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## CONTENTS

## EDITORS' NOTE

As Editors-in-Chief, it gives us immense pleasure to present Issue 4 of Volume 4 of the Comparative Constitutional Law and Administrative Law Quarterly (**"CALQ"**).

### IN THIS ISSUE

In ***Application of Fundamental Rights against Educational Institutions in India: Moving beyond the State Action Doctrine*****,** *Karan Trehan* and *Nishant Pande* advocate for alternatives to bring educational institutions within the ambit of fundamental rights. They begin with the premise that reliance solely upon "State Action Doctrine" under Article 12 of the Constitution of India has largely rendered fundamental rights ineffective- when sought to be applied against educational institutions. To drive this point home, the authors have delved into the judicial history on this issue. They discuss the decision in *Dr. Janet Jayapaul v. SRM University* [(2015) 5 S.C.C. 530] at length, where the Supreme Court of India had overruled *hitherto* jurisprudence on this matter and held a private university to be "State" under Article 12 of the Constitution of India. This article argues that "State Action Doctrine" has rendered Fundamental Rights as State's Constitutional duty of protecting rights, instead of substantive Constitutional rights and makes a case for horizontal application of Right to Education under Article 21 of the Constitution of India.

In the backdrop of the recent debate over role of Office of Governor, in the aftermath of Karnataka and Maharashtra State Assembly elections, we present ***A framework to reform the appointment procedure and discretionary authority of the Governor*** wherein *Surya Rajkumar* provides a framework to reform the process of appointments to the office and constrict the role and powers derived from the office. The author begins with providing a historical context of the role of governor and comparing the same with the current legal framework. The author further delves into a comparative analysis of the office of governor from United States of America, Canada and Australia. Among other things, the author has discussed several reforms for the office of Governor, which include

reduction of discretionary powers available to governors and increasing the threshold of non-involvement in active politics from 2 years to 10 years.

In ***Altering the Supreme Law of the Land: A Constitutional Dichotomy between India and Australia****, Aakash Laad* and *Harsh Singh* present a comparative analysis of public referendums and representative democracy as procedure(s) for amendment of the Constitution in Australia and India respectively. The authors have provided a comprehensive insight into the Australian and Indian framework for Constitutional amendment and have analysed the several lacunas present in both the systems. The authors suggest that the presence of provisions relating to, *inter alia*, judicial review, make the Indian framework for Constitutional amendment more efficient and desirable in comparison to the Australian framework for Constitutional amendment.

In ***Whipping up the 'cream'?* Indian Supreme Court and its decision in B.K. Pavitra-II,*** *Anant Sangal* sheds light on *B.K. Pavitra v. Union of India* [2019 S.C.C. OnLine SC 694], a recent judgement on affirmative action by Supreme Court of India. In this case comment, Anant has sought to make a case for the Courts to retain their power of judicial review on matters pertaining to reservations to caste minorities. He further argues that the idea of creamy layer for the Scheduled Castes and Scheduled Tribes destabilises the Dalit and Adivasi politics in India and hence must be made applicable to the aforementioned classes.

In ***Interview with Justice (Retd.) Shiva Kirti Singh***, Chairman of the Telecom Disputes and Settlement Appellate Tribunal and former judge of the Supreme Court, Justice Singh elucidates on various issues and topics, ranging from his professional journey to the appointment and accountability of the higher judiciary in India. Additionally, he puts forward his view pertaining to the desirability and effectiveness of impeachment proceedings (against sitting judges of the higher judiciary). Justice Singh's opinion on the Hon'ble Supreme Court's approach *vis-à-vis* matters of economic concern seem to be of grave importance.

***The Transformative Constitution by Gautam Bhatia*** has been reviewed by *Sayantani Bagchi*. According to Mr. Gautam Bhatia the Constitution of India is an embodiment of India's destiny to break free

from the linear continuity of political order from past, and he has successfully illustrated the same, through the course of nine major judgements under the theme of equality, liberty and fraternity. Sayantani celebrates the fresh and unbiased perspective offered by the book in a time of surge in radical progressivism and recommends the book as a must read for academicians and other members of legal fraternity.

***A People's Constitution by Rohit De*** has been reviewed by *Ashutosh P. Shukla.* In this book, Mr. Rohit De has utilized four judgements by the Supreme Court of India, as an example to further his view that the rights enshrined in Constitution of India were utilized by citizens at the margins, through writ jurisdiction of the Supreme Court. These cases, discussed as four separate chapters, interweave the socio-political conditions prevalent at the time, in its narration along with providing insights in legal aspects of curtailing citizens' rights by the State. Ashutosh readily agrees with Mr. Rohit De's views and recommends this book as a must read, in context of recent developments in India's institutions in the aftermath of 2019 General Elections.

