundation'; Vikram Aditya Narayan. 2022. 'The Indian Supreme Court's Use of Dignity in Constitutional Reasoning', Chapter 1 in this book.

105. Jeffrey Rosen. 2015. 'The Dangers of a Constitutional 'Right to Dignity'', *The Atlantic*, 29 April, available online at https://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/ (accessed on 25 April 2022); Christopher McCrudden. 2008. 'Human Dignity and Judicial Interpretation of Human Rights', *The European Journal of Human Rights*, 19(4): 655-724, available online at http://www.ejil.org/pdfs/19/4/1658.pdf (accessed on 25 April 2022).

106. 2006 (3) Bom CR 705.

107. The Rules under the Bombay Police Act, 1951, which were used to frame the regulations on dance bars, were passed in the interest of public safety and social welfare and to safeguard the dignity of women as well as prevent exploitation of women.

108. See *Anuj Garg*; *Hotel Priya* v. *State of Maharashtra* Civil Appeal No. 1459/2022 (Arising out of SLP (C) No. 13764 of 2012), Civil Appeal No. 1460/2022 (Arising out of SLP (C) No. 15953 of 2012) and Civil Appeal No. 1461/2022 (Arising out of SLP (C) No. 8992/2013), decided by the Supreme Court on 18 February 2022.

109. Writ Petition No. 2347/2022 decided by the Karnataka High Court on 15 March 2022, p. 91 available online at https://timesofindia.indiatimes.com/karnataka-hijab-verdict-2022/photo/90217078.cms (accessed on 24 April 2022). The rules prescribing the prohibition of hijabs were put in place in the Government Pre-University College for Girls in Udupi under powers granted by the Karnataka Education Act, 1983. Section 2(g)(v) of this Act provides for promoting 'harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities to renounce practices derogatory to the dignity of women'.

to the dignity of women. *Prima facie*, this set of facts appears to be similar to *Sabarimala* where a religious rule selectively applicable to women (like the hijab under Islam) was dismantled to protect womens' dignity. In fact, the Karnataka High Court relied on *Sabarimala* to observe that religious practices have been used to continue practices derogatory to the dignity of persons.[110] However, *Sabarimala* allowed women more choice and autonomy than they had previously while *Resham* and *ICRA* diminished the choices previously available to women. Women who hold the religious belief that they are not allowed in the Sabarimala temple can choose not to go and those who believe they are entitled to enter, may enter the temple. However, in the case of banning dance bars, those women that wish to continue performing no longer have the choice to do that and in the case of banning the hijab in educational institutions, women who want to wear the hijab no longer have that choice. This is, of course, assuming that these choices are free choices. The question of whether such choices can ever be free is one that neither of these decisions engages with and hence does not form the basis of these judgments. Rather, they are based more on a paternalistic view where majoritarian opinions supposedly make the correct and more dignified choice for these women instead of enabling the women to make the choice for themselves.

Moreover, such arguments also have to be contextualised in the light of majority and minority religious status. The judgment in *Resham* equates the purdah in some Hindu cultures to the hijab, asserting that the removal of both systems is integral to the emancipation of women—an application of 'same-ness' equality.[111] However, the equation of practices in a secure, majoritarian, and well-accepted religion like Hinduism in India to similar practices in Islam ignores the insecurity of minorities and the proportionate significance of a religious symbol to the identity of those practising a minority religion. A Muslim woman may be treated unequally by her religious community but may also be treated unequally by the larger citizenry on account of her being a Muslim—ultimately causing a dichotomy between her interests as a woman and as a Muslim. In such cases, both equality and dignity require deeper and more nuanced analysis and dignity, on its own, does not help understand intersectional discrimination. Further, taking away a woman's livelihood or access to education does not in any way further her dignity or equal treatment.

Dignity as a Search for an Unenumerated Moral Value

Nonetheless, the dignity narrative enriches the understanding of equality when taken to be an enabler of agency.[112] This is well illustrated in the case of *Joseph Shine*

110. *Resham*, pp. 56, 85-86.
111. *Resham*, p. 124.
112. For example, dignity has been seen to be an enabler of agency in *Puttaswamy*.

v. *Union of India*,[113] again a case involving the dignity of women. In this case, the constitutionality of Section 497 of the IPC criminalising adultery[114] was challenged before the Supreme Court. According to Section 497, a married man is the victim of adultery when another man (the perpetrator) has sex with the victim's wife without his consent. The victim cannot proceed against his wife but only against the man whom she had sex with. No equivalent law exists that criminalises extramarital sex by married men with unmarried women. This law was argued to be unconstitutional on the basis that it espoused the patriarchal notion of women as their husband's sexual property, whereby, they are treated as incapable of individual sexual agency once married.

The five-judge bench in this case found the law to be unconstitutional on the ground that it violated the right to equality. The judges employed various strands of reasoning, most strongly that the law robbed women of their dignity as human beings with agency and thus violated the principle of equality.

The constitutional challenge to adultery was raised before, in *Sowmithri Vishnu* v. *Union of India*[115] and *V. Revathi* v. *Union of India,*[116] in 1988. In these cases, Section 497 was upheld. The fact that women could not be proceeded against under Section 497 was seen as a permissible exception in favour of women as enabled by Article 15(3) of the Constitution. However, in *Shine*, the Supreme Court distinguished between laws that attempt to correct historical injustices or attempt to place women on an equal footing by recognising their social disadvantages and laws that perpetuate patriarchy by espousing romantic paternalism. Section 497 was crafted under the belief that women were incapable of independent decisions, were prone to seduction by men and hence could not be held accountable for their decision to engage in sexual activity outside their marriage. The Supreme Court clearly held that such a notion is one of romantic paternalism that does little to help women realise their rights as equal

113. *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39, decided by the Supreme Court on 27 September, 2018, available online at https://main.sci.gov.in/supremecourt/2017/32550/32550_2017_Judgement_27-Sep-2018.pdf (accessed on 22 April 2022) ('*Shine*').

114. Section 497, Indian Penal Code, 1860: 'Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.'

115. AIR 1985 SC 1618.

116. AIR 1988 SC 835.

citizens.[117] While affirmative action that enables a disadvantaged group to empower itself affords its subject human dignity, the *protection* of a disadvantaged group by denying it agency robs the subject of dignity.[118]

Nonetheless, Justice Mishra eventually struck it down on the ground of being 'manifestly arbitrary'.[119] Justice Nariman explored whether the provision actually achieved its objective, that is, the preservation of marriage, by conducting an examination akin to the second rung of the Classification Test and found that it did not.[120] Justice Indu Malhotra resorted to the comfort of the Classification Test and found that the classification between men and women being treated differently in terms of who can prosecute and who can be prosecuted against, is 'no longer' relevant and therefore the law is in violation of Article 14.[121] Her reasoning indicated that the treatment of women being subordinate to men in the manner that Section 497 endorsed was justified at some point in the past[122] and even suggested that gender equality itself is a 'later development'.[123] This approach views equality as responsive to evolving societal norms rather than constant objective principles.

Justice Chandrachud explored the nature of discrimination perpetuated by Section 497 most closely through a thorough analysis of the social and historical context within which the provision operated.[124] He recognised that Section 497 views people as gendered citizens[125] and was the only judge on the bench to explicitly recognise this as a form of discrimination.[126] He was also the only judge to test the provision against the guarantee provided in Article 15 against discrimination on the basis of sex. Without displacing any existing tests, he does appear to offer an

117. *Shine*, para 4, 124; *Shine,* para 93: 'The history of Section 497 reveals that the law on adultery was for the benefit of the husband, for him to secure ownership over the sexuality of his wife. It was aimed at preventing the woman from exercising her sexual agency. Thus, Section 497 was never conceived to benefit women. In fact, the provision is steeped in stereotypes about women and their subordinate role in marriage. The patriarchal underpinnings of the law on adultery become evident when the provision is considered as a whole'.

118. *Shine*, para 124: 'The disadvantage must be addressed not by treating a woman as "weak" but by construing her entitlement to an equal citizenship. The former legitimizes patronising attitudes towards women. The latter links true equality to the realisation of dignity'.

119. *Shine*, para 23.

120. *Shine*, para 81.

121. *Shine*, para 165: 'The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone'.

122. *Shine*, para 166: 'law which could have been justified at the time of its enactment with the passage of time may become outdated and discriminatory with the evolution of society and changed circumstances'.

123. *Shine*, para 166: 'A provision previously not held to be unconstitutional, can be rendered so by later developments in society, including gender equality'.

124. *Shine*, para 88.

125. *Shine*, para 88.

126. *Shine*, para 89.

alternative—'The primary enquiry to be undertaken by the Court towards the realisation of substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals'. However, he ultimately used the test of manifest arbitrariness to strike down the law, finally equating its patriarchal underpinnings to arbitrariness rather than discrimination.[127]

Despite using different tests and judicial tools, nearly all the judges drew a link between the violation of equality by Section 497 to the dignity of women as individuals. More specifically, Justice Chandrachud implied that Section 497's denial of a woman's ability to make choices within marriage while affording the same to a man, offends her dignity and thus, breaches the guarantee of equality.[128] The fact that no such provision existed penalising the extramarital sexual activity of men with other 'unattached' women was not *the reason* Section 497 violated equality, but an indication or symptom of the deeper social malaise of patriarchal discrimination which constituted the actual inequality. This is a good example of how tests can be used to diagnose inequality but do not confront the inequality itself. Limiting oneself to observing that no equivalent law for men exists or that women are not prosecuted under this law while men are, can lead to facile solutions like making the law equally applicable to both men and women, when, in fact, the problem is much deeper.

However, nearly all the judges felt the need to declare the law arbitrary in order to find it inconsistent with Article 14. This is problematic because the nature of injury causing the violation of equality is crucial to understanding what equality is. Arbitrariness or capricious unpredictable and baseless actions form a different mischief/injury than the perpetration of deliberate and systematic discrimination.

In any event, like in *Vikash*, weaving dignity into equality jurisprudence can afford the judiciary precious respite from restrictive tests. Its value is best appreciated by contrasting the above judicial reasoning with cases where it was not employed. For instance, the absence of dignity jurisprudence is felt deeply in *Sarkar*, where legislation providing for shorter trials for certain classes of criminal offenders without all the protective features of a fair trial available to others was challenged as violating the right to equality. While describing the inadequacy of the Classification Test, Justice Bose considered the hypothetical scenario of a law that all accused persons who cannot pass a particular intelligence test will be tried summarily so that the trial process would be simpler and commensurate with their intelligence. He noted, 'here is classification. It is scientific and systematic … There is no question of

127. *Shine*, para 150.

128. *Shine*, para 152: 'The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality'.

favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision? Surely simply this that the judges would not consider that fair and proper'.[129]

The emerging dignity jurisprudence would have provided an avenue for Justice Bose to articulate why this was not 'fair and proper' by considering the impact such legislation has on the dignity of the individual. While dignity jurisprudence holds certain moral appeal, it remains vague and undefined.[130] Ultimately, the search for the elusive but visceral element of 'justness' in the visualisation of equality in *Sarkar*[131] continues to this day, as can be seen from Justice Chandrachud's assertion that 'justness postulates equality' in *Shine*.[132]

Conclusion

The search for equality is deeply connected to the meaning of civilisation itself. Equality operates on various planes as our discussion shows. Within a constitutional democracy, questions of equality arise both within and outside the constitutional framework. As a result, the Constitution not only influences other structures, such as religion, in society but is also in a constant dynamic relationship with such other structures. While the judiciary is called upon to address these questions from time to time, it is not always equipped to find the right answers given the limited framework of its operation.

There is inconsistency in the judicial conceptualisation of equality, often within the same case.[133] This may be seen as the result of the continuing development of the concept and the crafting of constitutional concepts by discrete individuals that is at odds with the idea of the judiciary being a monolithic whole.

In a positive development, courts are increasingly analysing the nature of bias and prejudice that fuel existing discriminatory practices rather than relying on superficial

129. *Sarkar*, para 87.
130. See Baruah, 'Logic and Coherence in Naz Foundation'.
131. *Sarkar*, para 92: 'What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the *collective conscience* of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it'.
132. *Shine*, para 124.
133. For example, in *Ingale*, the various meanings of equality—equality of opportunity, the dignity of the individual, and relational equality—are described together.

analyses through tests to merely detect the presence of discrimination. Indian courts have turned to more fundamental values like constitutional morality, distributive justice, and, later, dignity, to reach equitable outcomes that focus on equality as the recognition of the individual worth of individuals. It is too simplistic to presume these various understandings of dignity are clear categories distinct from one another. In fact, they overlap considerably and a given fact situation can require justification from multiple angles to arrive at a conclusion regarding what equality may entail.

Despite these welcome developments, courts continue to be trapped in the dogma of equality as 'same-ness'. One glaring example is in the *Rajbala* v. *State of Haryana,*[134] where the Supreme Court turned a blind eye to the social realities of citizens. It upheld the requirement of educational and other qualifications affordable to the privileged for an elected post, insensitive to the fact that these are often denied to certain groups due to reasons beyond their control. Another example is in *Resham*, where the Karnataka High Court found the aspect of literal uniformity to be the equalising factor in school uniforms, without understanding the issue of denial of education based on clothing. When confronted with the demand for a reasonable accommodation as established in *Vikash*, the Court stuck to its limited interpretation of equality through formal classification by observing that if the hijab were allowed, '[t]here shall be two categories of girl students, namely, those who wear the uniform with hijab and those who do it without'. While one hopes the appeal at the Supreme Court will explore the conceptual basis of equality in this instance, it is clear that the judiciary is still in the process of developing a concrete understanding of equality that checks against individual prejudice.

134. AIR 2016 SC 33. The impugned legislation prohibited citizens who did not have a certain level of education, those who had certain types of debts, and those who did not have functional toilets in their home from contesting panchayat elections in Haryana. The contention raised was that these criteria unfairly discriminate against poorer and marginalized citizens who do not possess the economic or social capital to meet these criteria. See Alok Prasanna Kumar. 2015. 'The Supreme Court Just Delivered a Deadly Blow to the Idea of Universal Adult Franchise', *The Wire*, 10 December, available online at https://thewire.in/law/time-for-indias-poor-to-say-farewell-to-universal-adult-franchise (accessed on 20 April 2022); Upendra Baxi. 2015. 'Supreme Error', *The Indian Express*, 24 December, available online at https://indianexpress.com/article/opinion/columns/supreme-error/ (accessed on 20 April 2022).

3

Evolution of Jurisprudence on Sexual Harassment of Women at the Workplace with Reference to Constitutional Values

Anagha Sarpotdar*

Introduction

The Indian Constitution[1] envisages the concept of social justice which involves the establishment of an egalitarian social order with no discrimination between individuals on the basis of caste, religion, race, sex, or place of birth. This involves the provision of special safeguards and affirmative action for disadvantaged sections of society. Gender equality for women, who are historically a disadvantaged group, becomes a prominent matter of social justice. With reference to Articles 14, 15, 21, and 19(1)(g) of the Indian Constitution, women needed safeguards against sexual harassment at the workplace.

Incorporating a broad reading of the Constitution, in *Vishaka* v. *State of Rajasthan*,[2] the Supreme Court of India[3] recognised that sexual harassment violates the constitutional value of gender equality in all spheres of human activity and the fundamental rights of women to live with dignity, to personal liberty, and to carry on any occupation. The Court defined gender equality as including protection from sexual harassment and the right to work with dignity, a universally recognised basic human right. One of the logical consequences of sexual harassment is a violation of the fundamental right of women to work, as it is necessary to provide a safe working environment. It was affirmed by the Court that sexual harassment violates the

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 19 January 2022.

1. The Constitution of India is the supreme law of India. The document lays down the framework that demarcates fundamental political code, structure, procedures, powers, and duties of government institutions and sets out fundamental rights, directive principles, and the duties of citizens.
2. (1997) 6 SCC 241.
3. The Supreme Court of India is the supreme judicial body of India and the highest court of Republic of India under the Constitution. It is the most senior constitutional court, and has the power of judicial review.

freedom of speech and expression of a woman as it compels her to be in a threatening environment, working alongside the perpetrator, making her uncomfortable to participate in work-related activities. The Court further emphasised that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

This chapter looks at progressive judgments on sexual harassment at the workplace, upholding constitutional values such as justice, equality, and dignity. Foremost among all rulings is the Supreme Court's *Vishaka* judgment (1997) and five others delivered by the Delhi High Court. The High Court of Delhi has consistently engaged with matters concerning sexual harassment of women at the workplace and has handed down judgments meriting attention.

Justice

Sexual harassment at workplace in the larger context is about patriarchy and gender hierarchy in society. It is discrimination based on sex, a manifestation of patriarchy and male dominance, perpetrated with an expectation that women will submit to sexual harassment in order to retain their jobs or gain career advancements. This is clearly discrimination based on gender as it prevents women from participating in the work on an equal footing with men.[4] When women are sexually harassed or abused at workplaces, it involves sexual coercion, intimidation, deprivation of their right to work in a violence-free atmosphere, and a hostile work environment that affects their safety, wellbeing, and health.

In the Indian context, the judgment in *Vishaka* (1997) was the first step towards recognising the concept of sexual harassment as a blatant violation of gender equality, wherein the requirements of formal equality[5] meant protection of the law against discrimination while the requirements of substantive equality[6] meant recognising the needs of the disadvantaged, that is, women. *Vishaka* relied on the assumption that problems of inequality, injustice, and discrimination were not only individual and attitudinal but fundamentally structural, systemic, and institutional

4. Catherine A. Mackinnon. 1979. 'Sexual Harassment of Working Women: A Case of Sex Discrimination', *Political Science Quarterly*, 49(4): 696-698.
5. Formal equality is a belief that in the spirit of fairness, people must be consistently or equally treated at all times. It does not consider privilege and advantage of one person over the other in terms of their race, caste, class, or religion, and that persons unintentionally benefit from those privileges.
6. Substantive equality identifies differences among groups of people and attempts to remove the systemic advantages afforded to majority groups. It considers discrimination against groups which have been historically advantaged and aims at remedying that disadvantage through measures such as affirmative action.

inequities. Accordingly, the judgment set out guidelines for employers with the prevention of sexual harassment as the primary focus. The judgment targeted workplaces as their institutional structure sustained and reproduced inequities. The responsibility for prevention and redress of sexual harassment was placed on the employer. This was done by directing the employers to create an internal mechanism as a strategy to empower, mobilise, and organise women. The participation of women enabled them to lead the committees and become an authority that curbed sexual harassment.

Vishaka aimed at enforcing the fundamental rights of working women, preventing sexual harassment, and filling the vacuum in existing legislation. In the absence of a law, the problem of sexual harassment at the workplace was effectively expressed and situated in the language and framework of the Constitution of India and international law. The Court drew attention to Articles 14,[7] 15,[8] and 21[9] of the Constitution which were violated in cases of sexual harassment. Article 14 was interpreted from the point of view of gender equality which meant that women have a right to work with dignity and their rights are to be protected from sexual harassment. Using Article 15, sexual harassment was seen as discrimination based on sex. Article 19(1)(g),[10] which guarantees equal opportunity to all citizens to practise any profession or carry on any occupation, trade, or business, was also seen to be violated.

According to Article 21, all persons are entitled to life and personal liberty. When read along with Article 19(1)(g), which entitles all persons to equal opportunity at the workplace, it stands that no person shall be deprived of life or liberty at the workplace. Article 42,[11] which calls upon the State to provide for just and humane conditions of work, laid the foundation for future measures and legal remedies against sexual harassment at the workplace. The *Vishaka* judgment saw an application of provisions of the Indian Constitution and principles laid down in the United Nations Convention on Elimination of Discrimination Against Women (CEDAW).[12] Along with fundamental rights and directive principles of state policy in the Indian Constitution, the fundamental duty imposed on all Indian citizens to renounce practices derogatory to the dignity of women were also referred to by the Court.

7. Article 14, Constitution of India, 1950. Fundamental right to equality before the law and equal protection of the law.
8. Article 15, Constitution of India, 1950. Right to non-discrimination on grounds including of sex.
9. Article 21, Constitution of India, 1950. Right to life and liberty.
10. Article 19(1)(g), Constitution of India, 1950.
11. Article 42, Constitution of India, 1950.
12. UN General Assembly. 1979. *Convention on the Elimination of All Forms of Discrimination Against Women*. United Nations, Treaty Series, vol. 1249, p. 13, available online at: https://www.refworld.org/docid/3ae6b3970.html (accessed on 7 November 2021).

Understanding the circumstances (that is, essentially, the Bhateri gang rape case[13]) that were instrumental in the creation of *Vishaka* is important to grasp the development of the progressive jurisprudence[14] relating to workplace sexual harassment in India.

Bhateri Gang Rape Case

The Bhateri gang rape case became a unifying point for the women's movement in India. Bhanwari Devi, a *sathin* (friend/companion) was employed as a village-level social worker with the Women's Development Programme (WDP) of the Government of Rajasthan. Hailing from the *kumhar* (potter) caste, she was selected and trained as a *sathin*. The WDP was initiated in 1984 with financial support from the UNICEF.

Child marriages were prevalent in Rajasthan in the village where Bhanwari was working. Aware of this practice, the state government decided to campaign against the same and issued public appeals against child marriage. Bhanwari tried to stop a child marriage in an influential family in the village. However, the marriage did take place and no police action was taken against the family. The villagers were unhappy with Bhanwari's efforts to stop the marriage.

In September 1992, Bhanwari's husband Mohan was physically assaulted and Bhanwari was raped by five men from the village. The couple registered an FIR for rape after a great struggle. The investigation process was harsh on Bhanwari as she lacked adequate support. Poverty intersected with caste to render Bhanwari helpless at the hands of the legal and police system.[15] Bhanwari and the rapists belonged to a larger group defined as the Other Backward Classes (OBC). However, within this group, Bhanwari was at the bottom of the hierarchy, while the rapist belonged to the majority dominant caste which was economically and politically powerful. There was anger that Bhanwari shamed the village by making a private village matter public.

Role of the Women's Movement in Gaining Guidelines for Prevention and Redressal of Sexual Harassment of Women at Workplace

Bhanwari's rape trial commenced in October 1994 and a verdict was rendered in November 1995. The court acquitted all five accused against the charge of gang rape. The judgment revealed a patriarchal and prejudiced mindset. The reasoning observed that the accused were middle-aged and respected. It further stated that

13. Kanchan Mathur. 2018. 'Challenging the Collusion of Caste, Class and Patriarchy Embodied in the State', in Poonam Kathuria and Abha Bhaiya (eds.), *Indian Feminism*, pp. 59-88, Zubaan.
14. Avani Sood Mehta. 2006, 'Public Interest Litigation Case Studies: *Vishaka* v. *State of Rajasthan*', in *Litigating Reproductive Rights: Using Public Interest Litigation and International Law To Promote Gender Justice in India,* pp. 58-65. Center for Reproductive Rights.
15. Mathur, 'Challenging the Collusion of Caste, Class and Patriarchy Embodied in the State'.

Mohan's (Bhanwari's husband) inability to help was against Indian culture as he has taken a vow to protect his wife as part of his marital duties. It argued that since the offenders were upper caste men, the rape could not have taken place because Bhanwari belonged to a lower caste. The court also cast aspersions on the character of Bhanwari by suggesting the presence of a third man and implying that Bhanwari was an adulteress.

As Bhanwari faced these challenges consequent to her role as a *sathin*, a public interest litigation was filed in the Supreme Court against the State of Rajasthan, Women and Child Welfare Department, Department of Social Welfare, and the Union of India by some organisations under the collective platform of *Vishaka*. The *Vishaka* petition demanded justice for Bhanwari Devi and urged action against sexual harassment at workplace. In 1997, the Supreme Court took cognizance of the petition and delivered a historic judgment. The Bhateri gang rape case thus became a catalyst in strengthening the movement and creating large-scale awareness around issues of sexual violence.[16] Failure of legal institutions to provide justice to Bhanwari resulted in further nationwide debates and protests. As explained further by Mathur, a symbiotic relationship developed between a mainstream development programme such as WDP and the women's movement in India. As a result of the *Vishaka* judgment, national solidarity around the issue, built by feminists, succeeded in procuring landmark guidelines, which paved way for the law on sexual harassment at the workplace in 2013.

Vision and Mission of *Vishaka*

Before *Vishaka,* the language of sexual harassment in India remained shrouded and the sexual dimension of harassment was a mystery. At the level of the legislature and bureaucracy, CEDAW was signed by India on 30 July 1980 and ratified on 9 July 1993. In its first three reports[17] to the CEDAW Committee on the measures taken to give effect to the provisions of the Convention, the GoI referred to key judgments by the Supreme Court of India to demonstrate compliance, amongst which the *Vishaka* judgment was prominent. The GoI informed the CEDAW Committee that the Indian judiciary had played a proactive role and paved the way to use principles of the treaty in many judgments. It was brought to the notice of the international community that the Supreme Court of India adopted the definition of sexual

16. Mathur, 'Challenging the Collusion of Caste, Class and Patriarchy Embodied in the State'.
17. UN Committee on the Elimination of Discrimination Against Women (CEDAW), UN Committee on the Elimination of Discrimination against Women: Combined Second and Third Periodic Reports of States Parties, India, 19 October 2005, CEDAW/C/IND/2-3, available online at: https://www.refworld.org/docid/474433c72.html (accessed on 10 September 2021).

harassment from the CEDAW General Recommendation Number 19[18] while laying down guidelines for employers regarding sexual harassment. It was understood then that sexual harassment at the workplace could be approached from the point of view of systematic discrimination and that societal attitudes needed to change. Importantly, that it was a human rights issue, and not merely an issue falling within the framework of criminal law was emphasised. *Vishaka* had an enabling and compassionate approach as it focused on prevention which was missing in the criminal law.

Vishaka filled a void in domestic litigation and upheld women's constitutional rights by directly applying the provisions of CEDAW to enact guidelines against sexual harassment in the workplace. The Court[19] identified the PIL's goals as bringing attention to the problem of sexual harassment, to find 'suitable methods for realisation of the true concept of "gender equality", and to 'prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation'.

The focus was shifted from convicting the perpetrator to protecting the rights of women in relation to work. The judgment upheld the idea that the concept of equality was much more than treating all persons in the same way. It pronounced that equality between men and women in the true sense of the term could be realised by making concentrated efforts towards rectification of existing power imbalances in society—specifically those in workplaces.

Converse to the crime and punishment understanding, *Vishaka* envisaged sexual harassment as an issue of equality and loss of dignity. It was yet another instance of the women's movement demanding that the promise of protection of the laws be delivered to women who are sexually harassed by men because they are women. *Vishaka* saw engagement with workplaces to assume a shared responsibility to foster change through prevention. It promoted awareness by demystifying discomfort through encouraging meetings and discussions on sexual harassment with workers. It saw a workplace with increased awareness of the issue of sexual harassment with collaboration between employers and trade unions with the assistance of government and non-profit organisations.

This understanding characterised by *Vishaka* saw a law preventive in its character as well as punitive. The objective was to influence mindsets and promote changes in attitudes towards women and sex discrimination in the workplace with the help of

18. UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations Nos. 19 and 20, Adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38, available online at: https://www.refworld.org/docid/453882a422.html (accessed on 10 September 2021).
19. https://indiankanoon.org/doc/1031794/, para 1.

experts in committees set up to deal with sexual harassment at workplaces. It was thought that behaviour changes prompted by awareness voluntarily introduced and advocated by the employer would be constructive, compared to criminal litigation against those accused of sexual harassment. This would help the complainant to build positive relationships with both men and women at the workplace.

The uniqueness of *Vishaka* was carried forward by various courts after 1997 and more specifically after or closer to the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereafter referred to as the POSH Act, 2013). Five such rulings by the Delhi High Court are discussed below.

Equality

Access to resources, opportunities including economic participation, decision-making, and valuing different behaviours, aspirations, and needs irrespective of gender comprise gender equality. Sexual harassment at work perpetuated by men by virtue of their power positions is a manifestation of gender inequality. It seriously impairs the safety and progress of women. Hence, recognising the power imbalance between complainants and respondents in sexual harassment cases is the first step towards correcting the situation.

In the three cases discussed in this section, it is seen that complaints of sexual harassment were against senior-level men who had enormous influence in workplaces by virtue of their position. Hence, the High Court re-affirmed that the employer should ensure that the complaints be inquired into in an unbiased manner.

(i) Upholding the value of equality in the case of *Ruchika Singh Chhabra* v. *Air France India*,[20] the Delhi High Court held that it was imperative that the complainant felt safe during the inquiry conducted by the Internal Committee (IC) which would help build faith that the proceedings were unbiased and fair. Further, the Court commented that in the said case the IC did not take steps to lend confidence or assurance to the complainant though she repeatedly raised concerns about not feeling comfortable during the inquiry proceedings with the respondent around her. The Court reiterated that the primary obligation to make the workplace safe and equal was upon the employers and laxity in implementation reflected a lack of will on the part of the employer.

(ii) In *Rashi* v. *Union of India*,[21] recognising the power imbalance between a woman employee working on a contract and an officer at the level of a Chairman/

20. LPA 237/2018, C.M. APPL.16802-03/2018 (Delhi High Court) decided on 30 May 2018.
21. W.P. (C) 3396/2019 (Delhi High Court) decided on 4 December 2020.

Chief Commissioner, the Court stated that if the complaint of sexual harassment was against the person heading the department or the ministry itself or a person of the same/equivalent rank, it would be completely contrary to the basic tenets of fairness and impartiality to constitute an IC by an official of the same department/ ministry. This was because the respondent would be superior to almost all the personnel working therein and it would seriously hamper the process as he was in a position to influence the IC members. Hence, it was the responsibility of the employer to constitute an impartial IC not appointed at the level of the department but an external and independent one that would ensure unbiased inquiry done with fairness and equality. In order to ensure the spirit of equality, the Court highlighted that external members are appointed to the IC to ensure neutrality. In the current case, the Court directed that an IC be constituted by the Cabinet Secretariat, consisting of such persons who were independent and unbiased, to inquire into the complaint of sexual harassment.

The aim of gender equality in the workplace is to achieve broadly equal opportunities and outcomes for women and men, not necessarily outcomes that are exactly the same for all. Workplace gender equality will be achieved when people are able to access and enjoy equal rewards, resources, and opportunities regardless of gender.

(iii) In *Dr. Punita K. Sodhi* v. *Union of India & Ors*,[22] in consonance with the value of equality, the Court specified that sexual harassment is a form of sex discrimination. It violates equality at the workplace as the woman employee is discriminated against, that is, treated less equally on the basis of her gender identity. The Court explained that sex discrimination was projected through unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct with sexual overtones, whether directly or by implication. Particularly when submission to or rejection of such conduct by the female employee was capable of being used for affecting her employment, disadvantage her in connection with her employment or work, including recruiting or promotion, and unreasonably interfering with her work performance, it created an intimidating or hostile working environment for her.

The impact of a hostile working environment on the continuing working relationship shared by the complainant and respondent would also have to be considered by the IC in examining whether the complaint made of sexual harassment was justified even though there was a delay. In this case, the Court acknowledged that humiliation faced by a complainant of sexual harassment was revisited and compounded when the perpetrator and she were compelled to work in the same establishment. The imbalance in the power equation between the respondent and complainant intensified the problem.

22. W.P. (C) 367/2009 (Delhi High Court) decided on 9 September 2010.

The Court further directed that the incidents of sexual harassment were not to be viewed in isolation. Parts of the complaint where there were other forms of persistent sex-based discrimination or harassment from the respondent to the complainant over a prolonged period needed to be considered. The Court explained that sex-based discrimination could encompass a whole range of commissions and omissions, not restricted to sexual harassment. In this case, the language used by the respondent in the memos and letters issued by him to the complainant, questioning her integrity and competence was plainly abusive.

The Court remarked that the IC had overlooked the numerous instances cited by the complainant in her complaint which were that of sex-based harassment and discrimination. The approach of the IC in the case was noted to be limited and narrow because it failed to consider the context in which the complaint was made and the incidents of continued harassment which the complainant had faced from the respondent. Therefore, the IC's report was found to be unsustainable and was quashed by the Court. The court emphasised that it was important for ICs dealing with complaints of sexual harassment to understand the dimensions of sex-based discrimination at the workplace and not narrowly focus only on certain acts that may have been the trigger for a series of acts constituting sex-based harassment or discrimination.

It was also highlighted that employers be aware that sexual harassment would result in gender discrimination, as it leads to a hostile work environment, undermining the dignity, self-esteem, and confidence of the female employees, resulting in alienating them. This ruling assigns importance to sex-based harassment and discrimination at work in cases of sexual harassment, divergent to a recent ruling by the Kerala High Court in *Prasad Pannian* v. *Central University of Kerala,*[23] where the Court stated that the concept of sexual harassment in a workplace against a woman should start from an express or implied sexual advance, sexual undertone or unwelcome behaviour which has a sexual tone behind it, without which the provisions of workplace sexual harassment law will not apply.

Dignity

Human dignity is the guiding principle for gender equality. Dignity as a constitutional value is helpful in countering gender discrimination, thereby providing a clear connection between dignity and gender equality. Gender discrimination has been recognised as an obstacle to living a dignified life. As per *Vishaka*, employers are

23. WP(C). No. 9219 of 2020(B) (Kerala High Court) decided on 2 December 2020.

obligated to eliminate gender discrimination at workplace by creating conditions and facilities for women to realise their right to economic development.

(iv) In *Apparel Export Promotion Council* v. *A.K. Chopra*,[24] the Supreme Court of India declared that sexual harassment at the workplace was unquestionably incompatible with the dignity and honour of women. The Court underscored that there could be no compromise on eliminating sexual harassment of women at the workplace.

In *Bibha Pandey* v. *Punjab National Bank*,[25] although recommending punitive action against those found guilty of sexual harassment is one of the tasks to be done by the IC, while doing so, it cannot overstep boundaries delineated by the POSH Act, 2013 and penalise women complainants for making choices. Such penalisation amounts to humiliation and it was declared by the High Court as a violation of the constitutional value of dignity. The High Court emphasised that moral policing was not the job of the management or of the IC, and ensured the protection of the complainant's dignity. Consensual relationships among adults would not be the concern of the management or of the IC, as long as the said relationship did not affect workplace decorum and is not contrary to the rules or code of conduct binding on the employees. The IC was not to comment on the personal conduct of the parties and its jurisdiction is restricted to the allegations of sexual harassment and to the effect whether a complaint is false or not.

Underlining that complaints of sexual harassment are initially filed with enormous reluctance, the Court highlighted that the power of the IC was restricted to hold the inquiry and give a report adhering to the statutory provisions. If a case of sexual harassment is not made, the IC could only conclude that no action was required to be taken by the employer. The POSH Act, 2013 does not contemplate any action after the inquiry, which allows the IC to pass directions on the ground that the concerned persons indulged in inappropriate conduct. Such a determination and consequential recommendation were beyond the jurisdiction of the IC. In the said case, the IC went beyond its statutory mandate and jurisdiction.

The Court directed that the charge sheet seeking disciplinary action against the complainant be quashed. The Court directed that the complainant thus became eligible for promotion and that the employer would offer her promotion in accordance with her seniority, performance, and merit, as per applicable service rules. The charge sheet would no longer be an obstacle in her promotion and no disciplinary inquiry would now be held against her pursuant to the charge sheet. Thus, it is the flavour of human dignity jurisprudence that enabled the Court to recognise the right of women to exercise individual choices.

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24. AIR 1999 SC 625.
25. W.P. (C) 3249/2017 & CM APPL. 14126/2017 (Delhi High Court) decided on 16 December 2020.

(v) In another case, *Ms. X* v. *Union of India,*[26] the complainant approached the Court against the order of the single judge which directed her to deposit Rs. 50,000 as a penalty with the Delhi High Court Advocates Welfare Trust and gave her employer liberty to initiate appropriate action against her for filing a false complaint of sexual harassment. The Division Bench of the High Court specified that the IC was intended as a platform to provide an environment of confidence to the complainant. It added that the IC's role is not to doubt the veracity of the complaint or view the complainant with suspicion. The IC is to believe her and not compel her to name witnesses to seek corroboration, as the perpetrator seeks out his target without putting himself in danger of being caught. This scenario creates a 'your word against mine' situation, which the woman would possibly find difficult to surmount before an inquiry of the IC.

The Court further stated that the absence of eyewitnesses to the incident cannot detract from the credibility of the complainant. In the present case, the IC had recommended the transfer of both, the complainant and respondent. The Court directed that transfer of the complainant recommended by the IC was undesirable as the complainant had not requested for the same, neither was there a complaint filed against the complainant nor was the complaint found to be false. Such an arbitrary transfer would be adding insult to injury, that too when done on the pretext of ensuring a congenial and harmonious environment. It would create a rippling and crippling effect for other women who would be discouraged to complain of sexual harassment fearing transfer.

Additionally, the Court specified that in sexual harassment complaints, the efficiency, inefficiency, or temperament of the complainant is completely irrelevant and extraneous to the inquiry. The credibility of the complaint was not diminished because of such pending disciplinary proceedings against the complainant. In addition, a complainant cannot be expected to have clarity of thought, to remember the names of all those who were present at the time of the incident of sexual harassment, who may have witnessed the incident, and to recollect their names and faces during inquiry. The mere inability of a woman to name witnesses was insufficient to falsify her complaint. Therefore, there could be no insistence by the IC on the production of witnesses by the complainant to corroborate her statement.

While setting the order aside of the single judge, the Division Bench stated that it cannot be overlooked that the Court specified that gender sensitivity required an understanding of what a woman felt when she was sexually harassed. Owing to gender conditioning, complainants go through considerable soul-searching, trying to adopt measures of self-protection, such as avoiding the perpetrator or taking leave.

26. LPA 527/2019 (Delhi High Court) decided on 17 December 2020.

Multiple court rulings in the following years quoted and inherited the legacy of *Vishaka.* However, there are a few rulings by the same High Court which are seen taking a different approach than the ones discussed above. In one case,[27] completely relying on the defence provided by the employer, it appears that the Court made little attempt to understand the reason behind the complainant boycotting the inquiry conducted the IC. In another case,[28] the complaint was declared false by the Court because the complainant was unable to remember the names of witnesses during the inquiry and her past service record showed penalties imposed on her by the employer. In the third case,[29] the Court again relying on the findings of the inquiry by the IC declared that each physical touch cannot be considered as sexual harassment, thereby disregarding the point of view of the complainant and consequent prayer by her to hold the respondent guilty of sexual harassment.

Implementation of Act and Impact on Constitutional Values

Court rulings upholding constitutional values with the best directions cannot achieve the goal of justice in cases of violence against women unless obstacles such as inertia or resistance to change by employers, and social inequalities in terms of power imbalances between men and women are dealt with. They must be overcome before the values become meaningful tools for societal change. The *Vishaka* judgment was pronounced and the POSH Act 2013 was enacted with the objective of protecting women from sexual harassment by preventing and redressing it. These objectives were guided by constitutional values such as justice, equality, and dignity.

It appears that employers and ICs are falling short of achieving these objectives, thereby failing to uphold constitutional values. Eight years after its notification, the implementation of the POSH Act, 2013 is poor and fraught with problems.[30] There

27. *Abhilasha Dwivedi* v. *Department of Women and Child Development, NCT Delhi* W.P.(CRL) 1639/2019 (High Court of Delhi) decided on 19 November 2019.
28. *Anita Suresh* v. *Union of India*, W.P.(C) 5114/2015 (High Court of Delhi) decided on 9 July 2019.
29. *Shanta Kumar* v. *Centre for Scientific and Industrial Research, (CSIR)* W.P.(C) 8149/2010 (Delhi High Court) decided on 31 October 2017.
30. Human Rights Watch. 2020. 'India: Women at Risk of Sexual Abuse at Work—Poorly Enforced Laws Leave Informal Workers No Recourse, Human Rights Watch', 14 October 2020, available online at https://www.hrw.org/news/2020/10/14/india-women-risk-sexual-abuse-work (accessed on 10 November 2020); Anoo Bhuyan and Shreya Khaitan. 2021. '8 Years On, Poor Compliance With Sexual Harassment Law', *IndiaSpend*, 21 February 2021, available online at https://www.indiaspend.com/women/8-years-on-poor-compliance-with-sexual-harassment-law-729370 (accessed on 25 February 2021); Shikha Chhibber. 2021. 'Sexual Harassment of Women at Workplace: Govt Clueless About Implementation of SHWW Act', *Clarion India*, 27 March 2021, available online at

(Footnote No. 30 contd.)

is an absence of understanding regarding what constitutes sexual harassment and additionally, holding women responsible for it is prevalent, amounting to victim blaming.[31] In several instances, ICs were either non-existent,[32] ineffective,[33] or gave a clean chit to the respondent.[34] There was inaction on the part of the organisations,[35]

(**Footnote No. 30 contd.**)

https://clarionindia.net/sexual-harassment-of-women-at-workplace-govt-clueless-about-implementation-of-shww-act/ (accessed on 28 March 2021); Saritha S. Balan. 2021. 'Lack of Awareness, Poor Implementation: Why PoSH Act Fails to Protect Kerala Women', *The News Minute*, 27 April 2021, available online at https://www.thenewsminute.com/article/lack-awareness-poor-implementation-why-posh-act-fails-protect-kerala-women-147925 (accessed on 29 April 2021); Saakshi Mayank. 2021. 'Weak Implementation of Sexual Harassment Law in India', *Goa Chronicle*, 6 January 2021, available online at https://goachronicle.com/weak-implementation-of-sexual-harassment-law-in-india/ (accessed on 6 January 2021).

31. Express News Service. 2017. 'Air India SATS Vice-Chief Chargesheeted for Alleged Sexual Harassment', *The New Indian Express*, 21 March 2017, available online at http://www.newindianexpress.com/cities/thiruvananthapuram/2017/mar/21/air-india-sats-vice-chief-chargesheeted-for-alleged-sexual-harrassment-1583713.html (accessed on 24 March 2017); Faakirrah Junaid. 2021. 'Sexual Harassment in the Workplace Continues To Be Under-reported. Here's Why Women Remain Silent!', 6 April 2021, available online at https://www.peoplemattersglobal.com/blog/life-at-work/sexual-harassment-in-the-workplace-continues-to-be-under-reported-heres-why-women-remain-silent-28937 (accessed on 7 May 2021); Satyaki Dasgupta and Annesha Mukherjee. 2020. 'Survey of 500 Women Finds 1 in 10 Had Been Sexually Assaulted in Higher Education Institutions', *The Wire*, 4 October 2020, available online at https://thewire.in/women/sexual-assault-higher-education-institution (accessed on 6 October 2020); Salina Wilson. 2021. 'Believe her, support Her, Support Her: What India's Sexual Harassment Law Needs', *The Indian Express*, 6 April 2021, available online at https://indianexpress.com/article/opinion/india-sexual-harassment-law-me-too-priya-ramani-mj-akbar-7261587/ (accessed on 6 April 2021).
32. *Business Standard*. 2013. 'Tarun Tejpal Steps Down for 6 Months as Editor of Tehelka', *Business Standard*, 20 November 2013. available online at http://www.business-standard.com/article/current-affairs/tarun-tejpal-steps-down-for-6-months-as-editor-of-tehelka-113112000997_1.html (accessed on 26 November 2016).
33. Rishika Barua. 2015. 'Exclusive: Pachauri Harassment Survivor Shares Her Ordeal', *The Quint*, 27 July 2015, available online at https://www.thequint.com/india/2015/07/24/exclusive-pachauri-was-given-a-pleasant-send-off-not-sacked (accessed on 1 August 2015).
34. Kala Vijayraghavan and Lijee Philip. 2017. 'Indian Hotels CEO Rakesh Sarna Gets Clean Chit in Harassment Case', *Economic Times*, 21 March 2017, available online at http://economictimes.indiatimes.com/news/politics-and-nation/indian-hotels-ceo-rakesh-sarna-gets-clean-chit-in-harassment-case/articleshow/57741930.cms (accessed on 21 March 2017).
35. *Times News Network*. 2017. 'Several People Accuse TVF CEO of Sexual Harassment', *The Times of India*, 15 March 2017, available online at http://timesofindia.indiatimes.com/india/several-people-accuse-tvf-ceo-of-sexual-harassment/articleshow/57640911.cms (accessed on 16 March 2017); Scroll Staff. 2017. 'Will Take Action if Found Guilty: ScoopWhoop Responds to Sexual Harassment Case against Co-founder', *Scroll.in*, 12 April 2017, available online at https://scroll.in/latest/834426/will-take-action-if-found-guilty-scoopwhoop-responds-to-sexual-harassment-case-against-co-founder (accessed on 15 April 2017);
Maulik Vyas and Kailash Babar. 2015. 'Key IL&FS Executive in Trouble over Sexual Harassment Charges', *The Economic Times*, 19 August 2015, available online at

(**Footnote No. 35 contd.**)

especially when the complaint was against a man wielding power[36] in the organisation. In these situations, there was an invariable failure to protect the career interest of the complainant, leading to her termination or resignation from service.[37] This pushed complainants to approach external agencies, such as media, police,[38] and court for complaints redressals or commit suicide.

The *Vishaka* guidelines envisaged a complaint mechanism that built leadership towards the issue with enhanced experience and expertise.[39] After *Vishaka*, there came rulings from various High Courts that criticised the functioning of the IC. Prominent among them was the 2004 case in the Bombay High Court, in which the

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(**Footnote No. 35 contd.**)
http://economictimes.indiatimes.com/news/company/corporate-trends/key-ilfs-executive-in-trouble-over-sexual-harassment-charges/articleshow/48536006.cms?intenttarget=no.

36. *Live Law.* 2019. 'Complainant in the CJI Sexual Harassment Case Decided Not to Participate in the In-House Enquiry Any Longer', *Live Law*, 30 April 2019, available online at https://www.livelaw.in/top-stories/breaking-woman-who-alleged-sexual-harassment-by-cji-decides-not-to-participate-in-in-house-enquiry-144658 (accessed on 2 May 2019).
37. *Hindustan Times*. 2015. 'Pachauri Case Highlights Plight of Sexual Harassment Victims at Work', *Hindustan Times*, 27 February 2015, available online at http://www.hindustantimes.com/comment/pachauri-case-highlights-plight-of-sexual-harassment-victims-at-work/story-mwwkmeGpUDVVh6lZM9G7FI.html (accessed on 3 March 2015); Rajyasree Sen. 2015. 'What the Pachauri case reveals: Men can't take a polite no for an answer', *FirstPost*, 9 March 2015 available online at http://www.firstpost.com/living/pachauri-case-reveals-men-cant-take-polite-no-answer-2143239.html (accessed on 12 March 2015); Kian Ganz. 2015. 'What Happens When Women Complain of Sexual Harassment', *Live Mint*, 30 June 2015, available online at http://www.livemint.com/Politics/v8RrlLY5QvAj4JtgRsMhRK/What-happens-when-women-complain-of-sexual-harassment.html#nav=also_read (accessed on 9 July 2015); Jayadev Calamur. 2017. 'TVF Calls Allegations against Arunabh Kumar 'False', Promises 'Severe Justice', *DNA*, 13 March 2017. Viewed on 16 March 2017 available online at http://www.dnaindia.com/entertainment/report-dna-exclusive-tvf-ceo-arunabh-kumar-rubbishes-allegations-of-sexual-harassment-2351358 (accessed on 16 March 2017); Anjuli Pandit. 2018. 'My MeToo, Our WeToo' *Indian Express*, 1 November 2018, available online at https://indianexpress.com/article/ opinion/columns/metoo-india-movement-rakesh-sarna-sexual-harassment-5428040/ (accessed on 2 November 2018); *Ten News*. 2017. 'Single Mother Moves Court against Boss over Abuse at Workplace', *Ten News*, 1 January 2017. Viewed on 6 January 2017 available online at https://tennews.in/single-mother-moves-court-against-boss-over-abuse-at-workplace/ (accessed on 6 January 2017); *India Today*. 2017. 'After TVF's Arunabh Kumar, ScoopWhoop Co-founder Suparn Pandey Accused of Sexual Harassment', *India Today*, 12 April 2017, available online at https://www.indiatoday.in/fyi/story/sexual-harassment-scoopwhoop-former-employee-cofounder-accussed-970917-2017-04-12 (accessed on 15 April 2017); *Legally India*. 2019. 'Khaitan Associate Leaves after Concerns of How Firm Dealt with Her Sexual Harassment Complaint', *Legally India*, 27 June 2019, available online at https://www.legallyindia.com/ lawfirms/khaitan-co-associate-leaves-after-concerns-of-how-firm-dealt-with-her-sexual-harassment-complaint-20190627-10668 (accessed on 28 June 2019).
38. Press Trust of India. 2018. 'Pune Firm's MD Arrested For Sexually Harassing Employee', *NDTV*, 8 March 2018, available online at https://www.ndtv.com/pune-news/pune-firm-top-boss-arrested-for-allegedly-sexually-harassing-employee-1821261 (accessed on 10 June 2019).
39. Naina Kapur. 2013. 'Workplace Sexual Harassment: The Way Things Are', *Economic and Political Weekly*, June 15: XLVIII NO 24.

IC had forced the complainant to physically demonstrate the incident of molestation and she had succumbed to it under pressure. The High Court of Bombay discarded the inquiry report by the IC, calling it shocking and biased.[40] Recent reports highlight that women employees in the private sector seem to be unhappy with the functioning of the ICs as they were increasingly found to be reaching out to the SHe-Box.[41] It is also being reported that ICs have also fallen short[42] in adhering to the POSH Act, 2013 and have little understanding of the procedure, resulting in complainants losing faith in them.[43]

The above-mentioned examples seem an obvious defeat of the objectives of *Vishaka* and the constitutional values it upheld, aiming at furthering dignity and equality at workplaces because *Vishakha* came into existence with the aim of protecting dignity at workplace. However, taking into consideration the discussion above, the task of restoring the rights of women seems to be upon the courts[44] as women are compelled to move the courts for the protection of their rights at the workplace.

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40. Times News Network. 2004. 'New Panel to Probe NALCO Sexual Harassment Case', *The Times of India*, 9 June 2004, available online at https://timesofindia.indiatimes.com/city/mumbai/New-panel-to-probe-Nalco-sexual-harassment-case/articleshow/727134.cms (accessed on 13 July 2019).
41. Sexual Harassment electronic Box (SHe-Box) is an effort of the GoI to provide a single window access to every woman, irrespective of her work status, whether working in the organised or unorganised, private or public sector, to facilitate the registration of complaints related to sexual harassment. Any woman facing sexual harassment at the workplace can register their complaint through this portal. Once a complaint is submitted to the 'SHe-Box', it will be directly sent to the concerned authority having jurisdiction to take action into the matter.
    Sumi Dutta. S. 2019. 'Disappointed with ICC Sexual Harassment Survivors Turn to She-Box', *The Indian Express*, 29 July 2019, available online at http://www.newindianexpress.com/nation/2019/jul/29/harassment-victims-turn-to-she-box-2010886.html (accessed on 15 August 2019).
42. Indian National Bar Association (INBA) and Netrika Consulting. 2017. *Garima Sexual Harassment at Workplace*. Prabhat Books; Monica Sakhrani. 2017. 'Sexual Harassment: The Conundrum of Law, Due Process, and Justice', *EPW Engage*, 15 December 2017. Volume 52: Issue Number 50. available online at https://www.epw.in/engage/article/sexual-harassment-conundrum-law-due-process-and-justice (accessed on 20 December 2017).
43. Namita Bhandare and Ashwaq Masoodi. 2015. 'Gaps Emerge in Dealing with Sexual Harassment Complaints', *Mint*, 25 July 2015, available online at https://www.livemint.com/Politics/B1noOqzN9z2QAWccDLCKiO/Gaps-emerge-in-dealing-with-complaints.html (accessed on 21 June 2016).
44. Swati Deshpande. 2021. 'Sex Abuse' at Work: Bombay HC Tells Woman to Move Industrial Court', *Times of India*, 11 July 2021, available online at http://timesofindia.indiatimes.com/articleshow/84307461.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (accessed on 6 November 2021); *The Wire*, 2021. 'IAF Pilot Moves J&K HC Alleging Sexual Harassment by Senior Officer', *The Wire*, 27 April 2021, available online at https://thewire.in/law/iaf-pilot-moves-jk-hc-alleging-sexual-harassment-by-senior-officer (accessed on 6 November 2021).

The POSH Act, 2013 is an outcome of the long-standing struggle by women's groups and organisations towards the realisation of their right to work with dignity. It must be interpreted and understood by the employers and IC members within the framework of the constitutional values to safeguard the rights of women. It is a social legislation aimed at altering power imbalances at the workplace. The aim is to empower women as a disadvantaged group due to certain factors in the patriarchal society. Any interpretation of the law that is devoid of a pro-woman perspective derived from the understanding of constitutional values can become counterproductive.

Upholding the value of equality, women need to be motivated to complain when they face sexual harassment, freely and fearlessly, leading to the creation of workplaces free from sexual harassment. While the inquiry is pending it is the duty of the IC to understand the fears and apprehensions of the complainant. The ICs need to devise an inquiry process that is not threatening and is dignified. For that, it is important that the IC knows the POSH Act, 2013 thoroughly and is conversant with the inquiry procedure. Members should find time to do the groundwork on the complaint to understand chronology and circumstances that will facilitate in establishing corroborative and circumstantial evidence to support it. Information regarding the composition of IC and the identity of each member along with a broad explanation of the inquiry procedure should be given to the complainant. The focus should be on creating, enabling, and facilitating an environment for achieving justice. It will help the complainant to go through the process without fear and pressure. Further, the ICs should necessarily ensure that the complainant is protected from retaliation either from the employer or the respondent, especially if the power imbalance between the complainant and respondent is significant.

In the interest of justice, the IC should be able to adopt a trauma-informed approach to the inquiry while engaging with the complainant and provide assurance for her to start rebuilding her confidence. The emphasis during communication should be that the inquiry will be done following proper procedure which entails fairness and sensitivity. The body language of the IC members must be empathetic and attentive to the process. The perception of the complainant regarding a specific incident or behaviour will have to be respected. IC members will have to reject ideas and stereotypes regarding the external appearance and behaviour of the complainant. Sensitivity is of paramount importance. Any form of aggression or open disbelief in the complainant will be detrimental to the rapport-building process. The IC should be able to arrive at the conclusion and recommendation through collective effort and considering various factors such as the impact of sexual harassment, socio-economic position, power differences based on organisational hierarchy, and equations involved.

India slipped 28 places to rank 140 among 156 countries in the World Economic Forum's Global Gender Gap Report of 2021, becoming the third-worst performer in South Asia.[45] This only tells us that another generation of women will continue to wait for gender parity. It is evident that unless organisations across sectors take institutional responsibility for an attitudinal shift, workplaces will continue to be sexualised and toxic, survivors will continue to be silenced and perpetrators will go about their lives without consequence.[46] Moreover, the POSH Act, 2013 definitely has the potential to carry forward the process of shifting power relations using the work initiated by the *Vishaka* guidelines (1997). This can happen provided the employers implement the legislation from the standpoint of upholding constitutional values.

45. *Hindustan Times*. 2021. 'The Fight for Gender Equality', *Hindustan Times*, 1 April 2021. Available online at https://www.hindustantimes.com/editorials/the-fight-for-gender-equality-hteditorial-101617286978592-amp.html (accessed on 10 July 2021).
46. Wilson, 'Believe Her, Support Her'.

4

Regulation of Speech and Expression in India: From the First Amendment to The Heckler's Veto

Leah Verghese*

Introduction

The web series *Tandav,* which was released on Amazon Prime on 15 January 2021, ran into controversy when certain people accused the series of hurting their religious sentiments. The accusation was targeted at a scene in the series featuring actor Mohd Zeeshan Ayyub dressed as Lord Shiva talking about 'azaadi'. In response to these accusations, the creators apologised and deleted the controversial scene. However, the matter did not end there. BJP MLA Ram Kadam, representing Ghatkopar constituency, filed an FIR against the actors, director, and producer of the series. Similar FIRs were also filed in various parts of India.[1] Shalabh Mani Tripathi, information adviser to the Uttar Pradesh Chief Minister tweeted, 'The FIR has strong sections in it. Be prepared ... you will have to pay for hurting religious sentiments'.[2] The Information and Broadcasting Ministry of the Government of India then summoned the Amazon team to explain themselves even as the director and actors continued to face severe online trolling. After this meeting, the creators agreed to make changes to the show as directed by the Ministry.[3]

The Information and Broadcasting Ministry's interference in the content of *Tandav* marked the first foray of the Union Government into regulating web-based content in India. It must be kept in mind that at the time the Minister summoned the makers of the series, there was no legal provision under which such demands

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 24 January 2022.

1. The Indian Express. 2021. 'Tandav Controversy: Here's Everything You Should Know', *The Indian Express,* 27 January https://indianexpress.com/article/entertainment/web-series/controversies-surrounding-tandav-heres-everything-you-should-know-7163727/ (accessed on 15 April 2021).
2. Omar Rashid. 2021. 'Tandav' Crew and Cast Issue Apology', *The Hindu,* 18 January https://www.thehindu.com/news/national/tandav-web-series-controversy-fir-against-director-amazon-india-head-of-content/article33599380.ece (accessed on 15 April 2021).
3. The Indian Express, 'Tandav Controversy'.

could be made. Since then, the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 have come into force, extending the regime of prior restraint which already applied to movies and books to digital content.

The Ministry's actions are clear indication of the State's acceptance of the 'heckler's veto' in the regulation of speech in India. The doctrine of heckler's veto states that the State should prevent speech or expression when individuals and groups commit or threaten to commit acts of violence or disruption against such speech or expression. The State, by succumbing to the heckler's veto, suppresses the speech or expression that is potentially disruptive rather than protecting those whose controversial speech is under threat from hecklers and disruptors.[4]

This chapter explores the regulation on books and movies against the background of constitutional guarantees of free speech and the reality of censorship of both these mediums. I acknowledge that the courts are only one site for the contestations over speech and expression. As the example of *Tandav* demonstrates, in the present era, such contestations have spilled onto the streets and in the unregulated alleys of the internet, where the threat of violence and actual violence are being used to limit free speech. The legal sovereignty of the State is increasingly being challenged by competing repertoires of authority and violence anchored in communities and localities—local 'big men', pressure groups, religious, and caste organisations, or organisations of activists.[5] I examine the increasing aggrandisement of such groups and the executive, especially law enforcement agencies, and their role in regulating which films and books can reach the open market. I also examine how far the heckler's veto has become a part of the regulation of films and books despite constitutional protections and the consequences thereof. However, this chapter does not analyse in general the judicial interpretations of obscenity in books and films.

The first section of the chapter describes the constitutional protections for free speech in India and the impact of the first amendment to the Constitution. The second section analyses the regulation of films through the Central Board of Film Certification (CBFC) and executive orders. The third section examines the regulation of books through executive orders.

4. Julien M. Armstrong. 2016. 'Discarding Dariano: The Heckler's Veto and a New School Speech Doctrine', *Cornell Journal of Law and Public Policy,* 26(2): 389.
5. Laetitia Zecchini. 2019. 'Hurt and Censorship in India Today: On Communities of Sentiments, Competing Vulnerabilities and Cultural Wars', in Amélie Blom and Stéphanie Tawa Lama-Rewal (eds.), *Emotions, Mobilisations and South Asian Politics*, p. 246. Routledge.

Constitutional Protection of Free Speech

In India, the freedom of speech and expression is guaranteed to citizens as a fundamental right. In the original draft of the Constitution, Article 19(1)(a) gave all citizens of India the right to free speech restricted by Article 19(2) which enabled the State to make laws relating to 'libel, slander, defamation, contempt of court', 'any matter which offends against decency or morality', and permitted laws restricting any speech which either undermined the security of the State or had the tendency to overthrow the State. Sedition, public order, and hate speech were deliberately not listed as exceptions to Article 19(1)(a).[6] The debates in the Constituent Assembly reveal that the notion that the fundamental rights were guarantees to be upheld even when it was inexpedient, formed a clear dividing line between colonial and independent India.[7] The original Article of the Constitution would have most likely led to the repeal of Sections 124A, 153, 153A, 295, 295A, 499, 500, and 505 of IPC, since 'public mischief', 'outraging religious feelings', 'wantonly giving provocation', 'defaming reputations', etc. do not constitute a threat to the State itself.

This progressive regime did not last even two years. In June 1951, the Constituent Assembly (then a unicameral, provisional Parliament for India) introduced the first amendment to the Constitution, which amended Article 19(2) to include three new enumerated restrictions on the right to free speech. The immediate impetus for the amendment came from two Supreme Court judgments from March 1950, which had struck down 'Public Safety' Acts in Madras and East Punjab on the grounds that they violated the fundamental right to freedom of speech and expression.[8]

The first amendment to the Constitution permitted the State to make laws imposing reasonable restrictions in the interests of 'public order', 'friendly relations with foreign states', and 'incitement to an offence'.[9] The Statement of Objects and Reasons to the Bill introducing the first amendment stated,

> The citizen's right to freedom of speech and expression guaranteed by Article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom.

6. Abhinav Chandrachud. 2017. *Republic of Rhetoric: Free Speech and the Constitution of India*. Penguin Random House India, p. 85.
7. Tripurdaman Singh. 2020. *Sixteen Stormy Days: The Story of the First Amendment of the Constitution of India*. Penguin Random House, p. 20.
8. *Romesh Thapar* v. *State of Madras,* AIR (37) 1950 SC 124 and *Brij Bhushan* v. *State of Delhi,* AIR 1950 SC 129.
9. Chandrachud, *Republic of Rhetoric,* p. 86.

This amendment had wide-ranging implications. It rehabilitated and saved from repealing various colonial laws suppressing speech and expression, which the Constitution had tried to remove or supersede. The expansive wording of the new exceptions in Article 19(2) gave the State much leeway in suppressing dissent and criticism and reduced the scope for courts to protect it.[10] It set the stage for the overwhelming concern for law and order to govern the legal regulation of speech and determine the contours of free speech rights in the country, the effect of which we observe even today. This is especially evident in the regulation of books and films. Once the threat of a disruption of public order is given legal sanction as a reason to suppress free speech, it becomes easy for individuals and groups to threaten violence every time a work of creative expression offends their sensibilities. As a consequence, on multiple occasions, the State has given in to demands of censorship every time there are threats of disruption of public order. This method of vigilante censorship becomes a convenient extra-constitutional method to curb the extent of the 'marketplace of ideas'. Apart from permitting a regime of censorship of creative endeavour, artistic work, criticism of religion, a challenge to social orthodoxy, and satire, it also leads to self-censorship where creators themselves avoid creating works dealing with 'sensitive topics'. Instead of the State taking on the burden to ensure an atmosphere where everyone can speak, the burden is on speakers and creators to ensure that their audience and potential viewers are not offended enough to disrupt public order or be incited to commit offences.[11]

In terms of creative mediums, films are subject to the strictest regulations since they cannot be released without a certificate from the CBFC. Books are not subject to such censorship but there still exists a prior restraint regime under the Code of Criminal Procedure, 1973 (hereinafter 'CrPC') for them. In contrast, the press has more freedom, although in recent times gag orders have been issued against them.[12] The category of speech with the most protection is what is said in Parliament or state legislatures. In *P.V. Narasimha Rao* v. *State,* all five judges were in agreement on the point that the freedom of speech that is available to members of Parliament

10. Arudra Burra. 2018. 'Freedom of Speech in the Early Constitution: A Study of the Constitution (First Amendment) Bill', in Udit Bhatia (ed.) *The Indian Constituent Assembly: Deliberations on Democracy*. Routledge, p. 132; Ramachandra Guha. 2016. *Democrats and Dissenters*. Allan Lane, p. 28.
11. Siddharth Narrain. 2016. 'Hate Speech, Hurt Sentiment, and the (Im)Possibility of Free Speech', *Economic & Political Weekly*, 11(17): 119.
12. Arghya Sengupta. 2020. 'Andhra Pradesh HC's Media Gag Sign of New Culture Where Judges Pass a Firman', *The Print*, 24 September, available online at https://theprint.in/opinion/andhra-pradesh-high-court-media-gag-amravati-land-purchase-advocate-general/509333/ (accessed on 7 December 2022); The Hindu. 2019. 'Tejasvi Surya Gets Gag Order on Media', *The Hindu*, 30 March, available online at https://www.thehindu.com/elections/lok-sabha-2019/tejasvi-surya-gets-gag-order-on-media/article26689665.ece. (accessed on 7 December 2022).

under Article 105(1) is wider in amplitude than the right to freedom of speech and expression under Article 19(l)(a) since the freedom of speech under article 105(1) is not subject to the limitations contained in Article 19(2).[13] Parliamentary privileges are also available to non-members of a House who are under the Constitution entitled to speak and take part in the proceedings of a House or any of its committees, that is, Ministers and the Attorney-General.[14] The freedom of speech guaranteed as parliamentary privilege is constrained by Article 121 which states that no discussion can take place in any House with respect to the conduct of a Supreme Court or a High Court Judge in the discharge of his duties except when a motion for his removal is under consideration.

Regulation of Films

Statutory Framework

The Cinematograph Act, 1952 governs the certification and censorship of films in independent India. The Act established the Central Board of Film Censorship of India, a body in charge of these processes. The Board was later renamed the Central Board of Film Certification (CBFC). The CBFC comprises a Chairperson and members appointed by the Union Government.

The Cinematograph (Certification) Rules, 1983 detail the procedure for film certification. A film submitted for certification is first viewed by an Examining Committee whose composition is determined by the Regional Officer appointed by the Union Government. The Examining Committee may certify a film as either 'U' (unrestricted viewing), 'UA' (parental guidance for children under 12), 'A' (restricted to adults), or 'S' (restricted to special audiences). The Act empowers the Examining Committee to ask for cuts in a film or even deny a film a certificate altogether. Section 5B of the Cinematograph Act, 1952 lists the expansive grounds on which films may be denied certification. These grounds mirror the permissible grounds for restricting speech under Article 19(2) of the Constitution. Another notification issued in 1991 provided that the objectives of film certification are:

1. the medium of film remains responsible and sensitive to the values and standards of society;
2. artistic expression and creative freedom are not unduly curbed;
3. certification is responsive to social change;
4. the medium of film provides clean and healthy entertainment; and

13. AIR 1998 SC 2120.
14. Article 88 read with Article 104(5), Constitution of India, 1950.

5. as far as possible, the film is of aesthetic value and cinematically of a good standard.

The notification also listed 19 guidelines for the CBFC to ensure compliance in the films they were certifying. These include overbroad guidelines, such as human sensibilities not being offended by vulgarity, obscenity, or depravity, anti-social activities such as violence not being glorified or justified, and a prohibition of dual-meaning words as obviously catering to baser instincts. Apart from the Cinematograph Act, 1952, various states have legislations giving the executive sweeping prior restraint powers. These legislations empower the State Government to suspend the exhibition of a film if, in their opinion, the exhibition of the film may cause a breach of public order.[15]

Judicial Interpretation

Given the broad wording of the CBFC's guidelines and the powers given to the executive to ban films, it is not surprising that the Supreme Court and the High Courts have been called to resolve several disputes over the exhibition of films. In *K.A. Abbas* v. *Union of India,* the maker of a documentary titled *A Tale of Four Cities* applied for a 'U' certificate but was instead granted an 'A' certificate by the CBFC. On appeal, the CBFC agreed to grant a 'U' certificate to the movie provided that certain changes and cuts in some scenes were incorporated. The documentary maker approached the Supreme Court challenging the certification process and the process of censorship of films itself. The Supreme Court's judgement upheld censorship in India and held that it was not a violation of Article 19(1)(a). The Court also held that the classification according to the age groups was a valid exercise of power in the interest of public morality and decency. The Court justified the treatment of films differently from art and books by stating that a person reading a book or other writing or hearing a speech, or viewing a painting or sculpture is not as deeply stirred as by seeing a motion picture.[16]

Objections to films often arise despite the film being certified for release by the CBFC, as in the case of *Ramesh* v. *Union of India.* The petitioner in this case moved the Supreme Court under Article 32 demanding a prohibition of the television screening of the serial *Tamas*. The petitioner alleged that the exhibition of the said television serial was against public order and likely to incite people to indulge in the commission of offences and was therefore violative of Section 5B(1) of the Cinematograph Act, 1952. He also alleged that it was likely to promote feelings of

15. Some of these legislations are Gujarat (Cinemas) Regulation Act, 2004, Uttar Pradesh (Cinemas) Regulation Act, 1955, Rajasthan Cinemas (Regulation) Act, 1952 and Karnataka Cinemas (Regulation) Act, 1964.
16. 1971 AIR SC 481.

enmity, hatred, or ill-will among different religious groups and was thus prejudicial to communal harmony and national integration, and, therefore, an offence under Section 153A of the Indian Penal Code (IPC). The Court rejected the petitioner's claim, pointing out that the CBFC had already cleared the serial and that the procedure for granting a certificate of the exhibition to a film was quite elaborate and the unanimous approval by the Examining Committee must be given full weight. The Court explained,

> The attempt of the author in this film is to draw a lesson from our country's past history, expose the motives of persons who operate behind the scenes to generate and foment conflicts and to emphasise the desire of persons to live in amity and the need for them to rise above religious barriers and treat one another with kindness, sympathy and affection. It is possible only for a motion picture to convey such a message in depth and if it is able to do this, it will be an achievement of great social value.[17]

The cases discussed above involved laying down limits on State actions in certifying films and banning them. A more thorny issue is how the State should act when it controls the means of dissemination. The Supreme Court dealt with the issue of the upholding of the freedom of speech and expression by public enterprises in the case of *Life Insurance Corporation* v. *Prof. Manubhai D. Shah.* The case involved two incidents, the first was the refusal of a magazine run by Life Insurance Corporation to publish the rejoinder of the author of an academic paper criticising the Life Insurance Corporation of India's schemes to a reply to his paper published in the same magazine. The second incident involved a documentary film on the Bhopal Gas Tragedy, a case concerning the leak of lethal gases from a Union Carbide factory in Bhopal and the liability of Union Carbide for the deaths caused. Doordarshan, the national television channel, refused to air the documentary because it was critical for the government in power during the incident. The Court rejected this stance and held that the screening of a documentary cannot be denied merely because it is critical of the government. The Court held that freedom of expression includes not just the freedom to circulate one's views but also the right to defend them. In recognising this right, it placed a greater burden on publications made using public money. It also placed a high burden on the rejection of content by government-controlled media by requiring them to provide reasoned decisions that are valid in law.[18]

In *Director General, Doordarshan* v. *Anand Patwardhan,* the Supreme Court was presented with facts similar to those in *Life Insurance Corporation* and *Ramesh*. In this particular case, the respondent challenged Doordarshan's refusal to screen Part

17. 1988 SCC (1) 668.
18. 1993 AIR SC 171.

1 of his documentary, *Father, Son and Holy War* even though the documentary had received a 'U' certificate from the CBFC. The Court held that Doordarshan, being a State-controlled agency funded by public funds, could not refuse to screen the documentary except on specified valid grounds. The Court found that this film did not violate any constitutional provision, nor was it likely to create any law and order problems as Doordarshan feared. It fell well within the limits prescribed by the Constitution and did not appeal to the prurient interests of an average person. Applying contemporary community standards while taking the work as a whole, the work was held to be not patently offensive and without the power to deprave and corrupt any average Indian citizen's mind. No apprehension of an impact on public order or the likelihood of incitement to the commission of an offence was made out.[19]

In the case of *Bobby International* v. *Om Pal Singh Hoon,* the screening of the film *Bandit Queen,* about the life of Phoolan Devi, with its scenes of frontal nudity and rape, was challenged. Rejecting a challenge to the film's screening, the Court held that 'the object of doing so was not to titillate the cinema-goer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators'. The Court allowed the film to be screened with an 'A' certificate, holding that the scenes featuring nudity and expletives served the purpose of telling the important story and that the producers' right to freedom of expression could not be restricted simply because of the content of the scenes. The Court stated that 'a film illustrating the consequences of social evils must necessarily show that social evil', and that 'a film that carries the message that the social evil is evil cannot be made impermissible on the ground that it depicts the social evil'.[20] Similar to *Ramesh* discussed above, in this case too, the Court examined the work as a whole and refused to ban it since the objectionable scenes fulfilled a purpose in conveying the larger social message of the film.

Heckler's Veto

In *S. Rangarajan* v. *P. Jagjivan Ram,* the Supreme Court was confronted with a situation of the State arguing in favour of the heckler's veto. The revocation of a U-certificate to a Tamil film called *Ore Oru Gramathile,* a satirical take on caste and affirmative action was challenged before the Court in this case. The State of Tamil Nadu argued that various associations and parties had threatened violence if the film was screened and that the exhibition of the film would create a severe law and order problem in the state. The Court rejected this argument and asked what good is the

19. AIR 2006 SC 3346.
20. 1996 4 SCC 1.

protection of freedom of expression if the State does not take care to protect it in the face of the threat of demonstration and processions. The Court observed,

> If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem.

The Court held further that if a movie cannot be restricted under any of the grounds in Article 19(2), it has to be certified and then released. The Court made it clear that the CBFC should apply the standard of an ordinary man of common sense and prudence and not that of an out–of-the-ordinary or hypersensitive man while judging a film.[21]

The case of *Indibility Creative Private Limited* v. *Govt. of West Bengal*[22] concerned a 'shadow ban' on the Bengali film, *Bhobishyoter Bhoot* (Ghosts of the Future), a political satire, which was certified 'U/A' by the CBFC for public exhibition. The Court had to examine a situation of heckler's veto in this case, similar to *Rangarajan*. While there was no legal ban, the petitioners stated that the state had misused police powers and obstructed the film's screening. The Special Intelligence Unit of the state demanded a private screening of the movie before its release since they believed that the movie might hurt public sentiments and lead to law and order issues. The petitioner refused to comply with the request, and, in response, the Special Intelligence Unit informally directed movie theatres not to screen the movie. Several movie theatres complied with this request. The Court expressed its disapproval of the actions of the Special Intelligence Unit, stating,

> The police are not in a free society the self-appointed guardians of public morality. The uniformed authority of their force is subject to the rule of law. They cannot arrogate to themselves the authority to be willing allies in the suppression of dissent and obstruction of speech and expression.

The Court came down harshly on the 'shadow ban' of the film, which was not under any provision of law,

> The danger which this case exemplifies is the peril of subjecting the freedom of speech and expression of the citizen to actions which are not contemplated by the statute and lie beyond the lawful exercise of public power. All exercises of authority in pursuance of enabling statutory provisions are amenable to statutory remedies and are subject to judicial oversight under a regime of constitutional remedies. The exercise of statutory authority is not uncontrolled in a regime based on the rule of law. But what do citizens who have a legitimate right to exhibit a film confront when they are told that a film

21. 1989 SCC (2) 574.
22. 2019 SCC OnLine SC 564.

> which is duly certified and slated for release is unceremoniously pulled off the exhibiting theatres without the authority of law? Such attempts are insidious and pose a grave danger to personal liberty and to free speech and expression.

