ISSN: 2582-9807

NATIONAL LAW UNIVERSITY, JODHPUR

COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW JOURNAL

CALJ VOLUME IX ISSUE I
FEBRUARY 2025

CENTRE FOR COMPARATIVE CONSTITUTIONAL LAW AND ADMINSTRATIVE LAW
NATIONAL LAW UNIVERSITY, JODHPUR (Rajasthan, India)

PUBLISHED BY:

THE REGISTRAR, NATIONAL LAW UNIVERSITY,

JODHPUR ISSN: 2582–9807

BOARD OF ADVISORS

CONTENTS

EDITORIAL: RECONCILING COMPETING FUNDAMENTAL RIGHTS: AN ANALYSIS OF THE DOUBLE PROPORTIONALITY TEST IN *ASSOCIATION FOR DEMOCRATIC REFORMS V. UNION OF INDIA*

DR. VINI SINGH[1]

The Electoral Bonds Scheme was introduced to reduce the flow of black money in politics. It allowed authorised banks to issue electoral bonds that could be used to donate to political parties. This scheme also relaxed disclosure requirements and removed caps on corporate donations. The Supreme Court of India ruled that the Electoral Bonds Scheme was unconstitutional, as it limited the public's ability to make informed choices during elections due to the lack of transparency about donors and donation amounts. This undermines the core principles of democracy, such as openness, accountability, and participation. Further, to reconcile the competing rights of donor privacy and the right to information of voters, the Court devised and applied the double proportionality test. This article examines this test and argues that the Court erred in suggesting that this test would not apply when the Constitution provides for a hierarchy between competing rights. It also contends that it is challenging to meet the requirements specified by the Court regarding suitability and necessity. Finally, it suggests that the Court should have emphasised upon the comparative importance of the competing rights.

TABLE OF CONTENTS

* Cite as: Singh, *Editorial: Reconciling Competing Fundamental Rights: An Analysis of the Double Proportionality Test in Association for Democratic Reforms v. Union of India,* 9(1) COMP. CONST. L. & ADMIN. L. J. vii (2025).

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EDITORIAL: RECONCILING COMPETING FUNDAMENTAL RIGHTS: AN ANALYSIS OF THE DOUBLE PROPORTIONALITY TEST IN *ASSOCIATION FOR DEMOCRATIC REFORMS V. UNION OF INDIA*

INTRODUCTION

The Electoral Bonds Scheme, 2018 (**"EBS"**)[2] was introduced through the Finance Act, 2017 by the then Finance Minister, Mr. Arun Jaitley, as a measure to curb black money in politics. To encourage contributions through legitimate sources, it allowed authorised banks to issue electoral bonds, which could be purchased by individuals or entities wishing to contribute to political parties. Additionally, the EBS relaxed disclosure requirements and removed the cap on corporate contributions. The Supreme Court of India, in its landmark decision of *Association for Democratic Reforms v. Union of India* (**"ADR"**)[3] declared EBS as unconstitutional. It observed that, by concealing the identity of donors and the quantum of their political contributions, the EBS would severely curtail the public's ability to make informed choices during elections. This opacity in political funding would undermine the core principles of transparency, accountability and participation essential to a democracy. The EBS was, therefore, a "*manifestly arbitrary*"[4] and disproportionate restriction on the right to information of the voters.[5]

Nevertheless, the Court recognised that donor privacy is a fundamental right, since information regarding a person's political beliefs and opinions may be misused to suppress dissent.[6] It noted that it is imperative to protect donor privacy to enable individuals to form their political opinions and exercise their freedom of political expression.[7] Hence, it

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[2] The Finance Act, 2017, §§ 11, 137 & 154, The Gazette of India, pt. II sec. I (Mar. 31, 2017); The Reserve Bank of India Act, 1934, § 31(3), No. 2, Acts of Parliament, 1934 (India); The Representation of People Act, 1951, § 29C, No. 43, Acts of Parliament, 1951 (India); The Companies Act, 2013, § 182(3), The Gazette of India, pt. II sec. 1 (Aug. 30, 2013); and, The Income Tax Act, 1961, §13A, No. 43, Acts of Parliament, 1961 (India); These provisions were introduced or amended by the Finance Act, 2017.

[3] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214.

[4] Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶ 51.

[5] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 215.

[6] *Id.* ¶ 134.

[7] *Id.*

formulated the "*double proportionality test*"[8] to reconcile the right to privacy of the donors with the right to information of the citizens. This test may be applied to reconcile competing fundamental rights when the text of the Constitution does not provide for a hierarchy between them.[9] The test comprises three stages. *First*, determining whether the impugned measure is "*suitable*" for furthering both conflicting rights.[10] *Second*, assessing whether the measure is "*necessary*," i.e., it is the least restrictive means to further both competing rights and there are no other equally effective alternatives.[11] *Third*, the evaluation of whether the measure disproportionately impacts either right.[12] This test aims to ensure that equal respect is conferred on competing rights, and is therefore, applied from the perspective of both competing rights.

This article examines the application of the double proportionality standard in this case and assesses the efficacy of the double proportionality test in resolving complex rights conflicts, highlighting its potential shortcomings. Finally, it suggests changes to the test to enhance its efficacy in reconciling competing rights.

RECONCILING COMPETING RIGHTS: AN OVERVIEW OF PRE-*ADR* JURISPRUDENCE

The proportionality principle is the predominant framework for balancing competing rights in most legal systems. This approach treats rights as fundamental principles and seeks to establish a fair equilibrium, ensuring neither is unduly compromised while maximising protection for both, in light of all relevant circumstances.[13] It comprises four stages. The first step is "*legality*." At this stage, it is determined whether the conflict between the fundamental rights has arisen since "*a law*" restricts one fundamental right to safeguard the other. The realisation of one fundamental right serves as a "*legitimate aim*" for restricting the other.

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[8] *Id.* ¶ 145.
[9] *Id.* ¶ 157.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] KAI MOLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS (Oxford University Press, 1st ed., 2015).

Thereafter, the "*suitability*" of the means employed to achieve this legitimate aim is assessed by evaluating if there is a "*rational connection*" between the means and the end. The third step involves an examination of "*necessity*." At this stage, the chosen measure is compared with available alternatives on the grounds of efficacy and the degree of limitation it imposes on one right to enforce the other. The chosen measure only passes muster if it is the "*least restrictive*" and there are no "*equally effective*" alternatives available. The fourth and last step involves "*balancing*" the beneficial effects of the chosen measure with its deleterious effects in the given context.

There are slight differences in the application and the formulation of this standard across different jurisdictions. For instance, while in Canada, the analysis ends at the necessity stage if equally effective and less restrictive alternatives are available,[14] in the European Union ("**EU**"), the analysis continues till the final stage, even if less restrictive and equally effective alternative means are available, as other relevant considerations may be taken into account only at this stage to ascertain if a fair balance was struck or not.[15] Likewise, in the UK, the balancing test requires, "*an intense focus on the comparative importance of the specific rights claimed in the individual case.*"[16] Nevertheless, the constitutional courts in all these jurisdictions strive to achieve a fair balance between competing fundamental rights.

In contrast, the constitutional courts in India have had an *ad-hoc* approach to balancing competing fundamental rights. However, in most cases, they have applied a contextual balancing test. Further, unlike the US Supreme Court, which prioritises freedom of speech over other fundamental rights,[17] Indian constitutional courts have refrained from granting

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[14] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 SCR 835 (Can.).

[15] Allan Rosas, *Balancing Fundamental Rights in EU Law*, 16 CAMBRIDGE Y.B. EUR. LEGAL STUD. 347, 351-352 (2014).

[16] McKennitt v. Ash, [2007] EMLR 113.

[17] Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul,* 106 HARV. L. REV. 124 (1992); FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT (Yale University Press, 1st ed., 2017).

automatic precedence to any fundamental right. Instead, they have relied on external factors[18] such as "public interest" rather than constitutional values underlying the competing fundamental rights while balancing them. For instance, in *Mr. X v. Hospital Z,*[19] the Supreme Court prioritised the right to life and health of a woman over the fundamental right to privacy of her fiancée who was an HIV-positive patient. It observed that in a conflict of fundamental rights, the right "*which would advance public morality or public interest*"[20] in the given set of circumstances would alone be preferred. Likewise, in *PUCL v. Union of India*[21] the Court prioritised the right to information of the voters, as it served the larger public interest in that context. As a consequence, one fundamental right had to give way to enforce the other.

However, in other cases, the courts have ensured that the competing fundamental rights were given the maximum possible effect. For example, in *Subhash Chandra Aggarwal,*[22] the Court applied the proportionality standard to balance the right to privacy and judicial independence against public interest in disclosure and judicial accountability. Herein, the respondent had sought information regarding the assets of sitting judges, their correspondence regarding appointments of judges, and the likely influence over their decision. The Court determined that the Right to Information Act, 2005, constituted a justified limitation[23] on the right to privacy. It satisfied the requirements of "*legality*" and "*legitimate aim*" as it is a law that provides for the implementation of the fundamental right to information.[24] Further, it

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[18] The constitutional courts must preferably refrain from assigning priority amongst rights on the basis of external factors like national security or public interest. Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas* in EVA BREMS (ed.), CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 19 (Intersentia, 1st ed., 2008).

[19] Mr. X v. Hospital Z, (1998) 8 SCC 296.

[20] *Id.*

[21] People's Union for Civil Liberties v. Union of India, (2013) 10 SCC 1.

[22] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481, ¶ 87.

[23] Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1. The Court applied the proportionality standard laid out for limiting the fundamental right to privacy.

[24] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481, ¶ 42.

passes muster the requirements of "*necessity*" and "*proportionality*" as its provisions[25] permit disclosure of personal information only when public interest in knowing that information clearly surpasses the individual's right to privacy, and there is minimal risk of causing harm to a third party.[26]

The Court clarified that the mere existence of public interest does not prioritise the right to information over the right to privacy. Both rights flow from the Constitution, hence, they must be carefully weighed against each other, considering the specific goals underlying them, and the broader societal benefits that would flow from the disclosure or concealment.[27] For example, in this case, the goal of judicial independence could either be enhanced or compromised by the disclosure of personal information, depending on its specific nature and content.[28] The disclosure of judges' assets for instance would enhance accountability and judicial independence.[29]

Other members of the bench also relied on proportionality standards and emphasised that the fundamental right to privacy, and the right to information are "*co-equals*," neither can take precedence over the other and, they must be balanced.[30] Relying on the balancing test adopted in the UK in "*misuse of private information*"[31] cases, Ramana J. proposed a two-step approach to reconciling the right to information with privacy concerns. *First*, it must be determined whether the information in question carries a reasonable expectation of privacy, considering factors like the

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[25] The Right to Information Act, 2005, §§ 8(1)(j), 11, The Gazette of India, pt. II sec. I (Jun. 21, 2005).
[26] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481, ¶¶ 46–62.
[27] *Id.* ¶¶ 72–74.
[28] *Id.* ¶¶ 88–89.
[29] *Id.*
[30] *Id.*
[31] *See* Naomi Campbell v. Mirror Group Newspapers Ltd. [2004] UKHL 22; Murray v. Express Newspapers Ltd. [2008] EWCA Civ. 446.

information's nature and the individual's status.[32] If such an expectation exists, a subsequent evaluation is necessary to weigh the public interest in disclosure against the individual's privacy rights.[33] This assessment should consider potential benefits and harms to the public, as well as the specific nature and content of the information.[34] Chandrachud J. also relied on *Campbell*[35] to affirm the same. He reiterated that only when the information in question is identified as private and there are countervailing grounds for disclosure, the question of proportionate balancing arises. In this exercise, both the right to privacy and the right to information are legitimate aims and the concerned authority would have to balance both rights carefully such that enforcement of one right must not amount to undue abridgement of the other.[36]

Similarly, in *Sahara India Real Estate Corp. v. SEBI*,[37] a Constitution Bench of the Supreme Court reconciled freedom of press[38] with the right to fair trial.[39] It examined how other countries, like Canada and the UK handle similar cases. It looked at Canadian rulings in *Dagenais*[40] and *Mentuck*,[41] and the UK's approach to balancing freedom of expression with the administration of justice in contempt of court cases.[42] Drawing parallels, it elucidated that none of the values in the Constitution are absolute, and all constitutional values must be "*qualified and balanced*" against other

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[32] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481.
[33] *Id.* ¶¶ 36-39.
[34] *Id.*
[35] Naomi Campbell v. Mirror Group Newspapers Ltd. [2004] UKHL 22.
[36] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481.
[37] Sahara India Real Estate Corp. v. Securities & Exchange Board of India, (2012) 10 SCC 603.
[38] INDIA CONST., art 19(1)(a), which guarantees Freedom of Speech & Expression which encompasses the freedom of press. *See* Brij Bhushan v. State of Delhi, AIR 1950 SC 129.
[39] INDIA CONST., art. 21, which encompasses the right to a fair trial. *See generally*, P. Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 578.
[40] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 (Can.).
[41] R v. Mentuck, [2001] 3 S.C.R. 442.
[42] *See* PNM v. Times Newspapers Ltd. and Others, [2017] UKSC 49.

competing values.[43] It observed that like these jurisdictions, the Indian judiciary may rely on the tests of "necessity and proportionality" to assess whether a prior restraint must be imposed on publication of judicial proceedings to avert any "*real and substantial risk of prejudice to the administration of justice*". Unless the party seeking such a restraint is able to demonstrate such a risk, the open justice principle and consequently, the public's right to know would demand that judicial proceedings must be publicised. Likewise, in *Anuradha Bhasin v. Union of India*,[44] the Court stated that it relies on contextual balancing to "*harmonize competing rights*."[45]

ELECTORAL FUNDING: TRANSPARENCY V. PRIVACY

As discussed earlier, the constitutionality of the EBS was challenged by the Association for Democratic Reforms. Accordingly, the Supreme Court had to ascertain if the right of voters to know where funds to the political party come from, should outweigh the privacy rights of those donating the money. The Court held that the EBS unduly impinges upon the right to information of voters.[46] It undermines the foundational principles of the right to information, such as, "*good governance, transparency, accountability, participatory democracy, and individual self-fulfilment*." Moreover, less restrictive alternatives, such as the Electoral Trust Scheme,[47] could effectively address the concerns of donor privacy and black money in electoral funding. Therefore, it was neither necessary nor proportionate.

A. TRANSPARENCY AS A PRE-CONDITION FOR EFFECTIVE DEMOCRATIC PARTICIPATION

[43] Sahara India Real Estate Corp. v. Securities & Exchange Board of India, (2012) 10 SCC 603.
[44] Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.
[45] *Id.*
[46] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 216.
[47] The Income Tax Act, 1961, § 2(22AA), No. 43, Acts of Parliament, 1961 (India).

A well-informed citizenry is essential for a thriving democracy.[48] Citizens need access to information to understand the actions of their elected representatives, evaluate their performance, and participate meaningfully in the political process.[49] Since voting is "*one of the foremost forms of democratic participation*",[50] the Court observed that voters must have the right to access information that would "*allow them to cast their votes rationally and intelligently.*"[51] Prior to the introduction of the EBS, corporate donations to political parties were subject to caps and stringent disclosure mandates.[52] Political parties were obligated to maintain detailed records, undergo regular audits,[53] and submit comprehensive annual financial reports to the Election Commission of India.[54] The introduction of the EBS through the Finance Act, 2017, marked a significant departure from this regime, eliminating the cap on corporate funding and significantly relaxing disclosure requirements.[55] Under the new regime, corporations were only obligated to disclose the aggregate amount donated for political purposes.[56] The EBS further eroded transparency by exempting political parties from maintaining accounts for funds received through electoral bonds.[57] Additionally, political parties were not obligated to disclose the contributions received through electoral bonds to the Election Commission of India.[58] While the identity of the purchaser of an electoral bond can theoretically be traced through "*know your customer*" records of the issuing bank, the involvement of intermediaries can easily shield the

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48 People's Union for Civil Liberties v. Union of India, (2013) 10 SCC 1; Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294.

49 Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶¶ 65, 71.

50 *Id.* ¶ 77.

51 *Id.* ¶¶ 79, 95.

52 The Companies Act, 2013, §§ 293A, 182, No. 18, Acts of Parliament, 2013 (India); The Income Tax Act, 1961, §§ 80GGB, 80GGC, No. 43, Acts of Parliament, 1961(India).

53 The Income Tax Act, 1961, §§ 13A, 80GGB, 80GGC, No. 43, Acts of Parliament, 1961 (India).

54 The Representation of People Act, 1951 § 29C, No. 43, Acts of Parliament, 1951 (India).

55 The Companies Act, 2013, § 182(3), No. 18, Acts of Parliament, 2013 (India).

56 *Id.*

57 The Income Tax Act, 1961, § 13A, No. 43, Acts of Parliament, 1961 (India).

58 The Representation of People Act, 1951 § 29C, No. 43, Acts of Parliament, 1951 (India).

identity of the real donors.[59] This lack of full transparency raised concerns with the Court about potential undisclosed "*quid pro quo*" arrangements between corporate donors and political parties.[60]

The Court held that the EBS exacerbated political inequality in three ways. *First*, by removing the cap on corporate donations, the scheme enables corporations to wield disproportionate influence over the political process and distort free and fair electoral competition.[61] *Second*, it would hinder effective democratic participation by obstructing voters from making informed decisions.[62] *Third*, it would enable economically affluent persons to influence government policy.[63] Accordingly, the Court held that the EBS was "*manifestly arbitrary*" as its "*real purpose*" diverged from the "*ostensible purpose*" projected by the legislature.[64] It also treated the political contributions between individuals and corporations in the same manner without any consideration for the impact of corporate funding on politics.[65]

B. THE PITFALLS OF THE DOUBLE PROPORTIONALITY STANDARD FOR RECONCILING COMPETING RIGHTS

The Court identified two potential justifications for the EBS, "*curbing black money and safeguarding donor privacy.*" While acknowledging the government's aim to curb black money, the Court found the EBS disproportionate. Given the existence of less restrictive measures like cheques, bank drafts, electronic clearance, and the Electoral Trust Scheme,[66] the Court concluded that the scheme was not necessary to

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[59] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 17.
[60] *Id.* ¶ 103.
[61] *Id.* ¶¶ 46-55, 202-204 & 210.
[62] *Id.* ¶¶ 102-104.
[63] *Id.* ¶ 100.
[64] *Id.* ¶¶ 207-209.
[65] *Id.* ¶ 215.
[66] The Income Tax Act, 1961, § 2(22AA), No. 43, Acts of Parliament, 1961 (India). The Electoral Trust collects political contributions and disburses them. It only reports the no. of contributors, contributions received and how they were distributed between

achieve its stated objective.[67] Notably, the Court conducted this proportionality analysis despite the fact that the right to information flows from Article 19(1)(a) of the Constitution, and may be "*reasonably restricted*" only on grounds mentioned in Article 19(2).

With respect to the legitimate aim of protecting the privacy of political affiliation,[68] a fundamental right, the Court devised and applied the "*double proportionality standard.*"[69] It observed that conflicts between fundamental rights may be resolved by applying this standard, provided the Constitution doesn't explicitly prioritise one right over another.[70] For example, the freedom of religion is subject to limitations imposed by other fundamental rights. Therefore, in cases of conflict, these other rights would automatically prevail.[71] This aspect of the judgment significantly deviates from the existing constitutional jurisprudence. The Indian Constitution is a transformative and organic document.[72] It is a toolkit for re-engineering a society recovering from the injustices of the colonial era. Its provisions are aimed at furthering a social revolution or creating conditions that are necessary for it.[73] The fundamental rights are, therefore, read as a whole.[74] By suggesting that there exists a hierarchy between the fundamental rights in the Indian Constitution, the Court has overlooked their shared constitutional underpinnings.

Moreover, the Court failed to account for the significance of the individuals or entities holding the conflicting rights, which could potentially establish a hierarchy among them. For instance, in this case, the protection of donor privacy was essential for protecting citizens' political affiliation rights, their freedom of thought and self– self-determination; corporations, as non-citizens and juristic persons, lack the

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political parties. Hence, it is impossible to discern who has contributed to which political party.

[67] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 169.

[68] *Id.* ¶¶ 134 – 139, 141.

[69] *Id.* ¶ 145.

[70] *Id.*

[71] *Id.*

[72] Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

[73] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 4 (Clarendon Press, 2d. ed., 1966).

[74] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

constitutional freedoms of expression, association, thought and self-determination. Thus, restricting their privacy did not compromise these fundamental constitutional values. The Court also recognised this asymmetrical impact on rights.[75] This imbalance necessitated a tiered approach to balancing these rights. While both rights deserve equal consideration when the context involves citizen donors, the imbalance in the context of corporate donors warrants a different starting point for analysis in the case of corporate donors.

However, the double proportionality standard ensures that competing rights receive equal consideration right from the first stage of the analysis, i.e., suitability. As mentioned above, at this stage it is assessed whether the chosen measure furthers both competing rights. While it is conceivable that a measure could simultaneously advance both competing rights in certain instances, the present case itself exemplifies a scenario where this is not feasible. The EBS and its alternative, the Electoral Trust Scheme, enhance donor privacy, with the EBS imposing significantly greater restrictions on the right to information. Further, despite stating that the chosen measure must be suitable for furthering both competing rights, the Court proceeded to the next stage of analysis by simply assuming that EBS furthers both donor privacy and freedom of information.[76] Even if we assume it does, it is logically implausible for it to be the least restrictive and equally effective alternative to further both freedom of information and the right to donor privacy. The alternative, the Electoral Trust Scheme too, would not pass muster if the Court examined whether it is a necessary measure for realising both donor privacy and the right to information.

Moreover, the Court has overlooked the possibility of irreconcilable conflicts between fundamental rights. In such scenarios, the application of the double proportionality test might not be feasible. For example, as discussed above in the case of *Mr. X*,[77] safeguarding his fiancée's right to

[75] *Id.* ¶ 213.
[76] *Id.* ¶ 163.
[77] Mr. X v. Hospital Z, (1998) 8 SCC 296.

life and health necessitated a certain degree of intrusion into his privacy. Another such instance is exemplified by the well–known frozen embryos case.[78] Herein, a woman had approached the European Court of Human Rights to challenge the UK law that required the consent of both male and female partners for the IVF process to continue. The Court sympathised with her plight and noted that though she would be denied an opportunity to be a mother, the consent of the male partner in becoming a parent could not be overridden by her right to enjoy family life. In cases like these there is neither a hierarchy or rights, nor is it possible to identify common constitutional values underlying these rights to proportionately balance them in the given context.

Additionally, when applying the proportionality test, the relative importance of the rights must be considered in reference to the given context. While the Court acknowledged the relevance of both donor privacy and the right to information, it failed to explicitly incorporate this assessment into the steps of the double proportionality standard. This is ironic, as the Court proposed the double proportionality standard precisely because it was concerned that the "*single*" proportionality standard would give greater weightage to one right over the other.[79]

Therefore, a more comprehensive framework is required to ensure that the comparative weight of competing rights is explicitly accounted for. This can be achieved by adapting the single proportionality test. *First*, for applying the proportionality standard, the nature of the conflict between the rights in question must be ascertained. The rights in conflict should further some common constitutional values in the given context and must not be in total opposition to one another. For instance, both free speech and privacy further democratic participation, hence, it is possible to reconcile them using the proportionality standard. Conversely, in the context of a practice like Sati, freedom of religion and the right to life cannot be reconciled, as they would further diametrically oppose constitutional values in that context.

Second, as the objective of the proportionality test is to give the maximum possible effect to the competing rights, the nature of both rights,

[78] Evans v. The United Kingdom, 43 E.H.R.R, 21.
[79] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 153.

particularly the constitutional values underlying both rights in a given context must be duly considered. Hence, at the stages of suitability and rationality, a rational connection with the constitutional values underlying each of the rights must be identified. One right would then serve as the legitimate aim for limiting the other.

Thereafter, as is the practice in other jurisdictions like Canada[80] or the UK,[81] at the necessity stage, the necessity of limiting one right to further the other must be ascertained in reference to the underlying context and common constitutional values furthered by the competing rights. Finally, the beneficial effects of furthering one right must be weighed against the deleterious effects of limiting the other and vice-versa in the given context. At this stage, the broader societal impact may be considered as has been done in other jurisdictions like Canada,[82] UK[83] and South Africa.[84]

CONCLUSION

The Supreme Court's decision in *Association for Democratic Reforms*[85] marks a critical advancement in promoting the principles of open government, transparency, and effective democratic participation. However, the formulation of the double proportionality standard complicates the reconciliation of competing rights, often creating insurmountable challenges in application. Adapting the proportionality principle to accommodate the unique challenge of reconciling fundamental rights could provide a more effective and practical framework. The *Dagenais*[86]/*Mentuck*[87] framework from Canada and the jurisprudence

[80] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 (Can.).
[81] Naomi Campbell v. Mirror Group Newspapers Ltd. [2004] UKHL 22.
[82] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 (Can.).
[83] Murray v. Express Newspapers Ltd. [2008] EWCA Civ. 446.
[84] NM v. Smith, 2007 (5) SA 250 (CC).
[85] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214.
[86] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 (Can.).
[87] R v. Mentuck, [2001] 3 S.C.R. 442.

pertaining to the "*misuse of private information*"[88] in the UK are illustrative. The Court could begin the analysis by assessing the legality of the said measure that limits one fundamental right to further the other. It must ensure that the measure is imposed by law. Thereafter, it must assess the suitability of the measure for furthering one right and limiting the other. Notably, the limitation imposed on one right must have a rational connection with the protection accorded to the other.

Further, it could examine the necessity of restricting one right to realise the other. At this stage, only internal factors like underlying constitutional values should be given consideration. Finally, it could comparatively assess the importance of both competing rights in the given context to determine if the chosen measure is proportionate and constitutional. At this stage, external factors like broader societal interests may be considered to conduct an overall assessment of the pros and cons.

Adapting the single proportionality test in this manner, would thus simplify the process and prevent the creation of insurmountable challenges for legislative measures.

IN THIS ISSUE

The fields of constitutional law, and administrative law and their comparative aspects demand academic rigour from both the authors and the editors. Together, we are in a position to deliver something meaningful to the academic discourse. As the Editor-in-Chief of the Comparative Constitutional Law and Administrative Law Journal (**"CALJ"**) under the Centre for Comparative Constitutional Law and Administrative Law (**"CCAL"**), it gives me immense pleasure to introduce Issue I of Volume IX of our journal to the readers.

In ***Moving from the Basic Structure Towards a Permanent Structure: From Positive Law to Natural Law***, Prof. (Dr.) Devinder Singh, Dr. Deepak Kumar Srivastava, and Surya Dev Singh Bhandari examine the limitations of the basic structure doctrine in ensuring long-term constitutional integrity. Drawing from historical precedents and jurisprudential debates, the authors argue for a transition towards a

[88] Murray v. Express Newspapers Ltd. [2008] EWCA Civ. 446.

'permanent structure' rooted in natural law principles, offering a framework that could better safeguard fundamental constitutional values from transient political upheavals. The authors explore how legal history—from Nazi Germany's misuse of constitutional mechanisms to consolidate absolute power to postcolonial India's constitutional amendments—illustrates the fragility of constitutional safeguards in the face of political opportunism. Engaging with jurists like Hans Kelsen, Carl Schmitt, and Maurice Hauriou, they propose an alternative: a hierarchical framework that situates constitutional values within a 'permanent structure' rooted in natural law philosophy. This, they argue, would limit even a future constituent assembly's ability to undermine certain fundamental rights and democratic principles.

Dr. Uday Shankar, Sricheta Chowdhury and Sourya Bandyopadhyay in ***'Governed by Whom?' – Redefining the Role of Higher Judiciary, Diversity and Judicial Legitimacy in the Indian Context***, explore the expanding authority of the Supreme Court and High Courts. The paper interrogates how judicial power has evolved, often stepping into governance spaces left vacant by the legislature and executive, raising fundamental questions about democratic legitimacy. The authors analyse the intersection of judicial activism and legitimacy, emphasizing how the collegium system—despite its commitment to independence—lacks transparency in judicial appointments. The article evaluates whether increasing gender and social diversity in judicial selection can enhance public trust in the judiciary while maintaining its independence. Engaging with jurisprudential debates and comparative constitutional frameworks, the authors propose that a more representative and transparent judiciary could resolve the legitimacy concerns facing India's higher courts.

Dr. Ashit Srivastava and Aashutosh Jagtap, in '***Linguistic-cracy'***, examine the phenomenon of state-sponsored language discrimination. The article delves into how language has historically been wielded as a mechanism of governance, sometimes even serving as a means of oppression. The authors introduce the concept of linguistic theocracy, arguing that just as religion has been used to establish state identity,

language too has been leveraged to create exclusionary governance structures. The paper navigates through comparative case studies, including the imposition of Urdu in East Pakistan, Canada's Francophone immigration policies, and the European Union's handling of linguistic rights. Through these examples, the authors illustrate the tensions between cultural majoritarianism and minority linguistic protections. Engaging with constitutional safeguards from India, the European Court of Human Rights, and the International Covenant on Civil and Political Rights, they assess how legal frameworks either uphold or undermine linguistic diversity.

In ***'Securitization, Belonging and Citizenship Revocation in India',*** Atreyo Banerjee examines the statutory and judicial frameworks that underpin the termination and deprivation of citizenship under the Citizenship Act, 1955. By meticulously tracing the historical debates from Partition to the present day, the article unravels the ways in which executive supremacy and overlapping legislative regimes create a labyrinth of discretionary power, often at the expense of procedural fairness. With a keen eye on both archival records and recent judicial pronouncements, Banerjee illustrates how narratives of existential threat and the drive for national security have been mobilized to justify the exclusion of marginalised groups and to circumvent robust judicial oversight. The study not only exposes the legal ambiguities—such as the contested notion of 'voluntary' foreign citizenship acquisition—but also calls for a fundamental reimagining of India's citizenship regime to restore accountability and uphold democratic values.

In ***'Does the Political Question Doctrine Have a Place in the Indian Constitutional Setup?: An Analysis Through the Lens of Landmark Supreme Court Decisions'***, Arjun Sagar offers a meticulous examination of how the Indian Supreme Court has navigated the murky terrain of political questions. Sagar scrutinizes landmark cases that illuminate the doctrine's fluctuating role—from constitutional amendment disputes and state-emergency controversies to the justiciability of ordinance promulgations and foreign policy matters. The article seeks to determine the political question doctrine's place in the Indian constitutional set-up. Rooted in American constitutional jurisprudence, this doctrine compels judicial abstention in matters

deemed more appropriate for resolution by the political branches, even as its precise scope remains contested. By engaging with diverse theoretical approaches and contrasting them with evolving judicial practice, his analysis reveals the inherent tensions between upholding judicial review and respecting the prerogatives of the political branches.

Finally, Aditya Rawat in the wake of ongoing debates about decolonization and the search for a uniquely indigenous constitutional narrative, reviews ***Arghya Sengupta's 'The Colonial Constitution – An Origin Story'*** which has emerged as a provocative intervention. Rawat's review thoughtfully engages with Sengupta's central thesis—that India's constitutional framework, far from being a pristine product of post-colonial aspiration, is deeply entangled with colonial knots that continue to influence its interpretation and practice. Rawat situates Sengupta's work against a backdrop of persistent calls for decolonial constitutionalism, where even celebrated texts are re-examined through the lens of historical subjugation and epistemic dominance. In doing so, the review opens a critical dialogue on whether the colonial inheritance of legal structures necessitates a complete reimagining of India's constitutional identity, or if it can be reclaimed and repurposed to serve contemporary democratic aspirations. This introduction sets the stage for a nuanced exploration of the work's merits and its limitations, inviting readers to rethink the origins—and the future—of India's constitutional order.

CCAL ACTIVITIES

Over the last seven months, CCAL has undertaken several activities aimed at fostering interest and development in the fields of constitutional law and administrative law. The endeavour of the Centre to encourage discourse on the subject matter of constitutional and administrative law is furthered by hosting our annual National Seminar on Constitutionalism in Contemporary Times, guest lecture events, Writ[e] & Talk podcast and the regular publication of articles on topics of contemporary relevance on our blog "*Pith and Substance: The CCAL Blog*".

The Centre for Comparative Constitutional and Administrative Law hosts its podcast, "*Writ[e] and Talk*." This podcast features in-depth interviews with the authors of various articles. It allows listeners to take them beyond the written word, by delving further into the concepts, arguments, and analyses underlying published works. The same is hosted by Ms. Sayantani Bagchi, and our student members. Listeners can subscribe to our podcast on YouTube, Google Podcasts, and Spotify. This came as a further development to talks that were organised by the centre which saw several luminaries over the span of 4 years such as Dr. Seema Kazi, Dr. Rowena Robinson, Dr. Prashant Narang to name a few.

In pursuance of the same, this semester, we had the pleasure of hosting Professor Adrienne Stone, hosted by Ms. Kovida Bhardwaj, in her book chapter *Freedom of Expression and the Constitutional Canon*, published in *Global Canons in an Age of Uncertainty: Debating Foundational Texts of Constitutional Democracy and Human Rights*. She examined the landmark freedom of expression cases across jurisdictions, analysing how these cases collectively form a constitutional "canon". She explored how this canon reveals diverse conceptions of free speech rooted in the core constitutional values of liberty, equality and dignity. The discussion revolved around critique and engagement with the canon itself, offering a comparative and contextual analysis, while emphasizing its educational potential.

Our podcast is available on Spotify, Google Podcasts and YouTube. Transcripts of the episodes and links to relevant reading material can be found on our blog, Pith & Substance: The CCAL Blog.

The centre also had the pleasure of hosting Dr. Upendra Baxi, who gave a lecture with his profound analysis of 'evasive' jurisprudence in constitutional interpretation and offered deep insights into the nuances of judicial reasoning and its impact on constitutional law. His vast expertise and scholarly engagement stimulated critical discussions, leaving participants with a more refined understanding of the complexities inherent in constitutional jurisprudence. The University was also visited by Farhan Zia for their lecture on Queerness, Human Rights and the Law.

The centre aims to encourage dialogue and make academia accessible, by simplifying ideas and constitutional theory, for students and people from a non-legal background to understand the same.

For Constitution Day, the Centre hosted an Intra-University Essay Writing Competition for students of the university, inviting them to critically engage with the ethos of the Constitution, highlighting the legacy of Indian jurists whose contributions to the evolution and interpretations to the Constitution have been invaluable. This year, our 3rd edition, invited students to write on Justice HR Khanna.

Last, as a first-time feat, the Centre, in collaboration with the Constitutional Law Society at National Law University Jodhpur hosted the first offline and 3rd annual National Seminar titled '*Constitutionalism in Contemporary Times*', on 7th September, 2024. The seminar saw around 40 participants, spanning students to academicians, presenting their papers in front of a panel of appraised legal luminaries such as Dr. Niranjan Sahoo, Dr. Nizamuddin Siddiqui, Dr. Shameek Sen, Dr. Shivaraj Huchanavar, Dr. Max Steur and Dr. Seema Kazi.

ACKNOWLEDGEMENTS

The editorial board of CALJ ("**Board**") worked on the issue over the last five months with utmost dedication and determination. The process was a learning experience for us and provided us with the opportunity to bond with the entire team. The publication of this issue would not have been possible without the guidance of our Patron, Hon'ble Vice-Chancellor of the National Law University, Jodhpur, Prof. (Dr.) Harpreet Kaur. At this juncture, we would also take the opportunity to thank our Chief Editor – Ms. Sayantani Bagchi her constant support, mentorship and engagement with every initiative we undertake. The Registrar of National Law University, Jodhpur has also ensured smooth functioning at every stage, and we are thankful for it. We would also like to thank every member of the Board for working on the issue and ensuring that the standards of our journal improve constantly. Members of the Board — Sinchan Chatterjee, Krishangee Parikh, Sonsie Khatri, Tasneem Fatma,

Manugonda Soumya, Dhruv Singhal, Kovida Bhardwaj, Mohak Dua, Mudit Mangalam Pandey, Aadisha Dhaliwal, Aashirya Malik, Adithya Talreja, Amita Kaka, Anand Shankar, Gurmehar Singh Bedi, Manishka Baweja, Mayank Sinha, Paavani Kalra, Prabhav Chaturvedi, Suhana Gandhi — have been assets to our team.

We would like to express our gratitude to Mr. Gyan Bissa and the University's IT department for maintaining our website and providing us with sufficient resources. The Board also recognises the vital part performed in processing each application and ensuring the efficiency of the process by the University's Students Section. On behalf of the Board, we must also thank our authors for taking the time to contribute to this issue. The topics covered in this issue are of contemporary relevance to Indian Constitutional Law as well as theoretical underpinnings of the Constitution.

We are grateful to the writers for their persistence and cooperation throughout the editing process, which made the timely and smooth release of this issue possible. The Board hopes that readers will find this issue to be a useful resource and that it will encourage informed discussion on the topics of administrative law and constitutional law. Should our readers have any queries, suggestions or feedback for us, write to us at: **editorcalq[at]gmail[dot]com.**

Himanshi Yadav

Editor-in-Chief

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

PROF. (DR.) DEVINDER SINGH[1], DR. DEEPAK KUMAR SRIVASTAVA[2] AND SURYA DEV SINGH BHANDARI[3]

This paper deals with potential lacunae of the basic structure theory as it promises to provide long-term protection to the most innately cherished values of the Indian Constitution, especially in the face of a determined executive and legislature. The paper illustrates instances like those surrounding Hitler wherein the limited amending power and the emergency provisions were used to create a new dystopian constitution. The issue of whether the limited amending power can be used to grant oneself absolute power has been investigated. The attempt has been to examine and propose potential legal means to preempt a future demagogue from destroying the cardinal values of the Constitution. The paper highlights the potential legal challenges and fallouts that could emerge from an attempt to bypass the limitations imposed by the basic structure doctrine, especially by calling for a new constituent assembly. It starts by providing an overview of the idea, origin and judicial development of the basic structure doctrine, as well as by analysing the context and the cases from which the doctrine emerged. The next section of the paper deals with analysing the jurisprudential ideas forwarded by jurists like Conrad, Maurice Haurio, and Schmitt. These jurists in essence laid down the edifice of modern understanding of constituent and constituted power. Further, they have made immense contributions to the understanding of the nature and extent of the constituent power and by borrowing from their ideas the authors have attempted to propose a new alternative legal framework. The new legal framework that has been proposed is based on a novel hierarchical understanding of certain cardinal rights, constituent powers and the constituted powers. The highest echelon of the proposed framework has been envisaged as the unchanging idea of a 'permanent structure' based on the natural law philosophy. This limits the usage of the otherwise unfettered

* Cite it as: Singh, Srivastava & Bhandari, *Moving from the Basic Structure towards a Permanent Structure: From Positive Law to Natural Law,* 9(1) COMP. CONST. L. & ADMIN. L. J. 1 (2025).

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constituent power. The permanent structure is followed, hierarchically, by the constituent power that is expressed and exercised by the people. Constituent power, as a reservoir, continues to exist across different constitutions and epochs. Lastly, constituent power exists in the form of the parliament and the basic structure doctrine which deal only with one 'particular' constitution. The paper in the concluding section engages with jurisprudential issues related to natural and positive legal theories while proposing a framework to ensure the continued existence of certain fundamental values.

TABLE OF CONTENTS

INTRODUCTION

From the works of the much celebrated twentieth-century Austrian jurist Hans J. Kelsen, the Constitution of a nation can be viewed as the reflection removed of its *Grundnorm i.e.* the basic norm. This basic norm can crudely be understood as the harmonious amalgamation of the fundamental principles laying down the legal edifice, the polity of a nation and, resultantly, its governance. The Constitution of a state, in essence, lays down the political structure and delineates the limits and contours for the legitimate exercise of authority by the organs of the State i.e. it, *inter alia,* demarcates the role and functions of the legislature, executive and judiciary. For a jurisprudential gaze and in *the lumen* of the significant body of literature produced by Kelsen, the Constitution may also be conceptualised as being synonymous with the highest echelon of norms from which, directly or indirectly, all norms derive their validity. Though it might also be argued that apart from the *grundnorm*, there is an independent spirit and an underlying structure of the *grundnorm* which,

though distinct from it, exists alongside it. This spirit, which exists alongside the *grundnorm* may be called the basic structure[4] or in other words, the basic personality[5] of the Constitution. In regard to the Constitution, one is reminded of the quote by Caroline Fredrickson, "the Constitution exists to protect rights, not to undermine them."[6] Supplementing Fredrickson's opinion, it may be stated that within the Constitution, there exists a basic structure doctrine which quite zealously shields and protects the Constitution which is both the reservoir and protector of our rights.

The Judiciary, sentinel on the *qui vive* carries the perpetual obligation to the people of India to protect their Constitutional values from being miscarried due to the overzealousness of the legislature.[7] The discharge of this aforementioned duty of the Supreme Court provides a prolific basis for judicial innovation and herein lays the context and impetus for the evolution and subsequent development of the basic structure doctrine. However, the evolution of the basic structure was a particularly controversial exercise.[8] This is, though, often true for any seismic change in the internal separation of power of a state. The doctrine, in essence, augmented the strength of the judiciary with regards to the legislature.

When we refer to the expression, "basic structure" for a document as fundamental as the Constitution, we are essentially attempting to delineate our thinking towards a modicum of entrenched and deep-rooted provisions which cannot be detached from the Constitution, without altering the very essence of the document. In gravamen, one might venture to state that the basic structure is the sum total of the heart and the soul of the Constitution.

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[4] Justice H. R. Khanna introduced the expression '*basic structure'* in Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225. Further, he propounded that certain basic features cannot be removed by the legislature.

[5] Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225, JJ. Hegde and Mukherjee used the expression "The personality of the Constitution" rather than basic structure.

[6] Deepika, *The Constitution of India Basic Structure Doctrine*, 5(6) INT'L. J. L. MGMT. & HUMAN. 721, 723 (2022).

[7] In Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225, ¶614 as per JJ. Shela and Grover., the consequence is not that the Judiciary is supreme but that the Constitution is supreme.

[8] Ramaswamy R. Iyer, *Some Constitutional Dilemmas*, 41(21) EPW, 2064, 2065 (2006).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

One can draw an analogy with the text Animal Farm by George Orwell wherein the author, in the quest to satirise the socialist system, writes "*All animals are equal, but some animals are more equal than others*". The author essentially highlighted the fact that social stratification is the norm. The idea Orwell wanted to propound was that certain institutions, ideas and people are, for lack of a better term, '*privileged*'. Likewise, certain parts of the Constitution are more fundamental than others.[9] Though creating legal inequality among humans must necessarily be frowned upon, yet, the same cannot hold true for all constitutional values and principles as certain values are more ephemeral than others, and some parts of the constitution ought to be more basic than others. Certain principles are part of Constitutional law even if not expressly stated,[10] such as federal structure, separation of powers, popular sovereignty. As the result of judicial pronouncements, majority of the articles of the constitution could be amended by the Parliament as per the procedure entailed in Article 368 but certain other '*privileged*' Articles are beyond the preview of any constituent adventures by the Parliament. The proposition can be better understood in the words of former Chief Justice Sikri:

> "*One of the inferences that can be drawn is that the Constitution makers never contemplated, or imagined that Article 52 will be altered and there shall not be a President of India*."[11]

The genesis, growth and the subsequent valiant protection of the idea of basic structure in mature democracies, either by constituent or judicial means, was undertaken as a consequence of certain distasteful political lessons and experiences that the global community had gained. In a platitude of cases, across global constitutional history, more often than not, either the provisions related to the amendment of the Constitution or the provision related to the emergency were misused and abused to create a new dictatorial Constitutions with no semblance to their respective predecessor, Nazi Germany being a notorious example of the

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[9] *Id.* at 2065.

[10] M. Nagraj & Ors. v. Union of India & Ors, (2008) 8 SCC 212.

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

same.[12] Dr. B.R. Ambedkar also noted that during the interwar period from 1918 to 1939, certain European countries like Italy and Germany with working parliamentary democracies succumbed to the rise of extremist right-wing ideologies. These changes represented alterations to the constitutions, whereby the old democratic constitutions were replaced with a one-party legal order. The old constitutions were legally undermined by the usage of emergency or amendment-related provisions provided in the old constitutions themself. Such events call for the need for constitutional checks and limitations on the power within the Constitution to alter the Constitution. This trend reflects a malevolent practice, undertaken by Machiavellian politicians standing on the shoulders of the ideologues of extremist ideologies to gain absolute power. Such extralegal political revolutions and their legal offsprings could be termed as Constitutional *maleficence*. The foresight of the framers of any mature constitutional system ought to, at the very least, have internal checks and balances like the basic structure doctrine to prevent such constitutional maleficence.

If the Constitution could readily be altered and freely restructured without any effective limitation, then such a text would be worth less than the paper it is written upon. This would be especially true in the face of a violent and exclusionist political force when no limits on the constitutional amendment are provided or a legitimate political force with unconstitutional aspiration achieves the Constitutional prerequisites for effecting amendments. The basic structure doctrine ostensibly ensures the aspirations of J.S. Mill when he remarked "*not to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions*". In India, the fervent supporters of the doctrine of basic structure include, among others, luminaries such as Fali S. Nariman, Soli Sorabjee and former Chief Justice of India Aziz Mushabber Ahmadi.[13]

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[12] In India's immediate neighborhood, martial law powers were used to subvert their Constitution thrice, *First*, in Pakistan by Iskandar Mirza in 1958, second in Bangladesh, by General Zia-ul-Haq in 1977 and latest by General Pervez Musharraf in 1999. The judiciary legalised these coups by evolving the 'doctrine of necessity'. In Europe, the rise of dictators like Benito Mussolini, Antonio Salazar of Portugal, and Francisco Franco in Spain also reflects subversion of Constitutional structures in their respective countries.