***The Great Repression by Chitranshul Sinha*** has been reviewed by *Abhinav Sekhri.* The Great Repression is one of the few books written on development of law on Sedition in India and in this regard, Abhinav believes that this book is although not a comprehensive guide to sedition laws of India, it nevertheless offers a substantial introduction for the un-initiated, in an accessible manner.

**ACKNOWLEDGEMENT**

Through the course of the previous year, we have faced considerable challenges and have found ourselves looking for the shore. In moments such as those, it was our University through the Hon'ble Vice Chancellor, Prof. (Dr.) Poonam Pradhan Saxena, which has kept us going. The guidance and support of our University's Registrar, Mr. Sohan Lal Sharma was unparalleled. We take this opportunity to thank Prof. (Dr.) I.P. Massey, Director, Centre for Comparative Constitutional Law and Administrative Law, for having dwelled and deliberated on every aspect of this issue to further the vision of the journal.

We owe our gratitude for the consistent efforts made by the IT Department of our University, represented by Mr. Gyan Bissa, which has ensured that the journal is equipped with the best of resources at all times.

The culmination of this issue demands that we thank the members of the Editorial Board for their unequivocal dedication to the cause of the journal. They have once again proved that at the end of the day, it is all about team-work. While we hand over the reign to the next editorial board, we hope that the journal attains new dimensions in its upcoming years.

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

Gagan Singh and Akhil Shandilya
**Editors-in-Chief**

# JOURNALISTS' CLAIM TO SOURCE PROTECTION: REITERATING THE CALL FOR SHIELD LAWS IN INDIA[1]

For a society-state that is embroiled in controversies, misadministration, and misgovernance, the role of a strong press[2] in checking the ills of the decision makers is of paramount importance. Let us start with the proposition that freedom of press is undoubtedly one of the primary tools to ensure checks and balance in the society-state. For the purposes of this discussion, we assume that the checks and balances ought to be maintained not just with regards to the executive or the legislature but the courts of the land as well. At the bedrock of our discussion shall lie the assumption that unfiltered and unfettered access to information regarding governance and adjudication is an intrinsic right of the people in a society-state. This shall be the premise of our discussion hereafter on the need for '*shield laws*' in India. Shield law is the colloquial phrase to represent the idea of a law, which protects a journalist from disclosing her source (of information), subject to overriding public interest requirements- upon being compelled by the government[3] or the courts of law.[4]

The free speech allows open and unfettered dissemination of information. In the profession of journalism, free speech and protection of therewith allows a professional to seek the accountability of the ones who hold the highest public offices. The right to freedom of speech and expression is mandated under Article 19(1)(a) of Constitution of India, 1950[5] (**"Indian Constitution"**). By a catena of judgments[6] of the Hon'ble Supreme Court of India (**"Supreme Court"**), it is beyond dispute that the freedom of

[1] Editorial by Gagan Singh and Akhil Shandilya, Editors-in-Chief, Comparative Constitutional Law and Administrative Law Quarterly.

[2] For the purposes of brevity and to avoid confusion, it is clarified that the terms such as 'members of the press', 'journalists', 'reporters' and 'editors' are used interchangeably.

[3] GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB 320 (2016).

[4] Bhatia, Free Speech and Source Protection for Journalists, The Centre for Internet and Society (Jun. 19, 2014) https://cis-india.org/internet-governance/blog/free-speech-and-source-protection-for-journalists.

[5] INDIA CONST. art. 19(1)(a).

[6] Bennett Coleman v. Union of India, 1973 A.I.R. 106, ¶ 16 (Supreme Court, Five Judges' Bench) ; Indian Express v. Union of India, 1986 A.I.R. S.C. 515 (Supreme Court, Three Judges' Bench).

press, though not envisaged explicitly, is in essence recognised as a fundamental right under the Indian Constitution. Restrictions, if any, to be imposed upon the exercise of free speech shall be within the ambit of restrictions as prescribed under Cl. (2) of Article 19.[7]