The Court pointed out that by making an example out of the producers and the actors, there had been an attempt to silence criticism and critique. The Court was prescient in its observation that 'contemporary events reveal that there is a growing intolerance: intolerance which is unaccepting of the rights of others in society to freely espouse their views and to portray them in print, in the theatre or in the celluloid media'.[23]

One of the most controversial films in the recent past was *Padmavat* (originally, *Padmavati*). The film courted controversy from the time it was being shot. The film was set in the Kingdom of Chittor in modern-day Rajasthan and revolved around Allauddin Khilji, the Sultan of Delhi's fascination for the queen of Chittor, Padmini, and his attack on the kingdom to capture her. Protesters first wrecked sets of the film in two cities. A Rajput organisation, the Karni Sena, then claimed that the film was distorting history and tarnishing the legacy of their queen Padmini (whose historical existence is very much in doubt). BJP's Surajpal Amu offered a bounty of Rs. 10 crores for beheading Deepika Padukone, one of the lead actors in the film.

Interestingly, these protests and threats preceded the film's release, and so none of the offended parties had actually watched the film.[24] The matter reached the Supreme Court in *Viacom 18* v. *Union of India*. Though the CBFC had given the film an 'U/A' certification, the Government of Rajasthan banned the movie under the Rajasthan Cinemas (Regulation) Act, 1952, fearing that it may hurt the religious sentiments of the people and create a law-and-order situation in the state. The movie was banned under Section 7(1) of this Act which is as follows:

> The State Government in respect of the whole or any part of the State of Rajasthan and the District Magistrate in respect of the district within his jurisdiction may, if it or he is of opinion that any film which is being publicly exhibited is likely to cause breach of the peace, by order suspend the exhibition of such film and during such suspension, the film shall be deemed to be an uncertified film in such whole, part or district of the State of Rajasthan.

The producers of the film challenged the ban before the Supreme Court. The Court clarified that this Section does not permit prior restraint of a film that is yet

23. AIR 2019 SC 1918.

24. Anindita Sanyal. 2017. '₹ 10 Crore For Heads Of Deepika Padukone, Padmavati Director: BJP Official', *NDTV*, 20 November, available online at https://www.ndtv.com/india-news/padmavati-row-10-crore-for-heads-of-deepika-padukone-sanjay-leela-bhansali-bjp-official-1777473 (accessed on 2 May 2021).

to be exhibited openly and publicly in that particular state. It stated that when it is said that a film is described as publicly exhibited under this Section, it presupposes that the film is in fact being exhibited in the state and in doing so if it is found likely to cause a breach of peace. In such an event, this power could be exercised by the state government. The Court rejected the government's contention that the film was being screened in the State of Uttar Pradesh, and hence Section 7(1) could be invoked. The Court cast a duty on the state government to manage the law-and-order situation whenever a film is exhibited. The Court further said that it is also the government's responsibility to protect the persons involved in the exhibition of the film and the audience watching it, if necessary.[25]

The legal regime governing the release of a film for public viewing not only involves wide-ranging powers in the hands of the CBFC to censor but is also plagued with uncertainty. The creation of a body like the CBFC, even with all its flaws, should have provided a sense of certainty. Unfortunately, it does not because state governments still can ban films after the CBFC clears them for release. State governments are usually enforcing a heckler's veto through such prior restraints. It has become easy for religious and caste groups to commit acts of violence or threaten to do and coerce state governments into banning films that hurt their sentiments. This legal regime incentivises violence rather than offering any protection for filmmakers. Although courts have upheld the freedom of expression of filmmakers in several instances, it has been after they were subject to threats and destruction of property. From the perspective of a filmmaker, it is preferable to self-censor rather than subject oneself to the rigmarole of the legal process.

Regulation of Books

Statutory Framework

Books are not regulated by a body like the CBFC but are still subject to a prior restraint regime. Section 95 of the Code of Criminal Procedure, 1973 (similar to Section 99A of the Code of Criminal Procedure, 1898) gives the state government the power to order forfeiture of a book if it appears to such state government to contain any matter the publication of which is punishable under Section 124A (sedition) or Section 153A (promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or Section 153B (imputations, assertions prejudicial to national-integration) or Section 292 (sale, etc., of obscene books, etc.) or Section 293 (sale, etc., of obscene objects to young persons) or Section 295A (deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its

25. (2018) 1 SCC 761.

religion or religious beliefs) of the Indian Penal Code (IPC). Any person having an interest in a book that has been forfeited under Section 95 may approach the High Court to challenge the forfeiture.

Judicial Interpretation of the Provisions on Book Bans

In the Andhra Pradesh High Court's judgment in *N. Veerabrahmam* v. *State of Andhra Pradesh,* the subject before the Court was the Andhra Pradesh Government's forfeiture of copies of Veerabrahmam's book *Bible Bandaram* (Treasure of the Bible) under Section 99A of the Code of Criminal Procedure, 1898. The author challenged the government's action claiming that he had dealt with the Bible from a scientific and rationalist point of view. The petitioner also challenged the constitutionality of Section 99A of the Code of Criminal Procedure, 1898. The Court observed that the first amendment to the Constitution had expanded the scope of Section 19(2) to include 'in the interests of public order'. The expression 'in the interests of' is of wide connotation, and therefore any law penalising activities that have a tendency to cause public disorder is within the scope of authorised limits. The High Court followed the Supreme Court decision in *Ramji Lal Modi* v. *State of Uttar Pradesh,* where the latter rejected a challenge to Section 295A of the IPC as unconstitutional. The Section was declared constitutional because it 'punishes an aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class'.[26] The Court said that this pronouncement of the Supreme Court applies equally to Section 99A of the Code of Criminal Procedure, 1898 since only a matter that would fall either within the ambit of Sections 295A, 124A, or 153A of the IPC would enable the government to take action under Section 99A. The High Court said that in considering whether Section 99A imposes a reasonable restriction, it has to be remembered that Section 99D contains a provision for judicial remedy. On the book itself, the Court declared that Article 19(1)(a) does not give the freedom to make scurrilous attacks on the religion and religious beliefs of other sects with impunity.[27]

In *Harnam Das* v. *State of Uttar Pradesh*, two books written by the appellant were forfeited under Section 99A of the CrPC on the grounds that the said books contained matter the publication of which was punishable under Sections 153A and 295A of the IPC. The order did not, however, state the grounds for that opinion. The order did not specify which communities were alienated from each other or whose religious beliefs had been wounded, nor did it explain why the government thought that such alienation or offence to religion had been caused. The Supreme

26. 1957 AIR SC 620.
27. AIR 1959 AP 572.

Court, while setting aside the Government of Uttar Pradesh's forfeiture order, made it clear that,

> Two things appear clearly from the terms of this Section. The first thing is that an order under it can be made only when the government forms a certain opinion. That opinion is that the document concerning which the order is proposed to be made, contains 'any matter the publication of which is punishable under Section 124-A or Section 153-A or Section 295-A of the Penal Code'. Section 124-A deals with seditious matters, Section 153-A with matters promoting enmity between different classes of Indian citizens and Section 295-A with matters insulting the religion or religious beliefs of any class of such citizens. The other thing that appears from the Section is that the government has to state the grounds of its opinion.[28]

In *State of Uttar Pradesh* v. *Lalai Singh Yadav,* the Supreme Court had to decide on the Government of Uttar Pradesh's order under Section 99A of the Code of Criminal Procedure, 1898 forfeiting copies of a book entitled *Ramayan: A True Reading,* by Periyar E.V.R. Quashing the ban order, the Court held that different persons may have different reactions to the same work and that the rule of human advance is free thought and expression, but the survival of society enjoins reasonable curbs where public interest calls for it. The balance between these interests is struck by governmental wisdom overseen by judicial review. The Court pointed out,

> The compulsions of history and geography and the assault of modern science on the retreating forces of medieval ways—a mosaic like tapestry of lovely and unlovely strands—have made large and liberal tolerance of mutual criticism, even though expressed in intemperate diction, a necessity of life. Governments, we are confident, will not act in hubris, but will weigh these hard facts of our society while putting into operation the harsh directives for forfeiture. From Galileo and Darwin, Thoreau and Ruskin to Karl Marx, H.G. Wells, Bernard Shaw and Bertrand Russell, many great thinkers have been objected to for their thoughts and statements—avoiding for a moment great Indians from Manu to Nehru. Even today, here and there, diehards may be found in our country who are offended by their writings but no government will be antediluvian enough to invoke the power to seize their great writings because a few fanatics hold obdurate views on them.[29]

In *Gopal Vinayak Godse* v. *Union of India,* the Bombay High Court set aside the order forfeiting a book called *Gandhi-hatya Ani Mee* (Gandhi-assassination and I) by Gopal Vinayak Godse, and laid down the following ingredients to make out an offence under Section 153A of the IPC:

1. Under Section 153A, it is not necessary to prove that as a result of the objectionable matter, enmity or hatred was, in fact, caused between people of different classes.

28. AIR 1961 SC 1662.
29. 1977 AIR SC 202.

2. Intention to promote enmity or hatred, apart from what appears from the writing itself, is not a necessary ingredient of the offence. It is enough to show that the language of the writing is of a nature calculated to promote feelings of enmity or hatred for a person must be presumed to intend the natural consequences of his act.
3. The matter charged as being within the mischief of Section 153A must be read as a whole. One cannot rely on stray, isolated passages to prove the charge, nor can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning.
4. For judging what are the natural or probable consequences of the writing, it is permissible to take into consideration the class of readers for whom the book is primarily meant as also the state of feelings between the different classes or communities at the relevant time.
5. If the writing is calculated to promote feelings of enmity or hatred, it is no defence to a charge under Section 153A that the writing contains a truthful account of past events or is otherwise supported by good authority.

Applying these criteria, the Court held that the offending passages in *Gandhi-hatya Ani Mee* mentioned in the order of forfeiture cannot be read in isolation. They should be read in the context of the book as a whole and when read in such a manner the Court opined that the book did not promote feelings of enmity and hatred between Hindus and Muslims in India.[30]

Special Categories of Offence

The Supreme Court has reversed some of the gains made in previous judgements by creating higher thresholds for certain communities and historical figures, although such hierarchies have not been provided for in the statutes themselves. *Baragur Ramachandrappa* v. *State of Karnataka* is the first such example that marked a diversion from the previous pronouncements on how to determine if a book falls within the Sections mentioned in Section 95 of the Code of Criminal Procedure.

In this case, the Supreme Court examined the validity of an order by the Government of Karnataka forfeiting all copies of a book called *Dharmakaarana* under Section 95 of the CrPC for offending the sentiments of followers of the Veerashaiva sect. It was held by the Court that 'India is a country with vast disparities in language, culture and religion and unwarranted and malicious criticism or interference in the faith of others cannot be accepted'. The Court, by stating that 'what may be a laughable allegation to a progressive people could appear as sheer

30. AIR 1971 Bom 56.

heresy to a conservative or sensitive one', moved away from the approach in *Lalai Singh* which cautioned against acting on the wishes of 'few fanatics' holding 'obdurate views' who would be offended by the book. Instead, the Court held that 'India is a country with huge diversities in language and religion and the weaker amongst them must be shown extra care and consideration'. In effect, the Court stated that with respect to minorities and marginalised sections, the State must tread with additional caution while determining if a book offends their sensibilities. This approach has no basis in the Constitution or the CrPC itself. The Court departed from *Lalai Singh* in another respect too, by stating that the state government only had to demonstrate that the offending book *appeared* to have the potential to hurt people's sentiments. The burden was thus shifted to the creator of the work to prove otherwise.[31]

Similarly, in *Devidas Tuljapurkar* v. *State of Maharashtra*, the Supreme Court, while adjudicating on prosecution of a poet under Section 292 of the IPC for an allegedly obscene poem, titled 'Gandhi Mala Bhetala' (Gandhi Met Me) about Mahatma Gandhi, stated that the standard of judging obscenity would be higher for 'historically respectable personalities'. Section 292 itself creates no such category. The Court held that, 'what can otherwise pass of (sic.) the contemporary community standards test for use of the same language, it would not be so, if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene'.[32]

In both the above cases, the Court has in effect created special categories not contemplated in the statutes themselves. Thus, thresholds for offence taken against weaker and marginalised sections and judging obscenity with respect to historically respectable personalities are lower than those applicable to everyone else.

Heckler's Veto

In *State of Maharashtra* v. *Sangharaj Damodar Rupawate,* the Maharashtra Government's ban on James Laine's book, *Shivaji: A Hindu King in Islamic India,* was challenged. The ban was allegedly in response to the law-and-order situation created by groups and individuals protesting against the book. The publishers withdrew the book from circulation, but the violent and personal protests did not cease. A mob in Pune blackened the face of Shashikant Bahulkar, a Sanskrit scholar who assisted Laine in his research. Yet another angry mob, calling itself the Sambhaji Brigade of the Maratha Mahasangh, stormed the 104-year-old Bhandarkar Oriental Research Institute in Pune, where the author had conducted some of his research

31. (2007) 3 SCC 11.
32. AIR 2015 SC 2612.

and destroyed priceless manuscripts and artefacts.[33] The author apologised for the offending statements in the book and said that he only was responsible for the offending statement written in the book, and the publisher was not at all responsible for the same. An FIR was filed against the author, publisher, and printer under Sections 153, 153A, and 34 of the IPC, following which the printer was arrested.

Soon after that, the Maharashtra government banned the book under Section 95 of the Code of Criminal Procedure. They claimed that the book was likely to breach peace and public tranquillity, particularly between those who revere Shri Chhatrapati Shivaji Maharaj and those who may not. The ban was challenged and struck down by the Bombay High Court. The government appealed. The Maharashtra Government used the ransacking of the Bhandarkar Institute as evidence of the fact that the book created feelings of enmity between classes. It was also argued that if a book caused enmity between classes, it could not be protected under Article 19(1)(a) even if it contained historical truth.

Ultimately, the Court upheld the Bombay High Court's decision on the narrow, procedural ground that the Government's order did not specify the classes or communities between which enmity had been created. It added that the perspective from which the book ought to be judged must be that of 'the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view'.[34]

Interestingly, in 2017 a Sessions Court in Pune acquitted 68 persons associated with Maratha outfit Sambhaji Brigade and accused of ransacking Bhandarkar Oriental Research Institute stating that the prosecution had failed to establish the role of these 68 people in the incident.[35] Three years after the FIR was filed against the author, publisher, and printer, the Supreme Court quashed it, stating that no offence had been made out. The Court emphasised the need to examine the book as a whole and not 'rely on strongly worded and isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning'. The Court made it clear that it is the sole responsibility of the State to make positive efforts to resolve every

33. Sheela Raval. 2004. 'Maharashtra Govt Bans James W. Laine's Biography on Shivaji', *India Today,* 2 February, available online at https://www.indiatoday.in/magazine/controversy/story/20040202-james-wlaines-book-on-shivaji-sparks-controversy-790629-2004-02-02 (accessed on 15 May 2021).
34. (2010) 7 SCC 398.
35. Yogesh Joshi. 2017. 'Pune Court Acquits 68 Members of Sambhaji Brigade Accused of Ransacking Bhandarkar Institute', *Hindustan Times,* 28 October, available online at https://www.hindustantimes.com/pune-news/pune-court-acquits-68-members-of-sambhaji-brigade-accused-of-ransacking-bhandarkar-institute/story-NlL55an88Or1iztV8uptzK.html (accessed on 4 May 2021).

possible conflict between any of the communities, castes, or religions within the state and try every possible way to establish peace and harmony within the state under every and all circumstances.[36]

Section 95 of the Code of Criminal Procedure gives the executive sweeping powers of prior restraint. In interpreting Section 95 (formerly Section 99A of the Code of Criminal Procedure, 1898), courts have tried to curb these powers by insisting that the order of forfeiture be specific about which communities will be hurt by the work and how. However, the wording of sub-sections under Section 95 is quite ambiguous, leaving much scope for executive overreach. For example, it is still unclear what characteristics a group must possess to be classified as a class whose religious feelings have been outraged under Section 295A of the IPC. Does such a group need to represent the sect/caste or the entire religion? If a minority within a sect or caste feels outraged, does the executive have the power to ban the book? Similarly, under Section 153A, it is not clear how groups are defined to determine if the book is promoting enmity between them.

Additionally, courts have interpreted Section 95A in a way that the state governments do not have to demonstrate actual disruption of public order; an apprehension of such disruption in their minds is sufficient. The burden of disproving this apprehension thus shifts to the creator of the work. *Lalai Singh* had set a high standard for the executive authorities while deciding if the work hurt sentiments or not. *Baragur Ramachandrappa* has considerably watered it down by giving room for any group, especially a marginalised group, to claim hurt sentiments and get a book banned.

The scope for the executive to ban books may expand further if the reasoning in the Supreme Court's 2015 judgment in *Devidas Tuljapurkar* is used with respect to Section 95 cases as well. This particular judgment carved out a category of 'historically respectable persons' and created a lower bar for judging obscenity for works about such persons in the context of Section 292 of the IPC. Thus, a text that may not be ordinarily considered obscene may be considered obscene if it refers to a 'historically respectable persons'.

Conclusion

The legal regime governing the regulation of books and films reflects the uneasy compromise between the right of speech and expression guaranteed in Article 19(1)(a) and the restrictions on this right in Article 19(2). In terms of judicial

36. *Manzar Sayeed Khan* v. *State of Maharashtra,* (2007) 5 SCC 1.

pronouncements, we see two strands of judicial thinking. One strand emphasises the right to free speech, the need for citizens to be exposed to an array of ideas, and the State's obligation to maintain law and order. The other strand has a patronising attitude towards citizens whose delicate minds need protection from uncomfortable ideas and casts the duty of such protection on the State.[37] The legal regime combined with the absence of a clear judicial stand has over the years created a marketplace of hurt rather than a marketplace of ideas. While the constitutional guarantee to free speech is assumed to be clear-cut, the 'public order' and 'incitement to commit an offence' exceptions created in Article 19(2) and the legislation based on them have muddied the waters considerably. Significant leeway has been given to the executive to identify hurt sentiments of various groups and to determine if there is a threat to public order.

The most powerful weapon in the hands of the executive in this regard is the power of prior restraint. The regime of prior restraint which bans the book or film even before it is released in the public domain has in effect made hurt an entitlement. Such a regime is problematic because the initial censorship decision is made by an administrative body in non-judicial proceedings without hearing the author or the filmmaker. Gautam Bhatia has pointed out that when the material involved is critical of the government, or offensive to a group that is politically sensitive for the government, it is likely that the government will overestimate the nature of the threat, and err on the side of censoring or banning. The burden then shifts to the author or the filmmaker to approach a court to have the decision overturned. Even if the court overturns the executive ban, the process involves considerable time and money apart from the anxiety of dealing with threats of violence. In the case of post-publication censorship, the material has at least entered the public domain and its effect can be seen rather than imagined. A regime of prior restraint ensures that certain ideas never reach the 'marketplace'.[38]

What is apparent from the analysis of case law in this chapter is that hurt and offence to religion and caste are the most commonly contested categories. With respect to books, the law itself privileges insult to religion above sentiments about other belief systems through Section 295A of the IPC. This gives people who believe in any religion the right to ask for a ban on a book offending their religious beliefs. Similar privileges are not accorded to believers of any other belief system or philosophy.

37. Gautam Bhatia. 2016. *Offend, Shock, Or Disturb: Free Speech under the Indian Constitution.* Oxford University Press, p. 164.
38. Bhatia, *Offend, Shock, or Disturb*, p. 101.

These legal regimes can be seen as part of a broader tendency to confront problems of multi-community, multi-religious democracy through censorship. In contrast to the colonial government's obvious efforts to control nationalist ambitions, the efforts in independent India are couched as being fuelled by a desire to represent by anticipating hurt feelings and speaking for the 'public interest'.[39] An unfortunate consequence is that the controversies surrounding films and books are now no longer about the work itself, they have become about the creators as well. There is an increasing trend of 'hurt' groups demanding not only a ban on the book or film but also criminal proceedings against their creators. Such groups are emboldened by the fact that offences relating to speech are criminalised under the IPC and are cognisable. Thus, creators can be arrested without a warrant. Even if the creator is ultimately acquitted by a court of law, the prospects of pre-trial incarceration and a prolonged trial are sufficient disincentive to not put out material that could be perceived as offensive to any group. The inevitable consequences of these developments will be a chilling effect on future expression and self-censorship by authors and filmmakers.

In the long run, in response to the looming spectre of vigilante violence and criminal prosecution against offensive material, publishers, streaming platforms, and movie theatres will become gatekeepers over what reaches the public domain and what does not. Such gatekeepers, as private parties, are not accountable to citizens for their decisions. Their decisions will be taken in private and will not be open to judicial scrutiny. An example of this was the publisher Penguin's decision to pulp Wendy Doniger's book in response to pressure from Hindu groups.[40] It is likely that such gatekeepers will keep a wide margin of error while judging the material in order to protect themselves. Ultimately, there will be a chilling effect on creative expression, severely limiting the ideas that reach the marketplace and the quality of public debate.

39. Suzanne L. Schulz. 2016. 'Temporary Bans and Bad Laws: The Aarakshan Ban and the Logics of Censorship in Contemporary India', *Communication Culture & Critique,* 9(4): 537.
40. Chinmayi Arun. 2014. 'Gatekeeper Liability and Article 19(1)(A) of the Constitution of India', 7 *NUJS Law Review,* 73: 86.

5

Judicial Approach to Free Speech in Contempt of Court Cases

M.V. Sundararaman and Varsha Manoj*

Introduction

The right to free speech and expression is incorporated in Part III of the Constitution of India as a Fundamental Right of the citizens under Article 19(1)(a). This, however, is not an unbridled right. Article 19(2) allows the imposition of reasonable restrictions on this right under certain circumstances. One of these is 'in relation to contempt of court'. Unlike other restrictions listed under Article 19(2), the Constitution specifically confers power on the Supreme Court and High Courts to punish a person who commits contempt of court, under Article 129 and Article 215. Additionally, the Contempt of Courts Act, 1971 (the Act) was enacted, and it distinguished between civil and criminal contempt.

Contempt law in India traces its genesis to the laws enacted by the British in the early 1900s. When the ruling power is a coloniser, the dispensation could never allow its laws and its courts' pronouncements to be criticised or be subjected to contempt by the ruled. To enable their courts to function without criticism and to exact unwavering obedience to their draconian laws, the British enacted the contempt law. While the concept of contempt of courts is a legacy of British colonialism flowing from the Contempt of Courts Act, 1926, its continuance in India and the manner in which contempt power has been wielded by Indian courts have been discussed and critiqued widely. A major criticism against contempt law in India is that it has been used by the judiciary to suppress public criticism and that, consequently, it undermines the freedom of speech and expression guaranteed by the Constitution. While there can be no doubt that the judiciary as a public institution must be respected in civil society, the question that continues to be debated is whether respect for the judiciary must be propped up and enforced through laws or should respect for judicial institutions be commanded through their performance and conduct? In response, the need for contempt law to 'protect' the judiciary has

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 10 March 2022.

been justified by arguing that unlike other public figures, such as legislators and bureaucrats, judges cannot respond to public criticism through public debate.[1]

In India, the Act recognises two types of contempt: civil contempt and criminal contempt. Civil contempt refers to wilful disobedience of a judgment, decree, direction, order, writ, or other processes of a court, or wilful breach of an undertaking given to a court. There is consensus over the reasonableness, need, applicability, and relevance of this part of the law. However, the power to punish for criminal contempt is what has raked up substantial debate and controversy. The invocation of Section 2(c) of the Act is in the context of three main elements:

(a) words, whether written or spoken, signs and actions that 'scandalize' or 'tend to scandalize' or 'lower' or 'tend to lower' the authority of the Court,

(b) 'prejudices' or 'interferes with' any judicial proceeding, and

(c) 'interferes with' or 'obstructs' the administration of justice.

In a criminal contempt proceeding, the courts don the combined role of victim, prosecutor, and adjudicator. As will be illustrated in the sections below, the phraseology in the statute coupled with the broad and discretionary powers conferred on courts wielding the contempt jurisdiction have added to unpredictable outcomes and grossly disproportionate sentences handed down by courts to 'contemnors'. Additionally, criminal contempt has been criticised as being subject to the opinions and personal predispositions of the judges.[2] One could even argue that there is a presumption of guilt of the alleged contemnor, and the burden actually rests on him to prove his innocence by whatever yardstick the courts deem fit. This argument is premised on the possibility that the judge who complains that criminal contempt has been committed in his court, can himself initiate and hear the contempt action against the 'contemnor'.[3] Thus, the courts act as the complainant, the victim, and the prosecutor. This leaves the 'contemnor' to disprove the charge against himself. This mismatch, compared to any other criminal proceeding, is also highlighted by the lack of a *mens rea* requirement under the provision since it is the effect of the action that makes it punishable under contempt proceedings, rather than the intention with which it was done.

1. See *Shamsher Singh Bedi* v. *High Court of Punjab*, AIR 1995 SC 1974.
2. See Krishnan. 2020. 'Contempt of Court Provision Vague: Former Supreme Court, High Court Judges', *Hindustan Times,* 24 August, available online at *https://www.hindustantimes.com/india-news/contempt-of-court-provision-vague-former-sc-hc-judges/story-0rzJOODbOyIIrqrJhQwxnM.html* (accessed on 30 July 2021).
3. See *National Lawyers Campaign for Judicial Transparency and Reforms & Ors.* v. *Union of India and Ors.*, Writ Petition (C) No. 191 of 2019, (Supreme Court of India) decided on 12 May 2019.

Scope of Analysis

In decades past, the application of contempt of court law, more often than not, was directed towards the press as it was only through the press that mass dissemination/publication of information occurred. However, with the advent of social media, specifically designed to provide a platform for expression and exchange of thoughts and ideas, a more diverse set of individuals and entities have been subjected to the criminal contempt jurisdiction of courts.

There are several triggers for courts to wield their criminal contempt jurisdiction. In this chapter, we analyse these triggers and a few causes *célèbre* where contempt power was wielded by courts on the premise that certain actions/omissions of the 'contemnors' scandalised and/or lowered the dignity of the court. We will also briefly examine the approach of the Indian judiciary in enforcing the law of criminal contempt and the manner in which it has been interpreted and applied in various situations. We examine whether criminal contempt law has been strengthened or diluted over the years, what principles have been followed, whether these principles have been applied consistently or in a subjective manner, and what factors courts consider while arriving at a conclusion that certain speech or action constitutes contempt of court.

In this context, we also examine the interplay between statutory provisions relating to contempt of court and Article 19(1)(a) of the Constitution and specifically, how the courts have engaged in the balancing act of protecting citizens' rights to criticise the judiciary and preserving the integrity of the court. We also analyse other components while examining existing jurisprudence in relation to contempt of courts, since the path of each case differs.

Introduction to the Contempt of Courts Act, 1971

To fully understand current trends in the criminal contempt law, it is necessary to first understand the circumstances that led to such a provision being introduced in the statute book. In 1960, a bill was introduced in the Lok Sabha seeking consolidation of the law relating to contempt of courts in India. A special committee, the Sanyal Committee, was constituted to examine the existing law and provide recommendations on the proposed changes. In its report dated 28 February 1963, the Committee observed, *inter alia*, that the concept of 'contempt' cannot be defined except by enumerating the heads under which it may be classified; heads which can never be exhaustive. This paved the way for the broad and ambiguous 'definition' of criminal contempt under Section 2(c) of the Act, which has in fact only led to more uncertainty and arbitrariness in the exercise of this jurisdiction by courts in India.

Brief History

Before analysing current trends in the law, we briefly examine a few past cases to understand how the jurisprudence has evolved to become what it is today. In *C.K. Daphtary* v. *O.P. Gupta,*[4] a case filed under Article 129 of the Constitution of India, 1950, the alleged contemnor, O.P. Gupta, dissatisfied with the conduct of a sitting judge of the Supreme Court, moved the Lok Sabha to file an impeachment motion. This motion, which listed various reasons, such as 'prejudice' and 'bias' against the judge, was printed in pamphlets and distributed in Parliament for the proposed motion. This pamphlet was the subject of the contempt proceedings initiated against O.P. Gupta. The Supreme Court held that it is open to anyone to express fair, reasonable, and legitimate criticism of any act or conduct of a judge in his judicial capacity and that a distinction must be made between mere libel or defamation of a judge and an act amounting to contempt of court. It specifically distinguished between wrong done personally to the judge and wrong done to the public, stating that only the latter can constitute the basis for initiation of contempt proceedings.

In this case, the alleged contemnor raised the defence that his criticisms of the judgment delivered by the sitting judge were valid grounds for impeachment and that there was no reasonable ground to restrict his right to free speech. Interestingly, the Supreme Court made the following observation in its judgment:

> [that] if a judgment of the Court is criticized as containing errors, and coupled with criticism, dishonesty is also alleged, the Court hearing the Contempt petition would first have to act as an Appellate Court and decide whether there are errors or not. This is not and cannot be the function of a Court trying a petition for contempt. If evidence was allowed to justify allegations amounting to contempt of Court, it would tend to encourage disappointed litigants to avenge defeat by abusing the judge.

Here, the court noted that it is impermissible to judge a contumacious act by reviewing the judgment in question in its entirety, and in doing so, it would act as an appellate court. It was also acknowledged that if the court indulged in such an involved enquiry, it could open the floodgates, encouraging disappointed litigants to re-agitate their case in the guise of contempt proceedings. It appears that the court was keen on limiting the scope of enquiry in a proceeding for contempt and was reluctant to examine a justification for the alleged contumacious behaviour. It is worth noting that the above extract may simply be a reflective observation by the court rather than a statement of the law. However, in the absence of clear parameters for concluding that an act is contumacious, the statement is illustrative of factors considered by the court in a contempt proceeding.

4. AIR 1971 SC 1132.

The question that would arise is on what basis would a court hearing a contempt proceeding conclude whether an alleged contumacious act is fair criticism or whether it was intended to undermine the integrity of the court in the minds of the public. Although the Court held that O.P. Gupta was in contempt and sentenced him to two months' simple imprisonment, it did not set out any clear reasoning for the conviction and merely placed reliance on several other cases where aspersions had been cast on the conduct of judges to hold that the instant case would also amount to contempt of court. Thus, it appears that the conviction, in this case, was based on the subjective opinion of the court and not on established legal principles.

This case is perhaps one of the earliest examples of how the law relating to contempt has been vague and ambiguous, and how pronouncements of the Supreme Court have not helped in adding clarity to the law that was since codified.

In the case of *E.M. Sankaran Namboodiripad* v. *T. Narayanan Nambiar,*[5] contempt proceedings had been initiated against the then Chief Minister of Kerala who had made a public speech proposing that the judiciary was an engine of class oppression. Namboodiripad asserted that he had neither attributed motives to any individual judge nor called for disobedience of court orders. The contemnor also took the defence, which was ultimately rejected by the Court, that his views were informed by the philosophical teachings of Marx and Engels and, thus, his political views were not baseless and were protected by Article 19(1)(a) of the Constitution. The Supreme Court again, without laying down any clear standards or parameters for identifying contumacious conduct, merely reiterated in broad general terms that,

> an attack upon judges ... which is calculated to raise in the minds of the people a general dissatisfaction with, and distrust of all judicial decisions ... weakens the authority of law and law courts.

Another case that aptly illustrates the peculiar application of contempt law is *In Re S. Mulgaokar.*[6] In this case, the then Chief Justice of the Supreme Court considered the effect of a news item titled 'Behaving Like a Judge', published in a leading newspaper. The news article was about a proposed code of ethics that the Chief Justice of the Supreme Court had allegedly disowned. The article generally alleged corruption and inefficiency of the judiciary and, more specifically, implied a lack of moral courage being the cause for disowning the proposed code of ethics. In response, the Registrar of the Supreme Court clarified to the editor of the newspaper that the Chief Justice of India had merely written to the Chief Justices of the High Courts, proposing that such a code be drafted. In his reply to this response, the editor asserted that he was in possession of a copy of this confidential letter, and

5. AIR 1970 SC 2015.
6. AIR 1978 SC 727.

rather than print a retraction in their newspaper, the newspaper would print the entire letter to allow their readers to discern the true meaning of the letter. Because of this, contempt proceedings came to be initiated. Interestingly, Hon'ble Chief Justice Beg, as he was then, had written the letter that was the subject of the allegedly contumacious news article. Further, Hon'ble Chief Justice Beg was also one among the Bench that presided over the case and ultimately passed judgment on the matter.

The Court held that the judiciary could not be immune from criticism but when that criticism was based on an obvious distortion or gross misstatement and made in a manner that seemed to be designed to lower respect for the judiciary and destroy public confidence in it, it could not be ignored. Although ultimately contempt proceedings were dropped, this case is often referred to when seeking to understand the early problems that plagued the law relating to criminal contempt. The judgment passed in this case contains observations of all three judges of the Bench and while each judge expounded extensively on the principles and need for contempt law, their decision to drop the proceedings seems to be at odds with their scathing remarks against those who would contribute in any way to the denigration of the judiciary. Thus, while the judgment is a fount of information in relation to the march of law for criminal contempt, it does not provide a clear standard that can be applied to future cases.

Current Trends—Intention versus Effect

Recently, the Supreme Court *In Re Vijay Kurle & Ors*[7] examined the consequences of a letter and complaint filed by the alleged contemnors before the Chief Justice of India and the President of India against a bench of the Supreme Court. There were several allegations of bias and incompetence in the complaint. Contentious issues that were addressed by the Supreme Court were in relation to the *suo motu* initiation of contempt proceedings, the validity of the Bench against whom the complaint was made presiding over the contempt proceedings, and the freedom to criticise. The Supreme Court referred to the three decisions discussed above, as well as the principle of 'fair criticism' as elaborated in the following sections, to answer these questions.

The Court found the three contemnors guilty of contempt under Section 2(c)(i) of the Act on the grounds that there was no fair criticism, that it was merely an attack against sitting judges consisting of spurious allegations, not backed by evidence and had the effect of scandalising the Court and lowering its dignity. What

7. AIR 2020 SC 3927.

is interesting is that while the court analysed various factors constituting contempt under the Act, it did not examine the effect of the proceedings on the contemnors' right to free speech, except to state that the application of the Act is an accepted restriction of Article 19(1) of the Constitution.

Another recent case that attracted unprecedented attention to the criminal contempt jurisdiction exercised by courts in India is *In Re Prashant Bhushan & Ors.*[8] These proceedings were initiated in response to the publication of two statements on Twitter by Prashant Bhushan, an advocate practising before the Supreme Court. The contemnor contended that his statements constituted fair criticism on the working of the judiciary and were protected by Article 19(1) of the Constitution. However, the Court held that the statements were made based on distorted facts and thus had the effect or tendency to interfere with the administration of justice and undermine the dignity and authority of the institution of the Supreme Court.

During the sentencing hearing, the Attorney General recommended that no sentence be awarded as the contemnor's statements could in some ways be considered fair criticism. Prompted by this recommendation, the Court went into the relationship between free speech under Article 19(1) of the Constitution and the applicability of the Act as a reasonable restriction contemplated under Article 19(2). The Court acknowledged that the right to free speech is an essential pillar of democracy. However, it vaguely stated that in the 'national interest', it must protect institutions that serve the citizens, and thus it must balance free speech with the protection of these institutions. Ultimately, in this case, also, the court reiterated the position of law that the provisions of the Act are a reasonable restriction to the right to free speech.

Similar to other judgments discussed above, even in this case, the Supreme Court merely examined the *effect* of the alleged contumacious act while the *intention* of the contemnor (*mens rea*), discussed in detail below, was not deemed relevant or worthy of consideration. It would seem that regardless of intention and even when an act only has the potential to be contumacious, proceedings are initiated. The question is whether, in the guise of protection of the institution, too much is being compromised without almost no consideration or regard for free speech. Since *Nambooripad*, and later, the statute, contempt jurisprudence has hardly evolved in a manner that prioritises free speech over indeterminable threats to the 'prestige' and 'majesty' of the Court.

8. AIR 2020 SC 4114.

Apart from the established jurisprudence with respect to the manner of application of the provisions of the Act, courts have also considered other factors in determining whether or not the provisions are to be applied at all. A few of these factors are examined and discussed below.

Defamation v. Denigration

From *C.K. Daphtary* onwards, an aspect that continues to be discussed while deciding contempt is whether the alleged contemptuous act disparages the judiciary as an institution or whether it is an act that targets the judge as an individual. As stated in Section 2(c) of the Act, criminal contempt provisions are only intended to protect the judiciary as an institution and judges in the discharge of their judicial duties. The provisions of the Act are not intended to protect actions committed in their personal capacity. In cases where the alleged contumacious act is aimed against the action of the judges in their personal capacity, it has been argued that rather than use the law of contempt, they ought to personally sue the 'contemnor' for defamation, libel, or slander, and no action for contempt would be maintainable against him.

In 2003, in *Registrar General, High Court of Karnataka* v. *The Editor, Mysore Mitra and Ors*,[9] a Division Bench of the Karnataka High Court considered a false report published in the newspapers about the transfer of certain District Judges who were stated to be involved in a widely reported scandal involving certain sitting judges of the High Court. Contempt proceedings were initiated against certain news dailies by the Registrar of the High Court on the ground that such reports were not only incorrect but also had the tendency to interfere with the administration of justice. The Division Bench noted that even if the reports of transfer were incorrect, the orders of transfer were administrative in nature, not judicial, and could in no way be interpreted to be an interference in the administration of justice. The Court also noted that at best, perhaps a case for libel could be made out and not contempt.

The High Court of Karnataka had the occasion to examine another such scenario in the case of *Phaniraj Kashyap* v. *S.R. Ramakrishna & Ors.*[10] Proceedings were initiated against a leading newspaper and its editors who reported that the complainant was the recipient of special treatment from his university with respect to a re-evaluation of exam papers. It was alleged that this special treatment was on account of the complainant's father being a sitting judge of the Karnataka High Court. On examination of the facts, the Court determined that the news report was

9. 2003 (2) Kar LJ 195.
10. 2011 (3) Kar LJ 572.

intended to expose corruption within the said university and was not intended to call into question the integrity of the judiciary or judges. In fact, the only reference to the complainant's father was that he was a sitting judge of the High Court, and nothing more. The Court held that while the statements may have been defamatory, they would not have the effect of interfering in the administration of justice. The Court held that:

> Scandalizing the Court, therefore, would mean hostile criticism of Judges as Judges or judiciary. Any personal attack upon a Judge in connection with the office he holds is dealt with under law of libel or slander.

Interestingly, the complainants therein later filed a suit for recovery of damages against the newspaper before the civil court (O.S. No. 3366/2010) which was subsequently decreed in their favour on the ground of defamation.

If the criminal contempt case initiated against Prashant Bhushan is examined using the same lens as the cases mentioned in this section, perhaps it can be argued that the contemnor's tweets, which spoke of the Chief Justice of India specifically, could at best constitute a cause of action to prosecute the alleged contemnor for libel rather than proceed against him for contempt. Given the broad contours of the concept of criminal contempt and ambiguous language employed in the statute, it is now important to examine whether there are adequate checks and balances in the system to prevent abuse of the process.

Checks and Balances

Attorney General's Consent

Every court of record has the inherent power to take cognizance of, try, and punish for contempt of court. This jurisdiction is constitutionally preserved by Articles 129 and 215. The power to act *suo motu* is recognised in Sections 14(1) and 15(1) of the Act. When the court itself initiates *suo motu* proceedings for contempt, such consent is not necessary. However, as a matter of general practice, even in cases where the court has not taken *suo motu* cognizance and the Attorney General, Solicitor General, or the Advocate General has refused to grant his consent for such proceedings, there is no prohibition in the existing legal framework for a complainant to bring an allegedly violative action to the notice of the court and urge them to take *suo motu* cognizance of the same.

Section 15 of the Act describes the procedure for initiating a proceeding for contempt of court. In the case of the Supreme Court, the Attorney General, or the Solicitor General, and in the case of High Courts, the Advocate General, may bring

in a motion before the court for initiating a case of criminal contempt. However, if the motion is brought by any other person, the written consent of the Attorney General, Solicitor General, or Advocate General is required. The objective of requiring such consent before the court can take cognisance of a complaint is to save the court's time. Such consent is meant to act as a safeguard against frivolous petitions, as it is deemed that the Attorney General, Solicitor General, or the Advocate General, as the case may be, as an officer of the court, will independently ascertain whether the complaint is indeed valid.

In recent times, this power conferred on the law officers of the State has been used effectively and consent for several proposed contempt actions has been granted or rejected *in limine*. To illustrate, while the Attorney General gave his consent to initiate contempt proceedings against comedian Kunal Kamra and comic artist Rachita Taneja,[11] he had denied consent for contempt proceedings against actor Swara Bhasker.[12] Earlier, he had similarly declined to give consent to contempt proceedings against Andhra Pradesh Chief Minister Jagan Mohan Reddy[13] and most recently declined in the case of journalist Rajdeep Sardesai.[14] In each instance, the learned Attorney General provided reasons for his decisions, although this examination is also a subjective one.

Fair Criticism and Truth

While there are several exceptions to Section 2(c) of the Act, as listed in Sections 3 to 7 of the Act, the defence that courts have often discussed is the exception of fair criticism under Section 5 of the Act. There have been instances where the courts have declined to initiate contempt proceedings on the ground that the allegedly contumacious act was not 'abuse of court' but rather 'fair comment'.

In the case of *P.N. Duda* v. *P. Shiv Shankar,*[15] Senior Advocate Duda filed an application in the form of 'Information' before the Supreme Court seeking initiation

11. Contempt Petition (Crl.) Nos 1, 2 & 3 of 2020 (Supreme Court).
12. Scroll. 2020. 'Attorney General Declines Consent to Initiate Contempt Proceedings against Swara Bhasker', *Scroll.in*, 23 August, available online at https://scroll.in/latest/971180/attorney-general-declines-consent-to-initiate-contempt-proceedings-against-swara-bhasker (accessed on 30 July 2021).
13. Krishnadas Rajgopal. 2020. 'A-G Declines Consent for Contempt Proceedings against Jagan Reddy', aide, *The Hindu*, 03 November 2020, available online at https://www.thehindu.com/news/national/a-g-declines-consent-for-contempt-proceedings-against-ap-cm-aide/article33003865.ece (accessed on 30 July 2021).
14. *The Hindu*. 2021. 'No Contempt Case against Rajdeep Sardesai, Says Supreme Court', *The Hindu*, 17 February 2021, available online at https://www.thehindu.com/news/national/no-contempt-case-against-rajdeep-sardesai-says-supreme-court/article33854343.ece (accessed on 30 July 2021).
15. AIR 1988 SC 1208.

of contempt proceedings against Justice P. Shiv Shankar, a former High Court Judge, who was then a politician post-retirement. The petitioner/informant submitted that a speech given by the alleged contemnor, which was reported in a popular newspaper, was derogatory since it had attributed to the Court partiality towards economically affluent sections of the people. He alleged that this could affect public confidence in the judiciary and hence contempt proceedings were to be initiated. In this case, the Court also referred to the decision in Namboodiripad. In that case, Chief Justice M. Hidayatullah, as he was then, had held Mr Namboodiripad in contempt on the ground that his allegations against the judiciary, even if they did not in fact interfere with the administration of justice, had the potential or tendency to do so, and thus was sufficient to constitute contempt of court. In doing so, the Court disregarded the intent and understanding of the contemnor.

In Shiv Shankar however, the Court, having examined the allegations and context of the impugned remarks, dropped the charges against the contemnor, holding that the impugned remarks were made only in front of lawyers, jurists, and judges, not before the general public and that the speech represented primarily an exercise of examining the class composition of the Supreme Court (which is a matter of fact). He had stated that the class composition of any instrument indicates its predisposition and its prejudices, which the Court conceded was inevitable. These remarks were made to formulate a proposition to exact accountability from the judiciary in similar measure, as from the legislature and executive.

The only obvious difference between these two cases appears to be the public versus private nature of the remarks made. The decision in *Namboodiripad* was based on the effect of the remarks or even the potential effect of the remarks, while the intention of the contemnor was not deemed to be of much importance. In sharp contrast, in Shiv Shankar, the Court examined the context and intention behind the impugned remarks. Further, although certain damaging portions of the speech were reported by the newspapers, albeit out of context, the remarks were made before lawyers, jurists, and judges and thus held not to be public in nature.

A comparison of these two cases demonstrates an apparent lack of benchmarks in judicial approach, even in seemingly similar situations, when it comes to the exercise of contempt powers in relation to the 'fair criticism' exception. In cases of civil or criminal defamation, 'truth' or 'fair criticism' is an accepted defence against a charge of defamation. Even in cases under Section 123(4) of the Representation of People's Act, 1951, statements that would ordinarily be held to be corrupt would be justified if the individual making the statement had believed it to be true at the time of making it. However, in contempt law, whether a statement is a fair criticism, the truth, believed to be true, or entirely false has not been of much relevance. Here, the

courts have considered the effect or likely effect of an allegedly contumacious statement as the deciding factor in contempt proceedings. This difference clearly demonstrates the earlier assertion that *mens rea* is not considered an essential requirement for conviction in contempt actions. In the case of most criminal offences, *actus reus* (wrongful act) and *mens rea* (culpable mind) are required to be convicted of a crime. However, in some cases involving strict liability, only *actus reus* is sufficient. The difficulty with contempt law, however, is that even the question of what the *actus reus* is, is within the discretion of the Court. Additionally, in the absence of clear standards for what constitutes 'fair criticism', whether 'fair criticism' constitutes an efficacious exception to the rule of contempt is debatable.

Another case that can be contrasted against the two cases discussed above is *In Re Arundhati Roy*.[16] Arundhati Roy, an internationally acclaimed writer and a social activist, had protested in front of the Supreme Court against certain remarks recorded about her in its orders arising in certain public interest litigation cases. The Supreme Court had disapproved of her criticism of various judgments in relation to the Sardar Sarovar Dam Project and had expressed its displeasure at her conduct. Pursuant to verbal and physical altercations that ensued during the protests, the Supreme Court initiated *suo motu* contempt proceedings against her. In her defence, Ms. Roy contended that she was fighting for the dignity of Indian citizens and that to hold her in contempt was to suggest that the dignity of the Court and the dignity of the Indian citizens were incompatible, oppositional, and adversarial propositions.

The Court noted that Ms Roy had admitted that she had no specific knowledge of the judiciary or court system and that she only had an interest in the results of the Sardar Sarovar Dam Project litigations. She admitted that as such, her proclamations were covered by her right to free speech, and she was obligated to provide no justifications for her actions. Referring to Shiv Shankar, the Court noted that the benefit to which P. Shiv Shankar was held to be entitled, as a retired officer of the judiciary with knowledge of the workings of the judiciary, would not be applicable to Ms Roy. Further, the Court also declined to apply the ratio in Namboodripad, holding that it would not be an accurate comparison as in that case the contemnor had based his comments in the context of a philosophical school of thought. Ultimately, rejecting her defence, the Court convicted Ms Roy on the charge of criminal contempt, reasoning that she had imputed motives to the judiciary in passing certain orders against her and that they were done specifically to harass her. The Court convicted her of contempt, but only sentenced her to one day's simple imprisonment and fine.

16. AIR 2003 SC 1375.

Quantum of Punishment During Sentencing

Section 12 of the Act deals with punishments that can be imposed and the remedies that can be directed by the Court once contempt has been established. Though the Act only deals with punishments, sometimes, directions given by courts have a definite remedial character and hence Section 12 deals with punishments and remedies. The Supreme Court has held in the case of *Supreme Court Bar Association* v. *Union of India*[17] that High Courts cannot impose a greater punishment than what is provided for in the Act. However, it has left the question open as to whether the Supreme Court itself is also bound by the Act. This is another aspect of the unpredictability of outcomes that can emerge from contempt proceedings that are tried before the Supreme Court.

A relevant consideration when determining the quantum of punishment in case of conviction is *mens rea.* We note that courts are reluctant to levy a heavy punishment on a contemnor where it appears that the contumacious act was unintentional.[18] Similarly, while it is not necessary to prove that the contemnor has derived some benefit or advantage in order to establish a charge of contempt, the fact that no advantage was derived may be considered by the Court at the sentencing stage.[19]

Conclusion

The questions that require close re-examination are whether proceedings initiated for criminal contempt proceedings actually protect and/or uphold the dignity of the courts at all, and, whether they have actually deterred future 'violations'. For the reasons and circumstances discussed above, evidently, the law of criminal contempt is plagued by arbitrariness, subjectiveness, and non-uniformity. The public outcry and debate that followed *Prashant Bhushan* have presented a clear need to re-examine this fifty-year-old law that has barely kept pace with changing global developments in contempt jurisprudence. Although, broadly, the judiciary appears to have developed tests for the application of criminal contempt provisions, their practical application still remains subjective and discretionary.

It can hardly be gainsaid that the judiciary must be protected from denigration. However, it is highly likely that the ambiguity in the application of contempt law can undermine public confidence in the judiciary, the prevention of which, ironically, is the very purpose of criminal contempt proceedings. This is equally

17. (1998) 4 SCC 409.
18. *Rajendra Sail* v. *Madhya Pradesh High Court Bar Association*, (2005) 6 SCC 109.
19. *Murray & Co* v. *Ashok Kumar Newatia,* (2000) 2 SCC 367.

attributable to the law itself, in as much as it is to the approach of the judiciary, which has been demonstrably plagued by discretion and subjectivity. The judgments of various courts discussed above show that while the Supreme Court has, on several occasions, reiterated that the right of free speech must be balanced with the need to protect the judiciary from denigration, there has been little done to define the standard of how much protection is to be afforded to the judiciary and to what extent such protection must outweigh an individual's right to free speech. There has been sufficient espousal of the standards for consideration of free speech as an independent right. However, when it comes to consideration of a charge of 'scandalizing the court', outside a theoretical espousal of the principles, there are hardly any clear, specified standards set out for consideration. A criminal contempt proceeding is almost never tried or viewed as a proceeding for curtailment of free speech. It is always initiated and prosecuted as an 'offence' arising from the subjective view of a judge 'feeling' that the institution has been 'scandalised'. Such a lacuna in the law is further confounded by the individual judge's discretion and subjective application of the law.

Additionally, under Article 19, in case of restrictions other than those in relation to contempt of court, there is a high threshold of 'reasonableness' to be passed to ensure that a restriction be deemed not violative of Article 19(1). The myriad inconsistencies in the application of the provisions of the Act, and the jurisprudence that has developed post enactment of the Act, demand a thorough re-examination and overhaul of the existing regime of contempt law in India. Pertinently, the Constituent Assembly debates[20] on contempt of court as a restriction on Article 19 in relation to how there already existed relevant provisions in law prescribing what would amount to contempt. The House was concerned that the addition of contempt of court as a distinct restriction on Article 19 would confer extensive powers on the legislature to introduce laws that could go far beyond the scope of contempt in the existing legal framework. It was noted that it would lead to excessive and discretionary powers being conferred on the Court.

At the time of the introduction of 'contempt of court' as a reasonable restriction in Article 19(2), 'scandalizing the court' was never contemplated as one of the limbs of the restriction. However, it is apparent that during the debates, the draftsmen were more concerned with whether contempt of courts could be a constitutional restriction or not; there was hardly any discussion on what categories of actions or speech could warrant these restrictions. As a result, there is no proper mechanism to

20. See https://www.constitutionofindia.net/constitution_assembly_debates/volume/10/1949-10-17 (accessed on 2 August 2021).

check the reasonableness of the nature of acts listed as contumacious in the Act since the enactment of the Act itself is valid as per Article 19(2) of the Constitution.

Over the years, the manner in which contempt laws have been wielded, interpreted, and enforced makes it apparent that the law has now come to equate offending the sensibilities of the judiciary to disobeying judicial orders of the court. It is apparent that the two have been conflated time and again and as a result, the entire regime of contempt law post 1971 has created more confusion than clarity.

In the backdrop of the evolution of contempt law globally, it is most opportune now that the law in relation to criminal contempt in India be re-examined and thoroughly overhauled to ensure that it is uniform, fair, and non-arbitrary or, like in other developed countries, it be done away with in part or in its entirety.

GROUP IDENTITIES: BALANCING RIGHTS IN A DIVERSE SOCIETY

6

A Study of Caste-Sensitive Judicial Reasoning In Interpreting Article 17

Prannv Dhawan and Jwalika Balaji*

Introduction

Caste-based subordination has been a painful concomitant of the iniquitous Hindu social order that is marked by strict separation and gradation of castes, which has an 'ascending scale of respect and descending scale of contempt'.[1] Untouchability is the broad term that defines the practice of denying civil rights to castes that are at the lower rungs of the caste hierarchy.[2] According to Dr B.R. Ambedkar, these are exclusionary practices like 'restriction on temple entry, foreclosure from shops, public tanks, and eateries that are "outward registers of the same inward feeling of defilement, odium, aversion and contempt" towards the "untouchable" castes'.[3] In his words,

> Why will not a Hindu touch an untouchable? Why will not a Hindu allow an untouchable to enter the temple or use the village well ? Why will not a Hindu admit an untouchable in the inn? The answer to each one of these questions is the same. It is that the untouchable is an unclean person not fit for social intercourse. Again, why will not a Brahmin priest officiate at religious ceremonies performed by an untouchable? Why will not a barber serve an untouchable? In these cases also the answer is the same. It is that it is below dignity to do so. If our aim is to demarcate the class of people who suffer from social odium then it matters very little which test we apply. For as I have pointed out each of these tests is indicative of the same social attitude on the part of the touchables towards the untouchables.[4]

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* The atrocious practice of untouchability and the social structure of caste are a manifestation of historic injustice that the constitutional vision sought to radically transform. We wish to acknowledge that we are, as a matter of ancestry, members of the dominant Savarna castes—a designation which has conferred upon us systemic educational and societal privilege that we have done nothing to deserve.
All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 22 February 2022.

1. BR Ambedkar. 'Annihilation of Caste', in Vasant Moon (compiler), *Dr Babasaheb Ambedkar Writings and Speeches Volume 1,* p. 23. Dr Ambedkar Foundation.
2. M.C.J. Kagzi. 1976. *Segregation and Untouchability Abolition*. Metropolitan Book Company, p. 207—'Untouchability connotes the acts, action or practice of non-touching of the members of the lowest by the caste Hindus, which means separation, segregation and isolation'.
3. BR Ambedkar. 'Note submitted to the Indian Franchise Committee (Lothian Committee) on 1st May 1932' in Vasant Moon (eds.), *Dr Babasaheb Ambedkar Writings and Speeches Volume 2,* p. 492. Dr Ambedkar Foundation.
4. Ambedkar, *Dr. Babasaheb Ambedkar Writings and Speeches Volume 2*, p. 492.

Dr Ambedkar was also cognizant of the evolving nature of untouchability in modern times. He took note of colonial documents reporting the relaxation of caste rules in urban centres, where a certain degree of social intercourse (working in the same mill, for example) was unavoidable. Based on the same, he reasoned that untouchability in the notional sense persisted, in terms of not partaking in food prepared by untouchables or sitting at the same table, or smoking from the same hookah.[5] In 21st century India, these practices continue in the form of preventing marginalised castes from accessing education in common schools, preventing entry into 'cleaner' occupations, denying land ownership, preventing construction of dignified dwellings, wearing decent clothes or keeping moustaches or riding a horse during wedding processions.[6] Indian courts have played an instrumental role in crafting, defining, and entrenching core constitutional values in society. The jurisprudence evolved by the courts has been amongst the defining features of the story of Indian constitutional democracy.[7] This robust judicial role can be understood as the institutional response of the courts to changing social realities and the realisation of a duty to participate in this transformation.[8]

Article 17 is the primary Article in the Constitution that deals directly with untouchability.[9] It states that untouchability is abolished and practising it in any form is forbidden. In this context, the interpretive role of Article 17 assumes importance because it is one of the elements of Part III of the Constitution that recognises horizontal rights.[10] A horizontal right can be enforced against fellow

5. Ambedkar, *Dr. Babasaheb Ambedkar Writings and Speeches Volume 2*, p. 493.
   Incidentally, a similar reasoning was adopted by the court in *Devarajiah* v. *B. Padmanna*, (1958) Mys. L.J. 88 : AIR 1958 Mys. 84.
   A literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons such as their suffering from an epidemic or contagious disease or on account of social boycott resulting from caste or other disputes.
   The Mysore High Court interpreted the meaning of 'untouchability' by relying on Article 17 and reasoning that the lack of definition of the concept implies that it is not untouchability in literal or grammatical sense but the practice that had historically developed. Using this reasoning, the Court concluded that 'where the acts and conduct complained of may at the most amount to an instigation to social boycott between Jains, such conduct does not come within the mischief of the Act'.
6. Ghanshyam Shah *et al.* 2006. *Untouchability in Rural India.* Sage Publications.
7. Menaka Guruswamy. 2015. 'Crafting Constitutional Values: An Examination of the Supreme Court of India', in Dennis Davis, Alan Richter and Cheryl Saunders (eds.), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law*, pp. 215, 222. Hart Publishing.
8. Guruswamy, 'Crafting Constitutional Values: An Examination of the Supreme Court of India', p. 222.
9. Article 17 Abolition of Untouchability, Constitution of India, 1950—
   Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.
10. Gautam Bhatia. 2019. *The Transformative Constitution*. Harper Collins.

citizens and non-State entities, whereas a vertical right can only be enforced against State and State entities as defined in Article 12 of the Constitution.[11] Article 17, along with Articles 23 and 24, mandate the prohibition of a socially corrosive practice, as an essential element of the Fundamental Rights chapter. This right can be exercised against fellow citizens as well. This 'explicit guarantee of fundamental rights'[12] manifesting in a constitutional declaration that 'untouchability is henceforth illegal',[13] forms the bedrock of 'transformative law' in the Indian social context.[14]

Through the identification of humiliating and exclusionary caste-based practices as a punishable constitutional tort, Article 17 signifies the resolve to create accountability against social tyranny practised against marginalised groups under an unjust social order.[15] Symbolically, Article 17 is strongly associated with Dr B.R. Ambedkar's legacy and finds a place in various anti-caste articulations.[16] The Constituent Assembly consciously left the definition of 'untouchability' to the statute that would be enacted in compliance with this Article.[17] However, P.K. Tripathi observed that even in the absence of legislation, Article 17 'will have the effect of invalidating not only all laws, customs, usages, practices etc., directly or indirectly recognising or encouraging the practice of untouchability, but even any sales, contracts, covenants or other private transactions having the effect of such recognition or encouragement'.[18]

This must be read with Article 35(a)(ii) which confers upon the Parliament exclusive power to make laws prescribing punishment for those acts which are declared to be offences under Part III of the Constitution.[19] In line with Dr Ambedkar's insistence that 'rights are no good without remedies', the Indian Parliament took upon itself the task to enforce criminal accountability for violation of civil rights of

11. Article 12, The Constitution of India, 1950—'In this Part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India'.
12. Sukadeo Thorat. 2006. *B. R. Ambedkar: Perspectives on Social Exclusion and Inclusive Policies*. Oxford University Press.
13. Martha Nussbaum. 2016. 'Ambedkar's Constitution: Promoting Inclusion, Opposing Majority Tyranny' in Tom Ginsburg and Aziz Huq (eds.), *Assessing Constitutional Performance*, p. 312. Cambridge University Press.
14. Marc Galanter. 1989. *Law and Society in Modern India.*
15. Arvind Narrain. 2019. 'What would an Ambedkarite Jurisprudence look like?', National Law School of India Review, 30(1). See also BR Ambedkar. 1947. *States and Minorities*, Article II, Section II and III.
16. Anurag Bhaskar. 2021. 'Ambedkar's Constitution' *J-CASTE,* 2(1): 109-131.
17. Kalpana Kannabiran. 2012. *Tools of Justice: Non-Discrimination and the Indian Constitution.* Routledge, pp. 214-215.
18. PK Tripathi. 1972. *Some Insights on Fundamental Rights.* NM Tripathi Publications, pp. 188-89.
19. Seervai, *Constitutional Law of India*. Vol 1, para 10.54, 319.

constitutionally emancipated classes of people.[20] Thus, the Parliament enacted the Untouchability (Offences) Act, 1955 which was later amended and renamed in 1976 as the Protection of Civil Rights Act, 1955, (Civil Rights Act) and supplemented by Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (Atrocities Act). The object of these enactments was to ensure that persons are not deterred from exercising any right accruing to them by reason of the abolition of 'untouchability' by Article 17.[21]

However, the sheer persistence and evolution of discriminatory practices means there is a need to re-assess the framework of and jurisprudence on these enactments.[22] Realisation of the protections of these enactments by the victimised and marginalised communities has been hindered by material, social, political, linguistic and ideological barriers to accessing the criminal justice system.[23]

The persistence of such practices and barriers is especially relevant when it comes to judicial interpretation of the various statutes enacted to protect the rights of those from marginalised castes. Though the exercise of legal interpretation is generally considered an objective and logically deductive exercise that operates within the disciplinary rules of an interpretative community that is the legal fraternity,[24] the presence of social dynamics and prejudices amongst lawyers and judges puts this objectivity to question.[25] How does the judiciary appreciate the complex social context in cases under the Atrocities Act? How does it navigate the protective bar against anticipatory bail in the Atrocities Act? Does the judiciary consider power imbalances between dominant and subordinate castes as contextual factors while granting procedural reliefs like quashing criminal proceedings against the dominant

20. Martha Nussbuam, 'Ambedkar's Constitution'.
21. Section 7, Untouchability (Offences) Act, 1955; Section 2(a) of Protection of Civil Rights Act, 1955.
22. Martha Nussbuam, 'Ambedkar's Constitution', p. 313.
    The India Human Development Survey, conducted by the National Council for Applied Economic Research, reported in 2014 that 30 percent of rural households and 20 percent of Indian households said that they practiced untouchability. (This would involve, for example, restrictions on who could enter the kitchen and use cooking utensils.)
23. Dinesh Khosla. *Myth And Reality Of The Protection Of Civil Rights Law*. Hindustan Publishing Corporation, p. 61.
24. Owen Fiss, 'Objectivity and Interpretation' (1982) Faculty Scholarship Series.
25. Armour. 1995. 'Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit', *Cal. L. Rev.* 83: 733; Moore. 1989. 'Trial by Schema: Cognitive Filters in the Courtroom', *U.C.L.A. L. Rev.,* 37: 273. Also see Interview with Prof (Dr) Kalpana Kannabiran, 'Rescuing Insurgent Possibilities of Indian Constitutionalism', Varta Ep. 1 *Law School Policy Review & Kautilya Society* (28 February 2021) available online at <https://lawschoolpolicyreview.com/2021/02/26/rescuing-insurgent-possibilities-of-indian-constitutionalism-varta-episode-1/> (accessed on 21 June 2021).

castes?[26] In some cases, judges are cognisant of some of the complex nuances of caste and untouchability which are brought out through their reasoning,[27] but in many others, the formalistic and strict application of the law is often accompanied by stray comments which demonstrate their ignorance of social reality.[28]

In this chapter, we argue that in some cases, the judiciary uses Article 17 in very interesting ways that engage with the socio-historical context of caste discrimination. We submit that such an approach can potentially serve as the bridge between equality on paper and in reality. In the first section, we select an illustrative sample of cases in which the judges have engaged with the historical and social context surrounding Article 17, the Civil Rights Act, and the Atrocities Act. We demonstrate that in these cases, the judges, by relying on statistics, academic writing, political activism, history, and sociological literature, read Article 17 in a very expansive and caste-conscious manner. In the second section, we select two cases with similar fact situations, both dealing with the issue of anticipatory bail for an offence under the Atrocities Act. One case explicitly uses Article 17 in its reasoning to arrive at the final outcome, while the other does not. We use this case study to illustrate how the application of Article 17 can lead to a more sensitive and nuanced

26. This includes the quashing of the First Information Report to prevent the abuse of process of court or to meet 'ends of justice' under Section 482 of Criminal Procedure Code, 1973. See Dhawan and Singh 'End of Justice? The Supreme Court's Order in *Hitesh Verma* v. *State of Uttarakhand*'.

27. See section II discussion on *State of Karnataka* v. *Appa Balu Ingale*, (1995) Supp (4) SCC 469. Also see *Union of India* v. *State of Maharashtra*, (2020) 4 SCC 761 where the Supreme Court acknowledged the barriers faced by SC/ST complainants in the criminal justice process, and recalled its 2018 judgment, *Dr Subhash Kashinath Mahajan* v. *State of Maharashtra,* (2018) 6 SCC 454, that had diluted various provisions of the Atrocities Act. For a helpful discussion, please see Shardha Rajam, 2021. 'Feminist Questions in *Danish Khan* v. *State* (*Govt. of NCT of Delhi*) - Part I', *Law and Other Things*, 16 May, available online at <https://lawandotherthings.com/2021/05/feminist-questions-in-danish-khan-v-state-govt-of-nct-of-delhi/> (accessed on 21 June 2021).

28. See, for instance, Anupama Rao. 2015. 'Death of a Kotwal: The Violence of Recognition', in *The Caste Question*, pp. 250-263. University of California Press. Rao critiques the judgment cited as C.R.40/91, delivered on June 18, 1992, by Special Court, Parbhani court's judgment acquitting the accused for lack of *mens rea* while being oblivious to the social context within which the collective violence against a village kotwal belonging to Scheduled Caste community took place when he entered the temple to protect himself from rain. Rao critiques the way the judge 'disconnected the narrative of historic caste tension in the village from his evidentiary findings regarding intent, thereby separating aspects of the case that were integrally related to each other'.

Also see, National Dalit Movement for Justice – NCDHR. 2020. Quest for Justice: Implementation of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 and Rules 1995, Status Report (2009-2018). National Dalit Movement for Justice (NDMJ) – NCDHR. Available online at https://www.indiaspend.com/wp-content/uploads/2020/09/NCDHR_REPORT-NEW2.pdf (accessed on 22 June 2021).

understanding of the issues as opposed to cases that do not.[29] Therefore, our broad submission is that the judiciary has used Article 17, the Civil Rights Act, and Atrocities Act to arrive at caste-sensitive judicial reasoning.[30] The resultant jurisprudence strives to achieve the idea of an egalitarian society as enshrined in the Constitution and as visualised by anti-caste activists and reformers. However, we acknowledge the reality of those judgments which are caste-insensitive in their reasoning and only erode the constitutional mandate of equality.

Article 17 as the Catalyst for Caste-Conscious Judicial Reasoning

In this sub-section, we select a few cases and analyse them in detail to show how the courts have used Article 17 along with constitutional concepts and historical, sociological, and academic writing in their judicial reasoning. We submit that this reasoning is caste-sensitive and aims to further the constitutional mandate of an equal and inclusive society. We discuss cases under two categories—*one,* judgments that engage with Article 17 vis-a-vis other constitutional values, and *two,* judgments that engage with Article 17 vis-a-vis regional history and sociology.

Enumerating Equality through Article 17

The Supreme Court had occasion to use its criminal appeal jurisdiction to expound on the constitutional vision behind Article 17 in *State of Karnataka* v. *Appa Balu Ingale*.[31] As per the Court's record, 'this was the first time after 42 years of the Constitution coming into force that a case has come up to this Court to consider the problem' of caste discrimination.[32] In this case, four accused were tried under Sections 4 and 7 of the Civil Rights Act for forcefully restraining the complainant and other Dalit persons, from taking water from a newly dug borewell on the

29. Our analysis of over 40 Supreme Court and High Court judgments (accessed through SCC Online) showed that. However, we have just picked some of the most relevant judgments to analyse in this paper, illustratively.
30. For example, the courts have taken similar proactive action in other PILs pertaining to effective implementation of the Atrocities Act. See *P. Rathinam* v. *State of Tamil Nadu*, 2009 SCC OnLine Mad 596 paras 3, 7, 10 [ordering the enforcement of burial rights for SC community in public cremation ground]; *M.P. Mariappan* v. *Deputy Inspector General of Police,* (2014) SCC OnLine Mad 493, paras 17, 25-26 [ordering prompt filing of complaints, and granting compensation for delay]; *National Campaign on Dalit Human Rights* v. *Union of India,* (2017) 2 SCC 432, paras 3, 17-18. The Supreme Court referred to the mandate of Article 17 to abolish untouchability and all disabilities flowing from it. Ultimately, the Court emphasised the government's duty to ensure effective implementation of the Atrocities Act.
31. (1995) Supp (4) SCC 469.
32. *Ingale,* para 11.

ground that he was an 'untouchable'.[33] The trial court and the appellate court convicted the accused, holding that the charge against them was proved beyond reasonable doubt.

However, the Karnataka High Court, in the second appeal, had expressed doubt about the testimony of four Dalit prosecution witnesses of the culprits' acts of restraining the complainant 'by show of force from taking water from a newly dug-up borewell (sic.) on the ground that they were untouchables'.[34] The High Court displaced the lower courts' finding that Sections 4 and 7 of the Civil Rights Act were violated, on the basis of this testimony and held that 'their evidence was not uniform in regard to actual words uttered by the accused persons and the manner they prevented the complainant party from taking water from the well'.[35]

While allowing the appeal against the acquittal of the accused under the Atrocities Act, the Supreme Court critiqued the high burden of proof imposed on the prosecution in the case. Justice K. Ramaswamy criticised the Karnataka High Court for having 'found doubt when none exists'. The Court observed that 'reasonable doubt does not mean the mind of a doubting Thomas, nor vacillation,

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33. Punishment for enforcing social disabilities.—Whoever on the ground of 'untouchability' enforces against any person any disability with regard to—

(iv) the use of, or access to, any river, stream, spring, well, tank, cistern, water-tap or other watering place, or any bathing ghat, burial or cremation ground, any sanitary convenience, any road, or passage, or any other place of public resort which other members of the public, or have a right to use or have access to;

shall be punishable with imprisonment for a term of not less than one month and not more than six months and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees. [Explanation.—For the purposes of this section, 'enforcement of any disability' includes any discrimination on the ground of 'untouchability'].

7. Punishment for other offences arising out of 'untouchability'.—

(1) Whoever—

(a) prevents any person from exercising any right accruing to him by reason of the abolition of 'untouchability' under Article 17 of the Constitution; or

(b) molests, injures, annoys, obstructs or causes or attempts to cause obstruction to any person in the exercise of any such right or molests, injures, annoys or boycotts any person by reason of his having exercised any such right;

(c) by words, either spoken or written, or by signs or by visible representations or otherwise, incites or encourages any person or class of persons or the public generally to practice 'untouchability' in any form whatsoever; or

(d) insults or attempts to insult, on the ground of 'untouchability', a member of a Scheduled Caste;

shall be punishable with imprisonment for a term of not less than one month and not more than six months, and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees.

34. *Ingale,* para 1.

35. *Ingale,* para 2.

nor pusillanimity, nor deep-seated prejudices or predilections covertly found in other walks of life'.[36] The Court found fault with the High Court's undue concentration on the 'absence of parrot like repetition' by illiterate witnesses, while also critiquing the judicial indifference towards 'the effect [that the accused's words and actions] produced in preventing … Dalits to exercise the right to draw water from public borewell'.[37]

The Court also appreciated a broad range of sociological literature about the status of Scheduled Castes and the need for the Atrocities Act.[38] Even though the Atrocities Act was not attracted here, the Court commented on how it is absolutely essential for such a special legislation to govern criminal offences against Scheduled Caste and Scheduled Tribe members. It noted how despite the preambular promise of fraternity and dignity and the enactment of strong laws, '[Untouchability] is being practiced with impunity more in breach. More than 75% of the cases under the Act are ending in acquittal at all levels'.[39] The Court categorically highlighted judicial apathy and 'lack of proper perspectives even by the courts in tackling the naughty problem'.[40]

It further held that untouchability was a 'crime against the Constitution', as it was rooted in an attitude that considers Dalits as 'pollutants, inferiors and outcastes'.[41] Hence, the Court concluded that it was 'not founded on *mens rea*'.[42] It also provided substance to constitutional guarantees provided to marginalised sections of the population by emphasising the constitutional vision. In particular, it expressed the vision behind Article 17 of the Constitution as follows:

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36. *Ingale,* para 37.
37. *Ingale,* para 38.
38. Paras 15-19 includes many sources including but not limited to James M. Freeman. 1986. 'Consciousness of Freedom among India's Untouchables'. *Social and Economic Development in India, a Reassessment* Dilip K. Basu and Richard Sision (eds), Sage Publication; Dinesh Khosla. *Myth And Reality Of The Protection Of Civil Rights Law*. Hindustan Publishing Corporation; Lelah Dushkin. 1967. *The Policy of the Indian National Congress towards the Depressed Classes and Historical Study*; M.C.J. Kagzi. 1976. *Segregation and Untouchability Abolition*; L Elayaperumal and Others. 1969. *Report of the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes and Connected Documents.* Department of Social Welfare. Available online at https://indianculture.gov.in/report-committee-untouchability-economic-and-educational-development-scheduled-castes-and-connected (accessed on 11 October 2021).

    For a helpful discussion on how law draws on diverse forms of knowledge to frame a cogent narrative, see JB Whyte. 1985. 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life', *UCLR*, 52: 684, 698.
39. *Ingale*, para 11.
40. *Ingale*, para 11.
41. *Ingale*, para 21.
42. *Ingale*, para 21.

> The thrust of Article 17 and the [Civil Rights] Act is to liberate the society from blind and ritualistic adherence and traditional beliefs which [have] lost all legal or moral base. It seeks to establish a new ideal for society - equality to the Dalits, at par with [the] general public, absence of disabilities, restrictions or prohibitions on grounds of caste or religion, availability of opportunities and a sense of being a participant in the mainstream of national life.[43]

The Court proceeded to articulate the considerations that judges should be mindful of. It urged them to 'always keep at the back of his/her mind the constitutional goals and the purpose of the [Civil Rights] Act and interpret the provisions of the [Civil Rights] Act in the light thus shed to annihilate untouchability; to accord to the Dalits and the Tribes right to equality; social integration a fruition and fraternity a reality'.[44]

This can be characterised as an instance where the Supreme Court used its high public office to drive home a social message to ensure effective implementation of the special legal safeguards of Scheduled Castes. The Court showed judicial sensitivity towards the weaponisation of 'legal registers and legal aesthetics' as 'defensive shields against the demands of historically marginalized groups', thereby re-inscribing 'the very structural inequalities anti-discrimination laws are intended to address'.[45] The Court thus conducted extensive analysis of data and historical context surrounding Article 17 to frame a cogent narrative for furthering social justice.

The concern that accompanies cases involving caste discrimination is about how the police respond to these complaints in the first instance. The Supreme Court has addressed this concern in the case of *Prathvi Raj Chauhan* v. *Union of India* in 2020.[46] The Atrocities Act prevents the accused from being granted anticipatory bail, that is, bail for an impending arrest. In 2018, the Supreme Court had held that there was no absolute bar against the grant of anticipatory bail in cases under the Atrocities Act if no *prima facie* case is made out,[47] thus diluting the bar on anticipatory bail placed by the Atrocities Act. Following this, the Parliament amended the Atrocities Act by introducing Section 18A which affirmed the bar

43. *Ingale*, para 36.
44. *Ingale*, para 35.
45. Sandhya Fuchs. 2020. ''We Don't Have the Right Words!': Idiomatic Violence, Embodied Inequalities, and Uneven Translations in Indian Law Enforcement', *PoLAR: Political and Legal Anthropology Review*, 44: 177—
    'This process is often the result of a dual breakdown of translation. On the one hand, police officers often refuse to engage with the local linguistic idioms of marginalized communities in a way that makes their experiences legible to the law. On the other hand, survivors of discriminatory violence are themselves hesitant to make their suffering explicit due to trauma and fear of being publicly humiliated. Ultimately, this process can instill further feelings of inadequacy in victims of discrimination at the very moment they try to claim their rights.'
46. (2020) 4 SCC 727, para 25.
47. *Dr Subhash Kashinath Mahajan* v. *The State of Maharashtra*, (2018) 6 SCC 454.

against the grant of anticipatory bail, 'notwithstanding any judgment or order or direction of any Court'. In *Chauhan*, the constitutional validity of this amendment was challenged.