[13] Iyer, s*upra* note 8, at 2066.

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

The issue which has long plagued the judicial minds is whether the amending power could be used in a way to amend the Constitution to accord, upon the amender, unlimited power. Can the 'created' venture use its limited powers to destroy its creator and accord upon itself the status of a new omnipotent power, or can the whole Constitution be repealed and Mughal and British rule re-introduced?.[14] Theologically, the story of uprising the angel Lucifer against God is quite well known hence an Abrahamic analogy *vis-à-vis* our legal concern may be drawn in the paradigm of the revolt by the angel Lucifer against its creator, the God.[15]

The main challenge was to legally deny any extremist political party, playing on the momentary passion of the masses and having gathered the necessary majority, from exercising its legitimate legislative and constituent force, to undertake a substantial revision of the Constitution. The basic structure could be seen as a means of delineating the contours of the amending power. Without the doctrine of basic structure, democracy could be potentially used as a means to strangulate democracy itself and the limited amending power of the Constitution could be used to draft a novel and more violent Constitution, as it may be if so, required by amendments.

Adolf Hitler, Fuhrer of Nazi Germany, was a dictator[16], but the issue of interest for us is the question of whether he got his power through illegal means? The answer must be negative. It must be conceded that he was a democratically elected leader. Hitler fought elections,[17] engaged with voters, debated his opponents, appealed for votes and participated in the legitimate political mobilisation. He made his electorate trust his political philosophy and eventually went on to win a free, fair and unbiased election. However, subsequently, he used the emergency power provided by the Weimar Constitution to gather absolute power.

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[14] A.G. Noorani, *Behind the 'basic structure' doctrine*, FRONTLINE (May 18, 2019).

[15] Bible Isaiah 14:12-14 states that Lucifer said in reference to the aim of his rebellion against God that "I will be like the Most High".

[16] Ian Kershaw, *Working Towards the Führer: Reflections on the Nature of the Hitler Dictatorship*, 2(2) CONTEMP. EUR. HIST. 103, 105 (1993).

[17] *Id.* at 104.

Adolf Hitler pushed the Weimar Constitution to its limits[18]. So what if the Indian citizenry, in a moment of despair democratically elected a man who claims to be a prophet, a panacea, or elect a political party that denies the right of life and liberty or due process of law or human rights? The possibilities are limitless. What stops such jurisprudential agony and Constitutional violence? The swift retort, by a student of Constitutional law, would the existence and application of the doctrine of basic structure.

The Indian Supreme Court, when it realised that even the Indian leaders could go beyond the democratic tradition, to implement their vision of what they feel is right, crafted the doctrine of basic structure. It was the climate of constant Parliamentary aggression that provided the impetus and field for the judicial mind to develop the doctrine of the basic structure of the Constitution. The Forty Second Constitutional Amendment Act also called the mini-Constitution was passed during the emergency when most of the opposition Parliamentarians and leaders were lodged in various prisons, and the print and the electronic media were censored. Furthermore, for a short quantum of duration, the Constitutional position of the Directive Principles of State Policy and fundamental rights were reversed wherein, the latter became subservient to the former. Without going into the details, it can be safely stated that in both cases basic structure doctrine saved the day for India.

In light of the aforementioned, it might seem that all is fine but a complete victory over the forces of Constitutional violence and illegitimate disruption has not been won. One can only venture as far as to state that the battle to protect the basic constitutional spirit might have been won but the larger war to achieve a more permanent solution continues. The basic structure doctrine is only a partial and temporary solution. It merely remedies the symptom that is the abuse of amending power but does not address the underlying malady.

What would happen if a government is elected on a mandate which is in opposition to the basic structure and such a government is repeatedly hindered by the Courts to undertake a complete revision of the Constitution? The party leading the government may simply call for a

[18] Dorsey D. Jones and S. L. Meltzer, *Hitler and Hitlerism,* 8(4) SOC. SCI. 412, 414 (1933).

new constituent assembly and create a constitution suited to its whims. The challenge or protection, depending on perspective, created by the basic structure doctrine can simply be overcome by convening a new constituent assembly. As the basic structure is only binding over the Parliament created by the present Constitution, the new hypothetical constituent assembly and the new Constitution inevitably emerging from it, will not be under the onus to pass the test of any Constitutional muster. The comfort and protection offered by the doctrine of basic structure will fall short in such a case. The experience of most of the countries reflects that formulation of multiple Constitutions is the norm and not the exception. France and Germany both have witnessed multiple Constitutions come and go, some violently and others after well-argued discussions. Who knows when *Durvasa Rishi*[19] might appear for our much-cherished Constitution?

Legal regression is not unheard of. The French National Constituent Assembly of 1789 passed the Declaration of the Rights of the Man and of the Citizen of 1789 wherein Article 1 declared that "*all men are born and remain free and equal in rights*".[20] Despite the pompous declarations, subsequent French Empires and Republics, based on different Constitutions, in the succeeding years pursued a highly racist policy.[21] The recently attempted insurrection in the USA, to deter the peaceful transfer of power, again establishes that the ideas embodied in stable democracies and their mature Constitutions are fragile creations that need constant and ardent protection.

CONSTITUENT ASSEMBLY, INDIAN CONSTITUTIONAL CONFLICT AND THE CONSTRUCT OF BASIC STRUCTURE DOCTRINE

[19] The appearance of *Durbhasa Rishi* usually foretells a disaster by word of mouth - curse.
[20] Declaration of the Rights of Man and of the Citizen of 1789, art. 1.
[21] The nature of colonial practices followed by the French in Africa, Indo-China etc. during the age of colonialism *prima facie* refused to recognise basic rights of men, even though the idea of inherent rights of humans was recognised during the 1789 French Declaration.

In India, there is a separation of functions and not power.[22] Under the Constitutional arrangement, the Supreme Court is the protector of the Constitution. Nevertheless, the Indian Constitution is silent on the issue of basic structure, *per se*. The evolutionary journey of the doctrine can be seen across the span of a multitude of, closely contested, cases fought in the Supreme Court during the early decades of the republic. Amusingly, the source of the nasty conflict between the government, led by Congress, espousing socialist principles, and the Supreme Court was about the implementation of the much-needed land reforms. These seemingly necessary laws and welfare measures, that would have provided succour to the laity in distress, in form of necessary land redistribution had its conflict with the fundamental right to property guaranteed under Article 19(1)(f) of Part III of the Constitution of which the Supreme Court was the guardian by the virtue of Article 13 among others. This conflict over land reform provided the context for the development of this doctrine.[23]

Later, the steady Parliamentary aggression upon the Constitution and Constitutional values, during the era of Prime Minister Indira Gandhi in addition to the aforementioned context, provided an edifice for the slow but steady growth of the basic structure doctrine. The *cause célèbre* cases of, among other, *Kesavanada Bharati* v. *State of Kerala*[24], *Indira Nehru Gandhi* v. *Raj Narian*[25] and *Minerva Mills Ltd. and Others v. Union of India*[26] provided the landmark judgments wherein, the principle of basic structure was overtime introduced, debated, refined, established, and eventually entrenched by a whole generation of the Judges of the Supreme Court of India.

As noted earlier, the basic structure doctrine was the judicial solution for the predicament of curtailing the power of the Parliament to ensure that

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[22] Walekar Dasharath, *Changing Equation Between Indian Parliament & Judiciary,* 71(1) INDIAN J. POL. SCI. 163-167 (2010).

[23] SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE, 112 (Oxford University Press, 1st ed., 2010).

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

[25] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299.

[26] Minerva Mills Ltd. and Others v. Union of India, (1986) 4 SCC 222.

the Constitution is not turned over its head and certain values that are fundamental to human governance like democratic government, parliamentary structure, federalism, right of life and liberty, fundamental freedoms and right of equality remain intact irrespective of the Parliamentary majority or popular demands.

The Constitution of India is a reflection and culmination of the values espoused during the freedom struggle.[27] One weakness of the Constituent Assembly that has to be acknowledged is the fact that the members of the constituent assembly were partially, indirectly elected by the members of the provincial legislative assemblies who were themselves elected on a very limited and exclusive franchise and rest were partially nominated by despotic princes of the princely states whose interests were essentially feudal in nature.

The opinions of the members of the Constituent Assembly, on a large arena of Constitutional concern, were reflected in the Constituent Assembly debates, which are nothing short of legal poetry. A few have even argued that to keep the Constitution supreme in the country, India made the biggest written Constitution in the world.[28]

Though the Constituent Assembly, never entertained the idea of an unalterable basic structure that renders certain parts of the ensuing Constitution beyond the pale of Parliamentary amendment. Such an issue was surprisingly never the cynosure of any debate. The Union Constitution Committee was rather preoccupied with internal squabbles over the fine details of the process of Constitutional amendment[29] for instance, should the amendment process be allowed via simple majority or two-thirds majority and should the states have any involvement in the

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[27] India lost great freedom fighters and leaders like Abdul Gaffar Khan, Dr. Khan Sahib, Mian Iftkaruddin, among others due to partition hence they were not the member of constituent assembly of India and M.K. Gandhi was not a member of the constituent assembly.

[28] Fali S. Nariman, *Constitution under Threat*, THE TRIBUNE, Aug. 15, 2007.

[29] Ivan, *Basic Structure Doctrine Was Never Basal to the Constituent Assembly*, SCC ONLINE (May 6, 2020), https://www.scconline.com/blog/post/2020/05/06/basic-structure-doctrine-was-never-basal-to-the-constituent-assembly/.

procedure to amend the Constitution? Hence it is accurate to state that in India the doctrine of basic structure is the child of judicial interpretation or that it emerged out of the judicial mind. No article in the Indian Constitution substantively limits the amending power of the Parliament, though procedural limitations like the requirement of a two-thirds majority and in certain cases, consent of half of the states exists under Article 368.

Nonetheless, after the formulation of the Constitution, it was soon realised that the end of creating a modern Constitutionally governed nation based on values of rule of law and human dignity came at odds with the socialist socio-economic programs in general and land reforms in particular.[30] The *Zamindars* as a Marxian class, whose interests were protected by the fundamental rights, had largely remained loyal supporters to the British regime and they were the principal mode of exploitation of the laity.[31] As for *zamindars,* their status and power was guaranteed and perpetuated by the erstwhile colonial government.[32]

Coming back to the judicial arena, the Bihar Land Reform Act 1950[33] was declared unconstitutional by the Patna High Court in the case of *Kameshvar Prasad v. State of Bihar*.[34] Different interpretations were made by some other High Courts.[35] High Courts, in line with the Supreme Court, derived their power to declare the law of Parliament as unconstitutional from Article 13 of the Constitution, which prevented the Parliament from drafting any law that abridged the rights conferred under Part III of the Constitution.

To bypass the challenge, the Parliament passed the first Constitutional Amendment Act, 1951 wherein Article 31A and Article 31B were introduced. Article 31B was the genesis of the Ninth Schedule of the

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[30] *Id.* at 7.

[31] CHITTA PANDA, THE DECLINE OF THE BENGAL ZAMINDARS: MIDNAPORE, 1870-1920 15 (Oxford University Press India, 1997).

[32] *Id.* at 17.

[33] Bihar Land Reform Act, 1950, No. 30, Acts of Parliament, 1950 (India).

[34] Kameshvar Prasad Singh v. State of Bihar, AIR 1962 SC 1166.

[35] The Patna High Court held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislations in Uttar Pradesh and Madhya Pradesh respectively.

Constitution which was to be a reservoir schedule for the laws that were beyond the preview of being declared unconditional by the Courts using their power, of judicial review, under Article 13. The land reform acts of various state legislatures were inserted in the Ninth Schedule and the agrarian revolution envisaged was successfully achieved. However, the spectre of subverting the Constitutional Morality by adding laws in the Ninth Schedule remained.

The issue of land reforms went to the Supreme Court and in the *locus classicus*, of *Shankari Prasad Singh Deo* v. *Union of India*[36] the Court held that the power to amend the Constitution, including the fundamental rights, is conferred to the Parliament under Article 368, and the expression 'law' as mentioned under Article 13(2) does not include an amendment of the Constitution. Therefore, the Court made a distinction between Parliament's law-making power, that is, the legislative power[37] and Parliament's power to amend the Constitution i.e. Constituent power. In short, the Parliament was given absolute power to change the Constitution. The position of the Court implied that if the Parliament wanted to remove Article 21 or the whole of Part III, it was free and within its competency to do so. It is odd to think that the constitutional interpretation by the Supreme Court would have prohibited the Parliament from using its legislative power to alter Part III while it would have allowed the same Parliament to alter Part III using its constituent power. Nonetheless, the Courts had conceded that Parliament had the power to undertake a total revision of the Constitution.

This landmark judgment and its reasoning was followed in the case matter of *Sajjan Singh* v. *State of Rajasthan*[38]. The Supreme Court concurred with the earlier position and reaffirmed the decision of *Shankari Prasad*. However, the first seed for the future development of the basic structure doctrine was sown in this judgment by the dissenting opinions of J. Hidyatullah and J. Mudholkar. These judges, for the first time, raised doubts on the unfettered, unbridled authority of the Parliament to amend

[36] Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.

[37] Provided under the Seventh Schedule as per List 1 and List 3 across various entries.

[38] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

the Constitution. In particular, it was J. Mudholkar who first envisaged the idea of limited amending powers of the Parliament. J. Mudholkar observed that the Constitutional amendment should be excluded from the definition of law under Article 13 and he also gave an argument that every Constitution has certain basic principles which could not be changed.[39] Justice Hidayatullah observed;

> *'Fundamental rights cannot be amended by Constitutional Amendment as they are basic necessity for humans and Parliamentary cannot play with them'*[40]

He further observed:

> "*The Constitution gives so many assurances in Part-III that it would be difficult to think that they were the plaything of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other part and even on the less firm ground than one on which the articles mentioned in the proviso stand.*"

Further, J Mudholkar concurred with the opinion of the Chief Justice Gajendragadkar and questioned:

> "*It is also a matter for consideration whether making a change in the basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?*"

The view of J. Hidayatullah seems to be closer to the *ratio decidendi* of the *Golaknath* judgment, which made fundamental rights sacrosanct, whereas the remarks of J Mudholkar i.e. "Every Constitution has some basic elements which cannot be amended"[41] are close to the principle of basic structure and *ratio* of Kesavananda Bharati judgment. Still, the Court

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[39] Prashant Saurabh & Ankita Rani, *Doctrine of Basic Structure and the Spirit of Indian Constitution: An Analysis*, 5 INT'L J.L. MGMT. & HUMAN. 644, 645 (2022).
[40] Deepika, *supra* note 6, at 730.
[41] *Id.* at 731.

through its majority opinion again emphasized the absolute amending power of the Parliament. The vocal judicial minority seems to have appreciated the potential ramifications of allowing unhindered constituent power, a concern which is the central theme of the paper.

The issue of amending power of the Parliament was again made subject to judicial scrutiny by the Supreme Court during the era of Chief Justice Suba Rao in the watershed *I.C. Golaknath* case.[42] Unlike the five-judge bench in the cases of *Sajjan Singh* and *Shankari Prasad*, Chief Justice Subba Rao constituted a bench of eleven judges, wherein by a majority of six to five the Supreme Court held that the fundamental rights were sacrosanct and thereby outside the purview of the amending/constituent power of the Constitution. In the case, the judge did consider the doubts expressed by J. Hidaytullah and J. Mudholkar.[43]

The Court made certain intriguing observations. *First*, Article 368 was not a source of power in itself but merely provided a procedure. The Court opined that the power of amendment was not rooted in Article 368, where it was commonly believed to reside. *Second*, the Court held that the power to amend was derived from Article 248 read with Entry 97 of the Seventh Schedule. The said entry contains the residuary power of the Parliament to make law, and it must be remembered that the expression law is expressly part of Article 13. This new, *sui generis,* view was taken to ensure that any amendment made by the Parliament comes under the scope of Article 13 and thereby fundamental rights remain forever preserved. Further, the Court applied the Doctrine of Prospective Overruling[44] wherein the amendments prior to the judgment were saved. This again reflects the aim of the Court which was to simultaneously preserve the land reforms but also to deny the Parliament the power to conduct any such drastic reforms of Part-III. The Court in a sense dissolved the earlier distinction between the legislative and the constituent power as Article 248 deals with the 'Residuary power of legislation'. Thereby an amendment was interpreted as an action under

[42] I. C. Golaknath v. State of Punjab, AIR 1967 SC 1643.
[43] Deepika, *supra* note 6, at 733.
[44] Saurabh & Rani, *supra* note 39, at 645.

the residuary legislative power. However, the security provided was not as large as accorded by the doctrine of basic structure and this interpretation would not have allowed for the removal of the right to property from Article 19 an aspect which the doctrine of basic structure allowed.

The complex position, taken by the court, showed the immense desire of the Judges to preserve the vigour and vitality of the fundamental right from the excess that could potentially be committed by the Parliament. In essence by catapulting the fundamental rights to the status of a sacrosanct entity future organic growth of Part III of the Constitution was effectively barred. The Parliament's constituent powers with regards to Part III were left sterile and the only possibility of alteration was by virtue of novel interpretations offered by the Courts. Therefore, the Court had effectively established a permanent monopoly over any further progress of Part III of the Constitution. Most importantly the view that Parliament had absolute amending power was set aside. Therefore, the new judicial interpretation allowed for the Parliament to amend the whole of the Constitution except Part III. Vital aspects of the Constitution like universal adult franchise, separation of powers, and federal structure were still subject to absolute revision by the parliament.

The position on the contentious issue again changed and the doctrine of the basic structure of the Constitution was propounded by the Supreme Court in the case of *Kesavananda Bharati* v. *State of Kerala and another*[45] wherein thirteen judges bench sat for over sixty days and produced a cluster of opinion running into more than thousand pages.[46]

The influence of the research work of foreign authors is *ex facie* evident in the judgment, in particular, there is the immense influence of the work by German scholar, Dietrich Conrad.[47] Conrad believed that the amending power enjoyed by the Parliament was limited. Though this view was ex-facie accepted by J. Khanna it was simultaneously rejected by JusticeChandrachud in his separate opinion. The cardinal argument made in favour of the implied limitations on Constitutional amendment was

[45] *Supra* note 8.

[46] Deepika, *supra* note 6, at 735.

[47] A.G. Noorani, *Behind the 'basic structure' doctrine*, FRONTLINE (Apr. 28, 2001).

the word "amendment" itself. The contention was that the connotation of expression amendment in Article 368 of the Indian Constitution did not include the right to repeal, create or destroy the Constitution.

One could draw an analogy between the powers that the Parliament enjoyed under Article 368 as was originally bestowed by the constituent assembly and the powers bestowed on the demon Bhasmasur by Lord Shiva. The first act of demon *Bhasmasur*, after attaining the boon[48] from Lord Shiva was to attempt to lay his hands on Lord Shiva himself. The issue in both cases is can any institution which drives its power from a source, use its power, in such a manner as, to destroy the source itself.

This was refuted in particular by Chief Justice Sikri, who wrote:

> "*If this is so [unlimited amending power], a political party with a two-third majority [as required by Article368] in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism and enslave the people*."

The concerns of the authors are almost identical to those of Justice Sikri, the difference is that the Hon'ble Judge was primarily concerned about the threat to this Constitution from the Parliament, whereas the authors not only share his concern but are also worried about the threat from subsequent constituent assemblies to the future Constitutions. Basic structure can protect this constitution but cannot extend its limitations upon a future constituent assembly.

The basic structure doctrine, in effect but by a different jurisprudential means, achieved the same end that Chief Justice Subba Rao intended to achieve, i.e., the protection of vital parts of the Constitution from the destructive whims of a majoritarian Parliament. Though, the end of both the judgments was the same the *modus operandi* used was distinct. *Golaknath* protected only Part III of the Constitution whereas

[48] The boon gave the demon the power to convert anything into ash upon which he laid his hands.

Kesavananda's judgment protects the undefined basic structure which also covers large parts of Part III. The *Golaknath* judgment was premised on the expressed protection offered by Article 13 whereas *Kesavananda* saw the genesis of a new judicial innovation. Further, unlike *IC Golaknath's* judgment in *Kesavananda,* the majority did not consider Constitutional amendments as part of the expression law. This in effect set aside the complex view of the *Golaknath* judgment wherein Constitutional amendment acts were seen as law by virtue of Article 248 read with Entry 97 of the Seventh Schedule. It would not be inappropriate to state that in *Kesavananda* judgment *in toto* reverted to the old position of *Shankri Prasad* but with the caveat of the basic structure doctrine. Hence, the distinction between the constituent powers and the legislative powers was revived but the constituent power was made a perpetual slave to the basic structure doctrine.

The spirit of the basic structure doctrine could be very succinctly and aptly put forth by the theme song of the majority decision in *Kesavananda Bharati*:

> "*Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage; therefore, you cannot destroy its identity"*[49]

The doctrine of basic structure was only accepted by a very narrow majority of seven to six.[50] Though a thin majority was achieved these judges in the majority provided no unified reason as the Judges took very distinct positions. One could say the opinion of the majority was an amalgamation of several distinct and at times dissimilar reasoning. For illustration one of the majority judges in *Kesavananda Bharati,* Justice Palekar asserted that the Parliament has an indefinite power to amend.[51] Nevertheless the majority, in brevity, reasoned that Article 368 of the Indian Constitution did not enable Parliament to alter the basic structure of the Constitution.

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[49] KERSHAW, *supra* note 16.

[50] The narrow majority of seven judges were (namely, JJ. Sikri C. J. Hegde and Mukherjea; JJ. Shelat and Grover; J. Jaganmohan Reddy; and J. Khanna).

[51] Iyer, *supra* note 8.

As for the minority[52] J. Ray observed that "there is no limitation on the amending power of the Parliament".[53] Further, J. Beg, quoted ancient Hindu scriptures to highlight the necessity of change and warned against provisions that lead to an obsolete, rigid and ancient Constitution.[54] The views of the minority judges would have only encouraged and precipitated constitutional rewriting. The Parliament would have quickly acted upon the judgment in an alternate scenario, wherein the minority view was accepted by the majority, to forever prevent any attempt at judicial examination and curtailment of the Parliament's constituent power.

Despite the vocal opposition the doctrine of basic structure was reaffirmed in the case of *Minerva Mill*. Eventually, by the *I.R. Coelho* judgment, the original confrontation between Parliament and the judiciary regarding the ninth schedule was brought under judicial review.[55] With the pleasure of hindsight, it might be said that the tension between the Indian Parliament and the judiciary was natural and to some extent desirable.[56] Today, it can be stated, with absolute certainty, that the Supreme Court is supreme in deciding whether the laws enacted and the amendments made by Parliament are within the ambit of the Constitution.[57] Further, the position that the amending power, under

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52 The six judges in the minority were JJ. A.N. Ray, Chandrachud, Beg, Mathew, Dwivedi, & Palekar.

53 Deepika, *supra* note 6, at 736.

54 Iyer, *supra* note 8, at 908-909; Per J. Beg citing ancient Indian text The translation of which follows "the fundamental laws of kali age are different from all previous ages; the laws of kali age are different from all previous ages" conform to the distinctive character of that age (yuga roopa nusaara tah).

55 H. K. Dua, *9th Schedule Route Plugged*, THE TRIBUNE, (Jan. 15 2010), https://www.tribuneindia.com/2007/20070115/edit.htm.

56 K.G. Balkrishnan : *Basic Structure Doctrine : An Overview*, 50 J. IND. L. INSTI. 461, 463 (2008).

57 S. L. SIKRI, INDIAN GOVERNMENT AND POLITICS (Kalyani Publisher Ludhiana, 2012) 206.

Article 368, is subject to implied and inherent limitations is widely accepted.[58]

PHILOSOPHICAL EDIFICE OF THE BASIC STRUCTURE DOCTRINE TOWARDS PERMANENT STRUCTURE

France and Germany unlike England saw many revolutions and violent alterations of power structure. The process of Constitutional development in these countries was not as smooth and organic as in England. Therefore, these underlying circumstances may give one idea of why such views developed in the judicial soil of these nations.

Carl Schmitt was a prominent jurist from Germany who specialized in Constitutional Law; his contributions will be analyzed in this section. On the other side of the river, Rhine was an equally brilliant French jurist by the name of Maurice Hauriou. It was Hauriou who did extensive work in the area of constitutional law and developed the idea of implied constitutional limits on constitutional amendments. He was of the view that there were certain facets which were entrenched in the spirit of every Constitution. The literature developed by both these jurists justifies the limitation on the power of the Parliament to amend the Constitution, yet the approaches and the reasons provided for the curtailment of power were distinct and independent.

Schmitt's views, as to certain entrenched aspects of the Constitution, were based on mystical concepts and the belief in the limited ability of the legislature to exercise constituent power.[59] On the other hand, Hauriou opined that constituent power was only enjoyed by the constituent assembly. Further, Hauriou was also an ardent believer in the concept that certain essential values were within the ambit of natural law and therefore beyond the amending power. One may even feel that Hauriou was following the old tradition of French legal philosophers like Abbé Emmanuel and Joseph Sieyès.

A. CARL SCHMITT'S VIEW: ULTIMACY OF CONSTITUENT POWER

[58] MAHENDRA PAL SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA 1088 (Eastern Book Company, 1st ed, 2017).
[59] J. Colon Rios, *Five Conceptions of Constituent Power* 130 MCGILL L.J. 306, 329 (2014).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

The German jurist Carl Schmitt was undoubtedly the most renowned theorist on implied Constitutional amendment.[60] He formulated his theory on the subject of Constitutional law in his *magnum opus*, *Verfassungslehre*. This text was first published in the year 1928 when the Weimar Republic was witnessing significant troubles in establishing a firm political order. The views of Carl Schmitt were formulated within the expanses and framework of the German Constitution of 1919.[61] This Constitution was established after the end of the Great War. The most intriguing aspect of the Weimar Constitution was the fact that it did not contain any material limitations on the power of Constitutional amendment, whatsoever.[62] In this regard, Article 76 of the Constitution was of great importance as it contained the procedural limits regarding the amendments.

The Constitution can be amended by legislation. However, a decision of the Reichstag regarding the amendment of the Constitution only takes effect when two-thirds of those present consent.

The views of Schmitt were formulated upon the belief that the constituent power, and nothing else, was the basis for all powers. Schmitt went on to further argue that the constituent power was in itself a legal entity beyond the preview of the Constitution and existed concurrently with a Constitution.[63] This belief in the constituent power that exists outside and alongside the Constitution was the most important aspect of his ideas.

The theory, forwarded by him, believed that the will of this almighty constituent power solely was the edifice for both the continued existence and the legitimacy of any Constitution. Yet, the author did not venture as

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[60] Lars Vinx, Carl Schmitt, *in The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Fall 2019 Edition), https://plato.stanford.edu/archives/fall2019/entries/schmitt/.

[61] Charles Calvert Bayley et al., Germany, ENCYCLOPEDIA BRITANNICA, (Jan. 7, 2025), https://www.britannica.com/place/Germany.

[62] CARL SCHMITT, CONSTITUTIONAL THEORY 26 (Jeffrey Seitzer, Duke University Press, 1st ed., 2008).

[63] Monika Polzin, *The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting,* 5 INDIAN L. REV. 45, 53 (2021).

far as to pinpoint the nature of this constituent power but did indicate that it could either be the monarchy or the people. This constituent power had the sole authority and prerogative to decide on the manner, nature and structure of the Constitution.

Further, Schmitt went on to distinguish between two components of a constitution, these were firstly, the indispensable norms of a Constitutional document and secondly the other provisions.[64] The indispensable norms shaped the essential part of the Constitution, and on the other hand, were the other provisions which, no doubt were important, did not carry the status of a Constitutional norm.

This distinction highlights the fact that the whole of the Constitution in itself is not part of the basic structure rather only certain essential aspects like federal structure, separation of power, rule of law, Parliamentary form of government etc. are its part as pointed out by Chief Justice Sikri in the *Kesavananda Bharati* judgment.

In light of the aforementioned, it is safe to assume that the amending power provision in any Constitution does not empower the legislative body to alter those norms that, in the material sense, make the essence of the Constitution. These fundamental facets of the Constitution which contain the very essence of the document could only be amended by the constituent power. Such an action was beyond the capacity and preview of the legislative body; rather such acts could only be performed by the constituent power, whatever its nature may be. Schmitt further argued that about the Weimar Constitution, this constituent power was the people. Hence, as per his theory, the Constitutional laws were undoubtedly subject to change by the supreme legislative body, but upon the prerequisite that the fundamental nature and essence of the Constitution as a whole are not denuded of vigour and vitality. This aim could only be achieved by the constituent power that existed concurrently but separately from the legislative power.

Schmitt also adopted a position wherein he expressly refrained from any precise and exhaustive list of the components of the Weimar Constitution that were beyond amendment. Though Schmitt gave a

[64] *Id.* at 56.

theory with an overarching superstructure he remained elusively silent on the issue of how the people, i.e. by what procedure people can act as the constituent power.[65] One may note that Article 1 of the Weimar constitution noted that political authority emanates from the people.[66]

Schmitt's ideas could be seen as a product of the ideas developed by isolating the concepts propounded by Emmanuel Joseph Sieyès'[67] during the French Revolution. Sieyes, like many of his contemporaries, was deeply rooted in the belief in natural law school. The idea of a politico-legal entity that existed outside i.e. over and above the Constitution was, therefore it seems, taken from natural philosophy.

Schmitt further, gave the idea of a 'mythical will of the people' such that was beyond the control of the Parliament. One of the negative aspects that can be noted with Schmitt is his strong opposition to any form of judicial oversight.[68] For him, the onus of acting as the guardian of the Weimar Constitution was with the executive branch, i.e. the President of the Reich. The inevitable and the seriously negative fallouts, of his views, were evident within a decade of Schmitt publishing his text.

Despite the challenges and limitations, the theory propounded by Schmitt is still significant, at least, in continental legal thought in general and German Constitutional thought in particular. Furthermore, the noted positivist jurist Hans J. Kelsen opined that a facet of the Constitution was beyond the amending power if an express provision to that effect was present.[69] The said article must have the consequence of declaring that either the whole of the Constitution or certain of its parts are unchanging. Such a provision is present under the current German Constitution. It is pertinent to mention that the much debated eternity

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[65] *Id.* at 58.

[66] Weimar Constitution of 1919, art. 1.

[67] He was a clergyman who was the chief theorist of the French Revolution, his pamphlet 'What is the Third Estate?' became the political manifesto of the revolution.

[68] Polzin, *supra* note 63, at 53.

[69] *Id.* at 55.

clause[70] German Basic Law *ex facie* contains Constitutional limits on any amendment. This provision in the present German Constitution is the living evidence of the huge impact that the then literary contributions and theoretical works had on the Constitution makers.

Schmitt's work also introduced the idea of constitutional identity. As per the distinction propounded by Schmitt, there is a difference between constituent power and the constituted power. Such a distinction is also evident under the current German Basic Law. Within the paradigm of his theory, it is not inappropriate to state that only the constituted powers are bound by Article 79. On the other hand, the constituent power within Germany i.e. 'the people', unlike the parliament which represents the constituted power, has a continued right across generations and epochs to amend the facets of the eternity clause. In other words, the eternity clause recognises that certain legal principles are beyond the capacity of the constituted power i.e. the parliament to alter. The aspects of the eternity clause for instance are the rights provided from Article 1 to Article 20 of the German Constitution and the federal structure, among others. However, these rights and principles may be altered in future by the people who represent the constituent power.

This view of the said arrangement is reaffirmed by the landmark Lisbon judgment.[71] In the said judgment the German Constitutional Court found a direct relation between the ideas of Constitutional identity as contained under Article 79, and the different sources of Constitutional change i.e. the constituent power and the constituted powers. Whereas one is limited the other is unlimited. The German Constitutional Court held:

> "*From the perspective of the principle of democracy, the violation of the Constitutional identity codified in Article 79.3 of the Basic Law is an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the Constitution. No Constitutional body has been granted the power to amend the Constitutional principles which are essential pursuant to*

[70] Article 79(3), Basic Law of the Federal Republic of Germany, 1949 (Germany).
[71] BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil).

Article 79.3 of the Basic Law. The Federal Constitutional Court monitors this."

B. MAURICE HAURIOU AND THE CONCEPT OF CONSTITUTIONAL LEGITIMACY

The French jurist Maurice Hauriou was, if not the most significant, one of the leading Constitutional experts in the French legal fraternity of the twentieth century. He was an academician and worked as a professor of constitutional law, jurisprudence and administrative law at the esteemed University of Toulouse.[72] Significantly, his views were being independently developed contemporaneously to Schmitt in Germany. The major point of departure from Schmitt's view was that Hauriou made a patent rejection of the mystical ideas, and focused on the structure and rule of law as the basis for Constitutional amendment. He wanted to preserve the democratic ideas in his nation and emphasized the limited amending power of the Constitution, with the legislature.

The advantage of his work over his German contemporary was the fact that his work was more grounded and unlike the German jurist his emphasis on the mystical element was bare minimum. Hauriou opined that amendment should be introduced by a method that should be distinguished from simple legislative power. His analysis of the distinction between the ordinary legislative powers from the amending power was more nuanced as the jurist also proposed a distinction between minor and total revision of a Constitution. Hauriou laid great emphasis upon the fact that the labour for the enactment of a new Constitution can only be undertaken by a body which was specifically elected for that end.[73] Hence, the idea of total rejection or alteration of the Constitution in his view was beyond the power of even the supreme legislative body.

Hauriou was of the opinion that there exist certain vital values and features that are so cardinal that they supersede the legitimacy of the

[72] Polzin, *supra* note 63, at 57.
[73] *Id.* at 58.

written Constitution itself. Hauriou, further, went as far as to say that the fact of the presence of principles was not essential for them to be respected e.g. the fundamental rights and the republican principle.[74] Such an attempt to delineate the basic structure of the Constitution was also attempted by the judges in the case of Keshvananda Bharati and the subsequent cases related to basic structure doctrine but almost all judges gave their distinct opinions as to the essential aspects of the Constitution.

Hauriou's views were also consonant with the current Indian practice with regard to the power of the judge to exercise judicial oversight upon the Constitutional amendments. Hauriou, unlike Schmitt, argued in favour of judicial oversight and directly supported the prerogative of the Constitutional courts to declare Parliamentary amendments, if need be, unconstitutional.

To put it succinctly Hauriou accepted the view that Parliament only enjoys limited amending power and the power to venture to under a complete revision was only enjoyed by a constituent assembly. The most interesting and tempting aspect of his views is the faith that he accorded in certain higher principles which are superior to the powers of a constituent assembly to alter *e.g.* democracy and republican form of government. In the end, it should also be pointed out that the French jurist belonging to the sociological school Duguit was in a certain sense closer to Hauriou. This fact can be established by the views taken by him. He believed, like Hauriou, that certain features are beyond even the constituent power to alter. For instance, he saw the French Declaration of Human Rights of 1789 as over and above any Constituent Assembly.

C. DIETRICH CONRAD'S WORK

Now we shift our focus on Conard's literature which, unlike the other aforementioned jurist, had an immediate impact on the Indian Constitutional jurisprudence.[75] Nevertheless, his works reflect the great influence and impact of ideas that were earlier propounded by the aforementioned authors. Conard's views focused on the implied limits on

[74] *Id.* at 58.

[75] SCHMITT, *supra* note 62 at 16.

the amending power of the Parliament of India.[76] He opined that certain articles were entrenched within the essence of the Indian Constitution. Conard gave a much-celebrated lecture on "Implied Limitations of the Amending Power" in 1965 at the Law Faculty of Law of the Banaras Hindu University.[77] During this lecture, he propounded his views on the limited amending power of the Indian Parliament. He saw the power contained under Article 368 not as absolute, unfettered and overarching rather subject to the idea of inbuilt limitations.[78] His ideas were in opposition to the judgment of *Shankari Prasad* and *Sajjan Singh*.

After the landmark case of *I.C. Golaknath*, Conrad wrote a famous paper wherein he referred to the German Weimar Constitution, its Article 76 which contained a formal limit on the Constitutional amendment, and he also focused on Schmitt's works.

He fought for the position of a limited amending power due to the ever-present danger of a legal revolution or a legal coup. In the same breath, Conrad also emphasized that the doctrine of implied limitations should be done only as the last resort when every other means fails to prevent a Constitutional revision. This doctrine should be used to prevent the amendment whose unconstitutional nature is apparent on the face i.e., *ex facie*.

Therefore, to summarise his views, it can be safely construed that the power of Parliament to make Constitutional amendments is subservient to certain entrenched provisions. It is needless to state that amendment cannot go so far as to conduct a total revision of the Constitution. The identity of the Constitution must be preserved.

The views of Carl Schmitt are inherently susceptible to abuse as by stressing on the mythical will of the people and viewing people, without

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[76] Satya Prateek, *Today's Promise, Tomorrow's Constitution: Basic Structure, Constitutional Transformations and the Future of Political Progress in India* 1 NUJS L. REV. 34 (2016).
417, 444 (2008).
[77] *Id.* at 445.
[78] *Id.* at 446.

subject to any limitation, as the source of the constituent power he has opened the door for a demagogue to ride on the momentary passion of the masses to undermine the Constitution or deny certain inalienable rights like human rights, due process. One cannot dispute the fact that under modern conceptions of popular sovereignty, the people are the source of the constituent power but that power must be subject to certain higher norms and values. After all, almost all of the modern revolutions Islamic, Marxist, fascist, conservative were undertaken in the name of the people, recent examples include Bangladesh and Syria. However, the distinction made by Carl Schmitt as to the indispensable norm of the Constitution and other dispensable provisions is an important contribution and harmonious with the idea of the basic structure. Further, the idea that constituent power exists concurrently and is separate from the Constitution also seems acceptable as people being the source of constituent power never perpetually delegated this power to anyone and this constituent power can be called upon at any moment to formulate a new constitution.

As for Maurice Hauriou, his ideas are much more significant in many ways. Firstly, he divides constituent power into minor and major aspects. In this regard, the minor power may be legitimately exercised by the parliament but major constituent power can only be exercised by a body specifically elected for that end. Secondly, Hauriou also emphasized that certain principles ought to be read into a constitution even if they are not explicitly provided. The idea in simple terms means that certain features are so cardinal that they supersede the legitimacy of the written constitution itself. This reflects the very idea that this paper attempts to convey that certain values have to exist over and above the constitution and the constituent power.

Hence after scrutinizing the views of the aforementioned authors, a mechanism may be forwarded wherein, like ideas of Maurice Hauriou, certain values and principles are supreme and at the highest echelons of the hierarchy. These values ought to be considered part of the constitution even if they have not been explicitly provided. For example Indian Constitution under Article 21 only provided 'procedure established by law' but the Courts read the article as 'due process of law'. In the same light, certain rights ought to be read within a future

constitution even if they are not explicitly provided. Beneath these supreme rights, and principles there exists the constituent power with people as its source. This constituent power can only be exercised by the constituent assembly specifically elected for that purpose. Even after the creation of the constitution, the constituent power would continue to exist alongside the newly created constitution like the idea that Schmitt had forwarded. The constituent assembly would then create the constitution within which there would be certain entrenched indispensable provisions and certain other dispensable provisions. This idea will allow for the basic structure doctrine to exist while a particular constitution is in force. Lastly, as Schmitt suggested, there would exist the minor constituent power that may be exercised by parliament subject to judicial oversight.

To illustrate the position let us assume the idea that 'a kitchen is a room devoted to preparation of food' as the fundamental principle or value. Below this overriding value is the constituent power exercised by the people which exists concurrently with the constitution as Schmitt pointed out, represented by the will of the owner of the house. Then the Constitution would be the particular kitchen of that house and lastly, the maid representing the Parliament. The maid as Parliament is someone who works within the kitchen and is bound by its physical structure. This kitchen/constitution may be slightly altered by the housemaid/parliament by exercising her right of minor constituent powers of the parliament. The maid as the Parliament could alter i.e. amendment and change the kitchen only till the point that it remains a kitchen it should in no case become a living room or a library. The kitchen may only be significantly altered by the owner of the house exercising his constituent power yet the principle that the kitchen is a place to prepare food cannot be altered even by the owner as the concept is over and above him. With the change in social circumstance and coming of distinct milieu, new refurbishment may be conducted in the structure of the kitchen, tiles may be changed, the paint replaced, new utensils may be introduced but the essence of the kitchen as a room dedicated to the preparation of food cannot be altered.

AN OVERVIEW OF THE JOURNEY TOWARDS NATURAL LAW

As per the school of Natural Law the principles of law are based on certain basic ideas and concepts, the source of which is not in any worldly authority.[79] The more rational strands of this school focus, *inter alia,* on rationality and morality as the basis of this authority.[80] By and large; there is the belief that they are a product of reason.[81] Further, it is not a man-made law like Positivism. It is merely discovered by him. It is an ideal law since it consists of the highest principles of morality towards which humanity is striving.[82] Grotius himself stated as a hypothesis that natural law is so immutable that "*even God . . . cannot cause that two times two should not make four*"[83] The traditional view of natural law is that it is a body of immutable rules superior to positive law.[84]

As per Dias and Hughes, "*Natural law is a law which derives its validity from its inherent values, differentiated from the law promulgated by the State or its agencies*". Principles are believed to be unalterable, eternal and beyond the capacity of humans to alter. The school was famous in the ancient era. Aristotle defined natural law as reason unaffected by desires. Cicero remarked that "*true law or natural law is the right reason in agreement with nature*". Jurist like John Rawls, Stammler, Hall, Morris, among others, have future developed the doctrines[85] to bring this school in harmony with the modern mind.[86] Natural law could offer help with two contemporary problems namely, the abuse of power and the abuse of liberty.[87]

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79 B. N. MANI TRIPATHI, JURISPRUDENCE THE LEGAL THEORY 97 (Allahabad Law Agency, 2021).
80 Nathan Isaacs, *The Schools of Jurisprudence. Their Places in History and Their Present Alignment* 31(3) HARV. L. REV. 373, 386 (1918).
81 *Id.* at 389.
82 A. G. Chloros, *What is Natural Law?,* 21(6) MOD. L. REV. 609, 609 (1958).
83 *Id.* at 609.
84 *Id.* at 609.
85 N. KRISHNA KUMAR, JURISPRUDENCE AND COMPARATIVE LAW 17 (Central Law Publications, 1st ed., 2019).
86 RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 54 (London and New York: Cambridge University Press, 2nd ed., 1979).
87 DIAS, JURISPRUDENCE, 470 (LexisNexis, 1st ed., 2014).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

One of the major criticisms of the now hegemonic positive law is the fact that most positivity excluded natural law and morality from the ambit of the law. Positivism was a reaction against Natural Law. Legal positivism makes the law barren and soulless. We need a permanent structure based on natural law. As Aristotle said, "*natural law emanated from human consciousness and not from the human mind*". As noted in the prior sections, certain rights ought to supersede even the constituent power and as Maurice Haurio contented, these rights and values ought to flow even if the future constitution is silent on them. The larger issue remains what would be the source of these "highest rights". They cannot flow from the mystical will of the people or even the constituent power as these would be subject to alteration. Hence, the solution seems to be that these rights should flow from natural law philosophy. The highest rights should be viewed as the reflection of innate human morality and consciousness. In the end, one must remember that there is renewed interest in natural law, but scepticism is too widespread to permit its general acceptance.[88]

POSITIVE LAW AND THE THREAT OF MOMENTARY HUMAN (POLITICAL) PASSION

It can be safely stated that the development of political and legal institutions in any society depends on the established view about the innate human nature. In other terms, what is the conception, which is in vogue, in a society as to human character in the state of nature? Are humans seen as inherently evil or good? The social gaze on this issue formulates the base upon which the superstructure of the society is chiselled. The tone of the paper may wrongly induce one to believe that authors ascribe to the Hobbesian view about human nature.

English philosopher Thomas Hobbes had a conception wherein all humans, if left to themselves without a social contract, i.e., in the state of nature, were seen as evil, nasty and brutish. Hobbes accordingly believed that the state of nature was one of perpetual war of all against all. To his defence it must be remembered that Thomas Hobbes was writing during

[88] Robert A. Pascal, *Natural Law and Respect for Law,* 15(3) AM. J. COMP. L. 500, 505 (1966).

the course of the brutal English Civil War wherein, the parliamentarian led by Oliver Cromwell established a Commonwealth after defeating the Royalist forces. The authors surely do not ascribe to this view but, in the same breath, it is pressed, unlike Rousseau, that one should not too readily conceive of a state of nature wherein humans act as noble savages.

The greatest threat, it seems, is the susceptibility of the masses to believe in irrational things and violent myths created by Weberian charismatic leaders or demagogic politicians. Thereby it is contended that masses, though morally good, have a latent and ubiquitous potential of being used as instruments to commit inhumane actions. Noam Chomsky, a noted social scientist, also coined the term 'manufactured consent'.[89] Further, one should not forget that post-truth is the contemporary buzzword.[90] What guarantee is there, save for the basic structure doctrine, that manufactured electoral dictatorships created by a misinformed economy won't formulate a dystopian future? More often than not, humans do realise their mistake but that is after acting for long as the means of evil, as was the case with the German masses in Nazi Germany, Italians during the Fascist regime, Russians during the era of Joseph Stalin and Chinese during the epoch of Mao Zedong, etc.