We must not forget that Cl. (3) of Article 20[8] of the Indian Constitution mandates that one must not be compelled to be a witness against themselves.[9] Though, we enter the domain of this constitutional provision whilst touching upon criminal law jurisprudence, it is imperative for us to deliberate on the relevance of this provision in terms of the subject at hand. Take for instance, the case of the reportage surrounding the *Rafale* aircraft deal.[10] The editor of a newspaper had stated that he owed no legal obligation to disclose their source- which allowed them to access 'sensitive information' to which only the ones in the government were privy to.[11] Without dwelling into the intricacies of that particular case, we shall emphasize on the sub-text therein. The newspaper claimed that it could not divulge the identification of its sources owing to the fact that the sources in question had confided in the newspaper (through its editor) on the account of maintaining the anonymity.[12] Interestingly, when pressed about the charge that the newspaper had put 'sensitive information' in the public domain, the concerned editor was quick to argue that it chose to highlight only the relevant information in the documents it got hold off. In saying so, he argued that the documents in question had other information of sensitive nature, which the newspaper deem fit not to disclose, whilst exercising its 'due diligence'. This instance is apt to gauge the scope of other

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[7] INDIA CONST. art. 19(2).
[8] INDIA CONST. art. 20(3).
[9] *See In Re:* Resident Editor and others of the Hindustan Times,1989 S.C.C OnLine Pat 183 (Division Judges' Bench, Patna High Court).
[10] *See* Yashwant Sinha v. Central Bureau of Investigation, (2019) 6 S.C.C. 1 (Three Judges' Bench) ; Yashwant Sinha v. Central Bureau of Investigation, (2020) 2 SCC 338 (Three Judges' Bench).
[11] *Rafale deal: No force on earth can make me reveal the source, says N Ram*, The Business Line (Mar. 06, 2019), https://www.thehindubusinessline.com/news/nobody-will-get-any-information-from-us-on-source-of-rafale-documents-the-hindu-chairman-n-ram/article26447807.ece; See Rafale documents: we are committed to protecting *our source*s, says N. Ram, The Hindu (Mar. 06, 2019) *https://www.thehindu.com/news/national/rafale-documents-we-are-committed-to-protecting-our-sources-says-n-ram/article26447063.ece.*
[12] *Id.*

instances of such nature. On one hand, the idea of investigative journalism to ensure public accountability is uncontested. On the other, the assertion that the newspaper had exercised due diligence on its own part is concerning.

Would *every* organization in the press have the same level of *integrity* and *expertise* to sift the "to be disclosed" or "ought not be disclosed" from the information they receive? Unfortunately, in the light of a lack of exhaustive or even prescriptive legislative provisions; regulation; or industry practice, we cannot but ascertain the feasibility of this model. In our opinion, this only goes to further the cause of extensive deliberation on the subject to ensure that we do not start from scratch every time the courts and executive are to encounter such a case. At the same time, it shall be beneficial for the members of the press as well, given that a certain sense of predictability of law and the outcomes thereafter, may mitigate the chilling effect that would otherwise persist.

It is a well settled legal obligation on all persons to furnish relevant information to court, yet there are exemptions from disclosure of such information.[13] However, these exemptions do not apply to journalists. Should the journalist betray her professional ethics[14] by vowing not to disclose her source, she may be held guilty of contempt of court.[15] In other words, this leaves them with two choices, i.e. either to disclose their source or be subjected to punishment (including imprisonment) for contempt of court[16].

While Cl. (2) of Section 15 of the Press Council of India Act, 1978[17] (**"PCI Act"**) is the only legislative provision which directly concerns the non-disclosure of information by the journalists, it is largely inadequate as the ambit of the provision is limited only to the inquiry by Press Council of

[13] §§. 121-124; 126; 129; 131 and 132, Indian Evidence Act, 1872 (No. 1 of 1872).
[14] *See* Cl. 27 read with Cl. 23(iii), Press Council India's Norms of Journalistic Conduct, 2018.
[15] §. 12, The Contempt of Courts Act, 1971 (No. 70 of 1971).
[16] *Id.*
[17] Section 15(2), Press Council of India Act, 1978, "*(2) Nothing in sub-section (1) shall be deemed to compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist."*

India under the PCI Act. As a result, the scope of the law (and the protection therein) is narrow to the extent of redundancy.

Whistleblowers confide in press by providing them with sensitive information. This practice has two foreseeable consequences.[18] *First*, the information unearthed is of such nature that it may serve the quality and scope of the public discourse on governance. *Second*, the courts may compel the journalist to disclose their source of information, in order to ascertain the validity/authenticity of the claims made by the journalist.[19] It is here, where the Shield laws ought to have come to the rescue of the latter.