The case in *Chauhan* provided an opportunity for the Court to comment on the bar against granting anticipatory bail. Quoting Kabir and Guru Nanak, Justice Ravindra Bhat stressed the long struggle against caste oppression.[48] He emphasised how the preambular commitment to non-discrimination, fraternity, and dignity found substantive expression in Article 17.[49] He further relied on the constitutional prohibition of untouchability and all 'direct and indirect (but virulent, nevertheless) forms of caste discrimination' through Article 17 to underline the constitutional salience of the Civil Rights Act and the Atrocities Act.[50] While affirming the amendment, he explained that the legislative removal of direct and indirect caste-based practices furthered the constitutional goal of a casteless society that valued equality and fraternity.[51] He also took note of the National Human Rights Commission's report, which showed that 'despite enacting stringent penal measures, atrocities against [S]cheduled [C]aste and [S]cheduled [T]ribe communities continued; even law enforcement mechanisms had shown a lackadaisical approach in the investigation and prosecution of such offences'.[52] Most importantly, he highlighted the grim reality of persistent caste atrocities in the report of the National Crime Records Bureau[53] to stress the need to 'keep oneself reminded that while sometimes (perhaps mostly in urban areas) false accusations are made, those are not necessarily reflective of the prevailing and widespread social prejudices against members of these oppressed classes'.[54] Using these sources, the Supreme Court in this instance upheld the validity of Section 18A of the Atrocities Act.

Therefore, *Ingale* and *Chauhan* can be read as complementary judgments, which emphasise the need for caste consciousness and sensitivity, both from the police and the judiciary, when it comes to dealing with issues of caste discrimination. By emphasising on such a value, these judgments also further the goals of equality and inclusivity as enumerated by the Constitution, thus locating Article 17 within these broader goals.

48. *Chauhan,* paras 19-20.
49. *Chauhan,* paras 23-25.
50. *Chauhan,* paras 25-27.
51. *Chauhan,* paras 25.
52. *Chauhan,* para 27; See KB Saxena. 2009. *Report on Prevention of Atrocities Against SCs & STs.* National Human Rights Commission, available online at https://nhrc.nic.in/sites/default/files/reportKBSaxena.pdf (accessed on 11 October 2021).
53. *Chauhan,* para 30.
54. *Chauhan,* para 31.

Locating the Non-Exclusion Principle in Article 17

In one of the most recent judgments on Article 17, Justice Chandrachud referenced Dr Ambedkar in *Indian Young Lawyers Association* v. *State of Kerala*[55] and noted that the Constitution of India is the end-product of the struggle for social emancipation against an unequal social order.[56] According to him, it is the foundational document that aims at social transformation and the creation of an equal society. This sets the base for the anti-exclusion principle.

Justice Chandrachud notes that at the root of untouchability mentioned in Article 17 is the exclusion of certain individuals from the social order and equality.[57] The basis of this exclusion is the purity-pollution binary, which refers to social hierarchies created on the basis of what is considered pollution—for example, the physical touch of lower caste persons. Therefore, untouchability is thrust upon them by social compulsion and forcible exclusion from most aspects of social life. Justice Chandrachud holds that if this principle is extrapolated, Article 17 can stretch beyond caste untouchability to cover untouchability based on other forms of exclusion—for example, menstruation, as was the case in *Indian Young Lawyers Association*.[58]

In this case, a Constitution Bench of the Supreme Court, by a 4-1 majority, ruled in favour of women's entry into the Sabarimala temple.[59] Justice Chandrachud held that excluding menstruating women from the temple constitutes a form of untouchability under Article 17.[60] He referred to the Constituent Assembly Debates where the members were not in favour of restricting the way 'untouchability' was meant to be read.[61] When a member of the Assembly sought to introduce an amendment that explicitly mentioned that the 'untouchability' referred to in Article 17 was due to caste or religion, the Assembly rejected it, as they felt that it would limit the scope of this Article.[62] Justice Chandrachud adopted an expansive

55. (2018) SCC OnLine SC 1690.
56. *Indian Young Lawyers Association*, para 74.
57. Gautam Bhatia. 2018. 'The Sabarimala Judgment – III: Justice Chandrachud and Radical Equality', *IndConLawPhil,* 29 September, available online at <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/> (accessed on 4 December 2021).
58. *Indian Young Lawyers Association,* para 78; Gautam Bhatia. 2019. *Transformative Constitution.* Harper Collins, p. 179.
59. *Indian Young Lawyers Association*.
60. Suhrith Parthasarathy. 2020. 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in the Sabarimala Case', *Oxford Human Rights Hub Journal*. 3(2).
61. Parthasarathy, 'An Equal Right to Freedom of Religion', p. 12.
62. 'Constituent Assembly Of India Debates (Proceedings) - Volume VII, 29 November 1948', *Constitution of India,* available online at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-22 (accessed on 22 June 2021).

interpretation of 'untouchability *in any* form' in Article 17. 'The "in any form" prescription has a profound significance in indicating the nature and width of the prohibition', wrote Justice Chandrachud, observing, '[e]very manifestation of untouchability without exception lies within the fold of the prohibition…'.[63] He located the exclusion of menstruating women as stemming from the same notions of purity and pollution, which are some of the governing principles behind caste exclusion as well.[64] Thus, an 'anti-exclusion' principle was laid down, which characterised 'any form of social exclusion of identities' to be 'constitutionally suspect'.[65]

Therefore, Article 17 enabled the judge to go beyond the text of the Constitution and draw constitutional principles and values from the history of Indian society. The origins of untouchability and its association with the rigidity of the caste system were explored in the judgment to unearth the basis of such exclusion.[66] Article 17 recognises the subjugation of certain groups through forced exclusion and strives to eliminate such practices and re-imagine society as inclusive of such groups.

This case has far-reaching implications and has spurred progressive legal decisions. In *Nirjhari Mukul Sinha*, the High Court of Gujarat relied on Justice Chandrachud's reasoning in *Indian Young Lawyers Association* to hold that women have fundamental rights which would prevent and prohibit any exclusionary practice against them on the basis of their menstrual status. Any activity that does so would violate Article 17.[67] This is again rooted in the anti-exclusion principle, which takes cognizance of the fact that women are excluded from touching drinking water, vessels, cooking, entering the kitchen and sleeping quarters, entering places of worship, and are forced to stay in isolation, away from their family while menstruating.[68] These practices are based on the purity-pollution binary, wherein menstruating women are thought of as dirty, unclean, and impure presenting a contaminating threat to traditionally 'pure' areas and activities, such as the kitchen

63. *Indian Young Lawyers Association,* para 78.
64. *Indian Young Lawyers Association,* para 78; Gautam Bhatia. 2019. *Transformative Constitution.* Harper Collins, p. 179.
65. *Indian Young Lawyers Association,* para 8.
66. We acknowledge that there were many critiques and criticisms of this judgment, especially by Dalit scholars on how anti-caste activism has been appropriated in this case to essentially create rights for (upper-caste women). We agree that it is a valid critique, and we only refer to this case to make a limited point that rich jurisprudence on equality as a concept in itself can emerge from the study of Article 17. We also believe that the intersectional analysis carried out by Justice Chandrachud is an important method of analysis when reasoning on issues that affect identities on different axes such as gender, caste, class, etc.
67. *Nirjhari Mukul Sinha* v. *Union of India*, R/Writ Petition (PIL) No. 38 of 2020 decided on 26 February 2021 (The High Court of Gujarat).
68. *Nirjhari Mukul Sinha,* para 13.

and worship.[69] The Gujarat High Court recognised that this not only has an effect on their daily work but also has a huge impact on their mental health due to the stigma arising from menstruation and the consequent exclusion of women.[70] Therefore, the Gujarat High Court passed directions to prohibit the social exclusion of women from all places, whether public, private, religious, or educational, by grounding these prescriptions under the mandate of Article 17. It also instructed the Government, NGOs, and private parties to conduct awareness campaigns on menstruation and hygiene from a scientific perspective. This judgment is important because it addresses the private and insidious nature of exclusion, even within one's own home.

Therefore, we can see that Article 17 has far-reaching implications not just for the issue of caste untouchability, but plays a huge role in addressing instances of social exclusion based on the purity-pollution binary. This is important, as it clearly enumerates the basis of an egalitarian society—fraternity and anti-exclusion—which both are logical extensions of the law against untouchability.

Article 17 in the Context of Regional History and Sociology

Article 17 cannot be read as a provision in isolation. It is always situated within a certain historical context, which takes different forms in different regions. This sub-section will discuss two cases of caste discrimination and will analyse them *vis-a-vis* the regional history and politics of the concerned place.

The Board of Trustees Arulmighu Poottai Mariamman Temple v. *Revenue Divisional Officer-cum-Executive Magistrate* is a case that dealt with a temple procession deliberately avoiding a Dalit colony.[71] The chariot procession of the Mariamman Temple was not taken through the colony of the Adi Dravidars residing in that village. The petitioners argued that this amounted to untouchability. The respondents argued that the specific route of the procession was a long-standing custom that followed the Agama Shastras, thus protected under the right to religion in Article 25.[72] They argued that the law could not be used as a weapon to change that custom.

The Court relied on M.N. Srinivas' concept of Sanskritisation to say that it is highly unlikely that a regional, sub-cultural deity peculiar to South India like Mariamman and the instant temple would have been built according to the Agama

69. Meena Gopal. 2013. 'Ruptures and Reproduction in Caste/Gender/Labour', *Economic and Political Weekly*, 48(18): 91.
70. *Nirjhari Mukul Sinha,* para 14.
71. 2009 SCC OnLine Mad 2640.
72. Article 25(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

Shastras.[73] The Court also cited Dr A.K. Perumal's work which analyses the 'urbanisation and brahmanisation' of folk gods.[74] This argument follows a corpus of work that links the integration of Vedic Brahmanism and tribal culture to the establishment of the caste system.[75] As Brahmins started establishing their superiority in the Indian subcontinent, many regional deities and folk gods were co-opted into the Brahmanical religious fold over time.[76] The Court notes that the rituals and orthodox practices associated with sanskritised temples also began to be applied to regional deities and temples housing folk gods.[77]

This observation by the Court is important as it stresses upon the unique regional history of the Indian subcontinent. The 'urbanisation of folk gods' referred to by the Court addresses the integration and superimposition of Brahmanic culture on tribal cultures, which means that the tribes are actually the natives of India, with a legitimate claim to the land and equal participation in all societal activities.[78] The Court is using the history of folk temples in South India to legitimise the claims of the Adi Dravidars to equally participate in religious activities. Article 17 acts as a bridge in this case between history and the law resulting in a specific interpretation that furthers the mandate of this constitutional provision.

Hence, the Court held that the Agama Shastra rituals would not be endemic to the Mariamman Temple and the procession based on such Shastras cannot be protected by Article 25. The Court, citing *Pinnaiyakal* v. *District Collector*,[79] reiterated that the claim of the long-standing custom of the chariot procession of the Mariamman Temple being taken through a particular route was explicitly rejected by the Hindu Religious and Charitable Endowments Department of Tamil Nadu in

73. *Mariamman Temple*, para 19.
74. *Mariamman Temple,* para 19.
75. R. S. Sharma. 2017. *India's Ancient Past*, Oxford India Paperback, p. 203.
76. R. G. Bhandarkar. 1913. 'Vaiṣṇavism, Śaivism and Minor Religious Systems', p. 102.
77. *Mariamman Temple,* para 19.
78. In the context of the Court's critique of adoption of Brahmanical practices in South India, it is interesting to consider the historical arguments of the Dravidian movement. In particular, see anti-caste philosopher Jotiba Phule's argument in Gail Omvedt. 1971. 'Jotirao Phule and the Ideology of Social Revolution in India', *Economic and Political Weekly,* 6(37): 1969-1979— 'Untouchables, for example, were seen not as a group unique within India but as the most oppressed section of the masses, *part of the original community of the peasants* (emphasis added). The masses, from peasants through 'untouchables' and tribals, were the original inhabitants of India, "sons of the soil", writes Gail Omvedt interpreting Jotiba Phule. It is a re-interpretation of the Aryan theory which claims that the higher caste Hindus, such as Brahmins and Kshatriyas, were descendants of the ruling Aryan class. Phule turns this argument on its head and argues that upper caste Hindus are, then, the original invaders and Sudras and 'untouchables' are those who have the true claim to Indian soil. This, then, legitimises their claim to land, and associated religious practices.
79. 2008 (3) TLNJ 640 (civil).

Pinnayakal. Therefore, the Court reasoned that since there was no proof of a long-standing custom and given that this claim was explicitly rejected by the state authorities, Article 25 would not even be attracted here as there is no religious right to protect. Therefore, the attempt of Caste Hindus to deny the rights of the Dalits amounts to plain untouchability in this case, violating Article 17. The Court held as follows:

> The attempt by the Trustees to prevent the Dalits from taking the temple car to the Colony during the Temple Car festival held during the month of Aadi cannot be accepted by this Court. Any such order in their favour will amount to perpetuating untouchability which has been specifically prohibited by Article 17 of the Constitution of India… The Government cannot be a spectator in denying the rights of the Dalits of the colony and the constitutional mandate will have to be enforced through all legal means.[80]

Therefore, this case is important as it uses and locates Article 17 to understand the regional history and validate the claims of Adi Dravidars to both land and the right to be equally included in religious practices.

Another case that incorporates regional history and state politics in a similar way is *Pothumallee* v. *District Collector.*[81] This case was one that dealt with issues relating to Anganwadi workers in the State of Tamil Nadu.[82] There were several overlapping issues here. The first issue was that the reservation scheme was not being followed in the appointment of Anganwadi workers in a district of Tamil Nadu. The petitioners argued that this violated Article 17. However, the state relied on a letter from the Ministry of Human Resource Development and the Department of Women and Children that stated that Anganwadi workers were merely 'honorary workers from the local communities' and not holders of a civil post, as they were not statutory authorities or employees. Therefore, reservations would not be applicable to them. The second issue was that Anganwadi workers were discriminating against Dalit children in healthcare by treating them as 'untouchables'. They did not touch them to serve food or medicines, made them sit separately, spoke to them harshly, and served them food last. The state did not offer any response to this.

The Court rejected the state's contention that Anganwadi workers were honorary workers and that there was no statutory mandate for reservation. The Court referred to the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 (1993 Act) which explicitly provided for reservations in posts of public service. The Court held that the term 'services under

80. *Mariamman Temple,* para 26.
81. *Pothumallee* v. *District Collector*, 2010 SCC OnLine Mad 3176.
82. *Pothumallee* v. *District Collector*, 2010 SCC OnLine Mad 3176.

the state' has been defined widely so as to include Anganwadis and that appointments made to Noon Meal centres and Anganwadi centres would definitely attract the provisions of this Act.[83] Therefore, it was held that the 1993 Act imposes the mandate of reservation even in such posts.

The Court also drew a link between untouchability and segregated dining. The Court recognised that in villages, the schools and Anganwadi centres are set up in upper-class hamlets and are likely to be dominated by upper-caste individuals.[84] Therefore, the criteria for choosing honorary workers from 'local communities' would make it impossible for Dalits to be employed in such centres and schools.[85] If there was no reservation, upper caste families would not allow Dalit cooks and helpers to be a part of the centres as they did not want Dalits to feed their children. The Court held that such apprehension and discrimination by caste Hindus when they did not want Dalits to feed their children is a form of apartheid.[86]

This reasoning directly draws from Periyar and Ambedkar's arguments on the prohibition of inter-marriage and inter-dining being a prominent way to maintain rigid caste hierarchies.[87] E.V. Ramasamy or Thanthai Periyar, as he is known in Tamil Nadu, is the Father of the Dravidian Movement. He was a politician and an anti-caste activist who campaigned and introduced socio-political reforms in Tamil Nadu to break down Brahmanical hegemony. He writes on inter-dining, 'Even the Adidravidas are disinterested in the welfare of their society. It is because the Dravidians and even amongst the Adidravidians one set of people do not dine with others. They are now separated into innumerable castes unnecessarily. People of one caste do not dine with those of other castes. They do not have one common policy or religion'.[88] Similar to Ambedkar, he rooted casteism in the principle of exclusion and hierarchies, enforced through restrictions on marriage and dining, two of the most important aspects of social life. The Court makes an explicit reference to Periyar, 'E.V. Ramasamy (known as Periyar) opposed the practice of separate dining arrangements for Brahmin and the non-Brahmin students in Cheranmadevi Gurukulam'.[89]

By recognising this line of reasoning, the Court re-established this strand of social reform by incorporating it into judicial reasoning and state policy on the reservation. By reading these aims into the 1993 Act, the Court interlinks Article 17,

83. *Pothumallee,* para 7.8.
84. *Pothumallee,* para 8.1.
85. *Pothumallee,* para 8.1.
86. *Pothumallee,* para 8.2.
87. M.S.S. Pandian. 2007. *Brahmin & Non Brahmin*. Permanent Black, p. 190.
88. K Veeramani (ed.) 2016. *Collected Works of Periyar EVR.* The Periyar Self-Respect Propaganda Institution, p. 121.
89. *Pothumallee,* para 3.3.

reservations in Article 15, and state policies. History, anti-caste activism, and politics are incorporated through the mention of untouchability[90] and the 1993 Act.[91] This shows the impact of the constitutional mandate which is implemented through various entry points into the law.

The Court proposed that Dalit cooks be hired, stating that 'communal feasting and food being served to various groups by engaging cooks from underprivileged society will remove instantaneously some form of untouchability and will be a milestone in our march to an egalitarian society'.[92] This judgment recognises the importance of inter-dining for the social integration of 'untouchables' into society. Its reliance on history and anti-caste activism in Tamil Nadu grounds Article 17 in such a way that the reasoning reflects judicial sensitivity to local culture and politics.

The Interpretive Impact of Article 17

This section illustrates the impact of Article 17 on judicial reasoning and outcomes while interpreting provisions of the Atrocities Act. This section will compare two cases—one of the cases has used Article 17 and the goals inherent in that provision in the judicial reasoning, while the other judgment has not. We submit that judgments that substantially engage with Article 17 when deciding cases under the Atrocities Act, the Civil Rights Act, and connected issues, such as bail, usually arrive at more caste-sensitive outcomes than ones that do not.[93] While making this claim, we are cognizant of the fact that engagement with Article 17 does not always correspond with caste-sensitive reasoning, and various factors remain relevant to the study of judicial decision-making.[94] However, Article 17 and its constitutional mandate appear to play a substantial role in judicial decision-making.

90. *Pothumallee,* para 8.2, 8.3.
91. *Pothumallee,* para 7.6.
92. *Pothumallee,* para 8.2.
93. Our analysis of over 40 Supreme Court and High Court judgments (accessed through SCC Online) showed that most judgments cited Article 17 to emphasise the constitutional vision behind the mandate of enacting Civil Rights Act, Atrocities Act and other social justice legislations. See, for instance, *Pavadai Gounder* v. *State of Madras*, AIR 1973 Mad 458 where the Madras High Court rejected the Article 14 challenge to housing scheme for Scheduled Castes, and reasoned that Article 17 prohibited 'singling out the [Scheduled Caste] community for hostile treatment as a socially backward community', and that it does not 'prohibit the State from introducing and evolving a scheme which improves their conditions of living'. Taking a purposive approach to the interpretation of Article 17 and 15, the Court defended ameliorative policies as they represented the reverse of discriminatory treatment.
94. Pablo T. Spiller and Rafael Gely. 2008. *Strategic Judicial Decision-Making.* Oxford University Press, available online at <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199208425.001.0001/oxfordhb-9780199208425-e-3> (accessed on 7 October 2021).

Before discussing these cases, it is important to note that the Indian jurisprudence has predominantly read the rights of the accused 'in a manner that narrows the field of limitation, and expands the power of the State, in the interests of public order' while expressing 'disenchantment with procedural technicalities and niceties'.[95] In this context, it is interesting to analyse how this conventional logic operates in criminal proceedings under the Atrocities Act.

The two cases which are analysed in this section are *Danish Khan* v. *State (Govt. of NCT of Delhi)*[96] and *Manju Devi* v. *Onkarjit Singh Ahluwalia*.[97] Both these cases involve the adjudication of anticipatory bail applications in cases of caste insults against women from Dalit communities. Section 18 of the Atrocities Act, 1989 places a bar on the grant of anticipatory bail[98] for the accused in offences under the Atrocities Act. Under ordinary criminal law, anticipatory bail can be sought under Section 438 of the Criminal Procedure Code, 1973 by persons apprehending arrest, and is granted on the basis of the person's criminal background, ability to escape from justice, and the likelihood of committing similar offences. However, Section 18 bars the grant of anticipatory bail in cases under the Atrocities Act to the accused in order to protect the complainant from victimisation by the accused.[99] This provision has been a source of judicial and political controversy, leading to a number of decisions of the constitutional court.[100] As described before, Parliament inserted Section 18A in the Atrocities Act which reiterates that '[t]he provisions of Section 438 of the [Criminal Procedure] Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court'.[101]

95. Aparna Chandra and Mrinal Satish. 2016. 'Criminal Law and the Constitution', in Sujit Choudhary *et al* (eds). *Oxford Handbook on Indian Constitution,* p. 824. Oxford University Press.
96. 2021 SCC OnLine Del 3405.
97. (2017) 13 SCC 439, para 9-10.
98. Section 438 of the Code of Criminal Procedure, 1973 ('CrPC') provides an avenue for anticipatory bail to a person apprehending arrest on criminal charges.
99. Victimisation implies acts of reprisal and revenge against complainants for filing a complaint. The include intimidation to withdraw complaints, threat of physical violence and other forms of oppressive conduct. K. I. Vibhute. 2002. 'Right to Live with Human Dignity of Scheduled Castes and Tribes: Legislative Spirit and Social Response – Some Reflections', *Journal of the Indian Law Institute*, 44(4): 469-503.
100. This section has been held valid in a series of cases including *Jai Singh* v. *Union of India*, AIR 1993 Raj 177, paras 62-63; *KC Ravindran Pillai* v. *Union of India,* (1997) Cr LJ 1231; *Shakuntla Devi* v. *Baljinder Singh,* (2014) 15 SCC 521.
101. See Section 18A(2), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018, available online at https://socialjustice.nic.in/writereaddata/UploadFile/PoA_Act_20186370638525686331 4.pdf (accessed on 8 December 2022).

However, despite the reiteration of the constitutionality of Section 18 in a number of cases, its application remains inconsistent.[102]

Danish Khan v. *State of NCT of Delhi,*[103] was a case involving gender-based violence and caste slurs against a woman from a Scheduled Caste. As per the statement of the complainant, the accused obtained her consent for sex on the false promise of marrying her. When she asked him to follow through with his promise, he verbally abused her and refused marriage.[104] Criminal charges were framed against the accused. This harassment continued from 2013 to 2020. Citing an incident that happened on 8 February 2020, the complainant submitted an additional statement that when she refused romantic advances from the accused, he abused her with her caste names and denigrated her for expecting him to marry a 'low-caste' person.[105]

Based on this additional statement, the prosecution added charges under Section 3(2)(v) of the Atrocities Act in 2021. This Section stipulates a higher punishment for the commission of grave offences under the Indian Penal Code against persons belonging to the SC/ST community.[106] It is important to mention that this Section was subject to many conflicting judgments regarding the intention of the accused to commit the offence *solely* on the basis of caste. Prior to the 2015 amendment of the Atrocities Act, Section 3(2)(v) provided for a greater penalty to culprits who committed such serious offences against SC/ST persons 'on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe'. Since the restrictive

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102. This caste-blind approach of courts has also been observed in *Asharfi* v. *State of Uttar Pradesh,* (2018) 1 SCC 742 and *Pavas Sharma* v. *State of Chhattisgarh,* 2021 SCC OnLine Chh 288. This was recently critiqued recently by a two-judge bench of the Supreme Court in *Patan Jamal Vali* v. *State of Andhra Pradesh,* 2021 SCC OnLine SC 343.

103. 2021 SCC OnLine Del 3405;
Shardha Rajam. 2021. 'Feminist Questions in *Danish Khan* v. *State (Govt. of NCT of Delhi)* - Part I', *Law and Other Things* available online at <https://lawandotherthings.com/2021/05/feminist-questions-in-danish-khan-v-state-govt-of-nct-of-delhi/> (accessed on 21 June 2021).
Jaiyesh Bhoosreddy. 2021. 'Guest Post: Analysing of 3(2)(v) SCST Act in light of *Danish Khan* v. *State' Proof of Guilt*, March 19.

104. *Danish Khan,* para 5.

105. Para 6 and of the order mention the complainant's statement under Section 164 of Criminal Procedure Code, 1973 alleging that when she refused romantic advances from the accused, he abused her with her caste names and denigrated her for expecting him to marry a 'low-caste' person.

106. Section 3(2)(v) reads this way after 'The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015'.
'3. Punishments for offences of atrocities.— ...
(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—
(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;'.

judicial interpretation of 'on the ground' as 'only on the ground' led to a high rate of acquittals, the words 'on the ground of' were substituted with 'knowing that such person is a member of a Scheduled Caste or Scheduled Tribe'.[107] This means that mere knowledge that the victim is from the SC/ST community is enough to attract Section 3(2)(v) of the Atrocities Act. There is no need to demonstrate that the accused has committed such an offence *only* on the basis of the victim's caste. This amendment, thus, makes the judicial regime sensitive to the kind of evidence that is likely to be generated in such cases'.[108]

The Delhi High Court granted anticipatory bail to the accused. While allowing the application for anticipatory bail under Section 438 of the CrPC, the Delhi High Court held in 2021 that the offence would not attract the Atrocities Act as the crime was not committed *solely* on the basis that the woman belonged to the SC/ST community. The Delhi High Court rejected the textual interpretation of Section 3(2)(v) which considers knowledge of the caste status of the complainant to be sufficient for the offence.

Therefore, contrary to the letter and spirit of the Section 3(2)(v), the Delhi High Court held that 'For an IPC offence to attract Section 3(2)(v) of the SCST Act [Atrocities Act], it is necessary that the *offender's action is impelled by the consideration that the victim is a member of a Scheduled Caste or a Scheduled Tribe*…since this Special Act was enacted with a view to making more stringent provisions for punishment … of offences under the IPC which *target* persons belonging to a Scheduled Caste or a Scheduled Tribe *by reason of* their caste status' (emphasis added).[109] Applying this standard for *mens rea*, which was explicitly barred by the 2015 amendment to the Atrocities Act, the Court did not consider the accused's knowledge of the complainant's caste status and limited its factual analysis to the delayed inclusion of the Section to the FIR.

Further, the general law on anticipatory bail requires that such a remedy is granted sparingly in appropriate cases with due care and caution. Circumstances under which it may be granted included special cases indicating that the accused may be arrested on baseless ground or that the accusations have been made with a dishonest or malicious motive.[110] This case goes against the general principles of granting anticipatory bail as well.

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107. *Patan Jamal Vali* v. *State of Andhra Pradesh,* 2021 SCC OnLine SC 343; See Jwalika Balaji and Prannv Dhawan. 2021. 'Intersectionality Matters: The Supreme Court Judgment in *Patan Jamal Vali* v. *State of Andhra Pradesh*', *Centre for Law and Policy Research Blog*, 14 May, available online at https://clpr.org.in/blog/intersectionality-matters-the-supreme-court-judgment-in-patan-jamal-vali-v-state-of-andhra-pradesh/.
108. Atrocities Act, 2015 Amendment. See *Patan Jamal Vali*.
109. *Danish Khan,* para 17.
110. *Chauhan*, para 25.

The Court in *Danish Khan* concluded that 'the offences under section 376/354D/506 IPC, alleged to have been committed for the period between 2013 and 2019, had no reference to the prosecutrix's caste'.[111] Therefore, the Court granted anticipatory bail to the accused as 'the question of Section 18 or Section 18A(2) of the SCST Act [Atrocities Act] getting triggered does not arise'.[112] Notably, in this case, where the Court granted this significant pre-trial remedy, the order did not mention or consider Article 17.

This can be contrasted with the Supreme Court decision in the case of *Manju Devi* v. *Onkarjit Singh Ahluwalia*. The Supreme Court was hearing an appeal in a case where the Patna High Court had denied anticipatory bail to the accused who had allegedly offended the modesty of a Scheduled Caste domestic worker, and hurled caste slurs at her.[113] Thus, the question was similar to the one in *Danish Khan*—whether the bar under Section 18 would prevent the accused from seeking anticipatory bail.

Contrary to *Danish Khan*, the Court did not engage in the pre-trial determination of the merits of the case and did not grant the statutorily forbidden anticipatory bail remedy to the accused. The Supreme Court used Article 17 as a judicial tool to emphasise that the Atrocities Act was enacted to prevent and punish a special class of constitutionally forbidden acts and practices arising out of untouchability.[114]

The Court observed that

> It is undoubtedly true that Section 438 of the Code, which is available to an accused in respect of offences under IPC, is not available in respect of offences under the SC/ST Act. The offences enumerated under the SC/ST Act fall into a separate and special class. Article 17 of the Constitution expressly deals with abolition of 'untouchability' and forbids its practice in any form and also provides that enforcement of any disability arising out of 'untouchability' shall be an offence punishable in accordance with law.[115]

The Court reasoned that the bar on anticipatory bail needs to be appreciated in the context of this constitutional prohibition and existing social conditions. It explained that the purpose of Section 18 of the Atrocities Act is to prevent the accused from intimidating and threatening the complainant.[116] It emphasised the existence of 'every possibility' that the accused would 'terrorise' the complainant

111. *Khan,* para 18.
112. *Khan,* para 20.
113. *Manju Devi* v. *Onkarjit Singh Ahluwalia,* (2017) 13 SCC 439, paras 9-10.
114. *Manju Devi,* para 14.
115. *Manju Devi,* para 14.
116. *Manju Devi,* para 14.

after having publicly denigrated them. Thus, it concluded that the crimes notified under Section 3(1) of the Atrocities Act are not comparable to crimes penalised by the Indian Penal Code, 1860.[117] This possibility of existing caste hierarchies, subordination, and victimisation was not considered by the Delhi High Court in *Danish Khan.*The juxtaposition of the reasoning and outcome in *Danish Khan* and *Manju Devi* illuminates the impact of substantive engagement with Article 17 in judicial decision-making.

It is worth mentioning that the prosecution had relied upon the *Manju Devi* case in *Danish Khan* but the High Court of Delhi failed to apply the holding in *Manju Devi*. Not only did the reference to Article 17 in *Manju Devi* underscore the constitutional imperative behind Section 18 of the Atrocities Act but it also placed such cases in the reality of caste as socially sanctioned subordination and dominance which requires proactive State measures to balance social power dynamics. The analysis of Article 17 enabled a nuanced and sensitive appreciation of the power imbalance between the complainant and accused in cases under the Atrocities Act, leading to a reasoning that affirmed the bar against anticipatory bail. On the other hand, the analysis of the High Court of Delhi in *Danish Khan* diluted the pre-trial safeguards afforded to complainants by the Atrocities Act.

Conclusion

In this chapter, we argued that the courts' reasoning and judicial outcomes improve in cases where Article 17 has been used. First, we demonstrated that Article 17 embodies the content of various constitutional goals and principles beyond the annihilation of untouchability, which contribute to a rich jurisprudence of social protection. Article 17 enables the courts to look beyond the notion of formal equality and analyse societal practices to grapple with modern and nuanced forms of caste oppression. It also serves as an umbrella remedy to strike down such oppressive practices. Second, we illustratively analysed two cases with similar fact situations involving an application of a specific section of the Atrocities Act. We found that Article 17, its history and objectives were only explored in detail in one of the cases, and this enabled the Court to reach an equitable and caste-sensitive outcome in that judgment. This was contrasted with the other case in which Article 17 was not explored or taken to its logical conclusion, where the court rendered judgment effectively diluted anti-caste jurisprudence. Thus, we submit that Article 17 can be used as a positive tool to provide context to special legislations, such as the Civil Rights Act and the Atrocities Act, and read the protections thereof in a broad manner. This is desirable, as the

117. *Manju Devi,* paras 16-17.

members of the Constituent Assembly designed the wording of Article 17 in a manner such that it would be expansive and all-encompassing.[118]

However, even though Article 17 can serve as a useful tool in judicial reasoning, we acknowledge that a major challenge is that sometimes, the judiciary does not consider it while adjudicating cases that attract its application. This often results in inequitable outcomes.[119] For example, in *Hitesh Verma* v. *State of Uttarakhand*,[120] the judiciary read down the broad protection granted by the Atrocities Act by misapplying the test in a previous judgment, *Swaran Singh* v. *State*.[121] They narrowed down the meaning given to offence or insult delivered in a 'place within public view' (Section 3(1)(x) of the Atrocities Act), which *Swaran Singh* clearly held would encompass private spaces if members of the public other than relatives and friends were present. In *Hitesh Verma,* the victim was the subject of caste-based insults delivered around the presence of labourers who were working on the construction of her house, but the Court reasoned that since the abuse happened 'within the four walls of the house', it would not be a 'place within public view'. This judgment failed to take note of the objects and reasons of the Atrocities Act and its link with Article 17. While a judgment such as *Nirjhari Mukul Sinha* expanded the scope of Article 17 to even private spaces by condemning exclusionary practices against menstruating women within the household, *Hitesh Verma* failed to carry forward such jurisprudence which attacks discrimination and stigma at its roots, covering as many situations as possible.

Even as we recognise that cases such as *Hitesh Verma* leave much to be desired from judicial interpretation, the preceding discussion has illustrated how the judiciary has interpreted Article 17 in many cases to enumerate and actualise the

118. *Indian Lawyers Association,* para 74.

119. However, it needs to be borne in mind that some courts have also exhibited remarkable consciousness about caste dynamics in their judgments. In *Ram Prit* v. *The State of Uttar Pradesh,* 1991 SCC OnLine All 347, paras 25-29, a case concerning a Scheduled Caste accused of murder, the Allahabad High Court granted him the benefit of the defence of 'grace and sudden provocation' on account of the fact that humiliating caste-based insults had been hurled against him. The Court took note of Article 17 and the Atrocities Act, and reasoned, 'keeping the aforesaid development of individualistic freedom [through the passage of enactments] in mind, how much balance should be expected of an young man belonging to low caste who recently became a doctor when abuses were hurled on him publicly only because he was of low caste'.

120. (2020) 10 SCC 710. See Prannv Dhawan and Ishwar Singh. 2020. 'End of Justice? The Supreme Court's Order in *Hitesh Verma* v. *State of Uttarakhand*, *The Criminal Law Blog*, 12 November, available online at <https://criminallawstudiesnluj.wordpress.com/2020/12/11/end-of-justice-the-supreme-courts-order-in-hitesh-verma-v-state-of-uttarakhand/> (accessed on 22 June 2021).

121. (2008) 8 SCC 435. Here, The Supreme Court held that the expression 'in public view' includes utterances made within four walls of a building as long as third persons (excluding family members and friends of the complainant) were present.

ideals of constitutional equality. We have demonstrated that Article 17 has been a crucial bridge for the judiciary to rely on statistics, academic writing, political activism, history, and sociological literature, which elucidate the historical context and purpose being social justice legislations such as the Atrocities Act and Civil Rights Act. Therefore, cases like *Hitesh Verma* can be avoided if the judiciary merely draws from precedent and carries forward the rich Indian jurisprudence behind Article 17 that has been developed over time. This would enable them to adapt and invoke Article 17 to prohibit modern forms of untouchability and use it as a tool to address the dynamics of caste in society, as was its conceptualisation in the Constitution.[122] Perhaps, this would contribute to the end goal of legal and social change: the total 'annihilation of caste'.[123] We thus believe and conclude that if used effectively by the judiciary, Article 17 is a constitutional provision that has great potential and can pave the way forward for transforming social relations in society.

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122. Anupama Rao. 2015. 'The Paradox of Emancipation' in *The Caste Question.* University of California Press, pp. 167-168.
123. Martha Nussbaum. 2016. 'Ambedkar's Constitution: Promoting Inclusion, Opposing Majority Tyranny' in Tom Ginsburg and Aziz Huq (eds.), *Assessing Constitutional Performance,* p. 311. Cambridge University Press.

7

Women, Religious Freedom, and The Indian Constitution

Sandhya P.R.*

Introduction

Religious freedom under the Indian Constitution strives to strike a balance between group rights and individual rights. While striking this balance, the courts often decide what a religious practice entails. The secular approach to religion differs across jurisdictions, depending on the local context and the constitutional history that shapes the secular structure. Thus, secularism is localised in application.[1] The courts in India play a crucial role in safeguarding religious rights. This chapter will discuss how the courts have engaged with religion and analyse the tests framed by them in the context of religious rights discourse. Some argue that the idea of a 'transformative constitution' should be central to the courts' active role in regulating religion in India.[2] A transformative constitution is one that considers the underlying social and cultural structures while consciously attempting to bring about a change in the legal and political system.[3] In this context, this essay will evaluate the courts' approach to religious freedom and analyse how the courts are dealing with it, particularly in the context of women's access to temples. The courts have framed tests, such as the 'essential religious practices test', to regulate religious freedom, that are still in use. The courts are also opening up discussions on using other doctrines, such as the 'anti-exclusion' principle, in the context of women's entry into public temples. In assessing the 'anti-exclusion' principle and religious freedom under the Indian Constitution, the analysis will be situated in the context of various court decisions with a particular focus on the decision of the court in *Indian Young Lawyers Association* v. *State of Kerala*[4] (*Sabarimala*).

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* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 28 March 2022.

1. Deepa Das Acevedo. 2013. 'Secularism in the Indian Context', *Law & Social Inquiry*, 38(1): 138-167.
2. Gautam Bhatia. 2016. 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', *Global Constitutionalism*, 5(3): 351-382.
3. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 371.
4. *Indian Young Lawyers Association* v. *State of Kerala*, available online at <https://www.supremecourtofindia.nic.in/supremecourt/2006/18956/18956_2006_ Judgement_ 28-Sep-2018.pdf> (accessed on 11 June 2021).

Religion Under the Indian Constitution

Marc Galanter states that secularism does not translate into an impartial approach to religion.[5] So, irrespective of how the secular approach is framed, it will impact how the state engages with religion. In the Indian context, the courts' engagement with religious rights has even led to them offering definitions for a particular religion. For example, in *Sastri Yagnapurushadji* v. *Muldas Bhundardas Vaishya*,[6] the Court expounds on the contours of Hinduism. The Court's reach, in this case, was so extensive that it defined Hinduism and went on to analyse whether the sect in question can be considered Hindus. The reach of the Court in bringing within its ambit what Hinduism entails is also evident in some earlier cases.[7] The range of interpretation leaves room for doubt, culminating in a lack of consistency in its application. Cases such as *Sastri Yagnapurushadji* v. *Muldas Bhundardas Vaishya*[8] reveal that the secular nature of the Indian Constitution does not minimise the involvement of decision-making in the religious realm.[9]

Religious and Secular Practices: Development and Usage of the Essential Religious Practices Test (ERPT)

Articles 25 and 26 of the Indian Constitution provide for the religious freedom of groups and individuals while allowing state intervention in terms of regulating secular activities associated with religion.[10] Article 25(2)(a) provides for regulating secular activity that is associated with religious practice. For instance, activities associated with managing temple property and making rules for maintaining discipline and order inside the temple have been recognised as secular activities.[11] The courts are the deciding authority on what is secular and what is religious as Articles 25 and 26 do not provide the basis for such differentiation.[12]

The ERPT was developed by the judges to help navigate what activities deserve protection under the religious clauses of the Indian Constitution. The test, as it is

5. Marc Galanter. 1971. 'Hinduism, Secularism, and the Indian Judiciary', *Philosophy East and West*, 21(4): 479.
6. AIR 1966 SC 1119.
7. See *Sastri Yagnapurushadji* v. *Muldas Bhundardas Vaishya*, AIR 1966 SC 1119 and *Punjab Rao* v. *Meshram*, AIR 1965 SC 1179 at 1184.
8. AIR 1966 SC 1119.
9. Galanter, 'Hinduism, Secularism, and the Indian Judiciary', p. 479.
10. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 356.
11. *Tilkayat Shri Govindlalji Maharaj* v. *State of Rajasthan*, AIR 1963 SC 1638; *Sri Jagannath Temple Puri Management Committee* v. *Chintamani*, AIR 1997 SC 3839.
12. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', pp. 356-357.

used by the courts, reveals that the courts prefer to use the ERPT to derive whether an activity is 'essential' within a religion to qualify for protection under the Constitution.[13] If such activity qualifies as 'essential' to the religion, it is beyond the realm of secular activity. The focus on what is essential to a religion results in the court never really delving deeper into what should be secular activities, warranting non-interference by those who claim the protection of religious freedom. Thus, even if Articles 25 and 26 at the outset appear to grant complete control over religious rights to individuals and religious institutions, the courts often have protected only practices essential to a religion.[14]

The ERPT is said to have been first framed in the case of *The Commissioner, Hindu Religious Endowments, Madras* v. *Shri Lakshmindra Thirtha Swamiar of Shirur Mutt*.[15] ERPT is about identifying what is essential to a religion. According to the Court in that case, 'What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself'.[16] In *Shirur Mutt*, the Court was of the belief that the Constitution does provide for differentiation between what is religious and what is secular,[17] but did not elaborate on how the Court reached this conclusion. It further rejected the approach that all secular activities not essential to a religion are amenable to State regulation, thus providing a broad interpretation of what constitutes religious practice. Unfortunately, in *Shirur Mutt*, there was no effort to specifically identify what could be construed as secular practices.

The ERPT is noted to be an enquiry in which the Court looks within the religion to answer the questions of what is secular and what is religious.[18] The near-universal acknowledgement of Indian courts that the ERPT is definitive, without (re)considering whether it deserves a place in determining religious rights as set out in the Indian Constitution, is disconcerting. Courts have endorsed the ERPT time and again. In *Adi Saiva Sivachariyargal Nala Sangam* v. *Government of Tamil Nadu*, it was stated that the ERPT is a constitutional necessity and without such determination, it is not possible to effectively adjudicate the rights bestowed under

13. Suhrith Parthasarathy. 2020. 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in the Sabarimala Case', available online at SSRN: https://ssrn.com/abstract=3544657 (accessed on 25 April 2022).
14. Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in the Sabarimala Case'.
15. *The Commissioner, Hindu Religious Endowments, Madras* v. *Lakshmindra Swamiar*, 1954 SCR 1005.
16. *Swamiar*, para 20.
17. *Swamiar.*
18. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 360.

Articles 25 and 26.[19] It must be acknowledged that in *Sabarimala*, Justice Chandrachud and Justice Indu Malhotra expressed doubts as to the role of the courts in determining what is essential to a religion,[20] thus revealing some discomfort in using the ERPT. While these concerns were expressed, there were no discussions on how to re-assess the use of the ERPT or put an end to it or modify the same. Justice Chandrachud's engagement with doctrines other than ERPT can be considered as one way through which he attempted to make changes to the existing status quo involving ERPT.

The ERPT faces many criticisms. It is argued that the test is not rooted in the Constitution,[21] and the courts are said to have not done much to develop the test in a robust manner.[22] Another view is that the ERPT is guilty of making the courts a moral arbiter and a theological authority in cases involving religious freedom.[23] The courts also end up drawing the contours of true religious belief by the application of the ERPT,[24] which necessitates a discussion on whether the secular framework of the Constitution ought to allow such inferences by the Court. Given the nature of enquiries in determining what is religious and secular are merit-based, the courts have to rely on religious doctrines, facts, and customs, and balance them all against religious rights enshrined in the Constitution. This enquiry calls for a rigorous analysis of facts and should involve cross-examination and other aspects that befits a merit-based enquiry in law. The courts shy away from serious fact-finding and cases like *Sabarimala* reveal that there is a need to revisit the scope of the Court's enquiry in cases involving fact-finding, especially if the courts want to decide on merits while applying the ERPT.[25]

Access to Temples: Balancing Individual and Group Rights

While Article 25 focuses on individual rights, Article 26 focuses on group rights. Article 26 grants religious freedom to religious denominations. The word 'denomination' was discussed in *Shirur Mutt* where the Court used the Oxford dictionary term to define the same. To identify whether a group qualifies as a

19. *Adi Saiva Sivachariyargal Nala Sangam* v. *Government of Tamil Nadu*, (2016) 2 SCC 725, para 43.
20. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 152; *Indian Young Lawyers Association*, (Justice Indu Malhotra), p. 43.
21. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 364.
22. Galanter, 'Hinduism, Secularism, and the Indian Judiciary', pp. 482-483.
23. Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in the Sabarimala Case'.
24. Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in the Sabarimala Case'.
25. Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in the Sabarimala Case'.

religious denomination, the following should be examined: whether it is a collection of individuals who have a system of beliefs or doctrines which they regard conducive to their spiritual well-being, that is, a common faith, whether it possesses a common organisation; and whether it is designated by a distinctive name.[26]

Article 25(2)(b) allows for the opening up of Hindu temples of a public character to all Hindus, irrespective of class and section. Public institutions mean all kinds of institutions, including denominational temples and temples endowed to the benefit of a certain section of society, and the word 'public' includes any section of the public.[27] In *Sri Venkataramana Devaru* v. *State of Mysore*, the Court applied a harmonious construction of the religious rights under the Constitution and held that denominational rights granted under Article 26(b) would be subject to Article 25(2)(b).[28] The Court in this case applied the ERPT and held that access to temples under Article 25(2)(b) applies to all religious institutions of public character. While allowing access to temples, the Court noted that access cannot be absolute and unlimited, and in some scenarios, the religious institutions can exercise some limitations to access.[29] This could be in terms of the timing of the temple, the fact that some of the services may be restricted to be performed by those specifically trained, etc. but the public will be allowed access at other times.[30]

While determining issues of access, the court may also be called to decide on whether the religious institution seeking such restrictions is a religious denomination. Although, *Sri Venkataramana Devaru* v. *State of Mysore* made it clear that denominational rights granted under Article 26(b) would be subject to Article 25(2)(b), in certain scenarios, the religious denomination may still argue that the access restrictions are a part of their religious denominational rules. This argument was used in *Sabarimala* as well. The Court also delved into whether *Sabarimala* was a religious denomination entitled to put in place restrictions on women's entry. Thus, the issue of the religious denomination is often part of the discussion when it comes to debating religious rights, especially in the context of accessing religious places of worship.

Transformative Constitution

While India has seen cases pertaining to accessing places of religious worship, the ERPT, as set forth in *Shirur Mutt*, is usually employed in these cases. As discussed above, the ERPT faces severe criticisms and one alternative suggested to the ERPT is to read the religious clauses and other related provisions, such as Article 17, using

26. *S.P. Mittal* v. *Union of India*, (1983) 1 SCC 51; *Swamiar.*
27. *Sri Venkataramana Devaru* v. *State of Mysore*, AIR 1958 SC 255.
28. *Devaru*.
29. *Devaru*.
30. *Devaru*.

the reasons underlining the purpose of the Indian Constitution.[31] The 'transformative constitution' approach entails delving into the framing of the Indian Constitution and understanding the purpose of the clauses and their reasoning. However, conflict may arise as to which of the framers' reasoning must be relied on while interpreting the Constitution. This is a difficult exercise as it goes beyond the bare provisions of the Constitution and takes into consideration the literature on the making of the Constitution.

In international discussions, the idea of a 'transformative constitution' is one that considers underlying social and cultural structures while consciously attempting to bring about a change in the legal and political system.[32] One description of the transformative constitution by international scholars is as 'a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.[33] It should be borne in mind that the approach to a transformative constitution will vary depending on the history of constitution-making in a country. The effect of constitutions in imposing positive or affirmative duties on the state to promote social welfare and to assist people in authentically exercising and enjoying their constitutional rights is considered a facet of providing a purposeful interpretation of rights.[34] The disadvantage of this approach is that the role of the courts will move away from providing legal interpretations to what they consider the purposive interpretation of rights in terms of the transformative constitution. This is said to increase the risk of the judges providing their personal and ideological preconceptions in the quest to establish the norms for a 'transformative constitution'.[35]

Justice Chandrachud recognises the aspect of a transformative constitution in *Sabarimala*. While delving into the history of Article 17, he quotes renowned scholar Granville Austin and endorses the view that Article 17 aims to bring to the mainstream individuals and groups who have remained at the bottom of the societal hierarchy.[36] He further states that Article 17 reflects the transformative ideal of the

31. See Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution' and Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in the Sabarimala Case'.
32. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 371.
33. Karl E Klare. 1998. 'Legal Culture and Transformative Constitutionalism', *South African Journal on Human Rights*, 14(1): 146-188.
34. Klare, 'Legal Culture and Transformative Constitutionalism'.
35. Klare, 'Legal Culture and Transformative Constitutionalism'.
36. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 91.

Constitution. The portion of the judgment in *Sabarimala* where Justice Chandrachud attempts to interpret Article 17 as a transformative clause highlights the challenges the courts will face while engaging with the Constitution as a transformative document. For instance, 'untouchability' under Article 17 is not defined and the Constitution debates, as discussed by Justice Chandrachud, reflect the contested nature of the word. While one interpretation of 'untouchability' can include gender-based restrictions on access to religious places of worship, another interpretation may still allow for the refusal of such access, as it is not clear from the bare reading of Article 17 if the term 'untouchability' used therein envisages gender-based restrictions in the religious realm. It is pertinent to note that the word 'untouchability' carries serious ramifications of a social order that allows for caste-based discrimination. Whether, and how, it is appropriate to bring within its realm, discrimination faced by women of all castes in cases, such as *Sabarimala*, is something for the courts to engage with in the future.

Using the perspective of the transformative constitution for cases involving religious rights, Gautam Bhatia argues that the Indian Constitution tries to safeguard individual autonomy from the onslaught of strict community sanctions and inequalities that existed before the independence.[37] He adds that the clauses on religious freedom in the Indian Constitution are placed within the wider context of the fundamental rights chapter[38] and this makes a difference in how it is interpreted along with other provisions in the chapter, including Article 17. The idea of a 'transformative constitution' for India is a new approach and how it will be developed is up to the court's interpretation. ERPT was a creation of the court and the new alternative of the 'transformative constitution' suggested by some scholars will also be one for the courts to develop. This underlines the impact of the judiciary in interpreting the constitutional provisions pertaining to religion and the need for the judiciary to validate the approaches it takes through a robust methodology that allows for the balancing of religious rights for both the group and the individual.

It is to be borne in mind that the attempt to use a transformative constitution has its limitations, as the courts are not the only institutions that can rectify social inequalities in all spheres.[39] There is a more holistic approach to enable the concept of a transformative constitution that involves other systemic interventions beyond

37. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 372.
38. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 356.
39. Sanele Sibanda. 2020. 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism', *Law, Democracy and Development*, 24: 384-412.

the courts.[40] While those limitations are acknowledged, in the Indian context, the use of principles underlying a transformative constitution is yet to be fleshed out by the courts. It is too premature to comment on its efficacy as the concept is not been extensively employed by the Indian courts. In the context of religious rights, this approach can be mooted to see if the courts can flesh out the purpose of religious clauses that need more clarity. For instance, what is secular and what is religious in the Indian context needs more engagement and perhaps looking at the framing of the Constitution can provide some answers to the same.

Understanding Discrimination and Freedom of Religion through Anti-Exclusion

Article 15(1) of the Indian Constitution provides a non-discrimination guarantee. In the initial years, the approach of the courts in analysing discrimination as contemplated under Article 15(1) was formalistic in terms of interpreting the word 'only' in Article 15(1) and taking an effects-based approach to discrimination.[41] It is argued that the development of a transformative reading of Article 15(1) brought about a change in the development of discrimination jurisprudence in the Indian courts, leading to understanding discrimination from the perspective of institutional elements associated with discrimination.[42] The transformative reading of a provision allows one to consider structural impediments that create exclusionary patterns.[43]

The law relating to discrimination on the basis of sex is about gauging how a person is treated in relation to others. Indirect discrimination occurs when one sex is disadvantaged due to the unjustifiable standards imposed on them, and complying with the standards imposed is not possible for members of that sex, in comparison with the members of the other sex.[44] Neutral measures that cast an onerous burden on some people with particular characteristics, over other people without those characteristics, are also reflective of indirect discrimination.[45] Corrective justice

40. Sibanda, 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism'.
41. Gautam Bhatia. 2017. 'Sex Discrimination and the Anti-Stereotyping Principle: *Anuj Garg* v. *Hotel Association of India*', *SSRN*, 3 September, available online at https://ssrn.com/abstract=3031374 or http://dx.doi.org/10.2139/ssrn.3031374 (accessed on 1 June 2021).
42. Bhatia, 'Sex Discrimination and the Anti-Stereotyping Principle: *Anuj Garg* v. *Hotel Association of India*'.
43. Catherine Albertyn. 2007. 'Substantive Equality and Transformation in South Africa', *South African Journal on Human Rights*, 23(2): 253.
44. John Gardner. 1996. 'Discrimination as Injustice', *Oxford Journal of Legal Studies*, 16(3): 353.
45. Nicholas Hatzis. 2011. 'Personal Religious Beliefs in the Workplace: How Now to Define Indirect Discrimination', *Modern Law Review*, 74(2): 287.

within discrimination operates in a sphere where the evaluation is centred on the past actions of a party alleged to indulge in discriminatory behaviour.[46] Corrective justice focuses on undoing the damage done to a claimant.[47]

Women's Entry into Places of Worship

The issue of access to temples for women has been raised before the courts. In the Indian context, accessing temples as a right was first framed in the context of caste-based discrimination which did not allow people of certain castes to enter some temples for worship. Article 25(2)(b) allows for the opening up of Hindu temples of a public character to all Hindus, irrespective of class and section. The opening up of temples is now also framed in the context of women who are denied access. Two important cases in recent times setting out the Court's approach to women's entry to public places of worship are *Dr Noorjehan Safi Niaz* v. *State of Maharashtra*[48] (*Haji Ali*) and *Sabarimala*.[49] These two cases are important, as they both use the ERPT in the context of different religions. In *Haji Ali*, the question of women's entry into the dargah was rooted in the ERPT[50] and the Court did not engage with questions pertaining to whether the said ban constituted indirect discrimination. It was held in *Haji Ali* that the public character of a place of worship such as the dargah attracts Articles 14, 15, and 25 and there can be no discrimination on the basis of gender.[51] The Court also held that the state has to protect the citizens in terms of the rights guaranteed under Part III of the Constitution and Article 26 cannot abridge or abrogate the rights bestowed by Article 25.[52]

Haji Ali culminated in women gaining access and the ban being lifted in a realistic sense, as women can now enter the sanctum sanctorum of the place of worship.[53] This is an important aspect to consider, as the court's declaration of rights does not always mean access in a realistic sense, as public resistance to such verdicts may impact the court-sanctioned access. There are also other cases related to accessing temples. For instance, the restriction of women from entering the Shani Shingnapur temple in Maharashtra culminated in a legal battle where the temple

46. Gardner, 'Discrimination as Injustice', pp. 357-358.
47. Gardner, 'Discrimination as Injustice', pp. 357-358.
48. 2016 SCC OnLine Bom 5394.
49. *Indian Young Lawyers Association*.
50. *Niaz*, para 39 and 40.
51. *Niaz,* para 50.
52. *Niaz,* para 50.
53. Sadaf Modak. 2018. 'Haji Ali: Two Years on, Women Entering Inner Sanctum Freely', *Indian Express*, 19 October, available online at https://indianexpress.com/article/cities/mumbai/mumbai-haji-ali-dargah-women-entering-inner-sanctum-sabarimala-supreme-court-5408259/ (accessed on 25 April 2022).

trust agreed to finally grant access to the temple.[54] In Shani Shingnapur, as the trust agreed to grant access, the ground reality reflects the court's involvement in assisting the women in gaining access.

Sabarimala extensively dealt with indirect discrimination, women's religious freedom, and the Indian Constitution. *Sabarimala* concerned a Hindu temple in southern India that does not allow women in the age group 10–50 years to worship the idol, as they are considered incapable of completing the pre-condition to worship. One could argue that the pre-conditions are set in a way that doesn't allow women in the age group of 10–50 to complete them. The pre-conditions are termed as the 'vratham'[55] or in common parlance referred to as penance. It is evident that the penance is male-centric, as one of the conditions entails not interacting with women at all.[56] Rebutting the argument that the idol's celibate nature requires the absence of women in the age group 10–50, it was held that the same is not consonant with the Constitution.[57] The same is noted to 'impose the burden of man's celibacy on a woman and construct her as a cause for deviation from celibacy'.[58]

In *Sabarimala*, it was noted that the exclusion of women from worship is inconsistent with constitutional values and these values supersede claims of religious belief.[59] In indirect discrimination, the enquiry is about whether a criterion relied on by the discriminator has a disparate impact on a group of people whose characteristics are covered by the prohibited criterion.[60] The fulfilment of the vratham as a condition to entry to *Sabarimala* can be construed as indirect discrimination, imposing a burden on women in the 10–50 age group, who can be disadvantaged by this condition as they cannot fulfil them. The Court in *Sabarimala* noted that in discussing the freedom to practise religion, it is important to consider the structures of oppression and domination that exists within our society.[61] This reveals the Court's reading of Article 15(1) in a manner to include components covering systemic and institutional discrimination.[62] The issue of women's entry into

54. Alok Prasanna Kumar. 2016. 'Women in Shanti Shingnapur Temple: A Brief History of Entry Laws and How Times Are Changing', *FirstPost*, 12 April, available online at https://www.firstpost.com/india/women-in-shani-shingnapur-brief-history-of-temple-entry-laws-and-how-times-are-changing-2723582.html (accessed on 25 April 2022).
55. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 29.
56. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 29.
57. *Indian Young Lawyers Association*, (Justice Chandrachud), pp. 75-76.
58. *Indian Young Lawyers Association*, (Justice Chandrachud), pp. 75-76.
59. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 75.
60. Hatzis, 'Personal Religious Beliefs in the Workplace: How Now to Define Indirect Discrimination', p. 289.
61. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 162.
62. Gauri Pillai. 2020. 'Notes from a Foreign Field: Developing Indirect Discrimination – Bringing Fraser to India', *Indconlawphil*, 12 November, available online at https://indconlawphil.wordpress.com/?s=sabarimala (accessed on 11 June 2021).

public temples highlights the tension between the right to freedom of religion and the development of indirect discrimination jurisprudence in the Indian courts. While considering the right of women's entry in *Sabarimala*, Justice Chandrachud stated as follows:

> The quest for equality is denuded of its content if practices that exclude women are treated to be acceptable. The Constitution cannot allow practices, irrespective of their source, which are derogatory to women. Religion cannot become a cover to exclude and to deny the right of every woman to find fulfilment in worship.[63]

The Court charted out what constitutes discrimination while allowing for religious freedom in the context of women's entry into public temples. This led one of the judges in *Sabarimala* to develop a new approach that veered away from the previous approaches of the Court and the other majority judges in *Sabarimala*. The approach of the Indian courts had heavily focused on the ERPT in deciding questions concerning religious freedom under the Constitution. The new approach to religious freedom enquiry centres on the anti-exclusion doctrine, which was espoused by Justice Chandrachud in his judgment in *Sabarimala*.

The other judges who pronounced the decision of the majority in *Sabarimala* did not engage with the anti-exclusion approach espoused by Justice Chandrachud. They decided on the questions placed before them using the ERPT.[64] While Justices Misra and Khanwilkar held that Article 25(1) allows for intra faith parity, Justice Nariman stated that ERPT will allow the Court to decide on what superstitions are not considered essential to the religion. Thus, the issue of anti-exclusion was not considered by the other judges.

Anti-Exclusion Doctrine: An Introduction

In matters of conflict that involve striking a balance between a group's religious rights and an individual's religious rights, the anti-exclusion doctrine is mooted. This doctrine is called for in cases where there is a need to balance religious rights alongside other rights which appear to be irreconcilable with religious autonomy.[65] It is argued that anti-exclusion can be effectively used to ensure that religious rights and the other competing rights are taken on an even platform as the doctrine will allow for a fair balancing act.[66] In reading freedom of religion clauses, it has been

63. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 162.
64. *Indian Young Lawyers Association*, see judgments rendered by Justice Khanwilkar, Justice Misra, Justice Nariman.
65. Lucy Vickers. 2020. 'A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases', *University of Oxford Human Rights Hub. Journal*, 3(2): 151-159.
66. Vickers, 'A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases'.

proposed that the courts should apply the 'anti-exclusion principle'.[67] This principle is set out as one wherein actions of a group impede individual freedom in a manner that entails 'restriction of an individual from accessing basic goods that are necessary for a life of material and expressive dignity'.[68]

In *Sardar Syedna Tahir Saifuddin* v. *State of Bombay*,[69] the Supreme Court contemplated whether the restriction on the power to excommunicate a member interferes with the religious freedom exercised by the Dawoodi group in terms of regulating their own affairs. A majority of four judges allowed the Dai (that is, group head) to retain the power to excommunicate, stating that the Constitution protects practices that are essential to the religion. The genesis of the anti-exclusion doctrine is found in the dissent in this case.[70] The dissenting judgment stated that excommunication has an impact on rights that are of civil nature and a restriction on excommunication furthers the objective of Article 25(1) and prevents the treatment of an individual as a pariah.[71] In *Sri Venkataramana Devaru* v. *State of Mysore*, the Supreme Court held that the religious groups' right to restrict access to temples will not stand in the light of Article 25(2)(b) read with Article 17.[72] Thus, there are early instances of the courts applying Article 25(2)(b) and Article 17 while deciding on cases related to accessing public temples.

The use of the anti-exclusion doctrine as mooted by scholars and used by Justice Chandrachud in *Sabarimala* reveals that it is entwined with Article 17 and Article 25(2)(b). As early as in *Sri Venkataramana Devaru* v. *State of Mysore*, the awareness of the courts to apply Article 17 through the lens of anti-exclusion for cases dealing with public access to temples is evident. The challenge for the Indian courts is to frame the application of the anti-exclusion doctrine by reading these two Articles together. This is particularly necessary if the courts want to rely on Article 17, (which is crafted as a protection against caste-based discrimination), to make a case for gender-based discrimination. Judges will have to justify how women from all castes are eligible for the protection offered under Article 17 and why their exclusion from accessing temples will fall under the ambit of Article 17.

67. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 354.
68. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 354.
69. *Sardar Syedna Taher Saifuddin* v. *State of Bombay*, 1962 SCR Supl. (2) 496.
70. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 354.
71. *Saifuddin,* (Justice Sinha), paras 19 and 23.
72. *Devaru*.

Further, the 'anti-exclusion' principle is argued to be central to the constitutional value system that promotes values of liberty, dignity, and equality.[73] This would further entail that women will not be relegated to a secondary position in their right to worship.[74] The remedial nature of constitutional provisions is centred on the prevention of discrimination on the grounds of caste and gender, among other categories.[75] It is argued that the exclusion of women from worship is inconsistent with constitutional values and these values supersede claims of religious belief.[76] In engaging with religious freedom in the context of women's entry into public temples, the application of the anti-exclusion doctrine will be crucial. This doctrine has the potential to balance religious rights with other fundamental rights, without delving into the theological aspects of a religion, as it would allow for re-evaluating the questions that ought to be asked by the courts.[77] Some questions that this doctrine will help frame include: 'are the beliefs actually held, and by how many people? And does the group suffer exclusion—from public good more generally, and specifically through the exercise of religious autonomy?'.[78] The usage of anti-exclusion augurs well for the argument on the remedial nature of constitutional provisions as the same caters to addressing questions on overcoming social exclusion. When compared to the existing ERPT used in India, there is a compelling case to use this doctrine and explore its applicability in cases involving religious clauses, including cases pertaining to women's access to temples and public places of worship.

Anti-Exclusion and Article 17

The anti-exclusion doctrine will gain more context when looked through the lens of social reform clauses of the Constitution. It is to be borne in mind that the application of anti-exclusion along with Article 17, as espoused by some scholars and Justice Chandrachud in *Sabarimala*, relies heavily on the 'transformative constitution' angle. The challenges associated with the same have been dealt with previously in this essay.

'Untouchability', recognised in Article 17, encompasses elements that forbid the practice in any form and is all-inclusive of practices that bear any semblance to it.[79] The genesis of 'untouchability' is embedded in caste categorisation in India, and it

73. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 23.
74. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 23.
75. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 4.
76. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 75.
77. Vickers, 'A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases'.
78. Vickers, 'A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases'.
79. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 109.

entailed upper caste people who refused to share resources, including water and other civic facilities with those from the lower caste. In extrapolating the application of 'untouchability', Justice Chandrachud noted that exclusion of women in the social context using biological factors will fall under the ambit of a prohibited practice under Article 17 and that this stigmatisation should not pass muster as religious freedom under Article 25.[80] Restricting access in *Sabarimala* entails restricting 'substantive equality' as envisioned in the Constitution[81] and a denial of civic rights and religious rights.[82] This is further tethered to the impetus granted by Article 17. Article 17 is vested with an enforceability element, also it is directly linked to a just social order and speaks for the transformative impact that the Constitution seeks to exert.[83]

In the context of the constitutional debates, the framing of Article 17 is open-ended and could encompass a wider context depending on how it is interpreted.[84] Article 17 is a remedial clause and the framers understood the breadth encompassed within the clause.[85] As Justice Chandrachud put it, 'it is a move by the Constitution makers to find catharsis in the face of historic horrors'.[86] It is argued that the anti-exclusion principle can veer the court away from deciding on religious content and focus on deciding on the impact of discrimination.[87] The application of the anti-exclusion principle within the religious realm will ensure that religious groups are not preventing access for individuals to basic goods.[88] Further, it is argued that this kind of enquiry is also sanctioned within the constitutional framework.[89] Thus, it is rightly proposed that the anti-exclusion principle should apply when there is a conflict within a religious group about a religious practice.[90] The court should respect religious group's beliefs and should only apply the test when there are barriers that impede the social, cultural, or economic life restricting access to basic

80. *Indian Young Lawyers Association*, (Justice Chandrachud), pp. 115-116.
81. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 145.
82. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 149.
83. *Indian Young Lawyers Association*, (Justice Chandrachud), pp. 91-92.
84. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', pp. 368-369.
85. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', pp. 369-370.
86. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 104.
87. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 373.
88. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 374.
89. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 373.
90. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 382.

goods or affecting their dignity.[91] In the context of *Sabarimala*, which is a conflict between individual right to worship and group right leading to exclusion of women, the anti-exclusion principle and the individual right to worship should triumph. The remedial nature of the transformative constitution is succinctly elaborated as one which will support the equal participation of women.[92]

Anti-exclusion and Petitioner's Belief

One aspect that the Indian courts will have to delve deeper into is whether the petitioner's belief is an important question to be considered in cases that involve religion and the right to worship, including cases pertaining to women's access to public places of worship. The anti-exclusion doctrine should consider whether the exclusion is for the believer only or if it applies irrespective of the petitioner's belief. These questions have remained unanswered by Indian scholars and by the courts as of now, as the anti-exclusion doctrine is yet to be fleshed out. In cases where the petition was filed by a religious believer, the anti-exclusion doctrine applied by Justice Chandrachud in *Sabarimala* would resonate strongly. The remedial powers of Article 17 read with the social reform intent bestowed in Article 25(2)(b) would mean that Hindu temples of public character should be open to all. In considering the same, the challenge that lies before the court is twofold. The first challenge is charting out the role of the petitioner's belief in applying anti-exclusion. The second challenge is to navigate the application of anti-exclusion with regard to women who want to subscribe to exclusionary conditions, accepting them as part of the religious tenets. Petitioner's belief should be considered by the court as indirect discrimination in such cases occurs as a result of conflicting interpretations of religious belief between participants who both adhere to the religious belief, but in different ways. Once the petitioner's belief is established, the courts can delve into the anti-exclusion principle to ensure the religious participation of the aggrieved petitioner. For example, Article 25(2)(b) specifies '…throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus…' which reveals that an individual's belief as belonging to the Hindu religion is subtly recognised in the framing of Article 25(2)(b). This could also validate why the petitioner's belief is important in cases involving women and access to religious places of worship.

In *Haji Ali,* the Bombay High Court did not frame any issue with respect to the maintainability of the petitions or delve into petitioners' beliefs.[93] This was a case

91. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', p. 382.
92. *Indian Young Lawyers Association*, (Justice Chandrachud), p. 163.
93. *Niaz*, para 8.

where the petitioners identified themselves as social activists questioning the restriction on women's access to the dargah. The dargah was open to all, irrespective of religion, and the petitioners had been visiting the same for a long time.[94] Thus, in this case, while discussing women's access, the court did not engage with questions on indirect discrimination and whether a petitioner's belief is relevant and if relevant, to what extent.

The dissenting judgment in *Sabarimala* placed emphasis on petitioners' religious beliefs.[95] In *Sabarimala*, the Court encountered petitioners who challenged the religious practice on grounds of gender discrimination.[96] It was rightly noted that the petitioners' individual rights should be violated for enabling the Court to take note of the infringement of the fundamental right to religious freedom.[97] It was further argued by Justice Malhotra that the question of the religious faith of petitioners is not one of technicality, but one which encompasses an important requirement, which is essential to retain the sanctity of challenges to constitutional rights pertaining to religious discrimination.[98]

There was no comprehensive debate by the majority in *Sabarimala* on whether non-believers should be allowed to challenge religious beliefs. Justice Indu Malhotra briefly mentioned the importance of the petitioner's belief in religious rights' cases but did not delve further into how the courts should deal with the same. The majority judgment seems to have brushed this question aside on the grounds that it is a constitutional issue impacting women at large. Justice Nariman opined that the issue of entry into temples impacted women at large and thus the ramifications of such restriction of access is a purely constitutional issue.[99] Two judges, Justice Misra and Justice Khanwilka, did not address the question of maintainability. The lack of deeper engagement with the petitioner's belief is a missed opportunity as far as *Sabarimala* is concerned. While the Constitution does offer more scope to ensure equality and the courts are often flagbearers of this, it should not come at the cost of the court not attempting to frame robust tests to ensure all fundamental rights, including the right to religion, are given their due. Religious freedom is present within the fundamental rights and that is indicative of the importance that religion is accorded. The majority judges largely looked at the issue as patriarchal practices or superstitious ones, without once recognising the agency of the women who may want to subscribe to such practices. This is precisely why the petitioner's belief discussion would have added

94. *Niaz*, paras 5 and 6.
95. *Indian Young Lawyers Association*, (Justice Indu Malhotra).
96. *Indian Young Lawyers Association*, (Justice Indu Malhotra).
97. *Indian Young Lawyers Association*, (Justice Indu Malhotra), p. 23.
98. *Indian Young Lawyers Association*, (Justice Indu Malhotra), p. 24.
99. *Indian Young Lawyers Association*, (Justice Nariman), p. 75.

more nuance to the majority judgment. For instance, two majority judges commented that *Sabarimala* was a case of patriarchy negating the true essence of religion and interfering with women's faith[100] without analysing whether the petitioners have suffered as religious believers and are actually women of faith.

Religion in the Indian context is construed by courts as a doctrine of belief, protecting actions that are done in the pursuance of religion as captured in the phrase 'practice of religion' in Article 25.[101] In deciding matters of what religious beliefs meet the constitutional standard, the court will have to consider whether individuals who approach the court are ones who are practitioners of the religion, who are facing distress due to lack of an opportunity to carry on their worship. When people who are not in the 'practice of a religion' claim they are harmed by religious practices, it is the court's duty to consider issues of belief and practice. This will allow the court to be true to the religious freedom that the Constitution bestows on practitioners.

The anti-exclusion theory which led to Chandrachud's reasoning should be carefully considered. It is argued that the principle is apt when there is a conflict between religious believers over a practice.[102] The basic ingredient of intra-religious conflict is essential to apply the anti-exclusion doctrine and a non-religious petitioner filing the petition corrodes the innovative approach to anti-exclusion. The use of anti-exclusion allows the court to balance the right to religious autonomy and equality provisions.[103] It does not necessarily place one over the other, rather, allowing the court to weigh in and balance both objectively.[104] Anti-exclusion, if applied and developed, is a potent doctrine grounded in the overarching strength of Article 17. The court will have to wield its powers with caution if it wants to maintain the sanctity of the religious rights in the Constitution.

Conclusion

Thus, while the courts in India developed and used the ERPT, the adoption of the anti-exclusion doctrine in *Sabarimala* provides for an alternative approach. The anti-exclusion application can also benefit from how indirect discrimination is dealt with

100. *Indian Young Lawyers Association*, (Justice Misra and Justice Khanwilkar), pp. 3-4.
101. *Swamiar*. 5.
102. Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution'.
103. Vickers, 'A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases'.
104. Vickers, 'A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases'.

at the threshold, by inquiring into the petitioner's belief and the consequent disadvantage suffered. It is clear there is a range of facets within the religious clauses that need more engagement and clarity. This essay outlines some of them, including facets such as secular practices, the application of Article 17, whether the courts will rely on the 'transformative constitution' angle or develop anti-exclusion as a doctrine from the contents of Article 17, and lastly, whether the courts will decide on the role of petitioner's belief in using the anti-exclusion doctrine. In interpreting Article 25(1), it is noted that it is a right vested in the individual. The courts will have to engage with whether the petitioner's belief is important or not if they decide to use anti-exclusion.[105] If they want to ignore the petitioner's belief in cases of discrimination that culminate in restricting access of women to places of worship, they have to elaborate on whether the same can be done under the Constitutional framework. While the Constitution has bestowed many benefits, the court will have to be cautious in framing the new approaches in interpreting religious freedom clauses, to ensure respect for the religious Indian as well.

105. The review petitions filed in relation to the judgment in *Sabarimala* are still pending.

8

Environmental Jurisprudence and Expansionary Views on the Right to Life

G.R. Swaminathan*

Section I

When the Constitution was originally adopted, it did not contain a single provision relating to the environment. No member spoke on the subject in the Constituent Assembly. It took more than a quarter-century for Article 48A and Article 51A to gain place in the Constitution. They were incorporated through the otherwise infamous 42nd Constitutional Amendment.[1] This constitutional amendment normally evokes only negative memories. It restricted the power of judicial review of the High Courts, suspended the enforceability of some of the fundamental rights, and did many a thing to erode democracy. It was steamrolled during the Emergency years. Much of the damage wrought by it was undone later. Fortunately, the baby was not thrown with the bathwater. The 44th Constitutional Amendment left both these Articles intact. Article 48A forming part of the Directive Principles of State Policy states that the State shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country and Article 51A(g) casts a duty on every citizen to protect and improve the natural environment including forests, lakes, rivers, and wildlife. Jairam Ramesh's *Indira Gandhi: A Life in Nature* demonstrates that we owe them to the late Prime Minister.[2] The popular wisdom is that the 1972 Stockholm Conference led Indira Gandhi to bring about measures to prevent damage to the environment and ecology. It is not so. Indira Gandhi was a committed environmentalist and her conviction preceded her participation in the Stockholm Conference. Though among the last of the flowers to be embedded in the bouquet of constitutional values, environment as a theme is acquiring increasing importance in the constitutional discourse. This is entirely due to the engagement of the Supreme Court of India with environmental issues of every hue. Two developments facilitated this. One was the historic judgment in *Maneka*

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 1 December 2021.