So, the contention is that humans are innately good but could commit errors at times. The issue is that of legally, permanently, and effectively protecting values like human rights, due process, rule of law, golden triangle from any harmful exigencies of the uncertain future. Herein, natural law philosophy seems to provide an answer. At the onset, it must be made clear that the legal principles being moulded in the iron frame of natural law philosophy must only be the most innate and cardinal principle that is *sine qua non* for the assurance of human life, liberty and dignity. They may include, *inter alia*, the right to life, due process of law and equality before law.

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[89] *See in general* EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (New York: Pantheon Books, 1st ed., 1988).

[90] *See* in *general* KALPOKAS, A POLITICAL THEORY OF POST-TRUTH (Palgrave Macmillan, 1st ed., 2018).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

It must also be noted that the forced introduction of any secondary, transient or *ex facie* political aspects, into an unchanging mould of natural law, e.g. a socialist society, Islamic republic, monarchy etc will most certainly lead us to a Constitutional quagmire and it will do more evil than good.

The idea is to have a small core of unchanging principles based on natural law surrounded by the huge covering and overlay of positive law that can deal with the diverse challenges and legal needs of the future society. It is needless to state that this vast ocean of positive laws would be within the Parliamentary, or the constituent assembly's competency to amend or create. Hence, in the framework forwarded in the paper only the highest rights would be sourced from natural law philosophy and all the lower sections of the hierarchy including the constituent power would be an exercise of the positive law.

The aforementioned view can even accommodate the formulation of a new basic structure for a new Constitution. India tomorrow can frame a Constitution that provides for a unitary government or mandates a presidential system but all such provisions of a new Constitution would be subject to the continued acceptance of the values provided under natural law. Therefore, basic structures and Constitutions which are derived from the constituent power may come and go but the permanent structure in the form of the highest rights derived from natural law philosophy will continue to endure.

The issue that might arise is whether we can bind the future constituent assembly. Let us again go back to German Basic Law. Article 146 of the German Constitution provides "*[Basic Law] shall cease to apply on the day on which a Constitution freely adopted by the German people takes effect*". In effect, the eternity clause which is more or less the German basic structure could be bypassed by calling for a new constituent assembly but even this assembly shall be subject to the free will of the German people. Therefore, at least conceptually the present German basic law confines the power of a future constituent assembly by making it subservient to the free will of the people.

For Germans, at least, it seems we have hypothetically again reached square one. It seems that unlike the German jurist and philosopher Gustav Radbruch, German Constitutional makers have not learned the full lesson. The whole issue was what if the people tomorrow freely elect another Hitler to make a new Constitution and how to assure the presence of some innate principles even in the new Constitution. Nevertheless, one can say the German idea of the eternity clause read with Article 146 is superior to the Indian basic structure as it provides for an additional caveat, in the form of the provision, that the future Constitution must be freely adopted by the people. Therefore, there is an implicit acceptance that even today's basic law can bind tomorrow's constituent assembly. If the judiciary formulates the doctrine of highest rights in the form of a permanent structure, it can preempt and prevent the mistakes of any future constituent assembly and secure an enduring victory.

The idea being forwarded is that the current German Constitution binds that future constituent assembly as it provides that the future constitution ought to be freely adopted by the German people. Therefore, in a rudimentary sense, one may argue that principles of "*free adoption by German people of the future Constitution*" are part of the 'highest rights' a facet of a potential permanent structure.

If the doctrine is formulated and established today, then even two hundred years in the future, members of a new constituent assembly will not enjoy the prerogative to draft a new Constitution wherein the state could exercise its authority to arbitrarily take away life. The future Courts, *pro tanto,* will not allow any deviation and the new Constitution shall be in consonance and harmony with the most innate natural law principles. Therefore, the new constituent assembly may draft any document, and insert any provision but all exercise of constituent power will be subject to the permanent structure. The core values i.e. *creme de la creme* must be kept sacrosanct across the saga of time. This would be similar to the noble intent of J. Subba Rao in the *I.C. Golaknath* case wherein he lifted part three to a sacrosanct status.

CONCLUSION: TOWARDS A PERMANENT SOLUTION

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

It must be noted that the basic structure doctrine is essentially counter-majoritarian in nature, that is, even if a political party wins all the seats to the Lok Sabha till *ad infinitum,* it will remain sterile *vis-à-vis* effecting any change in the Constitution that is against the basic structure. Even if every Indian electorate votes for the removal of the right to equality from the Constitution the Supreme Court will not allow the same. The idea is that the Constitution is supreme and it may at times conflict with the concept of popular sovereignty.

The Indian Constitution was adopted, enacted and given to ourselves by the constituent assembly that was acting on behalf of "We, the people"[91]. One might be tempted to ask who these people were. This is a contentious matter. One might even suggest that these people are a work of constituent fiction. The challenge which this paper attempts to address is how to prevent the appropriation of the expression "We, the people" by some other bunch of people who might exploit the ephemeral passion of the people during times of crisis or revolutionary changes.

The present position is that the Constitution is a conscious creation of the founding fathers and the basic structure is a judicial innovation that is based on a document created by an exercise of positive law-making. We have the right to life because Article 21 of the Constitution says so and the article was consciously created, it was an exercise of positive law. What would happen if the new Constitution has no right to life, and no corresponding article for Art 21 of the present Constitution?

In the case of *ADM Jabalpur v. Shivkant Shukla*,[92] the dissenting opinion of Justice Khanna seems to be based on natural law:

> "*Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such a right existed even before the Constitution came*

[91] Expression used at the initiation of preamble of Indian Constitution.

[92] A.D.M. Jabalpur v. Shivkant Shukla AIR 1976 SC 1207. The judgment is also called the dark day of Indian Judiciary.

> *into force. Even in the absence of Article 21, the state has got no power to deprive a person of his life or personal liberty without the authority of law*"[93]

It is again most firmly pressed that any legal protection that can be consciously created by positive law can also be consciously taken away by another exercise of positive law. Herein, lays the biggest weakness of the basic structure doctrine it stands on the Constitution which stands on positive law. One can take away the basic structure by removing the Constitution upon which it stands. Therefore, a permanent solution lies in the acceptance of the views of Maurice Haurio that certain aspects as part of unchanging natural law which will forever remain over and above the human consciousness or human power of creation. We must create a situation wherein you do not enjoy the right to life because the Constitution says so but because you are a human being and this eternal position can only be accommodated by the principles of natural law. If the idea of the highest rights within a permanent structure is accepted the right of life will have to be read into every hypothetical new Constitution by the Courts even if such a right is not expressly provided. Even if it is conceded that Parliament is the constituted power and we the people embody the constituent power both, along with a new constituent assembly must forever remain subject to the permanent structure containing the highest rights.

Schmitt's contribution is noteworthy in regard to his distinction between the constituent power and the constituted power. Expanding upon an aforementioned illustration if the former is Lord Shiva then the latter is Bhasmasur, but we also need a protector when Lord Shiva i.e. the constituent power itself starts destroying the innate values. It is widely accepted that the Parliament is provided only with limited constituent power. In this regard, the works of both Hauroiu and Schmitt are important which saw a distinction between the articles of the Constitution wherein some are viewed as more basic parts of the Constitution and others are seen as ordinary provisions. We argue for a further division of the former wherein some parts will remain basic only to the extent of this Constitution and some will be read as the permanent

[93] It must be noted that the case was overruled recently in the case of Justice K. S. Puttaswamy (Retd.) & anr. v. Union Of India And Ors (2019) 1 SCC 1.

parts of any Constitution. Therefore, there are three forms of power: *first,* the mundane legislative power, *second*, the necessary constituent power to undertake revision subject to the basic structure and lastly the highest form of constituent power to undertake a major or complete revision of the Constitution including the authority to alter the basic structure. We would argue that both the first and second powers are firmly within the competency of the current Indian Parliament and the *third* one, the most fundamental, may be exercised only by a new constituent assembly specifically convened to undertake a revision as was argued by Hauriou. Though it has been proposed in this research paper that even the third power should be subject to a few rights and principles read in terms of natural law that would inevitably entail the formulation of a permanent structure.

Our view is that even the basic structure doctrine has elements that potentially may need change over time like, as aforementioned, a transition from federal to unitary structure or shift from the Parliamentary system to a presidential system. These changes which seem distant or unlikely today will quite certainly become necessary as our country will inevitably undergo metamorphosis over time. The next Constitution may have its own unique basic structure tailored to its own needs and the spirit of the age, *zeitgeist*[94] as J. Beg had, so many years ago, pointed out. Therefore, we cannot bind our future generation completely within the basic structure of today. Nevertheless, certain principles have to be carried forward.

What about the elements of the basic structure that are, in the sense of Haurious, even more innate than the other aspects, for example, the golden triangle, due process, human rights surely a new constituent assembly cannot be allowed to review the same. It is argued that a new judicial innovation will better cater to our concerns, a new doctrine of permanent structure which should not be contingent upon the stability of ever-changing positive law.

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[94] German expression used for defining spirit or mood of a particular period of history as shown by the ideas and beliefs of the time.

It must be remembered that Europe produced giants like Voltaire, Hegel, Kant, Schopenhauer, Rousseau, and Montesquieu. Nevertheless, even after centuries of exposure to their work and over one hundred and forty years after the great French Declaration of 1789, the ideas of scientific racism, colonialism, and fascism were popular across Europe. Hitler made his people believe that there was an evil alliance between the international capitalist Jewry and Marxist Bolshevism to destroy Germans.[95] One can only be baffled by the patent hollowness of the argument especially in light of the Cold War yet they were openly accepted by the well-read German masses. We must learn from history. The argument being forwarded is beautifully summed up by a quote from Friedrich Nietzsche:

> *'In individuals, insanity is rare; but in groups, parties, nations and epochs, it is the rule'*[96]

We need to ardently protect the principles of human rights, democracy, the constituent rights of the golden triangle, and due process of law for any future malady of madness. The protection of some fundamental values from the recurrent insanity is the very *raison d'etre* for this paper. As these fundamental principles ensure that there exists a government of law and not men, it must also be pointed out that these principles historically have been the exception and not the rule. These cardinal principles rest at the very kernel of our republic and they need to be constantly guarded. What we need is a jurisprudential *sentinel on the qui vive*.[97] A legal concept, rooted in natural law school, consisting of the most fundamental principle that will bind all the future, *bona fide* or *mala fide,* attempts to make new Constitutions. It seems to be our best bet. To conclude one might consider the much-celebrated novel 'Dune' by Frank Herbert. The author has visualised technologically a much evolved society, ten thousand years in the future, based on the medieval principles of governance. The novels, *in toto,* caution the reader from putting their

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[95] The Editors of Encyclopaedia Britannica, *Nazism*, ENCYCLOPAEDIA BRITANNICA (Jan. 7, 2025) https://www.britannica.com/event/Nazism.

[96] FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL (Dover Publications, 1st ed., 1998).

[97] The expression "Qui Vive" was first introduced into the Constitutional parlance by Justice Patanjali Sastri, in the famous case of VG Row in 1952.

faith, future and security in a messianic figure or a charismatic leader just like the idea of J.S. Mill. In this light, the authors cannot prevent but argue for the need for the continued perpetuation of certain innate rights and principles till such a time dawns upon us. The authors of this paper with the fear of repetition want that till the long foreseeable future certain principles, like the ones highlighted across the paper, should stand on the indestructible edifice of permanent structure that is provided by natural law.

These principles must be believed to be like the god's uncreated, omnipresent and eternal, always protecting the most basic of human rights from any future political association or ideology to the contrary. Let all our legal innovation remain within the realm of positive law that gives the fluidity to change over time. However, simultaneously we must accept to read the most cherished values in a school of jurisprudence that has been long overlooked and ignored. Let us move over, above and beyond the basic structure towards a permanent structure. So, that the basis of the Indian Constitutional system becomes strong enough to counter any shock that time has reserved for us. This is not a call for the abandonment of the basic structure but just a call for a new doctrine of a permanent structure to exist over and most importantly beyond it. The doctrine has immense utilitarian value to it and as Kant stated for natural law "natural law is the result of human wisdom acting upon human experience for the benefit of the public." Just like Grotius saw natural law as being made of a mould that cannot be changed even by god almighty, on par should be the strength of the permanent structure i.e. beyond the reach of mortal men. At present, the constituted power is subject to the basic structure doctrine but now even the constituent power should be subjected to the natural law.

Few notions have elicited more controversy in the history of juridical thought of the early modern period than that of natural law.[98] However, the idea in a novel understanding may be accepted.

[98] Alfred Dufour, *Natural Law and Natural Rights,* 54(2) J. MODERNHIS. 292, 292 (1982).

Dr. Ambedkar once remarked that "*equality may be a fiction but nonetheless one must accept it as a governing principle*". In a similar context, many arguments forwarded along with the paradigm developed in the paper might be pure fiction but nonetheless, they must be accepted as the governing principle to preempt possible dystopian futures. To conclude the noted Greek historian Herodotus stated that "*The Greeks though free were not absolutely free; they had a master called law*" in the same way constituent power as represented by the people and the idea of popular sovereignty is also independent and free but not absolutely free as constituent power ought to have a master in form of certain unalterable principles like human rights and due process.

'GOVERNED BY WHOM?' – REDEFINING THE ROLE OF HIGHER JUDICIARY, DIVERSITY AND JUDICIAL LEGITIMACY IN THE INDIAN CONTEXT

SRICHETA CHOWDHURY[1], **SOURYA BANDYOPADHYAY**[2] **& DR. UDAY SHANKAR**[3]

The constitutional design of the structure of India's apex court put the Supreme Court and High Courts almost in the same position when it comes to adjudication of constitutional cases. High court decisions can be appealed before the apex court since it is the court of last resort. The Supreme Court not only acts as a court of last resort but also for violation of fundamental rights it acts as a court of first resort. Given this kind of vast power arrangement, undoubtedly, the Supreme Court of India enjoys a very powerful status amongst other apex courts worldwide. Due to such an arrangement of power, the appointment process has been the big stick. India was never averse to representation on the lines of caste, religion, gender etc. in its public employment and educational institutions. Historically, judicial appointing authorities have taken into consideration 'religious and regional diversity' factors while selecting judges, despite Law Commissions' strong objections. Various judgments have highlighted that "social reflection" of the society, along with other qualitative markers must be taken into account in making appointments in order to give them some democratic legitimacy. However, how these markers are to be assessed and measured has been left dangling to the "consultation" process of the collegium. Due to the lack of a transparent mechanism for measuring these markers, coupled with an expansive governance-oriented role of the higher judiciary, the question "who are we governed by?" has become quintessential. In light of this backdrop, the paper briefly articulates the burden of the expanded role of the judiciary and then moves on to explore how this expanded

* Cite it as: Chowdhury, Bandyopadhyay & Shankar, *'Governed by Whom?' – Redefining the Role of Higher Judiciary, Diversity and Judicial Legitimacy in the Indian Context,* 9(1) COMP. CONST. L. & ADMIN. L. J. 40 (2025).

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role has opened a pandora's box and led to question about who the judges are, how they are being selected and how legitimate are their adjudication process from a democratic point of view.

TABLE OF CONTENTS

INTRODUCTION

Many constitutional scholars in modern times have critically evaluated the current global political landscape as being in a state of 'crisis'.[4] In post-emergency India, there was a clear distrust in the parliament to resolve social conflicts[5] – in modern-day terminology, it may be referred to as a 'democratic deficit'.[6] One may call it the Parliament's lack of sensitivity or awareness, that led people to turn to the courts as an alternate forum to vent their dissatisfaction. This reliance on courts in

[4] Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO NORTHERN UNIV. L. REV. 351 (2018); Yaniv Roznai, *Israel: A Crisis of Liberal Democracy, in* CONSTITUTIONAL DEMOCRACY IN CRISIS? MARK TUSHNET ET. AL., (Oxford University Press, 1st ed., 2018); Tom Gerald Daly, *Democratic Decay: The Threat with a Thousand Names*, LSE COMMENT (Mar. 09, 2019), https://blogs.lse.ac.uk/usappblog/2019/03/09/democratic-decay-the-threat-with-a-thousand-names/.

[5] S. P Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U.J.L. & POL'Y 29 (2001).

[6] ANDREW MORAVCSIK, IS THERE A 'DEMOCRATIC DEFICIT' IN WORLD POLITICS? A FRAMEWORK FOR ANALYSIS, GOVERNMENT AND OPPOSITION LTD. (Blackwell Publishing, 2004).

times of a 'deficit'[7] might have filled the democratic vacuum, but it also gradually gave rise to problems of democratic legitimacy. Normally, had the court been functioning within its ambit of only dispute resolution, these questions of legitimacy would not have arisen, but the court's refusal to be a silent negotiator in the country's 'governance' issues relating to socio-politically sensitive cases has made it the epicentre of constitutional scrutiny and larger public mistrust. With this expansion in its role, it has drawn public interest like moths to a flame. Unelected judges are indicted with the charge(s) of making political choices for the larger society which does not come under their constitutional charters.[8] In *Union of India v Association for Democratic Reforms*[9], the Supreme Court had observed that, by virtue of Article 32, read with Article 142 of the Constitution, court could make orders which by virtue of Article 141 get the effect of law and by Article 144, mandates all authorities to act according to such orders till the legislative vacuum is filled by the Parliament. Through these constitutional provisions, though the court has ensured the implementation of its orders, it has opened dense fissures from a legitimacy point of view. The question that arises next is - if the courts are performing the law-making function (in situations of a legislative vacuum), then how democratically legitimate is it to frame laws?

One way to look at the debate of judicial activism vis-à-vis overreach, being there right from the inception of the concept of judicial review[10] and showing no signs of slowing down in terms of intensity, is to inquire

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[7] Judith Resnik & Rane Dilg, *Responding To A Democratic Deficit: Limiting The Powers And The Term Of The Chief Justice Of The United States,* 154 UNIV. PENNSYLVANIA L. REV. (2006).

[8] In Anoop Barnwal v. UOI*,* (2023) 6 SCC 161*,* the solution that India has followed after various committee deliberations was setting up a "committee model" that included India's chief justice and two other political actors until the legislative vacuum is filled, which the legislature filled by bringing in the Chief Election Commissioner and other Election (Appointment, Condition, and Terms of Office) Act 2023. The legislation has gone up for the challenge in Jaya Thakur v. UOI (W.P. (Civil) No. 14/2024*,* on whether the Appointment of Election Commissioners Act, 2023, nullifies *Anoop Barnwal v. Union of India*. What makes the judiciary authorise its presence as mandatory in the selection of the Chief Election Officer? More importantly, what makes the judiciary think that presence of its agent in the commission would ensure a "full proof" method?.

[9] Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294.

[10] Shankari Prasad v. Union of India, AIR 1951 SC 458.

how the enhanced role of the judiciary can be legitimised. This conflict between overreach and activism is quintessentially a power conflict between two inter-governmental institutions bordering on 'legitimacy'. However, until the debate is settled, when courts are faced with critical socio-political issues, it must take a call to resolve the issue at hand. The underlying question is where does the court draw that power from and how legitimate that power is. Justice Kate O'Reagan, while speaking at the Hamlyn Lectures in 2022 on the 'role of court as a body-politic', stressed upon the fact that courts have a dynamic interdependent relationship with other organs of governance.[11] In this context, Bottoms and Tankebe's dialogic approach to legitimacy can take the conception of legitimacy beyond the normative framework within which the court functions.[12] Legitimacy, other than what it means and why it is significant, must also be understood from the point of the factors that create and sustain it.[13] 'People' are a huge part of those factors that contribute to maintaining the trust of the court. Therefore, transparency in dealings of the courts is a way of involving the 'people' in the process of legitimisation. Perhaps, that is how democratic legitimacy needs to be constructed through dialogue between multiple stakeholders (those who bring in the conflicts) and the powerholders (resolving authority) who function in their given structure.

On the other hand, there is also the growing popularity of 'responsive judicial review' by the court to self-restrict itself.[14] However, the biggest challenge in this approach is that the court has already expanded its role so far that it is difficult to retrieve its steps back and put the 'magic wand' away. Therefore, the paper intends to discuss how to balance out the 'legitimacy' issue without surgically curbing judicial independence. The

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[11] Oxford Law Faculty, *The Hamlyn Lectures 2022: Courts and the Body Politic,* YOUTUBE (Nov. 16, 2022) https://www.law.ox.ac.uk/content/event/hamlyn-lectures-2022-courts-and-body-politic.

[12] Anthony Bottoms & Justice Tankebe, *Beyond procedural justice: a dialogic approach to legitimacy in criminal justice*, 102 J. CRIM. L. & CRIMINOLOGY 119 (2012).

[13] *Id.* at 124.

[14] Rosalind Dixon & Michaela Hailbronner, *Ely in the world: The Global Legacy of Democracy and Distrust forty years on,* 19(2) INTL J. CONST. L. 427 (2021).

question of legitimacy draws its sustenance from how judges are appointed. Is it, *per se*, a democratic process?

According to Dr. Ambedkar, judges were to be appointed through a "middle course", whereby neither the executive nor the judiciary were to become the *imperium imperio*.[15] What India witnessed in its constitutional history is the setting up of a collegium, which lacked both a constitutional logic and a democratic process. The collegium is basically judges chosen by judges. The democratisation of this selection process holds a key to perhaps lending a hand in establishing legitimacy to the expanded role of the judiciary, where it stands today. The collegium has followed the principles of diversity in the composition of the judiciary for a very long time silently and to a larger extent, discretionally or informally.[16] With the advent of sustainable governance, it has become imperative that diversity is brought to the forefront and understood in a sense that can increase inter-governmental balance. The process of including diversity in the composition of the bench remains a debatable proposition.

With the purpose of redefining the conflict of judicial legitimacy and diversity, the authors of this paper have delved into three intertwined issues - first, the changing role of the court, second, the eclectic understanding of judicial independence and third, how diversity offers a probable solution to enhance public confidence in the judiciary today. The article follows an analytical doctrinal methodology in analysing the recent trend in understanding the role of the higher judiciary. This paper is broadly divided into three parts. Part I analyses the trajectory of the role of the court from a traditional positivist court to a governance-oriented activist court and the burden it has taken upon itself in that process. Part II seeks answers to the questions raised in Part I by establishing diversity as a probable solution to legitimise the court's

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[15] 8 LOK SABHA SECRETARIAT, CONSTITUENT ASSEMB. DEB., May. 24, 1949, https://www.constitutionofindia.net/debates/24-may-1949/. Speech by B. R. Ambedkar, "*The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex-hypothesis, well qualified to give proper advice in matters of this sort*.".

[16] GEORGE H. GADBOIS JR., JUDGES OF THE SUPREME COURT OF INDIA (Oxford University Press, 1st ed., 2016); ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION (Oxford University Press, 1st ed., 2014).

expansive actions but of course with restraint. Part III deliberates on the concerns regarding the limits and potholes of the diversity approach, followed by Part IV, which explores the eclectic concept of judicial independence that hinders reforms in the judicial appointment process.

THE JUDICIAL ROLE: A GREATER BUT SELF-ENHANCED BURDEN

Indian judiciary is essentially a three-tier organisation. The higher judiciary consists of the Supreme Court and the High Courts. The Supreme Court acts both as the highest appellate body and the highest constitutional court of the country and the High Courts serve as the highest appellate body and constitutional courts of the states.[17] Unlike the federal division of powers between the State judiciaries and the Union judiciaryin the United States, the judiciary in India is monolithic, with the Supreme Court being the overseer of all other courts and the ultimate announcer of the law of the land.[18] Both the Supreme Court and the High Courts have the power to enforce writs for the protection of fundamental rights - the High Courts additionally can issue writs to protect any other right.[19]

The rise of judicial governance in India,[20] is a process initiated and led by the Supreme Court, exercising both hermeneutic and adjudicatory leadership over the judicial structure as described in the preceding paragraph.[21] It is often considered to be 'The World's most powerful

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17 For an overview of the Indian judiciary, See, Upendra Baxi, *Law, Politics and Constitutional Hegemony: The Supreme Court, Jurisprudence and Demosprudence*, *in* SUJIT CHOUDHRY ET AL. EDS., THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, 1st ed., 2015).

18 INDIA CONST. art. 141.

19 INDIA CONST. art. 32, 226.

20 Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. UNIV. GLOBAL STUD. L. REV. 1 (2009); Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33 B.U. INT. L. J. 169 (2015).

21 For the leadership employed by the Supreme Court, See generally, Upendra Baxi, *Law, Politics and Constitutional Hegemony: The Supreme Court, Jurisprudence and Demosprudence,*

Court'.[22] But, like any other public institution in India, the judiciary also has a chequered history. Its stature and activity was heavily diminished during the emergency era.[23] The post-emergency period has seen a tremendous rise and expansion in the power of the Indian higher judiciary, namely the Supreme Court. The Court has come a long way, from being a positivist Court to a good governance Court, which has been linked with the global trend towards the same.[24] How did this transformation come about? What was the context in which this transformation developed? This section focuses on the trajectory of the expansion of judicial power in India and touches upon the legitimacy concerns arising therefrom.

The Indian judiciary led by the Supreme Court started its journey after the independence of India and the commencement of the Constitution in a highly positivist manner, holding that law means 'positive state-made law'.[25] The initial batches of judges were more in favour of granting the Parliament with the ultimate power to make or unmake laws. While in favour of protecting property rights (still a fundamental right) it marked a 'graceful exit' in favour of the legislature with regard to the ultimate power of amending the Constitution.[26] Yet in *Golaknath v. State of Punjab*, the Court, concerned with a fractured majority in the parliament, sought to protect fundamental rights from the purview of constitutional amendments.[27] This started the long constitutional battle between the legislature/executive and the judiciary, which resulted in the promulgation of the doctrine of basic structure. The Supreme Court in *Keshavananda Bharati v State of Kerala* declared that the Parliament can

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in SUJIT CHOUDHRY ET AL. EDS., THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, 1st ed., 2015).

22 Clark Cunningham, *The World's Most Powerful Court: Finding the Roots of India's Public Interest Litigation Revolution in the Hussainara Khatoon Prisoners Case, in* SP SATHE & SATYA NARAYAN EDS., LIBERTY, EQUALITY AND JUSTICE: STRUGGLES FOR A NEW SOCIAL ORDER, 83-96 (Eastern Book Company, 1st ed., 2003).

23 *See generally* ADM Jabalpur v. Shivkant Shukla, AIR 1967 SC 1207.

24 Robinson, *supra* note 20.

25 AK Gopalan v. State of Madras, AIR 1950 SC 27.

26 Shankari Prasad Singh Deo v. Union of India, (1951) SCC 966; Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845; also *see generally*, UPENDRA BAXI, INDIAN SUPREME COURT AND POLITICS (Eastern Book Company, 3rd ed., 1980).

27 IC Golaknath & Ors. v. State of Punjab, AIR 1967 SC 1643.

amend any part of the Constitution except the basic structure of the Constitution.[28] This had been nothing short of a judicial coup whereby the Court assumed 'constituent power' having the final say in validating a constitutional amendment through the litmus of some uncharted basic features to be propounded by the judiciary itself.[29]

Yet within a few years of this bold move, the emergency was declared, and the Courts' emergency-era activity has been criticised as akin to judicial surrender.[30] After the Emergency period, the Court was keen to regain its lost legitimacy by engaging in a populist quest for 'social justice'. Thus the Court evolved the Public interest litigation (PIL) movement. With diluted rules of standing and of procedure, coupled with self-enhancement of flexible remedial powers the Court has ensured a wide range of issues could be hauled into the courtroom which was not otherwise possible in a strict positivist set-up.[31] The Court removed itself from the positivist shackles with its creative reinterpretation and affirmation of the principle of interdependence of the different provisions of the Constitution, which has consequently allowed the Court to shape rights which were otherwise impossible to shape through a textual interpretation of the Constitution.[32] Apart from these, the judiciary, namely the Supreme Court also wrested control over judicial appointments from the executive through PILs.[33]

The Indian Judicial Activism, through its PIL jurisdiction, has extended its powers beyond known territories of traditional adjudication and

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[28] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

[29] Upendra Baxi, *The Judiciary as a Resource for Indian Democracy*, SEMINAR (Nov. 2010) https://www.india-seminar.com/2010/615/615_upendra_baxi.htm.

[30] Sathe, *supra* note 5.

[31] Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?,* 37 T. AM. J. COMP. L. 495 (1989).

[32] The Court finally established the inter-link between Articles 14, 19 and 21 in *Maneka Gandhi v. Union of India*, AIR 1978 SC 1473; Consequently, it was possible to read textually unjustifiable Directive Principles into the fundamental rights, thereby making the principles justiciable.

[33] Supreme Court Advocate-on Records' Association v Union of India, (1993) 4 SCC 441.

actively embraced and promoted the public law model of litigation.[34] The Indian Supreme Court in its own evaluation has differentiated between three phases in the expansion of the jurisdiction in PIL.[35] It is to be noted that these phases are not separated in watertight compartments, rather they often overlap and are interlinked. It is better to see these developments as the expansion of the scope of judicial power to new terrains. During the first phase**,** the PIL jurisdiction restrained itself to the relatively restricted field of enforcement of the individual rights of the socio-economically downtrodden section of the population**.** To be clear, the Court through the procedural inventions of PIL sought for the protection and enforcement of individual rights with greater creative vigour. The Right to Life under Article 21 was made the repository of all other rights and conjoint reading of this article with the non-justiciable directive principles resulted in the creation of a plethora of unenumerated rights such as, right to shelter,[36] right to livelihood,[37] right to legal aid,[38] right to health,[39] right to information,[40] right to clean environment[41] etc.

In the second phase, the court moved towards its lawmaking role, actively importing international legal obligations with regard to the protection of the rights into the Indian legal regime, declaredly to supplement the legislative vacuum. For example, the Court delivered a guideline to prevent sexual harassment of women at workplaces in the absence of legislation.[42] In a similar vein, the Court also issued guidelines for the protection of children's rights in inter-country adoption.[43]

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[34] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV., 1281 (1976).

[35] State of Uttaranchal v. Balwant Singh Chaufal & Ors. (2010) 3 SCC 402.

[36] Shantistar Builders v. Narayan Khimalal Gotame & Ors. (1990) 1 SCC 520.

[37] Olga Tellis & Ors v. Bombay Municipal Council (1985) 3 SCC 545.

[38] Madhav Hayawadanrao Hoskot v. State of Maharashtra, (1978) 3 SCC 544; For the link established between the directive principle to free legal aid with right to life, a fundamental right under Art 21., *See* State of Maharashtra v. Manubhai, (1995) 5 SCC 730.

[39] Pt. Parmanand Katara v. Union of India & Ors., (1989) 4 SCC 248.

[40] People's Union For Civil Liberties v. Union of India, (2003) 4 SCC 399.

[41] Subhash Kumar v. State of Bihar, (1991) 1 SCC 598.

[42] Vishakha & Ors. v. State of Rajasthan & Ors., (1997) 6 SCC 241.

[43] Laxmi Kant Pandey v. Union of India, 1987 (1) SCC 66.

The contemporary third phase is that of acting as a 'super executive', as a good governance court over the rest of the organs of the government.[44] This was the stage where the Court actively took over the task of disciplining the executive in terms of promoting good governance. In *Vineet Narain v. Union of India*,[45] the Court, supervised the work of the Central Bureau of Investigation in connection with the Jain Hawala scam involving several dominant politicians of the day. It enhanced the power of the Central Vigilance Commission to monitor corruption.[46] The process of judicial transformation of the relationship between the three organs of the government had been slow but drastic, and there was 'little left untouched by the passion' of this novel PIL/SAL Culture imbibed by the judiciary.[47]

These ventures into policy issues are not isolated but a part of the pattern. The real challenge is that the judiciary in India with its hyper-active incursions into governance has brought unto itself a greater burden than any other highest court in the world.[48] It has a greater need to justify and legitimise its actions, something which the Indian judiciary seems to be uncomfortable dealing with.[49] Amongst the justifications offered by the Court in legitimising its actions, the most frequent are, the need to fill the 'legislative vacuum' and the need to participate in upholding the constitutional vision.[50] The Court has time and again asserted that the judges do have a role to play in filling the vacuum left open by the legislature/executive inaction with suitable orders and directions till the latter starts functioning.[51] On the other hand, the PIL movement itself is rooted in the judicial urge to engage with the constitutional visions of

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[44] The three phases, Creative, Lawmaking and Super Executive has been described in Shubhankar Dam, *Lawmaking Beyond Lawmakers: The Little Right and the Great Wrong,* 13 TUL. J. INT. & COMP. L. 114-116 (2007).

[45] Vineet Narain v. Union of India, (1998) 1 SCC 226.

[46] *Id.*

[47] Dam, *supra,* note 44, at 110.

[48] Robert Moog, *Activism on the Indian Supreme Court*, 82(3) JUDICATURE 131 (1998).

[49] A casualty of justice or goal oriented decision-making has been the requirement of reasoned decisions. The Court orders are often not speaking orders.

[50] Dam, *supra,* note 44, at 126-128.

[51] Vineet Narain v. Union of India (1998) 1 SCC 226.

'social justice'.[52] Yet it does not entertain all types of policies. Subhankar Dam argues that the Court intervenes in only the politically 'comfort zones' of individual rights, which can be found in the constitutional scheme of rights and duties and which is supposed to be backed by popular legitimacy. For example, the right of women against sexual harassment, protection of children from malpractices in adoption etc., which are already there in the Constitutional right framework, and would not raise as many eyebrows if the judiciary intervenes. In other words, the judiciary creates zones of legitimacy. He suggests that the Court's legitimacy may come from entertaining only those activities which are informed by the Constitutional rights duty consciousness.[53] However, in recent times, the Court has moved far beyond that. In continuance with the super-executive role, the Court has for instance, in its anti-corruption drive ordered the allocation of natural resources through only auction.[54]

From a political science perspective, Pratap Bhanu Mehta analyses the role of the Court to be one of democratic balancer, and not much of a principle-driven judiciary.[55] It functions as an institution that balances different tensions between power holders in the country. In other words, when entering into overreaching grounds, the Court stands in higher need of legitimacy than the per se legitimacy that traditional courts have enjoyed. 'Without a legitimising process, judicial legislation creates a constitutional imbalance, that challenges the representative foundations' of the democratic polity.[56] The position in which the Court has placed itself in, is one which it cannot easily back out from.

Therefore, the need for greater public legitimacy and faith is required since an uninformed exercise of power may be detrimental to the very institution it seeks to overpower. This paper argues that the same can be achieved in part with the help of proper representation in the judiciary. In

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52 P.N. Bhagwati & C.J. Dias, *Judicial Activism in India: A Hunger and Thirst for Justice*, 5 NUJS L. REV. 171 (2012).
53 Dam, *supra* note 44, at 132-34.
54 Subrahmanian Swamy v. Manmohan Singh (2012) 3 SCC 64; Manohar Lal Sharma v. Principal Secretary (2014) 9 SCC 516.
55 Pratap Bhanu Mehta, *India's Unlikely Democracy: The rise of Judicial Sovereignty*, 18(2) J. DEM. 70-83 (2007).
56 Dam, *supra* note 44, at 140.

this paper, the authors have focused on one aspect of representation i.e. gender. The following sections elaborate on the need and condition of gender representation in the Indian higher judiciary.

ACHIEVING JUDICIAL DIVERSITY THROUGH REPRESENTATION: REDUCING THE BURDEN

A. OPTICS OF DIVERSITY

Historically, appointing authorities have taken into consideration the 'religious and regional diversity' while selecting judges despite Law Commissions' strong objections.[57] Among other concerns, the Law Commission noted and criticised the practice of appointing judges on communal and regional grounds and the exertion of executive influence in that process.[58] Another point that the Commission raised was the inability of the appointment process to appoint someone in the "distinguished jurist" category. It seemed the Law Commission was not of the same opinion as the appointing authorities that prior judicial experience is a *sine qua non*. Even though regional considerations were criticised in appointing judges by the Law Commission, it resurfaced numerous times in future discussions. While discussing the suitability of the Number of Judges, Amendment Bill,[59] with respect to the appointment of judges to the Supreme Court, Ajit Singh Sarhadi represented the voices who believed that along with merit and efficiency, regional considerations should also be taken into consideration, both in and while finalising appointments.[60] The debatable question in appointing judges from a diverse background is the selection process. The anti-diversity viewpoint based on a superfluous understanding of 'merit' and 'secularism' no longer fits into the modern discourse. The conventional contesting idea that diversity dilutes merit has been rejected by many

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[57] LAW COMMISSION OF INDIA, Report No. 14, REFORM OF JUDICIAL ADMINISTRATION (1958).
[58] *Id.* at 34.
[59] LOK SABHA DEBATES, Apr. 27, 1960 *speech by* Ajit Singh Sarhadi, 6773-75 https://eparlib.nic.in/bitstream/123456789/54807/1/lsd_02_11_03-09-1960.pdf.
[60] *Id.*

modern democracies, of which South Africa is the prime example.[61] The paper addresses 'diversity' from the point that it does not erode efficiency but enhances the court's legitimacy. Achieving a diverse composition of the bench through a transparent accountable process will be a true marker of democratising the bench.

Gadbois Jr.'s seminal work has given a demographic account of the profile of judges which shows that several extraneous factors were responsible for selecting judges in which merit was not the single factor.[62] These appointments made between 1950-1989 showed a high homogenous tendency of selecting judges of the same make and kind giving rise to a default-male image of what a judge should look like. Women never stood a chance before 1989 to fit into this closely guarded image of a Supreme Court judge. The Supreme Court of India has on multiple occasions addressed the issues regarding what constitutes 'merit' and whether it dilutes 'efficiency of administration'.[63] It began with a Brahmin woman filing a suit under Article 226 alleging that her basic right to admission to college was violated despite having good grades because of certain Communal Order.[64] Diversity was practised in the State of Madras way before the Constitution came into existence and there was a set practice to ensure the representation of different communities because of a non-Brahmin movement in Madras in the early 1920s.[65] As Abhinav Chandrachud narrates, Madras in 1912 had a disproportionate over-representation of Brahmins as sub-judges in provinces compared to their overall population in the province, which resulted in a political backlash from the civil society that brought about

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61 S. AFRICA CONST. §174(2) entrenching *"the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed"* is a laudable attempt to mitigate the 'diversity v merit' debate.

62 GADBOIS & CHANDRACHUD *supra* note 16.

63 Abdullah Nasir & Priya Anuragini, *Of Merit and Supreme Court: A Tale of Imagined Superiority and Artificial Thresholds*, 58(11) EPW (Mar. 18, 2023), https://www.epw.in/sites/default/files/engage_pdf/2023/04/03/161715-.pdf; GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS (Harper Collins India, 1st ed., 2019).

64 State of Madras v. Srimathi Champakam Dorairajan, AIR 1951 SC 226.

65 ABHINAV CHANDRACHUD, THESE SEATS ARE RESERVED: CASTE, QUOTAS AND THE CONSTITUTION OF INDIA (Penguin India, 1st ed., 2023).

this change.[66] The protected communities were non-Brahmin Hindus, backward Hindus, Harijans, Anglo-Indians and Indian Christians & Muslims. It is a different debate to study the efficacy and degree of these distributions. Still, it certainly points out that India had the ethos of 'representation' before the constitution came into existence.

Representation has been tested against meritocracy. The court has equated 'marks' with efficiency or merit, which continued to reflect in many other cases[67] until the court acknowledged that 'merit' and 'efficiency' are not the same thing and merit cannot be measured through neutral criteria.[68] All these discussions have been on the line of vertical reservations, it becomes confusing when it comes to horizontal reservations that give representation to women and other categories of people. The differential treatment of vertical and horizontal reservation jeopardises women's interests.[69] In *Rajesh Kumar Daria v. Rajasthan Public Service Commission*[70], the Supreme Court explained the distinction between vertical and horizontal reservation by explaining the "over and above" and "minimum guarantee" aspects of both.[71] The Supreme Court clarified

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[66] *Id.* at 27.

[67] The General Manager, Southern Railway v Rangachari, AIR 1962 SC 36; Dr. Preeti Srivastava and Anr. v. State of MP And Ors. (1999) 7 SCC 120.

[68] B.K. Pavitra v. Union of India, (2019) 16 SCC 129.

[69] CHANDRACHUD, *supra* note 65.

[70] Rajesh Kumar Daria v. Rajasthan Public Service Commission 2007 (8) SCC 785.

[71] *Id.* ¶7. "Where *a vertical reservation is made in favor of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under the Open Competition category. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such a list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list*

in *Saurav Yadav v. State of Uttar* Pradesh, that migration from reserved to open category is justified but not vice-versa.[72] For vertical reservation, the migration from reserved to open category was already clarified on the grounds that it may happen that few reserved category candidates can overcome the structural and institutional barriers and therefore would defeat the purpose of reservation if they remained in the reserved category. By the same logic, migrations in the horizontal reservations can be justified. It does, however, open the risk of reverse discrimination since it gives the disadvantaged group (for instance women) a double opportunity to secure positions both in reserved as well as in open categories. Thus, India was never opposed to representation on the lines of caste, religion, gender etc. in its public employment and educational institutions. Still, it made reservation the most utilised way of achieving social diversity. In majority judgments, "diversity" has been hitched with "merit", which became a normative touchstone on which adjudication was carried on despite the warnings of reading "merit" as "efficiency of administration" raised in *BK Pavitra v. Union of India*[73]. Nonetheless, if diversity has not eroded the other institutions and merit is not limited to 'grades' thereof, applying the same logic, diversity shall not pull down the efficiency of the judiciary as well. Still the question of how to apply "diversity" in judicial appointments, remains unanswered.

B. SELECTION OF JUDICIAL CANDIDATES

The wide requirements of Articles 124 and 217 in the Constitution leave enough free passage to devise a mechanism to select the best judicial candidate. Selection of High Court judges takes place in two ways, either through judicial service or through the Bar, i.e., two types of persons can be appointed as a judge of a High Court: a) judicial officers of ten years' standing, b) high court lawyers of ten years' standing.[74] When it comes to Supreme Court judges, the Constitution provides that the following individuals can be appointed as judges: a) high court judges of five years'

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relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women."

[72] Saurav Yadav & Ors. v. The State of Uttar Pradesh, (2021) 4 SCC 542.

[73] B.K. Pavitra v. Union of India, (2019) 16 SCC 129.

[74] INDIA CONST. art 217.

standing, b) high court lawyers of ten years' standing or, c) distinguished jurists in the opinion of the President.[75] This kind of qualification does not specifically speak much about the 'kind' of candidates appointed to the Court but gives wide powers to the 'appointing authority' to select candidates from a broader pool.

In the history of judicial appointments, people have silently observed the institutional conflict and a saga of inter-governmental distrust.[76] In *Registrar General, High Court of Madras v. R Gandhi*, the court while dealing with the limited scope of judicial review in the assessment of eligibility of judicial candidate of a High Court observed that:

> "*Appointments cannot be exclusively made from any isolated group, nor should it be pre-dominated by representing a narrow group. Diversity therefore in judicial appointments to pick up the best legally trained minds coupled with a qualitative personality, are the guiding factors that deserve to be observed uninfluenced by mere considerations of individual opinions."*[77]

How these "guiding factors" are to be assessed and measured has been left dangling in the "consultation" process of the appointing authority. Constitutionally speaking, the executive makes the appointments after consultation with the judiciary. However, the "consultation process" itself has been the bone of contention for decades post-emergency. The opinions of judges in Justice Himatlal Sheth's case pointed towards very relevant and significant questions regarding "consultation" required under Article 222 and "reasons" to be specified for transfers of judges.[78] The judges did not consider the "consultation" a binding requirement of the Executive to appoint. Rather, they penned down safeguards against arbitrary transfers by stating that such consultation must be "real,

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[75] INDIA CONST. art 124.

[76] S.P. Gupta v. President of India, AIR 1982 SC 149; Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268; In Re Presidential Reference, AIR 1999 SC 1.

[77] Registrar General, High Court of Madras v. R. Gandhi, (2014) 11 SCC 547.

[78] Union of India v. Sankal Chand Himatlal Sheth, AIR 1978 SC 2328.

substantive and effective" which will be done after "full, fair and complete discussion". Post-Himatlal, the debate became more ferociously heated with the advent of the judges' cases where appointment and transfer of judges were jointly debated.[79] The First Judges case did not make observations regarding the appointment of judges, however, Justice Bhagwati and Desai made observations about what criteria is to be utilised in appointing judges.[80]

The subtle remarks on "representation" as a criterion of appointment by the Supreme Court could not take precedence over 'merit' as a preferred touchstone on which appointments are required to be made. The stress has been so much on efficiency and anti-polarization that diversity could never take a front seat in the discussion on representation. In fact, 'seniority' as a norm has prevailed in selecting judges which directly goes against achieving a representative court. Justice Ahmadi, while disagreeing with the majority in the Second Judges case, observed that seniority not only disturbs the representative character of the court but also pushes 'merit' to the secondary position.[81] In a concurring opinion, Justice Pandian commented on the significance of 'social reflection of the

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[79] S.P. Gupta v. President of India, AIR 1982 SC 149; Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268; *In Re* Presidential Reference, AIR 1999 SC 1.