In 1964, Brennan J. of the US Supreme Court (**"US Sup. Ct."**) had recognised the negative implications of a '*chilling effect*', simply put, a deterrent for the journalist to propagate public accountability of the government administration [*New York Times v. Sullivan* (1964)][20]. Various courts across the globe have recognised that chilling effect may present itself as an unreasonable restriction on the freedom of press (and in turn, the freedom of speech and expression). However, the Supreme Court does not seem to have been swayed by the argument of a chilling effect deterring the freedom of speech under Article 19(1)(a) of the Indian Constitution in all instances. Even if one is to rely on the decision in *Shreya Singhal v. Union of India* (2015)[21] and *R Rajagopal v. State of Tamil Nadu* (1994)[22] to reiterate the court's application of the doctrine to do away with a restriction- we shall be reminded of the decision in *Subramanian Swamy v. Union of India* (2016)[23], wherein the court had an opportune moment to, *inter alia*, further the cause of free press in India by holding the law of criminal defamation as ultra vires the Part III of the Indian Constitution, owing to the chilling

[18] BERKOWITZ, *Reporters and their sources in* THE HANDBOOK OF JOURNALISM STUDIES 102 (Wahl-Jorgensn & Hanitzsch eds., 2009).
[19] Javed Akhtar v Lana Publishing Company, AIR 1987 Bom 339 (Bombay High Court, Single Judge Bench); Also *see*: Jai Prakash Agarwal v. Bishambar Dutt Sharma, (1986) 30 DLT 21 (Delhi High Court).
[20] New York Times v. Sullivan, 376 U.S. 254 (1964).
[21] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1, ¶ 90 (Supreme Court, Two Judges' Bench).
[22] R. Rajagopal. v. State of T.N., (1994) 6 S.C.C. 632, ¶ 26 (Supreme Court, Two Judges' Bench).
[23] Subramanian Swamy v. Union of India, (2016) 7 S.C.C. 221 (Supreme Court, Three Judges' Bench).

effect, which operates as an unreasonable restriction on one's freedom of speech and expression. As a result, we are posed with two issues with regard to the recognition and implementation of the Shield laws in India. *First*, the dilemma is in determining whether the mere occurrence of a chilling effect or the foreseeability of its occurrence is sufficient as a cause to ensure that the restriction causing the former is done away with it. *Second*, would the mere recognition by the Supreme Court that any law compelling the disclosure of the source (in certain or all circumstances) is ultra vires the Indian Constitution- be sufficient? The latter only serves a check on preventing the executive from implementing a law that would force the press to disclose their source (of information) with respect to circumstances in which the courts would hold the compelling as unreasonable.

Let us assume that the time is ripe to introduce Shield laws in India. If we are to do so, we are presented with a paradox. One on hand, if we do not allow the press to maintain secrecy with regard to their source, we propagate a *two-fold chilling effect*, one on the journalist and second on the source, as the latter shall be deterred from disclosing vital information to the press (a law protecting a whistleblower may not *always* serve the purpose with regards to the issue at hand). On the other hand, in the era where the society-state is bombarded with dissemination of 'fake news' it is difficult to envisage a remedy that curbs the same without ensuring the accountability of the press. It is in the ensuring of this accountability that the press may in certain scenarios be required to disclose their source(s). The question would then be, is the fake news an evil so undesirable that it shadows the need for Shield laws?

Not just India, but even other democracies have clamoured for Shield laws for a long time. Take for instance, the United States of America (**"United States"**), where the landmark decision with regards to source protection is *Branzburg v. Hayes* (1972)[24], wherein the US Sup. Ct. held that a reporter is not entitled to invoke his right under the First Amendment[25] to refuse disclosure of his source of information to a Grand Jury in a criminal trial. In other words, the law is clear that reporters do not enjoy an absolute privilege with regards to source protection. However, given the fact that

[24] Branzburg v. Hayes, 408 U.S. 665 (1972)
[25] U. S. Const. amend. I.

the decision was made by a majority of 5:4, there have been demands for the US Sup. Ct. to reconsider its decision.[26] In the absence of a federal law to ensure source protection for journalists, the states in the United States have taken the mantle to recognise the right of source protection.[27]

In India, the Law Commission of India, in its 93rd Report titled *"Disclosure of Sources of Information by Mass Media"*[28] recommended the insertion of Section 132A in the Indian Evidence Act, 1872. The proposed section would have enabled journalist to claim privilege from source disclosure.[29] This recommendation was further reiterated with certain changes in the 185th Law Commission Report on *"Review of the Indian Evidence Act, 1872"*[30]

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[26] Anthony L. Fargo, *A Federal Shield Law That works: Protecting sources, fighting fake news, and confronting modern challenges to effective journalism*, 8(2) J. INT'L MEDIA ENTERTAINMENT L. 39, 44.