1. Section 48A and 51A, The Indian Constitution (Forty Second Amendment) Act, 1976.
2. Jairam Ramesh. 2017. 'Indira Gandhi, A Life in Nature', *Simon and Schuster*.

Gandhi v. *Union of India*[3] in 1978 and the birth of Public Interest Litigation/Social Action Litigation soon thereafter.

Section II

An NGO named Rural Litigation and Entitlement Kendra, Dehradun sent a letter dated 2 July 1983 to the Supreme Court alleging that unauthorised and illegal mining of limestone in the Mussoorie/Dehradun belt adversely affected the ecology of the area and led to environmental disorder. On 14 July 1983, this letter was directed to be registered as a Writ Petition under Article 32 of the Constitution and a notice was ordered to the State of Uttar Pradesh and the Collector of Dehradun.[4] This was the first case of its kind in the country. It brought into sharp focus the conflict between development and conservation. The Supreme Court felt the need to reconcile the two. It constituted what came to be known as Bhargav Committee. Some of the limestone quarries were even ordered to be closed. Interim directions were issued for stopping the blasting operations. Though the Supreme Court acknowledged the paramount importance of the Himalayan region and noted the danger the valley was facing on account of irrational and uncontrolled quarrying, it made it clear that it was for the Government and the Nation, and not for the Court to decide whether the deposits should be exploited at the cost of ecology and environmental considerations, or if the industrial requirement should be otherwise satisfied.[5]

Soon thereafter, there was a change in its approach. The opening part of the judgment authored by Justice O. Chinnappa Reddy in *Sachidananda Pandey* v. *The State of West Bengal*[6] deserves to be quoted at length:

> 'A hundred and thirty-two years ago, in 1854, 'the wise Indian Chief of Seattle' replied to the offer of 'the Great White Chief in Washington' to buy their land. The reply is profound. It is beautiful. It is timeless. It contains the wisdom of the ages. It is the first-ever and the most understanding statement on the environment. It is worth quoting. To abridge it or to quote extracts from it is to destroy its beauty. You cannot scratch a painting and not diminish its beauty. We will quote the whole of it:
>
> How can you buy or sell the sky, the warmth of the land? The idea is strange to us.
>
> If we do not own the freshness of the air and the sparkle of the water, how can you buy them?

3. (1978) 1 SCC 248.
4. *Rural Litigation and Entitlement* v. *The State of U.P.*, 1986 Supp (1) SCC 517.
5. *Rural Litigation and Entitlement* v. *The State of U.P.*, 1986 Supp (1) SCC 517.
6. *Sachidananda Pandey* v. *The State of West Bengal*, (1987) 2 SCC 295.

> Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man.....
>
> This shining water moves in the streams and rivers is not just water but the blood of our ancestors. If we sell you land, you must remember that it is sacred, and you must teach your children that it is sacred and that each ghostly reflection in the clear water of the lakes tells of events and memories in the life of my people. The water's murmur is the voice of my father's father.
>
> The rivers are our brothers, they quench our thirst. The rivers carry our canoes and feed our children. If we sell you our land, you must remember, and teach your children, that the rivers are our brothers, and yours and you must henceforth give the kindness you would give any brother.
>
> ....
>
> He kidnaps the earth from his children. His father's grave and his children's birth right are forgotten. He treats his mother, the earth, and his brother, the sky, as things to be bought, plundered, sold like sheep or bright beads. His appetite will devour the earth and leave behind only a desert.
>
> ....
>
> What is man without the beasts? If all the beasts were gone, man would die from a great loneliness of spirit. For whatever happens to the beasts soon happens to man. All things are connected.
>
> ...Whatever befalls the earth befalls the sons of the earth. If men spit upon the ground, they spit upon themselves.
>
> This we know: The earth does not belong to man; man belongs to the earth. This we know: All things are connected, like the blood which unites one family. All things are connected.
>
> ...Where is the thicket? Gone. Where is the eagle? Gone. The end of living and the beginning of survival'.

It was held that whenever a problem of ecology is brought before the court, the court is bound to bear in mind Articles 48A and 51A(g) of the Constitution. The court should not refuse to give effect to the Directive Principle and the Fundamental Duty merely on the ground that priorities are a matter of policy and so it is a matter for the policy-making authority. In appropriate cases, the court may go further, but how much further must depend on the circumstances of the case. It however made it clear that it would shy away from balancing the rival considerations. The act of balancing must be done by the concerned authority.

When the issue of pollution of the Ganges came up, the Supreme Court made it clear that the discharge of untreated effluents by tanneries will have to be stopped.[7] When it was argued that the petitioner was not a riparian owner, it was laid down that the requirement of standing cannot stand in the way and that environmental litigation is not adversarial in character. In *Charan Lal Sahu* v. *Union of India,* even while upholding the validity of the statute empowering the Union Government alone to represent aggrieved parties, it was held that while granting licenses to transnational corporations, the conditions must prescribe norms and standards for running industries on Indian soil ensuring the safety of environment and ecology.[8]

The vehicular pollution in Delhi was the subject matter in *M.C. Mehta* v. *Union of India*[9] and over the years, a series of directions were issued. In quite a few cases, directions for shifting and relocation of industries were issued for safeguarding ancient monuments.[10] Specific directions were issued for the protection of the Taj Mahal. Coke and coal industries whose emissions were having a damaging effect on Taj were ordered to be closed.[11] Noticing that mining laws are silent regarding the protection of historical monuments, it was held that mining activities cannot be carried on in the vicinity of protected sites.[12] Whenever the setting up of public projects was challenged on environmental grounds, the Court would examine if the government had taken into account all relevant aspects or if it had ignored or overlooked any material consideration or if it was influenced by any extraneous consideration in arriving at the final decision.[13]

When it came to the notice of the Court that Hazardous Wastes (Management and Handling) Rules, 1989 and other statutory provisions for the protection of the environment were not being implemented and as a result, ecology had suffered degradation, the Court not only directed the closure of the units but also ordered appropriate remedial measures.[14] The local bodies have the statutory duty to keep the places clean, in particular, the hospitals must have appropriate arrangements to clear medical waste.[15] Directions were issued for protecting water bodies, rivers, and lakes from ecological degradation. This was done by banning construction activities within a particular radius.[16] To protect the coastal regions, a notification dated

7. *M. C. Mehta* v. *Union of India*, (1987) 4 SCC 463.
8. *Charan Lal Sahu* v. *Union of India,* (1990) 1 SCC 613.
9. *M. C. Mehta* v. *Union of India*, (1987) 4 SCC 463.
10. *Surendra Kumar Singh* v. *The State of Bihar,* (1991) Supp (2) SCC 628.
11. *M.C. Mehta* v. *Union of India,* (1997) 2 SCC 353.
12. *K. Guruprasad Rao* v. *The State of Karnataka*, (2013) 8 SCC 418.
13. *Dahanu Taluka Environment* v. *Bombay Suburban Electricity*, (1991) 2 SCC 539.
14. *Indian Council for Enviro-Legal Action* v. *Union of India,* (1996) 3 SCC 212.
15. *B. L. Wadehra (Dr)* v. *Union of India*, (1996) 2 SCC 594.
16. *M. C. Mehta (Badkhal and Surajkund Lakes Matter)* v. *Union of India,* (1997) 3 SCC 715.

19 February 1991 declaring coastal stretches as Coastal Regulations Zone (CRZ) for regulating the activities therein was made operative as a result of *Indian Council for Enviro-Legal Action* v. *Union of India*.[17] Noticing that intensive prawn farming culture industries in coastal areas were causing ecological degradation, the Court held that sea coasts and beaches are gifts of nature and any activity polluting the same cannot be permitted.[18] *T.N. Godavarman Thirumulpad* v. *Union of India*[19] is another important case at par with the M.C. Mehta batch of cases. The Supreme Court has been issuing countless directions from time to time for the protection of forests and to check further deforestation.

When a sugar factory did not properly comply with the directions of the Pollution Control Board and as a result, a river was found to have been polluted, the industry was ordered to be closed till effective remedial measures were taken.[20] *Intellectuals Forum* v. *State of Andhra Pradesh*[21] is a landmark decision for the protection of water bodies. They are communal properties, and the state authorities are to hold and manage them in trust for the benefit of the community. Even if a water body had fallen into disuse, it must be restored and cannot be alienated. In *Deepak Kumar* v. *The State of Haryana*,[22] the Court took cognisance of the consequences of indiscriminate sand mining, particularly, in riverbeds and directed that even if the areas were less than five hectares, still, environmental clearance must be obtained. It was observed that it is necessary to have an effective framework of a mining plan which will take care of all environmental issues, and also evolve a long-term rational and sustainable use of natural resource base and also the bio-assessment protocol. When construction had come upon a riverbank without obtaining mandatory approval, it was ordered to be demolished.[23]

Elephant deaths on railway tracks and construction activities in elephant corridors had also engaged the attention of the Supreme Court. The Court stressed the need to minimise human-wildlife conflict.[24] Resorts that had illegally been constructed on elephant corridors were ordered to be demolished. In quite a few cases, the Court had held that according of clearance by the environmental body was vitiated. The body must speak in the manner of an expert. Its remit is to apply itself to every

17. (1996) 5 SCC 281.
18. *S.Jagannath* v. *Union of India,* (1997) 2 SCC 87.
19. WP (Civil) No. 202 of 1995 before the Supreme Court.
20. *Bhavani River* v. *Sakthi Sugars Ltd.*, (1998) 2 SCC 601.
21. *Intellectuals Forum* v. *State of Andhra Pradesh,* (2006) 3 SCC 549.
22. *Deepak Kumar* v. *The State of Haryana,* (2012) 4 SCC 629.
23. *Assn. for Environment Protection* v. *The State of Kerala*, (2013) 7 SCC 226; *Vaamika Island (Green Lagoon Resort)* v. *Union of India.* (2013) 8 SCC 760.
24. *Shakti Prasad Nayak* v. *Union of India*, (2014) 15 SCC 514.

relevant aspect of the project bearing upon the environment and scrutinise the document submitted to it.[25]

The Court also gave equal importance to urban ecology. Since it was pointed out that the burning of firecrackers during Diwali substantially increases the pollution levels, crackers with reduced emissions and green crackers alone were permitted to be manufactured and sold. Since it was also generating noise pollution, timings were also laid down as to when they could be burst.[26] If in the master plan or layout, spaces had been earmarked for parks, they could not be altered and put to a different use.[27] For every locality, green spaces and green belts have to be provided to provide lung space to the residents of the locality.[28] Duty is cast upon the authorities to act as *cestui qui trust* concerning public parks.[29] When Indian Express carried a news item headlined 'Falling Groundwater Level Threatens City', *suo motu* notice was taken and directions were issued.[30] Pollution caused to New Delhi on account of stubble burning by farmers in the surrounding regions was taken note of and directions were issued.[31] Slaughterhouses in Delhi causing pollution were ordered to be closed.[32]

Section III

The Court borrowed certain conceptual tools to deal with the environmental issues. They are the doctrine of public trust, the principle of sustainable development, the doctrine of inter-generational equity, the precautionary principle, and the polluter pays principle. No doubt they were propounded either in other jurisdictions or by jurists, the Supreme Court did not innovate them, but it certainly pushed the legal and constitutional boundaries while applying them. Prof. Sax had propounded the public trust doctrine in his influential piece in *Michigan Law Review*.[33] He identified the following threefold restrictions on governmental authority:

1. the property subject to the trust must not only be used for a public purpose but it must be held available for use by the general public;
2. the property may not be sold, even for fair cash equivalent;

25. *BDA* v. *Sudhakar Hegde,* (2020) 15 SCC 63; *Hanuman Laxman Aroskar* v. *Union of India*, (2019) 15 SCC 401.
26. *Arjun Gopal* v. *Union of India*, (2019) 13 SCC 523.
27. *Bangalore Medical Trust* v. *B.S. Muddappa*, (1991) 4 SCC 54.
28. (2004) 5 SCC 182.
29. *Municipal Corpn. of Greater Mumbai* v. *Hiraman Sitaram Deorukhkar*, (2019) 14 SCC 411.
30. *MC Mehta* v. *Union of India (Groundwater case)*, (1997) 11 SCC 312.
31. *M.C. Mehta (Stubble Burning & Air Quality)* v. *Union of India*, (2020) 7 SCC 530.
32. *Buffalo Traders Welfare Assn.* v. *Maneka Gandhi*, (1996) 11 SCC 35.
33. Joseph L. Sax. 1970. 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', *Michigan Law Review*, 68: 471.

3. the property must be maintained for particular types of use: (i) either traditional uses or (ii) some uses particular to that form of resources.

This principle found its practical application in *M.C. Mehta* v. *Kamal Nath*.[34] When Indian Express carried a news item that a powerful politician had encroached on the banks of river Beas for putting up a resort, the Supreme Court took *suo motu* notice. After noticing that a large area of the riverbank which is part of a protected forest has been given on a lease purely for commercial purposes, it held that the Himachal Pradesh government committed a patent breach of public trust by leasing the ecologically fragile land. The lease was quashed. It declared that the public trust doctrine is a part of the law of the land.

In *Vellore Citizens' Welfare Forum* v. *Union of India*,[35] a few more concepts were articulated. Sustainable development is a balancing concept between ecology and development. The 'Precautionary Principle' and the 'Polluter Pays Principle'[36] are essential features of 'Sustainable Development'. The 'Precautionary Principle' in the context of the municipal law means environmental measures by the State Government and the statutory authorities must anticipate, prevent, and attack the causes of environmental degradation. Where there are threats of serious and irreversible damage, a lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. The 'onus of proof' is on the actor or the developer/industrialist to show that his action is environmentally benign. The 'Polluter Pays Principle' means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also to the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. The 'Precautionary Principle' and the 'Polluter Pays Principle' were held to be part of the environmental law of the country. Inter-generational equity means the concern for the generations to come. The present generation has no right to imperil the safety and well-being of the next generation or the generations to come thereafter.[37] In *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu*,[38] these concepts have been elaborated with admirable clarity.

34. (1997) 1 SCC 388.
35. (1996) 5 SCC 647.
36. LSE. 2018. 'What is the polluter pays principle?', *Grantham Research Institute on Climate Change and the Environment*, 11 May, available online at https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-polluter-pays-principle/ (accessed on 23 November 2021).
37. *State of Himachal Pradesh* v. *Ganesh Wood Products*, (1995) 6 SCC 363.
38. *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu*, (1999) 2 SCC 718.

The expansive interpretation given to Article 21 also came in handy. In *N.D. Jayal* v. *Union of India*,[39] the right to the environment was declared as a fundamental right. In *T.N. Godavarman Thirumulpad* v. *Union of India*,[40] the right to live was recognised as a fundamental right to an environment adequate for the health and well-being of human beings. The health of the environment is key to preserving the right to life as a constitutionally recognised value under Article 21 of the Constitution of India.[41] In the *Ramlila Maidan Incident*,[42] it was observed that the Constitution also speaks of preservation and protection of animals, all creatures, plants, rivers, hills, and the environment.

Section IV

Though the theoretical framework is sound and clear, when it comes to application, to concrete facts, the subjective elements come into play. In many a case, judges have chosen to defer to executive wisdom. Some critics contend that the Supreme Court blinked when it came to big-ticket projects, *G. Sundarrajan* v. *Union of India*[43] is cited as one instance. The Court batted for nuclear energy as a viable and sustainable source of energy and emphasised that it was necessary to increase the country's economic growth. Though directions were issued for installing appropriate safety measures, it was obvious that the Court would not question the executive decision. When the construction and implementation of Tehri Hydro Power Project and Tehri Dam were challenged on the ground that the site was an earthquake-prone zone, the Court chose to go by the clearance given by the official report. When Shri N.D. Jayal (described as a passionate environmentalist-administrator in Jairam Ramesh's book) intervened to point out that the safety of the dam was still in danger with regard to the seismological aspects of the area where the dam was to be constructed, the Court brushed it aside saying that there was no need to discuss the matter any further as the government has already fully considered every aspect of the project including its safety.[44] Irrepressible N.D. Jayal mounted an independent challenge and sought directions to conduct further safety tests. While dealing with the same, a prefatory remark was made that in such cases, it is necessary to draw a demarcating line between the realm of policy and the permissible areas for judicial interference. It was concluded that there was no material to show that the project work was being carried out without complying with the conditions of clearance and

39. (2004) 9 SCC 362.
40. (2002) 10 SCC 606.
41. (2020) 15 SCC 63.
42. *Re-Ramlila Maidan Incident Dt…*v. *Home Secretary & Ors*, (2012) 5 SCC 1.
43. (2014) 6 SCC 776.
44. *Tehri Bandh Virodhi Sangarsh Samiti* v. *State of U.P.*, (1992) Supp (1) SCC 44.

the challenge was repelled.[45] It would be a humbling experience for judges to re-read these two judgments every time a natural disaster strikes Uttarakhand. The fate of the litigation about the Narmada Dam was no better. A lot of concerns were expressed for the rehabilitation of the persons dispossessed on account of the construction of the dam and even directions were issued. But the Court refused to even consider the challenge to the project on the ground that it was filed belatedly.[46]

The recent order of the Supreme Court about the Second International Airport in Goa on the Mopa plateau has evoked scathing criticism.[47] In March 2019, the approval granted to the project was suspended on the ground that the project developer has given false information to secure the environmental clearance. The judgment reported was celebrated all over.[48] The Court refers to the thirteen principles adopted in 2016 by the First World Environmental Law Congress,[49] they are Obligation to Protect Nature, Right to Nature and Rights of Nature, Right to Environment, Ecological Sustainability and Resilience, In Dubio Pro Natura, Ecological Functions of Property, Intragenerational Equity, Intergenerational Equity, Gender Equality, Participation of Minority and Vulnerable Groups, Indigenous and Tribal Peoples, and Non-Regression and Progression. Even the UN referred to it as a significant advancement of environmental law. But, in less than twelve months, the suspension was lifted and the construction activities were allowed to resume. In the second verdict,[50] the Supreme Court noted that after the earlier round, additional environmental safeguards and conditions have been stipulated. After noting that the Expert Appraisal Committee (EAC) had followed a comprehensive process, the Court felt that its ultimate conclusions must be scrutinised in the course of judicial review in the context of the limitations which are attached to the court conducting a merits-based review. The standard of judicial review that must be applied in environment-related cases as enunciated in *Lafarge Umiam Mining (P) Ltd* v. *Union of India*[51] (not exactly a decision that can be a toast of any activist) was followed. The evaluation of merits is a matter which primarily

45. *N.D. Jayal* v. *Union of India and Ors,* (2004) 9 SCC 362.
46. *Narmada Bachao Andolan* v. *Union of India and Ors*, (2000) 10 SCC 664.
47. Ritwick Dutta. 2020. 'The Many Absurdities of the Supreme Court Judgement on Goa's New Airport, Science', The Wire, 8 April, available online at: https://science.thewire.in/environment/supreme-court-mopa-airport-moefcc-eac-environment-development-eia/ (accessed on 23 November 2021).
48. *Hanuman Laxman Aroskar* v. *Union of India*, (2019) 15 SCC 401.
49. IUCN, 2016, '1st IUCN Work Environmental Law Congress - April 2016', iucn.org, available online at: https://www.iucn.org/commissions/world-commission-environmental-law/events-wcel/past-events/1st-iucn-world-environmental-law-congress-april-2016 (accessed on 23 November 2021).
50. (2020) 12 SCC 1.
51. (2011) 7 SCC 338.

rests with expert authority. The Court can certainly supervise procedural compliance and ensure that all necessary inputs which are required to be factored into the decision-making process have been duly borne in mind. Once this has been done, the Court must be circumspect in micro-managing the decision-making process by EAC by substituting its own opinion for that of EAC.

However, since climate change is a pressing national and international concern, the higher judiciary has been fairly responsive. When the Government of West Bengal proposed to fell trees to construct Road Over Bridges and widen the roads, the Supreme Court constituted a committee of experts to discuss and recommend developing a set of scientific and policy guidelines that shall govern decision-making concerning the cutting of trees for developmental projects.[52]

Section V

The jurisprudence so far evolved by the Supreme Court has enabled the High Courts to effectively adjudicate environmental issues. Through several progressive judgments discussed in the previous sections, the Supreme Court introduced the Precautionary Principle, as well as the principles of the Polluter Pays and Inter-generational Equity into Indian environmental law. The Court has repeatedly stepped in to fill lacunae in legislations, relying on internationally accepted principles and case law from other jurisdictions. The development of environmental litigation was a natural corollary of the evolution of the Court's PIL jurisprudence starting from the 1970s. PILs allowed the Supreme Court judges to be flexible on issues of *locus standi* and procedure. They also were willing to tackle questions of executive action and inaction while pushing the boundaries of justiciability. The right to life was interpreted as not merely staying alive but living a life of dignity in a clean environment with access to clean air and water. Environmental damage was rightly seen as an obstacle to leading a dignified life and enjoying the other rights guaranteed in the Constitution. The Supreme Court's judgments on environmental issues have also enabled High Courts to decide these matters effectively.

Yet, the work is far from complete. In the 2000s, some decisions of the Supreme Court reflect a slight degree of circumspection on matters of policy. In these decisions, the Court has stepped back from an activist stance and stated that it cannot micro-manage the decision-making of expert bodies or substitute its decision for theirs but still can supervise procedural compliance and ensure that all necessary inputs are necessary for the decision-making process to have been considered.

52. *Assn. for Protection of Democratic Rights* v. *State of West Bengal*, (2021) 5 SCC 466.

Further, despite the large volume of environmental law cases, the principles laid down by the Court have not institutionalised or evolved into legislation in several cases. For future litigants on similar matters, this leads to ambiguity about the nature of the rights and entitlements available, the procedures for claiming these rights, and avenues for participating in decision-making on matters related to the environment. In addition, there are gaps in the implementation of the directions of the Court in their entirety. These factors reduce the long-term consequences of such cases on the lives of ordinary Indians.

Thus, the concepts evolved so far have served us well, but they may not be sufficient. One looks in vain for references to Chandi Prasad Bhatt or Sunderlal Bahuguna or J.C. Kumarappa in the judgments of the higher judiciary, but popular green struggles like Chipko Movement do not find mention.

So, what next? It is time the judiciary recognises in unequivocal terms that the current environmental ills are due to the relentless pursuit of economic growth and maximisation of private profit.

The Court is often called upon to engage itself in the debate which engaged Gandhi and Nehru as to what is the appropriate model of development. The founding fathers were on the opposing sides. Nehru was a vigorous votary of rapid industrial development. He made it clear that independent India would adopt a model of economic development based on the factory and the city rather than the farm and village. He was for mass production while Gandhi was for production by the masses. Gandhi realised that the world was going in the opposite direction. He remarked 'when the moth approaches its doom it whirls faster and faster till it burns up. It is possible that India will not be able to escape this moth-like circling. I must try, till my last breath, to save India and through it the world from such a fate'.[53] But the ruling elite favoured the Nehruvian model and we have been traversing the said path since Independence. How long and how far we can travel further down the road is a question facing all of us. It is only the judiciary that can put roadblocks and arrest the process of ecological degradation. When the government wants to give away an entire hill for mining and quarrying, can the villagers complain that their right to the environment is infringed? Can they argue that while a part of the hillock can be tapped for mineral wealth, the entire hill cannot be destroyed?

Gwendolyn J. Gordon, writing in Columbia Journal of Environmental Law,[54] states that legal personhood appears to be a promising tool for protecting nature.

53. Ramachandra Guha. 2018. 'Gandhi: The Years That Changed the World', Penguin Allen Lane, pp. 761-762.
54. Gwendolyn J. Gordon. 2018. 'Environmental Personhood', *Columbia Journal of Environmental Law*, 43(1), available at https://journals.library.columbia.edu/index.php/cjel/article/view/3742 (accessed as on 17 Feb 2023).

Given the acceptance of corporate personhood and personhood for ships and religious deities, the idea of environmental personhood does not require much of a stretch of our legal imagination. In New Zealand, a national park has been declared to be a legal entity. The country's Whanganui River has also enjoyed the same status since 2017. Ecuador's Constitution proclaims that nature has the right to exist, persist, maintain, and regenerate its vital cycles. In Bolivia, nature is defined as a juridical entity. In *A. Nagaraja*,[55] the Supreme Court has propounded a non-anthropocentric view of nature. The High Court of Uttarakhand[56] granted personhood rights to the Ganga river basin. Given the urgency of reversing climate change and widespread environmental degradation, the future of environmental jurisprudence in India may lie in this direction. The final step constituting a complete tryst with environmental destiny would be the recognition of nature as a person, having rights enforceable in courts of law.

55. *Animal Welfare Board of India* v. *A Nagaraja*, (2014) 7 SCC 547.
56. *Mohd Salim* v. *State of Uttarakhand,* WP No. 126 of 2014 before the High Court of Uttarakhand decided on 20 March 2017.

SYSTEMIC CONUNDRUMS: REIMAGINING RIGHTS

9

Court-Led Development of Participatory Democracy

Prashanto Sen*

Section I

'The political history of what we can call western liberal democracies is the history of development and application of a compromise aimed at resolving the dilemma of democracy—the dilemma of finding a way back to locate the ultimate source of political authority in democratic assent, without democracy collapsing into mob rule or being hijacked by an oligarchy'.[1] Public participation in decision-making is part of this democratic debate. The Supreme Court deals with this issue in *Rajeev Suri* v. *Delhi Development*[2] where one of the questions was whether there had been sufficient public consultation before initiating a project involving major architectural transformations of the Central Vista at the heart of the capital of India.

The majority judgment upholding the project confined the need for public consultation to statutorily and constitutionally prescribed cases. The logic was that requiring public consultation in administrative action which has large-scale consequences for the public, where public consultation is not statutorily prescribed, would render governance ineffective. The dissenting judgment however referred to sufficient legal basis in common law for the courts to extend the requirement of public participation to executive decisions. The conservative view taken by the Court misses the centrality of participation in democracy and the need to extend it to executive decisions to improve the quality of the decisions. A more participatory tilt to governance gives a greater sense of involvement to the citizens.

Judgments of courts, until now, have not engaged with participatory democracy in depth nor with the concept of deliberative democracy as an extension of

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All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 8 March 2022.

1. A.C. Grayling. 2017. *Democracy and Its Crisis. London.* One World Publications, p. 181.
2. *Rajeev Suri* v. *Delhi Development Authority*, (2021) SCC OnLine SC 7.

participatory democracy. There is also a need to understand the requirement of their deeper inculcation in the democratic setup in India to prevent its regression. Empirical evidence regarding some participatory structures introduced in Kerala has shown that Gram Sabhas enable better decision-making apart from providing a platform for weaker voices to be heard. Additionally, this chapter also argues that the principle of Wednesbury unreasonableness, which requires all aspects of a decision to be examined, is better served by a participatory model. With a declining trust in democratic institutions globally, and in India, there is a pressing need for more participation.

Section II of this chapter will describe the concept of participatory democracy as well as deliberative democracy in western philosophy. Section III will deal with the historical roots of deliberative traditions in India and the manner in which deliberative strands were woven into the fabric of Indian democracy following the Independence of India. Section IV will cover court engagement with participatory democracy. Section V will provide the legal basis on which the courts can review administrative and executive action through the prism of participatory democracy. The conclusion emphasises the need to extend participatory decision-making in view of the declining trust of citizens in democratic institutions.

Section II

The phrase 'participatory democracy' was first used by political philosopher Arnold Kaufman in a convention held by the Students for Democratic Society, an American group that felt it was crucial for people to have a part in how their society is governed for true democracy to be established.[3] Carole Pateman, in her seminal book on participatory democracy, emphasised that classical theorists of democracy valued the central role of participation in the theory of democracy.[4] According to her, Rousseau saw the central function of participation as educative. He envisaged it as a way to develop the political responsibility of the individual by going beyond the immediate interest of the individual. The sense of justice becomes an important component of the deliberation. In her account, according to Mill, an individual should be trained and prepared for participation at the local level of self-governance.[5]

3. Sam Roberts. 2012. 'The Port Huron Statement at 50', *The New York Times*, 3 March, available online at https://www.nytimes.com/2012/03/04/sunday-review/the-port-huron-statement-at-50.html (accessed on 4 July 2021).
4. Carole Pateman. 1970. *Participation and Democratic Theory*. Cambridge University Press.
5. Carole Pateman. 1970. *Participation and Democratic Theory*. Cambridge University Press, pp. 24, 25, 30.

There is empirical evidence that supports Rousseau's view that participation develops the political outlook and efficiency of the individual.[6] Although a detailed discussion of empirical evidence is beyond the scope of this chapter, there will be some discussion of the effect of participatory/deliberative decision-making in the Indian context in section III.

Deliberative democracy has been defined by Dryzeck as 'reflective assent through participation in authentic deliberation by all those subject to the decision in question'.[7] In their view, deliberation means to explore all aspects of a public decision by the citizens themselves. It is not enough if the elected representatives give the reasons while the citizens merely accept them.[8] As Steiner observes, 'There is consensus among the deliberative theorists that ordinary citizens should have the opportunity to take part in political deliberation'.[9] However, the difference between participatory democracy and deliberative democracy is in the nature of participation.[10] Unlike participatory democracy, public reasoning is a sine qua non for deliberative democracy. As Stephen Elstub explained, 'Two of the key norms of deliberative democracy are inclusion of those affected by decisions and inclusion of all the relevant positions on the issue at hand'.[11] However, deliberative democracy can be viewed as a form of participatory democracy.

Public reasoning and deliberation in India were prevalent in Buddhist, Jain, and Hindu traditions. Participation in such public debates was not limited to the intellectual, political, and religious elite. Debates in Kathas, Sabhas, Panchayats, and Samajas included a wide section of people and were not confined to the elites.[12] The Indian electoral democracy adopted a representative form of government at its independence. Subsequently, forms of deliberative democracy, such as Gram Sabhas, were adopted. It is defined under Article 243(b) of the Indian Constitution as 'a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level'. The modern Gram

6. Pateman, *Participation and Democratic Theory,* p. 105.
7. John S. Dryzek. 2010. *Foundations and Frontiers of Deliberative Governance*. Oxford University Press, p. 23.
8. Amy Gutmann and Dennis Thompson. 1996. *Democracy and Disagreement*. The Belknap Press of Harvard University Press, p. 358.
9. Jürg Steiner. 2012. *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications*. Cambridge University Press, p. 32.
10. Cited in Stephen Elstub. 2018. 'Deliberative and Participatory Democracy', in Andre Bächtiger *et al.* (ed.), *The Oxford Handbook of Deliberative Democracy*. Oxford University Press, p. 8.
11. Stephen Elstub. 2018. 'Deliberative and Participatory Democracy', in Andre Bächtiger *et al.* (ed.), *The Oxford Handbook of Deliberative Democracy*. Oxford University Press, p. 7.
12. Parthasarthy and Rao, 'Deliberative Democracy in India. Policy Research Working Paper No 7995'. *World Bank*, pp. 2-5.

Sabha was first envisaged in 1985,[13] with a central role in the Mandal Panchayat system of Karnataka. Subsequently, Kerala initiated a programme devolving 40 per cent of the state's development budget to village panchayats, giving substantial powers to these councils, and instituted a People's Campaign, that is, a grassroots programme to raise awareness and also train citizens about how to exercise their rights and become active contributors in the panchayat process, mainly by participating in Gram Sabhas. Gram Sabhas in Kerala have become central to the village planning process. Development seminars and working committees are mainly held in conjunction with Gram Sabhas to make them realistic spaces for deliberative decision-making and planning. Rather than open deliberation, participants are divided into resource-themed groups or committees and the discussions within each group produce consensual decisions concerning the designated resource.[14] Parthasarathy and Rao add that 'this structure is geared towards increasing the efficiency of consensual decision-making and is facilitated by various training programmes to instruct both citizens on deliberative planning and local bureaucrats on methods for turning plans into effective public action'.[15] The process of deliberation is aided by retired bureaucrats and experts. Assistance is provided in framing proposals as well. Experts in government play an important role but do not enjoy exclusive power to make decisions.[16]

There has been some empirical research on whether Gram Sabhas have been effective deliberative forums. Unlike Kerala, in other states, Gram Sabhas are often not held. However, when held, it has been found to improve governance. The deliberation is a means for improving the accountability of the government in policy and administrative decision-making. Rising literacy would make these dialogic spaces even more effective. Well-informed citizens are empowered to demand and enforce greater accountability.[17]

The emergence of Gram Sabha, particularly, in India reflects an 'Indianised deliberative democracy'. According to Parthasarathy, 'The sheer scale of deliberation practised through the Gram Sabha has been remarkable—they have

13. The Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats Act, 1983, received presidential assent on 10 July 1985 and was gazetted on 2 August 1985.
14. Parthasarthy and Rao, 'Deliberative Democracy in India. Policy Research Working Paper No 7995'. *World Bank*, p. 11.
15. Parthasarthy and Rao, 'Deliberative Democracy in India. Policy Research Working Paper No 7995'. *World Bank*, p. 11.
16. Archon Fung and Erik Olin Wright. 2003. 'Thinking about Empowered Participatory Governance' in A. Fung and E.O. Wright (eds.), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*. Verso, p. 17.
17. Parthasarthy and Rao, 'Deliberative Democracy in India. Policy Research Working Paper No 7995'. *World Bank*, p 12, 13.

been a key site where the citizens can challenge the entrenched social hierarchies and demand improved governance'.[18] From the study conducted by Parthasarathy and Rao, it is clear that Gram Sabhas have also been forums where inequalities have been questioned and voices have been raised by the disadvantaged in affirmation of their personal dignity. Although equality may not be the objective when the Gram Sabha is formed, the State policy and intervention can help to lessen inequality in the Gram Sabha. Programmes to train and empower the citizen like the People's Plan Campaign in Kerala or the women-centered Pudhu Vaazhvu in Tamil Nadu 'suggest that the facilitated deliberation can usher the sabhas closer to the deliberative ideal in which citizens of equal standing arrive at consensual decisions in matters of public interest'.[19] Increasing literacy is also likely to improve the efficacy of the Gram Sabha.

Section III

There are a large number of cases in Indian jurisprudence dealing with democracy as also participatory democracy. Democracy is part of the basic structure of the Constitution.[20] There are six million users of the Right to Information Act in India which reflects the increasing inclination of the citizens to engage with the government on issues of accountability and the right to know.[21] Courts have recognised the right to know, transparency, and accountability as the foundation for the democratic functioning of the government. The locus classicus in this regard is *S.P. Gupta* v. *President of India* decided in 1981.[22] In the *Him Prevesh Environment Protection Society* v. *State of Himachal Pradesh,*[23] the High Court of Himachal Pradesh emphasised that the government authorities, such as the Pollution Control Board, Ministry of Environment and Forests and the Expert Appraisal Committee (EAC), must play a more proactive role in public hearings. Project proponents paint a rosy picture and the government authorities must take the initiative to provide the complete picture rather than waiting for NGOs or local inhabitants to come to

18. Parthasarthy and Rao, 'Deliberative Democracy in India. Policy Research Working Paper No 7995'. *World Bank*, p. 15.
19. Parthasarthy and Rao, 'Deliberative Democracy in India. Policy Research Working Paper No 7995'. *World Bank*, p. 16.
20. *His Holiness Kesavananda Bharati Sripadagalavaru* v. *State of Kerala*, (1973) 4 SCC 225; *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1.
21. McGill University. 2018. *Unpacking Participatory Democracy*, p.11.
22. AIR 1982 SC 149, para 64; *Supreme Court of India* v. *Subhash Chandra Agarwal*, (2020) 5 SCC 481, para 31; *Gram Panchayat Navlakh Umbre* v. *Union of India,* (2012) SCC OnLine Bom 851, para 25.
23. *Him Privesh Environment Protection Society* v. *State of Himachal Pradesh,* CWP 586/2010 and CWPIL 15/2009 before the High Court of Himachal Pradesh decided on 4 May 2012, para 108.

court to question the validity of the project. *T.S.R. Subramanian* v. *Union of India*,[24] *Anjali Bhardwaj* v. *Union of India,*[25] and *R.K. Jain* v. *Union of India*[26] are some of the other judgments emphasising the right to know. Further, *Utkarsh Mandal* v. *Union of India*[27] emphasised the need for informing the public about the full contents of an Environmental Impact Assessment report before a public hearing related to a project.

There are several cases that have emphasised that democracy cannot be restricted to the periodic exercise of voting.[28] In *Avinder Singh* v. *State of Punjab*,[29] the court emphasised how law-making is often elitist and bureaucracy-dependant. Since the bureaucracy is isolated from popular pressure, the judgment highlighted the need for radical restructuring.

Decentralisation in decision-making has been seen as a step towards a more participatory form of democracy. In *Bhanumati* v. *State of Uttar Pradesh,*[30] the Supreme Court held that 'what was in a nebulous state as one of the Directive Principles under Article 40 through the 73rd constitutional amendment metamorphosed to a distinct part of constitutional dispensation with detailed provisions for functioning of panchayat. The main purpose behind this is to ensure democratic decentralisation on the Gandhian principle of participatory democracy so that the panchayats may become viable and responsive people's bodies as institutions of governance and thus may acquire the necessary status and function with dignity by inspiring respect of common man'. The recent *K.S. Puttaswamy* v. *Union of India,*[31] highlighted participatory governance as the essence of democracy which ensured responsiveness and transparency. The courts have viewed the amendments in the Constitution by which panchayats and municipalities have been constitutionally recognised as enhancing participatory and representative democracy.[32]

Constitutional recognition of the local bodies (panchayats and municipalities) also raises the question of consultation of its participants and what constitutes proper

24. (2013) 15 SCC 732, para 39.
25. (2019) 18 SCC 246, para 10.
26. (1993) 4 SCC 119, para 41.
27. *Utkarsh Mandal* v. *Union of India*, (2009) SCC OnLine Del 3836, para 21.
28. *Mohinder Singh Gill* v. *Chief Election Commissioner, New Delhi*, (1978) 1 SCC 405, para 23; *S.P. Gupta,* para 65; *People's Union For Civil Liberties (PUCL) and Anr* v. *Union of India and Anr,* (2003) 4 SCC 399, para 26.
29. (1979) 1 SCC 137, para 51.
30. (2010) 12 SCC 1, para 26.
31. (2019) 1 SCC 1, para 1110.
32. *State (NCT of Delhi)* v. *Union of India,* (2018) 8 SCC 501, paras 307, 475.6.

consultation. The tests of consultation have evolved in the backdrop of statutory requirements of public consultation before decisions are taken. The statutes are basically of two types. One category is legislations pertaining to land and natural resources, which would involve legislations such as the Environment Protection Act 1986 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, etc. The second category is cases where public consultation is required under economic regulatory legislations, such as the Telecom Regulatory Authority of India Act, 1997; Competition Act, 2002; and the Electricity Act, 2003. In regulatory legislation, the issue of participation and consultation is unproblematic. Stakeholders are knowledgeable and well-versed in making strategic interventions.[33] However, the issue of consultation and whether it was proper becomes germane in land and natural resources cases where the stakeholders are often consisting of rural population with unequal access to resources or knowledge.

The requirements of proper consultation were laid down in the *Cellular Operators Association of India* v. *Telecom Regulatory Authority of India* which affirmed the following principles from English law: '(a) consultation must be undertaken at a time when proposals are still at a formative stage; (b) it must include sufficient reasons for substantive proposals to allow those consulted to give intelligent consideration and an intelligent response; (c) adequate time must be given for this purpose and the product of consultation must be conscientiously taken into account when the ultimate decision is made; Consultation or deliberation is incomplete or ineffective unless the parties make their viewpoints known to each other'.[34] Moreover, *Hanuman Laxman Aroskar* v. *Union of India*[35] emphasised that public consultation should be extended to people beyond those who are to be directly affected. *Chandrawati Gram Panchayat* v. *State of Gujarat*,[36] relying on the works of Arnstive (1969), Hart (1992), John (1996), Franke (1997), Preteder (1997), and Lendonz (2001), highlighted participatory decision making not just as a notion but a vision.

In environmental jurisprudence courts have upheld and placed great emphasis on the need for proper public consultation which is statutorily mandated. There has

33. This will be clear from perusal of public notice dated 6 January 2022 by Airport Economic Regulatory Authority (AERA) wherein the public notice invited comments from stakeholders such as State Govt./ All the Airport Operators/ All Independent Service Providers/ Registered Cargo Trade Bodies/ Airlines/ Oil Companies and Others.
34. *Cellular Operators Association of India* v. *Telecom Regulatory Authority of India,* (2016) 7 SCC 703, para 82; *State of Jammu & Kashmir* v. *A.R. Zakki,* 1992 Supp (1) SCC 548, para 17; *S. Nandakumar* v. *The Secretary to Government of Tamil Nadu Department of Environment and Forest,* W.P. Nos.10641 to 10643 of 2009 before the high Court of Madras decided on 22 April 2010, paras 34, 35; *Vadodara Shaheri Jilla Khedut Mandal* v. *State of Gujarat,* 2014 GLH (1) 710, paras 70, 71.
35. (2019) 15 SCC 401, para 112.8.
36. *Chandrawati Gram Panchayat* v. *State of Gujarat,* Special Civil Application No. 96 of 2015 before the High Court of Gujarat decided on 4 February 2019, para 27.

been a case where petitioners challenged the public hearing conducted by State Pollution Board to grant environmental clearances to certain projects, wherein objections of villagers were suppressed by officers. The Court has interfered with the public consultation which could not be carried out peacefully and was interrupted by various elements.[37] In *Vijay Bansal* v. *State of Haryana*,[38] a distinction was drawn between public consultation and public participation. The object behind public consultation was held to be to obtain the viewpoint of the population at large beyond the locals while public participation was to be confined to those who are directly affected in the region. This would pose problems in determining who is directly affected and who is not and would give scope to the authorities and the project proponent to restrict the number of people participating in the public hearing. The Supreme Court, in *Hanuman Laxman Aroskar* v. *Union of India,*[39] has not gone into this distinction and has outlined public consultation to mean views of those in the local area as well as beyond, who have a plausible stake in the project or activity. This strikes the right balance in ensuring that the persons entitled to participate are not unduly restricted, at the same time the requirement of a 'plausible stake' dilutes the objective of the Supreme Court. What constitutes a plausible stake is something which could be an issue for the courts to delineate.

Under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, the Gram Sabha has been made a safeguard for the protection of the customary resources and religious rights of the tribals. In the case of *Orissa Mining Corporation* v. *MOEF*,[40] the Supreme Court directed the state government to place issues relating to religious and cultural claims of the tribals which were said to be involved in the case of mining in front of Gram Sabha. In effect, it underlined the importance of seeking proper permission from the Gram Sabha. Thereafter, there have been some National Green Tribunal judgments that have also emphasised the need for seeking permission from Gram Sabha before the establishment of the project.[41]

Section IV

The analysis of case laws demonstrates that the courts have enforced public consultations when required by statutes. In cases where the statutes have required public consultation/consent of the Gram Sabha, the courts have been vigilant in

37. *Padankar Vinayak Deshmukh* v. *Union of India,* 2012 (2) All MR 497, para 9.
38. CWP No. 20134 of 2004 before the High Court of Punjab and Haryana decided on 15 May 2009, para 49.
39. (2019) 15 SCC 401, para 110.
40. (2013) 6 SCC 476, para 48.
41. *Themrei Tuithung* v. *Union of India*, (2017) SCC OnLine NGT 967, para 41; *Paryavaran Sanrakshan Sangarsh Samiti Lippa* v. *Union of India* (04.05.2016 - NGT), para 20(ii).

protecting this requirement, irrespective of the size of the project involved as was apparent in the *OMC.*[42] There has been acknowledgment and reiteration of the fact that participatory democracy is an integral part of the Indian democratic framework. However, there has been no analysis of the nature of participation that is envisaged in a participatory framework (except in a limited way in cases dealing with a public hearing under the Environmental Protection Act, 1986). The right to be consulted and what amounts to effective consultation are the extents to which the courts have delved when engaging with the concept of participatory democracy. Participation has a far deeper significance to democracy. It was of central concern to western liberal philosophers and continues to be so. The Kerala experiment also reflects the powerful transformative effect it can have upon citizen's participation in political life.[43]

However, in *Rajeev Suri* v. *Delhi Development Authority* the *Central Vista* case reflects the hesitation of the courts to take the legal leap to endorse a more participatory framework. The argument is that unless there is legislation or there is a violation of a fundamental right, the courts cannot compel executive decision-making to be more participatory is misplaced. The dissenting judgment gives an elegant rebuttal to this line of thinking. It begins by referring to the case of *R. (Moseley)* v. *London Borough of Haringey*[44] where Lord Wilson held that a public authority's duty to consult those interested before taking a decision arises in the common law duty of procedural fairness, in the form of the doctrine of legitimate expectation. The first objective is, of course, to address the common law duty of procedural fairness in the determination of the person's legal right. It further held, 'Three other underlying procedures are (i) that consultation results in better decisions by ensuring that the decision maker receives all relevant information and is properly tested; (ii) it avoids the sense of injustice which the person who is subject to the decision would otherwise feel; (iii) it is reflective of the democratic principle at the heart of society'.[45]

The dissenting opinion referred to the observation of Lord Wilson that 'the degree of specificity with which the public authority should conduct its consultation exercise may be influenced by the identity of those it is consulting and the effect which the proposal has. In some situations it may also include the information

42. *Orissa Mining Corporation Limited,* para 48 (size of the project involved diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in Kalahandi and Rayagada Districts of Orissa).
43. Parthasarthy and Rao, 'Deliberative Democracy in India. Policy Research Working Paper No 7995. World Bank', p. 11.
44. (2014) UKSC 56.
45. *Rajeev Suri* v. *Delhi Development Authority*, para 621.

relatable to arguable yet discarded alternative options'.[46] The consultation itself should be as per the four principles propounded in *R.* v. *Brent London Borough Council ex parte Gunning,* also known as the Gunning Principles. The basic requirement, if the consultation was to have sensible content was:

> First, that consultation must be at a time when the proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit intelligent consideration and response. Third, to which I shall return, that the adequate time must be given for the consideration and response and, finally, fourth, that the product of the consultation must be conscientiously taken into account in finalising any statutory proposal.[47]

Although the Gunning case was in the context of framing of a statute, the same rigour and logic would apply to executive actions. In fact, the dissenting judgment makes the leap by clarifying that the conditions of the Gunning Principles flow from common law general duty of fairness, and the doctrine of procedural legitimate expectation. In the dissent, the basis of the doctrine of legitimate expectation has been held to be reasonableness and fairness, the denial of which may amount to an abuse of power.

The dissenting opinion goes on to highlight the importance of deliberative democracy as it accentuates the right of participation in deliberation, in decision-making and in [the] contestation of public decision-making. Contestation before the courts post the decision or legislation is one form of participation. Adjudication by the courts, structured by the legal principles of procedural fairness and deferential power of judicial review, is not a substitute for public participation before and at the decision making stage.[48]

Justice Khanna, the author of the dissenting judgment, refers to the several legislations which mandate public participation in the form of consultation and even hearing and emphasises that public participation under such legislations is of a higher order than primary legislations enacted by elected representatives.

The dissenting judgment is important on multiple counts. Most obviously, it gives a strong legal rebuttal to the majority's argument that there is no duty to consult the section of the public affected in case of an executive action unless the action violates the fundamental right to life under Article 21 or is contrary to the Constitution. The doctrine of legitimate expectation is made the foundation of the

46. *Rajeev Suri*, para 621.
47. *R.* v. *Brent London Borough Council*, (1985) 84 LGR 168, p. 189.
48. Prachi Bhardwaj, 2021 'Citizens have the right to know and participate in deliberation and decision making', *SCC Online Blog Post*, available online at https://www.scconline.com/blog/post/2021/01/05/citizens-have-the-right-to-know-and-participate-in-deliberation-and-decision-making-justice-khanna-dissents-in-21-verdict-clearing-the-central-vista-project/.

rebuttal. In fact, the sense of injustice that an affected person suffers on account of non-consultation by the executive before taking the decision is rooted in his dignity. The duty to consult is a prescription of fairness which in turn is a deeper philosophical assumption of human beings having the dignity, autonomy, and intelligence to be consulted.

Human dignity has been held to be an essential part of the Constitution in *Puttaswamy*.[49] Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19), and the right to life and personal liberty (Article 21).[50] Therefore, any executive action which violates legitimate expectation and/or procedural fairness by not providing for consultation for a section of stakeholders for a region is in effect violating their right to dignity, even in the absence of a statutory prescription requiring consultation. This points to a major lacuna in the logic of the majority judgment which overlooks the violation of the dignity of individuals not consulted in taking decisions affecting them as a community/stakeholders, even if there is no statutory prescription for consul-tation.

The second important aspect of the dissenting judgment is the appreciation of the nuances of participation and the point that it is the heart of democratic society. In fact, Justice Khanna places public participation on a higher pedestal than primary legislations enacted by elected representatives. The importance of participation as a facet of democracy has deep historical roots in the western liberal tradition as already described above.

The third is the recognition that contestation before courts is in fact a form of participation. This is in tune with the concept of advocacy democracy in which the citizens directly participate.[51] Advocacy democracy involves approaching the court on issues of government policy that are being objected to. The judicialisation of the policy process enables various public interest issues to be raised in the courts.[52] Public interest litigation enables intervention in policy in a manner that was not available to citizens and groups earlier.[53]

This also resonates with the two-track model of democracy proposed by Habermas.[54] One track is the democratic opinion formation occurring in the public

49. *K.S. Puttaswamy* v. *Union of India*, (2018) 1 SCC 809.
50. *K.S. Puttaswamy*, para 111.
51. Russell J. Dalton, Susan E. Scarrow, and Bruce E. Cain. 2004. 'Advanced Democracies And The New Politics', Journal of Democracy, 15, p. 128.
52. Alec Stone Sweet. 2000. Governing with Judges: Constitutional Politics in Europe. Oxford University Press, pp. 195-196.
53. Dalton, Scarrow, and Cain, 'Advanced Democracies And The New Politics, p. 129.
54. Jürgen Habermas. 1996. 'Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy'.

sphere outside the formal apparatus of the State. The other track is the democratic will formation occurring through the authoritative acts of the legislature, executive, and judiciary. Therefore, according to Habermas, political parties are only one of the means of will formation in a democracy.[55] It is this aspect of the courts being arenas of will formation that the minority judgment seems to allude to. The extent to which the courts should interfere in policy issues is itself highly contentious, however, its discussion is beyond the scope of the present chapter.

In India, there is a surfeit of public interest cases raising multiple public policy issues. While the action is filed on account of rights protection, it can have a fundamental impact on policy. As observed in Dalton Scarrow and Cain, 'Further, the judicial route to policy reform can be maximally efficacious, since judicial law-making grounded in an interpretation of a constitutional right is immune from legislative override; such rulings can be changed only through a subsequent judicial decision or by constitutional amendment. Thus, other things equal, policy outcomes produced through adjudication are often "stickier"...'.[56]

The recent case of such a policy intervention is the Supreme Court's engagement with the vaccination policy of the Central Government. The Centre on 7 June 2021 revised its vaccination policy by adopting the centralised vaccine procurement system, after the judgment of the Supreme Court dated 2 June 2021, in a *suo motu* writ petition. The court employed the dialogic approach to make significant interventions in the vaccine policy of the Government. The dialogic review theory was propounded first by Peter Hogg and Allison Bushell in their paper 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter Rights Isn't Such a Bad Thing At All)'.[57] The theory emphasises the importance of mutual discourse between judicial and political branches of the government on constitutional questions. This is a powerful avatar of participatory democracy at work.

Though not specifically enumerated by the dissenting judgment in the Rajiv Suri case, the principle of Wednesbury reasonableness is an additional legal ground to support the need for participatory input in executive action. It requires the executive to take into account all relevant considerations which necessarily must include the

55. Goodin, 'Innovating Democracy: Democracy Theory and Practice after the Deliberative Turn', p. 39.
56. Rachel A. Cichowski and Alec Stone Sweet. 'Participation, Representative Democracy, and the Courts'. 2003. Dalton, Scarrow, Cain (eds), *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies*, p. 197.
57. Peter W Hogg and Allison A Bushell. 1997. 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter Rights Isn't Such a Bad Thing At All)', *Osgoode Hall Law Journal*, 35(1): 75.

objections of stakeholders after they have been made fully aware of the consequences of a particular executive action. The consideration of objection and a reasoned acceptance or rejection of the same would be a definite requirement under the doctrine of Wednesbury reasonableness failing which the executive action would have to be set aside.

There is not only sufficient legal basis for the court to insist on deliberative decision-making under common law '…in the absence of statute, but the institutional structure is already present in the form of the Gram Sabhas which are the most widely used deliberative institution in human history'.[58] It would be open to the courts to lay down directions for the Gram Sabhas to be the deliberative frame for the deliberation of executive actions affecting a large number of stakeholders in any particular region. This would be for cases in which there are no statutory prescriptions. Even if there are statutory requirements for public consultations and public hearings, it is open to the courts to read in the requirement of consulting the Gram Sabhas as a requirement for a proper and comprehensive consultation.

In view of a robust common law tradition and legal principles which enable courts to prescribe public consultation even when not statutorily prescribed, there is no reason why participatory modes of decision-making should only be confined to statutory cases. *Rajeev Suri* reasoned that direct democracy was never envisaged by the founding fathers as an ideal model for the domestic socio-economic setup and the representative model was embraced. Over a period of time, there has been an endeavour to increase participation by way of legislation.[59]As per the judgment, public participation is to be regulated and/or prescribed by statute and/or the Constitution. No basis is given by the court to support its argument that unless public participation was specifically permitted by statute or the Constitution, it is barred. It is well established that common law is often the source of rights in the absence of statutes. The dissenting judgment has given an adequate legal basis on which a right of participation can be based under common law. In addition, it has already been argued in this Section that the Constitution supports the possibility of participation even in the absence of a statute.

The court endorses its dictum in the Ashwani Kumar case which laid great emphasis on the legislature as 'microcosm of the bigger social community possessing qualities of a democratic institution in terms of composition, diversity and

58. Parthasarthy and Rao, 'Deliberative Democracy in India. Policy Research Working Paper No 7995'. World Bank'. p. 3.
59. *Rajeev Suri*, para 216.

accountability'.[60] It quoted *Mohinder Singh Gill*[61] to emphasise periodic elections as the essence of the Constitution. The judgment reflects the view that has been criticised by Patrick Heller as an obsession with a competitive view of democracy involving periodic elections. Academics are interested in the aggregation of preferences. According to Heller, the focus should be on the manner of making and shaping preferences.[62] This would undoubtedly mean a deeper engagement with democracy.

Section V

An attempt has been made in the preceding sections to argue that there is a sound legal basis for a more participatory form of governance even if there is no specific statutory mandate for the same. The arguments have been made on the assumption that an increasingly participatory form of democracy is a desirable trend. Whether it is the best or an adequate response is beyond the scope of the article. However, even the majority judgment declares that Indian democracy is a representative democracy with participatory features. The example of Kerala demonstrates the great deliberative potential of Gram Sabhas for improving the sense of participation of the people and decision-making in general, apart from creating greater access and equality.

Yet the engagement of the courts with the concept of participatory democracy has been perfunctory. A deeper engagement involving examination of the nuances of participatory democracy and its further incorporation into the Indian democratic setup cannot be delayed. This has become imperative in view of the major decrease in popular confidence in the traditional institutions of representative democracies globally as well as in India. Democracy is in need of conceptual renewal.

India has not been spared the phenomenon of constitutional retrogression defined as a process of 'incremental (but ultimately substantial) decay in the three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the rule of law'.[63] Aziz Huq and Tom Ginsberg in their famous work 'How to Lose a Constitutional Democracy' evaluate the democratic backsliding of Liberal Democracies like the USA and also briefly evaluate the developments in governance in other countries around the globe. According to

60. *Rajeev Suri*, para 27.
61. *Mohinder Singh Gill*, para 23.
62. McGill University. 2018. *Unpacking Participatory Democracy*, p. 10.
63. Aziz Huq and Tom Ginsberg. 2018, 'How to Lose A Constitutional Democracy', *UCLA Law Review*, 65: 96.

Ginsberg and Aziz, retrogression would occur only when there is substantial change across all the three institutional predicates of democracy. Attempts have been made to quantify and track such retrogression. Although it is hard to quantify, one crude proxy is the decline in the level of democracy as measured by the polity database. In the study, India is one of the countries identified which shows constitutional retrogression.[64] It is therefore not surprising to witness a declining trust in Indian institutions of democracy as well. The distrust was recently and most dramatically reflected in the farmers' protest, whose main grievance was that they were not consulted before promulgating the laws that affected them vitally.

Ralf Dahrendorf (2000:311) has argued that 'representative government is no longer as compelling a proposition that it once was. Instead, a new search for institutional forms to express conflicts of interest has begun'.[65] The political analyst, Dick Morris (2000), observes that 'the fundamental paradigm that dominates our politics is the shift from representative to direct democracy'.[66] The Organisation for Economic Co-operaation and Development (OECD) countries have raised similar concerns in their dialogue on how the government could be reformed to create new connections to the public. The European Union recently issued a white paper regarding increasing citizens' involvement in the policy process.

As Rakhahari Chatterji pithily put it, 'in the citizen-state relationship the state has all the power. The citizen has none. The judiciary, the last resort for the powerless citizen to appeal to, is also the last gatekeeper of the citizens' trust in the government'.[67] The tenets of participatory democracy are ironic points of light in India's declining democratic alertness and ensuing democratic stupor. The courts must show an affirming flame if India is not to be left entirely defenceless under the night.

64. Huq and Ginsberg, 'How to Lose A Constitutional Democracy,' p. 120.
65. Ralf Dahrendorf. 2000. 'Afterword' in Susan J. Pharr and Robert D. Putnam, (eds.), *Disaffected Democracies: What's Troubling the Trilateral Countries?*, Princeton University Press, p. 311.
66. Russell J. Dalton, Wilhelm Burklin and Andrew Drummond. 2001. 'Public Opinion and Direct Democracy', *Journal of Democracy*, 12(4): 141.
67. Rakhahari Chatterji. 2022. 'Trust and Democracy', *Observer Research Foundation Commentaries*, 22nd September, available online at https://www.orfonline.org/research/trust-and-democracy/ (accessed on 4 July 2021).

10

Emerging Fault Lines between Parliament and Judiciary

Nikhil Majithia*

Introduction

Separation of powers is a well-known constitutional principle, quoted regularly by both judges and lawmakers within and outside courts. The question is: how well is this principle being adhered to by our courts and Parliament? It is increasingly seen that issues that were traditionally debated and discussed in the Parliament are being brought before courts. No longer are citizens, or even politicians, content with the democratic process of the Parliament. Everything from the labelling of a bill as a money bill to reference of a bill to a Parliamentary Standing Committee is being contested before the Supreme Court. Almost every recent state election and the question of government formation seem to be regularly agitated before the Supreme Court of India, with the court monitoring the vote of confidence and scheduling the vote itself. Historically, the courts have been reluctant to delve into questions or events occurring within the Parliament, but this does not seem to be the case anymore.

The formation of government is a keenly watched process. The issue of government formation being increasingly litigated before the courts has generated curiosity and discussion. However, the discussion has been focused on the court rulings themselves rather than the process. The court orders, directing for convening the legislature or for holding the vote of confidence, have not only impacted the formation of the government but also have a significant bearing on our polity and judicial system. Another area evoking equal interest is courts adjudicating upon issues that have historically been debated within the legislature. This chapter seeks to examine two broad trends in terms of the courts' involvement: (i) courts directing that a vote of confidence be held at the time of formation of government, and (ii) the court's interference with the functioning and operation of the parliament or legislature.

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 22 June 2022.

It is time to revisit the separation of powers principle, especially now, when these issues are being raised before the courts by elected representatives themselves. It is interesting to consider whether temporary impulses result in a change in the application of the principle or whether courts should respect the principle regardless of the pressures of present times.

Courts and Formation of Government

Elections are representative of a functioning democracy. With the increased presence of electronic and social media, a different dimension to elections has come to the fore. Every development, pre and post-announcement of results, is watched keenly by the press and packaged for immediate consumption by the public. This heightened interest has meant a greater involvement with the judicial process, as contentious election results leading to the formations of government land up in courts. Prior to the coalition era, government formation was not challenged in courts. The courts adhered to the principle of separation of powers, holding that the action of the Governor in inviting a leader of a political party to form the government was the sole prerogative of the Governor and no judicial review was available.[1]

Powers of the Governor

In 1969, the Calcutta High Court rejected a plea of quo warranto pertaining to the election of a Chief Minister, holding that Article 164(1) of the Constitution does not require the Governor to be guided by the advice of the Chief Minister. While appointing a Chief Minister, the Governor ought to ascertain who would be in a position to enjoy the confidence of the majority in the Legislative Assembly of the state.[2] Article 163(2) makes the Governor the sole judge, functioning at his own discretion. Courts have routinely defined such discretion to be a subjective satisfaction, where no judicial review lies.[3] In our federal Constitution, the President and Governor enjoy limited independent powers. In the matter of executive functions, the President and Governor are bound by the aid and advice of the Council of Ministers.[4] It is only in the matter of formation of government or dissolution of the House that the Governor plays an important, yet independent, role. The functioning of Governors has been discussed extensively by courts and

1. *Mahabir Prasad Sharma* v. *Prafulla Chandra Ghose*, AIR 1969 Cal 198.
2. *Ibid*. Interestingly, the Court considered that the case had generated attention in the public but still rejected the petition that it did not raise any arguable issue for rule nisi to be issued. It is difficult to imagine such bold approach being adopted a court today, given the intensity of public scrutiny. This case was overruled in *Nabam Rebia* v. *Deputy Speaker*, (2016) 8 SCC 1 insofar as Article 163(2) is concerned.
3. *Shamsher Singh* v. *State of Punjab*, (1974) 2 SCC 831.
4. Articles 74 and 163, Constitution of India, 1950.

other scholars, given their appointment by the Central Government, which has a stake in the political activity in the concerned state. Recently observed trends of Governors being perceived as representatives of the Central Government may result in changes in their appointment or functioning in the future. However, at the moment, the polity has to function in the manner prescribed by the Constitution, guided by constitutional conventions. The phrase subjective satisfaction was discussed in *Shamsher Singh*,[5] where the appointment and dismissal of two judicial officers on probation were in issue. It was argued before the Supreme Court that the Governor has acted at his own discretion while appointing or dismissing judicial officers in a state and was not bound by the aid and advice of the Council of Ministers. Two judges wrote a concurring opinion[6] commenting upon the formal nature of power exercised by the Governor independently. In the enumeration of instances where the Governor exercises independent power, the Court included the appointment of the Chief Minister, clarifying that the Governor is restricted by the paramount consideration that the person being considered for appointment should command a majority in the House.[7]

This trend continued even after the Emergency, and the Delhi High Court[8] and Calcutta High Court[9] refused to interfere with the dissolution of the Lok Sabha upon the resignation of Chaudhary Charan Singh, who had failed to muster a majority outside the House. A watershed moment came with *S.R. Bommai* v. *Union of India*[10] in which the Supreme Court redefined the powers of the Governor to proclaim a state of emergency under Article 356. This judgment would go on to have an effect even on the otherwise independent constitutional powers of the Governor. Until then, the courts had been observing the demarcated line that the elected government is ultimately responsible to the legislature and needs to prove their majority there.

The Advent of Defection and the Court's Role in Conducting Floor Test

The 1970s and 80s witnessed mass political defections.[11] The formation of government was no longer dependent on merely securing the highest number of

5. (1974) 2 SCC 831.
6. Majority opinion was rendered by AN Ray, CJI. The concurring opinion was authored by Krishna Iyer, J speaking for himself and Bhagwati, J. The instances given by Krishna Iyer, J did not fall for consideration really. This case was decided in 1974, much before the Emergency for the Court to venture in that territory.
7. *Shamsher Singh*.
8. *Dinesh Chandra* v. *Chaudhary Charan Singh*, AIR 1980 Del 114.
9. *Madan Murari* v. *Ch. Charan Singh*, AIR 1980 Cal 95.
10. (1994) 3 SCC 1.
11. See Pradeep Kaushal. 2019. 'History headline: Gaya Lal, and Haryana art of defection', *The Indian Express*, 4 August, available online at https://indianexpress.com/article/opinion/columns/gaya-lal-and-haryana-art-of-defection-5875942/ (accessed on 8 December 2022).

votes. It was now equally important to convince other elected members to join the government. Horse trading[12] gave a new dimension to the formation of government. Increasingly, it became clear that the timing of the vote of confidence would result in the making or unmaking of governments. This form of political activity remained confined to the political arena. Some petitions were filed seeking disqualification of the defecting members on account of the anti-defection law, but the power of the Governor to invite a leader of a political party or set the timeline for a vote of confidence in the Legislative Assembly was not challenged.

In 1998, the Governor of Uttar Pradesh dismissed the Kalyan Singh Government and invited Jagdambika Pal to form the Government. This was challenged before the Allahabad High Court, which stayed the decision of the Governor, but left it open to him to summon the House for a vote of confidence (*Jagdambika Pal* v. *Union of India.*[13] Significantly, the court did not direct that the vote of confidence be held, even though it observed, after examination of official records, that horse trading seemed a distinct possibility and floor test[14] was being evaded for the said purpose. This interim order was challenged before the Supreme Court. The Court went on to pass two orders,[15] which have been used as precedents by successive Benches. The Court directed that a special session of the Assembly be held on 26 February 1998 to conduct a composite floor test. The second order records the outcome of the vote of confidence, where Kalyan Singh emerged successful, though disqualification proceedings with respect to 12 MLAs were pending before the Speaker.

Post-2000, there has been a spate of orders where the Court has directed floor tests to be held. In *Union of India* v. *Harish Singh Rawat,*[16] the Supreme Court directed the respondent to prove his majority on the floor of the House and directed that the session of the state legislature be convened for the said purpose. The Court went to direct that an independent observer, namely, the Principal Secretary, Legislative and Parliamentary Affairs, supervise the floor test being conducted.

12. Express News Service. 2018. 'Explained snippets – This Word Means: Horse trading', *The Indian Express*, 17 May, available online at https://indianexpress.com/article/explained/karnataka-assembly-election-2018-results-horsetrading-bjp-congress-5179830/ (accessed on 8 December 2022).
13. *Narendra Kumar Singh Gour* v. *Union of India*, AIR 1998 All 395 : (1998) 1 UPLBEC 536. It is significant to mention that Kalyan Singh himself wanted to prove his majority on the floor of the House but the request was rejected by the Governor, who then went on to invite Jagdambika Pal to form a government and also administered oath as Chief Minister. Also, see *Jagdambika Pal* v. *Union of India*, (1999) 9 SCC 95.
14. See *The Economic Times*. 2018. 'All you wanted to know about floor test', *The Economic Times*, 19 May.
15. *Jagdambika Pal* v. *Union of India*, (1999) 9 SCC 95.
16. (2016) 16 SCC 744.

Significantly, the appointment of the observer was opposed on the ground that it was constitutionally impermissible for a third-party to intervene in the internal affairs of the legislature. This direction was sought to be justified on the ground that it was made, *singularly for the purpose of strengthening the democratic values and the constitutional norms.* This was the first case where the Supreme Court relied upon *Jagdambika Pal* to issue such directions even though, as noted earlier, *Jagdambika Pal* was merely an order, without a reference to either a judgment or any constitutional provision which allowed for a constitutional court to direct that the state legislature be convened, or a floor test be conducted for the leader of a particular party to prove his majority.

In *Chandrakant Kavlekar* v. *Union of India*,[17] the Court was concerned with government formation in Goa in 2017. The election result was declared on 11 March 2017, and a press note was issued on 12 March 2017, inviting a leader of a political party to form the Government, which was challenged under Article 32 of the Constitution on 13 March 2017. The Supreme Court heard the matter on 14 March 2017 and directed for holding of a floor test on 16 March 2017. The Court also directed that the sole agenda of the sitting of the legislature convened on 16 March 2017 would only be holding of floor test and nothing else. This was followed in *G. Parmeshwara* v. *Union of India* by Karnataka[18] in 2018, where again the invitation of the Governor to a leader of a political party to form the Government was challenged. The election result was declared on 12 May 2018, the writ petition was filed under Article 32 on 17 May 2018, which was taken up for hearing on the same date. The challenge was whether the Governor could invite the said party to form the Government. In this case, the Governor had given 15 days' time to the party to prove its majority on the floor of the House. The Court directed on 18 May 2018 that the floor test should be held on the next day itself. Although the Court noted that the Speaker was yet to be elected, it went on to pass the following directions:

1. Protem speaker shall be appointed immediately.
2. All elected members shall take oath on 19 May 2018, which should be completed before 4 pm.
3. Protem speaker shall conduct the floor test on 19 May 2018 by open ballot.
4. Adequate security arrangements shall be made by the Director General of the Police, Karnataka.

17. (2017) 3 SCC 758.
18. (2018) 16 SCC 46.

The year 2019 saw the Maharashtra election[19] results land up before the Supreme Court. The election result was declared on 24 October 2019. The Court was approached on 23 Noveember 2019 under Article 32. Here again, the Court directed that a floor test be held on 27 November 2019 and issued similar directions as in *G. Parmeshwara*,[20] including the appointment of a protem speaker. These orders refer to no constitutional provision but merely cite *Jagdambika Pal* as an authority. A recent judgment of the Supreme Court in *Shivraj Singh Chouhan* v. *Secretary, M.P. Legislative Assembly*[21] recounts a few of these instances where the Court directed for holding the vote of confidence.

Constitutionality of the Court's Role in Matters Concerning Government Formation

The crucial question is whether these orders find support constitutionally. Article 164 reads as under:

> Article 164. Other provisions as to Ministers:
>
> (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor:
>
> Provided that in the States of [Chhattisgarh, Jharkhand], Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.
>
> (1A) The total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent. of the total number of members of the Legislative Assembly of that State: Provided that the number of Ministers, including the Chief Minister in a State, shall not be less than twelve:
>
> Provided further that where the total number of Ministers including the Chief Minister in the Council of Ministers in any State at the commencement of the Constitution (Ninety-first Amendment) Act, 2003 exceeds the said fifteen per cent. or the number specified in the first proviso, as the case may be, then the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date as the President may by public notification appoint.
>
> (1B) A member of the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for

19. *Shiv Sena* v. *Union of India,* (2019) 10 SCC 809. The Karnataka and Maharashtra writ petitions continue to remain pending in the Supreme Court though governments were formed and continue to function pursuant to the floor test directed by the Court.
20. (2018) 16 SCC 46.
21. 2020 (5) SCJ 444.

duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council, as the case may be, before the expiry of such period, till the date on which he is declared elected, whichever is earlier.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

Article 164(1) of the Constitution states that the Governor shall appoint the Chief Minister. Article 164(2) provides for the Council of Ministers to be collectively responsible for the Legislative Assembly of the State. Given the clear mandate of Article 164(1), it is the prerogative of the Governor to invite the leader of a political party to form the government as it is for the Governor to determine who can form a government that can command the majority in the Assembly. In this limited but important sphere, the Governor exercises his discretion under the Constitution. Till such time as the new government proves its majority on the floor of the House, it is the sole prerogative of the Governor to determine who enjoys the majority in the legislature. This appointment of the Chief Minister by the Governor is ultimately subject to the outcome of the floor test in the legislature. Interestingly, Article 163(2) provides that the decision of the Governor to exercise his discretion shall be final, and the validity of any action purported to have been taken by the Governor shall not be called into question.

The role of the Governor in the formation of the government was first examined by the Sarkaria Commission. In matters of appointing a Chief Minister, it was recognised that the Governor was to act at his discretion. It was expected that the Governor would have 'to ascertain'[22] the leader who has the largest support in the Assembly while leaving the actual determination of the majority to the Assembly. The commission also recommended an order of preference to be followed by the Governor in situations where no single largest party had emerged after the election result. One notable recommendation was the leader of the party invited by the Governor should seek a vote of confidence in 30 days, which practice should be adhered to with the sanctity of law.[23]

The National Commission to review the working of the Constitution (NCRWC) delved into the issue of the Governor's role and powers.[24] The NCRWC opined that the Governor should not risk determining the issue of majority support on his own, outside the Assembly. They felt that a more prudent course would be to cause the

22. Sarkaria Commission report, Chapter IV, para 4.4.03(a).
23. Sarkaria Commission report, Chapter IV, paras 4.11.05 – 4.11.06.
24. NCRWC report, 2001.

rival claims to be tested on the floor of the House.[25] It made the following recommendations:

1. A party or combination of parties that command the widest support in the Assembly should be called upon to form the government.
2. If there is a single party having an absolute majority in the assembly, the leader of the party should automatically be asked to become the Chief Minister. If there is no such party, the Governor should select the Chief Minister from among the following parties or group of parties in the following order of preference.
    (a) An alliance of parties that was formed prior to the election.
    (b) Largest single party staking a claim to form the government with the support of others including independents.
    (c) A post-electoral alliance of parties, with some of the parties in the coalition joining the government.
    (d) A post-electoral alliance of parties, with some parties in the alliance forming government and the remaining parties including independents supporting the government from outside.
3. A Chief Minister should seek a vote of confidence in the Assembly within 30 days of taking over.

It can be argued that the order of preference should be followed by Governor as a healthy convention. However, each of these conditions may not occur with certainty. For example, a post-electoral alliance of parties having presented its claim to the Governor may have its alliance broken prior to the vote of confidence. The Governor would still be required to make a judgment as to who is the leader who can command a majority in the House in the new situation. It may be useful to remember that the Governor is not expected to hold a vote of confidence outside the Assembly.[26]

This report of the NCRWC was cited with approval by the noted constitutional scholar, D.D. Basu.[27] D.D. Basu also cited several judgments to state that in matters of appointment of the Chief Minister, the Governor is enjoined with a

25. The meaning of this sentence is not clear. The Governor is not required to hold a floor test in the Raj Bhavan but is required to arrive at some determination as to who is in a position to form the government. Thus, asking for the rival claims to be worked out on the floor of the House does not seem to be accurate description of affairs, considering the preference suggested by the Commission.
26. Sarkaria Commission as well as the NCRWC were both clear on this score.
27. Durga Das Basu. 2017. *Commentary on Constitution of India*, Vol. 9.

discretionary power that is non-justiciable. It was open to the Governor to prescribe a period for the incoming Chief Minister to prove his majority on the floor of the House, though there is no provision in the Constitution. Other authors have also approved the prescription of a time period by the Governor to a government for proving its majority on the floor of the House.[28] Article 164 of the Constitution does not prescribe any role of the judiciary in so far as the formation of government or appointment of Chief Minister is concerned, a view supported by constitutional experts. It seems that the exercise of powers by the Supreme Court in directing the holding of a vote of confidence or appointment of a protem speaker does not find support from any express provision of the Constitution. The cases cited above show that the Court directed the holding of floor test on specific dates, regardless of the fact that the minimum period of 30 days to prove a majority on the floor of the House still remained. This reflects the Court's lack of propriety and its interference in domains belonging to other organs of the Republic. Merely because a cause has been presented to it would not justify the extension of its jurisdiction.