[80] SP Gupta v. President of India, AIR 1982 SC 149. "*The appointment of a Judge of a High Court or the Supreme Court does not depend merely upon the professional or functional suitability of the person concerned in terms of experience or knowledge of law though this requirement is certainly important and vital and ignoring it might result in impairment of the efficiency of administration of justice, but also on several other considerations such as honesty, integrity and general pattern of behaviour which would ensure dispassionate and objective adjudication with an open mind, free and fearless approach to matters in issue, social acceptability of the person concerned to the high judicial office in terms of current norms and ethos of the society, commitment to democracy and the rule of law, faith in the constitutional objectives indicating his approach towards the Preamble and the Directive Principles of State Policy, sympathy or absence thereof with the constitutional goals and the needs of an activist judicial system. These various considerations, apart from professional and functional suitability, have to be taken into account while appointing a Judge of a High Court or the Supreme Court and it is presumably on this account that the power of appointment is entrusted to the Executive.*"

[81] *Supreme Court Advocates on Record Association* v. *Union of India*, AIR 1994 SC 268, ¶407 (J. Ahmadi). "*The seniority principle and the legitimate expectation doctrine are incapable of realistic application as they would destroy the representative character of the superior judiciary, which is absolutely essential for every segment of society to have confidence in the system. The seniority principle and the legitimate expectation doctrine would only push merit to the second place.*"

society' in every sphere including the judiciary, by observing the judges should be appointed from a diverse background.[82]

Prof MP Singh has called for a 'reflective judiciary' given the court's role in policy making which will justify this expanded role.[83] Earlier this responsibility of maintaining diversity was with the executive, who herself was a representative of the people, however, with the collegium being the deciding authority, the burden of understanding the mechanism of diversity and implementing has shifted to the judges.[84] Undoubtedly, the judiciary has faced challenges in implementing a diverse judiciary. As of 2023, out of 569 Judges appointed in the High Courts since 2018, 17 belong to the SC category and 09 belong to the ST category.[85] The Supreme Court has not seen any woman judge from SC and ST background since its inception. It is puzzling to observe this dichotomy of principles that the Supreme Court has followed for other public institutions (as discussed in the preceding section) in comparison with itself in matters relating to representation and diversity.

THE CHALLENGES OF ACHIEVING GENDER DIVERSITY IN APPOINTMENTS

For this article, authors remain confined to 'gender' in its binary sense. The need for greater gender diversity is largely understood in India in terms of number[86], given the current representation of women in the

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[82] Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441.

[83] M.P. Singh, *Securing the Independence of The Judiciary-The Indian Experience*, 10(2) IND. INT'L & COMP. L. REV. 245-292 (2000).

[84] *Id.* at 284.

[85] Information and Transparency, Only 17 SC, 9 ST judges among 569 HC appointments since 2018, THE LEAFLET (Mar. 18, 2023) https://theleaflet.in/only-17-sc-9-st-judges-among-569-hc-appointments-since-2018/.

[86] *Strongly Recommend 50% Reservation In Judiciary For Women Lawyers: CJI,* THE OUTLOOK, (Sept. 26, 2021) https://www.outlookindia.com/website/story/india-news-strongly-recommend-50-reservation-in-judiciary-for-women-lawyers-cji/395836.

judiciary.[87] This however is not an end in itself. In this part, two basic points of gender diversity are dealt with - the 'why' and 'how'. The arguments for greater demographic diversity are often driven by the belief that it will lead to 'value diversity' by drawing from different life experiences of judges.[88] While speaking at the HT Leadership Summit 2022, Justice Chandrachud spoke about his experience of working with Justice Ranjana Desai which established the above.

> *"There is something intrinsic about gender which adds to decision making ...irrespective of the outcome that you arrive at in an individual case, they bring to the case, a more deliberative, consultative and dialogic process to the art and science of judging."*[89]

According to Mallesson,[90] at the risk of sounding redundant, one must ask why gender diversity is required for at least three reasons which seem to be applicable to India as well. First, the rationale of equality must have a strong theoretical and empirical basis if it truly desires to change the legal profession's structural arrangement and the judiciary. For women 'Equality' has been largely perceived from a victim-oriented approach, whereby women have rightfully gained an equal footing in cases of violation of their privacy in multiple forms. The gamut of literature on gender justice indicates the progress made so far. However, with the advent of 'equality' that acknowledges the equal autonomous position of women in society,[91] opens a pandora's box and urges us to shift from a victim-oriented approach to an anti-discrimination-oriented one.

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87 R. Sai Spandana, *Only 107 of 788 Sitting High Court Judges are Women*, SUPREME COURT OBSERVER (Jun. 30, 2021) https://www.scobserver.in/journal/only-107-of-788-sitting-high-court-judges-are-women/.; List of Senior Advocates on 7/7/2022 https://main.sci.gov.in/pdf/seniorAdvocatesDesig/11122021_201328.pdf.

88 Kate Mallesson**,** *Values Diversity in the United Kingdom Supreme Court: Abandoning the 'Don't-Ask-Don't-Tell' Policy***,** 49 J.L. & SOC'Y 22, 22 (2022).

89 Swati Bhasin**,** *'Why Don't We Have More Women Judges?' Chief Justice Shares Views at HTLS 2022,* HINDUSTAN TIMES (Dec. 7, 2022), https://www.hindustantimes.com/india-news/hindustan-times-leadership-summit-2022-why-don-t-we-have-more-women-judges-chief-justice-dy-chandrachud-shares-views-at-htls-2022-101668239165657.html.

90 Kate Mallesson**,** *Justifying Gender Equality on the Bench: Why Difference Won't Do***,** 11 FEMINIST LEGAL STUD., 1, 1 (2003).

91 Joseph Shine v. Union of India, (2019) 3 SCC 39.

That brings us to Mallesson's second reason – what forms of actions may legitimately be pursued to achieve the goal of gender diversity? A blind reservation policy may not serve its purpose without assessing the ground realities of women in the profession. As seen in Part II, the judiciary has a predetermined mindset of appointing the best legal minds as judges, therefore, a reservation policy seems highly unlikely. In the legal profession, it is widely acknowledged that the profession has not been accommodative of women openly.[92] There are numerous forms of biases and hurdles that women cut through to make a living out of the profession.[93] Justice Leila Seth's account of being tested tenaciously by the system gives a clear picture of how the system assesses its women.[94] Nonetheless, women brace up against these challenges and create a work-life balance suitable for themselves. Lack of attrition data, however, does not let us have a complete picture. Nonetheless, the greater question is that to enhance diversity should women irrespective of their calibre be preferred for judicial appointments over male judges? Given the fact that the size of the pool of female students and advocates is smaller in comparison to males.[95]

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[92] Swagata Raha & Sonal Makhija**,** *A Survey of the Challenges Faced by Indian Women Advocates in Litigation***,** INDIA L. NEWS (Dec. 1 2013), https://indialawnews.org/2013/12/01/a-survey-of-the-challenges-faced-by-indian-women-advocates-in-li.

[93] *Id.*

[94] LEILA SETH, ON BALANCE: AN AUTOBIOGRAPHY (Penguin Books, 1st ed., 2007).

[95] MINISTRY OF EDUCATION, DEPT. OF HIGHER EDUCATION, GOVT. OF INDIA, ALL INDIA SURVEY ON HIGHER EDUCATION (2020-2021*)*, https://aishe.gov.in/aishe/viewDocument.action?documentId=322, 2.76 lakhs males and 1.36 lakh females enrolled in law,; MINISTRY OF EDUCATION, DEPT. OF HIGHER EDUCATION, GOVT. OF INDIA, ALL INDIA SURVEY ON HIGHER EDUCATION*, 15* (2019-2020), https://www.education.gov.in/sites/upload_files/mhrd/files/statistics-new/aishe_eng.pdf, The students enrolled in Law stream are 4.32 lakh out of which 2.87 lakh are male and 1.45 lakh are female ; MINISTRY OF EDUCATION, DEPT. OF HIGHER EDUCATION, GOVT. OF INDIA, ALL INDIA SURVEY ON HIGHER EDUCATION*,* 10 (2018-2019), https://aishe.gov.in/aishe/viewDocument.action?documentId=262, The students enrolled in Law stream are 3.98 lakh out of which 2.64 lakh are males and 1.34 lakh are female; MINISTRY OF EDUCATION, DEPT. OF HIGHER EDUCATION, GOVT. OF INDIA, ALL INDIA SURVEY ON HIGHER EDUCATION*,* 11 (2017-2018),

That brings us to the third reason – what level of participation of women is necessary, either proportionate or lesser/greater than males? This is by far the most pertinent question to ask. Inspiration can be drawn from the experiences of South Africa in its support. The transformative policies were introduced with the goal of balancing the demographic composition in accordance with the constitutional mandate under section 174 of the Constitution of South Africa 1996:

> *"[t]he need for the judiciary to reflect broadly the race and gender composition of South Africa must be considered when judicial officers are appointed".*

The Cape Bar policies introduced in 2009 take the initiative of acknowledging the practical disadvantages that women experience because of maternity leave.[96] Although bordering on essentialism, the policies include maternity leaves and various financial benefits to retain women in the profession, which is otherwise heavily dominated by white male lawyers.

Deliberating on the second aspect – how to achieve diversity – is problematic without touching upon the issue of transparency in matters related to judicial appointments. Justice Chelameswar's dissent in *Supreme Court Advocates-on-Record Assn v Union of India*[97] (NJAC judgment) destroyed the basis of the collegium's existence by condemning it to be counter-textual and against the intent of the Constituent Assembly. It has been proved that in times of distress if political branches fail, so can the judiciary. Therefore, to believe that the judiciary is the ultimate protector

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https://aishe.gov.in/aishe/viewDocument.action?documentId=245, The students enrolled in Law stream are 3.7 lakh out of which 2.5 lakh are males and 1.2 lakh are females; percentage of female senior advocates in Supreme court is 4.5%. List of senior advocates on 7/7/2022

[96] Constitution of the Cape Bar, 1993 https://capebar.co.za/wp-content/uploads/2021/04/1.-Cape-Bar-Constitution-2021-04-15.pdf; Geoff Budlender, Cape Bar adopts new maternity policy, Bar News https://www.gcbsa.co.za/law-journals/2009/december/2009-december-vol022-no3-pp10-11.pdf.

[97] Supreme Court Advocates-On-Record Association and Anr. v. Union of India, (2016) 5 SCC 1 ¶ 90.

of people's rights and liberties is unnecessarily rigid.[98] The defenders of collegium may argue that given the era's need, collegium was a required solution to save the institutional independence of the judiciary in a post-emergency period. By the same logic, in the present socio-political backdrop, developing a representative judiciary has become the need of the hour, which the collegium is not able to cater to.

Independence of the judiciary is indeed a basic feature but judicial appointment is not the only way to ensure it, other factors have roles to play and the primacy of judicial opinion is certainly not the only way to ascertain independence. Asserting the importance of transparency in the appointment process, J Chelameswar quoted J Ruma Pal's observation on the opacity of collegium proceedings that breeds and harbours disastrous practices.[99] Eventually, the Court did not approve of a commission model however, inspired by its spirit of judicial reform, the Supreme Court collegium decided to publish the resolutions of the collegium. As Prof Tripathy explains, the practice of publishing resolutions was made subject to 'confidentiality' with a possibility of tampering with the degree of transparency.[100] Meijer defines transparency as the availability of information about an actor that allows other actors to monitor the workings or performance of the first actor.[101] From the point of relation between object and subject of transparency, appointing authority is observed by people as well as other professional stakeholders.[102] From the point of exchange of information, information relating to internal working and performance is made available to the monitoring actor in a

98 ADM Jabalpur v Shivkant Shukla, AIR 1967 SC 1207; AK Gopalan v State of Madras, AIR 1950 SC 27.
99 Supreme Court Advocates-On-Record Association and Anr. v. Union of India, (2016) 5 SCC 1, ¶¶ 90 & 106.
100 Rangin P. Tripathy, *The Supreme Court Collegium and Transparency: A Non-Committal Relationship*, 17(1) SOCIO-LEGAL REV. (2022).
101 Albert Meijer, *Understanding the Complex Dynamics of Transparency*, 73(3) PUBLIC ADMIN. REV. 429 (2013).
102 *Id.*

wholesome way so that it helps in constructing the socio-political reality.[103]

Collegium's practice of sharing information in light of maintaining fictional transparency seems to be a make-shift approach to cope with the allegations of opacity.[104] The trajectory of published information of resolutions will throw light to see the gaps in information shared by the collegium.[105] For instance, the collegium's decision on a candidate after acknowledging that it has given due consideration to diversity factors, did not put out any evidence in regard to factors that let them finalise that candidate. As recently as 2021, the Supreme Court has published 'statements' instead of 'resolutions' without citing the reasons for approving the proposal for the elevation of advocates as judges in Punjab and Haryana High Court.[106] The same practice continued in September 2022.[107] A stark difference was observed in the resolution of October 2022, whereby the collegium came together to fill up 11 vacancies of judges in the Supreme Court.[108] Not only did the statement become a resolution, but it also gave a glimpse of the nature of deliberation that happened amongst the collegium members. Gradually, the publication of collegium resolutions has lifted the veil of non-transparency to a certain

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[103] *Id.*

[104] Markandey Katju, *One Way to Fix the Collegium is to Televise its Proceedings*, THE WIRE, (Nov. 5th, 2015), https://thewire.in/law/one-way-to-fix-the-collegium-is-to-televise-its-proceedings.

[105] *Re: Appointment of Ms Justice Sunita Agarwal, Judge, High Court of Judicature at Allahabad as the Chief Justice of the High Court of Gujarat,* SUPREME COURT OF INDIA, (Nov. 21, 2011) https://main.sci.gov.in/pdf/Collegium/05072023_173908.pdf. Very recently with the elevation of chief justices of high courts resolutions passed on 5th of July 2023, the collegium mentioned the demographic factors that they considered before finalizing the judges. Appointment of Ms Justice Sunita Agarwal, Judge, High Court of Judicature at Allahabad as the Chief Justice of the High Court of Gujarat.

[106] *Supreme Court Statement*, (Sept. 1 2021) https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/documents/collegium/03092021_174313.pdf.

[107] *Supreme Court Statement*, (Sept. 12 2022) https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/documents/collegium/12092022_130910.pdf.

[108] *Resolution*, (Oct. 9, 2022) https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/documents/collegium/10102022_055250.pdf.

extent by giving out the criteria and qualities taken into consideration before approving a candidate to the Supreme Court.[109] Justice Varale's appointment also witnessed the same pattern.[110] Although it is much appreciated, only time can tell whether these practices will continue to become a long-standing convention.

People have to keep faith in the wisdom of the collegium choosing a suitable candidate. Balancing the right to know, the right to privacy and the transparency, accountability and independence of the judiciary, J Chandrachud once opined that increasing transparency would not threaten judicial independence.[111] He carefully demystified the non-existence of any fiduciary relationship between the CJI and other judges, whereby he is not entrusted with any such power to protect and further the interests of individual judges who disclose their assets to him in an official capacity.[112] Every disclosure cannot be garbed under the cover of independence. If the information that flows from the top is murky such that it cannot give a preliminary clear picture about the process, criteria for selection, the people consulted, and the people considered for appointment, how can they devise a practical mechanism to enhance diversity? With a limited pool of women candidates, the collegium can only serve a half-baked cake in the name of gender diversity.

DEMOCRATISATION AND JUDICIARY: AN ECLECTIC UNDERSTANDING OF JUDICIAL INDEPENDENCE

As observed in the previous sections, judicial appointment has undergone many changes and has managed to include diversity informally. However, those informal measures have not been able to

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109 *Resolution,* (Jul. 11, 2024) https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/07/2024071134.pdf.

110 *Resolution,* (Jan. 17, 2024) https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012921.pdf.

111 Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481.

112 *Id.*

reflect positively on the inclusion of "non-traditional voices". That is why, it has become imperative to deliberate how to democratise the appointment process which could break the system of "tokenism" in it. Democratisation as noted by Christian Larkin is a 'gradual evolutionary' process that helps in establishing democratic procedures.[113]

A stable socio-political environment nurtures the establishment of the rule of law, which allows a country to develop a constitutional culture for itself. This entire process of democratisation creates a unique powerful position for the judicial branch, as the authors have deliberated earlier.[114] The escalation in the courts' role in matters of governance is complicatedly linked with the independence of the judiciary. An independent judiciary can fulfil the role of a fair arbitrator/negotiator among constitutional actors. But what connotes an "independent judiciary"? The Indian Constitution has identified several markers to ensure judicial independence and has safeguarded its' security through several mechanisms,[115] among which appointments have been the most contested ones.[116] The history of higher judicial appointments in India has been shrouded in an eclectic understanding of judicial independence, which has not let the discussion of appointment explore beyond conventional ideas. Over a period of time, independence of the judiciary has been equated with the independence from Parliamentary law, which does not resonate with the original intention of the framers of the Constitution.[117]

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113 Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996).

114 Dam, *supra* note 44, at 114-116.

115 The Judges (Inquiry) Act, 1968, No. 51, Acts of Parliament, (1968), regulates the procedure of investigation during the impeachment proceedings against a judge; The Supreme Court Judges (Salaries and Conditions of Service) Act, 1958, No. 41, Acts of Parliament, (1958); and the High Court Judges (Salaries and Conditions of Service) Act, 1954, No. 28, Acts of Parliament, (1954) determines the salaries, pension and other privileges of Judges of Supreme Court (Article 125), and of the High Court (Article 221). Parliament has widened the jurisdiction of the Supreme Court by means of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, No. 28, Acts of Parliament, (1970).

116 INDIA CONST. art 124.

117 8 CONSTI. ASSEMB. DEB., (May 23, 1949), https://www.constitutionofindia.net/debates/23-may-1949/. Prof. KT Shah's

The usual discussion has been around "who" can appoint judges rather than "who" can be a judge. Dr. Ambedkar in the Constituent Assembly Debates had raised the concern of judges being biased without demeaning the significant role of an adjudicator. Dr. Ambedkar's concern echoed through aeons and resonated in *CPIO, Supreme Court of India v Subhash Chandra Agarwal* .[118] The Supreme Court in *Subhash Chandra Agarwal* acknowledged that adjudicators in robes are human beings and may be predisposed to the failings that are inherently human.[119] This is why more emphasis is required to be on "who the judge is?". Though the judgment did not define the standards of judicial appointment the concurring opinion of Justice DY Chandrachud emphasised the need to put those standards in the public domain to promote public confidence.[120] The judiciary is not an elected body politic, it enjoys a public trust which is manifested in the independence that it enjoys. Making it accountable, as J Chandrachud observed, certainly does not dilute its independence.[121]

The next question that comes up immediately is "how much" and "what kind" of information can be put out in the public domain to fulfil the necessary requirement of maintaining transparency? Though *Helen Suzman*[122] was decided in 2018 and cited in *CPIO, Supreme Court of India v Subhash Chandra Agarwal* in 2019, it has remained largely confined to academic discussion to date. Subhash Chandra Agarwal dealt with four major objections against public access to information on appointments/selection of judges, namely, (i) confidentiality concerns; (ii) data protection; (ii) the reputation of those being considered in the selection process, especially those whose candidature/eligibility stands

proposed amendment of bringing a completely independent judicial branch was opposed by Shri K.M. Munshi on the ground that India has adopted the British model with an apex court designed in the image of the Privy Council.

118 Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481

119 *Id.* at ¶ 53.

120 *Id.* at ¶ 117.

121 *Id.*

122 Helen Suzman Foundation v. Judicial Service Commission, 2018 (7) BCLR 763 (CC) 8.

negated; and (iv) potential chilling effect on future candidates given the degree of exposure and public scrutiny involved.[123]

Indian judiciary is yet to discuss the modalities of information to be divulged and it largely depends on whether they want to step out of their cocoons.[124] The 2016 NJAC judgment[125] when it struck down the constitutional amendment on establishing a commission model made it clear that there are serious flaws in the present appointment system. A couple of years later, keeping up with the spirit of judicial reform, the Supreme Court collegium decided to publish the collegium resolutions with reasons. Prof. Tripathy's empirical study on collegium resolution reveals that the collegium had embarked on a path of grand plans of "transparency" without giving serious thought to the "degree" of transparency is feasible to achieve.[126] Very recently, the Supreme Court Collegium has amended its ways of publishing resolutions by legitimising the "informal"[127] factors as formal for considering a candidature as judge of the Supreme Court.[128] Having said so, the disbursing of information on collegium resolution is a highly Chief Justice-led phenomenon. Since, the time when the collegium started publishing its statements or resolutions, it has faced criticisms of lack of transparency and as a partial response to that CJI Dipak Mishra initiated the practice of publishing

123 Larkins, *supra* note 113, at ¶ 82.

124 *Id.*

125 Supreme Court Advocates-on-Record Association. v Union of India, (2016) 5 SCC 1.

126 TRIPATHY, *supra* note 97; Alok Prasanna Kumar, *Supreme Court Stops Uploading Collegium Resolutions on Website: Move is Major Self-Inflicted Wound, Smacks of Institutional Cowardice* FIRSTPOST (OCT. 22, 2019).https://www.firstpost.com/india/supreme-court-stops-uploading-collegium-resolutions-on-website-move-is-major-self-inflicted-wound-smacks-of-institutional-cowardice-7536991.html.

127 ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION, (Oxford University Press, 1st ed., 2014).

128 Appointments of Justice N. Kotishwar Singh and Justice R. Mahadevan are recent examples of how collegium resolutions are disbursing information about their decisions. It divulges the reasons for considering a candidate and giving precedence to one over others. Supreme Court Collegium Resolution dated 11th July 2024. https://cdn.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/07/2024071134.pdf.

them along with reasons from 2017.[129] So, it depends largely on that one person what kind of reforms he/she envisages, which tomorrow might change as well. Assessment of resolutions per se is not what this article intends to articulate; however, it takes into account the above-mentioned strategic gaps that limit the reach of collegium.

The existing Memorandum of Procedure talks about the authorities who are to decide on the proposed names. However, it lacks how to screen or assess those proposed candidates or what qualitative and quantitative criteria are to be measured and how to measure before finalising the proposed names. For instance, in a published proposal for the appointment of advocates to Punjab and Haryana High Court, some 11 names were recommended to the collegium by the Chief Justice of Punjab and Haryana High Court along with his two senior-most judges on 24th November 2017. The existing memorandum says to judge the suitability of these recommendations must be vetted by the concerned state Chief Minister (along with the Governor) and consulted with the judges who are conversant with the affairs of that court. For assessing the merit and suitability, all the materials pertaining to the recommendees must be scrutinised including observations of the Department of Justice.[130] This is the same procedure which was followed in 2024 as

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129 Mihir R., *Collegium's 13 Resolutions Recommending SC Judges*, SUPREME COURT OBSERVER, (Sept. 25, 2021) https://www.scobserver.in/journal/collegiums-13-resolutions-recommending-sc-judges/.

130 The proposal for appointment of a Judge of a High Court shall be initiated by the Chief Justice of the High Court. However, if the Chief Minister desires to recommend the name of any person he should forward the same to the Chief Justice for his consideration. Since the Governor is bound by the advice of the Chief Minister heading the Council of Ministers, a copy of the Chief Justice's proposal, with a full set of papers, should simultaneously be sent to the Governor to avoid delay. Similarly, a copy thereof may also be endorsed to the Chief Justice of India and the Union Minister of Law, Justice and Company Affairs to expedite consideration. The Governor as advised by the Chief Minister should forward his recommendation along with the entire set of papers to the Union Minister of Law, Justice and Company Affairs as early as possible but not later than six weeks from the date of receipt of the proposal from the Chief Justice of the High Court. If the comments are not received within the said time frame, it should be presumed by the Union Minister of Law, Justice and Company Affairs that the

well.[131] The revised Memorandum proposed to set up separate search-and-evaluation committees for the Supreme Court and all 25 high courts, which would screen names for appointment before they are recommended by the collegium.[132] In the absence of a revised Memorandum of Procedure, higher judicial appointments lack a discussion on a transparent qualitative assessment of a judicial candidate, which is quintessential for taking the discussion on "who the judge is" further.

CONCLUSION

Carving a transparent appointment process is required for the judiciary to sustain itself in the times that we live in now. The expanded role and responsibilities of the institution have attracted questions like "Who are we governed by", which is a pertinent one. This paper has attempted to cover an extensive discussion in a cogent manner by briefly discussing the role of the court, attempting to achieve diversity through representation, challenges in those attempts and why democratisation attempts should step out from an eclectic understanding of 'judicial

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Governor (i.e. Chief Minister) has nothing to add to the proposal and proceed accordingly.

The Union Minister of Law, Justice and Company Affairs would consider the recommendations in the light of such other reports as may be available to the Government in respect of the names under consideration. The complete material would then be forwarded to the Chief Justice of India for his advice. The Chief Justice of India would, in consultation with the two senior-most Judges of the Supreme Court, form his opinion in regard to a person to be recommended for appointment to the High Court. The Chief Justice of India and the collegium of two Judges of the Supreme Court would take into account the views of the Chief Justice of the High Court and of those Judges of the High Court who have been consulted by the Chief Justice as well as views of those Judges in the Supreme Court who are conversant with the affairs of that High Court. It is of no consequence whether that High Court is their parent High Court or they have functioned in that High Court on transfer. Available at https://doj.gov.in/memorandum-of-procedure-of-appointment-of-high-court-judges/.

131 *Resolution,* dated 24th September 2024. https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/09/2024092494.pdf.

132 Pradeep Thakur, *Supreme court pushes judge appointments, government keen on fixing memorandum of procedure,* THE TIMES OF INDIA, (Oct. 24, 2023) https://timesofindia.indiatimes.com/india/supreme-court-pushes-judge-appointments-government-keen-on-fixing-memorandum-of-procedure/articleshow/104662367.cms.

independence'. No social institution is value-neutral.[133] Every institution is run by people and to expect blindly that people can be value-neutral is nothing but a mirage. To ensure true independence of the judiciary it is pertinent to step out of this cocooned understanding of associating every aspect of judiciary's functioning with judicial independence. Any attempt to tame the reigns of the judiciary cannot be seen as a violation of the basic structure of the Constitution. Using 'representation' to achieve diversity to enhance public confidence in the judiciary remains a less explored area of research in India.

The roots of discussion on representation may fairly be drawn from the arguments of a reflective judiciary.[134] As enunciated in the 1983 *Montreal Declaration*,[135] the principle of 'fair reflection' has since been reaffirmed in numerous international instruments and operationalised in many domestic and international judicial appointment procedures. However, the method of achieving 'fair reflection' of non-traditional voices differs for different countries. A transparent appointment process should be the first step, if India has to think along the lines of building a 'reflective' judiciary then it can think along the lines of proportional representation. Hobbs believes that fair reflection of the society does not require fair reflection to mean an exact proportion. It simply requires that in its composition, the judiciary should mirror society in all its diversity - religious, gender, geographical, social, ideological, and so on.[136] Under the present appointment process it seems very easy to make the bench 'pseudo-diverse' (which means token appointments of non-traditional voices) but the lack of a transparent accountable method of appointments raises questions about the legitimacy of such diversity.

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133 Uday Shankar, *Appointment of Judges in Higher Judiciary*, in SWATI DEVA, LAW & INEQUALITIES (Eastern Book Company, 1st ed., 2010).

134 Harry Hobbs, *Finding a Fair Reflection on the High Court of Australia,* 40(1) ALT. L. J. 13 – 17 (2015).

135 *Montreal Declaration, Universal Declaration on the Independence of Justice***,** unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) on Jun. 10, 1983, https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf.

136 Hobbs, *supra* note 134.

Deeper questions of proportional representation of marginalised voices on the bench can be answered when the actual hurdles faced by 'marginalised voices' can be identified. Does collegium possess adequate information on where the non-traditional people are losing out and how can this attrition be controlled? It is certainly not enough just to put a 'known' non-traditional voice on the bench based on the opinion of a handful of judges. Appointing authorities will have to delve much deeper rather than just saying, "he belongs to a backward community from the State of... His appointment will bring diversity to the Bench."[137]

[137] *Supreme Court Collegium Resolution* (Jul. 11, 2024), https://cdn.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/07/2024071134.pdf.

LINGUISTIC-CRACY

DR. ASHIT SRIVASTAVA[1] & AASHUTOSH JAGTAP[2]

Language is not merely a medium of instruction, but also a reservoir of culture. Moreover, the crucial role language plays in our daily life cannot be understated. It is not only a mode of communication but also a formidable weapon that has shifted and continues to shift the structural paradigm of the world as we see it. Thus, the authors in this article highlight the phenomenon of language-based discrimination. Additionally, the paper ontologically studies the relationship between theocracy and language. At the outset, it aims to delve solely into the issue of language from a perspective that considers its role either in alignment with or independent of the state.

The objective of this article is first, to explain the socio-cultural rights connected with the language. Second, delve into the dominance of these rights via language and lastly, the authors shall attempt to analyse how these rights are curtailed when they conflict with other similar or contemporary rights. Generally speaking, it has been widely accepted that religion and language often become the basis of discrimination. Such biases are either unconsciously underlying in the society or have been actively used by the state as a tool of systemic oppression. This phenomenon is widely seen in theocratic states. Conversely, language is yet to be seen as a primary ground of state-sponsored discrimination. There are few, if any, instances where nations have taken language as a qualification for citizenships and even attempted to bring a cultural homogeneity through the means of language. A notable exception is Canada's Francophone immigration policy, which seeks to counter the declining Francophone population in Northern Canada by granting residency to skilled laborers based on their proficiency in French.

However, the authors seek to highlight specific instances in which language, under the patronage of the state, leads to problematic identity-issues for languages that are in the minority. Language, when considered in isolation, serves primarily as a medium of

* Cite it as: Shrivastava & Jagtap, Linguistic-Cracy, 9(1) COMP. CONST. & ADMIN. L.J. 71 (2025).

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communication. It is this particular instance of language that the authors try to examine, in comparison with that of religion. This phenomenon is termed by the authors as 'Linguistic-cracy'.

TABLE OF CONTENTS

INTRODUCTION

Language has continuously evolved since the inception of civilization. It has not only served as a medium of communication but also as an explicit manifestation of culture.[3] Consequently, any restriction, impediment, or regulation on the free traverse of the language is considered an attack on the self-expression of people.[4] Thus, it becomes essential to not only protect language but also to actively promote its preservation and development.

However, in a globalized world, the extent of this protection varies according to the changes in jurisdiction. In some cases, protection offered to one language may prove to be counterproductive to another language.[5] In some extreme cases, this protection may even translate into oppression of a particular language, whether it belongs to a minority or a majority group. A notable example is the oppression of the Bengali-

[3] Andrew Whiten & Carel P. van Schaik, *The Evolution of Animal 'Cultures' and Social Intelligence*, 362 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON 1480, 1485 (2007).
[4] *Id.*
[5] Bruno de Witte, *Language Law of the European Union: Protecting or Eroding Linguistic Diversity?*, *in* RACHAEL CRAUFURD SMITH ED., CULTURE & EUROPEAN UNION LAW 208 (Oxford University Press, 1st ed., 2004).

speaking oppressed class in Bangladesh by the Urdu-speaking elite.[6] Based on this premise, the authors try to determine whether such restrictions are also imposed upon the freedom of the individual on the basis of language.

Across jurisdictions, there are various constitutional protections that safeguard the right of a community to protect their rights to speak their language. This protection is often embedded in the provisions which address the rights of minorities in the jurisdiction.[7] The universal provision specifically addressing the protection of linguistic rights can be found in Article 27 of the International Covenant on Civil and Political Rights (ICCPR).[8] It states:

> "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."*[9]

Although this article is negatively phrased, restricting interference with minorities' rights to profess their culture and to speak their language — the United Nations Human Rights Commission (UNHRC) interpreted it as imposing a positive obligation upon the states to actively protect minority rights against infringement by all others.[10] Similar protection is enshrined under respective jurisdictions namely, Europe,[11] USA,[12] India[13] etc.

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[6] Kimtee Kundu, *The Past Has Yet To Leave The Present Genocide*, HARVARD INT. REV. (May 29, 2024) https://hir.harvard.edu/the-past-has-yet-to-leave-the-present-genocide-in-bangladesh/.

[7] Witte, s*upra* note 5.

[8] International Covenant on Civil and Political Rights art. 27 Dec. 16, 1966, 999 U.N.T.S. 171.

[9] *Id.*

[10] Moria Paz, *The Tower of Babel: Human Rights and the Paradox of Language*, 25 EURO. J. INT. L. 473, 479 (2014). *See also* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES, at 197 (Clarendon Press, 1st ed., 1991).

[11] European Convention on Human Rights art. 14, 213 U.N.T.S. 221 (adopted on Nov. 4, 1950, entered into force on Sep. 3, 1953).

However, implementing these provisions across jurisdictions is a whole new ball game. For example, the UNHRC in the case of *Guesdon v. France*,[14] ruled against the accused's request to present his case in a language other than that of the court and denied him access to a translator for the purpose of understanding the charges against him and presenting his case effectively. The Committee noted,

> *"…the requirement of a fair hearing does not mandate State parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter if he is capable of expressing himself adequately in the official language…"*[15].

In contrast, Indian criminal procedure mandates that the court read the charges in a language that the accused understands.[16] Moreover, it directs the court to explain the evidence recorded to the accused or his pleader, especially when the evidence is recorded in a language not understood by them.[17] In *Guedson v. France*, the Committee implicitly permitted a trial to proceed in a language that the accused was not well-versed in, which clearly contradicts the intent behind Article 27 of the ICCPR. This decision raises the concerning possibility of an accused being put to trial in a language they do not fully understand.[18]

In a case decided by the European Court of Human Rights (ECHR),[19] the core issue centered on a challenge to the Belgian linguistic legislation

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[12] Although there is no explicit law on the protection of linguistic rights of the individual, the protection can be claimed under the first and fourteenth amendment. S*ee* Cristina Rodríguez, *Language and Participation*, 94 CALIFORNIA L. REV. 687, 709–718 (2006).

[13] INDIA CONST. art. 29 & 30.

[14] Human Rights Comm., Communication No. 219/1986, Guesdon v. France, CCPR/C/39/D/219/1986 (1990).

[15] *Id.* at ¶10.2.

[16] CODE CRIM. PROC., 1973, § 228 r/w § 240.

[17] CODE CRIM. PROC., 1973, § 279. *See* also, CBI v. Narottam Dhakad, 2023 SCC OnLine SC 1069.

[18] Communication No. 323/1988, Cadoret v. France (1991); these precedents were also followed in ECtHR see App. No. 26891/95, Lagerblom v. Sweden, No. 26891/95, ECtHR (Fourth Section), 14 Jan. 2003.

[19] Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium', [1968] Yrbk Eur. Conv. on HR 832 (ECommHR) ('The Belgian Linguistic

that structured the education system on the basis of regional language decisions—French for the French-speaking region, Dutch for the Dutch-speaking region, and German for the German-speaking region. This created its own set of administrative glitches and demographical problems. In one such instance, a group of parents, along with their children challenged the validity of the enactment on the pretext that it denied their French speaking children the right to receive education in their native language within Dutch-speaking regions. The parents claimed it constituted a clear violation of Article 8 of the European Convention on Human Rights.[20]

Furthemore, the Belgian State withheld student grants for non-compliance with the linguistic mandates of the public schools. Notably, the Court did not interfere in the matter, primarily citing a lack of jurisdiction. In fact, it held that '*a right to obtain education in the language of his own choice would lead to absurd results*…'[21] This decision is contrary to the need for state administration to take into account cultural and linguistic identities.

WHAT IS LINGUISTIC THEOCRACY?

Globally, the term *theocracy* has several connotations. It denotes an institutional recognition or affiliation granted to a religion within a country. In practice, religion often becomes a qualification for holding governmental positions. State-sponsorship of religion can be generally classified into two categories: ranging from a radical theocratic states[22] (that tend to follow religious ideology radically) to moderate theocratic

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Case'); *see* also, App. Nos 43370/04, 8252/05, and 18454/06; Catan and Others v. Moldova and Russia (2012).

[20] European Convention on Human Rights art. 8, 213 U.N.T.S. 221 (adopted on Nov. 4, 1950, entered into force on Sep. 3, 1953).

[21] Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium', [1968] Yrbk Eur. Conv. on HR 832 (ECommHR) ('The Belgian Linguistic Case'); Also see, App. Nos 43370/04, 8252/05, and 18454/06, Catan and Others v. Moldova and Russia (2012).

[22] RAN HIRSCHL, CONSTITUTIONAL THEOCRACY, (Harvard University Press, 1st ed., 2010); Pakistan can be regarded as a hard theocratic laws, with religion being a qualification to hold a higher constitutional position.

states[23] (which despite being theocratic states, are still open to modern outlook). The number of theocratic states has gradually increased. It is on these lines that the authors differentiate between a radical theocratic state, that tends to emphasize more on a radical interpretation of religion, inclining more towards religious dogmas and tends to govern the civil and secular system based on religious order. For instance, Pakistan, which established Federal Shariat Courts, under the military dictatorship of Zia-Ul-Haq in early 1970s[24] with stringent blasphemy laws,[25] and largely diluted civil governance in favour of religious authority.

On the other hand, comparatively moderate theocratic states adopt a less stringent interpretation of religious text, and instead seek to control religious organizations and their interpretation of religion in sync with a modern economic outlook. For instance, Egypt and Israel, have given preference to secular courts over religious or *Rabbinical Courts*.[26] In fact, the orders/judgments of the religious courts are subject to appeal before secular courts.[27]

Generally, in comparative studies, this is regarded as a push towards a novel global constitutional order, where, instead of resisting the concept of religion in the functioning of the state, religion is becoming central to the state's identity. References to this can also be found in writings on comparative constitutional law, which highlight how modern states are increasingly willing to integrate religion into governance while incorporating elements of minority rights and a secular outlook.[28]

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[23] *See*, Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1820-1824 (2004); Egypt can be seen as an example of a soft theocratic state. With State-controlled interpretation of the religious tenets, the Egyptian Government has attempted to follow a secular outlook.

[24] Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to dissolve assemblies under the Pakistani Constitution and its discontent*, 23 THE ARIZ. J. INT.'L & COMP. L., 3 (2006).

[25] *Id.*

[26] Hirschl, *supra* note 23.

[27] *Id.*

[28] Mallat, Chibli, *Islam and the Constitutional Order*, in MICHEL ROSENFELD AND ANDRÁS SAJÓ (EDS.), THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Oxford University Press, 1st ed., 2012).

Due to the lack of appropriate literature, the authors propose the term '*Linguistic Theocracy*' to describe the concept of state affiliation with or recognition of a particular language as the foundational element in the governance or functioning of the state. The prefix '*linguistic*' signifies the role of language, while '*theocracy*' traditionally denotes a system of governance prioritizing religion. Drawing a parallel with theocratic systems, this study focuses on countries that base governance on language rather than religion, thereby coining the term '*Linguistic(cracy)*' to capture this phenomenon.

From a socio-political perspective, the concept of theocracy and linguistic (cracy) exemplify a larger goal of cultural majoritarianism.

THE EUROPEAN CASE

The European Union has grappled with the complex challenge of determining a representative language for each member of the union.[29] These issues may have been caused due to non-homogeneity or cultural differences. Things started to shape differently with the inception of the Council of Europe (CoE) after World War II,[30] which led to the enactment of the European Charter of Human Rights (ECHR), the European Charter for Regional and Minority Languages (ECRML) and the Framework Convention for the Protection of National Minorities (FCPNM).[31] These conventions and charters facilitated the recognition of minority rights, including the protection of their culture and linguistic heritage and also imposed a corresponding obligation on the State to safeguard these rights.[32]

In English-speaking settler societies such as the United States and Canada, the linguistic landscape has been significantly altered by

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[29] Kathleen R. McNamara, *Introduction*, in THE POLITICS OF EVERYDAY EUROPE: CONSTRUCTING AUTHORITY IN THE EUROPEAN UNION 12 (Oxford University Press, 1st ed., 2015).

[30] Philip McDermott, *Language rights and the Council of Europe: A failed response to a multilingual Continent?* 17 SAGE J., 603 – 626 (2017).

[31] Peter S, *The European charter for regional or minority languages,* in PROF. DR. ALEXANDER, H.E. MORAWA, ET. AL. EDS., MECHANISMS FOR THE IMPLEMENTATION OF MINORITY RIGHTS, 131–158 (Council of Europe, 1st ed., 2004).

[32] *Id.*

genocide, displacement, disease, and various forms of prejudice imposed on native peoples.[33] Approximately half of the 300 distinct languages originally spoken north of the Rio Grande have disappeared, and most of those that remain are no longer actively used, with fewer than ten native speakers.[34] Only a handful of widely spoken indigenous languages, such as Cherokee, Navajo, and Yup'ik, can be considered relatively secure, although they also remain under considerable threat. Similarly, the majority of the hundreds of Aboriginal languages once spoken in Australia are either no longer spoken or are now limited to small groups of elderly speakers, with only a few languages still being passed down to younger generations.[35]

On a similar note, in 2009, the Spanish parliament rejected a bill without any deliberation on it, solely because it had not been translated from Basque to Castilian (standard Spanish), despite Spain being a signatory to the ECRML.[36] In 2023, the Spanish Parliament granted Basque, Catalan and Galician languages parliamentary status,[37] which means what was denied in 2009 has been granted in 2023.

Furthermore, in February and March 2007, European Personnel Selection Office (EPSO), the agency responsible for recruiting EU officials, announced competitions for administrators and assistants in fields of information, communication, and media. The announcements were published in English, French, and German in the official journal of the European Union. Candidates were required to have a thorough knowledge of one official EU language as their main language and a satisfactory knowledge of English, French, or German as a second

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33 B. Kiernan, *Settler Colonialism*, in BEN KIERNAN ET AL. EDS., THE CAMBRIDGE WORLD HISTORY OF GENOCIDE 21–96 (Cambridge University Press, 1st ed., 2023).

34 Ross Perlin, *Disappearing tongues: The Endangered Language Crisis*, THE GUARDIAN, (Feb. 22, 2024) https://www.theguardian.com/science/2024/feb/22/disappearing-tongues-the-endangered-language-crisis.

35 *Id.*

36 Sam Morgan, *Language Discrimination Rife Across EU*, EURACTIV (Jun. 9, 2016) https://www.euractiv.com/section/languages-culture/news/language-discrimination-rife-across-eu/.

37 Sam Jones, *Spain grants Basque, Catalan and Galician Languages Parliamentary Status*, THE GUARDIAN (Sept. 19, 2023) https://www.theguardian.com/world/2023/sep/19/spain-grants-basque-catalan-and-galician-languages-parliamentary-status.

language. Only English, French, or German were to be used for test invitations, correspondence, and the tests themselves. These conditions also applied to admission to and in the taking of written tests. This led to a case being filed by Italy on the basis of language discrimination.[38] In its judgment, the European Court of Justice (CJEU) reviewed two key issues.

First, it addressed the lack of full publication of recruitment notices in all official EU languages, noting that EU rules require such notices to be published in all twenty- three official languages. The Court found that the failure to publish the notices in full, in all languages, was a legal error, even though amendments were later published. This lack of full publication disadvantaged candidates whose mother tongue was not English, French, or German, as they would have had to obtain and read the notices in one of these languages, potentially affecting their understanding and preparation time.[39]

Second, the Court examined the limitation on the choice of a second language for participation in competitions. It stated that such limitations could be justified in the interest of the service but required clear, objective, and foreseeable criteria. However, the institutions had not adopted rules specifying which languages to use, and the Commission had not provided other measures or reasoning for the language choices in the notices.[40]

This judgment showcases the inherent possibility of discrimination that can be propounded by those who are in majority. This instance bolsters a sense of 'normalisation' and preferential treatment for speakers of the majority-tongue, while rendering deviant and marginal, those groups that are unwilling to assimilate linguistically.[41] This is not the only instance where the CJEU recognised state-oriented discrimination on the basis of

[38] Case C-566/10 P, Italy v. Commission, Judgment on November 27, 2012.
[39] *Id.* at ¶ 9.
[40] *Id.* at ¶ 16.
[41] Stephen May, *Language Rights: Moving The Debate Forward*, 9 J. SOCIOLINGUISTICS 319, 322 (2005).

language. In a 1989 case[42], the CJEU held that the imposition of one language over another who does not speak or use such language must be justified by a clear and specific reason. Additionally, such a requirement must be proportionate to the objective pursued, reasonable and not arbitrary.[43]

Further, the CJEU, while expanding its scope, held that even a private entity or individual could not discriminate on the basis of language.[44] The court further held that a private employer's requirement for a specific diploma as a condition for employment hindered workers' freedom of movement. It observed that individuals not living in the province had limited opportunities to obtain the diploma, making it difficult for them to access employment.[45] In a similar case, where the issue involved a decree of Flander that required all cross-border employment contracts to be drafted in Dutch,[46] CJEU held that the requirement to draft all cross-border contracts in a specific language (in the instant case Dutch language) infringes freedom of movement for workers.

The above cases exemplify language- based majoritarianism. The decision of the CJEU rests upon the principle as enunciated in Article 14 of the ECHR, and along with the issue involved in the respective cases the court also recognized the minority and cultural rights concerning the language.

THE EAST PAKISTAN CASE

Thousands of people in India and Pakistan lost their lives during the phase of Partition. This led to inquiry on why the Partition took place in the first place, and on what ground the partition took place. This is not the core question of discussion of this paper. However, an aspect which

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[42] Case C-379/87, Groener v. Minister for Education and the City of Dublin Vocational Education Committee, Judgment on 28 November 1989. In this case, the court upheld the passing of the Irish language test in order to get permanent status as a lecturer.
[43] *Id.* at ¶ 11.
[44] Case C-281/98, Roman Angonese v Cassa di Risparmio di Bolzano SpA, Judgment on 6 June 2000.
[45] *Id.*
[46] Case C-202/11 Anton Las v PSA Antwerp NV, Judgment on 16 April 2013.

is related to the partition is of great relevance and that's why a brief knock at this is required.