[27] BELMAS, SHEPARD & WAYNE, MAJOR PRINCIPLES OF MEDIA LAW, 2017 363 (1st ed., 2016).

[28] LAW COMMISSION OF INDIA, REPORT NO. 93- DISCLOSURE OF SOURCES OF INFORMATION BY MASS MEDIA (1983), http://lawcommissionofindia.nic.in/51-100/Report93.pdf.

[29] *Id.*

*Sec 132A: No court shall require a person to disclose the source of information contained in the publication for which he is responsible, where such information has been obtained by him on the express agreement or implied understanding that the source will be kept confidential.*

*Explanation. For the purposes of this sub-section,*

*(a) "publication" means any speech, writing, symbols or other representation disseminated through any medium of communication including through electronic media in whatever form, which is addressed to the public at large or to any section of the public.*

*(b) "source" means the person from whom, or the means through which, the information was obtained.*

*(2) The Court while requiring any person to disclose the source of information under subsection (1), shall assess the necessity for such disclosure of the source as against the right of the journalist not to disclose the source.*

[30] LAW COMMISSION OF INDIA, REPORT NO. 185- REVIEW OF THE INDIAN EVIDENCE ACT, 1872 (2003), http://lawcommissionofindia.nic.in/reports/185thReport-PartIIIB.pdf.

*"132-A. (1) No Court shall require a person to disclose the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the Court that such disclosure is necessary in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to Contempt of Court or incitement to any offence.*

*Explanation.— For the purposes of this sub-section,*

*(a) 'publication' means any speech, writing, symbols or other representation disseminated through any medium of communication including through electronic media in whatever form, which is addressed to the public at large or to any section of the public.*

in 2003. The recommendation made in 185th report is more nuanced[31] as regard to the limitations of such privilege as compared to the recommendation made in 93rd report. However, we wish to hear more about the viability of these proposals, from our readers.

There are other concerns that ought to be addressed before India counts itself as a society-state that has Shield laws in effect. Who must be regarded as a person discharging "journalistic activities"? What would the definition of a "source" be? Should the decision to compel disclosure, if in any circumstance, rest with the Parliament and/or the judiciary? As a society-state do we prefer a law that *protects* disclosure in public interest or a law that *prevents* disclosure in public interest? Or rather a law that *both* protects and prevents disclosure by balancing the competing interests, and if so, then how do we achieve this balance? These are a few questions that ought to be answered to implement a robust Shield law jurisprudence in India.

*(b) "source" means the person from whom, or the means through which, the information was obtained.*
*(2) The Court while requiring any person to disclose the source of information under sub-s. (1), shall assess the necessity for such disclosure of the source as against the right of the journalist not to disclose the source."*
[31] Chatterjee, *Newsgatherers' Privilege to Source Protection*, 53(32) ECON. POL. WEEKLY 57 (Aug., 2018).

# APPLICATION OF FUNDAMENTAL RIGHTS AGAINST EDUCATIONAL INSTITUTIONS IN INDIA: MOVING BEYOND THE STATE ACTION DOCTRINE

**KARAN TREHAN[1] & NISHANT PANDE[2]**

*The question of applying Fundamental Rights against private actors has been a matter of great controversy with the Supreme Court of India's approach moving from an intertwined functional and structural analysis to a strict structural or control test. This becomes particularly relevant in context of educational institutions owing to the crucial role which education serves in achieving the political, economic and social goals of our nation as envisaged by our Constitution. This article traces the manner in which Indian constitutional courts have engaged with the question of applying Fundamental Rights against educational institutions, be they State maintained, aided, purely private or otherwise. While addressing the question of moving beyond the State Action doctrine, the article further attempts to devise an alternate remedy for the enforcement of Right to Education under Article 21A by its direct horizontal application without dwelling into the status of the institution under Article 12.*

## INTRODUCTION

In terms of whom fundamental rights bind or constrain, the most basic distinction arises between the 'vertical' and 'horizontal' application of these rights.[3] Rights which have vertical application apply exclusively against the Government or the State whereas those with horizontal application bind private actors as well.[4] The question of applying fundamental rights against private actors has been a matter of great controversy with the Supreme

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** The authors would like to thank Ms. N. Vasanthi (Professor, NALSAR University of Law, Hyderabad) and Mr. Sidharth Chauhan (Assistant Professor, NALSAR University of Law, Hyderabad) for their guidance in the writing of this paper.