On the other hand, we have an example in the form of the M.P. Special Establishment case,[29] where a Constitution Bench of the Supreme Court annulled the decision of the Council of Ministers, refusing to grant sanction to Ministers accused of corruption. The Supreme Court observed that there can be situations where the Governor can act at his discretion even though the Constitution has not expressly provided for it. One such situation according to the Court was where sanction would be required to prosecute a Chief Minister or a Minister. A similar situation could arise where the Council of Ministers disables or disentitles itself. In these situations, the Governor could act independently under Article 163(2) of the Constitution and such a decision would be final and could not be called into question. Two significant things emerge from this decision. First, the Governor is entitled to act independently of the Council of Ministers in certain situations and such power is available to him by virtue of Article 163(2) of the Constitution. Second, such a decision cannot be called into question in view of the express power conferred by Article 163(2). More importantly, for the purposes of our discussion, the approach of the Court remains inconsistent. In certain situations, the Court expects the Governor to act independently as a guardian of the Constitution where democracy may be in peril. It does however rely on an express provision of the Constitution for the existence of such a power, which empowers the Governor. On

28. Subhash C Kashyap. 2004. *Constitution Making Since 1950: An Overview*. Kashyap preferred 30 days time as a practice to be rigorously adhered to with the sanctity of rule of law. MP Jain felt that since there cannot be a gap of more than 6 months between 2 sessions of the legislature, the fate of the Ministry cannot remain in suspense for longer than 6 months.
29. *Madhya Pradesh Special Police Establishment* v. *State of Madhya Pradesh*, AIR 2005 SC 325.

the other hand, insofar as the formation of government is concerned, the Court is reluctant to wait for even a basic period of 30 days as recommended by various Committees, where the Governor can attempt to ascertain who can command a majority in the Assembly. Again, these orders of the Court find no support from any provision of the Constitution as the formation of government envisages no role for the courts in any form. It would have been far more encouraging for the Court to restrain itself from entertaining these petitions and allow the development of a healthy convention of governments being formed and proving their majority within a period of 30 days from the election result being declared.

Functioning of Parliament

Friction between the Parliament and the judiciary, considered to be a healthy phenomenon for our democracy, was present from the initial years. *Keshav Singh*[30] brought about a full-blown confrontation between these two organs. A delicate balancing act by the Government of the day in seeking a presidential reference on the issue of parliamentary privileges vis-à-vis fundamental rights and judicial review helped resolve the situation. The succeeding decades saw the emergence of a powerful executive, who was eager to assert its control over the judiciary and sought the appointment of judges who subscribed to its ideology. One of the results of wrangling over judicial appointments between the executive and the judiciary, which coincided with a weak legislature, was the lack of flashpoints with the Parliament as a collective body, which was otherwise seen in *Searchlight*[31] and *Keshav Singh*.

Power of Expulsion

Raja Ram Pal v. *Speaker, Lok Sabha*[32] saw the re-emergence of the Parliament as a collective body, claiming to exercise its plenary power to expel elected members for an undefined breach of privilege. Unlike the British constitutional setup, the Indian Constitution does set out the powers, privileges, and immunities of the Parliament under Article 105 and that of the state legislatures under Article 194. Article 105(1) provides for freedom of speech to its members, whereas Clause 2 provides for immunity against anything said or any vote given in the House and neither shall any person be liable for any report published under its authority in relation to the proceedings of the House. Clause 3, however, provides for blanket protection to the Parliament by giving it the freedom to define different powers, privileges, and

30. *In Re: Keshav Singh, Special Reference No. 1 of 1964,* (1965) 1 SCR 413.
31. AIR 1959 SC 395.
32. (2007) 3 SCC 184. For a detailed discussion on Raja Ram Pal's case, see Dr K S Chauhan. *Parliament, Powers, Functions & Privileges, A Comparative Constitutional Perspective*, Chapter 11.

immunities from time to time before the 42nd Amendment to the Constitution, which has been read to mean the same as they existed at the time of the adoption of the Constitution in 1950. Therefore, in all effect, if the House of Commons was exercising a particular power, or claiming an immunity or privilege, the Indian Parliament would also continue to lay claim to such a power, privilege, or immunity.

The Indian Parliament did not wish to burden the Constitution with a detail of all the privileges and immunities exercisable by it, that is why probably Dr Ambedkar suggested the adoption of the Article in that particular manner with Clause 3 leaving enough room to the House to manoeuvre in the future should such an occasion arise. It was rather soon that the Lok Sabha was presented with such an opportunity. In 1951, H.G. Mudgal was expelled on 25 September 1951 for undermining the dignity of the House and behaviour inconsistent with the standard that the Parliament felt entitled to expect from its members. The Rajya Sabha exercised this power in 1976 when Subramanian Swamy was expelled after going through the report of the Committee formed for that purpose. Few people would know that Mrs. Indira Gandhi was also expelled in December 1978 for the excesses during the Emergency, however, she was quick to have the records of that motion expunged after coming back to power in 1980. None of these expulsions by the Parliament were challenged in the courts of law, but expulsions by the state legislatures were taken up on a few instances before the high courts.

In *Raja Ram Pal*, the Court went on to hold that while the Parliament could exercise the power to expel its members for breach of privilege even though it was not defined expressly in the Constitution unlike the freedom of expression. It however significantly expanded the Court's jurisdiction to adjudicate upon the affairs of the House. The Court went to hold that it was the Court alone that could determine the existence of privilege or immunity available to the parliament as was being enjoyed by the House of Commons at the time of commencement of the Constitution. The Court held as follows:

> 62. In view of the above clear enunciation of law by Constitution Benches of this Court in case after case, there ought not be any doubt left that whenever Parliament, or for that matter any State Legislature, claims any power or privilege in terms of the provisions contained in Article 105(3), or Article 194(3), as the case may be, it is the Court which has the authority and the jurisdiction to examine, on grievance being brought before it, to find out if the particular power or privilege that has been claimed or asserted by the legislature is one that was contemplated by the said constitutional provisions or, to put it simply, if it was such a power or privilege as can be said to have been vested in the House of Commons of the Parliament of the United Kingdom as on the date of commencement of the Constitution of India so as to become available to the Indian Legislatures.

This claim of the Court stretched the boundaries of judicial review as the Court seemed to forget that the Parliament was an independent body. Surely, the Parliament had the right to claim the existence of a privilege without seeking any validation from a court. It would have been a different matter if the Court had found the claim of privilege to be inconsistent with the Constitution itself but to arrogate to itself the exclusive right to decide the existence of a parliamentary privilege was a body blow for the home of democracy. Soon enough, this grievance was made before the Court in *Amrinder Singh* v. *Special Committee, Punjab Vidhan Sabha*[33] but the Court chose to ignore the concerns placed before it by extracting a U.S. Supreme Court judgment.[34] While on one hand, the Court laments the lowering of standards in public life, especially concerning elected representatives, on the other hand, any action taken by the legislature for self-correction, including acts of misbehaviour and widespread allegations of corruption, is interfered with by the courts. It is arguable to suggest that the Court is not only deciding a particular case but also laying down the contours of powers to be exercised by other organs in a democracy. However, the Court also seems to be sending mixed signals to the legislature insofar as the issues of self-correction measures are concerned.

One recent example[35] is noteworthy in this aspect. During the presentation of the Finance Bill in the Kerala Assembly in 2015 a disruption took place. Some members of the opposition climbed over to the Speaker's dais and damaged furniture and articles including the Speaker's chair, computer, mike, emergency lamp, and electronic panel, causing a loss of Rs. 2.20 lakhs. This resulted in a First Information Report being lodged by the Secretary of the Assembly. With the change in government, the then opposition now being in power, a decision was taken to recall the proceedings launched against the erring members. On an application being filed seeking discharge by the public prosecutor, the Court rejected it.[36] While doing so, the Court again reiterated that it was the courts and not the legislature which would decide the nature and extent of privileges to be enjoyed by elected representatives. This reiteration is problematic as it systematically refuses to treat the Parliament as an independent and important part of our Republic. Such an approach will hardly inspire confidence amongst two pillars of our democracy, with the judiciary looking over the Parliament's shoulder as it pertains to defining its own privileges. The Court rightly decided that 'no member of an elected legislature can claim either a privilege or an immunity to stand above the sanctions of the criminal law, which applies to all citizens'. The Court also disapproved of the alleged act of destruction

33. (2010) 6 SCC 113.
34. *Amrinder Singh,* paras 87-91.
35. *State of Kerala* v. *K. Ajith*, AIR 2021 SC 3954.
36. *K. Ajith*.

of public property within the House by the members as a symbol to lodge their protest and neither could such protest be regarded as essential for their legislative functions. The Court's approach is commendable in two aspects. First, it reminds elected representatives that their conduct inside the Assembly is expected to be dignified rather than unruly and that unruly behaviour will not reap dividends but shall invite actions under the law, leading to fixing of responsibility for loss to the taxpayer. Second, the Court delineates the exercise of privileges to a functional relationship on account of being a legislator. This again reinforces the requirement of a legislator contributing to the full and proper functioning of the legislature and not in its disruption, which seems to be the norm now.

Another example of disruption was witnessed in the Maharashtra assembly where members of the opposition obstructed the proceedings of the House.[37] On the proceedings being adjourned, the members of the opposition accosted the Deputy Speaker near his chamber and hot words were exchanged between rival groups belonging to the ruling Coalition Government and the opposition. This resulted in a resolution being moved before the House, seeking suspension of members who had misbehaved with the nominated Chairman heading the session on that day. Ultimately, the Maharashtra Assembly passed a resolution suspending those members for a period of one year from participating in sessions of the Assembly. This was challenged under Article 32 before the Supreme Court of India. The Court seemed to proceed differently, observing that it was not for the Court to specify limitations on the privileges of the legislatures. This is at odds with *Raja Ram Pal* and more recently, *K. Ajith*, where the Court was emphatic in claiming the sole right to determine the extent of privileges available to the legislature. The Maharashtra Legislative Assembly Rules provided for the power of suspension[38] which the Speaker could exercise. Rule 53 according to the Court provided for a graded action in cases of misbehaviour by a member. Since the office of the Speaker was vacant on account of resignation, Rule 53 was not resorted to as the Assembly felt that the behaviour of the 12 members called for a stronger action than mere suspension for a day or the remaining days of the session. This did not find favour with the Court which felt the maximum punishment which could be imposed was the expulsion of a member, in which event, such member could still be eligible for re-election in six months. The Court felt that inflicting suspension for a period 'beyond the period necessary' would be irrational.

37. *Ashish Shelar* v. *The Maharashtra Legislative Assembly,* AIR 2022 SC 721. Article 32 seems to be the new Article 226 of the Constitution. It would be worth considering whether exercise of Article 32 powers by the Supreme Court signifies a lack of faith in the High Court's ability to decide contentious matters.
38. Rule 53.

The use of a conventional test of administrative law to determine the validity of a resolution of the Assembly would indicate a lowering of standards of judicial review in so far as actions pertaining to the legislature are concerned. Rather than posing a question as to whether the legislature had the power to suspend a member, dehors the existence of a Rule specifically catering to the situation, the Court proceeded to judge the validity of the resolution by comparing it to Rule 53. The answer to that question may have turned out differently if there was no Rule 53 or if it did not provide for a graded response. The initial years saw the Court playing a more nuanced role, especially in *Searchlight* and *Keshav Singh*, recognising the freedom of expression rather than the role of the judiciary in protecting that right or interfering with the internal affairs of the legislature. The last two decades have seen a more aggressive Court, taking on the mantle to even define the rights or privileges available to the Parliament.

Money Bill

Article 110 exhaustively defines Money Bills. A bill is defined as a Money Bill when it deals only with matters specified in Article 110 and not with any extraneous matter.[39] In its widest sense, a Money Bill means a Bill whose main purpose is either to impose a charge upon public funds or to impose a charge upon the people, that is, tax. A parliamentary money bill may be certified by the Speaker as a Money Bill if its provisions deal only with the imposition of charges. But it will not be certified as such if it contains provisions dealing with any other matter except 'subordinate matters incidental to such charges'.[40] The Constitution makes a distinction between a Money Bill and a Financial Bill. According to D.D. Basu, these following features define a Money Bill:[41]

1. The Bill must deal exclusively with any of the matters specified in sub-clause of Article 110(1).
2. The Speaker's decision as to whether a particular Bill is a Money Bill or not is final. The Speaker has no obligation to consult anyone in coming to a decision or not in giving his certificate about Money Bill. Clause 2 of Article 110 makes it clear that the mere fact that a Bill contains an imposition, would not make it a 'Money Bill' unless the requirement of Clause 1 is fulfilled.

39. D.D. Basu. 2017. *Commentary on the Constitution of India*, 9th edition, Vol. 8, p. 8745.
40. Erskine May. *Parliamentary Practice*, 20th Edition, pp. 855-856. For a detailed historical narrative on the development of Money Bill in England and elsewhere, see *Justice K.S. Puttaswamy* v. *Union of India*, Justice DY Chandrachud's dissenting opinion, (2019) 1 SCC 1 at 715.
41. D.D. Basu. 2017. *Commentary on the Constitution of India*, 9th edition, Vol. 8, p. 8760.

The present government has used the Money Bill device to enact laws of varying kinds. From Aadhaar to service conditions of members of tribunals, the Lok Sabha has presented the country with new laws, requiring the citizens to comply with these regardless of the manner in which these laws came to be enacted. Votaries of these laws may very well argue that measures like Aadhaar have heralded a new digital revolution in the country, from easing business and passing government benefits by bypassing the middleman to financial inclusion. While all this may be correct and commendable, the moot question remains—whether laws enacted bypassing the mandate of the Constitution really satisfy the Constitution or actually fail it.

In 1968, the Supreme Court witnessed an impasse in the Punjab Assembly,[42] where a session specially convened for discussion and vote on the budget was disrupted due to which the budget could not be passed before 31 March. This resulted in the promulgation of an ordinance to provide for budgetary allocation or the Punjab Government would have been left with no legally sanctioned money to undertake any expenditure. The discussion on the Ordinance was adjourned by the Speaker, who was a no-confidence motion. This discussion on the Ordinance was then tabled by the Deputy Speaker as a Money Bill was passed. The Court found this to be an unusual situation, which merited the action taken by the Assembly.

Two other examples stand out in recent years, which by any standard do not satisfy the definition of a Money Bill. The first is *Mohd. Saeed Siddiqui*,[43] where the term of the Lokayukta in Uttar Pradesh was increased. No other change or law was enacted with this Bill for imposition or alteration of a tax by the Uttar Pradesh Government. The second example is *Yogendra Jaiswal*,[44] where special courts were established to seize and try disproportionate assets of state employees in the State of Odisha. In both cases, the Supreme Court stated that labeling of a Bill comes within the concept of irregularity and not within the realm of substantiality, and thus does not warrant interference by the Court. Both these cases have now been overruled by a Constitution Bench in *Rojer Mathew* v. *South Indian Bank Ltd.*[45]

It was in the Aadhaar[46] matter that the Supreme Court declared that the certificate granted by the Speaker in certifying a Bill as a Money Bill is open to judicial review. The majority opinion upheld the certification of the Aadhaar Bill as a Money Bill by applying the pith and substance doctrine. Both Justice Sikri and Justice Bhushan, who upheld the Aadhaar Bill as a Money Bill, relied upon different provisions of Article 110(1) to accept this certification, while Justice Chandrachud

42. *State of Punjab* v. *Sat Pal Dang*, AIR 1969 SC 903.
43. *Mohd. Saeed Siddiqui* v. *State of U.P.*, (2014) 11 SCC 415.
44. *Yogendra Jaiswal* v. *State of Bihar*, (2016) 3 SCC 183.
45. *Rojer Mathew* v. *South Indian Bank Ltd and Ors,* (2020) 6 SCC 1.
46. *K. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

rejected their understanding that the Bill was primarily an expenditure on the Consolidated Fund of India, thus bringing it within the ambit of Money Bill definition. He advocated a stricter rule of interpretation[47] stating that if any of the provisions of the Money Bill pertain to other matters, which may even be incidental and do not fulfill the mandate of Article 110, such a Bill cannot be termed to be a Money Bill. This principle of interpretation has found favour with the Court in *Rojer Mathew*, where the Court referred the Aadhaar judgment for reconsideration on the aspect of Money Bill certification, on the ground that it had not examined the scope of Article 110(1), the principles of interpretation, and the effect of the word 'only' in Article 110. Though the Court was cautious in *Rojer Mathew* to recognise that it ought not to replace a Speaker's assessment or take a second plausible interpretation, the result is that the Court is no longer willing to overlook bypassing the Rajya Sabha on key legislations, regardless of the fact that these disputes have been brought to it by elected members of the Parliament, who may have been unable to prevail or convince the unsoundness of such measures within the House.

Conclusion

The increasing shrillness in our polity has not left the judiciary untouched. The demands on the judiciary have only increased with time. The 1990s and 2000s saw the judiciary stepping in the void created by a weak executive, hampered by the coalition-era governments. The judiciary was faced with different challenges from adjudicating anti-defection disputes to the dismissal of elected governments. It seemed a natural progression for the judiciary to step in, in what was then seen as a stabilising influence on the state of affairs afflicting the system. With the passage of time, we have seen a resurgent executive and a Parliament, eager, at least partially, to assert its important role in our democracy.

One of the key developments is that several issues which were traditionally confined to the Parliament, have now spilled over to the judiciary. It is often projected that elected representatives are being denied the right to debate and discuss these issues within the House. But the fact that several of these issues are being brought before the courts by elected representatives themselves or being canvassed by lawyers belonging to a political party casts doubt on the genuineness of such claims. More importantly, it has been noticed that elected representatives are using courts and litigations initiated by them as a means of building a certain profile in

47. See *K Puttaswamy* where the distinction is made between two expressions noting that the expression 'dealing with' is used in Article 110(1) as opposed to the wider expression 'related to'..

eyes of the public, where issues espoused by them in courts are carefully presented to the public through social media statements or updates. The overlap of their activities in the Parliament and courts is problematic as decisions rendered by the courts will not always be to their liking, which in turn will become a flashpoint. Either way, we find the courts being caught in a political cross-fight with its observations, made in course of hearings, being doled out in evening press conferences to canvass their political wins aided by sensationalist media. The judiciary is not equipped nor supposed to respond to such criticism being churned out on social media or prime time television. Sooner than later, the courts will have to determine the *locus standi* principle in such cases before lines become more blurred between political activities, actual functions of elected representatives, and causes being agitated in courts pertaining to the functioning of the Parliament.

Courts seems to acknowledge that partly the problem arises when we have successive Chief Justices rue the fact that PIL business is impacting the normal functioning of the court[48] or social media being used as a medium to lampoon judges, but given the multi-faceted dimension of the problem, there does not appear, for the time being, a single solution. However, relations between the courts and the Parliament constitute but one aspect of the problem highlighted. On the principle itself, we find the courts to be enthusiastic about issues that concern other organs of the democracy, especially as far as the trend of government formation or internal working of the Parliament are concerned. On the other hand, when it comes to Money Bill, we find the courts rather restrained in its approach, when there was clear guidance available to it as to the definition of Money Bill in Article 110. The Money Bill issue may see redressal soon enough with *K.S. Puttaswamy* referred for reconsideration.

The Supreme Court, of course, has given itself the role of the protector of the Constitution while issuing such directions. But if the Constitution itself does not grant the court any powers in this area of our polity, how does it arrogate to itself the right? This encroachment of power by the court on the legislative organ does not bode well either for the separation of powers under our Constitution or for the health of our Republic, as the Supreme Court reminded itself in *Divisional Manager* v. *Chander Hass*,[49] citing Montesquieu on the separation of powers and dangers involved in deviating from the principle. The Court was dealing with an appeal where the question was whether the Punjab and Haryana High Court can direct the creation of posts to accommodate daily wage earners. The Court, while allowing the

48. Debayan Roy. 2022. "PIL business is stealing attention from real matters" CJI NV Ramana, Bar and Bench, 21 February, available online at https://www.barandbench.com/news/litigation/pil-business-is-stealing-attention-from-real-matters-cji-nv-ramana (accessed on 26 February 2023).
49. (2008) 1 SCC 683.

appeal, answered this in negative with an apt warning for the Indian Judiciary, stating,

> Before parting with this case we would like to make some observation[s] about the limits of power of the Judiciary. We are compelled to make this observation because we are repeatedly coming across cases where judges are unjustifiably trying to perform the function of executive or legislative. In our view, this is clearly unconstitutional. In the name of Judicial Activism, judges cannot cross their limits and try to take over functions... which belongs to other organs of the state.

Recently, the Canadian Supreme Court turned down a challenge to a law reducing the number of wards when the election process had been set in motion, observing that unwritten constitutional principles cannot be used to annul legislative measures.[50] While the full measure of such principles can be deliberated later, it is safe to observe in the Indian context, we do have the basic structure doctrine which acts as a safeguard against constitutional excesses. However, the basic structure doctrine cannot be allowed to have a free run, to encroach upon powers of other organs of the State. We were recently reminded that the court is not a one-stop solution or first line of defence to resolve complicated issues of policy and society.[51] This solemn advice should be relevant in the area of maintaining the delicate relationship between the Judiciary and the Parliament. Courts must recognise their own limitations rather than getting engaged in political slug fights coupled with the monumental expectations from its citizens of speedy and inexpensive resolution of their grievances.

50. *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34.
51. Justice DY Chandrachud, at King's College, London (20 June 2022).

11

Constitutional Conundrums Involving Corporate Insolvency

Umakanth Varottil and Rahul Sibal*

Introduction

Companies in financial distress generate externalities on the environment in which they operate, thereby resulting in adverse impacts on various stakeholders, such as creditors, shareholders, employees, and the economy as a whole. In order to minimise such repercussions, the Indian Parliament has enacted a series of legislations that either provide for a rescue of distressed companies or measures for creditors to efficaciously recover the debt due to them.[1] This process has culminated more recently in the Insolvency and Bankruptcy Code, 2016 ('IBC' or the 'Code').

Briefly, the IBC comes into play when a company (referred to as a 'corporate debtor') has committed a default in payment obligations.[2] Either a financial creditor (such as a bank or financial institution that has lent funds to the corporate debtor), an operational creditor (such as a provider of goods or services or an employee), or the corporate debtor itself, may initiate a corporate insolvency resolution process before the National Company Law Tribunal (NCLT).[3] Once the NCLT admits such an application, it is required to declare a moratorium on suits, proceedings, and other forms of legal action against the corporate debtor.[4] The NCLT may appoint a resolution professional (interim and thereafter, final) who would take over the management of the affairs of the corporate debtor.[5] Any person (referred to as a 'resolution applicant') may propose a resolution plan to rescue the corporate debtor

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 1 March 2022.

1. These include the Sick Industrial Companies (Special Provisions) Act, 1986 ('SICA'), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('RDDB Act') and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act').
2. Section 6, IBC.
3. Sections 7 and 8, IBC.
4. Section 14, IBC.
5. Sections 16 and 22, IBC.

from its financial predicament.[6] Such resolution plans may be considered and approved by a requisite majority of a committee of creditors (CoC), which consists only of financial creditors.[7] Ultimately, after the NCLT approves the resolution plan, it becomes binding on creditors, shareholders, employees, and other stakeholders.[8] Appeals against orders of the NCLT lie to the National Company Law Appellate Tribunal (NCLAT), and thereafter to the Supreme Court. This is a time-bound process and, if a resolution is not successful, the corporate debtor is destined to end up in liquidation.[9]

Within a short span of five years, not only has the IBC undergone a multitude of amendments, but both the original and amended legislation have been subject to recurrent constitutional challenges on several facets, calling upon the judiciary to determine the *inter se* equities among various stakeholders against the touchstone of values enshrined in the Constitution. Our goal in this chapter is to explore the tremendous volume of constitutional jurisprudence that the Indian Supreme Court has generated in the context of firms confronting a financial end-game scenario. Through our analysis of the case law, we find that the judiciary has adopted a facilitative and rather non-interventionist approach while determining the constitutionality of the IBC. It has rendered utmost deference to the Indian Parliament and resisted second-guessing the legislative decision-making from a constitutional perspective. Barring a handful of instances, the Supreme Court has generally upheld the constitutionality of the IBC and its several amendments, that too regardless of the constituency from which a challenge may have emanated. The Court has played an active role in paving the way for the unhindered implementation of India's monumental corporate insolvency legislation.

At a broad level, the judicial philosophy surrounding the constitutionality of the IBC is understandable, especially given the socio-economic implications of the novel legislation. However, at a doctrinal level, the approach of the Supreme Court on matters pertaining to the constitutionality of specific provisions of the IBC, and its amendments, begets some element of critique. In its zeal to ensure the success of the policy relating to an important component of the corporate and financial markets, the Court appears to have forsaken stringent adherence to constitutional principles in favour of ensuring satisfactory economic outcomes, on a widespread basis. In the end, one may sum up the judicial philosophy relating to the constitutionality of the IBC as one in which pragmatism trumps doctrine. With this brief background, we analyse the jurisprudence emanating from the Supreme Court on the IBC.

6. Section 30, IBC.
7. Section 30, IBC.
8. Section 31, IBC.
9. Section 33, IBC.

Judicial Motivators for Legislative Deference

One may rationalise the Indian judiciary's light-touch approach towards the constitutionality of the IBC on several considerations. First, the Supreme Court has relied extensively on its constant refrain not to intervene in matters of economic policy. The Court's evaluation usually begins with the presumption of constitutionality, which imposes the burden on the challenger to demonstrate that a legislative provision violates the Constitution.[10] As to the level of scrutiny, the Court has made a clear distinction between legislation that is within the economic realm and statutes that affect personal life and liberty. Admittedly, the Court's enquiry as to the constitutionality of economic legislation is far more liberal as compared to statutes that affect fundamental human rights.[11]

This approach is evident in Justice Nariman's dictum in *Swiss Ribbons Private Limited* v. *Union of India*,[12] where he observes, 'the … experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities … passes constitutional muster'.[13] These observations constitute the hallmark of judicial scrutiny of the constitutionality of the IBC.[14] They recognise the 'wide latitude' given to the Parliament in this matter to not only respond by legislating on matters relating to the economy but also to mend any problems in the working of the legislation through appropriate amendments.[15] Hence, the judiciary has turned towards an approach that involves an aerial view of the constitutionality of the IBC, and it has shunned a microscopic examination that considers 'mathematical precision or wooden equality'.[16]

At this juncture, it is important to note that the Court's approach towards the IBC is consistent with its past precedents on the question of constitutionality of economic legislation.[17] Illustratively, such a stance is visible in the context of other economic legislations such as the Reserve Bank of India Act, 1934,[18] the Finance

10. *Subramanian Swamy* v. *Director, Central Bureau of Investigation*, (2014) 8 SCC 682, para 49.
11. *R.K. Garg* v. *Union of India*, (1981) 4 SCC 675, para 8.
12. (2019) 4 SCC 17.
13. *Swiss Ribbons*, para 120.
14. See, for example, *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta*, (2020) 8 SCC 531, para 109; *Hindustan Construction Company Limited* v. *Union of India*, 2019 SCC OnLine SC 1520, para 72.
15. *Manish Kumar* v. *Union of India*, 2021 SCC OnLine SC 30, para 141.
16. *Manish Kumar*, para 141.
17. *State of Gujarat* v. *Shri Ambica Mills Ltd.*, (1974) 4 SCC 656; *G.K. Krishnan* v. *The State of Tamil Nadu*, (1975) 1 SCC 375; *The State of Madhya Pradesh* v. *Nandlal Jaiswal*, (1986) 4 SCC 566.
18. *T. Velayudhan Achari* v. *Union of India*, (1993) 2 SCC 582, paras 27 to 34; *Bhavesh D Parish* v. *Union of India*, (2000) 5 SCC 471, paras 23-28.

Act, 2003,[19] and the Competition Act, 2002.[20] The Indian approach is also broadly consistent with other leading jurisdictions, such as the United States,[21] the European Union,[22] and the United Kingdom.[23]

Although this approach was considered settled law, recent events have cast a doubt on this position. In the matter of constitutionality of the 'demonetisation' of legal tender by the Government of India, the Supreme Court referred the question of 'the scope of judicial review in matters relating to [the] fiscal and economic policy of the Government' to a Constitution Bench.[24] Similarly, with respect to the pending matters relating to the constitutionality of the 'farm laws',[25] the Supreme Court ordered a stay on the implementation of these legislations without any observations on the factors that are evaluated while ordering an interim stay, such as whether the statute, *prima facie*, appears to be unconstitutional, the balance of convenience, and public interest.[26] In fact, some commentators have argued that the Supreme Court has exhibited a more liberal stance towards the imposition of a stay towards economic legislation such as the farm laws as opposed to non-economic statutes.[27] Given these developments, there appears to be a contrast between the Court's approach to the IBC compared to other economic legislations in the recent past.

19. *R.C. Tobacco* v. *Union of India*, (2005) 7 SCC 725, para 43.
20. *Mahindra Electric Mobility Limited* v. *Competition Commission of India*, 2019 SCC OnLine Del 8032, para 209.
21. *Ferguson* v. *Skrupa*, 372 US 726, 729 (1963); *National Federation of Independent Business, et al.* v. *Sebelius, Secretary of Health and Human Services*, 567 US 519 (2012) (noting 'we owe a large measure of respect to Congress when it frames and enacts economic and social legislation', *per* Ginsburg, J).
22. *Stec* v. *United Kingdom*, (2006) 43 EHRR 47; *Case of Ponomaryovi* v. *Bulgaria*, (2014) EHRR 20, wherein courts have retained for themselves a wide margin to address measures of economic strategy.
23. *Regina* v. *Secretary of State for Work and Pensions*, (2021) UKSC 26, paras 144 and 146, noting that courts can 'accord a high level of respect to the judgment of public authorities in the field of economic or social policy', but at the same time recognising the need for 'a safeguard against unjustifiable discrimination'.
24. *See,* Order dated 16 December 2016 in *Vivek Narayan Sharma* v. *Union of India*, Writ Petition (Civil) No. 906/2016, (Supreme Court of India) decided on 16 December 2016. Available online at https://main.sci.gov.in/jonew/judis/44414.pdf (accessed on 18 August 2021).
25. The expression is commonly used to refer to three legislations - The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, The Essential Commodities (Amendment) Act and The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act.
26. *Rakesh Vaishnav* v. *Union of India*, Writ Petition(s)(Civil) No(s).1118/2020 (order dated 12 January 2021).
27. Aakanksha Saxena. 2021. 'Guest post: A critique of the supreme court's farm act order – II', *Indian Constitutional Law and Philosophy*, available online at https://indconlawphil.wordpress.com/2021/02/06/guest-post-a-critique-of-the-supreme-courts-farm-act-order-ii/(accessed on 23 August 2021).

Second, the rulings of the Supreme Court are awash with its consciousness of the fact that the IBC emerged in the wake of arguably failed legislations such as the SICA.[28] The nobility of the purpose and object of the IBC, and the fear of the possible failure of another corporate rescue legislation, appear to have played a key role in a somewhat benevolent assessment of its constitutionality. Hence, ingrained in the constitutional analysis of the IBC, is its historical evolution and concern regarding the exigencies it sought to mitigate. The Court has also placed significant reliance on the preparatory work that went into the enactment of the IBC and its key amendments.[29]

At the same time, it is important to draw a distinction in the realm of the interplay of judicial adjudication and committee reports. The initial set of cases such as *Essar Steel* and *Innoventive Industries*, relied on committee reports and other legislative documents, such as the BLRC Report that had formed the basis of the enactment of the IBC. These documents largely focused on the policy objectives of the (then) proposed IBC Bill. However, after the enactment of the IBC, questions arose as to the operation and doctrinal interpretation of several provisions of the IBC. To resolve these ambiguities, several committees were formed *after* the enactment of the IBC.[30] Here, the committees' role tended typically to affirm one interpretation from a range of possible interpretations that arose in the working of the IBC. Put simply, these exercises were interpretational and doctrinal and did not concern the exposition of policy. For instance, after the enactment of the IBC, a question arose as to whether insolvency applications could be initiated in relation to time-barred debts. Prior to the Supreme Court's adjudication of the question, the Ministry of Corporate Affairs released the ILC Report 2018, which stated two reasons to conclude that time-barred debts were outside the purview of the IBC. First, it stated that the Limitation Act has been historically applicable to debts even in case of legislations predating the IBC, such as the Companies Act, 1956, wherein courts excluded time-barred debts from winding up proceedings. Second, allowing time-barred debts to be the basis of insolvency proceedings is in conflict with other provisions of the IBC.

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28. *Essar Steel*, para 118; *Manish Kumar*, para 214.
29. See, for example, the Bankruptcy Law Reform Committee. 2015. *The Report of the Bankruptcy Law Reforms Committee - Volume I: Rationale and Design*, available online at https://ibbi.gov.in/BLRCReportVol1_04112015.pdf (accessed on 18 August 2021) ('BLRC Report'); Ministry of Corporate Affairs, Government of India. 2018. *Report of the Insolvency Law Committee*, available online at https://ibbi.gov.in/uploads/resources/ILRReport2603_03042018.pdf (accessed on 18 August 2021) ('ILC Report 2018'); Ministry of Corporate Affairs, Government of India. 2020. *Report of the Insolvency Law Committee*, available online at https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf (accessed on 18 August 2021) ('ILC Report 2020').
30. These include, for instance, the committees that issued the ILC Report 2018 and the ILC Report 2020.

Based on the above reasoning, the ILC Report 2018 observed,

> Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis….[31]

It is interesting that the ILC Report 2018 made observations with respect to the intent of the unamended IBC without any reference to pre-legislative events or material. The discussion was largely consequentialist and doctrinal. Subsequently, the Parliament passed the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (the 'Second Amendment') and introduced Section 238A which ignored time-barred debts. However, Section 238A was not given retrospective effect from the date of the commencement of the IBC. Therefore, with respect to the time period between the enactment of the IBC and the Second Amendment, it was still unclear whether time-barred debts were excluded. The Supreme Court put an end to this controversy in *B.K. Educational Services Private Limited* v. *Parag Gupta and Associates*,[32] by holding that the time-barred debts were excluded from the very inception of the IBC. It observed, 'the Insolvency Law Committee Report of March 2018 makes it clear that the object of the Code from the very beginning was not to allow dead or stale claims to be resuscitated'.[33]

Evidently, the Court relies on the ILC Report 2018, among other grounds, to arrive at the conclusion that time-barred debts were outside the purview of the IBC from its very inception. This is a notable development. Reliance on the ILC Report 2018, to the extent of determining the purport of the provisions introduced by the Second Amendment is justified and is common practice since it is the very recommendations of the ILC Report 2018 that culminated in the Second Amendment. However, on the issue of interpretation of the unamended IBC, the reliance on reports that were prepared after the enactment of the IBC is a striking development given that such reports are not pre-legislative material and were not referred to during the process of the enactment of the IBC in its original form. This raises the question as to whether a report prepared by a group of experts after the enactment of a legislation can ever be understood to be reflective of the intention that the Members of Parliament had at the time of the passing of the enactment. The rationale behind the elevation of a mere administrative or ministerial opinion to the status of parliamentary intent is unclear.

31. ILC Report 2018, para 28.3.
32. (2019) 11 SCC 633.
33. *B.K. Educational*, at para 39.

Although the constitutionality of the IBC was not in question in *B.K. Educational*, this decision raises issues with respect to future decisions involving constitutional challenges to the IBC. In decisions such as *Swiss Ribbons* and *Manish Kumar*, the Court extensively relied on committee reports to determine the purview and intent behind the provisions under constitutional challenge. In these decisions, the respective committee reports predated the enactment of the respective provisions. Going forward, it will be interesting to see whether the Court will rely upon committee reports that are prepared after the passage of the relevant legislative provisions under constitutional challenge in future decisions.

Third, the judicial deference to legislative and executive efforts in the field of corporate insolvency ought to be viewed in the light of amendments to the law that are occurring at lightning speed. This is not only bound to cause uncertainty for all participants in the legal regime but the motivation of expediency could have the effect of short-changing due process and impinging upon the rule of law. For instance, the IBC was amended six times, however, only three of those amendments are relatable to reports of committees that made recommendations. Effective consultation with stakeholders was carried out on even fewer occasions. Even when stakeholders were consulted, the opportunity for effective consultation was rather limited. Illustratively, one of the consultations offered a mere 14 days to the public to send in their suggestions.[34] Constitutional scrutiny requires greater recognition of process-oriented matters, as much as substantive issues.

Fourth, apart from its (arguably excessive) reliance on committee reports, an important factor that has influenced the Court's decisions is that a key aim of the IBC is 'to bring the insolvency law in India under a single unified umbrella with the objective of speeding up the insolvency process'.[35] More importantly, the fact that the IBC is a legislation that enables the rescue and revival of the corporate debtor rather than one that equips the creditors to engage in a speedier recovery, has been at the forefront of the determination of its constitutionality.[36] Given that the resolution process under the IBC is an *in rem* proceeding,[37] it is necessary to consider the interests of all stakeholders relating to the corporate debtor.[38] All of these, according

34. Public comments we invited on 8 January 2021 with deadline of 22 January 2021. See Notice 'Invitation of comments from public on Pre-Packaged Insolvency Resolution Process under Insolvency and Bankruptcy, 2016', File No. 30/20/2020-Insolvency Section, dated 08.01.2021.
35. *Innoventive Industries Limited* v. *ICICI Bank*, (2018) 1 SCC 407, para 13.
36. *Swiss Ribbons*, para 28; *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited* v. *Axis Bank Limited*, (2020) 8 SCC 401, para 19.1.1.
37. As noted in *Booz-Allen and Hamilton Inc.* v. *SBI Home Finance Limited*, (2011) 5 SCC 532, para 37, 'A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals'.
38. *Pioneer Urban Land and Infrastructure Limited* v. *Union of India*, (2019) 8 SCC 416, para 49; *Arun Kumar Jagatramka* v. *Jindal Steel and Power Limited*, 2021 SCC OnLine SC 220, para 43.

to the Court, are a clear indication that the IBC is a beneficial legislation that has a wider impact on the economy, which has motivated the judiciary to view its constitutionality from the purview of its object and historical evolution.[39]

Fifth, the judiciary has taken cognisance of the socio-economic realities in the financial sector, and thereby adopted a contextual analysis of constitutional principles relating to the IBC. For instance, the Supreme Court has expounded on the gravity of the problem surrounding non-performing assets that has gripped Indian banks, and its consequential impact on the economy as a whole.[40] It has even paid heed to India's rankings in the World Bank's Doing Business Report as it relates to resolving corporate insolvency.[41] Similarly, it has applauded the seeming success of the IBC in comparison to its predecessor legislation and noted that it has resulted in an enhanced flow of financial resources to the commercial sector.[42] The judicial deference to the IBC abounds in the oft-quoted observation of the Supreme Court that 'the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful position has been regained'.[43] In that sense, one may view the judiciary as a stakeholder in ensuring the success of the IBC, which is a piece of beneficial legislation of which public interest is an integral part.

After an assessment of the motivations behind the philosophy adopted by the judiciary in assessing the constitutionality of the IBC, we now transition to an exploration of some of the more specific issues that arose for consideration before the courts, and how they were resolved.

Constitutional Resolution of Conflicts between Corporate Debtors and Creditors

Corporate debtors who face legal action from creditors tend to resort to constitutional challenges to forestall such action. It has been typical for debtors to challenge the constitutionality of debt recovery legislation where the debtor-creditor conflict is the most prominent.[44] Given the multiplicity of actors in a corporate

39. *Swiss Ribbons*, para 27; *Anuj Jain*, para 19.1.1.
40. *Innoventive Industries*, para 13.
41. *Innoventive Industries*, para 13.
42. *Swiss Ribbons*, para 121.
43. *Swiss Ribbons*, para 121.
44. See, for example, *Union of India* v. *Delhi High Court Bar Association*, AIR 2002 SC 1479 in relation to the RDDBI Act, and *Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311 and *Keshavlal Khemchand and Sons Pvt Ltd* v. *Union of India* in relation to the SARFAESI Act.

rescue legislation such as the IBC, resorting to constitutional challenges to resolve the debtor-creditor conflict plays a limited part. Yet, the conflict has emerged for consideration of the judiciary.

The very first constitutional challenge to the IBC arose in *Innoventive Industries*, wherein the corporate debtor challenged the legislative competence of the Parliament to enact the IBC. The debtor was already under the protection of a moratorium issued under a state legislation, namely the Maharashtra Relief (Undertakings) Special Provisions Act, 1956 (the 'Maharashtra Act'). Since both the IBC and the Maharashtra Act are traceable to the Concurrent List in the Seventh Schedule to the Constitution, the Supreme Court found that the IBC is a comprehensive code on matters of corporate insolvency and that the Maharashtra Act is repugnant to the IBC, and hence it cannot 'stand in the way of the corporate insolvency resolution process' under the IBC.[45]

Perhaps one of the most noticeable judicial setbacks to the implementation of the IBC arose in *Dharani Sugars and Chemicals Limited* v. *Union of India*.[46] The Parliament amended the Banking Regulation Act, 1949 ('BR Act') to introduce Section 35AA which empowers the Central Government to authorise the Reserve Bank of India (RBI) to issue directions to any bank to initiate the insolvency process under the IBC against a corporate debtor in case of a default. The RBI consequently issued a circular calling upon banks to initiate proceedings under the IBC in case of defaults by their corporate debtors. While the Supreme Court upheld the validity of the legislative framework of Section 35AA of the BR Act, it struck down the RBI circular as the RBI acted without the required prior authorisation of the Central Government, and because the RBI's mandate related to banks initiating proceedings under the IBC for defaults generally, rather than in relation to specific defaults by identified corporate debtors.

In all, barring the few instances discussed herein, the IBC has not generated much traction in relation to conflicts between the corporate debtor on the one hand and the creditors on the other that have called constitutional principles into application. However, the scenario has played out rather differently in relation to conflicts among various categories of creditors, to which we now turn.

Constitutional Resolution of Conflicts among Creditors

The IBC is unique in that it makes a stark distinction between financial creditors and operational creditors. While both types of creditors can initiate insolvency proceedings under the IBC, only financial creditors enjoy decision-making powers by way of a seat

45. *Innoventive Industries,* para 60.
46. (2019) 5 SCC 480.

at the table in the CoC, thereby causing some consternation among operational creditors. At the same time, operational creditors are not devoid of protection, as any resolution plan must stipulate that they receive at least liquidation value.[47]

The starting point for the analysis is whether such distinctions are sustainable in the face of Article 14 of the Constitution. Here, courts first consider whether there is an intelligible differentia between the different types of creditors and whether the classification bears a rational nexus to the object that IBC seeks to achieve.[48] Furthermore, courts are concerned with whether they ought to strike down a legislative provision (including a classification) on the ground of manifest arbitrariness under Article 14.[49] The quintessential question of the validity of the classification between financial creditors and operational creditors came up in *Swiss Ribbons*. The Supreme Court identified several distinctions between the two types of creditors and the debts owed to them, including the nature of the security interest, if any, nature and size of the creditors, type of contractual documentation, payment schedules, manner of dispute resolution, and the like.[50] While such distinctions are understandable, the question that remains open is whether the Court has relied somewhat excessively on variations in market practice, thereby over-generalising the issue.

More importantly, the Supreme Court's assessment draws upon the fact that financial creditors are more capable of exercising decision-making powers appropriately on the CoC than operational creditors.[51] The deduction is that financial creditors are considered to have 'skin in the game' by ensuring a proper resolution of the corporate debtor, while operational creditors display the determination to obtain their own individual recoveries. The Court brings out this aspect in *Anuj Jain* by highlighting that 'the financial creditor is, from the very beginning, involved in assessing the viability of the corporate debtor who can, and indeed, engages in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress ... [i]n short, the financial creditor is the one whose stakes are intrinsically interwoven with the well-being of the corporate debtor'.[52] In arriving at such a conclusion, the Supreme Court has drawn heavily on the preparatory steps taken towards the enactment of the IBC. It has placed extensive reliance on the BLRC Report that recommended the distinction between financial and operational creditors and set out the rationale for this distinction.[53]

47. Section 30(2)(b), IBC.
48. *Swiss Ribbons*, para 37; *Manish Kumar*, para 138.
49. *Shayara Bano* v. *Union of India*, (2019) 9 SCC 1, referred to in *Swiss Ribbons*, para 38.
50. *Swiss Ribbons*, para 50.
51. *Swiss Ribbons*, para 51.
52. *Anuj Jain*, para 42.3.
53. See, for example, *Swiss Ribbons*, para 68.

The classification issue arose again in the context of homebuyers as allottees in real estate projects. Although thousands of allottees found themselves in the lurch when real estate and housing companies went into insolvency, there was a lack of clarity on the position of such allottees under the IBC. Hence, the Parliament amended the statute by way of the Second Amendment to clarify that allottees of real estate projects will be considered financial creditors for purpose of insolvency resolution. Accordingly, not only do they possess rights to initiate insolvency proceedings, but they also have participation rights in the CoC, albeit through an authorised representative. This classification of allottees as financial creditors was the subject matter of constitutional challenge in *Pioneer Urban Land and Infrastructure Limited*.

In dealing with the constitutionality of the Second Amendment, the Supreme Court noted, 'It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code'.[54] In arriving at its conclusion, the Court placed emphasis on the ILC Report 2018, which had recommended that home buyers be treated as financial creditors rather than as operational creditors.[55] The ILC Report 2018 proceeded on the basis that the disbursements made by allottees of real estate companies were 'used as a means of financing the real estate project, and are thus in effect a tool for raising finance'.[56] In case of a failure of the project, the real estate company is obligated to refund the monies together with interest, which is based on the time value of money. The Supreme Court seemed persuaded with this analysis when it noted, 'What is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments [made by the allottees] are used as a means of finance qua the real estate project'.[57] Moreover, the Court also noted that in an operational debt, a person usually supplies goods or services and becomes a creditor in turn for the amounts due to it. Whereas, in the case of a real estate project, it is the homebuyer who pays amounts in advance and is a creditor of the real estate company, and hence the allottee has a stake in the outcome of the corporate debtor's insolvency.[58]

Arguably, there are difficulties in such an approach which the Court seems to have disregarded in its zeal to facilitate the implementation of the IBC in amended form. For example, the constitutionality of the treatment of allottees of real estate

54. *Pioneer Urban Land and Infrastructure Limited*, para 42.
55. *Pioneer Urban Land and Infrastructure Limited*, para 16.
56. ILC Report 2018, para 1.5.
57. *Pioneer Urban Land and Infrastructure Limited*, para 42.
58. *Pioneer Urban Land and Infrastructure Limited*, para 42.

projects as financial creditors cannot rest on the general trend that monies paid by allottees go towards the financing of the real estate projects. The utility of the funds by itself is insufficient to define the relationship between the parties. For that matter, a seller of goods or services may also utilise an advance received from a customer towards financing its business, but the IBC treats such a person as an operational creditor despite similarities with the position of a homebuyer. Likewise, an operational debt need not arise only when the creditor is a supplier of goods or services. It can also arise when the creditor is a buyer of goods or services, for which it has paid an advance. Given the light-touch approach of the judiciary in determining the constitutionality of the IBC, these doctrinal distinctions appear inconsequential to the Court's analysis.

The judiciary has adopted a similar stance even when the rights of certain creditors underwent a curtailment. For instance, the Parliament enacted the Insolvency and Bankruptcy Code (Amendment) Act, 2020, which introduced certain provisos to Section 7 of the IBC by which an application to initiate the corporate insolvency of the debtor can be made by allottees of real estate projects only if it has the support of 100 allottees or one-tenth of the total number of allottees, whichever is less, both in relation to a single real estate project. Hence, allottees of real estate projects find themselves classified as a sub-category of financial creditors who can initiate insolvency only when there is a critical mass of them, a requirement that does not apply to other types of financial creditors.

The constitutionality of this provision came under attack in *Manish Kumar*, principally on the ground of improper classification and manifest arbitrariness, which required examination under Article 14 of the Constitution. The first contention was that the expression 'allottees' was vague and arbitrary.[59] However, the Supreme Court took recourse to the provisions of the Real Estate (Development and Regulation) Act, 2015 to conclude that this was hardly a ground to strike down the amendment. The second, and seemingly more important, challenge to the amendment was that it lacked the reasonable classification required to pass muster under Article 14. Here, the Court rationalised the distinction between allottees of real estate projects and other financial creditors across three different parameters: (a) *numerosity*: there would be a large number of allottees compared to other financial creditors, (b) *heterogeneity*: there could be differences between members of a seemingly homogenous group; and (c) *individuality in decision-making*: each allottee may consider his own interests while deciding rather than decide in an institutionalised fashion.[60]

59. *Manish Kumar*, para 127.
60. *Manish Kumar*, para 209.

An idiosyncrasy of the 2020 amendment to the IBC is that the critical mass of allottees must belong to the same real estate project, which too was subject to a constitutional challenge by the petitioners in *Manish Kumar*. The Court, however, found that the 'connection with the same real estate project is crucial to the determination of the critical mass, which Legislature has in mind, as a part of its scheme, to streamline the working of the Code'.[61] Given that complaints relating to different projects may be varied, the Court concluded that the requirement 'does not suffer from any constitutional blemish'.[62] This argument does not stand to reason. The resolution process applies to the corporate debtor as a whole (that is on an entity-related basis) and not in respect of individual real estate projects (that is project-related basis). Hence, it is unfathomable as to how the project-related requirement to determine the critical mass can withstand scrutiny under Article 14 of the Constitution.

In all, we find that the conflict between different groups of creditors has attracted significant judicial attention, calling for a resolution of the conflict against the touchstone of the Constitution. It is reasonable to expect such a disposition, given that the IBC began with a classification of creditors into financial and operational creditors, and then its amendments created further categories, such as allottees of real estate projects who suffer more personal consequences in case a real estate company goes into insolvency. No matter which quarters the constitutional challenge has emanated from, the judiciary has been extremely slow to call into question the choice made by the legislature. Again, the jurisprudence is emphatic in that judicial intervention will be minimal with considerable leeway given to the Parliament to determine the relative rights and standing of the creditors as against one another. Another dominant feature in this arena is the oversized influence that the preparatory work relating to the IBC and its amendments, including the BLRC Report and the ILC Report 2018, play in the formulation of constitutional jurisprudence.

Constitutionality of the Rights and Responsibilities of Other Stakeholders

Another major player under the IBC is the resolution applicant, who is a person that submits a resolution plan for a restructuring of the corporate debtor, including by way of a takeover of the business or assets of the corporate debtor, merger, demerger, or other similar transaction, to bring about an insolvency resolution of the corporate

61. *Manish Kumar*, para 160.
62. *Manish Kumar*, para 160.

debtor.[63] Soon after the enactment of the IBC, a significant loophole emerged through which promoters or other persons connected to the corporate debtor, many of whom were essentially responsible for its financial predicament, or other unscrupulous persons, initiated a backdoor entry on terms more favourable to themselves than the other stakeholders by becoming resolution applicants. In order to address this, Section 29A was introduced into the IBC by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017. Section 29A stipulated a wide-ranging list of persons who would be disqualified from bidding for the corporate debtor. It immediately became a subject matter of constitutional challenge on various counts.

In *Swiss Ribbons*, the Supreme Court upheld the constitutionality of Section 29A by relying on the exposition of the statutory provisions and its *raison d'etre* provided in the earlier decisions of *ArcelorMittal India Private Limited* v. *Satish Kumar Gupta*[64] and *Chitra Sharma* v. *Union of India*.[65] The Court in *Swiss Ribbons* noted that there is no vested interest with any person in applying for treatment as a resolution applicant.[66] Moreover, under Section 29A, it is not necessary to find malfeasance in order to disqualify a person from bidding for the corporate debtor. This was found consistent with the legislative philosophy of the provision.[67]

The travails surrounding Section 29A resurfaced, requiring constitutional consideration in a different form. In *Arun Kumar Jagatramka*, a failed insolvency resolution process ended with the NCLT passing a liquidation order in respect of the corporate debtor. One of the promoters of the company who would otherwise have been ineligible to propose a resolution plan under Section 29A instead floated a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013. The adjudicatory authorities refused to entertain the scheme, against which the affected promoter mounted a two-pronged constitutional challenge.

First, the promoter called into question the constitutional validity of Section 35(1)(f) of the IBC which precludes the sale of a corporate debtor's property in liquidation to any person not qualified to be a resolution applicant under the IBC. Moreover, there is no bar in Section 230 of the Companies Act against a person ineligible under Section 29A of the IBC from proposing a scheme of arrangement. However, the Supreme Court underscored the need to read the

63. Sections 5(25) and 5(26), IBC.
64. (2019) 2 SCC 1.
65. (2018) 18 SCC 575.
66. *Swiss Ribbons*, para 98.
67. *Swiss Ribbons*, para 102.

two provisions in harmony,[68] and held that attaching the ineligibilities under the IBC to a scheme of arrangement under the Companies Act was not in violation of Article 14 of the Constitution.[69] The second challenge related to the constitutional validity of Regulation 2B(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, which stipulates that a person not eligible to submit a resolution plan under the IBC is precluded from initiating a scheme of arrangement under Section 230 of the Companies Act. Here, the Court ruled that Regulation 2B(1) was merely clarificatory in nature, and that the position of law under it would have ensued even in its absence. Hence, it refused to entertain the constitutional challenge. The Court suggested that 'the need for judicial intervention or innovation from the NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC'.[70]

In a different vein, the judiciary has encountered constitutional challenges when resolution applicants enjoy the benefit of certain protective mechanisms under the IBC. In *Essar Steel*, the Supreme Court propounded what later came to be referred to as the 'clean slate' theory, by which a successful resolution applicant cannot be foisted with liabilities relating to the corporate debtor once the resolution process is concluded. The corporate insolvency process represents the sole and exhaustive process for dealing with claims relating to the corporate debtor. As the Court in *Essar Steel* poignantly noted,' A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor'.[71]

The Parliament has since codified the clean slate theory in the form of Section 32A of the IBC, enacted by the Insolvency and Bankruptcy Code (Amendment) Act, 2020, which stipulates that once a resolution plan has resulted in a change in control of the corporate debtor in favour of a person who was not (a) a promoter, controller, or manager of the corporate debtor at the time of insolvency or (b) any person who had aided or conspired in the commission of an offence, the corporate debtor shall be free from prosecution for such an offence from the date of approval of the resolution plan. In these circumstances, the property of the corporate debtor shall be free from legal action, such as attachment, seizure, retention, confiscation,

68. *Arun Kumar Jagatramka*, para 76.
69. *Arun Kumar Jagatramka*, para 78.
70. *Arun Kumar Jagatramka*, para 103.
71. *Essar Steel*, para 107. See also, *Arun Kumar Jagatramka*, para 79; *Ghanashyam Mishra and Sons Private Limited* v. *Edelweiss Asset Reconstruction Company Limited*, 2021 SCC OnLine SC 313, para 95.

and the like. Section 32A faced a constitutional challenge in *Manish Kumar*. The Supreme Court articulated that the absence of such a protective mechanism would hinder any resolution applicant from making a bid for the corporate debtor to bring about the successful conclusion of a resolution process,[72] and thereby throw a spanner in the works of the functioning of the IBC. Moreover, the bar against prosecution and action against property applies only to the corporate debtor and not any of the other persons who are responsible for wrongdoing. Again, after observing that Section 32A is an economic measure with limited scope for judicial interference, the Supreme Court found no basis to impugn the statutory provision on the ground that it violates the Constitution.

In addition to resolution applicants as discussed above, constitutional issues have emerged in relation to personal guarantors of corporate debtors, who were generally promoters, directors, or other persons associated with the corporate debtors. At the outset, the IBC was made effective only in relation to corporate debtors. However, by way of a notification,[73] the government brought into force certain provisions of Part III of the IBC that deal with insolvency resolution for individuals and partnership firms, but only in so far as they relate to personal guarantors to corporate debtors and not for other individuals. This selective application to one class of individuals was the subject matter of a challenge before the Supreme Court, including on the ground that the notification was *ultra vires* Section 1(3) of the IBC, which states that different dates may be provided to bring into force different provisions of the Code. In *Lalit Kumar Jain* v. *Union of India*,[74] the Supreme Court upheld the Government's notification by observing that the intention of the legislature was always to treat personal guarantors of corporate debtors differently from other categories of individuals.[75] Hence, the government's issue of the notification was 'not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of the Code'.[76] Accordingly, the notification was found not to be *ultra vires*. Here again, harsh as it may be to individuals who are personal guarantors in respect of corporate debtors, the Court's approach ended up smoothening the operation of the IBC in the case of personal guarantors, such as promoters and directors, who are commonly required by banks and financial institutions to issue a personal guarantee.

72. *Manish Kumar*, para 272, quoting the ILC Report 2020, para 17.4.
73. Ministry of Corporate Affairs, Notification S.O. 4126(E), dated 15 November 2019.
74. 2021 SCC OnLine SC 396.
75. *Lalit Kumar Jain*, para 123.
76. *Lalit Kumar Jain*, para 124.

The manner of treatment by the Supreme Court of other stakeholders through the lens of constitutionality results in a similar outcome as in the case of conflicts between corporate debtors and creditors as well as *inter se* creditors. With this, we move to our final examination of certain residual process-oriented matters that have witnessed the invocation of constitutional considerations.

Constitutionality of Dispute Resolution Mechanisms and Procedural Matters

When it comes to process-related matters, the Supreme Court has been liberal in exercising its jurisdiction under Article 142 of the Constitution with a view to 'doing complete justice' in matters under the IBC that are before it. One such instance was where a corporate debtor and creditors preferred an out-of-court settlement when the insolvency resolution process was still pending before the adjudicatory authorities. In the initial sequence of cases, the Supreme Court noted that the adjudicatory authorities had no power to approve settlements outside of the scope of the IBC.[77] However, in a strange turn of events, despite the absence of powers with adjudicatory authorities to do so, the Supreme Court exercised its discretionary power under Article 142 to record the settlement and dispose of matters accordingly. The Court did so in brief orders that are devoid of necessary reasoning on jurisprudential questions an issue compounded by the fact that orders passed by it under Article 142 do not constitute binding precedent.[78]

At the same time, in order to avert the logjam regarding settlements, the Supreme Court recommended that the relevant legal regime be amended to include inherent powers for the adjudicating authorities to allow settlements, to obviate unnecessary appeals to the Supreme Court for its imprimatur to such settlements.[79] Aided by the ILC Report 2018, the Parliament picked up the gauntlet thrown by the Supreme Court by enacting Section 12A of the IBC, which confers power upon the adjudicating authority to allow settlements and the withdrawal of an application for insolvency resolution so long as the withdrawal enjoys the support of 90 per cent of the voting share of the CoC. Unsurprisingly, Section 12A was the subject of a constitutional challenge. In *Swiss Ribbons*, the Supreme Court adopted the usual stance of non-interference in economic legislation to conclude that there was

77. *Lokhandwala Kataria Construction Private Limited* v. *Nisus Finance and Investment Managers LLP*, (2018) 15 SCC 589; *Mothers Pride Dairy India Private Limited* v. *Portrait Advertising and Marketing Private Limited*, 2017 SCC OnLine SC 1789; *Uttara Foods and Feeds Limited* v. *Mona Pharmachem*, (2018) 15 SCC 587.
78. Ninad Laud. 2021. 'Rationalising 'Complete Justice' under Article 142', (2021) 1 SCC J-30.
79. *Uttara Foods*, para 2.

nothing arbitrary in the 90 per cent voting stipulation in the provision, which is squarely within the domain of legislative policy.[80]

The Supreme Court has exercised the power under Article 142 in other circumstances as well, for example, to order the recommencement of a resolution process afresh,[81] and to provide an opportunity to resolution applicants to pay off the non-performing assets of their related parties to be eligible in terms of Section 29A of the IBC to propose a resolution plan.[82] Hence, wherever there has been a need to remove difficulties or to tread unchartered territories, the Court has not refrained from taking on a more active role to ensure a proper implementation of the IBC.

One knotty procedural issue is whether the IBC can stipulate a mandatory time period for completion of the insolvency resolution process. In *Essar Steel*, the Supreme Court found that the failure to meet timelines is often beyond the litigant, and hence 'may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution'.[83] Accordingly, while leaving the timeline intact, the Court struck down the word 'mandatorily' on the ground of manifest arbitrariness under Article 14 as an excessive and unreasonable restriction on the ability of a litigant to carry on business.[84] The effect of the ruling is to replace the expression 'mandatorily' in the statute with 'ordinarily' to mitigate the harshness of a mandatory timeline on litigants.

If our analysis suggested that the Indian judiciary has adopted a passive stance in relation to substantive matters pertaining to the IBC, our findings regarding matters of procedure are altogether different. The Court has exercised its powers more actively to implement realistic solutions to ensure the unhampered enforcement of the IBC to fully realise the legislative goals of the Parliament.

Conclusion

There is no gainsaying that the IBC is one of the most significant pieces of legislation in recent times to affect the financial sector. The enormity of its impact on the constitutional jurisprudence of the country is evident from the frenetic level of judicial activity witnessed within the mere five-year period since the legislation

80. *Swiss Ribbons*, para 82.
81. *Chitra Sharma*, para 47.4.
82. *ArcelorMittal*, para 116.
83. *Essar Steel*, para 127.
84. *Essar Steel*, para 127.

was enacted. The Supreme Court, has played a far-reaching role in the evolution and implementation of the legislation. Being an economic legislation, the Court has adopted a rather hands-off approach in scrutinising the minutiae of the legislation from the purview of its constitutionality and has instead opted for a more broad-based outlook.

Given the context and circumstances surrounding the legislation and its enactment, the courts have underplayed any role in industriously monitoring legislative activity against constitutional yardsticks and, on the other hand, they have effectively joined forces with Parliament to expediate the success of the IBC. For example, the judiciary has painstakingly sought to elicit legislative intention by means of the preparatory documents that went into the making of the legislation, which has played an outsized role in ensuring the sustainability of the IBC in the wake of repeated constitutional challenges. The judiciary has engaged in innovative approaches to rationalise matters and devise outcomes wherever difficulties have emerged. In some areas, the judiciary has even offered cues to the legislative branch to rectify omissions and grey areas, which the Parliament has promptly done. The judiciary has followed the path of cooperation as opposed to circumspection in this sphere. We do not profess to predict the future but, discerning from the judicial trends emanating thus far, there is clarity on one aspect—anyone challenging the constitutionality of the IBC will carry an unduly high burden on their shoulders to obtain a successful outcome.

12

Judicial Engagement with Dissent In the Preventive Detention Era

Sithara Sarangan and Anindita Pattanayak*

Protest beyond the law is not a departure from democracy; it is absolutely essential to it.

—Howard Zinn

Introduction

Dissent is rightfully a part of every democracy and the protection of the right to dissent is the inherent duty of the State. It is an undeniable fact that the protection of freedom of speech, expression, and peaceful protest lies at the heart of every democracy. Any legislation that restricts these rights will have to remain within constitutional limits to be valid. Article 19 of the Constitution of India provides for a range of fundamental rights of which Article 19(1)(a) grants citizens the freedom of speech and expression which will be central to this chapter.[1] Free speech has particular significance in a young democracy since it was crucial in facilitating the transition of the Indian State from a colonial state to an independent nation. History is proof that speeches, anti-colonial journalism, and literature have all been central to the Indian independence movement in the quest for freedom. Dissent in various forms was often the target of oppressive colonial regulation given that it acted as a catalyst to foster independent thinking and placed a check on arbitrary State power.[2] Owing to this historical antecedent, it has been essential for the

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 27 April 2022.

1. Article 19(1), Constitution of India, 1950 states that, '(1) All citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms'.
2. For example, to know more about colonial responses to free press, see Prasun Sonwalker. 2015. 'Indian Journalism in the Colonial Crucible', *Journalism Studies*, 16(5): 624-636, available online at https://www.tandfonline.com/doi/full/10.1080/1461670X.2015.1054159 (accessed on 6 April 2022); Neeti Nair, 'Old Laws for New Reasons: The Limits to Free Speech in India', *Berkley Centre for Religion, Peace and World Affairs*, available online at https://berkleycenter.georgetown.edu/responses/old-laws-for-new-reasons-the-limits-to-free-speech-in-india (accessed on 6 April 2022).

modern Indian State to foster a safe space for dissent and dismantle the framework provided by the colonial regime that legitimised the suppression of free speech and peaceful protests.

However, this has not happened as many colonial regulations continue to directly or indirectly thrive today as they seek to serve the political interests of the executive, posing a threat to civil liberties.[3] After the Independence of India, dissent has been controlled with the help of various anti-terror statutes which place unfair restrictions on both individual rights and civil liberties under the pretext of maintaining public order. While these laws might have been put in place to tackle specific situations, the State machinery cannot allow for its implementation through the erosion of constitutional safeguards. The scope of this chapter, however, will focus on a specific regulatory setup that is being used to curb free speech—preventive detention laws. It seeks to establish the close nexus between preventive detention laws, stifling of dissent, and the lack of State accountability.

What are Preventive Detention Laws?

Under normal circumstances, persons accused of committing criminal offences undergo a full and fair trial that protects their rights, including the right to be informed of the charges levelled against them,[4] the right to legal representation,[5] and the possibility of bail.[6] Most importantly, persons that are being investigated in a criminal case cannot be physically detained by investigating authorities longer than 24 hours without being produced before a magistrate who then determines if there are enough grounds to continue detention.[7] Premised on the principle that all persons are presumed to be innocent until proven guilty, these measures are meant to protect the essential right to the personal liberty of accused persons.

Preventive detention laws, on the other hand, are laws that allow for the detention of suspects to prevent the commission of a crime, rather than as a punishment for a crime that has actually been committed. The significant distinction between preventive detention laws and the ordinary criminal law framework under the Indian Penal Code, 1860 is that the former punishes persons prior to the commission of an offence, while the latter seeks to punish persons for crimes that they have committed.

3. Saurav Datta. 2014. 'History revision: Why India's colonial laws haven't changed', *Index on Censorship*, 43(2): 122-126, available online at https://journals.sagepub.com/doi/10.1177/0306422014537155 (accessed on 6 April 2022).
4. See Section 50(1), Criminal Procedure Code, 1973.
5. See Article 22(1), Constitution of India, 1950 and Section 50(3), Criminal Procedure Code, 1973.
6. See the judgment of the Supreme Court in *D.K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416 for a comprehensive overview of the rights of the accused including judicially crafted protections.
7. See Article 22(1), Constitution of India, 1950 and Section 57, Criminal Procedure Code, 1973.

The preventive detention regime forms an exceptional legal framework that departs from the well-established principles of fair trial and offers much less protection to the accused. Under these laws, accused persons can be detained without a full trial or evidence against them for extended periods of time. The Unlawful Activities Prevention Act, 1967 (UAPA) exemplifies this type of law as it allows for pre-trial detention for up to 180 days which is twice the number of days that detention under regular laws is allowed before the suspect has to be released.[8] The latent peril of these preventive detention statutes is that it absolves the law enforcement authorities of accountability and places an unreasonable burden of proof on the accused person. Under the UAPA, there is a reversal of the common law principle of the presumption of innocence and the burden of proof is on the accused to prove that the allegations against them are false. Baxi identified systematic inconsistencies in the two systems operating simultaneously, first being the criminal justice system whereby there were features such as due process, personal rights, and rigorous judicial review of State power and then there was the preventive detention system which was devoid of the above features.[9] In other words, preventive detention laws allow for the dilution of the principles of fair trial in the interest of some significant and pressing purpose that justifies such a departure from these well-established principles.

Problematic Trends in Preventive Detention Laws

It is undeniable that the Constitution empowers both the central and state governments to enact legislations that have preventive detention provisions.[10] Ideally, preventive detention laws should be used, if at all, in specific and exceptional circumstances. However, this is far from how these laws are used in reality. The Supreme Court has recognised the drastic nature of preventive detention noting that the scope of an individual to challenge executive action in such an event is very limited. It has cautioned that the use of preventive detention should be minimal, and courts should be ever-vigilant to see that this power is not abused.[11] These laws are supposed to be designed to tackle an overwhelming threat to security that cannot effectively be tackled by traditional criminal law. Most anti-terror statutes have come

8. See Section 43D, Unlawful Activities (Prevention) Act, 1967.
9. Robert L Kidder. 1983. 'The Crisis of the Indian Legal System. By Upendra Baxi. New Delhi: Vikas (Alternatives in Development: Law), 1982. xiii, 358 pp. Appendixes, References, Index. N.p', *The Journal of Asian Studies*, 43(1), 177-178.
10. The Parliament has the exclusive power to enact a law for preventive detention for the reasons connected with defence, foreign affairs, or security of India under Entry 9 of List I of Schedule VII to the Constitution of India, 1950. Both the Parliament and the state legislatures have powers to enact such laws for reasons related to maintenance of public order or maintenance of supplies or services essential to the community under Entry 3 of List III of Schedule VII to the Constitution of India, 1950.
11. *Francis Coralie Mullin* v. *Administrator, Union Territory for Delhi*, AIR 1981 SC 746.

into being to tackle situations of insurgency or to control the secessionist movement post-Independence, however, their usage has continued to extend to regular law and order situations over time. The Terrorist and Disruptive Activities (Prevention) Act, 1987[12] (TADA) for instance, was enacted to counter a surge of separatist militancy in Punjab,[13] and similarly, the Prevention of Terrorism Act, 2002 (POTA) was enacted in response to rising terrorist activities in the country;[14] both of which were repealed after a period of time. Similarly, state laws such as the Maharashtra Control of Organised Crime Act, 1999 targeted highly organised criminal syndicates which were notoriously difficult to convict.[15] Other laws like the Armed Forced Special Powers Act (AFSPA) that allow for preventive detention of civilians by the armed forces are enabled only in certain 'disturbed areas', subject to the prevalence of insurgent activities in the area. They are, thus, designed to be limited in their enforceability both in terms of area and time and are meant to be used only when their application is justified. Nonetheless, such laws are prone to abuse and have been repeatedly misused without plausible reason resulting in egregious violation of civil liberties.[16] Increasingly, their use is being normalised as the scope of 'exception' under the preventive detention regime is ever expanding.[17]

12. The preamble of the TADA states that it aims to 'make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto'.
13. Jagrup Singh and Nirmal Singh Bhatti. 2021. 'Rise, Dynamics, and Decline of Violence in Punjab: A Critical Reassessment of Existing Explanations', *International Journal of Punjab Studies*, 22(1): 43-64.
14. The preamble of the POTA states that it aims to 'make provisions for the prevention of, and for dealing with, terrorist activities and for matters connected therewith'.
15. Abhishek Goyal. 2020. 'MCOCA: Expanding Realms of Penal Provisions', *SCC Online Blog*, 19 December, available online at https://www.scconline.com/blog/post/2020/12/19/mcoca-expanding-realms-of-penal-provisions/(accessed on 19 April 2022).
16. Apoorva Agarwal and Digvijaya Singh. 2021. 'Unlocking the reality of preventive detention laws in India', *The Daily Guardian*, 3 December, available online at https://thedailyguardian.com/unlocking-the-reality-of-preventive-detention-laws-in-india/ (accessed on 19 April 2022); Mohmad Aabid Bhat. 2019. 'Preventive Detention in Counter-insurgencies: The Case of Kashmir', *Insight Turkey*, 21(4): 53-68, available online at https://www.insightturkey.com/commentaries/preventive-detention-in-counter-insurgencies-the-case-of-kashmir (accessed on 19 April 2022); *Times of India*. 2021. 'Preventable abuse: SC calls out wrongful use of preventive detention. Such arrests must be made only in rare cases', *Times of India*, 3 August, available online at https://timesofindia.indiatimes.com/blogs/toi-editorials/preventable-abuse-sc-calls-out-wrongful-use-of-preventive-detention-such-arrests-must-be-made-only-in-rare-cases/(accessed on 19 April 2022).
17. Derek P. Jinks. 2001. 'The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India', *Michigan Journal of International Law*, 22(2): 311 [Jinks]; Neha Singhal. 2021. 'Preventive Detention Laws in India', *Journal of Indian Law and Society*, 12(1): 51.

Though TADA and POTA were eventually repealed amidst an alarming rise of concerns over their misuse,[18] similar provisions live on through the UAPA which is not limited to terrorist threats only but covers a nebulous scope of criminal activities, leading to widescale misuse by the executive.[19] State enactments allowing for preventive detention cover a wide range of crimes including bootlegging, cyber law offenders, and video pirating without any concrete justification as to why such criminal activity should be tackled with extreme measures like preventive detention.[20] There are instances of preventive detention for minor crimes like theft[21] and false advertisements.[22] These laws are emerging as tools for the executive to bypass the requirements of responsible public order maintenance, crime prevention, and investigation. While this has a particularly tumultuous effect on many civil liberties, this chapter will focus on the misuse of preventive detention laws by State machinery in order to suppress dissent and curb free speech.

Preventive Detention Laws Used to Suppress Dissent

The practice of exerting expansive executive powers to detain dissenters as an intimidation tactic is not new. Preventive detention laws were in fact a pivotal

18. Ujjwal Kumar Singh. 2004, 'Repeal of POTA', *Economic and Political Weekly,* 39(33): 3677-3680.
19. Susan Abraham. 2017. 'Misuse of the Unlawful Activities (Prevention) Act', *Economic and Political Weekly,* 52(12), available online at https://www.epw.in/journal/2017/12/web-exclusives/misuse-unlawful-activities-prevention-act.html-0 (accessed on 19 April 2022); *Al Jazeera*. 2021. '"Misused, abused": India's harsh terror law under rare scrutiny', *Al Jazeera*, 16 August, available online at https://www.aljazeera.com/news/2021/8/16/india-uapa-terror-law-scrutiny (accessed on 19 April 2022); Mayank Chawla. 2021. '"Have We Lost All Humanity?": Former SC Judges Raise Concerns on Misuse of UAPA', *The Quint*, 28 November, available online at https://www.thequint.com/news/law/former-supreme-court-judges-raise-concerns-over-misuse-uapa-sedition#read-more.
20. Tamil Nadu has the Prevention of Dangerous Activities of Bootleggers, Cyber Law Offenders, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Sexual Offenders, Slum Grabbers and Video Pirates Act, 1982. Karnataka has the Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders, Slum Grabbers and Video or Audio Pirates Act, 1985. Kerala has the Kerala Anti-Social Activities (Prevention) Act, 2007. Andhra Pradesh has the Andhra Pradesh Prevention of Dangerous Activities of Boot-leggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land-Grabbers Act, 1986. See also *The Hindu*. 2016. 'Tamil Nadu tops in use of preventive detention law', *The Hindu*, 27 October, available online at https://www.thehindu.com/news/national/tamil-nadu/Tamil-Nadu-tops-in-use-of-preventive-detention-law/article16082579.ece (accessed on 19 April 2022).
21. *A.Ganesh Raghu* v. *The State of Telangana*, Writ Petition No. 2156 of 2019 (the High Court for the State of Telengana) decided on 29 March 2019, available online at https://indiankanoon.org/doc/187303300/(accessed on 19 April 2022).
22. *Touphik* v. *The State of Telangana*, Writ Petition No. 2234 of 2021 (the High Court for the State of Telengana) decided on 28 April 2021, available online at https://indiankanoon.org/doc/91482068/ (accessed on 19 April 2022).

method used by the colonial regime to suppress the freedom movement. The Rowlatt Act, or the 'Black Act', as it was infamously known, was one such law that the colonial regime used to imprison persons for up to two years without a fair trial for indulging in any purported 'anarchical and revolutionary movements' which in many instances was mere speech, writing, or peaceful protest without any violence. These provisions were used to target journalists and educators who criticised colonial policies as they fuelled public sentiments, paving the way for the Non-Cooperation Movement in 1920.[23] While this arbitrary exercise of power by the colonial regime was deeply condemned, this practice continues to thrive in independent India. The Maintenance of Internal Security Act, 1969 (MISA) was ostensibly passed to counter threats to national security. However, this statute was acutely misused to target political dissidents during the emergency declared by the Indira Gandhi regime in 1975. Although MISA was eventually repealed once the Congress lost power, it gave way to a deeply disturbing practice of arrest and detention without trial, merely based on suspicion.[24] The fact that several past detainees under the MISA, such as L.K. Advani, George Fernandes, and Karunanidhi went on to run established and democratically elected governments raises serious concerns about the legitimacy of the preventive detention regime which considered them an overwhelming threat to national security at the time.