The main reason for the partition was religion. India emerged a Hindu-majoritarian state, whereas Pakistan, including West and East Pakistan, was established a Muslim Majority state. This is the view broached by those who favour the two-nation theory.[47] Upon Pakistan's creation, its government declared the nation to be an Islamic state rather than a secular state like India.[48] With time, the government started declaring all the symbols of Islam as a State symbol. It is in furtherance of this that the Government mandated the exclusive use of 'Urdu' for media and educational institutes.[49] This imposition was excessive for East Pakistan, as the culturally homogenous population of East Bengal identified themselves as 'Bengali' because of the region they lived in and the language they spoke.[50] Thus, the imposition of Urdu over East Pakistan was seen as an act of the imposition of the culture of West Pakistan over East Pakistan. This policy led to the outbreak of 'Bhasha Andolan' in East Pakistan and the first major resistance against the government which was dominated mostly by elites of West Pakistan.[51]

The identity of East Pakistan as 'Bengali', centred around its language and can further be understood through the historical stance of its people when Bengal was divided by Lord Curzon in 1906, for the purpose of better administration.[52] While '*better administration*' was the reason given by the Britishers, yet a letter written by AHL Fraser (the then Lieutenant-Governor of Bengal) to Lord Curzon hints at something else. He pointed out in this letter the reason to bifurcate the two regions by stating "*the hotbed of the purely Bengali movement, unfriendly if not seditious in character, and*

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47 C. Bennett, (2018) *Two-Nation Theory,* in Z.R. KASSAM, Y.K. GREENBERG, ET. AL., ISLAM, JUDAISM, AND ZOROASTRIANISM (ENCYCLOPEDIA OF INDIAN RELIGIONS), 695-699 (Springer, 1st ed., 2018).

48 PAKISTAN CONST., 1973.

49 Bashir Al Helal, *Language Movement*, in SIRAJUL ISLAM AND AHMED A. JAMAL EDS., BANGLAPEDIA: NATIONAL ENCYCLOPEDIA OF BANGLADESH, 200-215, (Asiatic Society of Bangladesh, 1st ed., 2012).

50 Ramkrishna Mukherjee, *Social Background of Bangla Desh*, 7 E.P.W. 265, 265 (1972).

51 *Id.*

52 G Johnson, *Partition, Agitation and Congress: Bengal 1904 to 1908*, 7 MODERN ASIAN STUD. 533, 540 – 545 (1973).

dominating the whole tone of Bengali administration".[53] The 'Bengali movement' is the movement where the people of the same culture speaking the same language are united against the alien. The effect of this unification can be seen in the protest against the partition of Bengal.[54] The tone of protest can very well be understood in the order passed by Indian Association, wherein they declared the partition as "*a partition against the Bengali-speaking race*"[55] addressing the protest, in the end, the order of Partition was taken back in 1911.

Post-independence, the common brotherhood came out as 'Bhasha-Andolan' (language-protest) when the Government mandated the exclusive use of 'Urdu' for media and educational institutes. This mandatory use of 'Urdu' had given birth to a counter Bengali Movement. It became a readily embraced concept and a powerful tool for mobilization. During the persistent Bhasha-Andolan, a member of the Constituent Assembly of Pakistan in 1948, introduced the motion to include Bangla as a national language. However, the same was opposed by Liaquat Ali Khan and the motion was dismissed.[56] Similar incidents led to the formation of Awami League in 1949, which was seen as an emancipator of Bengali population. Seeing growing hatred toward the government in West Pakistan by East Pakistan, the constituent assembly in 1954 recognized Bangla as a national language alongside Urdu.[57]

As noted by Sujit Choudhry, unlike Indian linguistic federalism, the then Pakistan constituent assembly was not inclined to delve power to Bengali-speaking East Pakistan as they considered it to be a stepping stone to secessionist tendency.[58] He further continued that the push for

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[53] John R McLane, *The Decision to Partition Bengal*, 2 INDIAN ECON. & SOCIAL HIST. REV., 221, 225 (1965).
[54] *Id.*
[55] S. N. BANERJEA, A NATION IN MAKING, 174-175 (Rupa Publications, 1925); *See generally*, JM Broomfield, *The Partition of Bengal: A Problem in British Administration*, 1839-1912, 23(2) THE PROCEEDINGS OF THE INDIAN HISTORY CONGRESS 13 (1960).
[56] Case C-379/87, Groener v. Minister for Education and the City of Dublin Vocational Education Committee, Judgment on 28 November 1989.
[57] BASHIR AL HELAL, BHASHA ANDOLONER ITIHAS, 80-85 (Bangla Academy, 1st ed., 1985).
[58] Sujit Choudhry, *Managing Linguistic Nationalism Through Constitutional Design: Lessons from South Asia,* 7 INT. J. CONST. L. 577, 584 (2009).

Pakistan stemmed from Urdu-speaking elites' failure to maintain Urdu's dominance, leading them to advocate for a separate state where Urdu would be official. Muslim clerics opposed this movement, seeking to preserve religious personal law.[59] The eventual secession of East Pakistan (Bangladesh) highlights the centrality of Urdu and the lesser role of shared religious identity in the Pakistan movement.[60]

The ill-treatment of Bangla by West Pakistan combined with non-representation of Bengali in the administration of a nation, where the Bengali population is in majority, led to the start of the Liberation war in 1970.[61] There were various reasons along with linguistic discrimination which led to resentment against the West Pakistan dominated governance.[62] This resentment came in the form of the liberation war, which was also supported by people and the government across the border.[63]

INDIA'S TRYST WITH LANGUAGE LINES

India got its independence in 1947 and enacted its Constitution in 1950. The Constitution is a transformative document which lays down a protective framework governing various facets of the lives of its citizens.[64]

Language is a facet of life that affects several other dimensions of it. The crucial role language plays in our daily lives is easily perceptible. Language has power beyond any cultural instrument. It is not only a way of communicating but also a formidable weapon that has shifted, and continues to shift the structural paradigm of the world as we see it. As elaborated above, Bangladesh is one such example that broke the shackles of linguistic imposition by an oppressive regime in 1971. They

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[59] *Id.* at 602.

[60] *Id.*

[61] *Id.* at 613.

[62] Sarmila Bose, *Anatomy of Violence: Analysis of Civil War in East Pakistan in 1971*, 40 E.P.W. 4463, (2005); *See* also, Yasmin Saikia, *Beyond the Archive of Silence: Narratives of Violence of the 1971 Liberation War of Bangladesh*, 58 HIST. WORKSHOP J. 275, (2004).

[63] S RAGHAVAN, 1971: A GLOBAL HISTORY OF THE CREATION OF BANGLADESH, at 15 – 18 (Harvard University Press, 1st ed., 2016).

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

stood their ground and successfully earned a partition, granting them the chance to freely practice the use of the language that was deeply connected with their identities.[65]

Part XVII of the Constitution deals with language. It concerns the language to be used by the Central or State Government for its official purposes.[66] During the making of the Constitution, Sujit Choudhry, propounds various alternatives to mold the Constitution as per either an ethnic or civic conception.[67] The ethnic conception of nationalism views nations as groups with pre-political bonds like language, history, or descent. It values political communities as a means for a nation's survival, allowing or precluding membership based on these shared characteristics.[68] On the other hand, the civic conception of a political community emphasizes shared principles of political justice and common political institutions. It views citizenship as voluntary and based on a collective commitment to political ends, with the nation's existence relying on the daily consent of its members.[69] However, the final provision that was adopted and enacted by the constitution is the compromise of both of these conceptions and a blend of historical and modern thought.[70]

The approach of the Congress before the independence of India was slightly tilted towards the ethnic conception where the party is divided horizontally on the lines of language and culture.[71] Gandhi was considered to be a believer of this notion, as it was because of such division that the Congress party worker at grassroots level could work for their people who speak the same language and share the same identity.[72]

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65 G. W. Choudhry, *Bangladesh: Why it happened,* 48 INTERNATIONAL AFFAIRS 242, (1972).
66 INDIA CONST. art. 343-348.
67 Mukherjee, *supra note* 50.
68 JURGEN HABERMAS, *Citizenship and National Identity*, in BETWEEN FACTS AND NORMS 491-500 (MIT Press, 2nd ed., 1996).
69 *Id.*
70 GRANVILE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (Oxford University Press, 2d ed., 1966).
71 Mukherjee, *supra* note 50.
72 *Id.*

However, things started changing with the partition of India based on religious lines. Bifurcation of the Bihar province to create a new province of Odisha on the basis of language and culture was indicative of the Congress's belief.[73] Pursuant to the horrors of the partition, the belief of the Congress also changed and the idea that states should be made on the basis of language started shifting.[74] This shift can be termed as shifting from ethnic conception to civic conception.

To deal with the question of organization of states on the basis of language, in 1948 President Rajendra Prasad established a commission under the chairmanship of SK Dhar, also known as the Dhar Commission. The Commission mainly dealt with two questions. First, what the official language of the union should be and second, how the states must be organised on the lines of language. It was propounded that the Union should adopt an official language for all its purposes and that the states shall not be divided on the basis of language.[75] The Commission believed that if states were to be divided based on language then it might lead to a dampening of the feeling of sub-nation among the states.[76] It noted "*language in this country stood for and represented the culture, tradition, race, history, individuality and, finally, a sub-nation.*"[77] This will finally lead to the feeling of succession from the union.[78] The reason for the adoption of language for the union is to bind a union to a common link, [79] the rationale adopted by the Commission inclined towards the civic conception of nationalism.

These findings of the Commission were not accepted by the government. However, extensive debates took place in the Constituent Assembly on those findings. The argument of linguistic homogenization was also put

[73] Dasarathi Bhuiyan, *Political Culture, Socialization and Modernization of Odisha*, 15 SOUTH ASIAN J. SOCIO-POLITICAL STUD. 1, 10—12 (2014).
[74] Mukherjee, *supra* note 50.
[75] S.K. Dhar, REPORT OF THE LINGUISTIC PROVINCES COMMISSION, GOVT. OF INDIA PRESS (Feb. 1948).
[76] *Id.* at 27.
[77] *Id.* at 28.
[78] *Id.* at 30.
[79] *Id.* at 30 & 38.

forward by Kher Commission (1955),[80] who was also tasked with submitting its report on the adoption and usage of Hindi as an official language of the union. The argument forwarded by the commissions can be traced to the civic conception. However, differing from both of these arguments, the Indian Constitution provides a middle path which takes into consideration both Ethnic and Civic conceptions.[81] Such a middle path is adopted due to the various movements for disintegration and restructuring of a state on the basis of language witnessed in India.[82] For instance, In 1936, Odisha's separation from the Bihar Province marked the beginning of State formation traced on a linguistic basis.[83] Though with independence, these movements turned violent in order for their demands to be fulfilled. [84]

After independence, in 1953, Andhra Pradesh became the first state to disintegrate on the basis of language (i.e., a Telugu-speaking state). Following citizen demonstrations and Potti Sriramulu's death after a 56-day hunger strike, authorities had to separate certain Telugu-speaking territories from Madras. Thus, on August 10, 1953, in the House of People, a bill to "provide for the formation of the Andhra State" was introduced.[85] This opened floodgates for similar demands by different states across the nation.

Looking into the complexity of the matter, the then government, on December 22, 1953, ordered the establishment of another commission consisting of three members, including former Justice Fazal Ali, KM

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[80] B.G. Kher, REPORT OF THE OFFICIAL LANGUAGE COMMISSION, GOVT. OF INDIA PRESS 251 (Jul. 31, 1956).

[81] The idea of 'Civic Conception' represents an approach of the Central Government to integrate the conception of citizenship under one language, whereas, an 'Ethnic Conception' is based on multiple-language identity of the State on a sub-state level. *See also* Sujit Choudhry, *Managing Linguistic Nationalism Through Constitutional Design: Lessons from South Asia,* 7 INT. J. CONST. L. 577, 582 (2009).

[82] S.C. Dash, *Government and politics in Orissa*, 26 IND. J. POL. SCI., 83, 85 (1965).

[83] S. Barman, *The Judiciary in Orissa: Evolution of the High Court at Cuttack*, 15 J. IND. L. INST. 74, 86 (1973).

[84] K. Seshadri, *The Telangana Agitation and the Politics of Andhra Pradesh*, 31 IND. J. POL. SCI. 60, 60 (1970).

[85] Y. Mallikarjun, *First linguistic State gets split*, THE HINDU, (Nov. 17, 2021) https://www.thehindu.com/news/national/andhra-pradesh/first-linguistic-state-gets-split/article6072332.ece.

Panikkar, and HN Kunzru.[86] Broadly speaking, the committee decided on two principles for separation of states: first, linguistic as well as cultural homogeneity is one of the most influential factors in determining the separation of states; and second, administration, finance, and geography for the purpose of reorganization.[87]

On these lines, the commission recommended reorganizing fourteen states.[88] The government, while accepting some of these recommendations, enacted an act known as the States Reorganization Act of 1956.[89] This legislation brought major changes to the boundaries of various states, primarily dividing them on a linguistic basis, thereby dividing the whole nation into a total of 14 states and six union territories.[90] The recommendation can be said to reflect a liberal construction, considering both the conception and the prevailing circumstances. It also takes into consideration the impact of the commission's findings on the future demands of separate states. The commission's findings provide for a middle path by considering the preservation of the culture and language of the particular region, as well as the unity and stability of the Union. Simultaneously, it aims to keep feelings of secession or animosity against the union in abeyance.

The Samyukta Maharashtra Movement led the charge for a separate Marathi-speaking state with Bombay, and simultaneously, the Mahagujarat Movement pushed for a Gujarat state in the Bombay State for Gujarati-speaking people.[91] The government accepted the demand for two separate states at that time, and thus the Bombay Reorganisation Act, 1960[92] was passed. Later, on September 18, 1966, a new state called

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86 REPORT OF THE STATES ORGANIZATION COMMISSION, 237 (1955), https://www.mha.gov.in/sites/default/files/State%20Reorganisation%20Commisison%20Report%20of%201955_270614.pdf

87 *Id.*

88 *Supra* note 75.

89 The State Reorganisation Act, 1956, No. 37, Acts of Parliament, 1956.

90 Mridula Chari, *How the map of India was redrawn on the lines of language*, SCROLL.IN, http://scroll.in/article/820359/how-the-map-india-was-redrawn-on-the-lines-of-language.

91 Farhana Ibrahim, *The Region and Its Margins: Re-Appropriations of the Border from "Mahagujarat" to "Swarnim Gujarat,"* 47 E.P.W 66, 69 (2012).

92 The Bombay Reorganisation Act, 1960, No.11, Acts of Parliament, 1960.

Punjab was formed after going through a turbulent phase of the Punjabi Suba Movement, which demanded a separate Punjabi-speaking state, denoting a shift from a bilingual state, home to both Hindi and Punjabi.[93] Thus, with the passage of the Punjab Reorganisation Act in 1966, Punjab became independent of Haryana and Himachal Pradesh. Recently, Telangana became the 29th state of India on June 2, 2014. Language, whether directly or indirectly, played an important role in their origination in this case as well.[94]

Language influences the perception and sense of unity of individuals and communities. It can therefore be seen as a crucial determinant for the political disintegration of states. If language can play such a pivotal role in nation-building, shouldn't it be our duty to mind it, respect it, and ensure that language doesn't become a barrier to an individual's rights as well as their cultural integrity? Recognizing its significance, the Indian Constitution, through Articles 29 and 30, emphasizes on the protection and promotion of linguistic and cultural rights, particularly for minorities. Article 29 affirms the importance of safeguarding linguistic diversity and preserving cultural heritage, preventing the marginalization of minority groups. Article 30 extends this protection by granting religious and linguistic minorities the right to establish and administer educational institutions of their choice. By doing so, it empowers these communities to impart education in their language, nurturing cultural and linguistic integrity for future generations.

These articles collectively reinforce the principle that language is not just a means of communication but a pillar of identity and dignity. They ensure that linguistic differences do not become barriers to individual rights or social cohesion, fostering a pluralistic society where diversity is celebrated and protected.

CONCLUSION

[93] S. S. Bal, *Punjab After Independence (1947-1956)*, 46 PROCEEDINGS OF THE INDIAN HISTORY CONGRESS 416, 429 (1985).
[94] Duncan B. Forrester, *Subregionalism in India: The Case of Telangana*, 43 PACIFIC AFFAIRS 5, 8 (1970).

This paper attempts to generate discourse and highlight a fundamental sociological phenomenon that has gone unnoticed from a large academic discourse. Gradually, constitutions across the world are seeing a growing trend of cultural assertion, under which, one or another form of cultural identities are given preference over other identities. Throughout the paper, the authors have highlighted how this preferential treatment of one language over the other had similar undertones of that of a theocratic state. It is safe to say that such policies are a reflection of a cultural assertion, no doubt, India also has such a provision under Article 351,[95] which talks about the duty of the Union Government to promote the spread of the Hindi Language, but it works at institutional level, not at private level and is primarily counterbalanced by the rights for Linguistic Minorities under Article 29 & 30.

However, the examples that the authors have highlighted in the earlier portions of the article are of those states that have purposefully infiltrated the public and private discourse with preference to certain language. The authors staunchly support the possibility that this preferential treatment for a language might gain such traction that it might impact the reasonable space for language of the minorities. This phenomenon will have the same, if not more, gravity as that of a theocratic state. A suitable example would be of *Franciso Franco* regime in Spain, wherein use of languages other than *Spanish* was banned for close to forty years[96] in between 1939-75. There was a special prohibition on the usage of the language *Catalan,* a language commonly spoken by the residents of

[95] It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages.

[96] Albert Gea, '*The rebirth of Catalan: how a once-banned language is thriving*,' THE CONVERSATION, (Sept. 24, 2015), https://theconversation.com/the-rebirth-of-catalan-how-a-once-banned-language-is-thriving-47587.

Catalonia.[97] The underlying object was to showcase Spain as a culturally and ethnically homogenous crowd.[98]

State-maneuvered idea of identity, in this sense, is problematic, wherein criminalization of identity closely tied with a linguistic identity[99]seems to be the end goal of the State. A good example on this line is Turkey, an ethnically diverse country that has always attempted to portray itself as a homogenous secular nation. In early phases pre-1980's, Turkey had ensured that *Turkish* is the official language, and is predominately used in the government offices, schools, public and private spaces. Though Turkey restricts the use of other languages, yet, there is a specific target against the *Kurdish* Language.[100] Interestingly, Kurds are the second largest ethnic identity in the State, and Kurdish is the second largest spoken language, yet, Turkey has ensured that *Kurdish* remains prohibited.[101] In between 1920-70s, the State had not allowed any research related to Kurdish studies and their origin, the idea was to assimilate the Kurdish identity within the Turkish identity, by tracing the roots of Kurdish identity from the Turkish origin.[102] However, times have changed, post-2003 there was some democratization of the language policy by the State, yet the acceptance of the Kurdish language at the private and public space is still not a comfortable notion.[103] In short, this criminalization of an identity through the means of language summarizes the theme of the paper to great extent.

This idea of linguistic preference backed with identity politics can have severe repercussions on the ethnic identities that do not favor the same set of values. Instead, it can become a means of repression and invisibility of linguistic plurality from the landscape of a nation. The authors categorically support rights for linguistic minorities. Repression of

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97 *Id.*

98 *Id.*

99 Human Rights Watch, *Report on Violations of Free Expression in Turkey,* 9 RESTRICTIONS ON THE USAGE OF KURDISH LANGUAGE, (Feb. 1999), https://www.hrw.org/reports/1999/turkey/turkey993-08.htm.

100 *Id.*

101 *Id.*

102 AMIR HASSANPOUR, NATIONALISM AND LANGUAGE IN KURDISTAN 1918-1985, 132-136 (Edwin Mellen Press, 1st ed., 1992).

103 *Id.* at 150-152.

cultural identity through the means of the language can have dire consequences on the stability of a nation, on these lines the authors suggest to include linguistic minority rights in lines to that of the Indian Constitution. Article 29 (1) & 30 (1) are a great harbinger to showcase how even language-identity can be a fundamental right. Under Article 29 (1), *any section of the Indian Citizen living in the territory of India having a distinct language, script or culture shall have a right to conserve the same* read with Article 30 (1): *All Minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.* The Indian judicial interpretation has given a definition to '*distinct*' and '*minority*' for Article 29 & 30 respectively,[104] whenever the population of a community is less than 50% of the total population of a State. In which case, that linguistic community has the right to conserve or set up an educational institution to safeguard their distinct language. This the author suggests will ensure that the minority linguistic rights will survive, even in presence of a majoritarian linguistic culture, provided the State maintains a constitutional commitment to these provisions as well.

[104] *In Re* the Kerala Education Bill*, 1957,* 1958 INSC 64; DAV College v. State of Punjab 1971 AIR 1737; TMA Pai Foundation v. State of Karnataka AIR 2003 SC 355.

SECURITIZATION, BELONGING AND CITIZENSHIP REVOCATION IN INDIA

ATREYO BANERJEE[1]

This paper investigates the securitisation of citizenship policies in India, focusing on the provisions for termination and deprivation of citizenship under Sections 9 and 10 of the Citizenship Act, 1955. It argues that these provisions, operating within an exceptional framework, have been historically justified through narratives of national security, deeply rooted in the partition of India and its enduring "migration crisis." By examining debates from the Constituent Assembly and the Lok Sabha, alongside legislative intent and judicial decisions, the paper illustrates how the securitisation of citizenship has entrenched executive supremacy while leaving minimal room for judicial oversight or procedural safeguards. The overlapping application of the Citizenship Act and the Foreigner's Act further exacerbates vulnerabilities, creating a labyrinthine legal regime where individuals are subject to arbitrary state action. The paper critiques the inherent ambiguities in determining the "voluntary" acquisition of foreign citizenship, the reversal of the burden of proof under the Foreigner's Act, and the reliance on executive-controlled bodies to adjudicate citizenship claims. Drawing on a range of cases from the early years of independence to contemporary times, it highlights the systemic exclusion of vulnerable groups, particularly those affected by partition and forced migration, and how these policies disproportionately target minorities and marginalised communities.

* Cite it as: Banerjee, *Securitization, Belonging and Citizenship Revocation in India*, 9(1) COMP. CONST. L. & ADMIN. L. J. 92 (2025).

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** The author thanks Dr. Shrimoyee Ghosh, Professor at Azim Premji University. Her many inputs were very valuable in shaping the paper. He also thanks Dr. Mohsin Alam Bhat, Assistant Professor at Queen Mary University of London. Many conversations with him around critical citizenship issues in India and the world shaped the core thesis of the paper.

SECURITIZATION, BELONGING AND CITIZENSHIP REVOCATION IN INDIA

TABLE OF CONTENTS

INTRODUCTION

Citizenship policies across the world are irregularising, unmaking and stripping off citizenship.[2] This is being done by using the language of law to clothe unfair, labyrinthine, and bureaucratic processes within which the threat of statelessness is large and citizenship status is debilitated. Despite growing criticism from international law scholars and organisations regarding the deprivation of citizenship, particularly in counter-terrorism contexts such as the Shamima Begum case, international law remains reluctant to robustly challenge the sovereign right of states to revoke citizenship, even when such processes remain exclusionary and violent[3]. The Indian State – keeping up with international trends – has taken it upon itself to conduct the 'biggest exercise in statelessness'[4] since the Second World War. While much of this has been restricted to the state of Assam, there exists enormous state will to replicate the horrors of the Assamese National Register of Citizens ("**NRC**") determination process across India. While this is egregious, the fact that citizenship revocation comprises discursive processes within which citizenship is adjudicated is not confined to Assam alone. Equally important is the regime of termination and deprivation of citizenship within the Citizenship Act, 1955 ("**Act**"). In contrast, the blatantly partisan and possibly unconstitutional nature of the

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[2] N. Jain, *Manufacturing Statelessness,* 116(2) AMERICAN JOUR. INTL. L., 237, 237-288 (2022).

[3] B. MANBY, CITIZENSHIP IN AFRICA: THE LAW OF BELONGING (Bloomsbury Publishing, 1st ed., 2021).

[4] Hannah Gordon & Elif Sekercioglu, *Citizenship Denied: Two Million in India Face an Uncertain Future*, RIGHT NOW, (Jun. 13, 2020) https://rightnow.org.au/analysis/citizenship-denied.

CAA[5] made it easier to generate discourse around its potential unconstitutionality.

On the other hand, the procedural regime of citizenship revocation comprising of termination and deprivation – rooted in Sections 9 and 10 of the Act – has either been lightly brushed by existing scholarship or not engaged with at all. While the Act is the umbrella legislation under which other acts and rules including the Foreigner's Act, 1946 ("**FA 1946**") must adhere, the Act also provides for citizenship revocation – distinct from other forms of revocation such as administrative actions or quasi-judicial declarations under the FA 1946. This regime's revocation of citizenship as it is rooted under the Act, has escaped scrutiny within critical citizenship studies. Sections 9 and 10 of the Citizenship Act, 1955, which govern the termination and deprivation of citizenship, are deeply problematic due to their exclusionary and often violent implications. Section 9 allows for the automatic termination of citizenship in cases of acquiring foreign citizenship, even unintentionally, without adequate procedural safeguards. Section 10 enables the deprivation of citizenship on grounds such as disloyalty to the Constitution or fraud, often relying on vague criteria that disproportionately target vulnerable communities. These provisions operate with minimal judicial scrutiny, leaving significant room for arbitrary state action.

Therefore, in this paper, I investigate the regime of citizenship revocation by asking the question of how the State justifies exclusionary and often violent citizenship policies – with negligible judicial oversight – to operate in a democracy? For this enquiry, in Part I, I argue that the state relies on a frame of securitization to use an 'existential' crisis to justify exceptional regimes of citizenship revocation. In Part II, I trace the narratives and tropes of security both historically and in contemporary times which have facilitated and allowed an exceptional regime to fester. In Part III, I look at how citizenship revocation takes place under the Act and identify sites of extreme confusion and a potent lack of clarity which

[5] M. Mohsin Alam Bhat & Aashish Yadav, *The NRC in Assam doesn't just violate human rights of millions–it also breaks international law,* THE SCROLL (Jan 7, 2021), https://scroll.in/article/983130/the-nrc-in-assam-doesnt-just-violate-human-rights-it-also-breaks-international-law.

contributes to a regime which is designed to exclude and operates with little judicial oversight.

SECURITY, BELONGING AND CITIZENSHIP

A. BELONGING IN EXCEPTIONAL REGIMES:

Popular justifications legitimizing the idea of nations rest on the role of a nation in providing security for its citizens.[6] Holding a firm monopoly on legitimate violence,[7] the nation-state formulates policies of citizenship[8] which allow persons to belong as full members of that community. However, as Arendt[9] and Agamben[10] argue, these policies are not neutral; they are exclusionary mechanisms that determine access to rights and protections, often leaving stateless persons and marginalized communities outside the bounds of security and belonging. In recent times, India's citizenship policies have been vigorously critiqued across the international community and in India alike.[11] International bodies such as Amnesty International have comprehensively documented the role of the Indian State in Assam in rendering people stateless.[12]

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[6] Lucia Zedner, *Citizenship deprivation, Security and Human Rights,* 18(2) EURO. J. MIGRATION & L., 222-242 (2016).

[7] Max Weber, *Politics as a Vocation, in* H.H. Gerth, C. Wright Mills ed., FROM MAX WEBER: ESSAYS IN SOCIOLOGY, 77-128 (Oxford University Press, 1946).

[8] XAVIER GUILLAUME, JEF HUYSMANS, CITIZENSHIP AND SECURITY: THE CONSTITUTION OF POLITICAL BEING (Routledge, 1st ed., 2013).

[9] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM, at 267 (Penguin UK, 1st ed., 1951).

[10] GIORGIO AGAMBEN, HOMO SACER SOVEREIGN POWER AND BARE LIFE (Stanford University Press, 1st ed., 1998).

[11] Abhinav Chandrachud, *Secularism and the Citizenship Amendment Act* 4(2) IND. L. REV, 138-162 (2020); *see also,* Jaideep S. Laalli, *Communalisation of Citizenship Law: Viewing the Citizenship (Amendment) Act 2019 through the prism of the Indian Constitution* 4 OXFORD HUMAN RIGHTS HUB, 41-58 (2021).

[12] Amnesty International. *Designed to Exclude: How India's Courts are allowing foreigners tribunals to render people stateless in Assam,* AMNESTY INTERNATIONAL (Nov. 20, 2019) https://www.amnesty.be/IMG/pdf/rapport_inde.pdf; Amnesty International. Designed to Exclude: How India's Courts are allowing foreigners tribunals to render people stateless in Assam, Amnesty International (Nov. 20, 2019) https://www.amnesty.be/IMG/pdf/rapport_inde.pdf.

Within India, scholars, and activists such as Mohsin A. Bhat argue[13] that India's citizenship policies irregularise the citizenship status of Indian Muslims. On similar terms, Anupama Roy[14] argues that since independence India's citizenship policies condemn certain religious and gender groups to the liminal space between being a citizen and being stateless. Other scholars[15] have thoroughly brought out the embedded administrative violence in citizenship policies in the state of Assam. Here citizenship is adjudicated through the foreigner tribunals[16] – Kafkaesque in its operation – unleashing a brutal precarity against the persons before the tribunals.

Taken as a whole, the multiple critiques converge on a single point which is the common theme of discrimination against the "other".[17] The "other" is usually the Muslim person in religiously mediated citizenship policies[18], the woman in a gendered reading of the policies[19] or the Bengali-speaking Muslim *Miya*[20] in the case of Assam, in reading the policies through an ethno-national linguistic critique. While this

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13 Mohsin Bhat, *"The Irregular' and the Unmaking of Minority Citizenship: The Rules of Law in Majoritarian India* 33(5) Queen Mary L. J. 395 (2022).

14 Anupama Roy Pal, *Liminal and Legible: Gendered Citizenship and State Formative Practices in the 1950s in* ANNE R. EPSTEIN, RACHEL G. FUCHS EDS., GENDER AND CITIZENSHIP IN HISTORICAL AND TRANSNATIONAL PERSPECTIVE: AGENCY, SPACE, BORDERS, 120 (Palgrave Macmillain, 1st ed., 2016).

15 Anupama Roy, *Ambivalence of Citizenship in Assam* E.P.W. 45 (2016); Sanjib Baruah, *The Partition's long shadow: the ambiguities of citizenship in Assam, India,* 13(6) CITIZENSHIP STUD., 593 (2009); Anupama Roy, Ujjwal Kumar Singh, *The ambivalence of citizenship: The IMDT Act (1983) and the politics of forclusion in Assam* 41(1) CRIT. ASIAN STUD., 37 (2009).

16 Talha Abdul Rahman *Identifying the 'outsider': An assessment of foreigner tribunals in the Indian state of Assam*, 2(1) STATELESSNESS & CITIZENSHIP REV., 112 (2020).

17 ARJUN APPADURA., FEAR OF SMALL NUMBERS: AN ESSAY ON THE GEOGRAPHY OF ANGER (Duke University Press, 1st ed., 2006).

18 Gyanendra Pandey. *Can a Muslim be an Indian?* 41(4) COMP. STUD. SOC. & HIST. 608 (1999).

19 M. Bhat & Ashish Yadav, *On the Verge: Revocation and Denial of Citizenship in India, in* ELM Fargues, REVOCATION OF CITIZENSHIP: THE NEW POLICIES OF CONDITIONAL MEMBERSHIP (European University Institute, 2021).

20 Tiasha Banerjee, *The Persecution of 'Miya' Muslims in Assam: A struggle for Identity and Justice,* BOROK TIMES (Sept. 6, 2024), https://boroktimes.com/the-persecution-of-miya-muslims-in-assam-a-struggle-for-identity-and-justice/.

scholarship brings out the brazen discrimination in citizenship policies,[21] it does not fully explain how elite political actors such as government officials, ruling party leaders, and policymakers justify exceptional policies threatening citizenship status while legitimizing the underlying violence that these policies unleash. Moreover, the citizenship regime in India is discursively emergent. There is no single window clearance to determine the citizenship status of a person. Instead, the regime determining citizenship is akin to a "snakes and ladders"[22] approach where citizenship is adjudicated within an expansive regime comprising of courts, tribunals, executive bodies such as the Ministry of Home Affairs ("**MHA**"),[23] the Election Commission[24] ("**EC**"), police authorities[25] and so on. There are disparate organs of the state and have their own rules, procedures, and ways of functioning. Hypothetically, a person's citizenship may be sought to be revoked through either of these organs or using the organs in different permutations and combinations. However, the common strand

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21 Bhat & Yadav, *supra* note 19; Salah Punathil, *Precarious Citizenship: Detection, Detention and 'Deportability' in India* 26 CITIZENSH. STUD., 55; Human Rights Watch, *Shoot the Traitors: Discrimination Against Muslims Under India's New Citizenship Policy* HUMAN RIGHTS WATCH (Apr. 10, 2020), https://www.hrw.org/report/2020/04/10/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy; Monika Verma, *Citizenship (Amendment) Act, 2019: The pernicious Outcomes of the Altering Equation of Citizenship in India,* 8(1) CONFLICT, JUSTICE, DECOLONIZATON: CRITICAL STUDIES OF INTER-ASIAN SOCIETIES (2021).

22 The analogy of 'snakes and ladders' reflects the unpredictable and convoluted nature of the citizenship adjudication process in India. Much like the game, where progress can suddenly be reversed by landing on a snake, individuals seeking to confirm or retain their citizenship can face abrupt setbacks due to overlapping jurisdictions, bureaucratic inefficiencies, or adverse decisions from any of the multiple authorities involved. For example, an individual declared a citizen by a tribunal may later face challenges from executive bodies like the Ministry of Home Affairs or police authorities, effectively nullifying earlier decisions. This fragmented system creates significant uncertainty and hardship, particularly for vulnerable groups; Kieran Lobo et.al., *NRC, Assam and What makes a Citizen: Navigate our Snakes and Ladders Citizenship Guide*, E.P.W., https://www.epw.in/engage/article/nrc-assam-citizenship-snakes-and-ladders-guide.

23 Roshni Shanker & Hamsa Vijayaraghavan, *Refugee recognition challenges in India*, 65 FORCED MIGRATION REV., (2020).

24 Amiya Kumar Das, *Documenting the Body: Entitlements and Paper Citizenship, in* AMIYA KUMAR DAS, GRASSROOTS DEMOCRACY AND GOVERNANCE IN INDIA: UNDERSTANDING POWER, SOCIALITY AND TRUST 89-104 (Springer, 1st ed., 2023).

25 Pandey, *supra* note 18.

within this splintered framework is that the way citizenship is adjudicated to weed out the "other"[26] is exceptional. By exceptional, I imply that citizenship policies in India have often deferred to executive supremacy with little judicial oversight transgressing procedural safeguards. For example, citizenship revocation as it happens under the Act is wholly at the behest of the central government[27] with no requirement for an independent review or participation of agencies outside the direct control of the union executive. While Articles 10 and 11 of the Constitution, read with Entry 17 to List I of Schedule VII, empower Parliament to regulate citizenship, this centralization of authority necessitates proportional safeguards to prevent arbitrariness. The absence of mechanisms such as independent tribunals or oversight bodies to ensure fairness further exacerbates the risks of abuse. As a result, procedural safeguards, such as the right to legal representation, detailed reasoning for revocation decisions, or an automatic right of appeal, remain glaringly absent[28], leaving affected individuals vulnerable to executive overreach.

Similarly, the way foreign tribunals are staffed, the conditions of service and the case flow to the tribunals are all controlled in essential aspects by the government[29]. In the case of the MHA and the regulation of long-term visas in India, there is negligible clarity and predictability as to how these visas are issued.[30] Perhaps, the clinching factor of executive supremacy here is none of the orders and decisions of these organs are justiciable. There is no right of appeal or judicial review. The limited right in extremely limited situations is in a 'writ remedy' but this is not a matter of entitlement and is contingent on the caprices of judges and particular questions of fact. More often than not, organs of the state play judge, jury and executions in determining who is a legitimate citizen in India. What is unclear is the reason for this deference.

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[26] CHANTAL MOUFFE, THE DEMOCRATIC PARADOX (Verso Books, 1st ed., 2000).

[27] The Citizenship Act, 1955, § 9, No. 57, Acts of Parliament, 1955 (India); The Citizenship Act, 1955, § 10, No. 57, Acts of Parliament, 1955 (India).

[28] Bhat & Yadav, *supra* note 19.

[29] *Supra* note 9; *supra* note 11.

[30] MINISTRY OF HOME AFFAIRS, LONG TERM VISA (LTV) TO PAKISTAN, BANGLADESH AND AFGHANISTAN NATIONALS, 2018, https://www.mha.gov.in/PDF_Other/AnnexVI_01022018.pdf.

Aiming to shed light on this, I adopt the framework of "securitization"[31] to explain this executive supremacy which since independence has formulated discriminatory citizenship policies. While it is legitimate for a state to ensure security and regulate borders, the concern arises when these measures disproportionately target vulnerable communities, lack transparency, and are implemented without procedural safeguards. This creates a regime of exclusion rather than inclusion, undermining democratic values. This paper does not critique the need for border regulation but interrogates the methods and impacts of securitization, particularly its reliance on exceptional frameworks that marginalize the vulnerable. This paper focuses on securitization as it has been the primary driver of citizenship policies in India since Partition, influencing legal frameworks and their application. While other factors like economic considerations and demographic shifts are important, they are often subsumed within the broader narrative of security. Securitization, as developed in critical security studies[32], refers to the process by which issues are framed as existential threats requiring urgent and extraordinary measures, thereby justifying a shift from the normal to the exceptional. This analytical framework allows us to examine how citizenship policies are moved into the realm of exceptionality,[33] where procedural safeguards and democratic norms are bypassed under the guise of addressing security concerns As an analytical framework securitization facilitates the examination of a shift away from the normal to the exceptional.[34] Given that citizenship policies routinely operate in the realm of exceptional, it is of considerable importance to question this operation and the justification which allows it. As fields of study – critical citizenship studies and security studies have not intersected meaningfully.[35] The intersection, if any, has been restricted to the role of the state in securing

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31 WILLIAM E. CONNOLLY, IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX (University of Minnesota Press, 1st ed., 1991).

32 Benjamin J. Muller, *(Dis)qualified Bodies: Securitisation, Citizenship and 'Identity Management'* 8(3) CITIZENSHIP STUD., 279 (2010).

33 Engin F. Isin, *The Neurotic Citizen,* 8 CITIZENSH. STUD., 217 (2004).

34 BARRY BUZAN ET AL., SECURITY: A NEW FRAMEWORK FOR ANALYSIS (Lynne Rienner Publishers, 1st ed., 1998).

35 *Supra* note 8; *see also* Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)* 75 UNIV. COLO. L., 59 (2004).

its legitimacy by securing the citizen. This limited intersection does not tell us how before securing the citizen, the conception of citizenship itself – deciding between legitimate and illegitimate citizens – is securitized. However, before investigating the intimacies between security concerns and citizenship policies, I lay out what the notion of securitization means, what are its core tenets and the nature of indigenous securitization vis-à-vis citizenship policies in India.

B. SECURITIZATION

Danger precedes the nation.[36] As a definitional category, the danger is malleable enough to incorporate myriad facts and situations – violent histories of nation-making, wars, terrorism, deadly viruses, and popular anxieties to name a few.[37] The very incommensurability of danger not only justifies the existence of bordered nations but also allows nations to shift legislative gear and place laws in the realm of the exceptional[38] to address an identifiable (or amorphous) danger. So why are citizenship policies relevant in the *raison d'etre* of the nation? One way to understand this is that citizens demand security and the nation provides security.[39] Hence, who becomes a legitimate citizen may be relevant to understand what needs to be secured. But, beyond the organizing dynamic of a nation, this does not explain the exceptionality in citizenship adjudication regimes. A better explanation might be to note that while nations are "internationally filing"[40] persons to different countries and slotting them according to their citizenship status, the idea of citizenship itself is securitised.

In the case of India, the very existence of imagined boundaries drawn as by-products of a colonial vestige – the country's borders – was the founding moment for the securitization of borders and migration across these borders. Here it is important to clarify – different countries may

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[36] *Supra* note 4.

[37] *Id.*

[38] Peter Nyers, *No one is illegal between city and nation,* 4(2) STUD. IN SOC. JUSTICE, 160 (2008).

[39] *Id.*

[40] ROGERS BRUBAKERS, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY (Harvard University Press, 1st ed., 2009).

choose a combination of factors through which one becomes a full citizen. This may include citizenship by investment,[41] theocratic citizenship,[42] bureaucratic citizenship[43] and so on. Each of these in its own way discriminates – rightly or wrongly, legally or illegally, arbitrarily or fairly – against persons who are or aim to be full citizens. Within this logic of discrimination, security is another metric which both discriminates against persons and also forms the logic which allows for discrimination. Seeing it as just another metric of discrimination is not by itself concerning. However, the difference when compared to other metrics is that securitization of citizenship policies grants a sovereign imprimatur to shift the *method* of making and executing those policies from the normal to the exceptional realm.[44] Usually, this takes a deeply anxious and existential form where the state believes that there is a threat – perceived or real – from an outsider. It is to suitably grapple with and nullify this threat that the nation adopts the logic of exceptional measures barring which the nation itself is under threat. In India, as will be explained later, this threat has often been the unmitigated and enormous influx of illegal migrants notwithstanding its veracity.[45]

For this paper, securitization indicates protecting the nation from external threats.[46] One may argue that a capacious definition of security ought to include social security, financial security and so on. While that is important, to understand the exceptional regimes of citizenship adjudication and its underlying logic we must locate the extent to which a secure state placates the anxieties and xenophobic fears its inhabitants have of outsiders. These anxieties and fears are necessary for

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41 Allison Christians, *Buying in: Residence and Citizenship by investment,* 62 Saint LOUIS UNIV. L. J., 51 (2007).

42 Rebeca Raijman, *Citizenship status, Ethno-National Origin and Entitlement to Rights: Majority attitudes towards minorities and immigrants in Israel,* 36(1) J. ETA MARITIME SCI., 87 (2010).

43 Kristin A. Collins, *Bureaucracy as the Border: Administrative Law and the Citizen Family,* 66 DUKE L. J., 1727 (2016).

44 Margaret R. Somers & Christopher NJ Roberts, *Towards a New Sociology of Rights: A Genealogy of "buried bodies" of Citizenship and Human Rights,* 4 ANN. REV. LAW SOC. SCI., 385-425 (2008).

45 M. Bhat, *The Constitutional case against the Citizenship Amendment Bill*, 54 E.P.W. (2019).

46 Thomas Diez & Vicki Squire, *Traditions of citizenship and the securitisation of migration in Germany and Britain,* 12(6) CITIZENSHIP STUD., 565 (2008).

understanding how certain issues – like the issue of citizenship here – become security concerns which allow the use of exceptional ways of governance.

Writing on the intersection of security and citizenship policies, Peter Nyers[47] states that citizenship policies are increasingly being undergirded by insecurities, anxieties, and fears. As a result, these policies are now concerned with weeding out the persons who have surreptitiously become citizens. The action then is not restricted only to the borders of a country which regulates the movement flow into the country, but is increasingly being played out inside countries such as India where policies[48] are disenfranchising millions of persons for being illegal immigrants. The enemy then, is not just outside the border but has managed to infiltrate and firmly establish itself within the interiorities of the nation. The resultant paranoia – threats of losing jobs, electoral manipulation, demographic changes, and cultural pollution – becomes a security concern requiring urgent state intervention. This framework of securitization then may be used by the state to adopt swift, efficient, and exceptional legal measures to exclude ineligible citizens, it can be used to label individuals and groups as "illegal immigrants" and justify such measures under the pretext of protecting national sovereignty.

In India, as we will see, the securitization logic underpins the Citizenship Act of 1955, particularly the sections dealing with the termination and deprivation of citizenship.[49] Constitutionally, Indian citizenship is secular[50] and accessible to its inhabitants, divorced from the lineaments of religion, caste, class, and gender. However, in practice, the logic of securitization restricts the capacious conception of Indian citizenship. This restriction – whether through the changes from *jus soli* to *jus*

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47 Peter Nyers, *The Accidental Citizen: Acts of Sovereignty and (Un)making Citizenship, in Securitizations of Citizenships*, in PETER NYERS, SECURITIZATIONS OF CITIZENSHIP (Routledge, 1st ed., 2009).

48 Joya Chatterji, *South Asian Histories of Citizenship, 1946-1970,* 55(4) HIST. J., 1049 (2012).

49 The Citizenship Act, 1955, §§ 9 & 10, No. 57, Acts of Parliament, 1955 (India).

50 ANUPAMA ROY, CITIZENSHIP REGIMES, LAW, AND BELONGING: THE CAA AND THE NRC (Oxford University Press, 1st ed., 2022); *See also* ROHIT DE, PEOPLE'S CONSTITUTION: THE EVERYDAY LIFE OF LAW IN THE INDIAN REPUBLIC (Princeton University Press, 1st ed., 2018).

sanguinis,[51] the gradual amendments to cement the figure of the migrant within citizenship policies, the impunity of state action in Assam in undertaking the "biggest act of statelessness",[52] or any other context within which citizenship has been unmade – is rooted in the deep need to secure the nation against external threats. To understand this perceived external threat, and the origins of the logic of securitization, the next section visits the founding moment of securitization in India.