[3] STEPHAN GARDBAUM, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 640 (Sujit Choudhry et. al, 2nd ed. Oxford University Press 2016).

[4] *Id.*

Court of India's (**"Supreme Court"**) approach moving from an intertwined functional and structural analysis[5] to a strict structural or control test[6]. Although the Courts have majorly followed a uniform approach for the last decade, the waters have recently been muddied by the Supreme Court's diametric shift towards a functional analysis for enforcing fundamental rights against private bodies[7] in a catena of cases.

This question becomes particularly relevant in the context of educational institutions, owing to the fact that they serve a crucial role in achieving the political, economic and social goals of the nation. The Supreme Court, in the 2015 case of *Janet Jayapaul v. SRM University*[8], held that SRM University was 'State' under Article 12 of the Indian Constitution because it was a 'deemed' University. This judgment marks a turning-point in the vast jurisprudence surrounding the applicability of fundamental rights against private educational institutions which was initially sparked-off more than six decades ago in the *University of Madras by the Registrar v. Shanta Bai*[9] case.

This article traces the manner in which Indian Constitutional Courts have engaged with the question of applying fundamental rights against educational institutions, whether they are State maintained, aided, purely private or otherwise [**Section II**]. While addressing the question of moving beyond the State Action doctrine, this article also attempts to devise an alternate remedy for the enforcement of the Right to Education (**"RTE"**) under Article 21A through its direct horizontal application i.e., applying it directly against private educational institutions for fundamental rights action without relying on Article 12 [**Section III**].

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[5] Sukhdev v. Bhagat Ram, A.I.R. 1975 S.C. 1331 (Supreme Court of India, Five Judges' Bench). (Functional doctrine is based upon the idea that certain functions are public in nature, and that, even in the absence of any other reason for finding state action, a private party performing that function will be held to the constitutional standard. Structural doctrine, on the other hand, focuses on the administrative and financial control over a body by the State.)

[6] Zee Telefilms v. Union of India, (2005) 4 S.C.C. 649 (Supreme Court of India, Five Judges' Bench).

[7] BCCI v. Cricket Association of Bihar, (2015) 3 S.C.C. 251 (Supreme Court of India, Two Judges' Bench).

[8] Janet Jayapaul v. SRM University, (2015) 5 S.C.C. 530 (Supreme Court of India, Two Judges' Bench).

[9] The University of Madras by the Registrar v. Shanta Bai, A.I.R. 1954 Mad. 67 (Madras High Court, Two Judges' Bench).

## APPLICATION OF THE 'STATE ACTION' DOCTRINE TO EDUCATIONAL INSTITUTIONS BY INDIAN CONSTITUTIONAL COURTS

Article 32 and 226 deal with the writ jurisdiction of the Supreme Court and High Courts respectively. The scope of Article 32 is limited to the enforcement of fundamental rights listed in Part III, only against those bodies that satisfy the test of 'State' laid down under Article 12. Article 226, on the other hand, is much wider in its ambit and an action for violation of any other right viz. a legal right is also maintainable under Article 226 against 'any person' or 'authority'.

This Section analyses how the Constitutional Courts i.e., the Supreme Court of India and various High Courts have approached the question of applying fundamental rights to educational institutions, especially aided and unaided private educational institutions. The analysis has been carried out, taking into consideration the evolving '*State Action doctrine*'[10] under Article 12 and its effect on fundamental rights jurisprudence surrounding educational institutions. The cases shall be analyzed to discern whether a particular educational institution satisfies the test of State under Article 12, which is essentially same for Article 32 and Article 226.

The Section is divided into three sub-parts. **Part A** analyses the cases concerning State aided and maintained educational institutions. **Part B** deals with purely private institutions and lastly, **Part C** deals with treatment of minority educational institutions under the Indian Constitution.

### PART A: AIDED AND MAINTAINED EDUCATIONAL INSTITUTIONS

The first noteworthy instance where the Supreme Court was faced with the question of reading educational institutions under Article 12 was *University*

[10] State action doctrine refers to the idea that certain provisions of the Constitution can apply only against infliction of injury or violation that can somehow be attributable to a 'State'. The violation or injury caused as a result of private persons, under this doctrine, are left unregulated by constitutional rule. For more information, *refer,* KAY, RICHARD S., *The State Action Doctrine, the Public/Private Distinction, and the Independence of Constitutional Law* 888 CONST. COMMENTARY (1993).