A common theme that one sees in the usage of all these preventive detention laws is that it is consistently being used as an instrument to foster the political beliefs of the ruling party at the time rather than being employed to manage the internal security of the State. Although a change in regime resulted in the MISA being repealed, its provisions happened to be reincarnated under the Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 by the successive government.[25] As a result of these legislative rebounds, the UAPA and state-level legislations continue to remain in force in one way or another to silence speech and suppress dissenters.

For instance, during the Bhima Koregaon violence investigation in 2018, a number of human rights activists (who had been critical of the ruling governments in the past) were arrested under the UAPA despite being nowhere near the violent

23. Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller, and Jed Rakoff. 2006. 'Colonial Continuities: Human Rights, Terrorism, and Security Laws in India', *Columbia Journal of Asian Law*, 20(1): 93.
24. Jinks, 'The Anatomy of an of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India'; Apoorva Mathur. 2021. 'The Statutory Approach to Counter Terrorism in India: From MISA to the UAPA', *Supremo Amicus*, 24, available online at https://supremoamicus.org/wp-content/uploads/2021/06/Apoorva-Mathur.pdf (accessed on 19 April 2022).
25. Dipankar Gupta. 1988. '"Illegitimate" Politics of the Indian State', *Economic and Political Weekly*, 23(4): 140-142.

incidents or having any substantial link with them.[26] In 2021, Stan Swamy, a tribal activist who was charged under the UAPA, died in preventive detention having been denied bail despite being diagnosed with Parkinson's and COVID-19.[27] Similarly, in 2020, Siddique Kappan, a journalist who writes about discrimination and violence against marginalised communities was arrested under the UAPA in Uttar Pradesh when he visited to cover a rape case that had taken place in Hathras.[28] Journalists and lawyers who questioned targeted violence against minorities in Tripura were charged with offences under UAPA last year.[29] Many lay persons who protested against the Citizenship Amendment Act were detained under preventive detention laws, including Dr Kafeel Khan whose detention was quashed by the High Court of Judicature at Allahabad after seven months.[30] While this might be the case with regard to central laws, one sees that state-level legislations are also regularly employed as a tool to imprison dissenters, such as filmmakers, activists, journalists, and protest groups, who are critical of the ruling governments, often labelling them 'goondas' under the presumption that they pose a threat to public order.[31]

26. *The Scroll*. 2018. 'Bhima Koregaon violence: Amnesty, Human Rights Watch call activists' arrests '"politically motivated"', *The Scroll*, 25 June, available online at https://scroll.in/latest/884045/bhima-koregaon-violence-amnesty-human-rights-watch-call-activists-arrests-politically-motivated (accessed on 19 April 2022); Prateek Goyal. 2021. 'Bhima Koregaon case; Three years of legal and rights violations', *NewsLaundry*, 2 January, available online at https://www.newslaundry.com/2021/01/02/bhima-koregaon-case-three-years-of-legal-and-rights-violations (accessed on 19 April 2022); Rajshree Chandra. 2021. 'Bhima Koregaon Case: Trying Without a Trial Is the Intent of Draconian UAPA Law', *The Wire*, 9 July, available online at https://thewire.in/rights/bhima-koregaon-case-trying-without-a-trial-is-the-intent-of-draconian-uapa-law (accessed on 19 April 2022).
27. Anupama Katakam. 2021 '"I would rather suffer and possibly die shortly than go to that hospital", Father Stan Swamy tells Bombay High Court', *Frontline*, 21 May, available online at https://frontline.thehindu.com/dispatches/i-would-rather-suffer-and-possibly-die-shortly-than-go-to-that-hospital-father-stan-swamy-tells-bombay-high-court/article34617828.ece (accessed on 19 April 2022).
28. Mahtab Alam. 2020. 'Hathras Case: Malayalam Journalist and Three Others Booked under Sedition, UAPA', *The Wire*, 7 October, available online https://thewire.in/media/hathras-case-malayalam-journalist-siddique-kappan-booked-under-sedition-uapa (accessed on 19 April 2022).
29. *Outlook*. 2021. 'Supreme Court Restrains Tripura Police from Coercive Steps against two Lawyers and one Journalist Booked under UAPA', *Outlook*, 17 November, available online at https://www.outlookindia.com/website/story/tripura-violence-sc-grants-protection-from-arrest-to-journalist-others-booked-under-uapa/401271 (accessed on 19 April 2022).
30. Vatsala Gaur. 2020. 'NSA slapped on UP's Dr Kafeel Khan', *The Economic Times*, 15 February, available online at https://economictimes.indiatimes.com/news/politics-and-nation/nsa-slapped-on-ups-dr-kafeel-khan/articleshow/74144891.cms?from=mdr (accessed on 19 April 2022).
31. Ilangovan Rajasekaran. 2017. 'Goondas Act: Act of suppression', *Frontline*, 18 August, available online at https://frontline.thehindu.com/the-nation/act-of-suppression/article9797029.ece (accessed on 19 April 2022); Dia Rekhi. 2017. 'Who is a Goonda? History of the Goonda Act in Tamil Nadu', *The New Indian Express*, 30 July, available online at https://www.newindianexpress.com/states/tamil-nadu/2017/jul/30/who-is-a-goonda-history-of-the-goonda-act-in-tamil-nadu-1635577.html (accessed on 19 April 2022).

These laws are increasingly being designed to minimise judicial interference, providing wide executive discretion while being used as a means to actively suppress dissent and perpetuate existing power hierarchies.[32] Their dubious use also has the effect of criminalising thought and opinion normalising the characterisation of dissent as a threat to security. As Justice Chandrachud recently articulated '[t]he blanket labelling of dissent as anti-national or anti-democratic strikes at the heart of our commitment to protect constitutional values and the promotion of deliberative democracy'.[33] This brings into focus the issue of how the judiciary has responded to this trend of misusing preventive detention to punish dissenters.

Judicial Response to Protecting Speech in Preventive Detention Cases

In the wake of Indpendence, the judiciary was vested with the challenging task of interpreting preventive detention laws in consonance with the newly realised right to freedom of speech and expression under Part III of the Constitution. This right, however, is not absolute and according to Article 19(2), the State can impose 'reasonable restrictions' on this right 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'.[34] Both detentions under preventive detention laws, and the validity of the preventive detention laws itself, have repeatedly been challenged before courts on various grounds, including the ground that they are not reasonable restrictions permissible under Article 19(2), with mixed results.

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32. Leah Verghese. 2020. 'The crippling effect of sedition and UAPA on dissent in India', *Hindustan Times*, 12 October, available online at https://www.hindustantimes.com/analysis/the-crippling-effect-of-sedition-and-uapa-on-dissent-in-india/story-QBCPtSpVcYgbdnavysc8UL.html (accessed on 19 April 2022); Faizan Mustafa. 2021. 'Law Blow: Harsh Laws are Always Used to Suppress Dissent and Opposition', *Outlook*, 2 August, available online at https://www.outlookindia.com/magazine/story/india-news-law-blow-harsh-laws-are-always-used-to-suppress-dissent-and-opposition/304800 (accessed on 19 April 2022); *Telengana Today*. 2021. 'Smothering Dissent', *Telangana Today*, 17 April, available online at https://telanganatoday.com/smothering-dissent (accessed on 19 April 2022).
33. *The Hindu*. 2020. 'Blanket Labelling of Dissent as Anti-National Hurts Ethos of Democracy: Justice Chandrachud', *The Hindu*, 15 February, available online at https://www.thehindu.com/news/national/blanket-labelling-of-dissent-as-anti-national-hurts-ethos-of-democracy-justice-chandrachud/article30829420.ece (accessed on 13 June 2021).
34. Article 19(2), Constitution of India, 1950 states that, 'Nothing in sub clause (a) of clause (1) [the right to free speech and expression] 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'.

Recognising Preventive Detention as a Free Speech Issue

Dissent itself cannot be a ground to detain persons without a trial. The executive, when targeting dissent, has to effectively substantiate that the dissent has in some way posed such an enormous threat to safety or security or some other value recognised in Article 19(2) that it merits an extreme response like preventive detention. This is often difficult to do and, therefore, it is not the speech itself that is furnished as a reason but some other associated elements that may or may not be true, for example, instances where ties with banned organisations have been identified, exhortations to violence, etc. In such instances, it is the function of the judiciary to then uncover whether preventive detention is actually meant to, or even has the effect of, targeting free speech under the guise of protecting law and order.

An early case that overlooked this essential connection between preventive detention and free speech was *A.K. Gopalan* v. *State of Madras*.[35] In this case, the petitioner who was detained under the Preventive Detention Act, 1950 (PD Act), challenged the validity of that act on the ground that it contravened his rights under, amongst others, Article 19(1)(a) of the Constitution. A.K. Gopalan was a prominent communist politician and leader who often contradicted the ruling party. He was arrested under several ordinary criminal law provisions, like criminal intimidation for delivering a series of public speeches, but these detentions were quashed by the High Court of Madras.[36] However, before he was released from jail pursuant to his acquittal, he was served with a preventive detention order under the PD Act, a draconian law that went to the extent of withholding the grounds of preventive detention from courts of law,[37] making it nearly impossible for a detainee to challenge the detention in court. While this particular provision (withholding grounds of detentions from court) was struck down as unconstitutional, the PD Act in itself was upheld by the Supreme Court. Specifically, with regard to Article 19, the judgment took a blinkered approach by observing that preventive detention incidentally affected the right to free speech, that is, a detainee, when detained, could not exercise the same rights of speech as a free person. Interestingly, the Court believed that the thrust of preventive detention here was not on speech itself but on liberty as interpreted under Article 21. Relying on this understanding, the Supreme Court reached the conclusion that the right to free speech was not applicable in this case. This is problematic on two counts:

35. *A.K. Gopalan* v. *The State of Madras*, AIR 1950 SC 27.
36. *The Indian Express*. 1950. 'A K Gopalan's petition dismissed', *The Indian Express*, 20 May, available online at https://news.google.com/newspapers?id=p7w-AAAAIBAJ&sjid=O0wMAAAAIBAJ&pg=1782%2C5547992 (accessed on 19 April 2022).
37. Section 14, Preventive Detention Act, 1950.

(a) Such reasoning ignores the effect of preventive detention on speech in general. It is not merely that A.K. Gopalan could not exercise his right to speech in jail while detained; it would also lead to the inference that he would not be able to exercise it when released either because the detention is effectively a punishment for raising a dissident voice. This also indicates to others that dissenting opinions are liable to be punished without effective recourse or review, therefore curbing free speech in general and suppressing dissent (the chilling effect).

(b) This reasoning views each fundamental right like speech or liberty in 'silos' where a fact situation attracts discrete application of each separately. In reality, a tyrannical detainment is a complex condition that violates one's sense of identity, liberty, and speech in an interconnected manner. What the court failed to recognise here is that a narrow interpretation of speech without understanding its relationship with other rights is bound to result in limited judicial outcomes and egregious violations of civil liberties.

Although in subsequent cases concerning rights other than free speech, this 'siloed' approach was corrected,[38] courts are yet to explicitly recognise the chilling effect that preventive detention has on speech. In several instances where the judiciary quashed preventive detention orders against dissenters, it did so for various other reasons, such as vagueness of grounds of detention or the lack of the opportunity for the detainee to respond, etc., and the discussion was limited to the right to life and fair trial, without adequate exploration of their effect on speech.[39]

In *Romila Thapar* v. *Union of India,*[40] the Supreme Court was faced with a matter involving the arrest of five academicians/activists under UAPA by the Maharashtra Police in connection with the Bhima Koregaon violence on sparse evidence. While the main argument raised was that these arrests were an intimidation tactic to restrain their right to speech, the judgment made only a passing observation on this point—

> There is a serious allegation that the arrests have been motivated by an attempt to quell dissent Individuals who assert causes which may be unpopular to the echelons of

38. See *Rustom Cavasjee Cooper* v. *The Union of India*, AIR 1970 SC 564; *Maneka Gandhi* v. *The Union of India*, AIR 1978 SC 597.
39. See *National Investigation Agency* v. *Zahoor Ahmad Shah Watali*, Criminal Appeal No. 578 of 2019 (Supreme Court of India) decided on 2 April 2019, arising out of Special Leave Petition (Criminal) No.7857 of 2018, decided by the Supreme Court of India on 2 April 2019, available online at https://indiankanoon.org/doc/117627977/(accessed on 19 April 2022); *Nuzhat Perween* v. *The State of Uttar Pradesh*, Habeas Corpus Writ Petition No. 264 of 2020, (the High Court of Judicature at Allahabad) decided on 1 September 2020, available online at https://www.livelaw.in/pdf_upload/pdf_upload-380732.pdf (accessed on 19 April 2022).
40. *Romila Thapar* v. *Union of India*, (2018)10 SCC 802.

> power are yet entitled to the freedoms which are guaranteed by the Constitution. Dissent is a symbol of a vibrant democracy. Voices in opposition cannot be muzzled by persecuting those who take up unpopular causes.[41]

Eventually, a Special Investigation Team was appointed to investigate the matter given that the police investigation had been highly biased. However, there is no concrete judicial holding that sufficiently establishes that preventive detention of dissenters violates the right to free speech by creating an environment of fear that suppresses other dissenters, thereby challenging the constitutionality of the preventive detention regime on the ground that it violates the freedom of speech and expression at large. In a case pending before the Supreme Court, the explicit argument raised was that preventive detention on vague grounds will have a 'chilling effect' on the freedom of speech and expression.[42] It remains to be seen whether the Supreme Court will finally accept this argument.

Vague Statutory Terminology Enabling Excessive Executive Discretion

What is ubiquitous in preventive detention laws is that there is a certain degree of ambiguity in the wording of the statutes which necessitates judicial intervention. They often have vague open-ended terminology, such as curbing 'unlawful' activities[43] or protecting 'public order',[44] which results in these provisions being left open to interpretation. This implies that such provisions can be used in exorbitant State power to meet dubious ends, including unfair restrictions on free speech. An important early development to tackle this practice post-Independence was seen in the case of *Romesh Thappar* v. *State of Madras*[45] in 1950. In this case, provisions of the Madras Maintenance of Public Order Act, 1949 were used to ban the circulation of Romesh Thappar's leftist journal on the grounds of 'public safety'. Although this case did not involve preventive detention, it is crucial to this discourse because the Supreme Court recognised the fallacy of relying on vague and broad terms like 'security of the state' and 'public safety' to clamp down on unpopular speech. In doing so, it admonished the equation of dissent to security threats.[46] It is this very

41. *Romila Thapar,* para 66.
42. R. Balaji. 2021. 'Supreme Court to take up 'urgent hearing' on UAPA validity', *The Telegraph Online*, 12 November, available online at https://www.telegraphindia.com/india/supreme-court-to-take-up-urgent-hearing-of-validity-of-anti-terror-law-uapa/cid/1838501 (accessed on 19 April 2022).
43. An example is the UAPA.
44. An example is the The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders, Slum-Grabbers and Video or Audio Pirates Act, 1985.
45. AIR 1950 SC 124.
46. However, it should be noted that at the time this case was decided, 'public order' was not explicitly identified as one of the grounds in Article 19(2) as a valid ground to restrict free speech. This ground was added via the first constitutional amendment in 1951.

practice that lies at the heart of the faulty implementation of preventive detention laws.

Despite this, over the years, the Indian judiciary has been largely deferential to executive discretion in cases of preventive detention. A worrying example of this judicial deference to the executive is in the detention of Mr Mian Abdul Qayoom, a 76-year-old severely ill senior lawyer who had been detained hours before the revocation of the special status of Jammu and Kashmir under the preventive detention provisions of the Public Safety Act, 1978.[47] Though he was detained in 2019, the order was based on charges levelled against him in 2008 and 2010. When the order was challenged before the High Court of Jammu and Kashmir, the court upheld the detention noting that the 'subjective satisfaction of the detaining authority to detain a person or not is not open to objective assessment by a court. A court is not a proper forum to scrutinise the merits of administrative decision to detain a person'.[48] Without the court assessing the merits of the executive's decision to detain a suspect, the right to challenge the order becomes fruitless.[49] This kind of judicial deference only emboldens executive agencies to mould preventive detention provisions to their own interests.

Nonetheless, there are other cases with more promising results where the judiciary has scrutinised the reasoning of the executive and found it severely lacking.

One sees how this reasoning plays out in *Nuzhat Perween* v. *State of Uttar Pradesh*.[50] Dr Kafeel Khan was a lecturer at a medical college in Gorakhpur who had participated in protests against the Citizenship Amendment Act by delivering a speech critical of the amendment to protesting students at Aligarh Muslim University.[51] He was 'preventively' detained due to his participation under the National Security Act, 1980 (NSA). His mother, Nuzhat Perween, subsequently challenged this detention order before the High Court of Judicature at Allahabad on the ground that his activities posed no threat to public order. The court accepted this contention and eventually invalidated the detention order. In the case at hand,

47. Majid Maqbool. 2020. '"Diabetic Surviving on One Kidney": 76-Year-Old J&K Lawyer's Family Fear for his Health in Prison', *The Wire*, 24 January, available online at https://thewire.in/rights/mian-abdul-qayoom-jail-jammu-and-kashmir (accessed on 19 April 2022).
48. *Mian Abdul Qayoom* v. *State of Jammu and Kashmir*, Writ Petition (Criminal) No. 251/2019, (the High Court of Jammu and Kashmir), decided on 7 February 2020, available online at https://indiankanoon.org/doc/6483200/(accessed on 19 April 2022), para 21.
49. Abhinav Sekhri. 2020. 'Preventive Detention and the Dangers of Volcanic, Ever-Proximate, Ideologies', *Indian Constitutional Law and Philosophy*, 29 May, available online at https://indconlawphil.wordpress.com/2020/05/29/guest-post-preventive-detention-and-the-dangers-of-volcanic-ever-proxim'ate-ideologies/(accessed on 19 April 2022).
50. Habeas Corpus Writ Petition No. 264 of 2020 (the High Court of Judicature at Allahabad) decided on 1 September 2020.
51. The entire speech is available at *Perween*, paras 23-31.

the challenge was limited to the detention order and did not extend to the provisions of the NSA, hence, the issue of the constitutionality of the legislation was not in question. This left a reduced scope for the Court to test the provisions of the NSA against the right to free speech. Nonetheless, the detention order itself could have been examined with respect to its effects on free speech as it was a direct consequence of his exercise of the right to speech by participating in the protest. The High Court avoided this approach and limited itself to assessing whether the content of the speech could reasonably be considered a threat to public order significant enough to merit preventive detention that should be reserved for exceptional instances. This reasoning characterises the act of the State as a disproportionate response rather than a deliberate and punitive attack on dissent—yet another instance of the trend of the judiciary refusing to engage with preventive detention as a free speech issue. However, this case is a positive development in that the judiciary refused to defer to executive discretion.[52]

'Exceptionalising' Preventive Detention in Free Speech Law

It is pertinent to note that the misuse of the law by the State to curb dissent is not limited to preventive detention alone. Laws such as sedition[53] and Information Technology regulations[54] are also being regularly used to limit uncomfortable

52. For another similar example, see *Mohammad Yousuf* v. *The State of Jammu and Kashmir*, (1979) 4 SCC 370.
53. Mythili Mishra. 2020. 'Criminalising Dissent: Sedition Laws in India', *Rule of Law Journal*, pp. 14-24, available online at https://ruleoflaw.lse.ac.uk/articles/abstract/25/(accessed on 19 April 2022); Siddharth Narrain. 2011. '"Disaffection" and the Law: The Chilling Effect of Sedition Laws in India', *Economic and Political Weekly*, 46(8): 33-37, available online at https://www.jmi.ac.in/upload/menuupload/16_ccmg_epwsedition.pdf (accessed on 19 April 2022); V. Eshwar Anand. 2017. 'Freedom of Speech and Expression: A Study on Sedition Law and the Need to Prevent its Misuse', *Media Watch*, 8(1): 6, available online at https://www.mediawatchjournal.in/wp-content/uploads/2020/07/Freedom_of_Speech_and_Expression_A_Study.pdf (accessed on 19 April 2022); Meher Manga. 2021. 'Sedition law: A threat to Indian democracy?', *ORF Online*, 26 July, available online at https://www.orfonline.org/expert-speak/sedition-law-threat-indian-democracy/ (accessed on 19 April 2022); Varun Pratap. 2021. 'In India, sedition law is the 'toolkit' to suppress dissent and criticism', *The Print*, 10 March, available online at https://theprint.in/campus-voice/in-india-sedition-law-is-the-toolkit-to-suppress-dissent-and-criticism/619121/ (accessed on 19 April 2022); Devangshu Datta. 2021. 'Sedition law and the art of dissent', *Business Standard*, 14 August, available online at https://www.business-standard.com/article/opinion/sedition-law-and-the-art-of-dissent-121081400036_1.html (accessed on 19 April 2022).
54. Internet Freedom Foundation. 2021. 'Explainer: Why India's new rules for social media, news sites are anti-democratic, unconstitutional', *The Scroll*, 27 February, available online at https://scroll.in/article/988105/explainer-how-indias-new-digital-media-rules-are-anti-democratic-and-unconstitutional (accessed on 19 April 2022); Pamela Philipose. 2021 'Backstory: The IT Rules Put 'Democratic' India in the League of Dictatorial Regimes', *The Wire*, 3 July, available online at

(Footnote No. 54 contd.)

opinions and are subject to criticism for that very reason. These actions are also challenged before courts, often with success. A recent example is the case of *State* v. *Disha A. Ravi,* wherein climate activist Disha Ravi had been arrested for her passive participation in the protest against recently introduced farm legislations on the allegation that she edited Greta Thunberg's Toolkit on the Protest against Farm Bills 2020.[55] The sessions court, in granting Ravi the bail order, upheld her right to dissent, holding that passive participation in a Whatsapp group or editing a toolkit cannot attract penal provisions under the Indian Penal Code or the Information Technology Act. While a comprehensive analysis of legal developments in these fields is beyond the scope of this chapter, there are a few notable developments in free speech law that hold immense significance for the way preventive detention law can and should be interpreted.

Shreya Singhal v. *Union of India*[56] decided by the Supreme Court is one such monumental decision since it unveiled the transformative potential of the Constitution by giving primacy to individual rights over State discretion. The Court in this matter, managed to successfully uphold the right to free speech while also adequately defining the contours of the reasonable restrictions that may be placed on such rights. In this case, the constitutionality of Section 66A of the Information Technology Act, 2000 (the IT Act) was challenged primarily on the ground that it violated the freedom of speech and expression and was struck down by the Supreme Court. This provision, introduced through an amendment to the IT Act, 2000, empowered the Government to criminally punish persons for posting 'offensive and menacing' content online and was passed without discussion in the Parliament. It allowed the police to make arrests for content that they, in their subjective

(**Footnote No. 54 contd.**)
https://thewire.in/media/backstory-the-it-rules-put-democratic-india-in-the-league-of-dictatorial-regimes (accessed on 19 April 2022); Christophe Jaffrelot and Aditya Sharma. 2021. 'India's new digital rules are bad news for democracy', *The Indian Express*, 4 March, available online at https://indianexpress.com/article/opinion/columns/social-media-rules-whatsapp-twitter-facebook-ott-platform-content-modi-govt-7213191/(accessed on 19 April 2022); Hannah Ellis-Petersen. 2021. '"Wolf in watchdog's clothing": India's new digital media laws spark fears for freedoms', *The Guardian*, 11 March, available online at https://www.theguardian.com/world/2021/mar/11/wolf-in-watchdogs-clothing-indias-new-digital-media-laws-spark-censorship-fears (accessed on 19 April 2022); Theres Sudeep and Krupa Joseph. 2021. 'Will new OTT, social media guidelines stifle all dissent?', *The Deccan Herald*, 6 March, available online at https://www.deccanherald.com/metrolife/will-new-ott-social-media-guidelines-stifle-all-dissent-958689.html (accessed on 19 April 2022).

55. *State* v. *Disha A. Ravi*, Bail Application Number: 420/2021, decided by Additional Session Judge in New Delhi on 23 February 2021, available online at https://images.assettype.com/barandbench/2021-02/05c1a67e-051b-49c3-a0a1-cd1bc1e24da0/Disha_Ravi_bail_judgment.pdf (accessed on 19 April 2022).
56. *Shreya Singhal* v. *Union of India*, AIR 2015 SC 1523.

discretion, could construe as 'offensive' or 'menacing' or causing 'annoyance' to prevent disorder. These terms were found by the Court to be too expansive and vague giving unguided discretion to the executive, making it prone to misuse. Justice Rohinton Nariman, in *Shreya Singhal*, rightly observed that 'protected and innocent speech' cannot be curtailed on vague grounds that it was 'grossly offensive' or cause 'annoyance or inconvenience' to others.[57] What offends, annoys, or inconveniences one may not have the same effect on another.

The case at hand is significant to this chapter because it specifically identified vague and subjective statutory terminology as being an active threat to free speech. It clearly took into account the fact that such provisions are abused; a line of reasoning that is in stark contrast with reasoning employed in preventive detention cases. In deciding the constitutionality of preventive detention laws, courts employed a cardinal rule—the mere possibility of abuse of a certain law was not a sufficient ground to strike it down. On this premise, the constitutionality of a vague statute like the National Security Ordinance was upheld in *A.K. Roy* in 1981[58] in the belief that the executive would interpret and apply the law rationally and straightforwardly. However, preventive detention implementation suggests that allowing for such a law to persist in its seemingly benign form does not necessarily mean that it would not take on a draconian form as it continues to be misused by law enforcement agencies. However, *Shreya Singhal* succeeded in sidestepping this decoy by actively challenging executive supremacy in the usage of such a statute.

Further, it explicitly identified the chilling effect of such provisions on free speech in general rather than limiting itself to the particular set of facts that the case was about, noting that 'Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the *chilling effect* on free speech would be total'.[59] [emphasis added]

Though this case does not deal with preventive detention, the reasoning highlighted above is fully applicable to preventive detention laws that have been used to target dissenters. This begs the question as to why this judgment, which was passed in 2015, is still not being applied as an effective precedent to interpret preventive detention provisions that are used to curb dissent. A possible answer could be the purported status of preventive detention law as an exceptional framework reserved for extraordinary threats to security. This is consistent with the

57. *Shreya Singhal*, paras 83, 90.
58. *A.K. Roy* v. *Union of India*, 1982 SCR (2) 272.
59. *Shreya Singhal*, para 83.

official purpose and object of these laws and it cannot be denied that the judiciary, by accepting this as a reality, has overtly created a 'state of exception'[60] for the preventive detention regime to operate, thereby immunising it from contemporary developments in free speech jurisprudence.

Unfortunately, in reality, the implementation of these laws is far from exceptional and is instead the norm. India's first preventive detention law, the Preventive Detention Act (the PD Act), was enacted in 1950. Though the PD Act was initially effective for one year, it was in effect till 1969. Since then, India has periodically enacted various such laws, many of which continue to be effective to date. Apart from two short spells between 1970–1971 and 1978–1980, at least one pan-Indian preventive detention law has always been in place in addition to a spate of state-specific preventive detention laws. Ironically, this constant state of 'exception' has, in principle, been permanently embedded into the Indian legal system. The direct result of this is that the executive is encouraged to use preventive detention laws to get away with excesses that are not possible under other laws, doing indirectly what it cannot do directly. It is, therefore, problematic to keep considering them as an exceptional law when their use is not exceptional. It is high time for the judiciary to apply the same contemporary standards of scrutiny to preventive detention laws as they apply to other legislations that restrict free speech, ending the false status of exception that preventive detention laws currently enjoy.

Conclusion

Right from the Anti-Citizenship Amendment Act protests in Delhi University[61] to curbing dissent against the scrapping of the special status of Jammu and Kashmir[62] and the recent ban of tweets on the Government's mishandling of COVID-19 vaccines,[63] the last five years have seen a plethora of dangerous trends in executive censorship. Preventive detention laws, supposedly framed for serious threats to safety like terrorism, are now being misused in this illegitimate quest to stifle dissent.

60. Gautam Bhatia. 2019. *The Transformative Constitution: A Radical Bibliography in Nine Acts*. India: Harper Collins, p. 255.
61. Kainat Sarfaraz. 2020. 'Anti-CAA Protests in DU Gain Momentum', *Hindustan Times*, 18 January, available online at https://www.hindustantimes.com/delhi-news/anti-caa-protests-in-du-gain-momentum/story-omTw3mZjpCmdTyZes878JN.html (accessed on 12 June 2021).
62. *BBC News*. 2019. 'Article 370: What Happened with Kashmir and Why It Matters', *BBC News*, 6 August, available online at https://www.bbc.com/news/world-asia-india-49234708 (accessed on 12 June 2021).
63. *The Times of India*. 2021. 'Twitter Removes Posts against Government's Covid Handling', *The Times of India*, 25 April, available online at https://timesofindia.indiatimes.com/india/twitter-removes-posts-against-govts-covid-handling-report/articleshow/82237750.cms (accessed on 12 June 2021).

Preventive detention laws offer a convenient departure from the rigorous standards of protection assured to the accused in a fair trial, under the guise of a vague larger public interest. They were a colonial tool of repression wielded against persons critical of the colonial regime and were often used to attack the ideas of the freedom movement that laid the foundation of the Constitution we cherish today. This fact, in itself, is enough for a thorough re-examination of the relevance of these laws in today's society and the wide discretionary powers they grant to the executive. Countries with a post-colonial constitution have an additional challenge of making the existing system work, while actively decolonising their institutions and maintaining a system of checks and balances.[64] The State cannot choose to retain the idea of nationalism which draws its roots from the freedom movement and simultaneously eschew fundamental rights and liberties which are again a product of the same movement.

Despite their dubious origins, preventive detention laws are entrenched in the current legal framework and continue to be used regularly by the existing power centres against political rivals, activists, artists, and other dissenters. Their propensity for misuse is in alignment with the interests of the powerful executive and, hence, it falls upon other institutions to ensure that their use, if at all, is limited to truly exceptional circumstances that can justify this deviation from the well-established principles of a fair trial.

One of the most important institutions tasked with carrying out this function is the court system. Though courts have tried to check the misuse of preventive detention laws to stifle dissent, there is a lot more they can do within their powers. Moreover, there is a worrying trend of judicial deference to executive and legislative power in cases of preventive detention concerning free speech. This is particularly problematic because the courts have failed to explicitly characterise the misuse of preventive detention laws as a free speech issue. The larger debate surrounding the validity of the preventive detention regime (including whether it is used for punitive or preventive purposes, permissible limits to Article 22 dealing with the rights of an accused, right to life and personal liberty, etc.) has obfuscated the specific consequence of these laws on free speech, the 'chilling effect' and the unquantifiable violation of the right to expression of those who wish to mount a criticism against power-holders but are intimidated into silence.

Nonetheless, there are encouraging developments in Indian free speech jurisprudence concerning laws other than preventive detention laws that are similarly

64. Sithara Sarangan. 2020. 'Effective Parliamentary Committee Systems and their Impact on the Efficacy of the Institution: A Comparative Analysis', *International Journal of Policy Sciences and Law*, 1(2), available online at https://ijpsl.in/wp-content/uploads/2020/12/Effective-Parliamentary-Committee-Systems-and-their-Impact-on-the-Efficacy-of-the-Institution_Sithara-Sarangan.pdf (accessed on 19 April 2022).

used by the executive to harass and intimidate dissenters. Courts, in these cases, have given life to the transformative nature of our Constitution and have taken steps to realise its full potential. More specifically, the adverse effect of repeated misuse of vague public interest provisions of criminal laws on free speech is recognised and tackled through cases like *Shreya Singhal*. Arguments adopting this line of thought have been presented to courts in preventive detention cases as well. Despite this, courts are yet to accept them and bring a similar change in their approach to preventive detention cases. The fate of each preventive detention order that is challenged depends on the personal inclinations of the judges presiding over the matter, rather than a modern set of immutable principles. Ultimately, the suspicion and panic that preventive detention laws capitalise on have cocooned them in a state of exception, immune from sweeping developments in free speech jurisprudence in general.

To illustrate this point, we can consider the criminal law of sedition in contrast with preventive detention laws. The criminal offence of sedition (the other oft-used law to target dissenters) cannot be levelled against a person unless they actively encourage or exhort others to violence.[65] Thus, speech that is today labelled as 'anti-national' cannot legally be considered sedition unless it is accompanied by exhortations to violence. However, no such objective standard exists for a speech to be targeted by preventive detention laws, neither do other standards like proximity in time between the speech and the perceived dangers to the public interest. In effect, ironically, the law of sedition (which comes with the entire gamut of protections for the accused under the ordinary criminal justice system) has a higher standard for the executive to satisfy than the much more severe preventive detention laws. This egregious double standard makes preventive detention laws easier for the executive to apply and more difficult for the accused to refute, trapping dissenters in a draconian fashion. As K.G. Kannabiran argued on preventive detention laws, the judiciary has essentially overlooked the impact of the freedom struggle on constitutional interpretation while being steered by the notion of colonial continuity of authority.[66] While the Indian State tries to usher the Constitution forward from a post-colonial to a transformative document by fostering inclusion through effective jurisprudence, it is simultaneously allowing for illiberal narratives emanating from the preventive detention regime to set us back further. Courts, in their analysis of preventive detention laws, have failed to adequately address this dichotomy in the field of free speech and use it to check the excesses of executive power.

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65. *Kedar Nath Singh* v. *The State of Bihar*, AIR 1962 SC 955.
66. K.G. Kannabiran. 2004. *The Wages of Impunity: Power, Justice, and Human Rights.* Orient Longman.

INSTITUTIONAL RESPONSES: CONSTITUTIONAL VALUES IN FLUX

13

Challenges to Fundamental Rights In the Context of Globalisation and Liberalisation of the Indian Economy

Aakanksha Mishra*

Globalisation, Related Concepts, and Its Consequences

Globalisation is a model of market economy which primarily entails the removal of national barriers to trade and investment. In economic terms, it is the opening up of the markets to operate under market forces, where the State has very little role to play. It is associated with the contemporary phenomena of privatisation, liberalisation, marketisation, the expanded provision of incentives for entrepreneurial behaviour, structural adjustment programmes, etc.

Liberalisation is the process of relaxation of government control. It refers to the removal of government restriction usually in the area of social and economic policies. When the government liberalises trade, it removes tariff, subsidies, and other restrictions on the flow of goods, services, and capital between countries. It is often used in tandem with another term—deregulation. Deregulation is the removal of State restrictions on both domestic and international business. In principle, the two are distinct (in that liberalised markets can still be subject to government regulations—for example, to protect the consumers), but in practice both terms are generally used to refer to the freeing of markets from State intervention. The rationale behind liberalisation is to increase foreign investment, increase consumption, reduce control over price, and reduce dependence on external commercial borrowings.

Privatisation means the transfer of ownership and/or management of an enterprise from the public sector to the private sector. It results in the introduction/promotion of competition in a traditionally monopolised industry to encourage efficiency, quality, and innovation in the delivery of goods and services.

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 28 March 2022.

Privatisation can take place in various ways like contracting out, joint ventures, divestiture, etc. Divestiture (or disinvestment) refers to the dilution of government shareholding in a public sector entity. The key difference between privatisation and disinvestment is that the former results in a change in ownership (government necessarily owns less than 50 per cent stake) and therefore change in, whereas, the latter results in dilution of ownership (while government stake is reduced, it may still own more than 50 per cent stake) and therefore, it may or may not be accompanied by a change in management. Disinvestment aims at lessening the fiscal burden on the government because of the inefficiency of the concerned public sector undertaking. Moreover, it aims at providing financial aid. Privatisation is encouraged to make the best possible use of the country's resources as well as to increase the operational and dynamic efficiency of the concerned public sector undertaking.

While liberalisation results in non-intervention and retreat of the State, marketisation, that is, exposure of an industry or service to market forces and increased competition via privatisation increases the burden on the State to regulate the market.

The advent of globalisation changed the intellectual comprehension of world politics, economy, and power equations. The concept of statehood has undergone a paradigm shift due to globalisation. The emergence of private and public-private participation in the socio-welfare sectors of the economy has altered the relationship between individual rights and governmental power. The benefits of globalisation, however, have been shared unequally between countries, regions, and social classes in individual nations. Developing countries have borne a disproportionately high burden of the negative pressures of globalisation like financial volatility, job and income insecurity, social disintegration, and other forms of insecurity, for example, health, environmental, personal, and political. The global transformations of the world economy have profoundly changed the parameters of social development.

In India, the adoption of liberalisation, privatisation, and globalisation (LPG) took place under the New Economic Policy of 1991 (NEP) and the messages it signaled resulted in the rise of private capital as a powerful interest group. After the unfolding of the capitalistic economy over the past few decades, the change in the relationship between the State and private capital is apparent. The State can no longer afford to go against the interests of private capital if it wants to promote economic growth and instead needs to ensure conditions for the smooth functioning of the private sector as it is the main motor of capital accumulation.[1] Thus, the practices underlying LPG policies have transformed the role of the State from a

1. Priya S. Gupta. 2014. 'Judicial Constructions: Modernity, Economic Liberalisation, and the Urban Poor in India', *Fordham Urban Law Journal*, 42(1): 25-90.

'service provider' to that of a 'service facilitator'.[2] The welfare functions of the State have now fallen into private hands. Admittedly, the Indian State has not entirely receded and deregulation has occurred in some, but not all areas of the economy. The decades following economic liberalisation, nevertheless, demonstrate the increasing importance of non-state actors in the social, economic, and political sphere.[3] This has posed serious questions about the efficacy of fundamental rights guaranteed under the Constitution. The underlying premise is that with the increasing role of private actors and decreasing role of the State, fundamental rights would be violated more by private enterprises than by the State. In the liberalised world where private players play a critical role, strict adherence to the verticality of the State without regard to practical considerations is no longer adequate to safeguard the fundamental freedoms enjoyed by the people.

Against this backdrop, the Indian judiciary has had to deal with the legal challenges thrown up by these changing socio-economic conditions. It has had to manage these processes and threats so as to enhance the benefits of the market-economy while mitigating its negative effects upon people and securing their basic needs and rights. Courts have had to examine whether the Indian Constitution provides any mechanism to meet the challenges of globalisation, what the role of the State in regulating the market economy should be under our constitutional set-up, and most importantly, how various constitutional provisions, particularly those guaranteeing fundamental rights and social and economic justice, should be interpreted in the light of the growing pressures of globalisation.

Adjudicating Constitutional Challenges to the Government's LPG Policies

A nuanced understanding of the working of the Indian Constitution in the post-liberalisation era reveals the challenges that the judiciary has faced in reviewing LPG policies of successive governments in view of the constitutional scheme of a socialist and welfare Indian State. A cursory review of the Preamble and the Directive Principles of State Policy (DPSP) makes it abundantly clear that our Constitution contains an explicit commitment to socialism[4] and imposes an obligation on the

2. Guido Bertucci and Adriana Alberti. 2003. 'Globalisation and Role of the State: Challenges and Perspectives' in Rondinelli and Cheema, *Reinventing Government for the Twenty-First Century. State Capacity in a Globalizing Society*, Kumarian Press.
3. Shameek Sen. 2019. 'Transformative Constitution and the Horizontality Approach: An Exploratory Study', *Indian Journal of Law and Justice,* 10(2): 141-161.
4. Preamble, Constitution of India, 1950.

State to promote the welfare of the people.[5] In the era post–NEP, the State is gradually losing effective control over the economy. When the State increasingly adopts measures of deregulation, disinvestment, and denationalisation it not only loses its regulatory powers but its redistributionist capacity as well.[6] If the redistributionist capacity is curtailed, can it carry out its constitutionally ordained welfare functions?[7] While neither the NEP nor the LPG policies it intended to promote are per se unconstitutional, it seemingly contradicts the socialist and welfare agenda contained in our Constitution. This section reviews how the courts in India reviewed challenges to the government's LPG policies in the post-liberalisation era in the light of the constitutional scheme.

In 1978, the landmark decision of the Supreme Court in *Maneka Gandhi* v. *Union of India*[8] set in motion an expanded interpretation of fundamental rights under Articles 14, 19, and 21. Reading Article 21 together with Article 14, the Court created a new standard of non-arbitrariness review whereby it equated the concept of 'arbitrariness' with 'inequality'.[9] The decision thus created higher levels of judicial scrutiny for laws or policies that restrict personal liberty and fundamental rights.[10] However, the Court was selective in wielding this expanded framework. In the immediate aftermath of the Emergency, the judiciary recognised a broad array of fundamental rights[11] and increasingly expanded its assertiveness in challenging the central government in key domains, including judicial appointments, corruption, and environmental governance (perhaps motived by a desire for institutional redemption and restoration of legitimacy lost due to the Court bowing down to the Emergency regime).[12] At the same time, it signaled a lower and more limited

5. Article 38(1), Constitution of India, 1950—'The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life'.
6. Upendra Baxi. 2002. *The Future of Human Rights*. Oxford University Press.
7. P. Puneeth. 2016. 'Privatisation And Public Welfare: Constitutional Imperatives', *KLE Law Journal,* Special Issue: 90-91.
8. (1978) 1 SCC 248, 283.
9. B.N. Srikrishna. 'Skinning the Cat', (2005) 8 SCC (J) 3.
10. Manoj Mate. 2014. 'Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India', *Temple International and Comparative Law Journal,* 28(2): 361-429.
11. *Hussainara Khatoon* v. *State of Bihar,* AIR 1979 SC 1377 (recognising broad scope of the right to life and liberty under a substantive due process conception of Article 21); *M.C. Mehta* v. *Union of India,* (1987) 4 SCC 463 (right to clean air); *Olga Tellis* v. *Bombay Municipal Corporation,* (1985) 3 SCC 545 (right to livelihood and shelter); *Consumer Education Research Centre* v. *Union of India*, (1995) 3 SCC 42 (right to health); *Sunil Batra* v. *Delhi Administration,* AIR 1978 SC 1675 (right to personal liberty includes right to be free of torture).
12. In cases like *Ajay Hasia* v. *Khalid M. Sehravardi* (1981) 1 SCC 722, *R.D. Shetty* v. *International Airports Authority* AIR 1979 SC 1628, and *D.S. Nakara* v. *Union of India* [1983] 2 SCR 165, the Court had applied a robust rights-based scrutiny in its review of government policies under arbitrariness review.

standard of review in the area of economic policies of the government. In *R.K. Garg* v. *Union of India,*[13] the majority held that courts cannot challenge the morality of particular legislation based on Article 14 and stressed the need for a deferential, rational-basis mode of review when examining government economic policies. Thus, courts in essence adopted a 'double standard' approach, applying the new heightened standard of Article 14 non-arbitrariness review to claims involving direct abrogation of fundamental rights, while applying a lower, rational-basis review to socio- economic policy. Post the adoption of the NEP in 1991, courts continued a highly deferential and limited judicial role in challenges to privatisation of the telecom sector, the privatisation and disinvestment of the industrial and mining sector, and other economic policy cases.

In *Delhi Science Forum* v. *Union of India,*[14] the Court was called upon to adjudicate a challenge to the adoption of the National Telecom Policy, whereby the government shifted toward privatisation of the industry. In rejecting arguments challenging the merits of the underlying policies, the Court held that it could not question the merits of the policy and that the proper place for substantive challenges was the Parliament and the political process, not the judicial one. It held that review under Article 14's non-arbitrariness standard must be limited to determining whether such decisions are (a) made in bad faith, (b) based on irrational or irrelevant considerations, or (c) made without following the prescribed procedures required under a statute (illegality).[15] By applying this limited scope of scrutiny, the Court upheld the telecom policy as legal and consistent with the Indian Telegraph Act 1885, and also upheld it on the ground of reasonableness.

In *BALCO Employees Union* v. *Union of India,*[16] the Court upheld the government's disinvestment in and sale of the Bharat Aluminum Corporation to a private company. The Court held that economic policies must be reviewed under a highly deferential rational basis scrutiny, and that the review should be limited to whether policy decisions are absolutely capricious, arbitrary, unreasonable, or violative of constitutional or statutory provisions.[17] It observed,

> Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the

13. (1981) 4 SCC 675.
14. (1996) 2 SCC 405.
15. *Delhi Science Forum.*
16. (2002) 2 SCC 333.
17. *BALCO.*

> Government has, while taking a decision, right to 'trial and error' as long as both trial and error are bona fide and within limits of authority… In the case of a policy decision on economic matters, the courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgment of the experts who may have arrived at a conclusion unless the Court is satisfied that there is illegality in the decision itself.

In *Centre for Public Interest Litigation* v. *Union of India,*[18] the Court struck down the privatisation of government oil companies through disinvestment in two of India's major petroleum companies not on the merits of the disinvestment policy as such, but because the sale was procedurally flawed. In another recent instance related to the disinvestment of the Vizag Steel Plant, the High Court of Andhra Pradesh stated that it was aware of the limitations imposed under the constitutional scheme, particularly in *BALCO*, with regard to the judicial review of disinvestment in public undertakings. The Court admitted the writ petition for the limited purpose of examining whether the decision-making process to arrive at the 'in principle' decision of 100 per cent disinvestment was a bonafide one and had been undertaken in a just, fair, and reasonable manner. It categorically stated that the Court was not inclined to address the correctness or otherwise of the disinvestment decision.[19]

The Court's jurisprudence reflects a bias that sometimes favours corporate interests and rights in the adjudicative process. In *Southern Structurals Staff Union* v. *Southern Structurals Ltd.,*[20] the Court held that the status of employees of a government company or 'other authority' under Article 12 of the Constitution does not prevent the government from disinvesting, nor does it make the consent of the employees a necessary precondition for disinvestment. In *BALCO*, the Supreme Court reiterated this position while considering the validity of the decision to sell a majority stake in a public sector company. The principal objection to the sale came from the employees who claimed that they would lose their constitutionally guaranteed rights against a state entity once it was transferred to a private company. Deferring to executive wisdom, the Court upheld the disinvestment decision. The Court adopted a restricted approach towards labour rights and held that the employees in the BALCO union did not have a right to a hearing prior to the disinvestment of government-owned enterprises under Articles 14 and 16. The Court held that the policy of disinvestment cannot be faulted if, as a result thereof, the employees lose their rights or protection under Articles 14 and 16 of the Constitution. In other words, the existence of rights under Articles 14 and 16 of the Constitution cannot have the effect of vetoing the

18. (2003) 7 SCC 532.
19. *Vasagiri Venkata Lakshmi Narayana* v. *Union of India*, WP (PIL) No. 64 of 2021 (Show cause notice before admission dated 15 April, 2021).
20. (1994) 81 Comp. Cases 389 (Mad).

government's right to disinvest.[21] The decision also restricted the ability of litigants to deploy public interest litigation challenges to government policies by holding that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the government in the exercise of its administrative power.

As evident from the above cases, in formulating the scope of fundamental rights in challenges to the government's disinvestment decisions, the Court has circumscribed labour rights by holding that they do not have strong constitutional rights to challenge government policies and actions. It has, at the same time, afforded protection to the rights and interests of private corporations and business entities under Articles 14, 19, and 21 by invoking the 'level playing field' logic.

In *Reliance Energy Ltd.* v. *Maharashtra State Road Development Corporation Ltd.,*[22] the Court interpreted Article 21's protection for of the right to life to include protection of 'opportunity'. It held that Article 19(1)(g), which guarantees to a company, the fundamental right to carry on business, also gives rise to the level playing field doctrine for private businesses. This means that equally placed competitors should be allowed to bid so as to sub-serve the larger public interest. The decision grounds the level playing field concept in a globalisation rationale, noting that 'globalisation, in essence is liberalisation of trade… Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of level playing field embodied in Article 19(1)(g)'. It goes on to reason that because the Maharashtra Government had failed to clearly specify the accounting norms for calculating the net cash profit for a designated number of years, which was one of the criteria specified in the tender conditions, the government's decision to exclude business entities based on that failure violated the rights guaranteed to these entities under Article 14 and 19.

Moreover, as commerce and advertising became increasingly important in post–liberalisation India, the Supreme Court considered it desirable to recognise commercial speech (speech that proposes a commercial transaction or is an expression solely related to the economic interest of the speaker and their audience) as a fundamental right under Article 19(1)(a).[23] In stark contrast, the Court held, in unequivocal terms, that there is no fundamental, legal, or moral right to strike.[24]

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21. Udai Raj Rai. 1994. 'Reach of Fundamental Rights', *Journal of the Indian Law Institute,* 36(3): 292-301.
22. (2007) 8 SCC 1.
23. *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641; *Tata Press Ltd.* v. *M.T.N.L.*, AIR 1995 SC 2438.
24. *T.K. Rangarajan* v. *The State of Tamil Nadu*, AIR 2003 SC 3032.

In 2020, while upholding the union government's decision of disinvestment of its shareholding in Bharat Petroleum Corporation Ltd., the Bombay High Court dismissed the contention of the petitioners that such a decision would adversely affect the rights of poor consumers to petroleum and kerosene subsidies, rights of the medium, small, and micro enterprises to compulsorily purchase from them in certain percentage points, rights of war widows and physically handicapped persons to preference in allotment of petrol pumps, gas agencies, and kerosene distributorship, and rights of SCs, STs, OBCs, and physically handicapped to reservation in jobs. The Court observed that these rights were not fundamental rights and that it is perfectly legitimate for the State not to make, or withdraw reservations already made.[25]

Significantly, in the 1990s, the judiciary also turned its attention to political society and the state apparatus, seemingly 'riddled with corruption and human rights atrocities on a disturbingly excessive scale', which jeopardised the rule of law.[26] The Court expanded its role as an anti-corruption institution, policing corruption in the processes of privatisation and liberalisation. Building on its prior decision in *Vineet Narain* v. *Union of India,*[27] the Court expanded the scope of its review to directly impugn and challenge government auctions of public resources including the 2G Telecom scam and the CoalGate scam. The Court scrutinised the auction processes for allocation of both the telecom spectrum and coal blocks to private entities based on the Article 14 arbitrariness review, while also playing an active role in investigating allegations of corruption.[28] Its decisions also catalysed the creation and strengthening of independent and autonomous regulatory structures like the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal.[29]

The above decisions suggest that, rather than allowing fundamental rights under Article 14 and Article 21 to serve as strong checks on government policies and actions, the Court has deployed these rights as structuring principles merely to test

25. *Federation of All Maharashtra Petrol Dealers Association* v. *Union of India,* Writ Petition (Stamp) No. 5665 of 2020 before the High Court at Bombay.
26. Rajeev Dhavan. 2000. 'Judges and Indian Democracy', in Francine R. Frankel, Zoya Hasan, Rajeev Bhargava and Balveer Arora (eds.), *Transforming India:* Social and Political Dynamic of Democracy, Oxford University Press.
27. (1998) 1 SCC 226 wherein it held that under Article 14 equality provision, the Court was empowered to fill the void left by other institutions in preserving and maintaining the rule of law, and that it could issue directives and orders to do so under Article 32 (power of 'continuing mandamus') and Article 142.
28. *Subramanian Swamy* v. *A. Raja,* (2012) 3 SCC 1 (quashing allocation of telecom licenses); *Subramaniam Swamy* v. *A. Raja*, (2012) 9 SCC 257 (adjudication of investigation into 2G scam); *Manohar Lal Sharma* v. *Union of India*, (2014) 9 SCC 516 (cancelling coal block mining licenses).
29. *Cellular Operators Association of India* v. *Union of India,* (2003) 3 SC 186.

the fairness, legality, and propriety of privatisation and liberalisation policy decisions of the government. This is much more limited in comparison to the higher levels of scrutiny expounded by the Court in *Maneka Gandhi*. The judiciary has also favoured certain norms and values in its adjudication, including norms of fairness, transparency, and competitiveness, and guarding against corruption.[30] This process-based scrutiny has sometimes created an advantage for corporate actors as they stand to benefit from the non-arbitrariness standard and the level playing field standard under Articles 14 and 19, respectively.

Enforcement of Fundamental Rights Against Violations by Private and Non-State Actors

After appraising the Court's tendency to generally defer to the government in its economic policy decisions, this section will review how the courts have secured fundamental rights in the context of abusive actions and behaviour of private actors and non-state entities.

Shifting Conception of Fundamental Rights

In the early years of Independence, the Supreme Court typically adhered to the general position that the fundamental rights contained in Part III of the Constitution apply only against the government and not against private individuals.[31] This was based on the understanding of the definitional provisions of Articles 12 and 13 at the beginning of Part III. Article 12 states that unless otherwise specified, Part III binds the 'State', as therein defined. Article 13 states that 'the law' must be consistent with Part III. In the words of the leading constitutional expert, H.M. Seervai, 'Under Article 13(2) it is state action of a particular kind that is prohibited. Individual invasion of individual rights is not, generally speaking, covered by Article 13(2)'.[32]

However, over the last three decades, the centrality of the State diminished significantly owing to the retreat of the welfare state and growing private power. The increasing importance of non-state actors in all spheres of governance rendered strict adherence to the traditional notions of verticality deficient and unsustainable. Moreover, it was felt that different aspects of interpersonal relations between private

30. Manoj Mate. 2016. 'Globalisation, Rights, and Judicial Review in the Supreme Court of India', *Washington Law Review*, 25(3): 643-671. (Mate, 'Globalisation, Rights, and Judicial Review in the Supreme Court of India').
31. *P.D. Shamdasani* v. *Central Bank of India,* AIR 1952 SC 59*; Vidya Verma* v. *Shiv Narain Verma,* AIR 1956 SC 108.
32. H.M. Seervai. 1991. *Constitutional Law of India*. Universal Law Publishing Company Ltd., p. 374.

actors also necessitated engagement with constitutional principles, especially when they involve elements of discrimination and abridgement of fundamental freedoms.[33] Constitutional Courts, therefore, started developing various ways to apply fundamental rights 'horizontally', that is, to apply rights in transactions where private actors are involved in some way. These rights can impact and effectively regulate private actors even in systems that adhere to the basic vertical position. As a result, the courts tacitly acknowledged the inherent limitations of the dogmatic vision of fundamental rights as negative rights imposing constraints on the State and started advocating a positive duty-based approach in order to fulfil the constitutional visions of a transformed society.[34]

Horizontal Application of Fundamental Rights

Courts have generally engaged with the horizontality of fundamental rights and crafted various kinds of remedies in the following manner:

S. No.	Type of Horizontal Application	Respondent	Cause of Action
1.	Private body brought under the definition of State under 'Article 12'	Private actor	Private act (re-classified as State act)
2.	Direct Horizontality	Private actor	Private act
3.	Indirect Horizontality a) Affirmative obligations on the State b) Application of fundamental rights to private law	State Private actor	State inaction to protect individuals from certain kinds of private acts Common law or legislations made by the State to govern private conduct

Private Body brought under the Definition of 'State' under 'Article 12'

The Supreme Court has extended the application of fundamental rights to private actors by including many non-state bodies performing functions of public

33. Sen, 'Transformative Constitution and the Horizontality Approach: An Exploratory Study'.
34. Sudhir Krishnaswamy. 2007. 'Horizontal Application of Fundamental Rights and State Action in India', in C. Rajkumar and K. Chockalingam (eds.), *Human Rights, Justice and Constitutional Empowerment*, Oxford University Press.

importance within the ambit of Article 12 by making use of the flexible 'other authorities' category. In determining the scope of 'other authorities' under Article 12, courts have fluctuated between a control/structural test,[35] which looks at the extent to which the private body is under the control of the State and a function test,[36] which asks whether the private body is performing a function that could fairly be called a State function.[37]

In *Zee Telefilms* v. *Union of India,*[38] the Court was called upon to decide whether the termination of a contract granting exclusive television rights by the Board of Control for Cricket in India (BCCI) violated the rights of the petitioner under Article 14. The majority concluded that the BCCI did not fulfil the criteria of being 'financially, functionally and administratively dominated by or under the control of the Government' and therefore was not a 'State' under Article 12, and dismissed the writ petition. However, the dissenting opinion stressed on the 'functions performed' by the BCCI and pointed out that meaning of 'State' under Article 12 was not confined to government control.

As described previously, the concept of State has undergone a drastic change. In the words of Justice Mathew in *Sukhdev Singh* v. *Bhagat Ram,*[39] the State can no longer be viewed as 'a coercive machinery wielding the thunderbolt of authority'. It has instead evolved into a 'service corporation'. Thus, there is a need to intensify the functional approach to the interpretation of 'State'. If the function performed by an entity is of 'such public importance and so closely related to governmental functions as to be classified as a government agency',[40] then such entity must be classified as 'State' under Article 12 and be subject to Part III of the Constitution.

Direct Horizontality

When fundamental rights are given a direct horizontal effect, individuals can be directly sued by others for violating their rights. The Indian Constitution has three specific provisions that proscribe horizontal rights violations, that is, these rights are enforceable against everyone and not just the State. Provisions of Article 17 (abolishing untouchability), Article 23 (prohibiting human trafficking and bonded

35. See *Chander Mohan Khanna* v. *National Council of Educational Research and Training,* 1991 (4) SCC 578.
36. See *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 SCC 111.
37. Gautam Bhatia. 2015. 'Horizontality under the Indian Constitution: A Schema', *Indian Constitutional Law and Philosophy*, 24 May, available online at https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/ (accessed on 25 February 2012).
38. (2005) 4 SCC 649.
39. AIR 1975 SC 1331, para 80 (hereinafter *Sukhdev Singh*).
40. *Sukhdev Singh,* para 98.

labour), and Article 24 (prohibiting employment of children below 14 years of age in factories, mines, or other hazardous employment) are enforceable against everyone.[41]

Articles 17, 23, and 24 aside, the Court has also given direct horizontal effect to some other fundamental rights in limited instances. It is, however, yet to provide a rigorously developed understanding of the situations under which direct horizontality can be extended to other fundamental rights.

In *Indian Medical Association* v. *Union of India,*[42] the Court horizontally applied Article 15(2) which guarantees that no citizen can be restricted from access to shops, public restaurants, hotels, places of public entertainment, and places of public resort dedicated to the use of the general public, on grounds only of religion, race, caste, sex, place of birth, or any of them. By referring to Constitutional Assembly debates,[43] the Court held that the word 'shops' referred not merely to a physical shop, but to any arms-length provision of goods or services in the market.[44] Extending the logic, the Court held that schools came within the meaning of shops for the purposes of Article 15(2) and that consequently, private schools were subject to the non-discrimination guarantees under the Constitution. In *Consumer Education and Research Center* v. *Union of India,*[45] the 'right to health' under Article 21 was held to apply against private employers in the context of the occupational health hazards caused by the asbestos industry.[46] In recent times, the Court has also given direct horizontal effect to the right to privacy under Article 21, described in further detail under the section 'Recent Developments in the Horizontal Application of Fundamental Rights'.

Indirect Horizontality

Courts have given indirect horizontal effect to some fundamental rights in two ways: (a) by imposing an affirmative duty on the State to protect individuals from certain actions by private actors; and (b) through the application of constitutional rights to private law.[47]

41. AIR 1982 SC 1473.
42. (2011) 7 SCC 179.
43. The relevant Constituent Assembly debates were those of 29 April 1947 and 29 November 1948. 'The first clause of Article 15 is about the State obligation; the second clause deals with many matters which have nothing to do with the State—such as public restaurants—they are not run by States; and hotels—they are not run by States. It is an entirely different idea, and therefore, it is absolutely essential'. See *Constituent Assembly Debates* , Vol. VII, 426-7
44. Bhatia, 'Horizontality under the Indian Constitution: A Schema'.
45. 1995 SCC (3) 42.
46. *CERC*, para 24.
47. Stephen Gardbaum. 2016. 'Horizontal Effect', in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford University Press.

Affirmative Obligations on the State

By mandating that the government enact and enforce measures against certain kinds of private conduct, the Court has indirectly secured fundamental freedoms and protected individuals against the abuses of private parties. In other words, the Court indirectly fixes the liability on the State for abrogating from its duty to protect via its failure to regulate private actors.[48]

In *Vishaka* v. *State of Rajasthan,*[49] the Court held that the State's failure to pass legislation on preventing sexual harassment in public and private workplaces amounted to a violation of the petitioner's rights under Articles 14, 19, and 21. Similarly, in the context of the Uphaar Cinema Fire Tragedy that killed 59 people, the Court held that by granting compensation in the exercise of its writ jurisdiction for the established violation of the fundamental rights guaranteed under Article 21 the Court was 'fixing the liability for the public wrong on the state which failed in the discharge of its public duty to protect the fundamental rights of the citizen'. The Court found that the Delhi Vidyut Board had been negligent in its duty to properly and effectively regulate private property owners which jeopardised public safety and resulted in the devastating fire. By failing to protect life and provide safe premises, the Delhi Vidyut Board (a public undertaking) was held liable for payment of compensation.[50] Courts have also cast a positive duty on the State to secure conditions where the right to freedom of speech and expression can flourish.[51] In *S. Tamilselvan* v. *Government of Tamil Nadu,*[52] the Court issued guidelines as to how State agencies or officials should respond and act in situations where extra-judicial organisations/individuals threaten the exercise of free speech by individuals.

Application of Fundamental Rights to Private Law

The Court has engaged with indirect horizontal application of fundamental rights by applying them to interpret provisions of private law in accordance with constitutional principles, thereby limiting what private actors can be authorised to do and which of their interests, choices, and actions are protected by law.[53] Instead of adjudicating the acts of the private actor, the courts decide whether the law that the private actor relies upon to justify its action passes muster under Part III of the Constitution.

48. Bhatia, 'Horizontality under the Indian Constitution: A Schema'.
49. (1997) 6 SCC 241.
50. *Association of Victims of Uphaar Tragedy* v. *Union of India,* (2003) 2 ACC 114.
51. *Indibility Creative Pvt. Ltd.* v. *Govt. of West Bengal*, 2019 SCC OnLine SC 564; *Maqbool Fida Husain* v. *Raj Kumar Pandey*, (2008) CrLJ 4107 (Del).
52. (2016) SCC OnLine Mad 5960.
53. Gardbaum, 'Horizontal Effect'.

Article 13 stipulates that the State shall not make any laws that are inconsistent with Part III. Given the broad definition of law under Article 13, one would think that all laws, including all private, common, and customary laws, are subject to fundamental rights. This understanding seems to find resonance with some of the earlier decisions of the Supreme Court. In *Bhau Ram* v. *Baijnath Singh*[54] and *Sant Ram* v. *Labh Singh,*[55] the Court struck down a 'statute' and a 'local custom' respectively, which mandated pre-emption in land sales on the ground of vicinage (there is vicinage if two properties are adjacent to each other), as being violative of the right to equality under Article 15 and the right to property under Article 19(1)(f) (subsequently repealed).

In *Mohini Jain* v. *The State of Karnataka*,[56] the Supreme Court held that the charging of a capitation fee by private educational institutions violated the right to education under Article 21. In holding that it was wholly arbitrary under Article 14 for the State to permit private universities to charge a capitation fee in consideration of admissions, the Court indirectly constrained their freedom of contract to charge what the market will bear.[57] Other instances of indirect horizontal application include the Court's interpretation of statutes/common law governing private actions consistently with fundamental rights. In *Githa Hariharan* v. *Reserve Bank of India,*[58] the Court interpreted Section 6 of the Hindu Minority and Guardianship Act 1956 (a law governing private action) in a manner such that it would not run foul of Article 15(1), which prohibits discrimination on the basis of sex.[59] Similarly, in *R. Rajagopal* v. *The State of Tamil Nadu,*[60] the Court modified the common law of defamation, adopting a stricter threshold for the plaintiffs, in order to bring it in line with Article 19(1)(a) of the Constitution. It also referred to Article 21 in order to strengthen the individual's right to privacy against other individuals. In this case, it is not private action that is directly being implicated, but the law that authorises such action that is constitutionally suspect.[61]

54. (1962) 3 SCR 7.
55. (1964) 7 SCR 756.
56. 1992 AIR 1858.
57. Gardbaum, 'Horizontal Effect'.
58. (1999) 2 SCC 228.
59. The Court held Section 6 of the Hindu Minority and Guardianship Act, 1956, which states that 'the natural guardians of a Hindu minor ... are - (a) in the case of a boy or unmarried girl—the father, and after him, the mother...', could be interpreted to mean that the mother could become the guardian not only after the death of the father, but also in his absence or because he was indifferent towards the child, or due to lack of understanding between the mother and father. In the absence of such an interpretation, the provision would be liable to be struck down as a violation of Article 15(1) which prohibits discrimination on the basis of sex. See Sen, 'Transformative Constitution and the Horizontality Approach: An Exploratory Study'.
60. AIR 1995 SC 264.
61. Bhatia, 'Horizontality under the Indian Constitution: A Schema'.

One significant departure from the above position is reflected in *Zoroastrian Cooperative Housing Society* v. *District Registrar*.[62] The Court refused to strike down the bye-law of the housing society which prevented the sale of the land to a non-Parsi person who claimed that this violated Articles 14 and 15 (discrimination on the basis of religion). The Court observed that while the Constitution prohibited religious discrimination in State action, Part III did not interfere with the right of a citizen to enter into a contract for their own benefit. By holding that fundamental right provisions of the Constitution are not relevant to all private law relationships and agreements, the Court carved out a certain autonomy or separateness for 'private law' that is hard to reconcile with Article 13 which does not distinguish between statutory and common law and requires 'all laws' to be consistent with Part III.[63]

Recent Developments in the Horizontal Application of Fundamental Rights

Recent judicial decisions have shown an increasing tendency to impugn private action through the horizontal application of fundamental rights, especially the right to life and liberty under Article 21. Owing to the COVID-19 pandemic, the plight of migrant workers has again come to the forefront. Most of these workers are employed by private individuals, and not the State, which makes the question of securing them their fundamental rights complex.[64] In 2020, the High Court of Karnataka ordered the state government to compensate migrant workers (hutment dwellers) and rehabilitate them on account of the destruction of their huts in a fire incident. The Court held that the state government had failed to uphold the fundamental right under Article 21 of the Constitution by remaining passive for a long time and making no effort to take any action against the miscreants.[65] In another case involving a young woman who had attained the age of majority being confined to a private mental clinic without her consent, on an application made by her parents, the High Court of Delhi held that protection against an attack on the right to life, liberty, privacy, and dignity can be sought not only against the State but also against non-state actors. In the view of the High Court of Delhi, the actions of the young woman's parents (private individuals) were in clear violation of their daughter's fundamental rights under Article 21 and, therefore, the parents were ordered to pay compensation.[66]

62. (2005) 5 SCC 632.
63. Gardbaum, 'Horizontal Effect'.
64. Raghuveer R. Sattigeri. 2020. 'Horizontal Effect: Hope for Migrant Workers', *The Leaflet,* 3 September, available online at https://www.theleaflet.in/horizontal-effect-hope-for-migrant-workers/ (accessed on 18 June 2021).
65. Writ Petition No. 7737 of 2020, High Court of Karnataka, Order dated 12 April 2020.
66. *Dr Sangamitra Acharya* v. *State* (*NCT of Delhi*), Writ Petition (Criminal) No. 1804 of 201, High Court of Delhi, Order dated 18 April 2018.

Another area where we can see a shift towards horizontal application is the fundamental right to privacy. By recognising that privacy has both a negative and a positive component, the Supreme Court in *K.S. Puttaswamy* v. *Union of India,*[67] imposed an affirmative obligation on the State to formulate a data protection legislation to secure the right to privacy of the people even against violations by private entities. In doing so, the Court recognised the need for cross-sectoral and horizontally applicable legislation (that is, applicable to the government as well as private persons). It noted that the right to privacy, being enforceable primarily against the State, imposes upon the State both negative and positive commitments, that is, to restrict the State from unfairly interfering in the privacy of individuals, while putting in place legislation to restrict others from doing so, and providing conditions for the development and dignity of individuals. As a result, the government is currently debating the Personal Data Protection Bill, which is horizontally applicable, rights-based (that is, it defines a data subject's rights vis-à-vis their personal data), and cross-sectoral in nature.

In *Puttaswamy*, Justice Sanjay Kishan Kaul referred to the protection of the right against non-state actors. Noting that social network providers, search engines, e-mail service providers, and messaging applications are all further examples of non-state actors that have extensive knowledge of our movements, financial transactions, conversations, health, mental state, interests, locations, habits, and other intimate details, he stated that there is a need for regulation of how information can be stored, processed and used by non-state actors. The impact of all these developments on private companies like WhatsApp and Facebook which collect massive amounts of data of their users will be an interesting development to watch out for. Will private companies be directly implicated for the violation of the fundamental right to privacy under the data protection legislation? Or, can they be brought under the ambit of 'State' as they arguably perform a public function by providing communication services to millions of people?

In *Ajit Mohan* v. *Legislative Assembly, National Capital Territory of Delhi,*[68] the Court observed that the unprecedented degree of influence wielded by Facebook necessitates safeguards and caution in consonance with democratic values. Platforms and intermediaries must sub-serve the principal objective as a valuable tool for public good upholding democratic values. The decision seems to be hinting at the fact that such platforms may be performing an important public function. This opens up the possibility of making them amenable to writ jurisdiction and constitutional scrutiny for horizontal privacy violations in the future. The decision

67. (2017) 10 SCC 1.
68. Writ petition (C) No.1088 of 2020, decided on 8 July 2021.

of the High Court of Delhi in *Jorawer Singh Mundy* v. *Union of India,*[69] adds to the plausibility of this argument. In this case, a single person's right to privacy was invoked and enforced against private actors. Though the High Court of Delhi did not mull over the publicness of their function, Google and Indian Kanoon were interdicted from providing access to an unreported judgment in protection of the petitioner's right to be forgotten, a facet of the right to privacy.

The other question is how the Courts will adjudge the validity of laws such as the recently notified Information Technology Rules, 2021 that seek to regulate Over the Top (OTT) platforms. While the government may argue that these laws are meant to secure the fundamental rights of the citizens, how will it reconcile these with its positive duty to maintain conditions for freedom of expression? The Bombay High Court has stayed the operation of some provisions of the Information Technology Rules, 2021 finding them *prima facie* to be an intrusion of the petitioners' rights under Article 19(1)(a).[70] These new developments around the enforcement of the fundamental right to privacy provide an exciting opportunity for the judiciary to conceptually distinguish between the different types of horizontality based upon the identity of the actors, as well as the nature of the action that is being challenged.

Conclusion

The relentless pursuit of LPG policies without sufficient attention to them can defeat the constitutional obligation of public welfare. After the adoption of the New Economic Policy in 1991, the privatisation of government-owned companies and disinvestment in public sector undertakings in several instances have been contested before the constitutional courts. The rulings demonstrate the judiciary's proclivity to support the state's policy. However, its jurisprudence lacks any broad-based principles that are followed to review such policies. There are no considerations peculiar to privatisation/disinvestment disputes and the judicial process can be broadly categorised into two familiar steps. First, if the challenge is concerned primarily with the 'decision' to privatise or divest, the courts are reluctant to intervene or second-guess the government if the decision follows a well-defined policy. Secondly, the courts scrutinise only the procedure followed by the administration to ensure that the extant laws and rules are respected, and do not review the substance or contents of these decisions. Neither step has contributed to

69. Writ Petition (Civil) No. 3918 of 2021, High Court of Delhi, Order dated 1 April 2022.
70. *Agij Promotion of Nineteenonea Media Pvt. Ltd.* v. *Union of India*, Writ Petition (L.) No 14172 of 2021, High Court of Bombay, Order dated 14 August 2021 and *Nikhil Mangesh Wagle* v. *Union of India*, Public Interest Litigation (l.) No. 14204 of 2021, High Court of Bombay, Order dated 14 August 2021.

developing a robust LPG jurisprudence in a country that has transitioned to a free market over two decades ago.[71]

As courts have continued to uphold disinvestment and privatisation decisions of the government, successive governments have been emboldened to continue the process of economic liberalisation.[72] The private sector will continue to play a pivotal role in powering India's journey towards becoming a global economic powerhouse. Market-friendly reforms and economic liberalisation will continue irrespective of the political leanings of the party in power. As seen recently, privatisation and disinvestment dominated budget headlines. The government wants to keep a bare minimum presence in strategic sectors and is aggressively looking to disinvest from major public sector enterprises.[73] Such rapid privatisation has been criticised as it will lead to the denial of social justice and reservations to the backward classes.[74] Bank unions have complained that the privatisation of the banking sector is a corporate bailout where the same private sector that is responsible for bad loans is being rewarded.[75] The risk of privatisation becoming politically motivated and pursued for the vested interests of different interest groups or individuals is thus very real. Given that the process is now irreversible, the judiciary must be cognizant of its role in adjudicating globalisation cases which can have profound consequences for the future of human rights and socio-economic justice in India, as it can influence the meaning of individual rights, regulatory structure and norms, and the legal-constitutional discourse on globalisation.

It is true that the changing role of the State in the globalsed world, the rise of private actors due to liberalisation, the privatisation of the Indian economy, and the altered dynamics between the state and the people, compelled the Courts to devise novel methods to ensure that the constitutional guarantee of social and economic justice does not suffer. However, the horizontal enforcement of fundamental rights remains inconsistent and unpredictable, lacking a systematic approach.

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71. Ravi P. Bhati. 2003. 'Evolution of Judicial Activism in India', *Journal of the Indian Law Institute*, 45(2): 262-274.
72. Rajan Gulati. 2020. 'A 20-year history of disinvestment in India', *Valuereserachonline.com*, 31 January, available online at https://www.valueresearchonline.com/stories/47774/a-20-year-history-of-disinvestment-in-india/ (accessed on 27 August 2021).
73. Remya Nair. 2021. 'Privatisation gets mega push in Budget 2021, most ambitious plan since Vajpayee era', *The Print*, 1 February, available online at https://theprint.in/economy/privatisation-gets-mega-push-in-budget-2021-most-ambitious-plan-since-vajpayee-era/596280/ (accessed on 18 June 2021).
74. *The Hindu*. 2021. 'BCs will lose job quota due to PSU privatisation', *The Hindu*, 12 April.
75. *Mint*. 2021. 'Bank strike ends, unions warn stir if govt goes ahead with PSB privatisation', *Mint*, 16 March.