C. FOUNDING MOMENT OF SECURITIZATION

The Partition of India and the resultant fratricidal civil strife, occurring alongside India's independence, ensured that securitization and citizenship became inextricably linked. Shruti Kapila's reconstruction of Partition as a civil war[53] offers a critical lens to understand this connection. She argues that the violence of Partition, fought between brothers and intimate cohabitants under British suzerainty, was not ancillary to independence but foundational in defining the political identity of '*we the people of India*.'[54] Partition violence played a dual role: first, it constituted sovereignty by using mass displacement and migration as mechanisms to delineate legible 'Indian' identities; and second, it juxtaposed this sovereignty against its *constitutive other* - the Muslim person.[55] The logic of Indian sovereignty, forged in this crucible of Partition violence, must perpetually reproduce its foundational partition logic to distinguish between the citizen and the *persona non grata.* Thus, citizenship policies, are not merely administrative or legal mechanisms; they are deeply rooted[56] in the securitization processes that emerged from

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51 NIRAJA GOPAL JAYAL, CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY (Harvard University Press, 1st ed., 2013).

52 Abdul Kalam Azad & M. Bhat, Harsh Mander, *Citizenship and the Mass Production of Statelessness in Assam*, AGE INDIAN EXCLUSION REPORT, (2020), https://tinyurl.com/4hzd9ufy.

53 SHRUTI KAPILA, VIOLENT FRATERNITY: INDIAN POLITICAL THOUGHT IN THE GLOBAL (Princeton University Press, 1st ed., 2021).

54 *Id.*

55 *Id.*

56 Human Rights Watch, *Shoot the Traitors: Discrimination Against Muslims Under India's New Citizenship Policy,* HUMAN RIGHTS WATCH (Apr. 10, 2020),

Partition, wherein the construction of the Indian citizen inherently involved the exclusion of the *other*.

In his work on the genealogy of civil wars, David Armitage[57] contends that civil wars are often described as outlier, and anomalous events and their repercussions ignored with time. But taking the examples of major civil wars such as the American Civil War he highlights the key role civil wars play in characterizing, building, and breaking political orders. In India, the Partition's shadow[58] continues to loom large in its citizenship policies. Once the *constitutive other*[59] has been defined and against whom the sovereign identity is constructed, the notion of securitization is used to maintain, support, and strengthen this division. For example, citizenship securitization in the Indian context, has a strong link to territorial security. The uncertainties of mass migration, together with the circumstances of independence and the transition to democracy, heightened anxieties about territorial integrity. Partition, migration, common-sense discourse — and its close association with issues of land loss, demographic imbalance, and fraudulent acquiring of Indian citizenship all influenced the direction of policies framed for the management of internal nation-space and protection from outsiders[60] in the context of citizenship securitization. Identity became fundamental to the securitization discourse[61], though it manifested differently across various different contexts. Concerns about '*legal as well as illegal immigration*,'[62] *'threats from the neighbouring countries*,' and *'Islamic terror globally*,' as defined in the national discourse, propelled policies framed in the language of '*national survival*'. As a result, the adjudicating claims based on them established the notion of national security, a complicated template that continues to define further identity, and communal politics, and steer

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https://www.hrw.org/report/2020/04/10/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy.

57 David Armitage, *Civil war and revolution,* 44(2) AGORA 18 (2009).

58 URVASHI BUTALIA, PARTITION: THE LONG SHADOW (Penguin UK, 1st ed., 2015).

59 *Supra* note 40.

60 Shekhar Bandopadhyay & Haiminti Roy, *Partitioned Lives: Migrants, Refugees, Citizens in India and Pakistan, 1947-1965,* 118 AM. HUMAN RTS., 1506, 1506-1507 (2013).

61 Peter Gatrell, *Citizenship Refugee: Forging the Indian Nation after Partition* 32 INT. J. REFUGEE L., 394, 394-396 (2020).

62 Binayak Dutta, *Partition's Long Shadow. Post-Partition Migration and the Citizenship Conundrum in Postcolonial Assam,* 4 J. MIGR. AFF., 20, (2021).

public policy. Citizenship policies had to be negotiated against the backdrop of a religiously motivated partition. While the concept of equal citizenship for all citizens remained important. A self-perpetuating logic that the demand for a Muslim homeland culminating in the creation of Pakistan implicitly means that Muslims would identify with Pakistan, while non – Muslims would automatically become part of India runs as a parallel process. This narrative was maintained by repeatedly stating that Muslim invaders[63] were to blame for civilizational decay and that centuries of rule had harmed Hindu pride, the final straw being partition.

Tracing and understanding the founding moment brings us to ask how the Indian state dealt with the aporia of citizenship. In this case, the aporia of citizenship is asking how the state ought to constitute a political community, and ensure its longevity amongst fraught and plural identities. What ought to be the rationale of law which informs citizenship policies which must continuously wrest against the threat of the other? To answer this, in the next part, I examine the interstitials between citizenship and security and describe the logic of securitization which is deeply enmeshed within citizenship policies in India.

NARRATIVIZING SECURITY

A. SETTING THE CONTEXT

In the previous chapter, I outlined the framework of securitization and the freedom it allows the state to situate citizenship policies in spaces of exception. In this chapter, I historicise the exceptional legislative framework of citizenship revocation which comprises termination and deprivation of citizenship under the Act. My aim is to argue that the narrative of security and the concomitant securitization of citizenship has been deeply enmeshed along the temporalities of citizenship revocation in India.

What are the safeguards which ought to govern citizenship revocation? What role do the preambular rights of the Constitution play in such

63 Sabyasachi Biswal, *The interpretation of religious texts and historical narratives around Hindu Muslim conflict in contemporary India,* 56 C.U. SOUTH ASIA DEMOCRATIC FORUM 1 (2020).

governance? Are there any limits or constitutional constraints on Article 11 – parliament's rights to legislate on citizenship – which ought to be read into any law which seeks to revoke Indian citizenship?[64] These are questions as old as independent India and have been part of a deeply contested and fraught dialectic of securitization and citizenship[65]. As this chapter will highlight, this fraught dialectic initially preceded and informed the imagination of India's citizenship revocation regime and later produced and reproduced its justification along temporalities from 1955 to today. In highlighting this, I also make a nested argument that due to different narratives of security India's citizenship revocation regime, as it exists, was always imagined as an administrative process *sans* procedural safeguards, leaving the citizen at the mercy of the state and a pliant judiciary.[66]

This chapter is thematically divided into two sections. The first section focuses on what preceded the citizenship revocation regime in India to argue that notions of securitization were immanent in any conception of citizenship revocation. To demonstrate this, I rely on the archives of the Constituent Assembly Debates ("**CAD**") and the debates of the first ten years of the *Lok Sabha*. As we shall see, these debates provide a rich

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[64] The preambular rights of the Constitution, such as justice, equality, and fraternity, are fundamental to governance and provide the moral framework within which laws, including those on citizenship, must operate. While Article 11 empowers Parliament to legislate on citizenship, this power is not absolute. It must be read in conjunction with other constitutional provisions, such as Article 10, which secures the rights of existing citizens, and the principles embodied in the Preamble. These rights create implicit limits or constitutional constraints on Parliament's powers under Article 11, ensuring that any law seeking to revoke citizenship adheres to principles of secularism, equality, and the rule of law. Moreover, it is worth considering whether the basic structure doctrine, which safeguards the foundational values of the Constitution, imposes substantive limits on citizenship laws. For instance, the secular and egalitarian character of the Constitution, as part of its basic structure, could be argued to constrain laws enacted under Article 11. The interplay of INDIA CONST., art. 11 r/w art. 10, r/w art. 246 and Sched. VII, List I, Entry 18. It highlights that the legislative power over citizenship is not unfettered but must operate within the constitutional framework, respecting the overarching principles of justice, equality, and fraternity.

[65] Yael Berda, *Managing 'dangerous populations': How colonial emergency laws shape citizenship,* 51(6) SECUR. DIALOGUE 557-578 (2020).

[66] Sanjib Baruah, *The Partition's long shadow: the ambiguities of citizenship in Assam, India,* 13(6) CITIZENSH. STUD., 593 (2009).

understanding of how the legal citizenship revocation regime is posited to maximising the security of the state and in some sense, have contributed to the precarity of belonging as an Indian citizen today.

In the second section, I argue that a key reason for imagining the regime in this way is because of the migration crisis which bears the residue of the "partition logic"[67]. It is this logic of paranoia and external threat directly linked to the body of the migrant[68] – fluid enough to both lithely distort borders and never truly be identified – that viciously links securitization with citizenship policies. To support this, I rely on the contemporary academic and policy framing of the link which reproduces the perpetual need to have profoundly securitized citizenship policies.

B. CONSTITUTING THE REGIME: NOTES FROM THE ASSEMBLY AND SABHA

The Assembly and Part II of the Constitution

The anxiety surrounding migration, particularly from Pakistan, was a direct by-product of the Partition's brutal realities, and these anxieties were enshrined in legal frameworks and policy discourses that have persisted since then. The Constituent Assembly, convened amid the chaos of Partition, reflects these securitized anxieties. The Debates highlighted two competing imperatives. First, the need to establish a secular, inclusive framework for citizenship and second, the perceived necessity of securing the nation against the demographic and political threats posed by migration. Articles 5, 6, and 7 of the Constitution encapsulate this tension. While Article 5 provides an expansive jus soli-based framework for citizenship, Articles 6 and 7 sharply qualify this by introducing the concepts of migration from Pakistan and "return migration," euphemisms that obscure the violence and coercion of Partition.

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[67] K. Gauba, *Forgetting partition: Constitutional amnesia and nationalism,* EPW 41 (2016).

[68] Anupama Roy, *Between encompassment and closure: The 'migrant' and the citizen in India,* 12(2) C.I.S., 219 (2008).

It is known that the Constitution is a living document. Over and above the act of state-making, constitutions may represent a multitude of things including a change in paradigms, a rupture from an iniquitous past and hope in the form of core rights which secure a citizen against arbitrary and despotic state power. The Indian Constitution – heralded for its secular and democratic ethos – is no different. Part III of the Constitution lays out rights and duties which radically alters the relationship the Indian subject shared with the colonial state. It did so by firmly enshrining the fundamental rights which will define the relationship of the Indian citizen with her freshly sovereign republic.

However, Part II of the Constitution, titled '*Citizenship*,' addressed the question of who would be an Indian citizen at the time of the Constitution's commencement.[69] The framers, through Article 11 left it to (yet to be constituted at the time) the Indian Parliament to devise a comprehensive legislation in due course of time, which would holistically address the questions of citizenship and its revocation. In time, the Citizenship Act, 1955 was enacted, but for now, it is imperative to understand the framers' rationale for keeping the notion of citizenship ephemeral.

While the Constitution drafting activity was itself historic, the fact that framers were drafting the Constitution *while* the violence and displacement of the partition were occurring was truly unique. The Indian Constitution was being founded within the foundational violence of the partition. This allowed the Constituent Assembly a singular and unrepeatable opportunity to stand in ontological apostacy – moving away from religious exclusivity, and to affirm a secular framework for Indian citizenship - to the idea of Pakistan and secure a status of citizenship which would be timeless and constitutionally protect the citizens of India. Not only did the Assembly not do this, but also ushered in what Jayal calls *citizenship for extraordinary times*,"[70] - the fact that the provisions on citizenship in Part II of the Constitution were designed to address the immediate and extraordinary circumstances of post-Partition India, including mass migration, communal violence, and the urgent need to

[69] INDIA CONST. art. 6 & 7; Niraja NIRAJA GOPAL JAYAL, CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY (Harvard University Press, 2013).
[70] *Id.*

determine the legal status of millions of displaced people. Rather than laying the foundation for a timeless, universally applicable framework, the Assembly's approach to citizenship was shaped by the urgency of stabilizing the nation during a period of unparalleled upheaval. Consequently, the transitional provisions focused on managing the chaos of Partition rather than setting a comprehensive or enduring model of citizenship, leaving key aspects to future legislation in the Constitution.
Discussions around the Citizenship Act, 1955, reveal a deep-seated preoccupation with the "migration crisis." The Assembly was predominantly considered by two issues. Firstly, the Assembly deliberated upon the rights of persons in countries other than India such as Ceylon, Burma and so on which had a large number of Indians.[71] This is now an anachronism, but the second issue emanating from this continues to be salient. The Assembly was deeply concerned about the founding principle of citizenship – the jostling of space with the *jus soli* and *jus sanguinis* – which would indicate citizenship in independent India. Certain members like Sardar Patel called the deliberations a "*simple problem*"[72] and that "*by comenting on every word in this (the citizenship clause), you will never come to an end*"[73](emphasis mine). For Patel, the solution was simple. The Constitution itself does not need to provide a charter of citizenship as that can be done by the Union – as and when necessary – in the form of a law governing citizenship. The President of the Assembly at that time, Dr. Rajendra Prasad perhaps ominously labelled the deliberations on citizenship as a "*purely legal problem*".[74] Ultimately, this purely legal problem was neatly slotted within the citizenship enclave – Articles 5 to 11 – in the Constitution. For our purpose, Articles 5, 6, 7 and 11 are of particular relevance.

For the citizenship enclave, the Assembly chose to follow the rule of *jus soli*[75] which finds its place within Article 5. Article 5 essentially recognises

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71 9 CONSTITUENT ASSEMB. DEB., Aug. 10, 1949, https://www.constitutionofindia.net/debates/10-aug-1949/.
72 *Id.*
73 *Id.*
74 9 CONSTITUENT ASSEMB. DEB., Aug. 12, 1949, https://www.constitutionofindia.net/debates/12-aug-1949/.
75 INDIA CONST. art. 5.

the citizenship of every person who was born in India or whose parents were born in India or who has been residing in India for not less than five years preceding the commencement of the Constitution. Naturally, Article 5 is both expansive and inclusive. It recognises the colonial vestige of subjecthood and also does not provide any religious (or other) marker which would caveat Indian citizenship. Nevertheless, Article 5 applied only to persons who were already residing in India, and its role is limited to merely recognising the change from subjecthood to citizenship.

On a standalone basis, Article 5 had the potential to stand in the face of the irreparable ripping apart of the multifaceted Indian identity into religious binaries. Yet, it was truncated by Articles 6 and 7 which qualified Article 5.[76] Article 6 was for providing citizenship status to those persons who migrated into India from Pakistan should they fulfil the conditions enumerated under the Article. Article 7 on the other hand, starting with a *non-obstante* clause against Articles 5 and 6, takes the citizenship away from a person who has migrated from India to Pakistan after March 1, 1947. At this point, the chronological set-up of Articles 5 to 7 is important. Firstly, Article 5 provided an expansive reading of citizenship, open to all, who were part of the land which became the Indian Republic. Article 6, without explicitly referring to the partition or its violence, provides citizenship rights to persons who migrated from Pakistan into India. Lastly, Article 7 strips citizenship rights of those persons who migrated into Pakistan from India. None of these articles make a passing reference to the barbarities of the partition. The framers of the Constitution deliberately avoided explicit references to Partition in Articles 6 and 7 to maintain a neutral and forward-looking tone. Using euphemistically clean terms such as "migration" and "domicile" these articles present a reality which is seemingly secure and persistent despite the underlying brutalities of partition migration. More importantly, the law here – Articles 6 and 7, occupy what Fitzpatrick[77] refers to a transcendent position where it can divorce itself from social realities while exercising general domination over them. The domineering aspect of these laws becomes clear by reading the proviso to Article 7 which is as follows –

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[76] NIRAJA GOPAL JAYAL, CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY (Harvard University Press, 2013).

[77] PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW (Routledge, 1st ed., 1992).

> "…*nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law*…" (emphasis mine).

In one stroke, the Indian Constitution took away the citizenship of persons migrating to Pakistan. As the chapter on case studies will reflect, portions of this migration were involuntary, chaotic, confounding and without the intention of making Pakistan home. Be that as it may, what is striking is the above-mentioned proviso which pretends to provide succour to returning migrants. But a close reading highlights that the citizenship rights of returning migrants, without situating their context amidst the violence of partition, were to be governed by a permit for resettlement process[78] thereby providing the roadmap of bureaucratising Indian citizenship.[79] While Articles 5, 6 and 7 were restricted to the commencement of the Constitution, Article 11 provided Parliament to comprehensively legislate on citizenship and determine who is an Indian citizen, when can such citizenship be revoked and under what procedural framework can it be revoked.

The Lok Sabha and the Citizenship Revocation Regime

Extant citizenship laws in India cover four prongs – the acquisition of citizenship, renunciation of citizenship, termination of citizenship and deprivation of citizenship rights. In this segment, I review the deliberations around citizenship revocation – comprising of termination and deprivation of citizenship – before they became sections 9 and 10 of the Act. The deliberations began with noting that since the Assembly had not conclusively determined the rights of citizenship and left it beyond the remit of the constitutional cores of the fundamental rights, federalism, preambular identities and so on, the task of deliberating upon

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[78] Abhinav Chandrachud, *Secularism and the Citizenship Amendment Act*, 4(2) INDIAN LAW REVIEW, 138 (2020).

[79] HAIMINTI ROY, PARTITIONED LIVES: MIGRANTS, REFUGEES, CITIZENS IN INDIA AND PAKISTAN, 1947-65 (Oxford University Press, 1st ed., 2012).

a citizenship law fell on the Indian Parliament.[80] While the Assembly was satisfied with classifying the rights around citizenship and its revocation as merely a "legal problem", the Lok Sabha saw thick contestations around how citizenship revocation ought to operate. These contestations can be broadly classified under the rubrics of secularism and security.[81] On one hand, there was a strong belief that citizenship revocation ought to be justiciable and appealable,[82] it should not be at the mercy of executive fiat,[83] it should not fall prey to differing political ideologies and it should memorialise the fact that Indian citizenship is being founded on the anvil of partition violence. This group believed that any regime of citizenship to markedly shift from the *ad hoc* regime in Part II of the Constitution and usher in a regime which is robustly secular in its imagination.[84] On the other hand, the belief was exemplified by the want for a "*secure state before a secular state*".[85] Here, while relying strongly on the laws of other commonwealth countries, it was argued that citizenship revocation ought to be under the sole control of the government. Since citizenship provides access to economic, social, and political participation, it should be regulated by the state.[86] Concerns about the mishandling or irregularization of citizenship were quickly dismissed by arguing that the state would not "*seek to frequently deprive citizenship*".[87] These differing standpoints are discussed below.

Secularism and Justiciability

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[80] 4 PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, OFFICIAL REPORT, 1-20, 36 (Aug. 5, 1955).

[81] 4 PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, OFFICIAL REPORT,1-20, 40 (Aug. 8, 1955).

[82] *Supra* note 77 at 47, 49 & 52; 7 PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, OFFICIAL REPORT, 1-20, 55, 76, 89 (Aug. 9, 1955).

[83] *Id.*

[84] 7 PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, OFFICIAL REPORT, Nos. 1-26, 34 (Dec. 2, 1955).

[85] 4 PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, OFFICIAL REPORT, Nos. 1-20, 40 (Aug. 8, 1955).

[86] 7 PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, OFFICIAL REPORT, Nos. 1-26, 50 (Dec. 9, 1955).

[87] *Id.*

Vociferous arguments for a justiciable revocation regime were made for making any decision of the state which would terminate or deprive an Indian of their citizenship to be appealable before high courts and the Supreme Court.[88] The crux of the argument was that without recourse to courts, a person's citizenship is rendered precarious and is at the mercy of the incumbent government.[89] During the debates, an idea was raised to establish a committee, comprising of members selected by the central government, that would offer recommendations regarding an individual's citizenship. It was argued that these recommendations ought to be made appealable, as the central government would not be bound by them.[90] At the heart of these deliberations was the concern that citizenship revocation ought not be subjected to unbridled executive fiat.[91] Different speakers argued that leaving citizenship revocation purely to the executive fiat would render groups and individuals with different political ideologies without any meaningful safeguards. Interestingly, concerns were also raised as to how the government would verify the citizenship status of a person. Since the verification process is done by bodies such as the border police directly under executive control, it was contended that the incumbent government would not have any motivation to check the veracity of reports made by the police. Hence, on one hand, there were questions regarding the leaving of absolute powers to the executive, but on the other hand, the manner in which different organs operate under the executive's command was also challenged. While these were notions of justiciability, the debates captured another salient point. In determining what would be the ultimate face of termination of citizenship it was vehemently argued that the draft clause 9 terminates the citizenship rights of those persons who have "*unfortunately*"[92] found themselves on the other side of the border because of the partition violence. This is of paramount importance, and as my case studies will

[88] 4 PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, OFFICIAL REPORT, Nos. 1-20, 47 (Aug. 5, 1955).
[89] *Id.* at 48.
[90] *Id.* at 39.
[91] 7 PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, OFFICIAL REPORT, Nos. 1-26, 55 (Dec. 2, 1955).
[92] Parliamentary Debates, House of the People, Official Report Vol VII, Nos. 1-26, December 9, 1955, p. 47.

demonstrate, several individuals displaced by the partition lost their citizenship when courts ruled that they had "*voluntarily*" acquired citizenship in another country.

To sum up, these deliberations indicate that the framers of the Act were deeply concerned and, in some instances, suspicious of the state consolidating power on the ostensible grounds[93] of national security, economic concerns and population control. However, it is important to note that this concern was not unanimously shared during the Parliamentary debates. While some members decried the 'blind borrowing' of laws from other Commonwealth countries as 'legislative larceny',[94] others appeared more willing to allow the state greater leeway in consolidating power for pragmatic governance. Despite these divergences, it was repeatedly emphasized that India's secular credentials are at test with her citizenship regime. Any regime in a secular nation must be thoroughly characterized by procedural safeguards that are justiciable and provide mechanisms to hold the state accountable, even in matters involving citizenship revocation.

Security and executive supremacy

The other side, however, argued almost as a peremptory norm were concerns of security. Right at the outset, the precise security concerns were never fully laid out in these debates. Much is left to the reader's imagination and the socio-political backdrop within which these debates took place. However, upon reading the debates as a whole, the paramount concern seems to be that of cross-border migration.[95] Although the debates do not explicitly mention this in relation to the citizenship regime, it euphemistically refers to the two-nation theory, the resultant partition, and the creation of Pakistan as 'circumstances' within which India won its freedom. A certain extract is worth examining in full:

> "… *Today our State is a secular State; I want it to be a secure State also. From that point of view the essential basis of citizenship,*

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93 *Id.*

94 Parliamentary Debates, House of the People, Official Report Vol IV, Nos. 1-20 , August 8, 1955, p. 32.

95 *Id.* at 30.

> *as I have said earlier, is loyalty to the Head of the State or that vague but noble conception of nation. It Is not that I am not unmindful of the context in which a country has attained its freedom. The very fact of freedom has resulted in certain consequences which are too well-known to be referred to here. Is It our intention to allow everybody from Pakistan here, without any restriction*?..."[96]

Therefore, the fundamental basis for having a regime devoid of justiciability was the notion that freedom in India has come at the cost of rupturing the body politic. To ensure that this does not repeat itself, the state must hold absolute power to decide questions of citizenship and its revocation. Other arguments included its logistical difficulties and onerous nature[97] of subjecting citizenship revocation procedures to courts. The framers of the Act felt that making decisions justiciable and appealable would be "*laborious*"[98] and could compromise the security of such decisions. Lastly, an overarching argument was that the government is aware of the consequences of citizenship revocation and will use it sparingly.[99]

Between these two contradictory stands, the latter emerged as the winner. Sections 9 and 10 of the Act dealing with the termination and deprivation of citizenship was framed without any possibility of justiciability or judicial oversight. In fact, the entirety of concerns as was brought out by those arguing for a secular and procedurally solid framework was not considered. While the effects of the adjudication of cases under Sections 9 and 10 will be highlighted in the next chapter, it is important to understand the threat of the migration crisis and its framing in contemporary politics.

C. SECURITY AND ILLEGAL IMMIGRATION

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[96] *Id.*

[97] 7 PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, OFFICIAL REPORT, Nos. 1-26, 47, (Dec. 2, 1955).

[98] *Id.*

[99] *Id.*

In the last section, I touched upon the malleable nature of danger, which allows the state to securitize certain fields of governance, such as citizenship in this case, and place them in exceptional spaces. In India, this danger is framed as the crisis of illegal immigration, which the state would have you believe occurs in overwhelming numbers, predominantly along the borders shared with Pakistan and Bangladesh. It is a crisis which may be traced back to the partition, except at the time it was not "illegal immigrants" crossing borders illegally but as Kapila aptly mentions "intimate brothers"[100] hitherto part of the same land who now found themselves divided by a line cutting through the body politic. In time, as the partition became a reality the border dividing the sub-continent slowly but surely was set in permafrost. Now, older inhabitants are not that – older inhabitants of an undivided land – but illegal immigrants who are nefariously and clandestinely crossing borders.

The aim of this paper is not to provide the specific reasons for such immigration or even enter its veracity. The modest aim is to recognise that there existed a narrative of such illegal immigration taking place for a plethora of reasons and this narrative has persisted over time. But as a narrative, this crisis – population mobility as illegal immigration[101] – has configured the norms of citizenship policies and the manner in which citizenship should be revoked in India. Seeing it as a crisis, illegal immigration is not a simple fact of population mobility but a phenomenon which requires a vital decision to be made.[102] The notion of a crisis is used to highlight this phenomenon as a contestation between different social groups – the true and authentic residents of a nation and the outsiders – and calls for an unprecedented intervention in the form of securitized citizenship policies. In India, different anxieties;[103] the religious anxieties of the partition, the unique history of Assam and the prevalence of ethno-linguistic politics, the logic of the two-nation theory,

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100 SHRUTI KAPILA, VIOLENT FRATERNITY: INDIAN POLITICAL THOUGHT IN THE GLOBAL AGE, (Princeton University Press, 1st ed., 2001).

101 CECILIA MENJÍVAR ET AL, THE OXFORD HANDBOOK OF MIGRATION CRISES (Oxford University Press, 1st ed., 2019).

102 Cantat et. al., *Migration as Crisis*, AMERICAN BEHAVIOURAL SCIENTIST 1 (2023).

103 Joya Chatterji, *South Asian Histories of Citizenship, 1946–1970,* 55(4) THE HISTORICAL J., 1049, (2012).

demographic disbalances in districts with higher number of Muslims[104] and a general scarcity of resources have often intersected to place blame on the body of the illegal immigrant.

In fact, this crisis has immense currency amongst elite actors such as parliamentarians, bureaucrats, institutional bodies like the Election Commission and the judiciary, to name a few. For example, examining Lok Sabha debates[105] since independence at various points in time, parliamentarians have expressed grave concerns about illegal immigration from Bangladesh. There is a view that illegal Bangladeshis have accessed ration cards, managed to infiltrate voter lists and that more than 20 percent of circulating ration cards are fakes.[106] Debates around the 'Multi-purpose National Identity Card' which is a precursor to the National Register of Citizens ("**NRC**") also emanates from the need to stop illegal immigration.[107] The paranoia ran so deep that parliamentarians argued the possibility of illegal immigrants having their own networks with the local police, enabling them to access a panoply of state documents including drivers' licenses, property documents, voter id cards and an infiltration of the lower rungs of government jobs. In addition to this, various policy documents both state and non-state categorically highlight that borders must be further securitized to stop illegal

[104] J. SAI DEEPAK, INDIA, THAT IS BHARAT: COLONIALITY, CIVILISATION, (Bloomsbury Publishing, 1st ed., 2021).

[105] Bulletin –Part-I, 13(4) LOK SABHA SESSION, (Aug. 21, 2000) https://eparlib.nic.in/bitstream/123456789/799375/1/lsb_13_04.pdf; Bulletin –Part-I, 13(12) LOK SABHA SESSION, (Mar. 3, 2003) https://eparlib.nic.in/bitstream/123456789/799419/1/lsb_13_12.pdf; Bulletin –Part-I, 14(9) LOK SABHA SESSION, (Nov. 30, 2006) https://eparlib.nic.in/bitstream/123456789/799650/1/lsb_14_09.pdf; Bulletin –Part-I, 15(4) LOK SABHA SESSION, (May 5, 2010) https://eparlib.nic.in/bitstream/123456789/799708/1/lsb_15_04.hin.pdf; Bulletin –Part-I, 15(7) LOK SABHA SESSION, (Mar. 11, 2011) https://eparlib.nic.in/bitstream/123456789/799385/1/lsb_15_07.pdf; Bulletin –Part-I, 15(9) LOK SABHA SESSION, (Dec. 21, 2011) https://eparlib.nic.in/bitstream/123456789/799383/1/lsb_15_09.pdf.

[106] *Id.*

[107] *Id.*; *see supra* note 91.

immigration[108]. Former heads of the Research and Analysis Wing have quoted on this anxiety which is worth seeing in full:

> "*Detecting illegal immigrants from Bangladesh is a daunting task. The subtle differences in the accents, dialect, and features between an Indian Bengali and a Bangladeshi are not easily discernible. The fact that most Bangladeshis already hold ration cards, voter identity cards, or even the unique-identity Aadhaar cards further compounds the difficulty. Ironically, an illegal Bangladeshi immigrant is more likely to be equipped with an Indian identity document than an Indian Bengali who may take his or her Indian citizenship for granted*"[109]

Perhaps the death knell of this paranoia was in 1997. In 1997, Assam's Governor S.K. Sinha released a report which was a paradigmatic shift for how illegal immigration is viewed. Up until this point, illegal immigration, although entrenched in citizenship policy, was not directly referred to. Sinha saw it fit to forego all euphemisms and, in the report, titled 'Illegal Migration Into Assam From Bangladesh',[110] he asserted upon the plans to create a "*greater Bangladesh*" by obliterating the demographic balance in Assam and making it disproportionately Muslim. While restricted to Assam, this report had a cascading effect on the nation and its imagination of illegal immigration. Soon after, in the year 2000, the Law Commission of India while suggesting reforms to the Foreigners Act categorically highlighted the fact of India facing unchecked illegal immigration, threatening its democracy. Perhaps, the crescendo here was the Supreme Court's decision in *Sarbananda Sonowal vs Union of India*.[111] This judgement tagged the problem of illegal immigration as one of "*external aggression*" against the nation, similar to a situation of emergency as it threatens national security. The judgment also drew on constitutional provisions, especially Articles 14 and 29, to strengthen its

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[108] *Id.*

[109] Sanjeev Tripathi, *Illegal Immigration From Bangladesh to India: Toward a Comprehensive Solution*, CARNEGIE INDIA, (Jun. 29, 2016), https://carnegieendowment.org/research/2016/06/illegal-immigration-from-bangladesh-to-india-toward-a-comprehensive-solution?lang=en.

[110] Kongkona Sarmah & Ujjal Protim Dutta, *Illegal Migration into Assam from Bangladesh: Causes and Consequences,* 3(6) GALAXY: INT. MULTIDISCIPLINARY RES. J., 20, 20, (2014).

[111] Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665.

stance. Article 14, which guarantees equality before the law, was invoked to underline the rights of Indian citizens, while Article 29, protecting the cultural and educational rights of minorities, was used to argue that unchecked immigration threatens the cultural fabric and identity of indigenous communities in Assam. The Court framed illegal immigration as not just a demographic issue but an existential one, branding it as "external aggression." By tying cultural survival to national security, the judgment gave powerful legitimacy to harsh measures against immigration, embedding a rhetoric of fear and securitization deep into the policies of citizenship and migration.

These different imaginations of the migration crisis are fully cemented in academia. Writing in 2008, Sadiq mentions "*networks of profit*"[112] and "*networks of complicity*"[113] which essentially means that illegal immigrants have complicit personnel across borders who assist them with documentation, residence andjobs . Further, there is a 'profit' element as these immigrants alter the demographics of a particular place, creating electoral rewards for different political groups[114]. Sur[115] has highlighted this in her work where she argues that migrants easily procure citizenship documents and most importantly, purports how citizenship for illegal immigrants manifests itself through corruption. This indicates a deep rot in the system[116] which allows unchecked illegal immigrants into the country and distributes benefits to them at the cost of legitimate citizens. The roles of border guards, local politicians and village heads have been called into question for facilitating this[117].

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112 KAMAL SADIQ, PAPER CITIZENS: HOW ILLEGAL IMMIGRANTS ACQUIRE CITIZENSHIP IN DEVELOPING COUNTRIES (Oxford University Press, 1st ed., 2008).

113 *Id.*

114 Alex Waterman, *Unheeded hinterland: identity and sovereignty in northeast India,* 118-120 (Routledge, 1st ed., 2017).

115 MALINI SUR, JUNGLE PASSPORTS: FENCES, MOBILITY, AND CITIZENSHIP AT THE NORTHEAST INDIA-BANGLADESH BORDER (University of Pennsylvania Press, 1st ed., 021).

116 Anupama Roy, *Identifying Citizens: Electoral Rolls, the Right to Vote, and the Election Commission of India,* 11(2) ELECTION L. J., 170, 170, (2012).

117 ABHISHEK SAHA, NO LAND'S PEOPLE: THE UNTOLD STORY OF ASSAM'S NRC CRISIS (Harper Collins India, 1st ed., 2021).

This suggests a deep and pervasive belief that migration *is* a crisis in India. It is not only a belief in the chambers of legislative drafting – the Lok Sabha and Constituent Assembly – but also something which can be identified at every juncture, relevant for making and implementing policy. This narrative of a crisis which threatens the security of the nation leads to having a regime of revocation which is wholly exceptional. The next chapter investigates how this exceptional regime operates and what implications that has for the rule of law.

SECURITIZATION AND CITIZENSHIP REVOCATION

In the previous chapters, I laid out the theoretical backdrop of securitization and its link to citizenship policies. Following that, I argued that narratives of security posited on a thesis of securitization which incubates in moments of social crises are deeply imbricated within India's citizenship regime. Scholarship on critical citizenship studies with keeping India as the site of study has restricted itself to the state of Assam. Perhaps, there is a good reason for this, given that there is enormous state will to replicate the horrors of the Assamese NRC determination process across India. While this is egregious, and scholarship on the NRC is well-traversed. The fact that citizenship revocation –comprising the myriad discursive processes within citizenship is adjudicated – is not merely restricted to Assam has not found much discussion. In fact, recent discussions on citizenship revocation in India have emanated solely out of the nefarious and partisan Citizenship Amendment Act, 2019 ("**CAA**") and the National Population Register ("**NPR**"). The protests against the CAA captured a public consciousness hitherto unseen in independent India, transcending barriers of caste, gender and class.[118] However, as I mentioned, the chronological triumvirate of the NPR-NRC-CAA is one site within a splintered legal regime in which citizenship is revoked. Equally important is the regime of termination and deprivation of citizenship within the Citizenship Act, 1955 ("**Act**"). While the CAA is egregious, partisan and possibly unconstitutional,[119] its blatant and manifestly discriminatory

[118] M. Mohsin Alam Bhat, *The constitutional case against the Citizenship Amendment Bill*, EPW (Jan. 19, 2019) https://www.epw.in/journal/2019/3/commentary/constitutional-case-against-citizenship.html.
[119] *Supra* note 7.

nature made discourse around its possible unconstitutionality easier to garner. On the other hand, the procedural regime of citizenship revocation consisting of termination and deprivation – rooted in Sections 9 and 10 of the Act – has either been lightly brushed by existing scholarship or not engaged at all. While the Act is the umbrella legislation under which other acts and rules including the Foreigner's Act, 1946 ("**FA 1946**") must adhere, the Act also provides for citizenship revocation – distinct from other forms of revocation – under Sections 9 and 10. This regime's revocation of citizenship as it is rooted under the Act, has escaped scrutiny within critical citizenship studies. In this chapter using the framework of securitization and the narratives of security – both of which were foundational to the regime of Citizenship Revocation in India – I look at how termination and deprivation of citizenship work within the Indian legal system. I do this by reading the judicial archives of different high courts in India and the Supreme Court of India. I focus specifically on cases which have dealt with termination and deprivation of citizenship from the years 1955 to 2020. At its core, my method is not about legal doctrine or testing "realism"[120] of law but also questions the role of the law in making meaning. In this sense, the legal imprimatur is "jurispathic"[121] which means that legal processes distill multiple meanings – the meaning of Indian citizenship here – into a meaning which is sanctioned by law. Through this, I argue that the manner in which the Act and its concomitant rules are set out and the method in which cases falling under the Act have been litigated has firmly entrenched the narrative of securitization in India.

A. TERMINATION AND DEPRIVATION OF CITIZENSHIP

Sections 9 and 10 of the Act make provisions for the termination and deprivation of citizenship in India, respectively. For terminating the citizenship of a person, the said person must "voluntarily" acquire the citizenship of another country.[122] By definition, this means that the mere acquisition of citizenship of another country is not salient. It is instructive that the acquisition must have an element of will and

[120] Brian Z. Tamanaha, *Understanding legal realism,* 87 TEX. L. REV., 731, 731 (2009).
[121] Robert M. Cover, R. M, *Foreword: Nomos and narrative*, 97.1 HARV. L. REV, 1, 4, (1983).
[122] The Citizenship Act, 1955, § 9, No. 57, Acts of Parliament, 1955 (India).

voluntariness by the acquirer before her Indian citizenship is terminated. In order to determine the voluntariness of a foreign citizenship acquisition section 9(2) of the Act mandates an enquiry by an "Authority" to be determined by the central government. This Authority keeping with rules of evidence then launches an enquiry into the antecedents of a person who is alleged to have voluntarily acquired the citizenship of a foreign country. Similarly, section 10 provides for five circumstances when a person may be deprived of their Indian citizenship. Even here, the central government is to prescribe an authority which then undertakes an enquiry to gauge if the circumstances are satisfied. A few other sections are relevant for understanding how revocation operates. Sections 15 and 15(A) of the Act provide for 'Revision' and 'Review' of orders made under the Act including orders made under Sections 9 and 10. Hence, a person whose citizenship is arbitrarily revoked may opt for a revision or review of the order.

The centralisation of power within the executive raises significant procedural and constitutional questions. Both sections rely heavily on determinations by executive authorities, with minimal judicial oversight or procedural safeguards. For instance, Section 9 mandates an inquiry by an authority prescribed by the central government to determine if foreign citizenship has been voluntarily acquired. However, there is no clarity on whether this inquiry is quasi-judicial or administrative, leaving the process open to arbitrary decisions. Similarly, Section 10 allows for deprivation of citizenship on vague grounds like disloyalty or fraud, again without the need for independent judicial review. The provisions for review and revision under Sections 15 and 15(A) of the Act further consolidate power within the central government, as it remains the arbiter of its own decisions. This undermines fundamental principles of accountability and procedural fairness, particularly when decisions on citizenship have profound consequences for individuals and communities. The absence of independent oversight bodies or tribunals compounds the problem, enabling the executive to operate without meaningful checks. In a nutshell, then, the Central Government prescribes the authority which determines if a person's citizenship ought to be revoked, the Central Government is also the authority which is seized with all revisions and reviews emanating from orders passed by its prescribed authority and lastly in the event of persons opting to litigate these orders, the same is

litigated against the Central Government. The lack of transparency and procedural fairness in implementing these provisions becomes evident when examining their application.

The Citizenship Rules

While the Act sets out the legislative intent of revocation, the Citizenship Rules ("**Rules**") lay out the precise manner in which such revocation is to take place. For this paper, Schedules II and III of the Rules are pertinent as they refer to deprivation and termination of citizenship, respectively. Both these schedules provide for issuing a notice, applicable rules of evidence and the steps which are to be taken before rendering an adverse finding. Importantly, clause 3 of Schedule III lays down that if a person has obtained a passport from a different country, that is "conclusive" proof that the person has voluntarily acquired the citizenship of another country.

Within this legislative backdrop, the next portion of this chapter will focus on how cases under this whole regime have been litigated. The argument that undergirds this is that the executive – the Central Government in this case – wields *carte blanche* power[123] when it comes to citizenship revocation by performing the roles of judge, jury and executioner in citizenship revocation. This role of executive supremacy needs a parallel officials-based deference which allows the executive to arbitrate upon all questions of citizenship revocation. As we will, the judicial history of these cases is weaved with executive deference founded on the security of the nation. To make these two arguments, I selectively focus on four aspects of citizenship revocation. *First*, the interpretation of the words "*voluntarily acquires the citizenship of a foreign country*" to understand how voluntary acquisition of foreign citizenship is understood. Secondly, the interplay between the Citizenship Act and other acts such as the Foreigner's Act to argue that notions of security allow the prescribed authority to work with fluidity and choose amongst different legislative frameworks on the spectrum of procedurally solid to

[123] Atreyo Banerjee, *The State Playing Judge: A Case for Revisiting Deprivation of Indian Citizenship,* THE LEAFLET (Aug. 11, 2022) https://theleaflet.in/governance-and-policy/the-state-playing-judge-a-case-for-revisiting-deprivation-of-indian-citizenship .

draconian. Through this, I also focus on the manner of determination when it comes to enquiring about cases of citizenship revocation. Lastly, I read the inherent limitations of writ courts coupled with the provisions of revision and review in the Act to conclude that the regime is designed to exclude persons arbitrarily from Indian citizenship.

B. VOLUNTARY ACQUISITION OF FOREIGN CITIZENSHIP

Textually, there is little objection to the sections stating that voluntarily acquiring foreign citizenship terminates Indian citizenship. In fact, section 9 gives effect to Article 9 of the Constitution. Recall that Part II of the Constitution dealing with the question of citizenship was restricted till parliament by virtue of Article 11 formulated a comprehensive citizenship law. Section 9 then borrows directly from Article 9 which essentially prohibits dual citizenship. However, while Article 11 can be read to provide a broad principle of prohibiting dual citizenship, the Act and Section 9 read with the Rules ought to have provided a comprehensive framework which explains how an enquiry into determining the voluntariness of an acquisition is to be done. This provision is fundamentally flawed within the Act. Further, it is unclear if the enquiry under Section 9(2) is a quasi-judicial enquiry, and if the Rules can provide for an automatic termination of citizenship which would situate administrative rules in the domain of substantive law. Lastly, the voices of different litigants arguing for the 'involuntariness' of their acquisition of foreign citizenship highlights the lacuna within this determining framework. [124]

Tracing the judicial history of the first two decades of Indian courts evinces the precarity with which litigants approached writ courts to argue that their acquisition of foreign citizenship was not voluntary but forced under varied circumstances. For example, In *Abdul Salam*[125] the Petitioner was forced to migrate to Pakistan in lieu of communal violence and the ill health of his father and was unable to return to India. To return, he acquired a Pakistani passport. Bear in mind that this was at the height of

[124] State of Gujarat v. Yakub Ibrahim, (1974) 1 SCC 283; Mohd. Ayub Khan v. Commissioner of Police, Madras (1965) 2 SCR 884.
[125] Abdul Salam v. Union of India, AIR 1969 ALL 223.

partition violence. However, the authority and the court found the Petitioner's actions to be voluntary. In a telling line, the court observed

> "*The desire to be present at a particular place does not create any legal obligation to be present. Hundreds of persons are unable to be present at the illness of a parent. The compulsive force must be something more than an inner urge however strong.*"[126]

Similarly, in a catena of cases such as *Mohammad Ibrahim vs Union of India*[127], *Shree Mohammad Yusuf vs Union of India and Others*[128], *Habatullah Haji Fazale Hussain vs The State*[129], *Mohammad Ibrahim vs Union of India*[130], *Mashkurul Hasan vs Union of India* [131], *Mohammad Kamal Khan and others vs The State of Andhra Pradesh and another*[132] and others[133] rehash similar tropes of violence and forced migration. These were all cases being litigated in the early years of India's independence when partition violence was both at its crescendo and its role in creating the migrant crisis was beginning to form. As the Assembly debates and later the Lok Sabha debates categorically show – the framers of the Constitution and the Act were aware and cognizant of the fratricidal violence of partition. Yet, the Act makes no special provision and deems the acquiring of foreign citizenship purely voluntary even when it is marred by blood and force of dividing the sub-continent. This brings me to the second argument of whether this is a quasi-judicial enquiry or not. As cases such as *Shri Mustaq Husain vs State of Uttar Pradesh,*[134] *Nasiruddin vs Union of India,*[135]

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126 Abdul Salam v. Union of India, AIR 1969 ALL 223.
127 Mohammad Ibrahim v. Union of India, AIR 1967 P&H 339.
128 Shree Mohammad Yusuf v. Union of India, AIR 1967 PAT 266.
129 Habatullah Haji Fazale Hussain v. The State, AIR 1964 Guj. 128.
130 Mohammad Ibrahim v. Union of India, AIR 1967 P&H 339.
131 Mashkurul Hasan v. Union of India, AIR 1967 ALL 565.
132 Mohammad Kamal Khan and Ors v. The State of Andhra Pradesh, AIR 1962 AP 247.
133 Sejal Vikrambhai Patel v. State of Gujarat, AIR 1993 GUJ 150; Moosa and Ors v. Union of India, 1999 SCC OnLine Ker 443; Mohd. Islam Ahmad Khan v. Ist Addl. District Judge, Saharanpur and Ors., 1997 SCC OnLine All 165; Md. Ishaque v. The Under Secretary to the Govt. of India AIR 1991 CAl 289.
134 Shri Mustaq Hussain v. State of Uttar Pradesh, AIR 1960 All 559.
135 Nasiruddin And Anr. v. Union of India AIR 1956 MP 346.