*of Madras v. Shanta Bai.*[11] Here the question for consideration before Madras High Court was whether directions issued by a University preventing its affiliated colleges from admitting girl students was in violation of Article 15(1) and 29 of the Constitution. The Court, while interpreting the expression 'local and other authorities' under Article 12, held that this could only mean to include authorities exercising governmental functions. Thus, relying on the fact that *first*, University of Madras is a body established by an Act, *second*, it is purely promoting education and is not charged to perform a governmental function, and *third,* though a State-aided institution, the University is not state-maintained, it was held that the University shall not be a State under Article 12. It was also held that Article 29(2) is a controlling provision when it comes to admission to educational institution.

Two important observations from the judgment are that *first*, only State-maintained institutions are amenable to Fundamental Rights action under Article 15(1) i.e., only such institutions will amount to State. *Second*, that if Article 29(2)[12] was supposed to be the controlling provision, then there was no need for the Court to look into the applicability of Article 15(1) in the present case.

One may also consider the decision by the Madhya Pradesh High Court in *Ashalata d/o Baboolal v. M. B. Vikram University,*[13] where Vikram University, an autonomous educational institute established by a statute and maintained by the State of Madhya Pradesh, was held to be a State. It is pertinent to note that the issue for consideration before the Court was not a fundamental right violation, yet the Court subjected the University to analysis under Article 12 for the purpose of issuing a writ under Article 226.

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[11] *Supra* note 9.

[12] INDIA CONST. art. 29(2) prohibits discrimination in matters of admission into educational institutions on grounds only of religion, race, caste, language or any of them. This provision guarantees the rights of individual irrespective of the community to which he belongs. In other words, the right guaranteed under this Article is not restricted to minorities but extends to all citizens whether belonging to majority or minority.

[13] Ashalata d/o Baboolal v. M. B. Vikram University, A.I.R. 1961 M.P. 299 (Madhya Pradesh High Court, Two Judges' Bench).

The consistent view propounded in these two cases that only a state-maintained and not state-aided educational institution would be a 'State' under Article 12 was further conformed by the Calcutta, Punjab & Haryana and Mysore High Court in *Smt. Ena Ghosh v. State of West Bengal*[14], *Krishna Gopal Sharma v. Punjab University Through its Registrar*[15] and *B.W. Devadas v. Selection Committee, Karnataka Engineering College*[16] respectively.

However, an exception can be seen in *Rajinder Kumar Sharma v. The Vice Chancellor, Punjab University*[17], where the Punjab & Haryana High Court bypassed the question with respect to state-maintained or state-aided and held that the Punjab University was not a State. This decision was solely based on the fact that the University was established under a statute.

A shortcoming present in all of the cases cited above, was that the Courts did not distinguish between bodies established by or under a statute. The focus was only on state maintained or aided nature of the institution in order to determine Article 12 question.[18]

The Supreme Court's landmark decision in *Rajasthan State Electrical Board,*[19] though not decided in the context of educational institutions, referred to these aforementioned cases and overruled them to the extent of their interpretation of 'other authorities', according to which Universities and private colleges were autonomous bodies and not in the nature of Government authorities. However, the distinction between bodies established by or under a statute was again overlooked in this case.

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[14]Smt. Ena Ghosh v. State of West Bengal, A.I.R. 1962 Cal. 420 (Calcutta High Court, Single Judge Bench).

[15]Krishna Gopal Sharma v. Punjab University Through its Registrar, A.I.R. 1966 P. H. 34 (Punjab & Haryana High Court, Two Judges' Bench).

[16]B.W. Devadas v. Selection Committee, Karnataka Engineering College, A.I.R. 1964 Mys. 6 (Karnataka High Court, Two Judges' Bench).

[17]Rajinder Kumar Sharma v. The Vice Chancellor, Punjab University, A.I.R. 1966 P. H. 269 (Punjab & Haryana High Court, Two Judges' Bench).

[18] *Supra* note 16. In the case of *B. W. Devadas*, the educational institute in question was controlled by a society registered under a statute. However, the Court did not discuss that particular question and concluded that the institute did not fall under the ambit of Article 12 because it was not State-maintained.

[19]Rajasthan State Electrical Board v. Mohan Lal, A.I.R. 1967 S.C. 1857 (Supreme Court of India, Five Judges' Bench).