Problems started creeping in with the unfettered expansion of Article 21 through the doctrine of 'unenumerated' rights. If Article 21 covers within its wide sweep the right to a clean environment, shelter, medical care, and various other such judicially crafted rights, would these rights be enforceable at all without active cooperation by non-state actors? In *Vishakha,* the Supreme Court justified the exercise of judicial power on account of a violation of fundamental rights under Articles 14, 15, 21, and 19(1)(g). However, the Court failed to appreciate that the extension of the guidelines to private entities required a separate conceptual enquiry. While the horizontal application of fundamental rights to non-state actors brought about a desirable outcome for the facts of this case, it, unfortunately, did not translate into doctrinally sound constitutional jurisprudence as private actors, as opposed to the State, have their own fundamental freedoms. The right to one man's privacy could well amount to an unreasonable restriction on the other's right to free speech when horizontally applied. Similarly, the right of one person to non-discrimination could impact a private corporation's right to carry on business. In short, the nature of the enquiry has to be necessarily different when imposing a duty on non-state actors, who themselves enjoy fundamental rights. In *Board of Control for Cricket in India (BCCI)* v. *Cricket Association of Bihar,*[76] while the majority ruled that BCCI was not 'State' under Article 12, it still allowed for a writ petition under Article 226 as a safety valve realising that some of the BCCI's functions significantly impacted the exercise of fundamental rights by citizens. In doing so, the Court conflated 'rights' and 'remedies'.[77] The judgment in *Zoroastrian Cooperative*[78] can be read to suggest that constitutional and private law remain importantly separate spheres, with the indirect horizontal effect of Part III as it relates to private law in practice being rather weak.[79]

The approach of holding non-state actors liable for violations of fundamental rights by including them within the ambit of 'other authorities' has not yielded consistent results. There are instances in which certain bodies have not been regarded as 'State' for the purpose of fundamental rights.[80] Thus, the actions of the Supreme Court may not be enough to bridge the public-private divide in relation to these rights. Furthermore, the twin principles of corporate law (limited liability and separate personality) operate as a well-documented barrier in access to justice against

76. (2015) 3 SCC 251.
77. In Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution,* pp.581-599. Oxford University Press.
78. *Zoroastrian Cooperative.*
79. Gardbaum, 'Horizontal Effect'.
80. *Tekraj Vasandi* v. *Union of India*, AIR 1988 SC 469; *Chander Mohan Khanna* v. *National Council Of Educational Research and Training*, AIR 1992 SC 76; *Zee Telefilms Ltd.* v. *Union of India,* AIR 2005 SC2677.

corporate defenders. The solution may lie in either amending the definition of 'State' under Article 12 of the Constitution or developing a new test that focuses more on the functions of private non-state actors.[81]

The discussion above suggests that although efforts have been initiated by the judiciary to protect people from infringement of their fundamental rights by private action, they have been sporadic and still lack a degree of tangible certainty. Fundamental rights form the soul of our constitutional philosophy and the time has come to take them to their logical next step, that is, make them enforceable against private abuses without trying to establish a strenuous link with the 'State'.[82] Therefore, what is it that the judiciary must do to reach this logical next step?

Firstly, it is time to move beyond the notion that 'judges do not possess a fund of economic or social wisdom' and promote a multidisciplinary approach where judges draw from all forms of knowledge—legal, economic, social, and political—to reach an informed decision in such cases. A certain degree of responsibility also lies on lawyers to push the bounds of LPG jurisprudence. Legal submissions can be substantiated by data that describe the financial, economic, or sociological impact of LPG policies on investors, labour, and the public. The courts, in turn, must welcome such analysis as a means to do complete justice as opposed to conveniently avoiding sticky issues by citing lack of knowledge.[83]

Secondly, it is possible to reconstruct the definition of 'State' to bring private companies within the purview of Article 12 to realise the constitutionally backed promise of socio-economic justice. Both private, as well as government companies, are treated substantially the same under the Companies Act. The major difference is between the nature of shareholders, but the tasks performed are substantially similar, and the manner in which they are held accountable under the Companies Act is more or less the same. Therefore, in the present push towards privatisation and disinvestment, while converting a PSU into a modern day company some guidelines should be developed in order to ascertain the nature and benefits of a private player's dominance in the economy.[84] We have seen that the legislature uses certain criteria like the size of the company to decide the applicability of several social security and

81. Surya Deva. 2016. 'Background Paper for India's National Framework on Business and Human Rights', *Ethical Trading Initiative*, 22 March, available online at https://www.ethicaltrade.org/sites/default/files/shared_resources/india_national_framework_bhr_background.pdf (accessed on 28 August 2021).
82. Sen, 'Transformative Constitution and the Horizontality Approach: An Exploratory Study'.
83. Ravi P. Bhati. 2003. 'Evolution of Judicial Activism in India', *Journal of the Indian Law Institute*, 45(2): 262-274.
84. S.K. Verma. 2000. 'Globalisation, Marketisation and Constitutional Mandate, *Journal of the Indian Law Institute*, 42(2/4): 395-408.

labour legislations to private companies. Therefore, while developing these guidelines, the courts should consider factors like the number of employees, the company's gross sales as a percentage of industry sales, industry sales as a percentage of GDP, and other criteria that indicate the ability to amass great power over the economy and the economic rights of the citizens.

Thirdly, the judiciary must conceptually distinguish between the different *types* of horizontality, based upon the identity of the actors, as well as the nature of the action that is being challenged. Once that is done, it must also develop these distinct models in a doctrinally consistent and justified manner. The courts must explain the circumstances under which indirect horizontality can be invoked in relation to private law in proceedings between private parties. Similarly, courts must develop a rigorous and constitutionally backed model of positive fundamental rights, with affirmative mandates being imposed on the State to ensure that the constitutional vision of securing justice, liberty, and equality, in all its dimensions, is faithfully accomplished. It must clarify the extent to which the State must regulate the conduct of private actors as an aspect of those positive duties.

The judicial enforcement of a positive obligation, whether it be in the form of a socio-economic right or a civil right, raises the important question about the limits of the judiciary in the light of the principle of separation of powers. To what extent can the Court actually direct the State to act in a particular way? One way to answer this would be to look at the fundamental rights as a scale. The State can take any action it deems fit to shift the position of the right to the negative side of this scale, provided it follows the grounds set out under Articles 19(2) to 19(6). On the other hand, a right can exist towards the positive side in any measure. When the right on the positive side of the scale comes dangerously close to becoming nil, however, the obligation of the State extends to ensuring this does not happen. Viewing rights in such a way will also help to better define the extent of judicial enforcement of a positive obligation that lies on the State. If rights are viewed as a scale, to contend that courts cannot 'dictate policy and budgetary allocation' is a weak argument. This is because all judicial orders require some expenditure by the State. State expenditure incurred in pursuance of enforcing a legitimate fundamental right cannot constitute a violation of the separation of powers.[85] Some scholars have also argued for the conception of a 'minimum core'—a modicum of a right that must be respected irrespective of budgetary constraints or any other policy argument, without which

85. Aditya Phalnikar. 2020. 'Coronavirus and the Constitution – XXVI: Migrant Workers, Freedom of Movement, and Positive Obligations', *Indian Constitutional Law and Philosophy*, 16 May, available online at https://indconlawphil.wordpress.com/tag/positive-rights/ (accessed on 17 January 2022).

the right itself becomes illusory.[86] In South Africa, the constitutional court has observed that the right to basic education must be 'immediately realisable' because the constitution does not provide for 'progressive realisation' despite the economic realities of the State.[87] The constitutional court justifies this progressive standard with a reference to the 'minimum core' conception under the International Covenant on Economic, Social, and Cultural Rights. This conception recognises a minimum core of obligations—basic education, primary healthcare, basic shelter, and housing. If the minimum core obligation is not met, the State is exempted only if it can demonstrate that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[88] The idea of 'rights as a scale' or 'a minimum core of rights' can hence reconcile the aspect of a positive right with the idea that the judiciary cannot dictate policy, but only enforce rights.

Through the interpretation and enforcement of fundamental rights, the courts can play a huge part in shaping what is viewed as legitimate—legitimate actions on the part of the State and legitimate actions on the part of its people.[89] Therefore, the judiciary must understand the critical role that it plays in moulding the future course of the nation's economic agenda, which will hopefully be more inclusive and respectful of the constitutionally guaranteed rights of every citizen.

86. Gautam Bhatia. 2020. 'Coronavirus and the Constitution – XVII: The Supreme Court's Free Testing Order – Some Concluding Remarks', *Indian Constitutional Law and Philosophy*, 11 April, available online at https://indconlawphil.wordpress.com/2020/04/11/coronavirus-and-the-constitution-xvii-the-supreme-courts-free-testing-order-some-concluding-remarks/ (accessed on 17 January 2022).
87. *Governing Body of the Juma Musjid Primary School* v. *Essay N.O.*, (CCT 29/10) (2011) ZACC 13 : 2011 (8) BCLR 761 (CC) (11 April 2011).
88. *Minister of Health* v. *Treatment Action Campaign* (No 2), (CCT8/02) (2002) ZACC 15; 2002 (5) SA 721 : 2002 (10) BCLR 1033 (5 July 2002).
89. Gupta. 'Judicial Constructions: Modernity, Economic Liberalisation, and the Urban Poor in India'.

14

A Critical Examination of The Discourse of Indian Courts On (De)criminalisation

Shraddha Chaudhary*

Introduction

Ever since the 19th century, Anglo-American literature on the philosophy of criminal law has seen raging debates on what the values or principles of criminalisation ought to be.[1] While it is accepted that the coercive force of criminal law should be deployed in limited circumstances, there is little agreement on how a legislature may best determine *which* circumstances merit the use of such force. Parts of this debate have informed the decisions of courts in India, as can be seen in the reference to the Wolfenden Committee Report[2] in the High Court of Delhi's decision in *Naz Foundation* v. *Government of NCT, Delhi*[3] as well as the judgment of Justice D.Y. Chandrachud in *Navtej Singh Johar* v. *Union of India*[4]. As the move to decolonise knowledge systems and fields of research gains ground across the world, it is worth considering whether there is also an Indian (in origin or application) way of thinking about questions of criminalisation and decriminalisation. By 'Indian' way of thinking, I mean principles that have originated from or are unique in their application to the Indian legal system.

One way to do this would be to consider the Indian parliamentary debates preceding the introduction of criminal statutes. However, this would provide insight into legislative concerns underlying criminalisation in very few cases where a new kind of act was criminalised, for instance, the criminalisation of triple *talaq*. Post-

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 19 January 2022.

1. See Duff, Farmer *et al.* (eds.). 2014. *Criminalization: The Political Morality of Criminal Law*. Oxford University Press.
2. Wolfenden, John, James Adair, Mary G. Cohen *et al.* 1963. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution.
3. 2009 (111) DRJ, para 82.
4. (2018) 10 SCC 1, paras 565-594.

colonial criminal statutes seldom *create* criminal offences. More frequently, they expand the scope of an offence,[5] creating gradations in an existing offence,[6] or changing (usually increasing) the punishment attached to offences.[7] Furthermore, the parliamentary debates are largely focused on questions aligned to party politics, or issues of efficacy and impact, hardly ever discussing what principles may validly determine questions of criminalisation. For instance, in the parliamentary debates on the Muslim Women (Protection of Rights on Marriage) Act, 2019,[8] questions of religiously motivated legislation, the impact of the legislation on women, and the (im)propriety of criminalising a civil issue were brought up repeatedly. But it was never clear precisely what (other than deterrence) was sought to be achieved by criminalising the pronouncement of triple *talaq*.

The other way to search for an Indian way of thinking about questions of criminalisation or decriminalisation is by looking at how Indian courts have dealt with these questions. The judgments of courts are a better source for this exercise than the parliamentary debates because, (a) there have been several judgments in post-colonial India that have considered questions of criminalisation and decriminalisation, (b) the focus of courts is more likely to be on jurisprudential, principled considerations (at least in the way the judgments are written), and (c) these judgments do frequently, if not inevitably, consider the Parliament's intention in criminalising conduct when considering the submissions on behalf of the government. Even though judgments usually[9] speak only of the grounds on which an act may be *de*criminalised, in doing this they are also concerned with the appropriate goals of criminal law or the principles underlying valid criminal legislation. With this in mind, this chapter shall analyse judgments by the High

5. The Criminal Law (Amendment) Act, 2013 expanded the scope of acts that constituted the offence of rape, while continuing, at its core, to criminalise non-consensual penetrative acts by a man against a woman. The legislation also made 'gangrape' a special offence vide section 376D, but the essence or wrong of the offence was no different to rape simpliciter.
6. The Protection of Children from Sexual Offences (POCSO) [Amendment] Act, 2019 created gradations between the same offences committed against a child aged under-12 years, under-16 years and under-18 years.
7. The POCSO (Amendment) Act, 2019 also introduced the death penalty for the existing offence of aggravated penetrative sexual assault.
8. Parliamentary Debates (Lok Sabha) XVII Series, Volume 3, First Session 2019 No. 29, Debate on 25 July, 2019, pp. 115- 310, available online at <http://loksabhadocs.nic.in/debatestextmk/17/I/25.7.2019(f).pdf> (accessed on 11 June 2021; Parliamentary Debates (Rajya Sabha) Volume 249, No. 29, Floor Version of Debate on 30 July 2019, pp. 31-156, available online at <https://rajyasabha.nic.in/Documents/Official_Debate_Nhindi/Floor/249/F30.07.2019.pdf> (accessed on 11 June 2021).
9. A notable exception is the judgment of the Supreme Court of India in *Independent Thought* v. *Union of India*, (2017) 10 SCC 800, which criminalised all marital sex with a child under the age of 18 as rape.

Courts and the Supreme Court of India, delivered post-Independence, which consider the validity of criminal legislation or offences, with the aim of discovering—(a) whether there is an Indian way of thinking about criminalisation and decriminalisation, and (b) if so, what is it, and to what extent can it serve as a useful guide for lawmakers?

Questions of criminalisation and decriminalisation have come to constitutional courts framed in the language of the violation of fundamental rights. Unsurprisingly, therefore, decisions of these courts have also focused on whether the statutes before them might contravene fundamental rights, and whether this contravention might be justified by the reasonable restrictions written into them. In the following sections, however, I contend that while the courts cannot avoid evaluating the statutes before them through the lens of fundamental rights, this should not prevent them from viewing the question of (de)criminalisation as a distinct one. In fact, recent judgments *have* looked at a set of principles outside the bounds of fundamental rights when determining whether the criminal law was the appropriate method to achieve the purported ends of the statute, without any challenge to their authority to do so. However, this approach is still relatively new and rare, and its application, somewhat tentative. As a result, most judgments on (de)criminalisation continue to revolve primarily around the violation of fundamental rights. While this does not necessarily lead to 'bad' or 'incorrect' decisions, important considerations, which would have come to the fore if the courts considered (de)criminalisation as a distinct issue as well, do not receive due attention.

Judgment Analysis

The Criminalisation of Speech

Certain forms of speech (seditious, defamatory, obscene) have been sought to be restricted through criminal law, meaning that such speech attracts liberty-limiting criminal sanction which is the most severe consequence that the law can impose. The cases in this section consider the way the courts have dealt with the criminalisation of speech.

Kedar Nath Singh v. The State of Bihar[10]

The key question before the Supreme Court, in this case, was whether Sections 124-A[11] (sedition) and 505[12] (statements conducing to public mischief) of the

10. *Kedar Nath Singh* v. *The State of Bihar*, AIR (1962) SC 955.
11. Section 124-A, Indian Penal Code, 1860 (hereafter, IPC).
12. Section 505, IPC: Statements conducing to public mischief.

Indian Penal Code, 1860 (IPC) were constitutionally valid in the light of Article 19(1)(a)[13] (right to freedom of speech and expression) of the Constitution of India, 1950 (Constitution). After a detailed examination of precedent on Section 124-A, IPC, the criminalisation of purportedly seditious speech by Section 124-A was held to be constitutionally valid insofar as it sought to prevent the harm of 'disorder and disturbance of peace by resort to violence',[14] even though the language of criminalisation was never used, and the Court did not separately consider the question of criminalisation. Relying instead on Article 19(2)[15] of the Constitution, it concluded that the criminalisation of sedition was a reasonable restriction on the freedom of speech and expression.

The principle that appears to underlie this decision is that the prevention of a certain degree of harm to public order ('incitement to an offence') and protecting the 'sovereignty and integrity of India and security of the State', which are listed as reasonable restrictions to Article 19(1)(a), are good reasons for criminalisation. This should not be taken to mean, in my view (upon which I elaborate in the following sections), that any and all grounds stated under Article 19(2) may always and unambiguously provide reasons for, or justify, criminalisation.

Subramanian Swamy v. Union of India[16]

The Supreme Court of India, in this case, examined the constitutional validity of criminal defamation under Section 499, IPC.[17] In response to the contention that defamation constitutes a civil wrong to an individual's reputation which need not be addressed through criminal sanction, the Court held that since the individual is part of society and the defamatory comments lower the reputation of the individual within society, defamation cannot simply be a private matter.[18] In this case, the Court made the choice to move beyond the jurisprudence of fundamental rights and consider the issue of criminalisation separately. To that end, the Court discussed a range of precedents (from India) and academic opinion (mostly from classic English texts which were, even at the time of this judgment, somewhat outdated, and certainly not reflective of the full range of the discussion on 'what is a crime').[19]

13. Article 19(1)(a), Constitution of India, 1950.
14. *Kedar Nath*, para 27.
15. Article 19(2), Constitution of India, 1950.
16. *Subramanian Swamy* v. *Union of India*, (2016) 7 SCC 221.
17. Section. 499, Indian Penal Code, 1860 (Defamation).
18. *Subramanian Swamy*, paras 95-97.
19. The Court referred mainly to classic English texts such as Blackstone and Halsbury's Laws of England which defined, in the simplest terms, what is meant by a crime, without providing any jurisprudential guidance on what *ought* to be criminalised. See *Subramanian Swamy*, paras 80-86.

(Footnote No. 19 contd.)

From this discussion, the Court concluded that defamation is a public wrong that, despite being directed at an individual, harms society in general, although in reaching this conclusion, the Court appeared to be moving backwards, concluding that because defamation had been criminalised and crimes ought to be a public concern, defamation was a criminal concern.[20] The correct approach in determining this particular question, in my opinion, would have been to look at why defamation, in and of itself, is a public concern worthy of criminalisation and then to assess whether the criminalisation of defamation was valid.

The Court gave examples of untouchability, child labour, trafficking, and sexual harassment to make the point that conduct against individuals may nevertheless be relevant to the public interest.[21] This, of course, was never in doubt. As the Court's discussion of Sandra Marshall and Antony Duff's theory of public wrongs indicates, wrongs may concern private spaces or individuals and yet be public in nature if they threaten public order or the interests of the society at large. Since the Court made the choice to consider the question of criminalisation separately on the principle of 'public wrongs', the relevant point of consideration was, in fact, why defamation should *qualify* as a public wrong. However, this point remains unanswered in the judgment (except for the unsubstantiated assertion that the protection of an individual's right to reputation is 'imperative for social stability in a body polity'[22]).

In response to the petitioner's argument that criminal defamation is excessive and has a chilling effect on speech, the Court held that 'reputation' was an essential aspect of dignity under Article 21[23] (the right to life and personal liberty), and therefore criminal defamation, which seeks to protect reputation, calls for a balance between Article 21 and Article 19.[24] On balance, the Court found that the right to reputation under Article 21 meant that the law of criminal defamation was within

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(**Footnote No. 19 contd.**)

Amongst modern texts on criminalisation, the Court referred to R.A. Duff's book, *Answering for Crime* (2007) and Duff and Marshall's article, 'Public and Private Wrongs' (2010), both of which define 'crime' from the perspective of legal moralism (a branch of the philosophy of criminal law which stresses and approves the relationship between law and morality), but did not refer to works that approached the subject from the perspectives of consequentialism, utilitarianism, contractarianism, or constitutionalism, among other schools of thought. Even the court's reference to Duff and Marshall's works is somewhat incomplete because the court does not demonstrate how these theories justify the criminalisation of defamation.

20. See the Court application of precedent and academic opinion. *Subramanian Swamy*, paras 80-96.
21. *Subramanian Swamy*, paras 88, 95.
22. *Subramanian Swamy*, para 80.
23. Article 21, Constitution of India, 1950, (Protection of life and personal liberty: 'No person shall be deprived of his life or personal liberty except according to procedure established by law').
24. *Subramanian Swamy*, paras 135-136.

the ambit of Article 19(2). The Court relied on the concepts of 'fundamental duty'[25] and 'constitutional fraternity'[26] to draw a link between individual and social interest,[27] although the link ('the individual interest of each individual serves the collective interest and correspondingly the individual interest enhances the collective interest')[28] appears vague and certainly does not serve to explain what *societal or public* interest is protected by criminalising defamation.

As with other public wrongs, the rationale for treating defamation as a public wrong worthy of criminalisation should, in my opinion, be two-fold—first, to deter defamatory speech through fear of criminal sanction, and second (more importantly), to justly punish defamatory speech by depriving the accused of their liberty and/or property.[29] The Court's concern appears to align more with the first rationale than the second—since a person's reputation is protected by their right under Article 21, it is reasonable for the State to seek to prevent harm to reputation. But does a person who makes defamatory remarks about another deserve to have their liberty curtailed through criminal action? If the answer to this question is no, as I contend it should be, then defamation does not meet the standard of a public wrong. A person who makes defamatory remarks about another does not deserve to be criminally sanctioned because the harm caused by defamation is entirely personal in nature and can easily be remedied by civil action which remains available to the aggrieved party. In fact, the ability of the rich and powerful to intimidate critics through the coercive force of criminal defamation goes against the public interest. Criminal defamation, in other words, is the legal equivalent of using a sledgehammer to break open an egg.[30] While the Court did observe that Section 499, IPC is not excessive or arbitrary, it did not give any consideration to whether

25. Here, the Court refers to Article 51-A, Constitution of India, 1950 (Fundamental Duties), of which clause (e) lays down the duty 'to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities'.
26. The Court's use of the term seems to imply the sense of community and brotherhood embodied by the Constitution, according to which an individual's rights must be balanced against community interest. *Subramanian Swamy*, paras 153-157.
27. *Subramanian Swamy*, para 166.
28. *Subramanian Swamy*, para 166.
29. It has widely been argued that what sets criminal law and sanction apart is that it conveys social opprobrium and condemnation which, in turn, justify its imposition. See H.M. Hart. 1958. 'The Aims of Criminal Law', *Law and Contemporary Problems*, 23: 404; J. Feinberg. 1965. 'The Expressive Function of Punishment', *The Monist*, 49: 402; R.A. Duff. 2018. *The Realm of Criminal Law*. Oxford University Press, p. 196.
30. On these points, see the decision of the Constitutional Court of Lesotho in *Peta* v. *Minister of Law, Constitutional Affairs and Human Rights*, (2018) LSHC 3, which relied on similar arguments to hold criminal defamation unconstitutional.

and why defamatory speech should merit coercive criminal sanction. To that extent, its application of the public wrong standard was incomplete.

Notwithstanding this objection, it is clear that the Court's judgment, in this case, focused on two principles of criminalisation—the presence of harm, and the standard of a public wrong. In applying these principles, however, the Court did not distinguish between tests of constitutionality (is X a reasonable restriction on speech?) and principles of criminalisation (is X a valid candidate for coercive criminal sanction?), frequently discussing both questions interchangeably. This conflation is a conceptual error. While criminal law that is unprincipled may also be unconstitutional (for instance, by being arbitrary), unconstitutionality is not a reason for criminalisation, nor would every conduct found to be unconstitutional call for criminal sanction.[31] A good example of this would be triple *talaq*. The Supreme Court of India held the pronouncement of triple *talaq* unconstitutional and void, but the rationale for unconstitutionality (arbitrariness, non-compliance with the principles of the *Quran*) does not map onto criminalisation. Likewise, just because the Constitution recognises reasonable restrictions on constitutionally guaranteed freedoms, it does not follow that these restrictions may automatically take the form of criminal sanction.

The distinction between these questions of constitutionality and criminalisation was obliquely referenced in *Gian Kaur* v. *The State of Punjab*,[32] where the Court held that the desirability of retaining Section 309, IPC (attempt to commit suicide) is 'a different matter and *non-sequitur* in the context of constitutional validity of that provision which has to be tested with reference to some provision in the Constitution of India, 1950'.[33]

The Criminalisation of Intimacy and Sexuality

Naz Foundation

Naz Foundation, a non-governmental organisation filed a Public Interest Litigation (PIL) challenging the constitutional validity of Section 377,[34] IPC, to the extent that

31. The issues of labelling something as 'criminal' and attaching criminal sanction to it are inextricably linked. Only when the labelling is fair can the sanction validly follow. It has been argued by eminent scholars of the philosophy of criminal law that the attachment of coercive, liberty-limiting sanction and the social opprobrium that are attached to a 'crime' serve to distinguish criminal wrongs from civil wrongs. See, H.M. Hart, 'The Aims of Criminal Law'; J. Feinberg, 'The Expressive Function of Punishment'; and R.A. Duff, *The Realm of Criminal Law*.
    This does not mean, however, that anything to which the Parliament decides to attach criminal sanction may validly be called criminal. Quite the contrary. Because criminal sanction is, by its very nature, a threat to individual freedom and liberty, to a person's dignity and reputation, the imposition of criminal sanction must be thoroughly justified against some valid principle of criminalisation.
32. (1996) 2 SCC 648.
33. *Gian Kaur*, para 17.
34. Section 377, Indian Penal Code, 1860 (Unnatural offences).

it criminalised private consensual sex between adults of the same sex. In allowing this plea, the High Court of Delhi dealt extensively with the impact of criminalisation on those who identified as homosexuals,[35] including the use of the provision to harass homosexuals.[36] The Division Bench dealt also with the interaction between morality and criminalisation, although here again, the focus of the discussion was not criminalisation per se, but whether morality was an appropriate ground to restrict fundamental rights.[37] While the Court quoted from sources that were explicitly concerned with the appropriate purpose of criminal law, such as the decision in *Dudgeon* v. *United Kingdom*[38] or the Wolfenden Committee Report, the key question it sought to answer was whether morality was a compelling State interest that would allow the infringement of a fundamental right, and if so, what form of morality it would be. The Court concluded that the enforcement of public or majoritarian morality[39] would not amount to compelling State interest, and would not justify the restriction of a fundamental right. Only the enforcement of constitutional morality[40] would pass the test of compelling State interest.[41]

The limited guidance that may be drawn from this judgment is that to the extent that morality is a driver of criminalisation, the enforcement of public morality

35. *Naz Foundation*, paras 49-52.
36. *Naz Foundation*, para 74.
37. *Naz Foundation*, para 33.
38. *Dudgeon* v. *United Kingdom*, (1981) ECHR 5.
39. Patrick Devlin, 'The Enforcement of Morals', at Maccabean Lecture on Jurisprudence (18 March 1959). According to Sir Patrick Devlin, public morality, or the collective morality of society, refers to 'certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole', and applies even to consensual, private acts of adults which have no bearing or impact on society otherwise.

    The term has been defined differently in different jurisdictions and by different scholars. Even insofar as Sir Patrick Devlin's understanding is concerned, there is room for debate on what, precisely, he wanted the standards of public morality to be. As far as Indian law is concerned, the Delhi High Court in *Naz Foundation* defined popular or public morality, in opposition to constitutional morality, as 'shifting and subjecting notions of right and wrong' (*Naz Foundation*, para 79). In other words, it reflects public disapproval or social moral condemnation which may frequently, though not necessarily, be in opposition to the socially progressive, liberal values of the Constitution of India.
40. According to the High Court of Delhi, this refers to the morality derived from constitutional values, distinct from popular morality (*Naz Foundation*, para 79). These values may be derived from the substantive provisions of the Constitution (as well as judgments which interpret and expand their scope) pertaining to equality, autonomy, privacy, individual dignity, inclusiveness, diversity and so on. See, Latika Vashist. 2013. 'Re-Thinking Criminalisable Harm in India: Constitutional Morality as a Restraint on Criminalisation', *Journal of the Indian Law Institute*, 55(1): 80. Here, the author claims that constitutional morality consists of key values of the Constitution, which may be drawn from Parts III and IV (Fundamental Rights and Directive Principles of State Policy), but also includes principles such as diversity.
41. *Naz Foundation*, para 75.

through criminal law must be tempered with the values of constitutional morality. In other words, laws (including criminal laws) that are based on, or seek to implement morality, must not fall foul of constitutional morality.[42] However, since the judgment viewed the issue of Section 377 from the perspective of infringement of fundamental rights, the 'compelling State interest' test centralised constitutional morality only to determinations of when a fundamental right may be infringed. It follows from this that constitutional morality ought to be relevant whether or not this infringement takes place through criminalisation or some other legal restriction or policy. The judgment, however, did not delve specifically into whether, and to what extent, the standard would apply as a principle of criminalisation in Indian law.

Navtej Johar

In this case, a five-judge bench of the Supreme Court of India once again considered the constitutional validity of Section 377, IPC. The decision of the High Court of Delhi in *Naz Foundation* had been overturned by a division bench of the Supreme Court of India in *Suresh Kumar Koushal* v. *Naz Foundation*.[43] One of the arguments of the petitioners in *Navtej Johar* was that the decision of the Court in *Suresh Koushal* was driven by societal or majoritarian morality, when in fact, it should have been based on constitutional morality.[44] The question of criminalisation was specifically discussed only by Justice Chandrachud and though the discussion was somewhat limited and outdated (being based primarily in 19th and 20th-century literature which has since been supported, elaborated as well as countered),[45] it did give a sense of how decisions of (de)criminalisation should be approached by Indian courts. Based on his discussion of the views of Bentham,[46] Mill,[47] Devlin,[48] and Hart,[49] he concluded that one common element in all (major) theories of crime and criminalisation is the requirement of injury or harm to a third person or to society.[50] Based on this, he held that the conduct covered by Section 377, insofar as it concerns consenting adults, does not cause harm to any person, nor does it pose a

42. *Naz Foundation*, para 75. It has been argued that the test of 'compelling State interest' does not prohibit the enforcement of public morality as such. It states only that where such morality conflicts with the substantive morality of the constitution, the latter would trump the former. See, Gautam Bhatia. 2019. *The Transformative Constitution: A Radical Biography in Nine Acts*. Harper Collins Publishers India, pp. 89-90.
43. (2014) 1 SCC 1.
44. *Navtej Johar*, para 13.
45. See Duff, *Criminalization: The Political Morality of Criminal Law*, pp. 1-53.
46. *Navtej Johar*, paras 573-577, 589.
47. *Navtej Johar*, paras 578-581, 590.
48. *Navtej Johar*, paras 582-585.
49. *Navtej Johar*, paras 586-588.
50. *Navtej Johar*, para 592.

threat to the stability and security of society (essentially the 'public wrong' standard), and therefore is not a fit candidate for criminalisation.[51]

Through this conclusion, the decision reiterated the need to base criminalisation on the existence of a 'harm' or 'public wrong', although it is unclear whether these standards were meant to be threshold requirements (you cannot criminalise conduct unless it is harmful or is a public wrong) or to provide positive grounds for criminalisation (if a conduct is harmful or qualifies as a public wrong, it is a fit candidate for criminalisation). It also appears that the standards of 'harm' and 'public wrong' were seen as emerging from the same foundation ('harm') and existing on the same spectrum ('harm' to the individual and 'harm' to society at large), when in fact, the origins of the two standards and the meanings they convey are completely distinct.[52]

As with *Naz Foundation*, the use of constitutional morality in *Navtej Johar* extended to any law that deprived the rights and entitlements of full and equal citizenship,[53] including (but not limited to) the interpretation of a right in a matter of decriminalisation.[54] The discussion on constitutional morality in this judgment, however, did clarify that constitutional morality was meant to convey the substantive morality of the Constitution.[55] While I have argued elsewhere that constitutional morality may, so understood, be used to understand what qualifies as a harm worthy of criminalisation,[56] the Court itself did not make such an assertion. The Court's decision to decriminalise Section 377, IPC, while touching upon

51. *Navtej Johar*, para 592.
52. The first and most widely-cited 'harm' principle is attributed to J.S. Mill, who propounded it from a utilitarian perspective (which seeks to maximise the happiness, freedom or utility of each individual), whereas the 'public wrongs' standard was developed by Antony Duff, who is a legal moralist (legal moralism is concerned with explaining and justifying the links between law and morality, and especially the enforcement of morality by law). See J.S. Mill. 1859. *On Liberty*; Duff, *The Realm of Criminal Law*.

    The 'harm' principle stated that the only good reason to criminalise conduct would be the prevention of tangible some tangible harm to another, whereas the 'public wrong' standard conveys a high or severe standard of wrongfulness (based in morality) that is rightly the concern of the society at large because ignoring such a wrong would threaten the very existence of society. The justifications for criminal sanction under both these standards are divergent.
53. *Navtej Johar*, para 606.
54. *Navtej Johar*, para 607.
55. *Navtej Johar*, paras 600-605.
56. S. Chaudhary. 2018. 'Criminalisation and Privacy: Examining the State's Right to Interfere in the 'Private Sphere' through Imposition or Lifting of Criminal Sanction' in *International Association of Constitutional Law (IACL-AIDC) Blog Symposium on Section 377: The Supreme Court's expanding LGBT Rights Jurisprudence*, available online at < https://blog-iacl-aidc.org/section-377-expanding-lgbt-rights-in-india/2018/9/18/criminalisation-and-privacy-examining-the-states-right-to-interfere-in-the-private-sphere-through-imposition-or-lifting-of-criminal-sanction?fbclid=IwAR3PnZThFqHs5FYNMB-a6oijKg8ZWJvLTDZDBm_eLJZYC8Zh2-PDY9X6-Do> (accessed on 15 June 2021).

principles of criminalisation, was, like other decisions on (de)criminalisation, still *based on* the apparent violation of the fundamental rights recognised by Articles 14[57] (the right to equality), 19, and 21.

Criminalisation of Personal Choice

Shaikh Zahid Mukhtar v. The State of Maharashtra[58] *and Confederation of Indian Alcoholic Beverage Companies v. The State of Bihar*[59]

The two cases saw the High Court of Bombay and the High Court of Judicature at Patna dealing with a broad range of constitutional questions. Relevant to the present discussion is the fact that the possession, sale and consumption, transport, etc. of cow, buffalo, or bull's slaughtered meat were prohibited, and the contravention of the prohibition was declared to be an offence in Maharashtra.[60] Likewise, the consumption, sale, etc. of liquor were prohibited, and any contravention of the prohibition was declared to be a criminal offence in Bihar.[61] A number of constitutional arguments were considered in deciding whether these prohibitions were valid, such as the individual's right to privacy (extending to the decisional autonomy to determine what to eat and drink),[62] and Directive Principles of State Policy which encourage the State to prohibit the slaughter of cows, calves, and other milch and draught cattle,[63] or which encourage the State to prohibit the consumption of liquor or other intoxicating substances which are injurious to health.[64] In *Zahid Mukhtar*, the High Court of Bombay held that Section 5-D of the Maharashtra Animal Preservation (Amendment) Act, 1995 was violative of the right to privacy recognised under Article 21 to the extent that it prohibited the possession and consumption of cow, bull, or bullock slaughtered outside the state. The intention of the legislature to prohibit the slaughter of cows in a primarily agrarian society, anchored in Article 48, was relied upon to hold that other prohibitions on transport, slaughter, or sale of such animals were constitutionally valid.[65] But since the personal possession or consumption of the prohibited animals did not fall within

57. Article 14, Constitution.
58. *Shaikh Zahid Mukhtar* v. *The State of Maharashtra*, (2016) SCC OnLine Bom 2600.
59. *Confederation of Indian Alcoholic Beverage Companies* v. *The State of Bihar*, 2016 SCC OnLine Pat 4806.
60. Maharashtra Animal Preservation (Amendment) Act, 1995.
61. Section 19(4), Bihar Excise Act, 1915 read with the New Excise Policy of 2015.
62. *Zahid Mukhtar*, para 202; *CIABC*, para 173.
63. Article 48, Constitution.
64. Article 47, Constitution.
65. For a critique of the judgment from the perspective of constitutional law, see, G. Bhatia. 2016. 'The Bombay High Court's Beef Ban Decision', *Indian Constitutional Law and Philosophy Blog*, available online at <https://indconlawphil.wordpress.com/2016/05/07/the-bombay-high-courts-beef-ban-decision/> (accessed on 16 June 2021).

the purview of this larger object, this prohibition was held to be violative of Article 21. Likewise, Justice Singh's judgment in *CIABC* was that the consumption of liquor within the confines of one's home fell within the right to privacy under Article 21.[66]

Both judgments were driven by whether the prohibitions were constitutionally valid. The criminal penalty attached to contraventions of the prohibitions was not considered on their own merits (in terms of whether the criminal penalty was required for such contravention in the first place), betraying the assumption that if the prohibition was constitutionally valid, the enforcement of the prohibition through criminal sanction was also valid. In both cases, the statutes were *creating* criminal offences, which would trigger the process of independent criminal trial and punishment. While the High Court of Judicature at Patna held the prescribed punishment to be excessive, the High Court of Bombay declared the reverse presumption clause to be unconstitutional, thereby engaging incidentally with questions of criminal law, procedure, and evidence, neither court considered whether the offences being created were valid instances of criminalisation.

This, I argue, meant that several important questions were left unanswered. For instance, even if the court felt that it was constitutional to prohibit a person from slaughtering their own cow, bullock, or bull within their own home for the purposes of consumption, would it be appropriate to *punish* such a person, and if so, on what grounds? What harm is sought to be punished in a transaction where one party slaughters a cow for its meat and another party buys it? Similarly, the High Court of Judicature at Patna never considered whether and on what grounds a criminal prohibition on the sale, import, purchase, or consumption of liquor (whether in private or in public) would be valid. To what extent is a self-regarding conduct, such as alcohol consumption, even if harmful under certain circumstances to the person consuming it, a good candidate for criminal sanction? In the absence of demonstrable harm to others or to the stability and security of society in general, was the purpose of such criminalisation the enforcement of morality, and if so, which conception of morality was sought to be enforced?

In my view, the focus of these judgments on constitutional validity, without sufficient attention to the propriety of criminalisation, meant that none of the aforementioned questions were considered or engaged with. In that sense, I contend,

66. For a critique of the judgment from the point of view of constitutional law, see G. Bhatia. 2016. 'The Bihar High Court's Prohibition Judgment: Key Constitutional Issues – II: The Fundamental Right to Privacy', *Indian Constitutional Law and Philosophy Blog,* available online at <https://indconlawphil.wordpress.com/2016/10/01/the-bihar-high-courts-prohibition-judgment-key-constitutional-issues-ii-the-fundamental-right-to-privacy/> (accessed on 17 June 2021).

these judgments demonstrate that the narrow focus on constitutional validity does not appropriately address all the questions that need to be answered when making decisions on criminalising or decriminalising conduct. The tests of constitutionality do not map onto the tests of criminalisation, even more so when, as in these two cases, the tests move beyond questions of the violation of fundamental rights.

Offences against Marriage

Joseph Shine v. Union of India[67]

In this case, a five-judge Bench of the Supreme Court considered the constitutional validity of Section 497, IPC[68] (adultery). Examining the provision on the touchstone of Articles 14 and 21 of the Constitution, the Court in *Joseph Shine* held that the offence of adultery, as recognised by the IPC, was unconstitutional because it treated the wife as the chattel of the husband,[69] and betrayed a blatant disregard for the privacy, dignity, and autonomy of the wife.[70]

Justice Misra also discussed the propriety of treating adultery as a criminal offence. In a marked departure from the stand of the Court in previous constitutional challenges to the provision,[71] he couched adultery as a private (civil) wrong, notwithstanding the impact it could have on a marriage.[72] He distinguished adultery from other offences that might take place within the context of marriage, such as domestic violence or cruelty, on the ground that the latter was meant to prevent and punish serious harm to a married woman and was, in that sense, apt subjects of criminalisation.[73] This point was further clarified and driven home by Justice Chandrachud, who stressed the feminist adage that 'the personal is political', meaning that 'private' and 'public' should not be determined by the space (home vs. market) or the relationship (husband and wife vs. employer and employee) within which the conduct takes place, but rather the ramifications that it would have for the public sphere.[74] It is also worth considering that Justice Chandrachud, in his judgment, held in no uncertain terms that enforcement of marital fidelity was not a valid object of criminalisation, '[j]ust as all conduct which is not criminal may not necessarily be ethically just, all conduct which is inappropriate does not justify being

67. (2019) 3 SCC 39.
68. Section 497, Indian Penal Code, 1860 (Adultery).
69. *Joseph Shine*, para 30.
70. *Joseph Shine*, paras 43, 48.
71. See *Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137 and *V. Revathi* v. *Union of India*, (1988) 2 SCC 72, where the court held the provision to be constitutionally valid as an offence against the sanctity of marriage.
72. *Joseph Shine*, paras 50, 58.
73. *Joseph Shine*, para 57.
74. *Joseph Shine*, paras 194-196.

elevated to a criminal wrongdoing'.[75] Justice Malhotra also addressed this issue directly, holding that though adultery was a moral wrong against the spouse, it did not have the element of public wrongfulness that would justify its criminalisation.[76] She also observed astutely that the State must follow a minimalist approach to criminalisation, striking a balance with the right of the individuals to make their own personal choices.[77]

It seems clear, therefore, that protecting the sanctity of the abstract institution of marriage was not approved as a valid ground for criminalisation in this judgment. And even though the focus of the Court was, again, the constitutionality of Section 497, IPC, the five-judge Bench unanimously held that the elements of 'harm' and 'public wrong' must be present for valid criminalisation.

Nadeem Khan v. Union of India[78]

Without going into the merits of the challenge to the Muslim Women (Protection of Rights on Marriage) Act, 2019 since a similar challenge is pending before the Supreme Court of India, the High Court of Delhi, in this case, commented briefly on the 'object' of the legislation. Among other things, the law criminalises and makes punishable the pronouncement of triple *talaq*, that is, attempting to effect divorce through the Muslim personal law practice of *talaq-i-biddat*. The practice has already been held to be unconstitutional and void by the Supreme Court in *Shayara Bano* v. *Union of India*,[79] meaning that the utterance of *talaq, talaq, talaq* no longer has legal effect. The petitioner argued before the Court that there was no purpose to criminalising the pronouncement of triple *talaq* once it had been rendered ineffective by declaring it void and unconstitutional.[80] In response to this, the Court held *prima facie* that the purpose of criminalising the pronouncement seems to have been to deter the practice, and it was the legislature's prerogative to declare it an offence.

There is little disagreement that deterrence may be a legitimate goal of criminal legislation, but it cannot and should not be the sole purpose of *and* the justification for criminalisation. The legislature cannot, on a whim, decide that it wants to deter certain conduct by the threat of criminal sanction without justifying why that conduct deserves to be deterred and merits the restriction of personal liberty and

75. *Joseph Shine*, para 211.
76. *Joseph Shine*, paras 281.1-281.4.
77. *Joseph* Shine, para 281.3.
78. 2020 SCC OnLine Del 1336.
79. (2017) 9 SCC 1.
80. *Nadeem Khan*, para 11.

social opprobrium that accompanies criminal sanction.[81] This was an order issuing notice, and therefore, the comments of the Court on this substantive issue were only preliminary in nature, which should not be taken to be indicative of Indian judicial thinking on criminalisation. However, the Court's observations do highlight the need for clarity on the subject, something of a roadmap for decisions about (de)criminalisation that can critically engage with the state's decisions on (de)criminalisation.

Criminalisation by the Court

Independent Thought v. Union of India

This case deserves consideration because it is a rare instance in which a court intentionally expanded the scope of a criminal provision, essentially criminalising acts that were, up to that point, exempt from criminalisation.[82] Prior to this judgment, an exception to Section 375, IPC provided that sex by a man with his own wife would not be rape if the wife was over the age of fifteen.[83] A Division Bench of the Supreme Court in *Independent Thought* modified this exception to the effect that sex by a man with his own wife would not be rape if the wife is over the age of 18. In the most basic sense, the Court simply brought the IPC in tune with other laws, such as the Protection of Children from Sexual Offences Act, 2012[84] which defined 'child' as a person under the age of 18.

Once again, the focus of the Court was on whether the exception to Section 375, IPC was violative of Articles 14, 15[85] (right against discrimination), and 21, and the Court was, therefore, concerned with the ways in which the exception was

81. On this point, see, S. Chaudhary. 2021. 'Weaponising Criminal Law as Political Rhetoric: The Menace of Unprincipled Criminalisation', *RGNUL Student Research Review Excerpts from Experts*, available online at <http://rsrr.in/2021/05/06/criminal-law-as-political-rhetoric/> (accessed on 28 June 2021).
82. Typically, it is the function of the Legislature to make or legislate law and of Courts to interpret law. In reality, however, this separation of powers is not always watertight. In fact, it has been held, time and again, that unlike the Constitution of the U.S.A., the Indian Constitution does not envisage a rigid separation of powers, and some degree of overlap (to the extent permitted by the Constitution itself) is permissible. See, *Indira Nehru Gandhi* v. *Raj Narain*, 1975 SCR (3) 333.

    Article 142, Constitution, empowers the Supreme Court to pass any order necessary to do complete justice in any matter before it. This extends to striking down, reading down or modifying laws to do complete justice. Furthermore, Article 141, Constitution states that the law declared by the Supreme Court shall be binding on all Courts in the land, which, in effect, means that the Supreme Court can lay down the law of the land. Therefore, some legislative powers have been given to the Supreme Court by the Constitution itself.
83. Sections 375, Indian Penal Code, 1860, Exception 2.
84. Protection of Children from Sexual Offences Act, 2012.
85. Article 15, Constitution of India, 1950.

arbitrary,[86] or the ways in which it violated the dignity of a child bride between the ages of 15 and 18 years.[87] The Court, however, did also discuss why the conduct in question qualified as rape. It demonstrated that rape is worthy of criminalisation on the grounds that it violates the bodily integrity of women and is instrumental in subordinating women.[88] With regard to child brides, in particular, the rationale of the Court was that regardless of marriage, children are considered legally incapable of giving valid consent to sexual intercourse, and the factum of marriage is not proof of consent. If anything, forced sexual intercourse may simply be an extension of a forced child or early marriage.[89] In stating this, the Court implicitly acknowledged the harm and affront that is caused to a person's dignity and sexual autonomy when their lack of consent is ignored. The Court also noted the incidental harms of such sexual intercourse, such as early pregnancy and childbirth, which might be physically dangerous for young girls (as well as their children),[90] and would not sufficiently respect their right to make reproductive choices[91] (in addition to severely limiting their prospects by imposing the burdens and responsibilities of motherhood too early in life). The health consequences of early pregnancy and childbirth may, then, have consequences for society at large by perpetuating intergenerational inequality.[92]

It appears that the decision of the Court was equally motivated by concerns regarding the violation of the fundamental rights of child brides between the ages of 15 and 18 years, and by the determination that sexual intercourse with child brides in that age group was likely to be non-consensual and severely harmful, both to the individual child and to society at large. Like *Subramanian Swamy* before it, *Independent Thought* affirmed 'harm' and 'public wrong' (although here again, it appeared that 'harm' and 'public wrong' were applied as concepts along the same spectrum) as principles of criminalisation, although in the latter case the application of the principle was far more lucid. And unlike *Navtej Johar* (which was decided after this case) it confirmed these principles as positive principles of criminalisation instead of negative constraints on criminalisation, perhaps because the two cases were approaching the issue from different starting points. The conclusion of this case appears to be, however, that where a conduct is sufficiently harmful, either to an individual or to society in general, threaten the stability and security of society, there are good reasons to criminalise such conduct. At least insofar as marital rape of

86. *Independent Thought*, para 33.
87. *Independent Thought*, paras 53, 66.
88. *Independent Thought*, paras 67-75.
89. *Independent Thought*, para 84.
90. *Independent Thought*, para 91.
91. *Independent Thought*, para 91.
92. *Independent Thought*, para 91.

adult women is concerned, I have demonstrated elsewhere,[93] that the reasons and principles for criminalisation were clearly laid out by this judgment.

Conclusion

From the foregoing analysis, it emerges that discussions on (de)criminalisation by Indian courts have ordinarily been anchored, given the function of these courts, in questions of constitutionality, meaning that the jurisprudence of constitutionality and criminalisation have frequently overlapped. This has meant that reasonable restrictions on fundamental rights have been presented as grounds for criminalisation without considering whether the restriction (even if reasonable) actually needs to be imposed through criminal law. More recently, since the question of the legitimacy or validity of criminalisation has been discussed separately from the question of constitutionality (even if both issues are discussed in the same judgment) by courts in some cases (see *Subramanian Swamy*, *Navtaj Johar*, *Joseph Shine*), some clarity on what Indian courts consider to be appropriate principles of criminalisation seem to be emerging. Based on the discussion above, I would summarise the position that can be gleaned from what has been enunciated by courts in the following key points:

1. That an element of 'harm' to the individual or to the security and stability of society is an essential element of valid criminal law.
2. That the 'harm' must qualify the standard of a public 'wrong', in the sense of being worthy of public concern and censure through criminal sanction.
3. That wherever a restriction of a fundamental right (whether through criminal law or otherwise) is grounded in morality, the relevant lens ought to be constitutional morality, or at the very least, the morality embodied by the law should not be contrary to constitutional morality.

Aside from the third point, these principles do not reflect an approach that is distinguishable from that already laid out in Anglo-American literature on the philosophy of criminal law. The reliance on constitutional morality is also not a radically unique approach,[94] but since it embodies the substantive morality of the Indian Constitution, its application is likely to be distinctly Indian. Notwithstanding

93. S. Chaudhary. 2017. '*Independent Thought* v. *Union of India* and the Unconstitutionality of Marital Rape', *Socio-Legal Review Forum*, available online at <https://www.sociolegalreview.com/post/independent-thought-v-union-of-india-and-the-unconstitutionality-of-marital-rape> (accessed on 20 June 2020).
94. See, Michael Thorburn. 2011. 'Constitutionalism and the Limits of Criminal Law', in Duff Farmer *et al.* (eds), *The Structures of Criminal Law*, 98-102. Oxford: Oxford University Press.

this, the affirmation of these principles by constitutional courts when considering issues of (de)criminalisation places them firmly within the Indian jurisprudence on (de)criminalisation. The question that follows from this is, how can these principles guide decisions on valid criminalisation, and how can questions of valid criminalisation be considered distinctly from questions of constitutional validity even if the challenge to the law is framed in terms of the violation of fundamental rights or other constitutional principles? I believe the answer lies in synthesising the test of a reasonable restriction with the principles of criminalisation outlined above to reach a method that would be uniquely Indian in its application.

In *Justice K.S. Puttaswamy* v. *Union of India*[95] laid down the characteristics that a restriction to a fundamental right would require to qualify as 'reasonable'. The Court reiterated and approved the test of proportionality laid down in *Modern Dental College and Research Centre* v. *The State of M.P*,[96] which has the following components:

1. A measure restricting a right must have a legitimate goal (legitimate goal stage)
2. It must be a suitable means for furthering this goal (suitability or rational connection stage)
3. There must not be any less restrictive but equally effective alternative (necessity stage)
4. The measure must not have a disproportionate impact on the right-holder (balancing stage)

Whether every act of criminalisation would involve the restriction of a fundamental right may be open to debate (with which a meaningful engagement is beyond the scope of this discussion). But in the broadest terms, every decision to criminalise certain conduct is a decision to limit personal autonomy, and criminal sanction is undoubtedly a threat to personal liberty. The test of proportionality approved in *Puttaswamy*, therefore, can also serve as a useful guide to decisions on (de)criminalisation, allowing the Court to consider it separately from the issue of the violation of fundamental rights without fully leaving the fundamental rights framework.[97] The principles of criminalisation that have been affirmed and reiterated by constitutional courts in India also map well onto this test.

95. (2019) 1 SCC 1.
96. (2016) 7 SCC 353.
97. This was also the approach (with some variations based on the relevant law) of the Constitutional Court of Lesotho in *Peta* v. *Minister of Law, Constitutional Affairs and Human Rights*, (2018) LSHC 3, in dealing with criminal defamation.

The legitimate goal stage would require the decision-maker to establish that the conduct being criminalised is harmful. Based on the discussions above, this does not simply mean showing that there is some harm (that is, for instance, that cheating on one's spouse causes hurt to the spouse and potentially destabilises the marriage) but that it is a harm worthy of criminalisation. Here, the standard of 'public wrong' and the lens of constitutional morality become relevant. The 'harm' should be of a kind that threatens the security or stability of society, that is legitimately a public concern. And what should be a public concern, or what can threaten the stability of society should, in turn, be assessed using the lens of constitutional morality. While this last prong has not, so far, been stated by Indian courts, it does follow from the idea that the morality relevant to considerations on criminalisation is constitutional morality. Since 'harm' and 'public wrong' are, in fact, subjective concepts, their interpretation is always likely to make the moral lens relevant. So, if asked, 'is the existence and affirmation of non-heterosexual/heteronormative identities a threat to the stability of society?', the answer would be 'no', because diversity, inclusiveness, personal autonomy, privacy, and dignity are essential elements of constitutional morality.

The rational connection stage would require the decision-maker to show that criminalisation (in the manner intended) would, indeed, help prevent or address the harms that are caused by the conduct. In this context, if the 'harm' in question is violation of the sanctity of a marriage, would sending a third person (who is not part of the marriage) to jail help preserve a marriage where infidelity has already taken place? And can it do so if the infidelity of the husband does not have the same consequence?

The necessity stage is perhaps the most important in this application. The decision-maker would need to demonstrate: first, that criminalisation and nothing else could achieve the aims that are sought to be achieved, and secondly, that the conduct merits the severity of the criminal sanction. Here, Justice Malhotra's suggestion that the State should be minimalistic in criminalising conduct becomes relevant. The question then becomes, if a person has sex with a married woman, does he deserve to go to jail for it? Would civil consequences, such as the option to divorce on the ground of adultery, not suffice?

And finally, the balancing stage would require the decision-maker to demonstrate that the degree to which the criminal sanction infringes upon personal liberty is not disproportionate to the harm sought to be addressed. This would be relevant not only in decisions to (de)criminalise, but also in prescribing potential sentences for the proscribed conduct. At this stage, then, the burden on the decision-maker is to show that, for instance, the enforcement of public morality (even assuming that is a legitimate goal) justifies the stigma, repression, and assault on non-heterosexual/ heteronormative identities that results from criminalisation.

This roadmap can, in my opinion, ensure that decisions to criminalise or decriminalise conduct are principled, consistent, and respectful of personal liberty, freedom, dignity, and autonomy. It can ensure State minimalism and restraint in criminalisation so that criminal law is not reduced to the whims of the legislature. It can help distinguish conduct that is unethical, from that which is unconstitutional, and both of these from conduct that is worthy of criminal sanction, and by so doing, single out conduct that may validly be (de)criminalised.

15

Upholding Constitutional Values During COVID-19

S.S. Naganand and Sharada Naganand*

The role of the judiciary in our society has dramatically changed over the past 15 months. As an organ of the State, it has splendidly risen to the challenges faced in the light of the COVID-19 pandemic in many ways. The raging pandemic has severely affected the rights guaranteed under the Constitution of India and the constitutional values that are paramount. This chapter will address the sweeping and unprecedented changes that have occurred in these past months, the manner in which the judiciary has responded, and its effects on the society we now find ourselves in.

The Functioning of Constitutional Courts prior to and during COVID-19

The Indian Constitution clearly demarcates the three wings of the State, namely, the legislature, the executive, and the judiciary. The unprecedented pandemic of COVID-19 has disrupted the entire world. The lives of people have completely changed. It has not made any distinction between rich or poor, black or white, race or religion. Article 14 of the Constitution of India, 1950 has been applied with precision and perfection by the pandemic.

Like all emerging economies, India is struggling to bring about an egalitarian society with social, economic, and political rights being assured to all human beings by means of a well-written, intricate, and effective Constitution which is now over 70 years old. Though 70 years is not a long time in the life of a nation, from its colonial past to the stage of a sovereign, socialist, secular, democratic republic, India has made vast strides. With the demographic advantage of being the second most

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 21 January 2022.

populous country in the world, following China, India has had its own unique advantages and problems. Though India was subjugated by its colonial masters for 200 years, a brief study of that period would indicate clearly and unambiguously that the colonial rulers had no desire to ameliorate the dismal plight of the citizens subjugated by them. While some institutions were set up for basic governance, such as healthcare, education, and employment, the eradication of hunger and economic progress was not within the zone of consideration. The geographic spread of the country and the sharp division between the rural and urban population, due to the predominantly primitive agrarian economy, accentuated the problems of the country even during normal times.

Among the many institutions set up by our erstwhile colonial rulers, the judiciary was modelled on the common law framework, with a hierarchical judicial system. For the protection of contractual, industrial, family, and the whole branch of civil rights, the remedy was through the subordinate judiciary which was organised in three tiers below the High Courts. For the criminal justice system, there was a similar three-tier mechanism. For the protection of constitutionally guaranteed fundamental and other rights, the High Courts in every state were charged with the responsibility of redressing the grievances of citizens.

The constitutional scheme in India was such that the Supreme Court and the High Courts were granted independent constitutional jurisdiction. The Supreme Court under Article 32 had the power to issue directions, orders, or writs to protect fundamental rights and the High Courts were given a wider perspective, to look at all infractions under Article 226. Irrespective of whether these rights stemmed from state or central laws, both courts had concurrent jurisdiction. The unwritten code that was followed was that if there was an issue that was being considered by the Supreme Court, the High Courts normally would not intervene and would refrain from passing orders on the same until the Supreme Court had decided the issue, unless the Supreme Court itself, directed that the High Court could proceed to examine it.

The High Courts also dealt with a large volume of litigation, relating to several other fields such as company law, taxation, succession, and judicial review. Most states had a High Court in a single geographical location within a state. Some High Courts had more than one locational bench within the state. For the entire country, there was a single apex court that was established.

For the system to run efficiently, the workload in all these courts was an important factor to consider. For example, the number of judges, per thousand of the population and the number of cases per judge, would be clearly indicative of the efficiency of the system. On both these counts, India's record is dismal. Though the

State is the largest litigant, and is also a cause for litigation, no effective mechanism is in place, nor is there any serious endeavour made, to analyse and resolve the problems created by the various State agencies, which has resulted in enormous delays in effective judicial adjudication of disputes.

This problem was rather acute and had reached alarming proportions even before the pandemic. Several committees and commissions had studied the problem and had given erudite reports and suggestions. Some attempts had been made to redress the situation, though these efforts have remained largely insufficient to tackle a problem of this magnitude.

While the constraints of the judicial system loomed large, the economic position of the State also caused significant alarm among economists. Several measures were taken to improve this aspect as well, but to move an elephant, an army of ants cannot succeed. The conundrum of the economic and fiscal constraints on the executive is somewhat complex and is akin to the chicken and egg question. The executive is juggling too many balls that are moving at an fast pace, leading to the juggler becoming breathless. The lack of adequate, committed and efficient manpower in the State sector is the bane of the Indian executive. While there are many extraordinary officers who are extremely committed and honest, it is a common experience that finding such officers is like trying to find a needle in a haystack.

The legislature both at the central and state level also faces similar constraints. The calibre of the members of the legislature, over the years post-Independence has dwindled to an abysmal level. The emphasis on electoral reforms has not been adequate. With a large number of illiterate and uneducated voters, political parties, without exception, have resorted to foul methods of winning over citizens through monetary and other enticements. This is the scenario in which India was when the pandemic struck. The constraints faced by the country were soon to be accentuated and would seriously impede the functioning of all three wings of the State.

While the Constitution guaranteed several fundamental rights to the citizens, most importantly, the right to life and liberty under Articles 19 and 21, the pandemic made it impossible for citizens to enjoy these rights. It had a domino effect on every aspect of one's life—it impeded economic activity, the liberty to move around freely, the right to earn a livelihood, and access to medical care, etc. Unlike many western governments in advanced economies, where the State could afford to compensate its citizens whose earnings were affected, this was an impossibility in India. The sheer magnitude of the problem left the State in a helpless condition. The complete lockdown, which was first announced on 22 March 2020, was

initially made out to be a temporary measure, but fifteen months later, it turned out to be more or less a permanent feature.

The role of the State in protecting its citizens and providing the basic necessities of life has come into sharp focus. While the executive is grappling with this enormous problem with limited resources, as the situation emerges, it seems that like everyone else, the State is trying to find a black cat in a dark room with its eyes blindfolded. The reason for this is that the pandemic came unannounced and has kept everyone guessing while raging unabated on the world over, baffling the medical profession, the administrators, the executive, and the legislature. The laws in place were found to be archaic, insufficient, and ineffective. The fears of the populace were insurmountable. The tragic loss of a large number of young and old was heart-wrenching.

In this context, the judiciary's role in protecting the rights of the citizens, interpreted in the context of migrant labourers, universal medical insurance, access to healthcare, medicines, and vaccines; as well as economic rights, in the context of individuals facing huge losses in business, the effects of the pandemic on private hospitals, the plights of vaccine manufacturers, etc, has come to the fore.

In this scenario, the judiciary has emerged as the lone sentinel, like the boy who stood on the burning deck of Casabianca and tried to keep the flag of its citizens' rights fluttering to some extent.

The Judiciary 2.0—Judicial Activism during COVID-19 and the Emergence of a New and Improved Judiciary

While the executive scrambled all the jets to confront the enemy aircraft which had intruded into its airspace, it found that the pilots had suddenly turned blind, the aircraft had flat tyres, the fuel supply had run out, and there were no armaments to be loaded onto the aircraft to protect the country. This meant that the pandemic had invaded the country, and the medical infrastructure was not sufficient, the manpower in the form of doctors and paramedics was ill-equipped; medicines, oxygen, and other supplies were not forthcoming, and even if all of this was available, it was not possible to muster up a stiff fight as no one had proper knowledge or information about the disease, its progression, and prognosis.

In this scenario, the helplessness of the executive stirred the judiciary into action. The expansive jurisdiction of the courts in the form of public interest litigation (PIL) was resorted to by the High Courts and the Supreme Court. The executive at every level was called into question. The inaction of the executive was

viewed seriously and where appropriate, specific directions were given. The High Court of Karnataka in, *Mohammed Arif Jameel* v. *Union of India* WP No. 6435/2020,[1] issued a slew of directions on relief measures during the lockdown, while considering various factors ranging from measures taken to protect vulnerable communities, migrant workers, residents of slums, etc. as well as access to food and essential commodities, medical supplies, animal welfare, and parole for incarcerated prisoners during COVID-19. In keeping with the emergent need of the times, the Court passed several interim orders to tackle the various immediate issues that arose through the pandemic, on an urgent basis, such as the Interim Order dated 30 March 2020 in which the High Court issued directions to the government to take a decision and formulate an action plan to ensure the supply of rations to those without ration cards on the basis of identification documents. On 9 April 2020, the High Court issued another Interim Order in the case to ensure that two months pension was paid to the transgender population under the Mythri Scheme.

Courts also sensitised the various officers and agencies who had statutory duties to act within their powers, mindful of their constraints, in order to provide some succour in difficult times. Many High Courts took up cases on their own, by way of *suo motu* proceedings, and also allowed public-spirited citizens, non-governmental organisations, and people's representatives to air the problems of vast sections of society who were adversely affected and who had no means to seek redress.

In the case of *Court on its Own Motion* v. *State, Through Chief Secretary,*[2] the High Court of Tripura initiated a *suo motu* PIL requiring the state administration to provide data with respect to whether there was a scientific model in place to predict with reasonable accuracy the peak number of corona positive cases per day, thereby predicting the required number of hospital beds and oxygen requirement. The High Court also directed the State to provide information pertaining to the availability of remdesivir and other lifesaving drugs. The Court also questioned the state's preparedness with respect to paediatric COVID-19 patients and whether special arrangements had been made to cater to their care.

In *Reference (Suo Motu)* v. *Union of India,*[3] the High Court of Madhya Pradesh directed the state government to place information on record with respect to the number of ventilators obtained under the PM Cares Fund and how many were

1. 2020 SCC OnLine Kar 425.
2. 2021 SCC OnLine Tri 265.
3. 2021 SCC OnLine MP 935.

functional. The Court also sought the state government's response on the fixation of a cap on charges in private hospitals for COVID-19 patients.

PILs were filed on a vast array of issues, such as the rights of people to file proceedings when limitation was running out, or others dealing with COVID-19 insurance, etc. In *Reepak Kansal* v. *Union of India,* WP. (Civil) No. 554/2021,[4] the Supreme Court of India directed the Union of India to launch the National Insurance Scheme for Disaster Related Deaths in India that was recommended in the Finance Commission's 15th Report, which would also act as a social protection scheme.

The courts, by their directions, were able to take cognisance of and address these issues during the pandemic by effectively directing governmental authorities, monitoring them, and channelising the required government machinery that was still grappling with the magnitude of the problem.

In WP (PIL) No. 1961/21, *Sitwanto Devi Mahila Kalyan Sansthan* v. *The State of Jharkhand,*[5] the High Court of Jharkhand passed an order to ensure that the guidelines on the management of dead bodies were followed, in view of the vast number of dead and the resultant improper disposal of bodies. It also issued directions to ensure that the bodies of those that died due to COVID-19 were handed over to their kith and kin for their families to perform last rites as per their religious customs.

In *PIL (Suo Motu) No. 3/2021* dated 10 May 2021,[6] the Gauhati High Court unconditionally extended a host of Interim Orders passed by it during the second wave of the COVID-19 pandemic. It also held that any decree for eviction/ dispossession or demolition which was passed by any court, tribunal, or authority during this period would remain in abeyance. It also extended the bail granted to the accused in criminal cases that would expire.

Large sections of society were forced to migrate in difficult circumstances in the fond hope of protecting their life and surviving the pandemic. The courts played an important role in trying to find ways and means of getting them some relief. Several High Courts examined the peculiar problems in their respective territories. In the first wave of the pandemic, towards the latter half of the year 2020, the problem of migrants returning en masse to their hometowns led to acute distress. Instances of a large number of people walking with their belongings for thousands of kilometres

4. 2021 SCC OnLine SC 443 (Supreme Court of India) decided on 30 June 2021.
5. SCC Online Blog. 2021. 'Family members permitted to perform religious rituals and last rites according to COVID-19 Guidelines on Dead Body Management but cannot dispose the dead body by themselves', *SCC Online Blog*, 2 July, available online at <https://www.scconline.com/blog/post/tag/religious-rituals/> (accessed on 14 December 2022).
6. Available online at <https://ghconline.gov.in/General/Notification-10-05-2021-2.pdf>.

also came to light. The courts had to grapple with the role of the State to provide some relief in the form of free rail travel, food en route, etc.

In the case of *In Re: Problems and Miseries of Migrant Laborers,*[7] the Supreme Court of India directed that a Common National Database be established for all organised workers in the country, in order to ensure that such workers are able to access and reap the benefits of various government schemes. The Court also directed the government to provide dry rations and access to a community kitchen for the stranded migrant workers under the Atma Nirbhar or other schemes. The state governments were also directed to file affidavits indicating the mechanism by which dry rations would be distributed to migrant workers who did not possess a ration card.

The suddenness of the pandemic led to a situation where there was no preventive vaccine or any medication to cure the disease. Social media and the conventional media were agog with discussions, viewpoints, half-baked medical information, and scenes of distress.[8] The courts often took note of these reports and appointed committees or called for reports from governmental and other agencies about the veracity of these media reports, and the extent of relief that was planned.

In the case of *In Re: Distribution of essential supply and services during the pandemic*, *Suo Motu* WP (Civil) No. 3/21,[9] the Supreme Court, while considering the plight of individuals seeking help on COVID-19 support platforms, who were targeted on social media and harassed, directed the central and state governments to notify all Chief Secretaries/Directors General of Police/Commissioners of Police that any harassment caused to such individuals would attract the coercive exercise of jurisdiction by the Court. The Court also noted the unprecedented humanitarian crisis that the pandemic had wreaked, and considered and issued directions on various other aspects as well, including medical infrastructure, oxygen availability and allocation, vaccine pricing and disbursal, potential of compulsory licensing of vaccines, the supply of essential drugs and black marketing, etc.

The lockdown measures also led to many protests that employees in the unorganised sector and self-employed sector bore the brunt of economic distress with loss of jobs, business, earnings, and means of sustenance. The courts goaded the

7. 2021 SCC OnLine SC 398.
8. *Hindustan Times*. 2021. 'Will treat action against social media Covid appeals as '"contempt of court": SC', *Hindustan Times*, 30 April, available online at <https://www.hindustantimes.com/india-news/will-treat-action-by-states-against-people-s-appeals-on-social-media-as-contempt-of-court-sc-at-covid-19-hearing-101619767976766.html> (accessed on 14 December 2022).
9. Available online at <https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_27825_ Judgement_30-Apr-2021.pdf> (accessed on 14 December 2022).

executive to provide relief in the form of rations,[10] food security,[11] medicines,[12] and medical treatment. A number of medical facilities were set up *ad hoc* to cater to the flood of victims who needed hospitalisation.[13] The monitoring mechanism was under strain and courts supervised the handling of the pandemic and were sometimes extremely harsh. Many orders passed by the courts required huge resources which the State did not possess.[14] The medical fraternity and the paramedics were overburdened. Private medical establishments were forced to surrender a part of their facilities for the treatment of patients and a spate of litigation came before the courts relating to the right of the State to commandeer private medical establishments for free treatment.[15] There were parallel proceedings before many High Courts relating to the supply of essential medication. As the first wave subsided, though a second wave was predicted by virologists, the State relaxed its stand in order to restore a semblance of normalcy. This led to complete

10. *In Re: Problems and Miseries of Migrant Laborers*, 2021 SCC OnLine SC 398.
11. *In Re: Problems and Miseries of Migrant Laborers*, 2021 SCC OnLine SC 398.
12. *In Re: Distribution of essential supply and services during the pandemic*, *Suo Motu* WP (Civil) No. 3/21, available online at <https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_27825_ Judgement_30-Apr-2021.pdf> (accessed on 14 December 2022).
13. Soumya Chatterjee. 2021. 'Karnataka HC tells govt to submit vision plan to tackle third wave of COVID-19', *The News Minute*, 13 May, available online at <https://www.thenewsminute.com/article/karnataka-hc-tells-govt-submit-vision-plan-tackle-third-wave-covid-19-148739> (accessed on 14 December 2022);
    Telangana Today. 2021. 'Telangana HC orders ad-hoc renewal of Virinchi Hospitals' licence', *Telangana Today*, 13 May, available online at <https://telanganatoday.com/telangana-hc-orders-ad-hoc-renewal-of-virinchi-hospitals-licence> (accessed on 14 December 2022).
14. Akshita Saxena. 2021. '"State Inaction In Providing Healthcare To Citizens Violates Article 21": Patna High Court Directs State Human Rights Commission To Conduct Surprise Inspections At Covid Hospitals', *LiveLaw*, 21 April, available online at <https://www.livelaw.in/news-updates/patna-high-court-healthcare-covid-article-21-inspections-at-covid-hospitals-human-rights-commission-172886> (accessed on 14 December 2022). Aneesha Mathur. 2021. 'Cannot pay Rs 4 lakh compensation to Covid victims, would exhaust disaster funds: Centre tells SC', *India Today*, 20 June, available online at <https://www.indiatoday.in/coronavirus-outbreak/story/centre-supreme-court-on-rs-4-lakh-compensation-for-covid-victims-1817101-2021-06-20> (accessed on 14 December 2022).
15. *Hindustan Times*. 2021. 'Karnataka asks hospitals with over 30 beds to designate 80 per cent for Covid patients', *Hindustan Times*, 22 April, available online at <https://www.hindustantimes.com/cities/bengaluru-news/karnataka-asks-hospitals-with-over-30-beds-to-designate-80-for-covid-patients-101619072803106.html> (accessed on 14 December 2022);
    The Economic Times. 2020. 'Government classifies health facilities into 3 categories for COVID-19 patient care', *The Economic Times*, 7 April, available online at <https://economictimes.indiatimes.com/news/politics-and-nation/government-classifies-health-facilities-into-3-categories-for-covid-19-patient-care/articleshow/75033608.cms> (accessed on 14 December 2022).

callousness on the part of every section of the community which probably hastened the advent of the second wave.

The courts' proactive role in upholding the fundamental rights of the citizens continued with monitoring the availability of oxygen[16] and pushing the government to investigate negligence by the administrators leading to mass casualties. The allocation of central resources to the states, particularly medical oxygen, was the subject matter of many cases before the various High Courts and the Supreme Court even set up a 12-member National Task Force to monitor the supply of oxygen to the states and Union Territories.[17] At that stage, the Supreme Court *suo motu* decided to monitor and regulate the process. This led to severe criticism of the action of the Supreme Court in trying to restrict the High Courts from continuing to exercise their constitutional power. The Supreme Court thereafter made it clear that the pendency of proceedings before the Supreme Court would not in any way affect the role of the High Courts which were free to continue their monitoring.[18]

Though the courts have gone above and beyond in their effort to alleviate the suffering of the people through the course of this humanitarian crisis, by issuing directions and orders on a wide array of issues, they have also had to consider the best interests of the State whose resources have been stretched to the limit in the effort to quell the contagion of COVID-19. In a recent PIL before the Supreme Court, the central government filed a lengthy affidavit on the question of whether ex-gratia payment of Rupees four lakh may be paid to the victims of COVID-19 by the central government, stating that the utilisation of scarce government resources to

16. *In Re: Distribution of essential supply and services during the pandemic*, *Suo Motu* WP (Civil) No. 3/21, available online at <https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_27825_ Judgement_ 30-Apr-2021.pdf> (accessed on 14 December 2022); *Union of India* v. *Rakesh Malhotra*, SLP No 11622/2021 before the Supreme Court, decided on 5 May 2021, available online at <https://main.sci.gov.in/supremecourt/2021/11622/11622_2021_35_1_27996_Order_ 05-May-2021.pdf> (accessed on 14 December 2022).
17. Prachi Bhardwaj. 2021. National Task Force for allocation of oxygen to States: Who are the experts and what will they do? Here's all you need to know', *SCC Online Blog*, 9 May, available online at <https://www.scconline.com/blog/post/2021/05/09/covid-19-national-task-force-for-allocation-of-oxygen-to-states-who-are-the-experts-and-what-will-they-do-heres-all-you-need-to-know/> (accessed on 14 December 2022).
18. R. Balaji. 2021. 'Anti-Covid measures: Supreme Court clarifies after criticism from lawyers' bodies', *The Telegraph Online*, 24 April, available online at <https://www.telegraphindia.com/india/anti-covid-measures-supreme-court-clarifies-after-criticism-from-lawyers-bodies/cid/1813490> (accessed on 14 December 2022); Mehal Jain. 2021. ' "We Are Not Overtaking The Powers Of High Courts Or The Executive": Read The Full Courtroom Exchange In Supreme Court's *Suo Motu* Covid Matter', *LiveLaw*, 27 April, available online at <https://www.livelaw.in/top-stories/supreme-courts-suo-motu-covid-matter-powers-of-high-courts-or-the-executive-173213> (accessed on 14 December 2022).

give ex-gratia compensation would have the unfortunate consequence of affecting pandemic response and health expenditure in other aspects and cause more damage than good.[19] The central government also submitted in the case that the payment of said compensation would exhaust all disaster relief funds available to the government. Combatting the pandemic has resulted in grave fiscal constraints for both the centre and the states. Courts, as organs of the State, have had to remain cognisant of their duty to be conscious of this fact while passing orders.

The courts have, on multiple occasions, considered the issue of waiver of interest on bank loans.[20] The question to be considered then follows as to the effects of such waivers on banks and financial institutions. Who will face the consequences of such waivers if issued, since banks, including public sector banks, have also suffered grave losses through the course of the pandemic? To some extent, the courts have tried to provide some relief in certain cases. However, there is no standard rule to be applied in all cases. The courts are not in possession of a magic wand by which they can alleviate all the problems of all the parties. They can only channelise the resources available in the State and make sure that they are used efficiently and equitably. One such instance is that of the case of *Small-Scale Industries Manufacturers Association* v. *Union of India,*[21] in which the Supreme Court held that there would not be any charge of interest on interest, compound interest, or penal interest from any borrowers who availed of the RBI's loan moratorium scheme between 1 March 2020 and 31 August 2020 during the COVID-19 lockdown. The Court, however, denied the plea to extend the moratorium period and also denied the grant of a total waiver of interest.