Attaullah vs Union of India and others[136] *Rahman, Sekandar Bepari and other vs The Superintendent of Police and Registration Officer of Goalpara*[137] and others will indicate the template used by authorities is usually a notice issued by the prescribed authority calling upon the person in question to vacate India immediately due to them having voluntarily acquired the citizenship of foreign country – which is almost always Pakistan or Bangladesh. No findings are given as to the specific set of facts which led to this decision. Now Schedule III does not mention a full-fledged inquiry following the principles of natural justice. But, to understand if citizenship has indeed been acquired by a foreign country, recourse has to be made to the laws of the country. The limited avoidance of this is possible if a person has already acquired a passport. But as I have mentioned often such acquisition is not voluntary, and it is unclear what is the touchstone to measure such voluntary acquisition.

C. INTERPLAY OF LEGISLATION AND DETERMINATION

Often as cases such as *Ummayau vs Union of India,*[138] *K Mohammad Ahmed vs State of Kerala and others*[139] and *MD Kaleemuddin vs The Union of India and others*[140] enumerate orders are passed under the Foreigner's Act directing a person to leave India within a certain timeline. As such, neither Sections 9 and 10 nor Schedules II and III make any reference to the Foreigner's Act while explaining the manner of determination under the sections. By determination, I refer to the process of enquiry to determine if a person has ceased to be a citizen of India as per sections 9 and 10. This is pertinent to note. Sometimes orders are passed using the framework of the Foreigner's Act without any findings being rendered under section 9 or 10 of the Act. However, the reason for orders of deportation and/or detention as the case may be, is that the person has breached the provisions of section 9 or 10 of the Act.[141] Therefore, orders are being passed under a wholly different Act the purpose of which is not to

136 Attaullah v. Union of India, 1987 SCC OnLine All 411.

137 Rahman, Sekandar Bepari and others v. The Superintendent of Police and Registration Officer of Goalpara AIR 1962 Ass 103.

138 Ummayau v. Union of India, 1987 SCC OnLine Ker 408.

139 K Mohammad Ahmed v. State of Kerala and others, AIR 1983 KER 146.

140 MD Kaleemuddin v. The Union of India and others, 1989 SCC OnLine Pat 118.

141 *Id.*

regulate Indian citizenship while the reasons for these orders are being derived from the conditions of sections 9 and 10 of the Act. Much has been written about the Foreigner's Act[142] but perhaps its most egregious provision is the reverse burden of proof.[143] If proceedings are commenced under the Foreigner's Act, the procedure must – contrary to established standards – prove her citizenship. Established standards, such as the presumption of innocence and the principle that the burden of proof lies on the party making an allegation, as enshrined in criminal law and Article 21 of the Constitution, are inverted in this framework. This reversal places an onerous burden on individuals, especially those who may lack access to necessary documentation or legal representation, undermining procedural fairness and natural justice.

The Act and especially sections 9 and 10 do not make any reference to the draconian reverse burden of proof. At this point, it is also trite to mention that in cases such as *Abbas Ali v. The State*[144] there has been no reference to the Foreigner's Act, and orders have been passed after an enquiry under the Act. Further, in cases like *Sham Roj v. Addl. Superintendent of Police and others* [145] and *Mohd. Yasin Khan v. State* [146] notes, oftentimes there are individual persons who are expected to petition the central government for undertaking an enquiry under the Act. Lastly, as different high courts have held in *Mahammad Nazaharul Haque v. B.Bagchi, I.P.J.P and others*[147], *Khan, In re*[148] and *Abdul Rahim Khan v. Union of India*[149] an enquiry is mandatory when orders are sought to be passed under sections 9 and 10 of the Act. Therefore, the cases demonstrate the

142 M. Mohsin Alam Bhat, *The constitutional case against the Citizenship Amendment Bill*, EPW, (Jan. 19, 2019); Mihika Poddar, *The Citizenship (Amendment) Bill, 2016: International law on religion-based discrimination and naturalisation law* 2(1) INDIAN L. REV. 108; Talha Abdul Rehman, *Identifying the 'outsider': An assessment of foreigner tribunals in the Indian state of Assam,* 2(1) STATELESS AND CITIZENSHIP REV., 112, 112-137 (2020).

143 Foreigner's Act, 1946, § 9, No. 31, Acts of Parliament, 1946 (India).

144 Abbas Ali v. The State, 1975 SCC OnLine Cal 14.

145 Sham Roj v. Addl. Superintendent of Police & Ors., AIR 1977 CAL 252 (India).

146 Mohd. Yasin Khan v. State, 1977 SCC OnLine All 289.

147 Mahammad Nazaharul Haque v. B. Bagchi, I.P.J.P. and others, AIR 1974 Cal 29 (India).

148 Khan, In re, 1970 SCC OnLine Mad 346.

149 Abdul Rahim Khan vs Union of India 1976 SCC OnLine Bom 118.

following. *First*, there is no clarity as to which act – the Citizenship Act, the Foreigner's Act or both – are to be used to conduct enquiries and pass orders. The permutations and combinations from studying the cases conclude that either of them may be used sometimes together, and at other times individually.[150] *Second*, in cases of enquiries under the Act, the evidentiary standards as mentioned in the Schedules seem to apply. However, in case the Foreigner's Act is used the burden of proof shifts entirely upon the person to prove they are legitimate Indian citizens. *Third*, the timing and burden of determination, as courts have held that individuals ought to have petitioned the authorities when there were doubts about their citizenship implies that an expansive reading of Sections 9 and 10 provides for individual petitioning. Yet, reading the bare text it is nowhere mentioned that there is a right of petitioning or that there is a duty to petition. This is also important for another reason. Imagine, if a person is concerned about her citizenship status, and petitions the government for an enquiry. Now, she would not know under which act such enquiry would happen and what would the evidentiary standards involve. Further, in the event an adverse order is passed she would risk deportation under the Foreigner's Act. Now, as the case of *Aditya Andreas*[151] highlights, the failure to petition to determine one's citizenship – even though the same is not mandated by the Act or the Rules – can be read against a person's intent. Therefore, it remains unclear as to what is procedurally the correct method here. Lastly, it is not certain as when an order of deportation can be passed as courts have at times laid down that an enquiry and order under sections 9 and 10 are necessary precursors, and other times such orders have been given effect without the necessary enquiry.

D. TROPES OF SECURITY IN WRIT COURTS

This entire case study is done predominantly relying on the archives of writ courts. The primary decisions of the central government or its prescribed authority are unavailable. Hence, only those cases where

[150] This observation is a general claim based on a qualitative analysis of the cases discussed above, rather than an empirical or quantitative study. The claim reflects the inconsistencies and lack of a standardized approach in the application of these laws, as highlighted by the case outcomes.

[151] Aditya Andreas v. The State, 2020 SCC OnLine Mad 2780.

persons have chosen to approach the court seeking relief in writ, are publicly available. Be that as it may, the above cases demonstrate that there is immense executive deference in the way judges adjudicate these cases. Multiple cases from 1955-2021[152] judges have upheld the executive right to terminate and deprive citizenship posited on concerns of security. Courts have even held that the principles of natural justice, and other procedural safeguards may not be strictly followed as there are not judicial enquiries.[153] Recall the Lok Sabha debates, and the point of forcefully having to acquire citizenship of Pakistan due to forced migration. Despite such narratives being furthered before the making of the Act, in reality the law never paid heed to the historical violence of the partition but quickly shifted the burden on citizens moving along a fluid border to prove their movement as involuntary in a way which is cognitively understood by the law.[154] This highlights the historical links which exist between securitization, the existential threat of the migration crisis due to the partition, and the manner in which citizenship revocation attempts to regulate this crisis. The logic of securitization created this regime of revocation which continuously shifts its shape and does not adhere to any fixed procedure. The underlying premise being given the links of security of the nation and legitimate citizenship, the executive must always be able to easily, quickly and seamlessly revoke the citizenship of persons who are potential threats. As previously highlighted, writ courts have limited authority in addressing this issue.

[152] This time frame reflects the period studied for this analysis, beginning with the enactment of the Citizenship Act, 1955, and covering significant judicial developments up to 2021. The cases cited within this article span this timeframe, illustrating how the Citizenship Act and the Foreigner's Act have been applied inconsistently over the decades. Manju Devi v. State of Bihar, 2010 SCC OnLine Pat 1900; Patrick Savio Marcelino Almeida v. Devanand Vasudev Shirodkar, 2014 SCC OnLine Bom 497; Padam Prasad Sharma v. Union Of India & Ors, 2011 SCC OnLine Del 1324; Narendra Reddy Thappeta v. Union of India, 2019 SCC OnLine Kar 3530.

[153] Nagina Devi MLA v. Union of India, 2010 SCC OnLine Pat 2; Mumtaz Parveen v. State, 2013 SCC OnLine Del 348.

[154] Mukteshwar Prasad @ Mukteshwar Ram v. The State Of Bihar, 2018 SCC OnLine Pat 1083.

More often than not, they either rule in favor of the executive or dismiss the matter as a *question of fact.* [155]

CONCLUSION

In this paper, I have argued that narratives of security are deeply interwoven into what ultimately became the citizenship revocation regime in India. The debates of the Assembly and the Lok Sabha, while different in their content, find convergence in the fact that the security of the nation – at that time a newly independent India emerging from the bloody throes of the partition – is of paramount importance. While the Assembly was concerned with only the immediacy of independence, its concerns were still largely centered around preventing unchecked migration from Pakistan. The Lok Sabha took this a step further, and firmly situated the need for having unchecked executive power while adjudicating on citizenship in the need to keep the nation safe. It was accepted that India could be secular, after it is safe.

Following this, I highlighted that the safety concerns were posited on the 'partition logic' of migration and the broad acceptance by elite institutional actors of a transcendental migration crisis. While this contemporary logic was playing out, India's nascent citizenship revocation regime was slowly litigating cases around the "voluntary acquisition of foreign citizenship" where time and again the narratives of partition were used by litigants to argue that their acquisition of Pakistani citizenship was forced and out of duress. However, the law makes no recognition of this historical event, and countless persons lost their Indian citizenship for not having a procedurally solid and judicially safeguarded regime of citizenship revocation in place. In fact, the courts on more than one occasion categorically noted the security concerns emanating from unchecked migration, having the potential to overwhelm the nation, and therefore to the regime to operate as before. We do not know if there indeed *is* a migration crisis if our borders are truly compromised, and if our laws are, in fact, grossly inadequate to grapple

[155] Muhammed @ Kunhu Muhammed v. Union Of India, 2011 SCC OnLine Ker 353; Kolakkadan Moosa Haji v. Union of India, 2014 SCC OnLine Ker 24730; Kiran Gupta v. The State Election Commission, 2020 SCC OnLine Pat 1641; Joseph Olakkengil v. State of Kerela, 2022 SCC OnLine Ker 1018.

with this. Yet, as it exists, the bare letter of seemingly neutral laws operates in a way which furthers the narrative of needing security at the cost of having safeguards, as if the security is compromised then the existential threat of the migrant crisis – whether true or false – can destroy the nation.

To move forward, India's citizenship policies need a fundamental reimagination to address the systemic flaws and exclusions embedded within the current regime. The Citizenship Act, 1955, and its related frameworks require urgent amendments to fix the glaring gaps in fairness and accountability. One critical reform is the establishment of independent tribunals to handle cases of citizenship termination and deprivation, ensuring that decisions are not left entirely to the unchecked power of the executive. These tribunals must be built with robust safeguards to guarantee procedural fairness, protecting individuals from arbitrary action. Equally essential is codifying clear safeguards into law—ensuring that those facing the loss of their citizenship have a right to legal representation, receive detailed reasons for decisions, and are granted an automatic right to appeal before an impartial judicial authority.

Ensuring transparency in how the Citizenship Act interacts with the Foreigner's Act is another crucial step. The current opaque overlap between the two laws creates confusion and exacerbates vulnerabilities for those caught in its web. Clear provisions must be introduced to define the procedures and evidentiary standards for determining citizenship, removing the ambiguities that enable arbitrary state action. Additionally, it is imperative to confront the historical realities that continue to cast their shadow over citizenship policies. The laws must explicitly recognize the involuntary nature of migration during Partition, ensuring that this historical trauma does not remain ignored in adjudicating claims of citizenship. Without these reforms, India's citizenship policies will remain exclusionary and unjust, perpetuating insecurity instead of fostering the inclusive democracy promised by its Constitution.

DOES THE POLITICAL QUESTION DOCTRINE HAVE A PLACE IN THE INDIAN CONSTITUTIONAL SETUP?: AN ANALYSIS THROUGH THE LENS OF LANDMARK SUPREME COURT DECISIONS

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The power of judicial review has been recognised as an intrinsic feature in a constitutional democracy. It acts as a check against arbitrary legislative and executive action. However, this power is not unfettered. In order to prevent judicial adventurism, the judiciary has devised some self-imposed principles of restraint, one of which is the political question doctrine. Having its roots in the American constitutional jurisprudence, the doctrine warrants judicial abstention in issues which are deemed better suited to be dealt with either by the legislature or executive on account of them being 'political' in nature. The doctrine has been relied upon by US Courts to refuse adjudication upon political issues in several cases, but its exact scope of application remains ambiguous. This has invited scholars to present different approaches towards interpreting the doctrine, with some considering it to be recurrent in the court's practice, while others aiming to disprove its very existence. The judiciary and legal fraternity have largely remained aloof from undertaking an in-depth analysis of this doctrine in the Indian context; though interestingly, the Supreme Court has touched upon its scope of application in some of its landmark decisions. This article seeks to determine the political question doctrine's place in the Indian constitutional set-up by tracing the Supreme Court's approach towards its application. An effort is also made to analyse the extant literature and judicial pronouncements pertaining to the doctrine in order to discern its exact meaning and import.

* Cite it as: Sagar, *Does the Political Question Doctrine have a place in the Indian Constitution setup?: An Analysis through the lens of Landmark Supreme Court Decisions,* 9(1) COMP. CONST. L. & ADMIN. L. J. 132 (2025).

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**The author is grateful for the rigorous review of this piece undertaken by Sinchan Chatterjee, Mr. Mohak Dua and other members of the Editorial Board, Comparative Constitutional Law and Administrative Law Journal, National Law University, Jodhpur which markedly improved its quality.

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TABLE OF CONTENTS

INTRODUCTION

In a democracy, the judiciary is entrusted with the onerous task of guarding the Constitution. It is through the power of judicial review that the courts are able to successfully undertake this task. In simple terms, judicial review refers to the overseeing by the judiciary of the exercise of power by other coordinate organs of the state to ensure that they act in conformity with the constitutional principles.[2]

The Indian Constitution makers borrowed this concept from the United States ("**US**") Constitution. In the US, the historical judgement of *Marbury v. Madison*[3] ("***Marbury***") marked the inception of judicial review as we know it today. In this case, the court, elaborating on its own function(s) declared that *"in case of a conflict between the Constitution and a legislative statute, the Court will follow the former, which is superior of the two laws, and declare the latter to be unconstitutional."* It can, therefore, be said that the power of review of courts is based on the premise that legislative enactments and executive actions must be reviewed at the touchstone of the Constitution of the country.[4] It has been observed by the Supreme Court that judicial review is *"one of the features upon which hinges the system of checks and balances."* [5]

[2] S.P. Sathe, *Judicial Review in India: Limits and Policy*, 35 OHIO ST. L.J. 870-72 (1974).
[3] Marbury v. Madison, 5 U.S. 137 (1803).
[4] *Id.*; State of Rajasthan v. Union of India, (1977) 3 SCC 592.
[5] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

Though the power of judicial review has been cemented as an inextricable feature of the Indian Constitution, the Court's approach towards the exercise of this power has undergone considerable changes over time. In the first two decades since 1947, the Court stuck to a textual interpretation of the Constitution and largely confined itself to the traditional role of the judiciary, i.e., interpretation of the law.[6] This is evinced from the precedent laid down in *AK Gopalan v. Union of India*[7], where the court adopted a strict interpretation of Article 21.[8] In this case, while deciding upon the State's power of detention under the Preventive Detention Act, 1950, the court observed that the term "personal liberty" under Article 21 solely includes liberty of the physical body. It also ruled that Articles 19 and 21 must be read disjunctively, which in turn greatly restricted the scope of Article 21.

Similarly, on the issue of the amending power of the Parliament; in *Shankari Prasad v. Union of India*[9], it was held that amendments to the Constitution cannot be considered as "law" under Article 13(2)[10] and by implication, the Parliament practically enjoyed unfettered power of amendment, including the amendment (and taking away) of fundamental rights. The same stance was reiterated in *Sajjan Singh v. State of Rajasthan*.[11] These three decisions revealed considerable restraint on the court's part to impose any significant limitations on the powers of the legislature/executive, and are evidence of the reserved approach of the court which prevailed at that time.

However, there began a marked change in the approach of the Supreme Court starting from the case of *Golak Nath v. State of Punjab*[12] ("***Golak Nath***") (in which *Shankari Prasad*[13] and *Sajjan Singh*[14] were overruled).

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6 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS, 151-162 (The Colonial Press, 2nd ed, 1899).

7 A.K. Gopalan v. Union of India, (1950) SCC 228.

8 INDIA CONST. art. 21.

9 Shankari Prasad v. Union of India, (1951) 4 SCC 966.

10 INDIA CONST. art. 13(2) talks about the extent of law-making power by the state so as to not abridge fundamental rights in the Constitution.

11 Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

12 Golak Nath v. State of Punjab, AIR 1967 SC 1643.

13 Shankari Prasad v. Union of India, (1951) 4 SCC 966.

14 Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

This period is often termed as the period of judicial activism, where the Court played a proactive role in the working of the democratic polity of the country.[15] The basic structure doctrine was promulgated[16], Article 21 was interpreted to include a plethora of rights which otherwise were not a part of the Constitution[17], the rule of *locus standi* was modified by introducing the concept of PILs (public interest litigation)[18] and the court exercised the power of judicial legislation in a myriad of cases.[19]

However, this interventionist approach of the Court in affairs of the legislature and executive has been criticised by some.[20] The primary ground for such criticism has been that the judiciary has breached the principle of separation of powers at times.[21] Though the Indian constitutional scheme does not adopt a strict model of separation of powers[22] like the US, and it cannot be given primacy over judicial review[23], it must be noted that the Constitution by no means envisages the assumption of legislative and or executive functions by the judiciary.[24]

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15 Shyam Prakash Pandey, *Understanding Judicial Activism and Its Impact*, 4(2) GLS L.J. 15 (2022).

16 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

17 Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

18 S.P. Gupta v. Union of India, AIR 1982 SC 149; Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai, (1976) 3 SCC 832; Bar Council of Maharashtra v. M.V. Dabholkar, (1975) 2 SCC 702.

19 Vishaka v. State of Rajasthan, (1997) 6 SCC 241 (guidelines were laid down by the SC for the protection of women from sexual harassment at workplace); D.K. Basu v. State of W.B., (1997) 1 SCC 416 (guidelines to be followed by police while arresting a person); Vishwa Jagriti Mission v. Central Govt., (2001) 6 SCC 577 (anti-ragging guidelines).

20 S.P. Sathe, *Judicial Activism and the Indian Experience,* 6 Washington U. J. of L. and Policy 30, 88-89 (2001).

21 *Id.*

22 Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159.

23 Justice Ruma Pal, *Judicial Oversight or Overreach: The Role of the Judiciary in Contemporary India*, 7 SCC J. 9, 13 (2008); *see also*, Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549; Powers, Privileges and Immunities of State Legislatures, Re, Special Reference No. 1 of 1964, (1965) 1 SCR 413.

24 Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159.

The proper functioning of a democracy depends upon the strength and independence of each of its organs.[25]

Hence, the courts observe a self-imposed discipline on their otherwise sweeping powers of review, known as judicial restraint.[26] In pursuance of this discipline, the courts have relied upon certain doctrines such as the doctrine of presumption of constitutionality[27], the doctrine of harmonious construction[28], the Wednesbury principle[29] and a much lesser-known 'doctrine of political question' ("**the doctrine**"). It was evolved by courts in the US and in its essence, it seeks to preserve [the] "…*proper and properly limited role of the courts in a democratic society.*"[30]

While the doctrine has been subjected to criticism both in India and in the US, it has its roots deeply entrenched in constitutional law[31] and the courts[32] have relied upon it in multiple cases to determine the justiciability of an issue. This article seeks to undertake an all-encompassing study on the genesis and growth of the political question doctrine, in order to determine its place in the Indian constitutional set-up. It analyses the major judicial pronouncements of US courts and the scholarly commentary pertaining to the doctrine. It scrutinizes three major theoretical approaches towards its application to discern their respective merits and demerits. After providing this backdrop to the doctrine, the article goes on to analyse landmark cases of the Supreme Court of India where the doctrine has been subjected to different, and quite often, conflicting interpretations. The conclusion of the article provides a synthesis of the preceding sections by applying the theoretical foundations of the doctrine to the Supreme Court's approach towards its application; to argue that the doctrine can, and does fit into the Indian

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25 Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159.

26 Jaya Thakur v. Union of India, (2023) 10 SCC 276; *see also*, Trop v. Dulles, 356 U.S. 86 (1958).

27 PUCL v. Union of India, (2004) 2 SCC 476; Natural Resources Allocation, *In re*, Special Reference No. 1 of 2012, (2012) 10 SCC 1.

28 National Buildings Construction Corporation v. Pritam Singh Gill, (1972) 2 SCC 1.

29 Rohtas Industries v. S.D. Agarwal, (1969) 1 SCC 325.

30 Warth v. Seldin, 422 U.S. 490, 498 (1975).

31 Fritz W. Scharpf, *Judicial Review and the Political Question Doctrine: A Functional Analysis*, 75 YALE L.J. 518, 524 (1966).

32 Baker v. Carr, 369 U.S. 186 (1962), Coleman v. Miller, 307 U.S. 433 (1939).

Constitutional framework, as it is nothing but an overt expression of the principle that the power of judicial review is not unrestricted.

THE POLITICAL QUESTION DOCTRINE IN THE US

A. LEADING JUDICIAL PRONOUNCEMENTS

The inception of the political question doctrine can be traced back to 1803, when the US Supreme Court in *Marbury* declared that "*questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.*"[33] This had the effect of the demarcation of a territory into which the courts cannot venture, as the issue raises a political question or has been submitted to another branch of the state. In simple words, the doctrine relates to the questions which the courts should refuse to decide upon or take cognizance of, on account of their political character.[34]

More than a century after *Marbury*, in 1939, the *Coleman v. Miller* case[35] considerably expanded the scope of this doctrine. In this case, constitutional amendments were excluded from judicial scrutiny, both on procedural and substantive grounds, based on the reasoning that granting a degree of finality to the decision of political branches is imperative in some constitutional matters, including amendments. Declaring amendments to the Constitution to be political questions, the judiciary was reasoned to be ill-equipped to gauge the myriad of political, social and economic conditions which mandate such amendments.[36]

However, till 1962, the courts were unclear about the exact application of this doctrine. It was only after the *Baker v. Carr*[37] ("***Baker***") case that it

[33] Marbury v. Madison, 5 U.S. 137 (1803).
[34] BLACK'S LAW DICTIONARY, 1319 (Bryan A. Garner, 12th ed., 2024).
[35] Coleman v. Miller, 307 U.S. 433 (1939).
[36] Mohammad Moin Uddin, *et al.*, *Judicial Review of Constitutional Amendments in Light of the Political Question Doctrine: A Comparative Study of the Jurisprudence of Supreme Courts of Bangladesh, India and the United States*, 58 J. INDIAN L. INST. 313, 317 (2016).
[37] Baker v. Carr, 369 U.S. 186 (1962).

started taking a definitive shape. A set of factors constituting the doctrine were laid down in this case:

> "*i) a textually demonstrable constitutional commitment of the issue to a coordinate political department;*
>
> *ii) or a lack of judicially discoverable and manageable standards for resolving it;*
>
> *iii) or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;*
>
> *iv) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to co- ordinate branches of Government or an unusual need for unquestioning adherence to a political decision already made;*
>
> *v) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.*"[38]

It must be noted that while laying down these criteria, the court cautioned that whether a case raises a political question or not must be decided on a case-to-case basis and no water-tight rule can be laid down for its application.[39] These principles have subsequently been relied upon by courts[40] to refuse adjudication of impeachment proceedings undertaken by the Senate[41], matters of foreign policy[42], military affairs[43] and political conventions.[44] In recent cases, such as *Zivotofsky v. Clinton*[45],

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[38] *Id.*

[39] *Id.*

[40] Congressional Research Service (US), *Report on The Political Question Doctrine: Justiciability and the Separation of Powers*, DOC. NO. 7-5700 (2014).

[41] Nixon v. United States, 409 U.S. 1 (1972), where the Court decided not to interfere to accord finality to the Senate's decision while relying upon criterion no. 5 laid down in Baker v. Carr, 369 U.S. 186 (1962).

[42] Goldwater v. Carter, 444 U.S. 996, 1004 (1979); Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

[43] Gilligan v. Morgan, 413 U.S. 1, 3-4 (1973).

[44] O'Brien v. Brown, 409 U.S. 1 (1972).

[45] Zivotofsky v. Clinton, 566 U.S. 189 (2012).

the courts have been relatively cautious in the application of the doctrine. However, it continues to hold an important place in US constitutional law.[46]

DIFFERENT APPROACHES TOWARDS APPLICATION OF THE DOCTRINE

The political question doctrine has been subjected to varying interpretations by scholars. Some have supported it but profess a narrow application, some advocate a liberal application, while still some assert that the doctrine either does not or should not exist. These different perspectives can be studied under three broad heads or approaches, namely – Classical, Prudential and Critical.

A. THE CLASSICAL APPROACH

The classical theory propagates for a narrow application of the doctrine. It was initially propounded by Justice Marshall in *Marbury*.[47] Though Justice Marshall did not make an explicit mention of the doctrine, he asserted that issues raising a political question may be beyond the scrutiny of courts but the court *cannot* forgo its constitutional duty to adjudicate issues of law.[48]

The most renowned proponent of modern classical theory is Herbert Wechsler. He tried to reconcile the application of the doctrine with the *"inflexible judicial duty"* of courts to decide cases.[49] The courts, in his opinion, should refuse to take jurisdiction wherever necessary but at the same time, they should *not* (emphasis added) refuse to take jurisdiction solely because they consider the issue to be "*doubtful*." In Wechsler's words, this amounts to *"treason of the constitution."* He believed that the

[46] Curtis A. Bradley, et al., *The Real Political Question Doctrine*, 75 STANFORD L. REV. 1033, 1089 (2023).
[47] Marbury v. Madison, 5 U.S. 137 (1803).
[48] SCHARPF, *supra* note 30.
[49] Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

political question doctrine calls upon courts to decide if an issue has been committed to another organ of the government and that is completely different from a "*broad discretion to abstain.*"[50]

In other words, the classical theorists posited that courts should consider the Constitution as the touchstone to decide whether to abstain or to interfere. A matter placed within the domain of a coordinate branch by the Constitution should not be interfered with by courts. However, questions which are legal must undoubtedly be adjudicated upon. If the court is doubtful as to the nature of the question raised, *i.e.*, if the question is partly political and partly legal, the court must exercise its jurisdiction. It can, therefore, be stated that the classical theorists were in favour of a limited application of the doctrine and emphasized more on the exercise of the power of review, even in "*doubtful*" cases.[51]

B. THE PRUDENTIAL APPROACH

The term *"broad discretion to abstain"* that Wechsler made a reference to is the approach propounded by Alexander Bickel, an American constitutionalist, through his concept of passive virtues.[52] This concept seemingly aligns with Bickel's justification for judicial review in a democracy: that it ensures a principled government.[53] He believed that the judiciary exercises three functions: "*[first], striking down a legislation which is inconsistent with principle, [second], validating a legislation which is consistent with principle, or [third] doing neither.*"[54] In Bickel's opinion, courts

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[50] J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 110 (1988).

[51] WECHSLER, *supra* note 49.

[52] Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 74-80 (1961).

[53] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 169-70 (Yale Univ. Press, 2nd ed. 1986). As per Bickel, the courts are the guardian of *'society's enduring values.*' He distinguishes between the concepts of '*principle'* and '*expediency'* and posits that while the political branches of the state have liberty to act on the premise of expediency (or necessity), judicial review exercised by the courts is "*always idealistic*" and aimed at upholding the ideals (or principles) dear to society. For him, pronouncing and guarding the values of society and ensuring a principled government is the only justification for judicial review in a democracy.

[54] Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1575, 1584-1585 (1985).

have the *discretion* to refuse to decide upon a case where it may not be "*prudent*" to do so.[55] An oft-quoted passage summing up Bickel's description of the political question doctrine is as follows:

> "*Such is the basis of the political-question doctrine: the court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be but won't; finally and in sum (in a mature democracy), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.*"[56]

Though this description reiterates the concepts of principle and expediency to some extent and also recognises the court's lack of capacity to examine certain issues, it is unclear and ambiguous. Bickel terms the judiciary as being "*electorally irresponsible*" which for him, should act as a restraint on its power of judicial review.[57] This power, according to him, is a counter-majoritarian force as striking down an act of the legislature or executive (the electorally responsible organs) gradually frustrates the will of the people. Hence, he states that by applying the principle of passive virtues, the courts should abstain from adjudicating an issue when a *"principled judgement"* is not possible, in order to maintain their perceived legitimacy. Bickel's hypothesis seems to advocate for the deferment of a judgment by the courts till the circumstances are not ripe, and the courts in his opinion, have complete discretion to do so.[58] However, the import of the terms used by him, such as "*circumstances*",

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[55] *Id.*

[56] BICKEL, *supra* note 53, at 184.

[57] *Id.*

[58] BICKEL, *supra* note 53, at 110. Bickel saw nothing in the Constitution to prevent courts from choosing to decide some constitutional issues and not others.

"*principled judgement*" and "*expediency*" is difficult to understand and hence, the prudential approach seems to be an ambiguous one.

C. THE CRITICAL APPROACH

Though Wechsler and Bickel were at loggerheads with each other over the scope of application of the doctrine, their approaches intersected at the point that the doctrine does in fact exist and should be applied by courts. However, starting from the 1970s, attempts were made by a group of scholars to dismiss the very existence of the doctrine.

Louis Henkin, in his work titled "*Is There A Political Question Doctrine*?"[59] states that whenever the courts decide that an issue is better suited to be dealt with by the legislature or executive, they are not applying a doctrine *per se* (emphasis added). Rather, this is done to give ordinary respect to the decisions of the other branches of the government. Even in cases where the courts declare that the impugned issue has been assigned to another organ by the Constitution, they are undertaking judicial review by affirming that such organ was constitutionally authorised to carry out the act. This, according to Henkin, cannot be done without going into merits of the case[60], which is an exercise of the power of review. By implication, the doctrine is rendered redundant even when the court ultimately decides not to interfere in a matter. Therefore, the doctrine, in his words is no more than "*an unnecessary, deceptive packaging of several established doctrines*"[61] and should be discarded permanently.

Professor Redish is another scholar who supports a complete abandonment of the doctrine. He believes that as judicial review is an immutable part of a constitutional democracy, there can be no exceptions to the rule of justiciability.[62] Redish is one amongst several modern scholars who consider that as the judiciary is the only organ empowered to interpret the Constitution, there cannot be a case where the legislature

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[59] Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 598, 599 (1976).
[60] Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 614 (1987).
[61] HENKIN, *supra* note 59, at 622.
[62] Martin H. Redish, *Judicial Review and the Political Question*, 79 N.Y.U. L. REV. 1031, 1059-1060 (1985).

or executive enjoys unfettered discretion.[63] The doctrine is irreconcilable with his vision of constitutional democracy as it seeks to limit the scope of justiciability of issues raised before the court.

CRITICAL ASSESSMENT OF THE THREE APPROACHES

The classical, prudential and critical theories posit different interpretations and scope of application of the political question doctrine. In order to determine which of these theories is legally as well as logically sound, their respective merits and demerits need to be considered.

The classical theory adopts an arguably safe application of the doctrine by relying upon the Constitution. This can be termed as a balanced approach because this leads the court to maintain a harmonious balance between its duty to adjudicate legal issues and forgo adjudication of political issues. However, this theory's application becomes confusing when we look into instances when the courts have transgressed explicit provisions of the Constitution that seemingly confer discretion upon the legislature or executive and have held the matter justiciable. A pertinent example of this is the case of *Powell v. McCormack*, in which the Court intervened in the selection of members based upon the qualifications set by Congress, for which it has been declared as the sole judge by the Constitution.[64] The classical theory provides no solution to this inconsistency.

Bickel's prudential theory has also been criticised on several fronts. In a democracy, the courts do not function solely to maintain their perceived legitimacy. Merely because the judges are not elected by the people, courts cannot shrug off their constitutional duty on the ground that a decision would lead to criticism, hostility or disobedience.[65] If the court exercised the power of review only in cases where the circumstances are

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[63] *Id.*

[64] Powell v. McCormack, 395 U.S. 486 (1969).

[65] Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1477-1478 (2005).

favourable, it would be undermining its position as the institution entrusted with guarding the Constitution. Moreover, the explanation rendered by Bickel for the political question doctrine and the concept of passive virtues is inconclusive. Questions such as what is the exact import of the term "*prudence*", or how the courts can distinguish between constitutional and political questions have been overlooked in his theory.[66]

The political question doctrine, as pointed out by Henkin, can be termed as a manifestation of the principle of separation of powers[67], but in reality, the doctrine goes much beyond this principle and encompasses variegated concepts of judicial abstinence which are required to be observed by courts.[68] There are matters that require extraordinary judicial abstinence, such as those of foreign policy and defence, something which Henkin overlooks. Such matters involve considerations which are exclusively within the knowledge of the executive, due to which the judiciary is not well-equipped to adequately adjudge them.

Moreover, Henkin's view that a court's *prima-facie* refusal to adjudicate upon an issue implies that it has gone into the merits of the case, cannot be said to be correct. This is because a refusal to adjudicate in itself means that the court considers it unwise to touch upon the merits and in turn, dismisses the matter at the outset. Therefore, Henkin's observations regarding the doctrine are also not free of fault.

The author would be inclined to disagree with Redish's observation that any exception to justiciability invites disaster. The court is a judicial institution with limited knowledge about the existing social, political and economic conditions.[69] This should prompt a deferential attitude towards certain issues. The court's role should be limited to examining whether a breach of constitutional principles has taken place.[70] If the court is satisfied that there is no such breach, the political branches should be

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66 BICKEL, *supra* note 53, at 115.

67 HENKIN, *supra* note 59, at 613.

68 Baker v. Carr, 369 U.S. 186 (1962).

69 Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1.

70 B.A.L.C.O. Employees Union (regd.) v. Union of India, (2002) 2 SCC 333.

allowed to exercise reasonable discretion in their domains. This necessarily implies certain limitations on the power of judicial review.

Considering the continuous tussle between scholars regarding the nature of the political question doctrine, as well as its inconsistent application by courts, it is evident that the precise nature and scope of the doctrine is still "*murky and confused*."[71]

THE INDIAN SUPREME COURT ON THE POLITICAL QUESTION DOCTRINE

The political question doctrine has received substantially less attention in India as compared to the US. There is little to no scholarly work on the Indian judiciary's perspective towards the doctrine. However, in several cases encompassing a range of issues, the Supreme Court has made reference to the same. This section contains a concise analysis of the different interpretations that the doctrine has been subjected to by the Supreme Court in several landmark cases.

A. CONSTITUTIONAL AMENDMENT CASES

The *Golak Nath* and *Kesavananda Bharati v. State of Kerala* ("***Kesavananda Bharati***") case(s) are arguably the two most important cases in the history of the Indian Constitution. The primary question before the court in these cases pertained to the power of the Parliament to amend the Constitution under Article 368.[72] In *Golak Nath*, the State raised the contention that the amending power of the Parliament is a sovereign power and cannot be equated with ordinary legislative power. Thus, an Amendment to the Constitution is the prerogative of Parliament, the exercise of which involves a *political question* and hence it is not amenable

[71] Bradley, *supra* note 46.
[72] INDIA CONST., art. 368.

to judicial review. The court rejected this contention and made three observations[73]:

1. That the nature of the question posed before it is irrelevant and the only thing which needs to be determined is whether the matter has been "*explicitly or by necessary implication excluded from its jurisdiction*." (emphasis added)

2. That it is "*not possible to define what is a political question and what is not. The character of a question depends upon the circumstances and the nature of a political society*." (emphasis added)

3. That the objective of Parliament while amending the Constitution may be political but the court in "*denying that power is not deciding upon a political question*." It also noted that the court "*does not decide any political question at all in the ordinary sense of the term*." (emphasis added)

These observations are, in the author's opinion, self-contradictory to some extent. In the first observation, the court believed that the nature of the question was altogether irrelevant. However, in the third observation, the court found it necessary to clear that imposing a limit on the amending power of the Parliament is not a political question, noting that the court ordinarily does not decide political questions. This implies that the court did, in fact, consider the nature of the question to be of relevance. The first and second observations are rendered redundant by this concession, as it found the nature of the question to be of significant importance while determining the justiciability of an issue and evidently, it was also able to distinguish between a political and non-political question in the third observation. Therefore, it can be said that in *Golak Nath*, the court has inadvertently recognised and affirmed the political question doctrine while accepting the inherent limitations on its review power. It was ultimately held by the court that an Amendment to the Constitution comes under the purview of 'law' in Article 13(2)[74] and therefore, the fundamental rights laid down in Part III cannot be abridged by way of an Amendment. It also noted that Article 368 of the

[73] Golak Nath v. State of Punjab, AIR 1967 SC 1643.
[74] INDIA CONST., art. 13(2).

Constitution only provided for the procedure of Amendment and did not confer any constituent power on Parliament to amend it.

To nullify the effect of the *Golak Nath* judgement, the Constitution (Twenty Fourth Amendment) Act was introduced in 1971. The Amendment completely overhauled Article 368 of the Constitution which now conferred constituent amending power upon Parliament including the power to amend fundamental rights.[75]

The said Amendment was challenged in *Kesavananda Bharati*.[76] Similar to the contentions raised in *Golak Nath*, the State asserted that constitutional amendments fall within the realm of the political question doctrine and hence are not subject to judicial review. To answer this contention, the court quoted an excerpt from the Australian case of *Commonwealth of Australia v. Bank of New South Wales* which stated that "*the problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law*."[77] The Supreme Court here undertook a correct interpretation of the limitations in applying the political question doctrine.

The doctrine does not warrant abstention from courts solely because an issue has a political complexion or can have political consequences.[78] In any constitutional matter, the court is not adjudicating upon the social, economic or other issues presented before it but upon the constitutional questions presented.[79] The political question doctrine comes into an application only in cases where a legal question does not arise *at all* (emphasis added) and the matter entirely falls in the political domain. Putting the respondents' concerns to rest, the Supreme Court in this

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[75] The Constitution (Twenty Fourth Amendment) Act, 1971, sp 3, Acts of Parliament, 1971 (India).

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

[77] Commonwealth of Australia v. Bank of New South Wales, [1950] A.C. 235, 310 (Austl.).

[78] *Supra* note 40, at 2.

[79] State of Rajasthan v. Union of India, (1977) 3 SCC 592.

momentous case went on to enunciate the basic structure doctrine[80], posing a limitation on the amending power of Parliament while upholding the validity of the impugned Amendment Act.

B. STATE-EMERGENCY CASES

Article 356 of the Constitution empowers the President to issue a proclamation of emergency if he is satisfied that the constitutional machinery in a state has broken down.[81] The aftermath of such a proclamation is that the concerned state directly comes under the President's rule. A profoundly extraordinary provision such as that of Article 356 was intended to be used in the rarest of rare cases by the members of the Constituent Assembly.[82] However, it was seen that the provision was often used capriciously for attaining oblique motives.[83] The High Courts in several cases[84] had declared that the satisfaction of the President warranting proclamation of emergency is a political issue and the court cannot examine such satisfaction due to a lack of "*satisfactory criteria*"[85] for judicial determination. The proclamation of emergency was thus considered to be a political question entrusted to the executive, beyond the scope of judicial review.

However, this changed after the 1978 decision of the *State of Rajasthan v. Union of India*. The Supreme Court in this case was presented with the issue of determining the extent to which power exercised under Article 356 is subject to judicial scrutiny. Article 74(2)[86] was relied upon by the respondent to argue against the interference of the court as this provision

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[80] The basic structure doctrine restricts the Parliament from amending the fundamental principles of the Constitution, such as democratic and republic state, universal adult franchise, free and fair elections, judicial review and so on.

[81] INDIA CONST., art. 356.

[82] R. Prakash, *Judicial Review of Presidential Proclamation Under Article 356*, 6 SCC J-13 (1998).

[83] Sarkaria Commission Report (1987), p. 6.4.01, quoted in S.R. Bommai v. Union of India, (1994) 3 SCC 1, *infra* note 94; *see also,* Baker v. Carr, 369 U.S. 186 (1962), criterion no. 2.

[84] Rao Birinder Singh v. Union of India AIR 1968 P&H 441; Gokulananda Roy v. Tarapada Mukharjee AIR 1973 Cal 233; A. Sreeramula, *in re*, AIR 1974 AP 106.

[85] *See* Baker v. Carr, 369 U.S. 186 (1962), criterion no. 2.

[86] INDIA CONST., art. 74(2): *"The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."*

bars an inquiry by a court into the advice tendered by the Council of Ministers to the President. It was deemed relevant to rely upon as it seemingly restricted judicial interference in the President's decision to declare a state emergency.

The court referred to the political question doctrine as "*an open sesame expression that can become a password for gaining or preventing admission into forbidden fields.*"[87] This expression finds elaboration in the latter part of the judgement.

The court declared that the President (in consultation with the Council of Ministers) must be left as the "*sole judge*" to determine whether a situation exists that warrants a proclamation of emergency. The facts disclosed to the President by the Council of Ministers are political in nature and the courts should never enter into this "*prohibited field.*" It was observed that "*if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities.*"[88]

However, the court, like in *Kesavananda Bharati*, cautioned that essentially every constitutional question can have a political complexion, but this cannot be the sole ground for the judiciary to refrain from appraising the issue at hand.[89] Undertaking its role as the interpreter of the extent of powers assigned to the political branches in the Constitution, the court held that the President's decision of proclamation of emergency would not be amenable to judicial review *unless* it is *mala-fide* or based on extraneous grounds.[90] The burden of proving that the proclamation was guided by extraneous factors is upon the party that challenges the legality of such proclamation. This can be proved by showing that the proclamation is fuelled by political motives and/or that nothing has been

[87] State of Rajasthan v. Union of India, (1977) 3 SCC 592.
[88] *Id.*
[89] Baker v. Carr, 369 U.S. 186 (1962).
[90] State of Rajasthan v. Union of India, (1977) 3 SCC 592.

placed on record which shows that there is a breakdown of constitutional machinery in the state which warranted the exercise of emergency power.

The Supreme Court's views on the political question doctrine in *State of Rajasthan v. Union of India* have been criticised[91] on the ground that the Constitution (Thirty-Eighth Amendment) Act, 1975 was in force at the time the case was decided. This Amendment declared the President's decision to proclaim an emergency to be conclusive and not amenable to judicial review.[92] However, the explanation of the political question doctrine as laid down in *State of Rajasthan v. Union of India* was later affirmed by the Supreme Court in the case of *SR Bommai v. Union of India*[93]("***Bommai***") as well, long after the said Amendment had been struck down, thereby proving the criticism to be unfounded.

In *Bommai*, the court reasoned that Article 356 of the Constitution is wrapped up with "*political thicket*" not only on account of the proclamation power being vested in the hands of the executive head of the country but also because of the additional layer of judicial abstention posed by Article 74(2).[94] The court declared that such proclamation is a political judgement based on "*varied factors, fast changing situations, potential consequences, public reaction…and a host of other considerations*"[95] which the judiciary cannot gauge due to a want of judicially manageable standards.[96] Hence, it is left to the subjective satisfaction of the President. Scrutinizing the advice tendered by the Council of Ministers or substituting the opinion of the President with its own amounts to a questioning of political wisdom which the courts must avoid. However, the court while concurring with the precedent laid down in *State of Rajasthan v. Union of India* observed that this political thicket can be unwrapped in select circumstances where the emergency provision has been patently misused, leading to a violation of the constitutional principles. This rationale was followed in *Rameshwar Prasad v. Union of*

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91 A.K. Roy v. Union of India, (1982) 1 SCC 271.

92The Constitution (Thirty-Eighth Amendment) Act, 1975, §6, Acts of Parliament, 1971 (India).

93 S.R. Bommai v. Union of India, (1994) 3 SCC 1.

94 *Id.*

95 *Id.*

96 *See* Baker v. Carr, 369 U.S. 186 (1962), criterion no. 2.

India[97], where the court scrutinised the reasons quoted by the State to justify the proclamation of state emergency in order to determine whether the proclamation was in fact, warranted. The court also reiterated that a proclamation issued under Article 356 is amenable to judicial review on the grounds mentioned above[98], *i.e., mala-fide* exercise of power or extraneous considerations.

C. ORDINANCE PROMULGATION CASES

A similar discretionary power is vested upon the President by virtue of Article 123 of the Constitution. It empowers the President to promulgate ordinances when both houses of the Parliament are not in session and when the existence of certain circumstances mandates immediate action.[99] The contours of the powers conferred by Article 356 and Article 123 are relatively similar as both are vested in the hands of the President who exercises the power upon the advice of the Council of Ministers. The case of *AK Roy v. Union of India* ("***AK Roy***") is a landmark pronouncement on the extent of justiciability of promulgation of ordinances. The court in this case laid down that an ordinance is amenable to judicial review *only* (emphasis added) on the grounds of vagueness, arbitrariness, reasonableness and public interest.[100] However, the court was once again confronted with the question of the application of the political question doctrine with respect to Article 123.

The petitioners in this case asserted that the doctrine does not act as a bar against the justiciability of satisfaction of the President while issuing ordinances. To refute its application, two primary contentions were raised, *first* that the doctrine is the result of a rigid separation of powers followed in the US, which is not the case under the Indian Constitution and the observations made by the Apex Court in the case of *Madhav Rao*

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97 Rameshwar Prasad v. Union of India, AIR 2005 SC 4301.
98 State of Rajasthan v. Union of India, (1977) 3 SCC 592.
99 INDIA CONST., art. 123.
100 A.K. Roy v. Union of India, (1982) 1 SCC 271.

Scindia v. Union of India[101] ("***Madhav Rao***") essentially negates the application of the political question doctrine in India.

The court while dealing with these contentions adopted a hostile attitude towards the doctrine. The petitioner's first contention was affirmed by the court. The fact that India follows a flexible model of separation of powers does, in the author's opinion, limit the circumstances where the doctrine can be relied upon, but as noted in the preceding sections, it does not render it otiose. The doctrine can still be applied as the term 'flexible' does not mean that the judiciary enjoys unfettered power. Moreover, the court in this case seemed to have implicitly limited itself to Bickel's interpretation of the doctrine: that they must apply a prudential attitude and not interfere when claims of principle and claims of expediency are at loggerheads with each other.[102] As aforementioned in Part II of the paper, Bickel's interpretation of the doctrine cannot be considered to be an adept one for several reasons.

With regard to the second contention, though the court did not directly address the observations laid down in *Madhav Rao,* at this juncture it is important to understand why the petitioners relied upon the said case to negate the application of the doctrine. The Supreme Court had opined in *Madhav Rao* that there is no political power under the Constitution as it only recognises legislative, executive and judicial powers.[103] However, it would be incorrect to infer that this observation of the court negates the application of the political question doctrine in its entirety. The term 'political' is an umbrella term relating to the policy[104] or administration of the government in which both the legislature and executive play a role. Declaring that these bodies do not exercise political powers is doubtful. The doctrine does not envisage a literal import of the term 'political.'

Also, it is important to consider the context in which the court made this observation. In *Madhav Rao*, the petitioners while relying upon Article

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[101] Madhav Rao Scindia v. Union of India, (1971) 1 SCC 85.

[102] A.K. Roy v. Union of India, (1982) 1 SCC 271.

[103] *Id.*

[104] *Supra* note 34, at 1316, policy means *'the general principles by which a government is guided in its management of public affairs, or the legislature in its measures.'*

363[105] of the Constitution (which precludes the jurisdiction of the Supreme Court in any dispute arising out of any provision of a treaty, agreement or covenant to which the Government is a party) made the claim that in such matters, the President enjoyed sovereign or paramount power not subject to any checks. The court, while rejecting this contention, had stated that there can be no political power vested in the President which can transcend the Constitution or the law. Therefore, the views of the court can be considered to be confined to the peculiar facts of the case.

Another reason why *Madhav Rao* cannot be considered as the final authority to declare the political question doctrine to be inapplicable in India is that the doctrine has been affirmed by the Supreme Court in several subsequent cases. In *Indira Nehru Gandhi v. Raj Narain*[106], the Supreme Court directly tackled the observation made in *Madhav Rao*. It observed that though the political question doctrine may seemingly have *"no hospitable quarters"* in our Constitution, it eventually conceded to the logical presumption that only this doctrine can explain why courts do not interfere in certain issues, such as with the verdict of Parliament to impeach the President.[107]

Therefore, though the Court in *AK Roy* might not have adopted a correct approach in analysing the doctrine, its decision that the doctrine cannot act as a bar to assess if the exercise of power under Article 123 has been used capriciously is constitutionally sound.

Gurudevdatta VKSSS Maryadit v. State of Maharashtra[108] is another case dealing with the justiciability of promulgation of ordinances by the President. Though the court resonated with the narrow grounds on which the court can scrutinize the enactment of an ordinance laid down

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[105] INDIA CONST., art. 363.

[106] Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159.

[107] *Id. See also* Baker v. Carr, 369 U.S. 186 (1962), criterion no. 5.

[108] Gurudevdatta VKSSS Maryadit v. State of Maharashtra, (2001) 4 SCC 534.

in *AK Roy*[109], it adopted a different approach towards the political question doctrine. It opined that the doctrine has "*to be treated as a tool for maintenance of governmental order.*"[110] In other words, the doctrine should be followed in cases where the policy being adopted by the government is in danger of being disrupted. However, the court cautioned that it is impossible to devise a straitjacket formula for application of the doctrine as it would vary as per the facts and circumstances of each case.

D. FOREIGN POLICY AND DEFENSE CASES

The affairs relating to the maintenance of relations with other states, formulation of foreign policy, defence and security matters and execution and recession of treaties have been vested in the hands of the executive by the Constitution.[111] The variegated factors which the courts cannot examine adequately for want of requisite information have refrained the courts from entering into the realm of foreign policy and defence matters as far as possible. This abstention finds its ground in *Baker's* two principles: the institutional limitations of the judiciary and the lack of manageable standards.[112]

An oft-quoted Indian case on the extent of justiciability of actions undertaken by the executive in foreign matters is that of *RC Poudyal v. Union of India*.[113] Succinctly stating the relevant facts of the case, the validity of accession of the state of Sikkim to India and the subsequent insertion of Article 371-F[114] into the Constitution stipulating the special terms on which said accession took place were in question. The State contended that the issues raised in this case "*involve complex questions of political policy and expedience; of international-relations; of security and defense of the realm etc. which do not possess and present judicially manageable standards*"[115]

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[109] A.K. Roy v. Union of India, (1982) 1 SCC 271.

[110] Gurudevdatta VKSSS Maryadit v. State of Maharashtra, (2001) 4 SCC 534.

[111] Marie Emmanuel Verhoeven v. Union of India, (2016) 6 SCC 456; Abdul Salem Abdul Qayoob Ansari v. State of Maharashtra, (2011) 11 SCC 214; Citizens of Green Doon v. Union of India, 2020 SCC OnLine SC 1360.

[112] El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010) (U.S.A.); *see also* Goldwater v. Carter, 444 U.S. 996, 1004 (1979).

[113] R.C. Poudyal v. Union of India, (1994) Supp (1) SCC 324.

[114] INDIA CONST., art. 371-F.

[115] R.C. Poudyal v. Union of India, (1994) Supp (1) SCC 324.

which warrant non-interference by the Court. Reliance was also placed upon Article 2 of the Constitution which confers power upon the Parliament to admit new states into the Union "*on such terms and conditions as it finds fit.*"[116]

The court reasoned that the exercise of power conferred by Article 2 undoubtedly involves complex political issues for the examination of which judicially manageable standards may not be present. However, the court demarcated the strict line of constitutionalism which the legislature cannot transgress even while exercising as wide a power as envisaged under the said Article.[117] Reference was made by the court to the observations made in *Baker* that every case relating to foreign relations does not lie beyond judicial scrutiny.[118]

E. RECENT CASES

In two recent landmark judgements of *Supriyo* v. *State of Rajasthan*[119] ("***Supriyo***") and *Anoop Baranwal* v. *Union of India*[120] ("***Anoop Baranwal***"), the Supreme Court dealt with complex issues seemingly raising political questions. In *Supriyo*, the court grappled with the issue of granting legal recognition to homosexual marriages by reading into the provisions of the Special Marriage Act, 1954.[121] The State relied upon the political question doctrine and the principles laid down in *Baker* to argue that "*such issues are left for being decided by the competent Legislature where social,*

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116 INDIA CONST., art. 2.

117 *See* Madhav Rao Scindia v. Union of India, (1971) 1 SCC 85.

118 Baker v. Carr, 369 U.S. 186 (1962).

119 Supriyo v. Union of India, 2023 SCC OnLine SC 1348.

120 Anoop Baranwal v. Union of India [Election Commission Appointments], (2023) 6 SCC 161.

121 It was argued that the Special Marriage Act, 1954, § 4(c), No. 43, Acts of Parliament, 1954 recognizes marriage only between a male and a female, essentially derecognizing same-sex marriages. Section 4 provides for conditions for solemnization of special marriages. Sub-section (c) provides: "the *male* has completed the age of twenty-one years and the *female* the age of eighteen years."

psychological, religious and other impacts on society can be debated."[122] The court made a general remark upon this argument (while reiterating *Baker's* essentials) that political questions are considered "*off-limits*" for judicial review. However, with respect to the issue raised in the present case, the argument that the doctrine poses a bar to deciding upon the legality of homosexual marriages was rejected by the court, though ultimately it exercised restraint in granting the relief claimed by stating that the "*Court … must steer clear of matters, particularly those impinging on policy, which fall in the legislative domain*" due to its "*institutional limitations.*"[123] This decision has been criticised[124] as some believe that it was an issue which warranted the exercise of the power of review by the court.

On the other hand, in *Anoop Baranwal*[125], the issue of enactment of a law for the appointment of the Chief Election Commissioner and the Election Commissioners of the Election Commission ("**EC**") was raised. The petitioner argued that Article 324(2)[126] of the Constitution imposes an obligation upon the legislature to enact a suitable law in this regard, while one of the arguments of the State was that this issue raises a political question and hence, it should not be interfered with by the court. However, the obligation of enacting a law under this provision had not been met by the legislature till then and appointments of the EC Commissioners were being made unilaterally by the President, *i.e.*, the executive. The court held that by inserting this provision, the Constitution makers intended that the appointment of EC Commissioners must be regulated by law in order to maintain the independence of the EC, which is crucial to ensure free and fair elections.

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122 Supriyo v. Union of India, 2023 SCC OnLine SC 1348.

123 *Id.*

124 Danish Sheikh, *et. al.*, *Besides Marriage Equality: Conversations on Supriyo*, 20(1) SOC. L. REV. (2024), *see also,* Akshat Agarwal, *When Discrimination Is Not Enough,* VERFASSUNGSBLOG (Dec. 8, 2024,), https://verfassungsblog.de/when-discrimination-is-not- enough/.

125 Anoop Baranwal v. Union of India [Election Commission Appointments], (2023) 6 SCC 161.

126 INDIA CONST., art. 324(2): "*The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.*"

It was never intended that this power be unilaterally exercised by the executive. The Court went on to establish an interim Committee comprising the Prime Minister, the Leader of the Opposition and the Chief Justice of India to advise the President in making such appointments until a law is made by the Parliament. Soon after this ruling, a law was passed in this regard.[127]

The inconsistent approach of the court in these two cases is evident. In *Anoop Baranwal*, the issue may be said to be squarely falling under the political question doctrine. *Baker's* first essential that "*a textually demonstrable constitutional commitment of the issue to a coordinate political department*"[128], *i.e.*, where the Constitution commits an issue to a particular branch, is fulfilled here. This is because Article 324(2) of the Constitution explicitly vested the power of appointment of the EC Commissioners in the hands of the President, subject to a law made by the Parliament. However, the court, observing that there was a legislative vacuum on account of the Parliament's non-enactment of law, found it within its institutional competence to lay down an interim scheme, irrespective of the fact that such power was textually committed to other branches. This is in sharp contrast to the *Supriyo* verdict where the court neither found it prudent to accord recognition to homosexual marriages nor suggested that the Parliament make a suitable law/amendment to the existing regulations, citing its institutional limitations. Both cases posed seemingly political questions but the Court adopted completely different approaches in determining its competence to adjudicate the issue raised.

CONCLUSION

After an analysis of the past references made by the Indian Supreme Court to the political question doctrine, it can be concluded that the court's approach towards the political question doctrine has been

[127] Anoop Baranwal v. Union of India [Election Commission Appointments], (2023) 6 SCC 161.
[128] Baker v. Carr, 369 U.S. 186 (1962), criterion no. 1.

fluctuating. The doctrine has been dismissed in its entirety in one case[129], while it has been affirmed in another.[130] Much like in the US, there remains some ambiguity surrounding the doctrine owing to the restraint on the part of courts in recent cases in applying it (though *Baker* continues to be an established authority). The recent decisions of *Supriyo*[131] and *Anoop Baranwal*[132] support this proposition.

However, a common thread of reasoning that seems to flow in all these cases is that the court has been wary of adopting a complete hands-off approach where even the slightest possibility of a violation of the Constitution is in question. When a matter has been textually committed to the legislature or executive, or where the court's jurisdiction has been excluded (such as under Articles 356, 123 and 74(2)), the Court has still ruled in favour of the exercise of judicial review, though in a strict and narrow sense. In contrast, the courts in the US have considered it wise to not interfere where the Constitution grants discretion to the political branches of the state and have placed considerable reliance upon the political question doctrine to abstain from adjudication.

The reason for the Indian Supreme Court exercising over-arching powers of judicial review with limited exceptions while the US Supreme Court being more or less restricted to the 'traditional' role of judiciary can be attributed to different socio-political conditions prevailing in the countries. In India, deep-rooted corruption and malpractices have had an impact on the legitimacy of the legislative and executive branches. This has led to the judiciary being labelled as the last resort for resolution of citizen's problems. The Constitution of India, when considered as a whole, has also reposed trust in the judiciary for guarding the Constitution, which has prompted courts to adopt an 'active' role in the functioning of the state. However, the courts have still been cognizant of their inherent limitations on certain matters where their interference would most likely usurp, and not uphold the constitutional vision.

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129 Madhav Rao Scindia v. Union of India, (1971) 1 SCC 85.

130 S.R. Bommai v. Union of India, (1994) 3 SCC 1; State of Rajasthan v. Union of India, (1977) 3 SCC 592.

131 Supriyo v. Union of India, 2023 SCC OnLine SC 1348.

132 Anoop Baranwal v. Union of India [Election Commission Appointments], (2023) 6 SCC 161.

This is where the political question doctrine comes into the picture. It serves as the yardstick for courts to decide whether a particular case warrants a deferential approach owing to the existence of certain factors. The Supreme Court's views in *State of Rajasthan v. Union of India*[133] that the doctrine is an expression to prevent or admit entry into *"forbidden fields"* correctly implies that it is still ultimately the judiciary which has to decide whether the legislature or executive should be allowed to act without interference. Hence, Redish's views[134] can be termed to be correct to the extent that only the judiciary can interpret the Constitution and that the political branches do not enjoy absolute discretion even where the Constitution seems to confer the same upon them. This is also the approach adopted by the Indian Supreme Court while interpreting cases involving the exercise of discretionary executive power like under Article 356[135] and Article 123.[136]

In sum, it can be said that the Indian Constitution does not entirely prohibit the existence of such a doctrine as the constitutional scheme itself recognises some limitations of the judiciary as well as some independence to be enjoyed by the legislature and executive. It cannot be consistently relied upon by courts as has been the case in the US, but it can surely be used as a barometer to test the nature, and ultimately the justiciability of the question posed before it.

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133 State of Rajasthan v. Union of India, (1977) 3 SCC 592.

134 REDISH, *supra* note 62.

135 S.R. Bommai v. Union of India, (1994) 3 SCC 1; State of Rajasthan v. Union of India, (1977) 3 SCC 592.

136 A.K. Roy v. Union of India, (1982) 1 SCC 271; Gurudevdatta VKSSS Maryadit v. State of Maharashtra, (2001) 4 SCC 534.

UNTANGLING COLONIAL KNOTS: REFLECTING ON ARGHYA SENGUPTA'S, *THE COLONIAL CONSTITUTION – AN ORIGIN STORY* (JUGGERNAUT: 2023)

ADITYA RAWAT[1]

TABLE OF CONTENTS

INTRODUCTION: DECOLONIZATION'S COMPLEXITIES

Bibek Debroy's clarion call, last year, for a new Constitution, did not sit well with jurists, the legal fraternity as well as legal academia.[2] He argued, *"We should go back to the drawing board and start from first principles, asking what these words in the Preamble mean now: socialist, secular, democratic, justice, liberty, and equality. We the People have to give ourselves a new Constitution.*"[3] In 2023, on the occasion of the Constitution Day, the online legal news portal, Bar and Bench published an article featuring insights from legal experts

* Cite it as: Rawat, *Untangling Colonial Knots: Reflecting on Arghya Sengupta's, The Colonial Constitution – An Origin Story (Juggernaut: 2023),* 9(1) COMP. CONST. L. & ADMIN. L.J. 161 (2025).

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[2] Bibek Debroy, *There's a case for 'we the people' to embrace a new Constitution*, THE LIVEMINT (Aug. 14, 2023), https://www.livemint.com/opinion/online-views/theres-a-case-for-we-the-people-to-embrace-a-new-constitution-11692021963182.html.; For similar op-ed, *see,* Alok Bansal, *77th Independence Day: Time is Ripe to Ponder If India Should Switch to Presidential Form of Govt*, NEWS18 (Aug. 15, 2023), https://www.news18.com/opinion/opinion-77th-independence-day-time-is-ripe-to-ponder-if-india-should-switch-to-presidential-form-of-govt-8537187.html.

[3] *Id.*

regarding the demand for a new Indian Constitution.[4] Legal Experts were unanimous in their belief that *"the Constitution of India, as it stands, is capable of enduring future challenges.*"[5]

Discourse concerning the need for a new Constitution or amendments have been around since the making of the Constitution itself. For instance, resolutions were presented in the Constituent Assembly for the formation of a new Constituent Assembly since the existing one had failed in its task and was not perceived to be legitimate.6 Contemporary legal scholarship has often judged the validity of the Constitution through the lens of legitimacy.7 On the other hand, any conversations challenging the legitimacy of the Constitution evoke hostility because of its revered nature. Jawaharlal Nehru anticipated this hostility while presenting the first amendment bill in Parliament as early as 1951. In his speech, he stated, "*If we want to kill a thing in this country, we deify it. That is the habit of this country largely. So, if you wish to kill this Constitution, make it sacred and sacrosanct – certainly.*"[8] As post-colonial India navigated through its 'tryst with destiny' in the face of capitalism, transnationalism, and globalisation using

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[4] Aamir Khan & Giti Pratap, *Constitution Day 2023: Legal experts decry calls for a 'new Constitution'*, BAR AND BENCH (Nov. 26, 2023), https://www.barandbench.com/columns/constitution-day-2023-legal-experts-decry-calls-for-a-new-constitution.

[5] *Id.*

[6] Damodar Swarup Seth, 7, CONST. ASSEMB. DEB., (Nov. 5, 1948), https://www.constitutionofindia.net/debates/05-nov-1948/#102170; To understand the distinction between validity and legitimacy, refer, Upendra Baxi, *Nihilisms, Contradictions, and Anomie in New Constitutionalisms: A view from India,* in BOAVENTURA DE SOUSA SANTOS, SARA ARAÚJO & ARAGÓN ANDRADE (eds.), DECOLONIZING CONSTITUTIONALISM 61 (Routledge, 1st ed., 2024).

[7] *Id.*

[8] PARLIAMENTARY DEBATES (OFFICIAL RECORD) 29 MAY 1951, PART II – PROCEEDINGS OTHER THAN QUESTIONS AND ANSWERS, COLS 964-965, https://eparlib.nic.in/bitstream/123456789/760712/1/ppd_29-05-1951.pdf.

the yardstick of the Constitution, the revered constitutional text often found itself (and still does) at the center of mainstream discourse.[9]

Often repeated and much-needed criticism is directed towards the colonial nature of the Constitution. Scholarship on Constitutional history is replete with such attacks on the colonial epistemology of the Constitution.[10] In this backdrop, Arghya Sengupta's book, The Colonial Constitution' is a timely work, which reflects his anticipation regarding increasing interest in decolonial constitutionalism and the possibilities of 'banal homilies'.[11] It becomes evident in his epilogue wherein he urges the readers that, "*India today needs an honest conversation about its colonial constitution and whether it is ready to chart its own constitutional course. The time for banal homilies is over.*"[12]

Reviewing this work becomes significant *first* due to the complexities associated with the conceptual and jurisprudential understanding of decolonial constitutionalism; and *second,* due to the polarising responses to the work. Dr. Moiz Tundawala criticises Sengupta's approach to alternative formulations to representative democracy and calls out his version as Hindutva Constitutional imagination, stating "*The Hindu Mahasabha's constitutional alternative as reasonable and secular is partial, misleading and dangerous.*"[13] He sardonically draws attention towards Sengupta's professional affiliation with the ruling dispensation suggesting that there is a possibility of this aspect impacting narrative choices while discussing

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[9] Pratap Bhanu Mehta, *This Republic Day, fighting the dark,* THE INDIAN EXPRESS (Jan. 26, 2023), https://indianexpress.com/article/opinion/columns/pratap-bhanu-mehta-writes-this-republic-day-fighting-the-dark-8404865/.

[10] Sandipto Dasgupta, *Democratic Origins I: India's Constitution and the Missing Revolution*, in ALF GUNVALD NILSEN, KENNETH BO NIELSEN & ANAND (eds.), INDIAN DEMOCRACY: ORIGINS, TRAJECTORIES, CONTESTATIONS (Pluto Press, 1st ed., 2019); ARVIND ELANGOVAN, NORMS AND POLITICS: SIR BENGAL NARSING RAO IN THE MAKING OF THE INDIAN CONSTITUTION (2019); For counter-arguments, *see* Ornit Shani, *The People and the making of India's Constitution*, 65(4) THE HIST. J. (2022).

[11] ARGHYA SENGUPTA, THE COLONIAL CONSTITUTION (Juggernaut, 1st ed., 2023).

[12] *Id.* at 216.

[13] Moiz Tundawala, *Book Review- Why not to call the Constitution Colonial*, THE NLS BLOG (Jan. 19, 2024), https://www.nls.ac.in/blog/why-not-to-call-the-constitution-colonial/.; for other scathing criticism of the work, *see* Haresh B. Narasappa, *An Open & Shut Case*, DECCAN HERALD (Oct. 15, 2023), https://www.deccanherald.com/features/books/an-open-shut-case-2725310.

Hindutva constitutional imagination. Dr. Tundawala curtly dismisses the central theme, stating that "*For better or for worse, its Constitution is national*" and opines that Sengupta's work is just another decoloniality onslaught for the sake of it.[14] On the other end of the spectrum, reviews by Swapnil Tripathi, Shishir Tripathi and others are of a more celebratory nature, emphasizing that it is a "*must read not just for members of the legal fraternity but also anyone interested in law, politics and history.*"[15] Swapnil Tripathi's review also defends Sengupta's work, especially post criticisms directed against him on X (formerly Twitter) for propagating the right-wing Hindutva Constitution. He writes, "*Second, the book does not call for a right-wing Hindutva constitution and, in fact, debunks myths about Hindu Mahasabha's ideas for a constitution and argues that it was as colonial as the Constitution of India.*"[16]

The engagement with Sengupta's book is done in three parts. *First,* I will post a summary of the work and assess the merits. *Second*, I will elaborate on critical assessment and limitations of the work. *Last*, I will state my concluding remarks.

SUMMARY OF THE WORK AND ASSESSING THE MERITS

The book's prologue sets the tone of what Sengupta tries to achieve by the end. He juxtaposes homages to the colonial legacy by dignitaries in the Supreme Court on the eve of Constitution Day with problems faced by film-maker Deepa Mehta for shooting her film (*Water*) on the plight of

[14] *Id.*

[15] Swapnil Tripathi, *Book Review: Arghya Sengupta's 'The Colonial Constitution*, THE BASIC STRUCTURE (Oct. 15, 2023), https://thebasicstructureconlaw.wordpress.com/2023/10/15/book-review-arghya-senguptas-the-colonial-constitution/.; Shishir Tripathi, *Beyond hagiography, Arghya Sengupta takes critical look at Indian Constitution*, FIRSTPOST (Oct. 02, 2023), https://www.firstpost.com/opinion/book-review-beyond-hagiography-arghya-sengupta-takes-critical-look-at-indian-constitution-13193712.html.; T.C.A Raghavan, *A Provocative Argument*, THE TELEGRAPH ONLINE (Dec. 01, 2023), https://www.telegraphindia.com/culture/books/a-provocative-argument-the-colonial-constitution-author-arghya-sengupta/cid/1983786.

[16] *Id.*

Indian widows around the same time.[17] He does this to bring out the dichotomy between how Indian civic society, with its deeply entrenched civilisational issues required an autochthonous Constitution and ways in which the erudite, open-minded constitutional framers thought of the Constitution, consequently giving us the '*music of an English band*' when '*we wanted the music of veena or sitar.*'[18] He strongly asserts that our Constitution is a colonial document, and something that '*has been widely glossed over.*'

The book consists of two parts with each part containing three chapters. Through the first part, he substantiates his core argument of why the Constitution is colonial. In the second part, he engages with then available alternatives during the making of the Indian Constitution.

In the first chapter of Part-I, he traces how and why Government of India Act, 1935 ("**the 1935 Act**") became a typecast document to adopt and modify, despite the knowledge that the same legislative framework was set in motion to substantiate imperialism. Sengupta argues in the chapter that there were multiple reasons for making the conscious choice of using the 1935 Act as a base document. I am positioning four of them for the purpose of this review.

First, tumult of the period (pre and post partition) – The events leading to the partition resulted in the change of immediate priorities for the Constituent Assembly, which became more apparent with the absence of the Muslim League. The immediate concern was to reach a consensus and the 1935 Act was the least bad option available at the time.

Second, working knowledge of the 1935 Act by BN Rau and major national parties – BN Rau, who was the Advisor to the Constituent Assembly, had extensive experience of working with the 1935 Act. The

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[17] The film was considered threatening to the cultural integrity of the nation through its negative portrayal of Varanasi and Hindu widowhood, *See* Edwina Mason, *The water Controversy and the politics of Hindu Nationalism*, 25(3) SOUTH ASIA: J. SOUTH ASIA STUD. 253 (2002). For understanding the controversy, *see* ABC News, *'Water' Fires Up Hindu Controversy*, ABC NEWS (May 26, 2006), https://abcnews.go.com/International/Entertainment/story?id=2007642&page=1.

[18] The author borrows this line from Kengal Hanumanthaiah's speech in the Constituent Assembly. For the entire speech, *see* Kengal Hanumanthaiah, 11 CONST. ASSEMB. DEB. (Nov. 17, 1949), https://www.constitutionofindia.net/debates/17-nov-1949/.

author notes that even BN Rau's own survey questions show that his ideas were heavily influenced by this earlier act. Similarly, all parties involved in making of the Constitution had working knowledge of the 1935 Act. Through provincial elections in 1937, the Congress formed governments in Madras, Bihar, Central Provinces, United Provinces, and Bombay. Muslim League also had extensive knowledge of the operation of the Act through its administration of Punjab, Bengal, and Sindh.

Third, a lawyerly conservative methodological approach of making the Constitution (every member who served on the Drafting Committee was a lawyer) – The framework relied heavily on established precedents, drawing inspiration from successful governance systems in other countries, particularly those with Commonwealth ties.

Fourth, Dr. Ambedkar's strong reliance on modern concepts of liberal and socialist democracy – Dr. Ambedkar considered it commonsensical to do cautious copying from other constitutional designs. He stated while presenting the draft Constitution, "*There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a Constitution.*"[19]

In the second chapter, Sengupta traces the dilution of bold, original, post-colonial construct of India as an economic democracy through directive principles, and colonial vestiges of preventive detention framework in Constitution.

When BN Rau conceptualised Directive Principles, he found takers of the concept through Dr. Ambedkar and Professor KT Shah. Sengupta posits that there was a dearth of serious discussions over the binding nature of Directive Principles in the Drafting Committee as well as the Constituent Assembly even by those who ardently supported the concept. He further argues that the distinction between enforceability of civil-political rights and socio-economic rights was always fluid and not acutely clear. This led to a dilution of radical ideas through clever lawyerly formulation of

[19] B. R. Ambedkar, 7 CONST. ASSEMB. DEB. (Nov. 4, 1948), https://www.constitutionofindia.net/debates/04-nov-1948/.

bifurcating them in Part-I rights and Part–II rights and ultimately, making it a 'dustbin of sentiments'.[20]

Concerning preventive detention, the author traces why framers went for a deep state model even when some of the core demands made during the freedom struggle advocated strongly against overarching influence of the state.[21] He argues that the presence of preventive detention in Part-III further substantiates that the freedom struggle was not the source of the formulation of fundamental rights and legal pragmatism coupled with availability of benchmarking provisions in the Act won hands down.[22] In the third chapter, Sengupta examines the historiography of conceptual foundation for president rule in the Constitution. He argues that the expanded logic of Section 93 of the Act in the form of emergency and failure of State machinery owes primarily to the fears of makers, especially post-partition and the need of maintaining territorial integrity.

In Part II, Sengupta deliberates with three alternate models available in the form of three chapters. In the first chapter of Part II, he talks about the Gandhian Constitution and why it remained an illusive promise irrespective of its radical appeal. Some of the important tenets of the Gandhian model are – village republics as the self-sufficient confederations, duty-centric relationship with State, no separation of powers, no common-law legal system, etc.[23] The author argues that one of the significant reasons for the curt dismissal of the Gandhian Constitutionalism was that neither Gandhi nor those devout Gandhians (for instance, Shriman Narayan Agarwal, and Prof. Shibban Lal Saxena) provided serious thoughts on the pragmatic and applicability of Gandhian conceptual frameworks. More importantly, the author posits that this

[20] SENGUPTA, *supra* note 11, at 67.

[21] The Hindu Team, *What is 'Deep State' in the field of political science?*, THE HINDU (Mar. 22, 2017), https://www.thehindu.com/opinion/op-ed/what-is-deep-state-in-the-field-of-political-science/article17565975.ece.

[22] SENGUPTA, *supra* note 11, at 86..

[23] Shriman Narayan Agarwal, *Gandhian Constitution For Free India* (1946), CONSTITUTION OF INDIA, https://www.constitutionofindia.net/historical-constitution/gandhian-constitution-for-free-india-shriman-narayan-agarwal-1946/.; NARENDRA CHAPALGAONKAR, MAHATMA GANDHI AND THE INDIAN CONSTITUTION (Routledge, 1st ed., 2016).

might be owing to Gandhi's equivocal understanding of Constitutions itself, for which Sengupta calls Gandhi a 'Constitutional realist'.[24]

In the second chapter, Sengupta examines the possibility of a Hindutva constitutional imagination. His core thesis for this chapter is that there was no Hindutva-based alternative to the Colonial Constitution. The Constitutional endeavor of Hindu Mahasabha i.e., the Constitution of the *'Hindusthan Free State'* was heavily borrowed from the West because it endorsed secularism and equal citizenship against the fundamental principles of Hindutva. Sengupta asserts that the Mahasabha's Constitution was *"undoubtedly a sacrifice of ideology at the altar of political acceptability"*. He also criticises the document as 'a fanciful wish list'.[25] He traces the 'lack of constitutional imagination' among Hindutva ideologues to the rise of Savarkar and the RSS, for whom the Constitution was never a priority. He briefly engages with Savarkar's revivalist formulations through his work, *Essentials of Hindutva*..[26]

The last chapter of the book dispels the mainstream myth of Ambedkar's singular authorship of the Constitution. Sengupta further asserts that the title of 'Drafting Committee' is misleading because the Committee's main function was to scrutinise the draft prepared by Sir BN Rau and to revise it before presenting it to the Constituent Assembly. He takes the readers through the Constitution of Committees or sub-committees that were primarily responsible for writing the text of the Constitution. He brings out the paradox of attributing authorship to Ambedkar, by stating that most of Ambedkar's suggestions in the form of his work, *Constitution of the United States of India* (which he wrote on behalf of the All India Scheduled Castes Federation) was dismissed by Sub-committee on Fundamental Rights. Some of his suggestions such as separate electorates for scheduled caste, and reserved seats for them in legislature were not discussed in the assembly at all.[27] In the chapter, the author also delves deeper into why Ambedkar was so strongly in favour of the strong Central Government.

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[24] SENGUPTA, *supra* note 11, at 137.

[25] SENGUPTA, *supra* note 11, at 159.

[26] V. D. SAVARKAR, ESSENTIALS OF HINDUTVA (Veer Savarkar Prakashan, 1923).

[27] SENGUPTA, *supra* note 11, at 180.

The author compares the same to his lived experiences that made him believe that a strong Centre is a precondition for safeguarding minority's rights. For Ambedkar, the Government of India Act, 1935 was a good base document advocating for a strong union government having overwhelming powers to curtail provincial autonomy.

There are two key merits of the work. *First*, Arghya Sengupta ensures that it is an immersive reading with evocative writing style and lucid analogies**.** His writing does not succumb to academic writing silos and tries to break free from it.[28] This has also been pointed out by reviewers who praised his work for catering to readership outside academia.

Second, it is a sincere endeavor to understand the colonial consciousness of Indian legal thought through the prism of constitutional text. One must acknowledge that most constitutional law textbooks taught in Indian law universities venerate the Constitution and its makers. Similar sentiments are buttressed by innumerable apex court's judgements. Sengupta himself acknowledges the hagiographic lens associated with contemporary scholarship on constitutional history in his prologue. Sengupta's scholarship is a welcome addition to strands of thought which allows us to reflect on the deification of the Constitution.

CRITICAL ASSESSMENT AND LIMITATIONS OF THE WORK

The book provides a comprehensive overview of why the Constitution can be called Colonial. Nevertheless, some of the arguments presented are open to critical engagements. In this part, I will state my four major reservations of the work. They are explained under subheadings as below:

(i) Constricted engagement with Decolonisation and Plurinational Constitutionalism**:** My primary reservation with Sengupta's work lies in his limited engagement with decolonisation and plurality. Decolonisation is an ongoing process which seeks to, *first*, challenge and overcome the legacies of colonialism and imperialism by decentering dominant Western epistemological and ontological perspectives and centering the experiences and knowledges of marginalized and colonized communities and, *second*, acknowledges diversity of cultures, knowledges, and forms of

[28] Tripathi, *supra* note 15.

life to promote a more inclusive and participatory form of global governance.[29]

This deprives Sengupta of the richness required to untangle conceptual knots of Colonial Constitution. His entry point of what he understands by colonialism is unfortunately linear. As I stated earlier, decoloniality is a messy knot (owing to multiple coloniality of India including British, Portuguese, French, and Dutch rule as well as internal colonization when looked through the prism of caste and subalterns).[30] Prof. Sudipta Kaviraj concedes this complexity and writes:

> "*Colonialism was a vast, internally diverse, phenomenon…European colonial power – in its political, economic and epistemic forms – encountered quite different social and epistemic universes in its path to world conquest. Subjection of each social universe – the Indian, the Islamic, the Latin American, the East Asian, the African – required different types of power strategies, and produced different kinds of eventual configurations of subordination*".[31]

As an example, the work is also premised on an *a priori* assumption that concepts such as liberty, equality, and fraternity are Eurocentric canon. There is a plethora of scholarship that challenges the legitimacy of them being western concepts.[32] Epistemology of South should hold "*constitutional principles up to the cruel mirrors of the colonialist and patriarchal capitalist world in which we live*" as Global South's postcolonial history is

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[29] BOAVENTURA DE SOUSA SANTOS, EPISTEMOLOGIES OF THE SOUTH – JUSTICE AGAINST EPISTEMICIDE (Routledge, 1st ed., 2016).

[30] DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (Princeton University Press, 1st ed., 2000); For Internal Colonization, *refer*, B.R. AMBEDKAR ANNIHILATION OF CASTE (1936); G C Spivak, *Can the Subaltern Speak?,* in CARY NELSON & LAWRENCE GROSSBERG eds., MARXISM AND THE INTERPRETATION OF CULTURE, at 271 (University of Illinois Press, 1st ed., 1988).

[31] Sudipta Kaviraj, *On Decolonizing Theory*, 6(1) KAIROS: A J. OF CRIT. SYMP. (2021).

[32] Aakash Singh Rathore, *Decolonizing Constitutional Law: An Ambedkarite Perspective*, YOUTUBE (Oct. 06, 2023), https://www.youtube.com/watch?v=VCpivc2C2Rk&t=13s.

marked by complicities with colonial legacies, including the adoption of modern law, western institutions and western epistemologies.[33]

Similarly, he uses Constituent Assembly debates as focal points for his core argument perpetuating what Peter Fitzpatrick calls, *Mythology of Modern law*[34] or Griffiths' *Legal Centralism*.[35] It is disheartening that his alternatives do not even mention (i) constitutional texts that were being developed in princely states (Example, *Shahpura State Constitution, Manipur State Constitution*), and (ii) constitutional alternatives posited by plural marginalized sections (tribals/subalterns - *adivasis, etc.*) of India. Rohit De & Ornit Shani's recent contribution is an insightful response to constitutional stories within corridors of Constituent Assembly.[36] They posit:

> *"… the storeyed halls of the Assembly were only one of multiple spaces where the Indian constitution was being engaged with, debated, contested and produced. The members of the Assembly, it shows, were not the sole participants in the constitution-making process. The embryonic constitution had vibrant life outside formal legal chambers, which was critical for its future reception and legitimacy. The 5,546 pages of the Assembly debates represent a tiny sample compared with the thousands of pages of wide-ranging deliberations around the making of the constitution outside the Assembly*".[37]

Such scholarship highlights the significance of considering the broader context of constitution-making, beyond the formal Assembly debates, and emphasizes the importance of a more comprehensive and inclusive approach to understanding India's constitutional history.

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[33] BOAVENTURA DE SOUSA SANTOS, SARA ARAÚJO & ARAGÓN ANDRADE (eds.), preface.

[34] PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 3 (Routledge, 1st ed., 1992).

[35] John Griffiths, *What is Legal Pluralism?*, 18(24) J. LEG. PLUR. UNOFF. LAW (1986). As per Griffith, In the legal centralist conception, law is an exclusive, systematic and unified hierarchical ordering of normative propositions predominantly having statist origin.

[36] Rohit De & Ornit Shani, *Assembling India's Constitution: Towards a New History,* 263(1) PAST & PRESENT 205, 248 (2024).

[37] *Id.*

(ii) Sengupta's Origin story: This criticism flows from the first criticism itself. Sengupta ends his prologue by stating that, *"It is an origin story that begins on the morning of April Fools' Day, 1937"*.[38] He establishes this over the period of next three chapters but conspicuously misses out on any engagement with historical constitutional journey prior to the Government of India Act 1935. This becomes major lacuna, especially when he wants readers to believe that the Constitution is 'a case of cautious copying'.[39] He justifies it further by stating that, "*In 1950, the only document that could generate such consensus was a tried and tested colonial one*".[40]

Recent works on historical constitutions like the Swaraj Bill, 1895 and Sir T Madhava Rao's 1874 Constitution for the Princely States might posit direct challenges to Sengupta's understanding of Indian constitutional journey being entirely colonial.[41] As political Scientist, Rahul Sagar recently argued while criticising mainstream constitutional story of India:

> "*What this story would miss, however, is that long before 1949, there was on the table another constitution for another India. This constitution was drafted in March 1874. It was the product not of British India, but of Indian India – as the Princely States were termed.*"[42]

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[38] SENGUPTA, *supra* note 11, at 14.

[39] SENGUPTA, *supra* note 11, at 48.

[40] *Id.*

[41] Rohit De, *Constitutional Antecedents*, in SUJIT CHAUDHARY, MADHAV KHOSLA & PRATAP BHANU MEHTA (eds.), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, New Delhi, 2016); S.P. Sathe, *Fundamental Rights and Directive Principles*, in N.M. TRIPATHI (ed.) CONSTITUTIONAL DEVELOPMENTS SINCE INDEPENDENCE (N. M. Tripathi Private Ltd., Bombay, 1975); and NIRAJA GOPAL JAYAL, CITIZENSHIP AND ITS DISCONTENTS – AN INDIAN HISTORY (Harvard University Press, 2013).; For Madhao Rao's constitution, *see* Rahul Sagar, *How a researcher found, almost accidentally, the first modern Indian treatise on government*, THE SCROLL (Sept. 02, 2022), https://scroll.in/article/1031818/how-a-researcher-found-almost-accidentally-the-first-modern-indian-treatise-on-government.

[42] Rahul Sagar, *How, and why, the first Constitution in modern India was written, 75 years before the one we follow*, THE SCROLL (Jan. 19, 2020), https://scroll.in/article/950118/how-and-

(iii) Narrative choices of the author lack substantive context: There are multiple instances when Sengupta throws facts at the readers without providing substantive context. The same has also been pointed out by other critics of this work.[43] For instance, Ambedkar's swing vote that in his words, *"fundamentally responsible for conceptualizing the preventive detention provision"* does not have enough context especially how other Drafting Committee members viewed preventive detention. (Page 87) As a reader, it leaves you wanting for more, especially when it forms such an integral component of his central thesis.

(iv) Most of his arguments are neither novel nor innovative**:** His core argument of tracing coloniality of Indian Constitution to the Act of 1935 is tried and tested disquisition. Retd. Supreme Court judge Ravindra Bhatt's recent lecture titled, *Shedding the Colonial Hangover - Perspectives on Indianising the Legal System* at Kerala High Court dismissed the argument of the Un-Indianness of the Indian Constitution just because of its connection with the 1935 Act.[44] He stated:

> "*Our constitution is a living document which cannot but be the answer to what is Indian. Just because it has colonial origins cannot be reason to say it is essentially un-Indian…The blind rejection of the Constitution on the ground that it is a modification of Government of India Act of 1935 is not a well thought out argument…*"[45]

Similarly, he dedicated an entire chapter to dispel the myth of singular authorship of Dr. Ambedkar. However, academic scholarship on the making of the Indian Constitution is characterised by nuanced and complex arguments that extend beyond debates over authorship and Constituent Assembly discussions, even problematizing the notion of

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why-the-first-constitution-in-modern-india-was-written-75-years-before-the-one-we-follow.

[43] RAGHAVAN, *supra* note 15.

[44] Giti Pratap, *Constitution cannot be rejected merely because it is a modification of Government of India Act: Justice S Ravindra Bhat*, BAR AND BENCH (Dec. 06, 2023), https://www-barandbench-com.cdn.ampproject.org/c/s/www.barandbench.com/amp/story/news/constitution-cannot-rejected-modification-government-of-india-act-justice-s-ravindra-bhat.

[45] *Id.*

'We, the People' as the foundational basis of the Constitution.[46] As an anecdotal evidence, Aditya Nigam in his seminal paper, '*A text without Author*' categorically stated that if we look at Constituent Assembly as an 'event' itself, it will deepen our understanding of "*how different currents and polyphonic voices came together in the forming of the conjuncture within which the assembly took shape - as demanded by the imperatives of a common territory, tradition and history.*"[47]

CONCLUDING REMARKS

Assessing the merits and criticisms of the work, one can safely comment that Arghya Sengupta's book is an interesting addition to contemporary scholarship on colonial impact in Indian constitutionalism. Decolonisation is inevitable and much needed, especially in the context of State apparatuses which are heavily dipped in the ink of colonial epistemology. With recent attempts at decolonization of laws (For example, Bhartiya Nyaya Sanhita, 2024), it becomes a pressing need to understand decolonization and its emancipatory promise.[48]

Frantz Fanon in one of the earliest works on European coloniality urges his fellow citizens thus:

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[46] Kalyani Ramnath, *'We The People': Seamless Webs and Social Revolution in India's Constituent Assembly Debates,* 32(1) SOUTH ASIAN RESEARCH (2012).

[47] Aditya Nigam, *A Text without Author – Locating Constituent Assembly as an event*, 39(21) E.P.W. 2107 (2004).

[48] Prof. Upendra Baxi, *Crime & Punishment: Between Mood Swings of Reform*, INDIA LEGAL (Sept. 25, 2024), https://www.indialegallive.com/magazine/bharatiya-nyaya-sanhita-bill-mob-lynching-sedition-media-freedom/.; Shreya Bansal, *The three new criminal law Bills: Missed opportunities and misplaced priorities*, THE LEAFLET (Sept. 08, 2024), https://theleaflet.in/the-three-new-criminal-law-bills-missed-opportunities-and-misplaced-priorities/.; Gyanvi Khanna, *New Criminal Laws Are Continuation Of Colonial Logic, Expand Police Powers: Professor Anup Surendranath*, LIVELAW (Jan. 15, 2024), https://www.livelaw.in/top-stories/new-criminal-laws-are-continuation-of-colonial-logic-expand-police-powers-professor-anup-surendranath-246737.; Anushka Pandey, Preeti P. Dash, & Mrinal Satish, *Bharatiya Nyaya Sanhita: Decolonising or Reinforcing Colonial Ideas?*, THE NLS BLOG (Jan. 25, 2024), https://www.nls.ac.in/blog/bharatiya-nyaya-sanhita-decolonising-or-reinforcing-colonial-ideas/.

> "*So, comrades, let us not pay tribute to Europe by creating states, institutions, and societies which draw their inspiration from her. Humanity is waiting for something other than such an imitation, which would be almost an obscene caricature…If we wish to live up to our peoples' expectations, we must seek the response elsewhere than in Europe.*"[49]

Decolonisation might not be a novel concept but is "worth remembering and repeating."[50] Jean Paul Sartre in the foreword of the above work asserts that through Fanon's work, "The Third World finds itself and speaks to itself".[51] In a similar vein, Sengupta's work is partially successful for the Indian Constitution to 'find itself and speak to itself.'

[49] FRANTZ FANON, THE WRETCHED OF THE EARTH, at 254-55 (Grove Press, 1963).
[50] Yogendra Yadav, *India needs to challenge colonialism in its own language. But solution isn't Hindu worldview*, THE PRINT (May 06, 2022), https://theprint.in/opinion/india-needs-to-challenge-colonialism-in-its-own-language-but-solution-isnt-hindu-worldview/944406/.
[51] FANON, *supra* note 49, at 9.

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