The Judiciary's Advent into the 21st Century

Large sections of employees in the State and non-State sectors were themselves infected by COVID-19, leading to hospitalisation, isolation, quarantine, and a large number of fatalities. Many breadwinners lost their lives. The number of people working decreased, both in the government and in the judiciary. The staff required

19. Aneesha Mathur. 2021. 'Cannot pay Rs 4 lakh compensation to Covid victims, would exhaust disaster funds: Centre tells SC', *India Today*, 20 June, available online at <https://www.indiatoday.in/coronavirus-outbreak/story/centre-supreme-court-on-rs-4-lakh-compensation-for-covid-victims-1817101-2021-06-20> (accessed on 14 December 2022).
20. Prabhjote Gill. 2021. 'India's Supreme Court waives compound interest on ALL loans put under moratorium due to COVID-19 pandemic', *Business Insider*, 23 March, available online at <https://www.businessinsider.in/finance/banks/news/indias-supreme-court-waives-compound-interest-on-all-loans-put-under-moratorium-due-to-covid-19-pandemic/articleshow/81645705.cms> (accessed on 14 December 2022).
21. 2021 SCC OnLine SC 246.

to efficiently run the system was just not available. The courts had to innovate, which they did admirably well. The reluctance to use modern tools of communication slowly gave way to the adoption of video conferencing as a mode of hearing in the High Courts and in a limited manner before the subordinate courts and tribunals.

While one section of the stakeholders welcomed this, large sections opposed the move and clamoured for restoration of status quo ante or physical hearings. That was not possible due to the lockdown and the restrictions on the movement of people. The adoption of modern communication tools like Zoom, Cisco Web-Ex, Microsoft Teams, Jitsy, Blue Jeans, etc. pushed the lawyer community to adapt to the changing times. Many lawyers did not have the hardware to do so. The Supreme Court set up video conference facilities that lawyers could use free of charge to participate in court hearings. Judges often stepped down from their ivory towers and did not hesitate in using other communication tools such as cell phones, WhatsApp, etc. to communicate with lawyers in the course of hearings. Many High Courts switched over seamlessly and continued their hearings as efficiently as the old system of physical appearance. Many lawyers benefitted by being able to appear in courts in multiple geographical areas while sitting in the comfort of their homes or offices with two to three screens in front of them. The archaic court system of filing hard copies slowly gave way to electronic filing and rules of procedure were liberalised to enable the courts to continue their role. New-age technology was embraced and made full use of through the course of the pandemic.

In order to prevent overcrowding, the Supreme Court and the High Courts passed many general directions extending the period of limitation, in many cases, during the continuance of the lockdown. The courts developed an attitude of being extraordinarily considerate to requests for adjournments on grounds of ill health, quarantine, isolation, or death among the lawyer and client community. Non-appearance of parties was no longer a ground to dismiss cases or pass adverse orders. In contrast, these concessions could not be fathomed prior to the pandemic when the courts were far stricter and these requests would be viewed as diversionary tactics. In this milieu, a large number of cases were heard by the Supreme Court, the High Courts, and the subordinate courts. Many important constitutional litigations were effectively heard by the Constitution Bench of the Supreme Court and other benches and were effectively resolved, such as the case of *Tamil Nadu Medical Officers Association* v. *Union of India*.[22] The system of hybrid hearings with one of the parties appearing in person and the opposite party through video conferencing was also innovated.

22. 2020 SCC OnLine SC 699.

The judiciary showed great statesmanship and resilience and worked under great constraints of the fear of infection, inadequate staff, and pressure of work, but it did not falter. No doubt, there were constraints, especially in the subordinate courts and the criminal courts due to the difficulty of holding trials and systemic constraints of effective video hearings. These were inevitable having regard to the nature and magnitude of the problem. Many arbitral tribunals switched to virtual mode and found ways and means of even conducting elaborate trials during the pandemic, with lawyers, arbitrators, clients, and witnesses sitting in different locations.

While the judiciary innovated, its actions were often highlighted. How far can the courts go? How equipped are the courts to supervise policy and executive action? What is the role of the State, given its economic constraints, to give financial support to the citizens in distress? Can medical facilities be set up by the fiat of a court? Who will govern the rights of the medical fraternity and grant them succour when they become victims of the pandemic?—these are some of the questions that were raised in the face of the evolving role of the judiciary, whose answers are not easy or clear. With each order that gets resistance from the executive or public criticism, the courts reconsider their stand, and a self-imposed restriction by the courts seems to be the middle path. In the extraordinary circumstances that have arisen, the judiciary, which includes the fraternity of lawyers, has performed to the best of its ability in ensuring that the Constitution is protected and enforced.

Failure of the Criminal and Civil Justice System during COVID-19

The severe restrictions on the movement of people during the lockdown, coupled with the archaic manner in which the courts function and court records are kept, has led to a complete breakdown of the civil and criminal justice system at the lowest rung of the ladder. Modern telecommunication facilities have not reached every nook and corner of the country except for large metropolitan areas where power supply is guaranteed 24 hours a day. The far-flung areas, such as semi-urban and rural areas are plagued by frequent disruptions in power supply. The curtailment of public transport systems in both cities and rural areas alike has severely restricted the movement of clients as well as lawyers. The inability of the infrastructure in the subordinate courts to switch over to modern tools and the lack of training for judicial officers has led to a situation where cases have only multiplied and are not being resolved. These constrictions have resulted in an increase in the arrears on the courts which are bound to take a very long time to be overcome even after normalcy has resumed.

A large number of accused and convicted persons who are in jail have no means of securing bail. In some cases, High Courts have come to their rescue and directed the release of undertrial and convicted persons whose appeals are pending in order to reduce the population of inmates in jails. In the case of *In Re. Contagion of Covid Virus in prisons in the State of Andhra Pradesh, Suo Motu* WP 10151/2021[23] dated 7 May 2021, the High Court of Andhra Pradesh in view of the second wave of the COVID-19 pandemic, directed that all convicts and undertrial prisoners that were readmitted to prisons after being released on bail the previous year be released on interim bail of 90 days.

Several directions have been issued by High Courts to vaccinate prisoners and those in employment of prisons and to ensure adequate medical care for them. The Gauhati High Court in the case of *Lawyers Association Guwahati* v. *The State of Assam,* PIL No. 24/2020[24] stated that caretakers of juvenile centres were akin to 'frontline warriors' and directed that they be vaccinated for their safety and also for the safety of the juveniles.

Expansion of Right to Life and the Role of the State

The cornerstone for the exercise of constitutional jurisdiction by the High Courts is Article 226 of the Constitution of India, 1950. It empowers the High Courts to issue high prerogative writs for the purpose of enforcing constitutional rights. Part III of the Constitution of India, 1950 guarantees certain fundamental rights to citizens, one of them being the right to life under Article 21. The role of the State in protecting the lives of its citizens has come to the fore during the pandemic. Since India does not have any system of medical insurance for all citizens and that is left to the individual decision of the citizen, in the case of the poorest sections of society, the question has been raised as to whether the State should support them by providing food and shelter, and most importantly medical care. The State did assume this role but when the measures taken were found to be arbitrary, inadequate, or sporadic, courts stepped in and sought to protect the right to life of the citizens.

In *Registrar General* v. *The State of Meghalaya,*[25] decided on 23 June 2021, a Division Bench of the High Court of Meghalaya considered the question of whether vaccination can be made mandatory and whether such mandatory action could

23. *In Re : Contagion of COVID 19 Virus in Prisons*, available online at <https://main.sci.gov.in/supremecourt/2020/9761/9761_2020_31_301_27999_Order_07-May-2021.pdf> (accessed on 14 December 2022).
24. *Lawyers Association, Guwahati* v. *The State of Assam*, PIL No. 24/2020 (Gauhati High Court) decided on 19 May 2021, available online at <https://www.livelaw.in/pdf_upload/gauhati-hc-juveniles-vaccination-393019.pdf> (accessed on 14 December 2022).
25. 2021 SCC OnLine Megh 130.

adversely affect the right of a citizen to earn his/her livelihood. The court while acknowledging that the right to health care, which includes vaccination, as a fundamental right also considered whether mandatory vaccination or vaccination by the adoption of coercive methods vitiated the very purpose of the welfare attached to it. It acknowledged that

> Any action of the State which is in absolute derogation of this basic principle is squarely affected by Article 19(1)(g). Although, Article 19(6) prescribes 'reasonable restrictions' in the 'interest of general public', the present instance is exemplary and clearly distinguishable. It affects an individual's right, choice, and liberty significantly more than affecting the general public as such or for that matter, the latter's interests being at stake because of the autonomous decision of an individual human being of choosing not to be vaccinated.

The Court finally held that the burden lay on the State to disseminate correct information and sensitise citizens of the entire exercise of vaccination with its pros and cons in order to facilitate informed decision making, particularly when the beneficiaries have been fed with deliberate misinformation regarding the efficacy of the vaccination by entities with oblique motives.

There has been a complete failure on the part of the central and state governments across the country to enforce and ensure compliance with COVID-19-appropriate behaviour despite the harsh lessons learnt during the first wave. The various governments have on multiple occasions, in keeping financial and economic considerations at the forefront, chosen to ignore the humanitarian repercussions of the pandemic, which has taken the lives of countless citizens leading to a situation that is now being referred to as a crime against humanity. The question remains as to whether the State, as the body that has the responsibility of safeguarding the right to life of all its citizens could be held responsible for the resultant horrors that these decisions have affected. The disaster management machinery of the State completely broke down and was unable to act to alleviate the effects of the pandemic even to a small degree. Despite having a lead time of over three months advance warning, as the world came to know of the extent of the contagion of the virus of COVID-19 in December 2019, the government, and the disaster management machinery of the State, failed to take pre-emptive measures to prevent its spread in the country and it was only months after its virulent proliferation in India that the government announced the first national lockdown.

While the government has, to a large extent, been unsuccessful in protecting the population, the judiciary has stepped in and done what it could in the circumstances. To what extent the courts can effectively change the governance structure, however, has been the subject matter of intense debate. Unless some statute vests certain specific rights, can the judiciary be expected to assume the

omnibus role of protecting all citizens' lives even if that is beyond the capacity of the judiciary? In a recent case being heard before the Supreme Court,[26] the central government filed an affidavit addressing the subject of excessive judicial intervention, stating that there was 'little room for judicial interference' in a global pandemic where the strategy of the nation was driven by expert medical and scientific opinion. It also stated that 'any overzealous, though well-meaning, judicial intervention' could lead to unforeseen and unintended consequences'.

Though the governments' have not denied their role, the courts have pulled up the government for failing to act in a rational, objective, and reasonable manner in the discharge of this obligation. Many irrational actions of the government have been questioned by the courts. The national policy on vaccination throughout the country too has led to considerable litigation. The government has revisited the policy of providing free vaccination to all citizens above 18 years of age, entailing a very large expenditure. Though the courts are aware of their inherent limitations, they have been providing the necessary impetus and push for a national policy to fight the pandemic and to protect the constitutional rights of the citizens as far as possible.

The proactive role the judiciary has assumed through the course of the pandemic has certainly had the effect of upholding the rule of law and thereby, constitutional values. The courts have worked tirelessly towards ensuring that all citizens have equal protection of the law by striving towards universal oxygen supply, speedy and widespread vaccination, etc. The courts have also upheld the value of fraternity enumerated in the Indian Constitution or brotherhood by refusing preferential treatment for COVID-19 care[27] and insisting on treatment equivalent to the medical treatment meted out to the common man. The pandemic, the various situations that arose in its wake, and the actions of each State body that followed, reinforced the objectives behind Montesquieu's Doctrine of Separation of Powers and the Doctrine of Judicial Independence by providing the courts with multiple occasions to act as a check and balance on the executive. The courts did on innumerable occasions exercise their powers of judicial review and judicial activism through the various orders passed and reliefs granted towards alleviating the havoc wreaked by the pandemic. The judiciary through the course of COVID-19, certainly lived up to the

26. Dhananjay Mahapatra. 2021. 'Centre pushes back at Supreme Court, warns of '"overzealous judicial intervention"', *The Times of India*, 11 May, available online at <https://timesofindia.indiatimes.com/india/centre-pushes-back-at-sc-warns-of-overzealous-judicial-intervention/articleshow/82537296.cms> (accessed on 14 December 2022).
27. Srishti Ojha. 2021. ' "Its Unthinkable,We Never Asked For Any Preferential Treatment": Delhi High Court Slams Delhi Govt For its Order Giving 5-Star Covid Facility For Judges', *LiveLaw*, 27 April, available online at <https://www.livelaw.in/top-stories/delhi-high-court-slams-delhi-govt-for-its-order-giving-5-star-covid-facility-for-judges-173220> (accessed on 14 December 2022).

intent of Dr B.R. Ambedkar, the Chairman of the Drafting Committee of the Constitution of India, who encapsulated the kind of judiciary that the Constitution of India would afford to the people of India in the following words. There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself.

The courts have cracked the whip on many occasions and ensured adherence to COVID-19 protocol, rules, and regulations established for the welfare of the population at large. By ensuring that people follow the law, wear masks, only indulge in COVID-19-appropriate behaviour, and penalising violations of these laws, the courts have been constant defenders of the rule of law. Where the government has fallen short, the courts have stepped in. These actions have benefitted large sections of the society, who may not have approached the court in their own right, either due to ignorance, poverty, or financial or other reasons. Public spirited people have stepped in, by filing a multitude of PILs which the courts have examined while ignoring normal rules of *locus standi* on many occasions, and in so doing have ensured that not only legal but constitutional rights are given effect. The result of this paradigm shift in the role of the judiciary is surely that people's access to justice, a necessity of the utmost importance in these trying times, has not only remained steadfast but perhaps has even improved.

16

Administering Virtual Justice in Times of Suffering during COVID-19

Varsha Mahadeva Aithala and Siddharth Peter de Souza*

We have never before seen a pandemic sparked by a coronavirus. This is the first pandemic caused by a coronavirus. And we have never before seen a pandemic that can be controlled, at the same time…This is not just a public health crisis, it is a crisis that will touch every sector – so every sector and every individual must be involved in the fight...

—WHO Director-General's opening remarks at the media briefing on COVID-19 (11 March 2020)

Introduction

The pandemic has caused widespread devastation in India, both during its first and second waves. The first wave evoked images of migrant workers leaving cities in huge numbers because of the lack of access to basic food, shelter, and employment. In the second wave which took place between March and May of 2021, a common thread was the lack of access to hospital beds, shortage of oxygen cylinders, desperation for medicines, and a peer-to-peer plea for help across social media and other platforms as the State machinery simply did not respond adequately. The pandemic struck and impinged several fundamental rights including the right to health care, in terms of access to medication or protections for frontline workers; right to privacy, in terms of contact tracing apps; right to work and livelihood, in terms of pay; and the right to dignity, in terms of food, shelter, and even in respectful cremations.[1] The pandemic challenged how policy—in the

* All facts, references and descriptions of legal developments in this chapter are updated until and verified as on 27 March 2022.

1. The authors through their work at Justice Adda, have also worked on the C-HELP | Centre for Health Equity Policy Law and, 'C-HELP COVID-19 and the Constitution: A Timeline', available online at <https://covid-19-constitution.in/> (accessed on 23 November 2021); **(Footnote No. 1 contd.)**

forms of lockdowns, delayed payments, and health operating procedures—had implications for the material lives that people lived.

In 2020, in the early months of the lockdown, the then Chief Justice of India, Sharad Bobde, asked petitioners in a matter of ensuring payment to migrant workers 'why wages are required when meals are provided by the government',[2] a statement demonstrating a lack of understanding of the hardships that ordinary people were facing in the surge of the pandemic. Kalpana Kannabiran has argued how the courts, in multiple petitions, whether in terms of examining the necessity to provide accommodation for migrant workers, the urgency to take over private hospitals to ensure capacity, or even in advising the media to report according to the official developments of the government rather than critically and independently, demonstrated an unwillingness to take into account the disproportionate impact that the pandemic had on the poor and the suffering that was caused on account of it.[3]

In this chapter, we look at whether the courts took suffering seriously. In his seminal paper in the 1980s on social action litigation, Upendra Baxi advances how the Supreme Court transformed

> from a traditional captive agency with a low social visibility into a liberated agency with a high socio-political visibility is a remarkable development in the career of the Indian appellate judiciary… there is little prospect of the Court reverting to its traditional adjudicatory posture where people's causes appeared merely as issues, argued arcanely by lawyers, and decided in the mystery and mystique of the inherited common-law-like judicial process… people now know that the Court has constitutional power of intervention, which can be invoked to ameliorate their miseries arising from repression, governmental lawlessness and administrative deviance.[4]

(**Footnote No. 1 contd.**)
Vivek Divan. 2022. 'COVID-19 and the Constitution', *International Journal on Human Rights*, 31, available online at <http://https%253A%252F%252Fsur.conectas.org%252Fen%252Fcovid-19-and-the-constitution%252F> (accessed on 1 February 2022). This resource documents the implications that the pandemic has had on fundamental rights protections through analyzing policy, documenting personal narratives of people affected, and providing topical analysis.

2. *The Telegraph Online*. 2020. 'If meals are given…: Supreme Court's query', *The Telegraph Online*, 7 April, available online at <https://www.telegraphindia.com/india/if-meals-are-given-why-do-they-require-wages-supreme-courts-query-during-coronavirus-lockdown/cid/1762977> (accessed on 31 August 2021).
3. Kalpana Kannabiran. 2020. 'Justice and Rights In Viral Contexts In India', *The India Forum*, 28 April, available online at <https://www.theindiaforum.in/article/justice-and-rights-viral-contexts-india> (accessed on 4 June 2021).
4. Upendra Baxi. 1985. 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', *Third World Legal Studies*, 4, available online at <https://scholar.valpo.edu/twls/vol4/iss1/6> (accessed on 15 December 2022).

This regard for courts as institutions, which is vital to uphold social values and provide protections to those that are most vulnerable and without security, needs to be evaluated in the context of the pandemic. In the past year, several commentators have written about and evaluated the substantive interventions that the courts in India have made during the pandemic and how they were lacking.[5] In this chapter, we specifically explore some of the administrative decisions taken by Indian courts and evaluate the implications of these decisions on the fundamental principles of equity, transparency, and access to justice. We are interested in focusing on these administrative decisions because, as we will demonstrate, these decisions have not taken place in a vacuum, they become the basis for material impact on people's lives. For instance, recently, concepts of judicial evasion and judicial abdication have gained currency, where, by virtue of dealing with time-sensitive matters without urgency, courts end up taking a stance, primarily by benefitting the party in power.[6] We argue that administrative decisions are not purely technical decisions, but they are decisions that exist in a socio-political reality[7] which in turn affect how people have access to basic services, how they can enjoy their fundamental rights, and meaningfully participate in democratic processes.[8] In focusing on the administrative

5. Amal Sethi. 2021. 'Judging Under Extreme Conditions: A Court's Role During a National Crisis', *Social Science Research Network*, SSRN Scholarly Paper ID 3838579, available online at <https://papers.ssrn.com/abstract=3838579> (accessed on 7 December 2021); Kalpana Kannabiran, 'Justice and Rights In Viral Contexts In India'; Prachi Bhardwaj. 2020. 'SC says "system of Video Conferencing has been extremely successful"', 27 October; *SCC Blog*; Ajit Prakash Shah. 2020. 'Failing to Perform as a Constitutional Court', The Hindu, 25 May, online available online at <https://www.thehindu.com/opinion/op-ed/failing-to-perform-as-a-constitutional-court/article31665557.ece> (accessed on 31 August 2021); Apoorva Anand. 2021. 'COVID Has Exposed the Supreme Court's Utter Disregard for the Plight of Ordinary Citizens', The Wire, 24 April, available online at <https://thewire.in/law/supreme-court-covid-19-crisis-centre-high-courts-darkest-phase> (accessed on 31 August 2021); CHRI. 2021. 'Disconnected: Video Conferencing & Fair Trial Rights', CHRI, 13 May, available online at <https://www.humanrightsinitiative.org/publication/disconnected-videoconferencing-and-fair-trial-rights> (accessed on 15 December 2022); Upendra Baxi. 2020. 'Exodus Constitutionalism', The India Forum, 11 June, available online at <https://www.theindiaforum.in/article/exodus-constitutionalism> (accessed on 31 August 2021).
6. Gautam Bhatia. 2017. '"O Brave New World"': The Supreme Court's Evolving Doctrine of Constitutional Evasion', *Indian Constitutional Law and Philosophy*, 6 January, available online at <https://indconlawphil.wordpress.com/2017/01/06/o-brave-new-world-the-supreme-courts-evolving-doctrine-of-constitutional-evasion/> (accessed on 23 October 2019).
7. Usha Ramanathan. 2011. 'The Myth of the Technology Fix', *Seminar Magazine*, 617, available online at <https://www.india-seminar.com/2011/617/617_usha_ramanathan.htm> (accessed on 1 September 2021); Siddharth Peter de Souza. 2019. 'Towards a User-Centered Engagement with Law', *Südasien-Chronik - South Asia Chronicle*, 283.
8. See generally Sofia Ranchordas. 2021. 'Empathy in the Digital Administrative State', *Social Science Research Network*, SSRN Scholarly Paper ID 3946487, available online at <https://papers.ssrn.com/abstract=3946487> (accessed on 7 December 2021).

decisions of the courts, this chapter seeks to examine the inextricable link between these organisational aspects and the suffering that they can cause.

A key aspect of the pandemic response of the Indian courts was their switch to conduct proceedings virtually. The State claims that the video conferencing facility created under India's ambitious eCourts Mission Mode project has played a vital role in managing the justice system during the COVID-19 pandemic.[9] Following international practice, this was recommended as a measure to contain the spread of the coronavirus which was ravaging the country. The process of moving the courts to virtual modes was set out through Standard Operating Procedures (SOPs), which covered the basics—electronic filing of documents, processes for mentioning, listing, and hearing of matters through video or teleconference.[10] We examine the performance of the judicial system through an assessment of the working of the Supreme Court, select High Courts, and subordinate courts from March 2020 to February 2021, when courts mandated that matters be heard online through video or teleconferencing. For the purposes of our study, we looked at decisions ranging from (a) the managerial, in terms of determining Standard Operating Procedures for the courts, (b) the technical, in terms of determining what kind of technologies to use, and (c) the procedural, in determining the nature of what cases or hearings were heard. We offer a case study to review the impact of these decisions to conduct virtual proceedings and to understand their impact on different stakeholders. In doing so, we examine whether courts are taking adequate care and scrutiny in arriving at administrative decisions as well as the processes through which the decisions were arrived at.

In this chapter, we examine how the sudden shift to a different mode of working has impacted the rights guaranteed to every citizen and values protected by the Constitution. These include equality, non-discrimination, dignity, fairness in treatment, and protection for the rule of law. We seek to explore whether these principles and values were at the centre of the design of this new mode of working and in the next section, we examine this mode of virtual justice across two rubrics. The first is to examine the implications of the decisions for people, namely, the litigants and lawyers. The second is the managerial architecture of courts under the e-Courts project, examined in terms of the plans and their execution by courts, as well as in terms of creating systems for listing. This is necessary to explore the interlinkages between the technical and the material implications of courts and their operations which we examine in the third section of this chapter. Finally, we conclude by unpacking how in India's recent experience with digitisation of courts strongly influenced by the COVID-19 pandemic, the virtual administration of

9. Rajya Sabha. 2021. Report No. 107. *Demand for Grants of the Ministry of Law and Justice*. Government of India, pp. 55-56, para 5.39.
10. Refer to the list at Appendix 1.

justice presents a cautionary tale in terms of the impact of decisions taken by the courts without thinking through the design of the technological solutions, which has perpetuated the already existing exclusions, arbitrariness, and solutionism by courts.

Administering Justice in a Crisis

The Digitised Judiciary, with the Promise of Digitalisation

The COVID-19 pandemic resulted in a total shift to the online mode which was made out of compulsion given the gravity of the situation in the country, and everyone—the litigants, lawyers, judges, and court staff—had to quickly adapt to this model, the groundwork of which was laid earlier through the Supreme Court's eCourts initiative. The eCourts Integrated Mission Mode Project (eCourts project) is an electronic governance initiative of the State, implemented in the subordinate courts since 2005. The project aims to provide the required IT infrastructure facilities to enable courts to deliver services to litigants and lawyers and to monitor and manage their functioning.[11] It is designed to work in phases, with Phase 1 completed in 2014. Some of the main features of this phase included the computerisation of courts and the training of judicial officers in Ubuntu-Linux OS and the integrated Case Information System (CIS) managed by the NIC. Litigants have access to case-related information on the eCourts website[12] and video conferencing facilities are available for litigants and persons in custody.

In Phase 2, the main objectives include enhancing the Information Communication Technology (ICT) infrastructure of the subordinate courts including enabling electronic filing and payment and the use of mobile applications for case-related activities; connecting all courts to the NJDG for eventual integration with the proposed interoperable criminal justice system (ICJS); enabling citizen service centres at court complexes; computerisation of legal services authorities; enabling the court management system through digitisation, document management, judicial knowledge management and learning tools management; installing a cloud network and solar energy resources at courts; facilitating change management and process re-engineering, and improving process servicing by courts. The Department of Justice credits these various features as the building blocks of the robust digital infrastructure created during the first two phases of the eCourts

11. e-Committee, Supreme Court of India. 2005. 'National Policy and Action Plan Document Phase I', 1 August; e-Committee, Supreme Court of India. 2014. 'Policy and Action Plan Document Phase II of the Ecourts Project', 8 January, available online at <https://doj.gov.in/sites/default/files/Justice-II-FAQ.pdf> (accessed on 5 April 2021).
12. The eCourts website contains case related information from the Supreme Court, High Courts and district courts in India. Available online at <https://ecourts.gov.in/ecourts_home/> (accessed on 4 October 2021).

project,[13] which have ensured the smooth transition of the Indian courts from the physical mode to virtual delivery of justice.

However, as the Parliamentary Standing Committee of Personnel, Public Grievances, Law and Justice in its 107th report ('Parliamentary Committee Report') notes, 'the true potential of this project is yet to be realised as only limited functions like e-filing, e-pay, case tracking, etc. are being operationalised'.[14] The Parliamentary Committee Report recommends using advanced technologies like blockchain and artificial intelligence to supplement the work of judges and judicial officers,[15] representing a promise to move from digitisation to digitalisation of the Indian courts.[16] However, in the latest version of this vision of the courts, Phase 3 seeks to transform justice from a sovereign function into a service.[17] In this imagination, justice is seen to be disaggregated into specific services rather than being the prerogative of public institutions, which has raised questions about the implications that such a move will have for transparency, accountability, and equity of the last person, who requires open, accessible, and affordable justice.[18] There is also the risk

13. Rajya Sabha. 2021. Report No. 107. *Demand for Grants of the Ministry of Law and Justice*. Government of India, p. 55, para 5.37, available online at <https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/18/146/107_2021_3_10.pdf>, (accessed on 15 June 2021).
14. Rajya Sabha. *Demand for Grants of the Ministry of Law and Justice*, para 5.40, p. 55.
15. Rajya Sabha. *Demand for Grants of the Ministry of Law and Justice*, paras 5.40-5.41, p. 56.
16. We use these terms as explained by Chapco-Wade (2018). Digitisation is the conversion of analog to digital, through internal optimisation of processes, which results in cost reductions. Digitalisation is the use of digital technologies and digitised data to impact how work gets done, transform how customers and companies engage and interact, and create new (digital) revenue streams. Digitalisation is a strategy or process that goes beyond the implementation of technology to imply a deeper, core change to the entire business model and the evolution of work. Colleen Chapco-Wade. 2018. 'Digitisation, Digitalisation, and Digital Transformation: What's the Difference?', *Medium*, 21 October, available online at <https://medium.com/@colleenchapco/digitization-digitalization-and-digital-transformation-whats-the-difference-eff1d002fbdf> (accessed on 15 December 2022); See also Peter C. Verhoef *et al.* 2021. 'Digital transformation: A multidisciplinary reflection and research agenda', *Journal of Business Research*, 122: 889-901, available online at <https://www.sciencedirect.com/science/article/pii/S0148296319305478> (accessed on 15 December 2022).
17. The Supreme Court's e-Committee released draft Vision Document provides that 'Given the large, diverse and constantly evolving needs of different users and the constant evolution of technology, administration of justice must not just remain as a sovereign function, but evolve as a service: to mitigate, contain and resolve disputes by the courts and a range of public, private and citizen sector actors', p. 5.
18. Siddharth Peter de Souza, Varsha Aithala and Srishti John. 2021. 'The Supreme Court of India's Vision for e-Courts: The Need to Retain Justice as a Public Service', *The Hindu Centre For Politics and Public Policy*, Policy Watch No. 14, 10 July, available online at <https://www.thehinducentre.com/publications/policy-watch/article35229520.ece> (accessed on 15 December 2022).

of pushing, prematurely, the idea of 'government as a platform'[19]—a unified digital system that is imagined to evolve seamlessly according to its use without adequate thought to the impact on citizens of the State 'retreating into the virtual realm'. Tomlinson quotes from Teubner[20] who contends that any design or redesign of an administrative institution that seeks to improve its performance in one of three respects: efficacy, responsiveness, and coherence, 'would almost certainly have negative effects on at least one of the other two'.[21] In the context of digitalisation in particular (of which, as we explained earlier, digitisation is the first step), he suggests that the 'control of institutional design questions ought not to be yielded to those who possess technological expertise … because new technology can be difficult to understand, and it comes with its own (often hidden) methods and politics when deployed in institutions'. He argues that 'technologists have no special authority to make claims about institutional design beyond purely technological solutions … [it] is a means of advancing the functions of the state … no more than one tool in the state's toolbox'.[22]

In June 2021, to 'imbue greater transparency, inclusivity and to foster access to justice', the Supreme Court's e-Committee released a draft of the Rules on Live-Streaming and Recording of Court Proceedings for public consultation.[23] These cover live-streaming mainly through electronic transmission of court proceedings, conducted within the court premises or remotely. Parties may raise objections to live-streaming. The final decision though, vests entirely with the presiding judge. The courts can restrict access to live recordings at different stages of the trial. Transcriptions of recordings are available only to the advocate or the litigant-in-person. The Rules envisage dedicated spaces within the court premises for viewing the live stream, and subject to permissions, litigants and other parties are provided entry into these spaces. Moore points out that digitisation through live-streaming serves the important political function of addressing the 'crisis of public trust' in 21st century liberal democracies by making public-facing institutions accessible to citizens through 'pushed out data' and 'broadcast streams' 24/7 and achieve the

19. Tim O'Reilly. 2010. 'Government as a Platform', *Innovations*, 6: 1, available online at <https://www.mitpressjournals.org › pdf › INOV_a_00056> (accessed on 15 December 2022).
20. Gunther Teubner. 1987. 'Juridification: Concepts, aspects, limits, solutions' in Gunther Teubner (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law*, pp. 3-48. Walter de Gruyter.
21. Joe Tomlinson. 2019. *Justice in the Digital State*. Policy Press, p. 15.
22. Id. at pp. 16-17. He cites Deirdre Mulligan and Kenneth Bamberger. 2018. 'Saving governance-by-design', *California Law Review*, 106 (3).
23. eCommittee, Supreme Court of India. 2021. 'Rules on Live-Streaming and Recording of Court Proceedings', available online at <https://ecommitteesci.gov.in/document/draft-model-rules-for-live-streaming-and-recording-of-court-proceedings/> (accessed on 11 June 2021).

cherished value of transparency.[24] While it is still early to decide whether these Rules support or hinder court users and ordinary litigants, it is important that these Rules do not perpetuate the existing crisis of court capacity—of poorly designed public services failing to meet user needs. Moore warns that though premised on 'pure visibility' and aimed at achieving total accessibility and usability, such interactions between the public and the State is a particular form of access, which is 'mediated rather than direct', 'virtual rather than based on co-presence' with 'those like us' and 'not so like us'.[25] She agrees with Mulcahy (2008) that live-linked video hearings 'signal a creeping dematerialisation of the court space, and this threatens the very basis of the court hearing as a public ritual'.[26] As Donald Horowitz (2016) emphasises, 'while "buy-in"' from the judiciary is critical for effective implementation of the [system] principles, consultation with a broad range of stakeholders, including those the system is designed to serve, is also crucial for a credible and legitimate process'.[27] Salyzyn (2016) extends this obligation to lawyers and explains that litigators have an ethical responsibility 'to understand the technologies used in the courtroom in order both to identify potential malfeasance by others, and to optimally use those same technologies themselves in order to represent their clients'.[28]

In its application to India, while the Supreme Court is increasingly adopting a technology-first approach, whether it be live-streaming cases or the use of artificial intelligence in the judiciary, as we have argued elsewhere, such solutionism requires an engagement with the material realities of the technology. This can be imagined through, for instance, the Indian public's ability to use and access the internet and be not just digitally literate but also comfortable with digital tools.[29] India is still in the early stages of digitisation and its past attempts at digitalisation, as we explained

24. Sarah Moore. 2019. 'Digital government, public participation and service transformation: the impact of virtual courts', *Policy and Politics*, 47: 3, pp. 495-509, available online at < https://researchportal.bath.ac.uk/en/publications/digital-government-public-participation-and-service-transformatio> (accessed on 15 December 2022).
25. Bonnie Honig. 2017. *Public Things: Democracy in Disrepair, Thinking Out Loud*. The Sydney Lectures in Philosophy and Society, Fordham University Press.
26. Bonnie Honig, *Public Things: Democracy in Disrepair, Thinking Out Loud*, p. 504 quoting Linda Mulcahy. 2008. 'The Unbearable Lightness of Being? Shifts Towards the Virtual Trial', *Journal of Law and Society*, 35: 4. pp. 464-489, available online at <http://doi.org/10.1111/j.1467-6478.2008.00447.x> (accessed on 15 December 2022).
27. Donald J Horowitz. 2016. 'ATJ Technology Principles: Access to and Delivery of Justice' and Jacquelyn Burkell. 2016. 'Troubling the Technological Imperative: Views on Responsible Implementation of Court Technologies' in Karim Benyekhlef, Jane Bailey, Jacquelyn Burkell and Fabien Gélinas (eds.), *eAccess to Justice*, pp. 158, 163. University of Ottawa Press.
28. Amy Salyzyn. 2016. 'The Case for Courtroom Technology Competence as an Ethical Duty for Litigators' in Karim Benyekhlef, Jane Bailey, Jacquelyn Burkell and Fabien Gélinas (eds.), *eAccess to Justice*, at pp. 159, 222.
29. Sarah Moore, 'Digital government, public participation and service transformation: the impact of virtual courts', pp. 504-505.

earlier, have remained concerning. There is a need, therefore, to ensure that there is adequate preparation and channeling to constructively use technology for courts such that the public's 'claim to see' translates to 'serve[-ing] as would-be, potential viewers, their presence "felt" in as much as they can dip in and out of the mediated courtroom'.[30]

In the next section of this chapter, we delve more deeply into the human aspects of the digitised judiciary to unpack how the story of virtual justice plays out for different stakeholders.

The Impact of a Digitised Judiciary on People

In this section, we will briefly account for the experiences of both lawyers and litigants to demonstrate how justice resided when looked at in a distributive sense, and how it impacted people in different social and economic circumstances.

Lawyers' Experiences

The lockdowns brought to the fore, systemic inequalities in full display between the better resourced urban lawyers and the struggling younger lawyers, particularly in smaller towns and tier-2 cities, many of whom lost livelihoods and were forced to look for alternative income sources for sustenance.[31] This was felt particularly by lawyers practising in subordinate courts. The trial courts, district courts, family courts, labour courts, and industrial tribunals suddenly closed down with a stipulation that hearings would be restricted to 'extremely urgent' matters which were to be conducted via video conference and all communications were to be made solely through email.[32] The courts were constrained to cancel sittings and declined to hear matters that they did not consider 'urgent'. Lawyers were discouraged from physical appearances before courts and encouraged to practise social distancing and electronic filing of documents was mandated. The assumption was that all lawyers possessed stable and secure internet connectivity, high-quality electronic infrastructure, and digital skills required to navigate these processes as well as the physical space in their homes to focus on the hearings, while in reality, discussions with lawyers revealed that several advocates, particularly those practising in subordinate courts, lacked even laptops and computer

30. Sarah Moore, 'Digital government, public participation and service transformation: the impact of virtual courts', p. 503.
31. Bhadra Sinha and Apoorva MandhaniI. 2020. 'Virtual courts system is pathetic: justice not being done', *The Print*, 9 June, available online at <https://theprint.in/judiciary/virtual-courts-system-is-pathetic-justice-not-being-done-sc-bar-body-chief-dushyant-dave/437864/> (accessed on 15 June 2021).
32. For instance, the High Court of Karnataka notified closure of all lower courts from 15 April to 3 May 2020, through a notification dated April 16, 2020, available online at <http://karnatakajudiciary.kar.nic.in/noticeBoard/notice-annexure-a-16042020.pdf> (accessed on 27 May 2021).

facilities.[33] At the time, it appeared as if the Supreme Court failed to consider the preparedness of the lawyers to be able to transition online. There seemed to be no acknowledgment of the need for infrastructure, basic digital literacy, and support to make required behavioural changes to adapt to the eCourts system. The precarious situation of advocates prompted a public litigation action before the Supreme Court requiring bar councils to provide ex gratia aid to lawyers.[34]

A study from April 2020 on advocates practising before various High Courts by the Vidhi Centre found that most lawyers were unaware of the provision for financial assistance to them under the Advocates Welfare Fund.[35] The lack of financial security for lawyers is worrying since most of them practise in courts compared to a minority working in law firms in a transactional or advisory capacity. Some improvement was noticed during the second wave of the pandemic. Several bar councils launched financial assistance schemes to support advocates.[36] These are

33. Sobhana K. Nair. 2020. 'Law Ministry panel bats for more virtual courts', *The Hindu*, 11 September, available online at <https://www.thehindu.com/news/national/continue-virtual-courts-in-post-covid-period-as-digital-justice-is-faster-cheaper-panel/article32579533.ece> (accessed on 15 June 2021).
34. Akshita Saxena. 2020. 'Plea In SC To Draw Up A Uniform Policy For Giving Financial Assistance To Lawyers In Times Of Emergencies', *LiveLaw*, 27 April, available online at <https://www.livelaw.in/top-stories/plea-in-sc-to-draw-up-a-uniform-policy-for-giving-financial-assistance-to-lawyers-in-times-of-emergencies-read-petition-155865?from-login=518567> (accessed on 16 December 2022). In W.P. (Civil) Nos. 554 and 539/2021, the Supreme Court, by order dated 30 June 2021, directed the National Disaster Management Authority (NDMA) to frame guidelines for disbursement of compensation to the kin of those who died owing to the COVID-19 pandemic. The NDMA recommended Rs. 50,000 as minimum ex-gratia payment to the next of kin of the deceased. This amount is in addition to any other amount paid under any other such benevolent schemes by the government. Referring to these cases, in *Pradeep Kumar Yadav* v. *Union of India.*, W.P. (Civil) No. 706/2021, (Supreme Court of India) decided on 14 September 2021, the Supreme Court dismissed a petition seeking Rs 50 lakh *ex-gratia* from the Union of India for families of lawyers who died before 60 years of age due to sickness, and additional monetary compensation if the lawyers died due to COVID-19 induced sickness. The Court ordered the petitioner to pay costs for abusing the process and acting irresponsibly.
35. This fund was set up under the Advocates Welfare Fund Act, 2001. Chitrakshi Jain, Shreya Tripathy and Reshma Sekhar. 2020. 'A Survey of Advocates Practicing Before the High Courts', *Vidhi Centre for Law & Policy*, available online at <https://vidhilegalpolicy.in/research/a-survey-of-advocates-practicing-before-the-high-courts/> (accessed on 21 June 2021).
36. See for instance, the Supreme Court COVID-19 Financial Assistance and Grant Scheme, 2020, available online at <https://scbaindia.org/SecretaryNotices/852.pdf> (accessed on 16 December 2022); Karnataka State Bar Council. 2020. 'Guidelines for grant of financial assistance under KAWF for COVID-19', available online at <https://ksbc.org.in/> (accessed on 16 December 2022); Bar Council of Delhi in *Ritesh Tanwar* v. *Union of India* and the discussion in Aneesha Mathur. 2021. 'Bar Council of Delhi gives over Rs 3.59 crore as financial aid to Covid-affected lawyers', *India Today*, 20 May, available online at <https://www.indiatoday.in/coronavirus-outbreak/story/delhi-bar-council-gives-over-rs-3-59-crore-as-financial-aid-to-covid-affected-lawyers-1804941-2021-05-20> (accessed on 21 June 2021).

in addition to existing insurance policies for advocates[37] and arranged for payouts from the council's advocate welfare funds towards medical treatment in the event an advocate gets infected with the COVID-19 virus.[38]

There have been persistent issues of access faced by lawyers. For instance, the Supreme Court Advocate-On-Record Association wrote to the Chief Justice of India (CJI) requesting courts to resume physical court hearings to overcome difficulties that lawyers faced in virtual hearings due to technical glitches.[39] These could affect the quality of representation that a litigant received. A recent study, DAKSH found that the number of physical filings increased dramatically after 1 June 2020 since the first round of lockdowns were eased, indicative perhaps, as the report remarks, of inconvenient design of the e-filing infrastructure or their own discomfort to adapt to new working practices and resistance to change.[40]

Since then, and until the recent lockdown in some states, High Courts and district courts in India have been operating in physical courts while online courts continue to operate via video conference.[41] This complements the vision of futurists like Susskind of this space as a 'blend' of physical courts, virtual hearings, and online courts, where disputes are disaggregated and different portions allocated to the most efficient and just process.[42] In operation though, hybrid hearings bring their own distinct challenges. The Supreme Court of India User Guide for Hybrid Physical Hearings (2021)[43] requires that when an advocate needs a physical hearing, they must submit a request to appear within 24 hours (or 1 pm) of the publication of the weekly matters hearing list.[44] This leaves little time for the advocate to prepare effectively for the matter. Hearings are restricted through entry passes, for which a person needs to possess a functional mobile number and email address. This has the potential to worsen the digital divide since tracking and

37. Nyaya Kavacha: Group Insurance Scheme, available online at <http://ksbc.org.in/circular_bar.php> (accessed on 15 June 2021).
38. Karnataka State Bar Council, 'Guidelines for grant of financial assistance under KAWF for COVID-19'.
39. Bhadra Sinha. 2020. 'Lawyers' body urges CJI to resume physical hearings from July, says virtual courts not working', *The Print*, 2 June, available online at <https://theprint.in/judiciary/lawyers-body-urges-cji-to-resume-physical-hearings-from-july-says-virtual-courts-not-working/434087/> (accessed on 15 June 2021).
40. Leah Verghese, Shruthi Naik, Siddharth Mandrekar Rao, Sandhya PR, and Amulya Ashwatappa. 2020. *Lawyers' Experiences During the COVID-19 Pandemic*, available online at <https://dakshindia.org/wp-content/uploads/2021/01/Laywer-Survey_06.pdf> (accessed on 16 December 2022).
41. Rajya Sabha. 2021. Report No. 107. 'Demand for Grants of the Ministry of Law and Justice', Annexure V 'Current status of virtual hearing in courts as on January 28, 2021'.
42. Richard Susskind. 2019. *Online Courts and The Future of Justice*, p. 63.
43. Available online at <https://main.sci.gov.in/notices-circulars> (accessed on 10 May 2021).
44. Supreme Court of India. 2021. 'Hybrid Physical Hearing', available online at <https://main.sci.gov.in/pdf/LU/14032021_042201.pdf> (accessed on 3 May 2021).

complying with these processes substantially increases the workload of the lawyers as separate entry passes need to be generated for each matter. A coherent, rational, and consistent approach to court hearings followed uniformly across courts at different levels is critical to empower practitioners.

Did Litigants Experience Virtual Justice?

An official estimate shows that the Supreme Court held 43,713 video conference hearings with 1,998 Supreme Court benches hearing matters via video conferencing until 31 December 2020.[45] However, as press reports suggest,[46] this does not reflect the actual lack of capacity building, especially among the lower tiers of the judiciary, the district, and sessions courts. As Neeraj Mishra points out '...even by August 2020, most district and mofussil courts around the country had barely acquired the know-how and capacity to deal with virtual court sessions. Even today, while courts and their staff might have become digitally capable, advocates and their clients are yet to acquire the same proficiency...'.[47]

This is not surprising. The United Kingdom has undertaken an expansive court reform programme since 2016. Even after four years, in March 2020, when English courts had to replace physical hearings with virtual ones, the Bryrom Review discovered several technical problems with the IT infrastructure used by courts.[48] Only in 19.5% of the cases, users received some form of technical assistance since court administration staff were not available to assist. It found that this significantly hampered the effective participation of litigants in hearings.[49] Litigants expressed the highest levels of dissatisfaction with video and audio hearings at county courts with overall low levels of digitisation.

The Supreme Court directive on the operation of courts during lockdown[50] required all courts to make video conferencing facilities available for litigants with

45. Supreme Court of India. 2021. 'Supreme Court of India Observes 71st Anniversary: Doors of Justice Remained Open Despite the Pandemic', *Public Relations Office*, 28 January.
46. See for example, Sobhana Nair. 2020. 'Law Ministry panel bats for more virtual courts', *The Hindu*, 11 September; Yash Agarwal. 2020. 'Challenges in setting up virtual and online courts in India', *The Leaflet*, 23 October.
47. Neeraj Mishra. 2021. 'Forced to go 'virtual', Indian courts had a trying time during the pandemic in 2020', *National Herald*, 18 January, available online at <https://www.nationalheraldindia.com/opinion/forced-to-go-virtual-indian-courts-had-a-trying-time-during-the-pandemic-in-2020> (accessed on 16 December 2022).
48. Dr N. Bryom *et al.* 2020. 'The impact of COVID-19 measures on the civil justice system', CJC, LEF, available online at <https://www.judiciary.uk/announcements/civil-justice-council-report-on-the-impact-of-covid-19-on-civil-court-users-published/> (accessed on 19 May 2021).
49. Dr N. Bryom *et al.*, 'The impact of COVID-19 measures on the civil justice system'.
50. *In Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 pandemic*, *Suo Motu* Writ (Civil) No. 5/2020, Supreme Court, available online at <https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf> (accessed on 11 June 2021).

no means or access to video conferencing facilities during this period. In practice, however, since hearings were limited to the most 'urgent' matters like bail hearings,[51] other matters were adjourned. This has severe implications for the promise of the rule of law. As the former Chief Justice of the High Court of Australia, Sir Gerard Brennan observed,

> [courts] are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases they are bound to entertain, the rule of law would be immediately imperiled. This would not be merely a problem of increasing the backlog; it would be failing to provide the dispute-resolving mechanism that is the precondition of the rule of law....[52]

Litigants are forced to bear this burden. They have to continue to engage lawyers and pay their fees, despite their matters being in limbo for weeks at a stretch. From early 2020, when successive state governments began to impose lockdowns, appearing for hearings was difficult for litigants with no effective internet access. They were forced to rely completely on their lawyers for updates on matters.[53] The Supreme Court's e-Committee believes that so far the video conferencing facilities created under the e-Courts project have played an important role in operating the justice system during the COVID-19 induced pandemic.[54] This, as our discussion so far shows, has not considered the practical challenges faced by litigants.

Remote hearings take time since only a limited number of matters can be listed each day. Remote delivery of justice, then, need not necessarily be better than physical delivery.[55] The pandemic affected both the institution of new matters and the disposal of pending cases. As the table below shows, at the first stage of the lockdown in April 2020, 1,06,210 cases were filed in India's courts and 49,875 cases were disposed of. Comparatively, in April 2019, on an average, 12,49,546 cases were filed and

51. For instance, the Standard Operating Procedure (SOP) of Karnataka High Court on video conferencing rules restricted the number of virtual hearings to 20 in a day. This is in contrast to daily cause lists with more than 100 matters listed daily on a regular basis in most subordinate courts.
52. The Honourable Sir Gerard Brennan, AC KBE, Chief Justice of Australia, 'The State of the Judicature' at 30th Ausralian Legal Convention Melbourne (19 September 1997), available online at the <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_judicat.htm> (accessed on 3 July 2021).
53. Even for litigants with access, the number of video links provided is highly restricted, available online at <https://main.sci.gov.in/pdf/LU/16052020_123951.pdf> (accessed on 15 June 2021).
54. Rajya Sabha. 2021. Report No. 107. *Demand for Grants of the Ministry of Law and Justice*, pp. 55-56, para 5.39.
55. John Sorabji. 2021. 'Initial Reflections on the Potential Effects of the COVID-19 Pandemic on Courts and Judiciary of England and Wales', *International Journal for Court Administration*, 12(2): 6, available online at <https://www.iacajournal.org/articles/10.36745/ijca.394/> (accessed on 18 May 2021).

1,06,8355 cases disposed of. While in 2019, the total filings were at ~1.66 crore and disposals at ~1.49 crore, this substantially reduced in 2020 to ~1.23 crore filings and ~77 lakh disposals.[56] These values have improved slightly in 2021 and as seen in early October, filings increased to ~1.27 crore cases and disposals to ~99.6 lakh cases.

Total number of cases	**2019**	**2020**	**2021 (until 05.10.21)**
Filed	1,66,34,866	1,22,79,555	1,27,57,051
Disposed	1,49,15,588	76,79,076	99,59,071

The Parliamentary Committee Report also records that since March 2020, while 3,240 court complexes were fully equipped for virtual proceedings, 14,443 were still to be provided these basic facilities.[57]

The Digital Freedom Fund observed that inclusivity is essential in the design of digital interfaces and 'digital tools should not shift the burden of proving eligibility or need onto individuals'.[58] Given the centrality of effective party participation in their faith in the fairness of litigation, this needs urgent attention. Procedural fairness is of particular concern, since it '...includes an opportunity to tender and challenge evidence, and to advance arguments in favour of, and respond to arguments against, a party's interests in issue in a trial'.[59] Procedural fairness is required to uphold the rule of law and maintain public confidence in the legal system.[60] In a virtual setting, access to good quality audio-visual equipment is indispensable. This means the quality of the process, which includes orientation and

56. 'Institution v/s Disposal: National Judicial Data Grid', available online at <https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard> (accessed on 6 September 2021); also see, Maneesh Chhibber. 2020. 'How lockdown has hit judiciary, in numbers — April cases fall to 82k from 14 lakh avg in 2019', *The Print*, 4 May, available online at <https://theprint.in/judiciary/how-lockdown-has-hit-judiciary-in-numbers-april-cases-fall-to-82k-from-14-lakh-avg-in-2019/413666/> (accessed on 15 June 2021).
57. Rajya Sabha. 2021. Report No. 107. *Demand for Grants of the Ministry of Law and Justice*, p. 55, para 5.36, available online at <https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/18/146/107_2021_3_10.pdf> (accessed on 16 December 2022).
58. Jonathan McCully. 2020. 'Toward a Litigation Strategy on the Digital Welfare State', *Digital Freedom Fund*, 23 April' available online at <https://digitalfreedomfund.org/towards-a-litigation-strategy-on-the-digital-welfare-state/> (accessed on 16 December 2022).
59. Michael Legg and Anthony Song. 2021. 'The Courts, The Remote Hearing And The Pandemic: From Action To Reflection', *UNSW Law Journal*, 44(1): 126, p. 137.
60. Michael Legg and Anthony Song, 'The Courts, The Remote Hearing And The Pandemic: From Action To Reflection', quoting Chief Justice Robert French. 2010. 'Procedural Fairness: Indispensable to Justice?', Sir Anthony Mason Lecture, at University of Melbourne Law School, 7 October, p. 137.

support with the technology, and the quality of the environment, namely the technology and 'remote space comfort'[61] could determine the output.

Even though India's internet penetration rate improved from 4 per cent in 2007 to 45 per cent by 2021, more than half of these users are between 20–39 years of age and users over the age of 40 form the lowest share of internet users.[62] There are also significant gaps in internet usage along rural-urban, gender, and class lines.[63] This gap has only worsened during the pandemic.[64] Attempts to bridge the digital divide are now being discussed in the Indian policy space. Electronic *Sewa Kendras* are being piloted in High Courts and a few district courts, to assist litigants and lawyers with case-related information and electronic filing services.[65] Once fully in operation, their utility needs to be critically evaluated.

Certain matters, like criminal trials, remain unsuitable for virtual hearings. There is a severe disconnect between the promise and performance of video conferenced.[66] A growing body of literature internationally[67] finds that witnesses are less credible on screen than in face-to-face environments, and the manner in which audio-visual links are implemented has 'a real impact on the court's service delivery and hence its justice outcomes'.[68] In India, the Commonwealth Human Rights Initiative

61. David Tait and Vincent Tay. 2019. 'Virtual Court Study: Report of a Pilot Test 2018', Research Report, *Western Sydney University*, 16 October, pp. 29-30.
62. Simon Kemp. 2021. 'Digital 2021: India', *DataReportal*, 11 February, available online at <https://datareportal.com/reports/digital-2021-india> (accessed on 16 December 2022).
63. Simon Kemp, 'Digital 2021: India'.
64. On the gender divide, see Mitali Nikore and Ishita Uppadhayay. 2021. 'India's gendered digital divide: How the absence of digital access is leaving women behind', *Observer Research Foundation*, 22 August, available online at <https://www.orfonline.org/expert-speak/indias-gendered-digital-divide/> (accessed on 16 December 2022); On the urban-rural access gap, see *India Today*. 2021. 'More than 50% of Indian students in rural and urban areas don't have access to internet: Survey', *India Today*, 18 February, available online at <https://www.indiatoday.in/education-today/latest-studies/story/more-than-50-of-indian-students-in-rural-and-urban-areas-don-t-have-access-to-internet-survey-1770308-2021-02-17> (accessed on 16 December 2022).
65. E-committee, Supreme Court of India, 'e-Sewa Kendra', available online at <https://ecommitteesci.gov.in/service/e-sewa-kendra/> (accessed on 16 December 2022).
66. Sahana Manjesh. 2020. *Disconnected: Videoconferencing and Fair Trial Rights*. Commonwealth Human Rights Initiative.
67. See for instance, David Tait and Vincent Tay. 2019. 'Virtual Court Study: Report of a Pilot Test 2018', *Western Sydney University*, 16 October, pp. 29-30; David Tait. 2017. 'Towards a Distributed Courtroom', *Western Sydney University,* 15 July as quoted in Michael Legg and Anthony Song. 2021. 'The Courts, The Remote Hearing and the Pandemic: From Action to Reflection', *UNSW Law Journal*, 44(1): 126, p. 139.
68. Emma Rowden, Anne Wallace, David Tait, Mark Hanson and Diane Jones. 2013. 'Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings', *The Court of the Future Network*, 20 March, p. 10, available online at <https://courtofthefuture.org/publications/gateways-to-justice-guidelines-for-remote-participation-in-court/> (accessed on 16 December 2022).

conducted a rapid review of criminal lawyers and judges between August and December 2020 and found that such hearings infringe the right of the accused to a fair trial. This includes rights against arbitrary arrest and detention, meaningful participation in court proceedings, access to effective legal counsel, protection of confidentiality, and openness of hearings. It also covers due process safeguards, such as protection from bias and presumption of innocence, guaranteed by national and international law. Jaya Jaitly opines on the unjust nature of virtual courts, particularly on important matters that according to her, need direct human interaction since it 'shortchanges' wisdom, compassion, and leniency from decision making, '...Rushing into new protocols without understanding uses and applications will disempower the poor even further, especially undertrials who cannot afford lawyers'.[69]

Parties who are unable to attend or access court hearings or have sensitive personal information leaked due to a data breach have no real remedy. Besides violating the cardinal principle of 'open justice',[70] this also means that managers of virtual hearing platforms are not really accountable to users. Guaranteeing effective access cannot be the sole responsibility of the court staff and court managers working at a reduced capacity.

The Workings of the Court and Its Adhoc Management

A working paper by Rastogi *et al.* analysed the response of 25 High Courts to the pandemic between March and August 2020.[71] This was based on three criteria: (a) definition of 'urgency' (b) determination of 'urgent' matters and (c) the switch to virtual hearings and electronic filing of case materials. The study relied on notifications, circulars and administrative orders passed by the High Courts available on their respective websites.

On the first criterion of defining urgent matters, the authors find that courts determine regular and anticipatory bail applications, criminal matters affecting personal liberty like habeas corpus petitions, detention terms, and sentencing-related

69. Jaya Jaitly. 2020. 'Virtual courts cannot fully replace a process that demands direct human interaction', *The Indian Express*, 22 October, available online at <https://courtofthefuture.org/publications/gateways-to-justice-guidelines-for-remote-participation-in-court/> (accessed on 16 December 2022).
70. Thomas de la Mare QC. 2020. 'Coronavirus and Public Civil Hearings', *Blackstone Chambers*, 30 March, available online at <https://coronavirus.blackstonechambers.com/coronavirus-and-public-civil-hearings/> (accessed on 16 December 2022).
71. Anubha Rastogi, Tanima Kishore, Surabhi Singh and Shreya Kanauj. 2021. 'Analysis Of Accessing High Court During COVID Lockdown', *Live Law*, 1 April, available online at <https://www.livelaw.in/columns/analysis-accessing-high-courts-lockdown-march-august-2020-172014> (accessed on 16 December 2022).

cases as 'urgent'. Some courts like the High Court of Delhi adopted a wider criterion and included domestic violence and matrimonial matters, eviction cases, and accident matters involving death and disability within the 'urgent matters' list. Exceptionally, some courts like the High Court of Uttarakhand came up with a comprehensive list that included property matters—such as eviction, ejectment, dispossession, demolition, and attachment—petitions where major penalties have been levied in departmental hearings, and service matters as 'urgent'.

On the second criterion, the authors note that there is wide variance among courts on the timing of classifying cases as urgent, starting from March 2020 in some courts while other courts did this as late as June 2020. They also found divergence in the progressive widening of the criteria used by the High Courts to determine urgency during this period.

On the third criterion, there was a significant variance in practice observed across states. Different web-based applications and platforms for virtual hearings in different forums and at different times for the same forums were experimented with. There was no dedicated platform developed to facilitate efficiency and consistency of purpose. For electronic filing of documents, particularly during the initial days of lockdown, the authors note that documents were sent via email to a specific email address provided or to the email of a staff member on duty. Some High Courts, like the High Court of Bombay, specified email addresses for each court bench for filing new matters and additional documents.

This study is instructive in several ways: it clearly brings out the *ad hoc* nature of determining urgency among High Courts. For instance, similar matters like applications for bail which were classified as 'imminently urgent' by most courts, were not considered as urgent by the High Courts of Rajasthan and Bombay. In fact, as the study points out, the High Court of Bombay decided that 'urgency' is subjective and that the 'circumstances in which a bail application is made must be considered' before determining it as urgent. The courts, therefore, seemed to adopt their own subjective approach to determine urgency in each case with no central guiding principle at play. Similarly, the determination of urgency was left to the Chief Justice in some courts, and in other courts, other judges decided whether a case was urgent or not. Vagueness in defining matters that the courts consider 'urgent' is a huge concern. Several High Courts did not seem to consider the obvious and basic difference between an urgent matter during a pandemic and in normal times. For instance, in April 2020, the High Court of Madhya Pradesh issued guidelines for video-conferencing and electronic filing of documents for urgent matters. These imposed several requirements on the practising advocates as well as on the litigants, which accentuated the practical difficulties faced by the

advocates and their clients. Advocates appearing on urgent matters were required to ensure that *all pages* of case documents were physically signed by the *litigating party and the advocate*, before the entire case file was scanned into PDF format, to be filed using specifically 'designated email addresses of the court registry. Following this, every electronically filed petition was required to contain a screenshot of the email showing all soft copies of the supporting case documents attached and an undertaking of the advocate or the party to this effect. For the conduct of virtual hearings, detailed requirements were imposed on advocates, for instance, for making requests for virtual hearings, mentioning urgent matters, appropriate attire for attending hearings, ensuring unrestricted internet access on their devices in advance of hearings, and installing required hardware and software, etc.[72] Another report highlights the disparities in practice and lack of uniform standards of video-conferencing in criminal trials between different regions in India.[73]

Similar issues were observed at the Supreme Court. From March 2020, the Court began to operate at a reduced capacity and imposed restrictions on advocates' entry to the Court premises. Similar to the High Courts, only 'urgent' matters were taken up and other matters adjourned. This was then further restricted to 'extremely urgent matters'. The category of 'urgent' matters kept on expanding to include short category, death penalty matters and family law disputes and by July 2020, practically all matters, regular and miscellaneous were being heard online. Adhocism in determining urgency was apparent since urgency was determined at the sole discretion of the presiding judge of the bench. There was a strong push to encourage lawyers to attend hearings via video-conferencing and for parties to use e-filing facilities for documents. Cases selected for hearing would be listed online, and only later in the evening on the previous day of the hearing, leaving little time for the advocates to be sufficiently prepared for the proceedings.

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72. Other High Courts issued similar orders/notifications: High Court of Madhya Pradesh, 'Standard Operating Procedure (S.O.P.) (For Hybrid System of Physical / Virtual Hearing of the Cases)', available online at <https://www.livelaw.in/pdf_upload/mphc-sop-389021.pdf> (accessed on 16 December 2022); The High Court of Orissa, 'The Orissa High Court Video Conferencing for Courts Rules, 2020, available online at <https://www.orissahighcourt.nic.in/VCrules.pdf> (accessed on 16 December 2022); The High Court of Judicature at Allahabad, 'Instructions for Taking Up Urgent Matters in Allahabad High Court During COVID-19 Pandemic/Lockdown', available online at <http://www.allahabadhighcourt.in/event/event_7403_11-04-2020.pdf> (accessed on 16 December 2022); The High Court of Rajasthan, 'Standard Operating Procedure for participating in the court proceedings through Video Conferencing', available online at <https://hcraj.nic.in/hcraj/Allfiles/JitsiSOP.pdf> (accessed on 16 December 2022); The High Court of Karnataka, 'Rules of Video Conferencing for Courts', available online at <https://karnatakajudiciary.kar.nic.in/govtNotifications/Rules_of_VC_08122020.pdf> (accessed on 16 December 2022).
73. Sahana Manjesh. 2020. *Disconnected: Videoconferencing and Fair Trial Rights*. Commonwealth Human Rights Initiative.

As the COVID-19 pandemic raged on in June 2020, the extreme hardship faced by litigants and lawyers in virtual proceedings forced the Supreme Court to resume physical hearings in compliance with social distancing protocols. With rising COVID-19 cases, the Court was forced to operate virtually in July 2020. Only towards the end of August 2020, it opened a few courts for physical hearings of matters on an experimental basis. Finally, hybrid hearings were allowed in the Supreme Court from March 2021 with severe limits on the number of people in a courtroom, which was restricted to 20. The vagueness and adhocism of the previous year returned in April 2021, with only 'urgent' matters being permitted to be mentioned as 'Listed Mentioning' for the Court's consideration.

On Thinking about Suffering: Exclusions, Arbitrariness, and Solutionism

In the previous sections, by analysing the administration of justice in a crisis in terms of the digital approaches, we sought to demonstrate the way administrative decisions of the courts have had a material impact on how people have been able to use and access courts.

The impact of the decisions of the courts, in our view, is at three levels. The first is at the level of exclusions—which refer to the manifest ways in which different groups were denied full participation in the justice delivery processes. The second is at the level of arbitrariness—which refers to the ways in which administrative decisions of the courts were designed without consideration of the implications, the lack of uniformity, and how they hindered parties in experiencing the justice delivery system. The third level is that of solutioning—which is the way the courts have come up with models for combating the pandemic without thinking through the design of the technological solutions.

In terms of exclusions, what becomes apparent when the impact of digitisation is examined is that courts appear to have underestimated the ramifications of their decision to move online in terms of how lawyers' livelihoods would be affected by the digitisation process, litigants would be excluded both because of lack of digital access and courts working below their capacity and hearing only certain types cases.[74] These exclusions demonstrate that the administrative nature of the decisions has strong substantive impact. For instance, the right to access information on court proceedings

74. The impact of a technology first approach that does not consider the implications on people has been seen in the work on Aadhaar. Reetika Khera. 'UID: From Inclusion to Exclusion', *Seminar Magazine*, 672, available online at <https://india-seminar.com/2015/672/672_reetika_khera.htm> (accessed on 16 December 2022).

is an important aspect of the constitutionally guaranteed freedom of expression. The court is a public space, and this fundamental nature of court hearings was called into question at several instances during the COVID-19-induced lockdowns.[75] Limits were imposed on the number of video call links at two per litigant, restrictions were imposed on the recording of court proceedings, and only 'urgent' matters were listed where the criteria for determining urgency were different at different courts and even within the same court it kept changing constantly. All these effectively converted the public nature of a trial to a private hearing. This also has an impact on people's entitlement to receive a full and accurate record of court hearings and easy access to court orders. This highlights the importance of acknowledging that many of the offline exclusions were translated into the online/virtual realm. In doing so, acknowledging that in thinking about digital rights, and digital access, it was important to keep human rights and values of life, liberty, equality, and autonomy at the core.[76] Failure to do so would result in new kinds of marginalisations in a new sphere, as was demonstrated. To protect against such outcomes, it is also imperative to think about how administrative principles such as due process can develop and adapt to the challenges that emerge with a digitised system such that principles of transparency and accountability continue to be guaranteed.[77]

During a crisis, it is understandable that courts had to make several decisions without recourse to the benefit of time for deliberations. However, in administering justice, there is also an expectation that decisions should not have a disproportionate impact on people and that they cannot be seen should not be unreasonable.[78] There was a severe lack of uniformity in modes used by courts for online hearings. High Courts used different software platforms and even within a single High Court several platforms were used by different benches. In fact, High Courts moved between several software applications during the months studied.[79]

75. Siddharth Peter de Souza, Varsha Aithala and Srishti John. 'The Supreme Court of India's Vision for e-Courts: The Need to Retain Justice as a Public Service'.
76. *Digital Freedom Fund*. 2020. 'Digital Rights Are Human Rights', *Digital Freedom Fund*, 10 December, available online at <https://digitalfreedomfund.org/digital-rights-are-human-rights/> (accessed on 16 December 2022); Linnet Taylor. 2017. 'What Is Data Justice? The Case for Connecting Digital Rights and Freedoms Globally', *Big Data & Society*, 4:1.
77. See generally Danielle Keats Citron. 2008. 'Technological Due Process', *Washington University Law Review*, 85(6): 1249.
78. See generally for discussions on arbitrariness, Tarunabh Khaitan. 2015. 'Equality: Legislative Review Under Article 14', *Social Science Research Network*, SSRN Scholarly Paper ID 2605395, available online at <https://papers.ssrn.com/abstract=2605395> (accessed on 18 June 2021).
79. See for instance, circulars from the High Court of Bombay requiring users to use Zoom for online hearings and two days later, banning the use of Zoom and mandating exclusive use of Vidyo software and a similar order from the High Court of Orissa. 2020. 'Notification', 17 April, available online at <https://orissahighcourt.nic.in/important-notices-pdf-view/notification/196/> (accessed on 16 December 2022).

These included Zoom, Webex, Bluejeans, Vidyo, Microsoft Teams, Jitsi, and even Whatsapp. Rastogi *et al* point out that this became cumbersome and inefficient for all stakeholders, particularly, litigants and lawyers who had to constantly adapt to these different formats, often at short notice. Lawyers had to keep up with the constantly varying processes for virtual appearance before courts (depending on the online platforms used) and electronic filing of documents. In many states, this spurred growth of a parallel industry of litigation assistants: shopkeepers who charged lawyers and clients for assisting them in preparing and consolidating case materials in PDF format, which could be filed before the courts electronically, raising huge privacy and affordability concerns.[80] From this analysis, it becomes obvious that even after a year of operating virtually, courts have not adopted a transparent and uniform method, putting litigants, advocates, and the public at the mercy of administrative arbitrariness at a critical time, when the nation has been in the throes of multiple rounds of lockdown and court administrations are stretched to capacity. While one may argue that the court had to respond in dynamic circumstances and therefore should be given the benefit of doubt while operating in emergency situations, what emerges through an insight into even the choices of technical devices is that there was a clear lack of communication across different institutions on the merits, challenges, and implications of using certain technologies. This indicates that some platforms were chosen for safeguarding privacy more robustly while others appeared to be those which were most conveniently available. These arguments are also on account of a lack of engagement with the technology, seeing it more as a fix, and an enabler, instead of investigating the impact of its introduction.

The third level of discussion is at the level of solutioning through technology. Through the pandemic, there has been a surge in interest and developments around the digitisation of the judiciary. As discussed earlier in this essay, with the Supreme Court arguing for a new vision for e-Courts through making it a service, as we argue elsewhere, such a vision will result in the commodification of justice. We have argued that the 'technology-worshipping vision' that tends to predominate this debate has led to 'a celebration of technology in and of itself and a constant postponement of measuring whether the technology has actually been effective'.[81] There is a danger of prioritising technology for efficiency without addressing fundamental values like procedural compliance, inviolability of rights, and

80. Anubha Rastogi *et al.*, 'An Analysis Of Accessing High Courts During COVID Lockdown'.
81. Renaud Beauchard. 2016. 'Cyberjustice and International Development: Reducing the Gap between Promises and Accomplishments' in, Karim Benyekhlef, Jane Bailey, Jacquelyn Burkell and Fabien Gélinas (eds.), *eAccess to Justice*. University of Ottawa Press.

protections for liberty.[82] As Sen points out, virtual court technology should adhere to fundamental design needs: minimal asymmetry of information, uniformity in operation, interoperability, ease of use, accessibility, automation of key processes, intelligent tools, and transparency.[83] An evaluation of the effectiveness of virtual justice delivered by Indian courts during the pandemic should be based on fundamental justice values of equal access, independence, accountability, impartiality, transparency, privacy, and legal validity.[84]

Conclusion

This chapter has sought to examine the nature of the response of the Indian courts in terms of the ways in which they responded to suffering during the pandemic. We focus on administrative decisions of courts and have considered the case of the digitisation of the judiciary as this was seen as a primary response of the courts to the pandemic to ensure that courts remained open, and functioning.

In our discussions in this chapter, we have adduced how, in its response, the digitisation of the judiciary had both managerial as well as human impacts. Digitalisation has the tendency to substitute human discretion with rigid rules and performance metrics. This can exclude several from the process, and it is these kinds of challenges that this chapter has sought to unpack.

We stand between two seemingly opposing positions—of a steadfast rejection of the move towards greater digitalisation of justice and strong support for techno-centric courts. As we have attempted to point out, the debate is far more nuanced. There is increasing recognition of the need to build a supportive ecosystem, enabled by technology. However, technology must not be seen as means to an end. The COVID-19 pandemic forced several rapid changes in the manner of working of courts, and the Indian courts quickly adapted but we ask whether, as they adapted, if they took people along with them.

82. Siddharth Peter de Souza and Varsha Aithala. 2018. 'Can Technology Finally Deliver on India's Legal Aid Promise?', *Stanford Social Innovation Review*, 27 July, available online at <https://ssir.org/articles/entry/can_technology_finally_deliver_on_indias_legal_aid_promise> (accessed on 16 December 2022).
83. Prashanto Chandra Sen. 2020. 'COVID 19 and the Courts', *The Daily Guardian*, 15 August, available online at <https://thedailyguardian.com/covid-19-and-the-courts/> (accessed on 15 May 2021).
84. Giampiero Lupo, *Ibid*.

Appendix

Chronological list of the main SOPs, Circulars, Orders and Notifications on the Operations of Virtual Courts in India:

Supreme Court:

- https://scobserver-production.s3.amazonaws.com/uploads/beyond_court_resource/document_upload/384/Hearing_of_only_Urgent_Matters.pdf (13 March 2020)
- https://main.sci.gov.in/pdf/cir/23032020_153213.pdf (23 March 2020)
- https://main.sci.gov.in/pdf/ListingNotice/18042020_083110.pdf (18 April 2020)
- https://main.sci.gov.in/pdf/LU/14062020_072900.pdf (14 May 2020)
- https://main.sci.gov.in/pdf/LU/16052020_123951.pdf (16 May 2020)
- https://main.sci.gov.in/pdf/Notice/02062020_121526.pdf (2 June 2020)
- https://main.sci.gov.in/pdf/LU/04072020_153040.pdf (4 July 2020)
- https://main.sci.gov.in/pdf/LU/11072020_111721.pdf (11 July 2020)
- https://main.sci.gov.in/pdf/LU/27072020_124229.pdf (27 July 2020)
- https://main.sci.gov.in/pdf/LU/31082020_092032.pdf (30 August 2020)
- https://main.sci.gov.in/pdf/LU/12092020_105000.pdf (12 September 2020)
- https://main.sci.gov.in/pdf/LU/04022021_052911.pdf (1 February 2021)
- https://main.sci.gov.in/pdf/cir/27022021_094843.pdf (27 February 2021)

High Courts and Subordinate Courts:

- https://bombayhighcourt.nic.in/writereaddata/notifications/PDF/noticebom20200314152601.pdf (The High Court of Bombay, 14 March 2020)
- https://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_F96N7ECEFRP.PDF (The High Court of Delhi, 23 March 2020)
- http://www.allahabadhighcourt.in/event/event_7392_25-03-2020.pdf (The High Court of Judicature at Allahabad, 25 March 2020)

- vent_7403_11-04-2020.pdf (allahabadhighcourt.in) (The High Court of Judicature at Allahabad, 11 April 2020)
- https://highcourtofuttarakhand.gov.in/files/DETAILED_SOP.pdf (The High Court of Uttarakhand, 12 April 2020)
- https://highcourtofuttarakhand.gov.in/files/SOP_for_subordinate_courts_1.pdf (The High Court of Uttarakhand, 12 April 2020)
- https://districts.ecourts.gov.in/sites/default/files/doc00908420200415102042_0.pdf (The High Court of Rajasthan, 15 April 2020)
- http://www.hcbombayatgoa.nic.in/download/Notice17042020.pdf (The High Court of Bombay, 17 April 2020)
- https://orissahighcourt.nic.in/important-notices-pdf-view/notification/196/; https://www.orissahighcourt.nic.in/CorrectedNOTICE.pdf (The High Court of Orissa, 17 April 2020)
- https://districts.ecourts.gov.in/sites/default/files/AdvisoryNote.pdf (The High Court of Karnataka, 21 April 2020)
- guide_line_08052020_c50.pdf (highcourtchd.gov.in) (The High Court of Punjab and Haryana, 2 May 2020
- Notification-05-09-2020.pdf (ghconline.gov.in) (Gauhati High Court, 5 September 2020)
- https://karnatakajudiciary.kar.nic.in/govtNotifications/Rules_of_VC_08122020.pdf (The High Court of Karnataka, 8 December 2020)
- https://www.calcuttahighcourt.gov.in/Notice-Files/general-notice/3485 (The High Court of Calcutta, 14 December 2020)
- http://patnahighcourt.gov.in/pdf/UPLOADED/4545.PDF (The High Court of Judicature at Patna, 5 February 2021)
- (The High Court of Orissa, 15 February 2021)