Shortly after, in a first of its kind case, the Delhi High Court, in *Amir-Jamia v. Desharath Raj,*[20] had to decide the amenability of writ jurisdiction against Jamia Millia Islamia, a University originally registered under the Societies Registrations Act, 1860. The University, though an autonomous body, started receiving substantial grant-in-aid from the Government of India years after its establishment and was subsequently declared a deemed University under the University Grants Commission Act, 1956 (**"UGC Act"**). Hence, the University was subjected to UGC regulations and was conferred all the powers provided under the UGC Act including, but not limited to, the power to distribute degrees. The Court, while defining 'public authority', held that:
*"To sum up, a body of persons may become a public authority either because in its inception it is created by a statute or because the Governmental authority is conferred upon it later either by statute or even by executive action."*

Thus, while holding the University to be a "*public authority… fully covered by the principle underlying Article 226 and 12…*", relying upon the fact that the University performed the governmental function of distributing degrees which was conferred upon it under the UGC Act, though it might not have originally been formed by a statute.

However, a bare reading of the above-quoted text creates confusion as to whether the body in the present case was also declared a State under Article 12. The dilemma seems to have been clarified by the same Court's subsequent decision in *Anwer Raza Rizvi v. Jamia Millia Islamia*[21], when it ruled Jamia University to be a State and held that the Article 16 challenge would be tenable against it.

The reading of these two cases allows for following inferences to be made. *First*, they seem to endorse the functional approach by referring to government function which the Supreme Court, though without referring to these judgments, read into the agency and instrumentality test in the

[20]Amir-Jamia v. Desharath Raj, I.L.R. 1969 Delhi 202 (Delhi High Court, Two Judges' Bench).
[21]Anwer Raza Rizvi v. Jamia Millia Islamia, I.L.R. 1972 Delhi 799 (Delhi High Court, Two Judges' Bench).

*Sukhdev v. Bhagatram*[22] case. *Second*, the fact that Jamia Millia Islamia, despite being a state-aided University, was still held to be State shows a divergence from the position endorsed by earlier cases where the Courts held that only state-maintained institutions fell under the ambit of Article 12.

The position regarding State-aided and State-maintained educational institutions becomes clearer in *Anandi Mukta Sadguru Trust v. V.R Rudani.*[23] In this case, the question before the Supreme Court was whether a writ of Mandamus can be issued against a private educational institution affiliated to a University receiving aid from the State. It was held that such an institution is devoid of a purely private character and would, thus, be amenable to writ jurisdiction under Article 226 in pursuit of the compliance of the statutory duties upon it though the institution would not be State as contemplated under Article 12. This position has further been affirmed in a catena of Supreme Court cases.[24]

The law underwent significant change after the *Ajay Hasia*[25] decision, where a writ under Article 32 was filed against the state-aided Regional Engineering College, Srinagar for violation of Article 14. The Supreme Court propounded the juristic veil principle for the expression 'other authorities' provided under Article 12 and, in effect, held the college to be State.

Further, the Court also clarified that for this analysis it was immaterial whether the corporation was created by or under a statute. Now, state-aided private educational institutions, which were previously amenable to writ jurisdiction only under Article 226, could be read as State (under Article 12), if they satisfied the test laid down in *Ajay Hasia*. The law laid

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[22] *Supra* note 3; It is pertinent to note that this case is referred here for being one of the landmark precedents on Article 12 jurisprudence and was not decided in the context of educational institution.

[23]Anandi Mukta Sadguru Trust v. V.R Rudani, A.I.R. 1989 S.C. 1607 (Supreme Court of India, Two Judges' Bench).

[24]Tika Ram v. Mundikota Shikshan Prasarak Mandal, A.I.R. 1984 S.C. 1621 (Supreme Court of India, Two Judges' Bench); Francis John v. Director of Education, A.I.R. 1990 S.C. 423 (Supreme Court of India, Three Judges' Bench).

[25] Ajay Hasia v. Khalid Mujib, A.I.R. 1981 S.C. 487 (Supreme Court of India, Five Judges' Bench).

down in this case has been consistently followed in several later cases pertaining to educational institutions.[26]

While, the principles laid down in *Ajay Hasia*[27] had facets of both structural and functional approaches, the subsequent seven-judge bench decision of *P. K. Biswas*[28] adopted a strict structural approach in the form of a financial, functional and administrative dominance or control by the State over the body in question. This was further expressly affirmed by a five-judge bench of the Supreme Court in *Zee Telefilms*[29] and has been the law till date[30].

## PART B: UNAIDED PRIVATE EDUCATIONAL INSTITUTIONS

As a general rule, the concept of State Action has never been extended to include unaided private educational institutions i.e., institutions receiving no aid from the government have not been considered to be a State under Article 12.[31] This can again be attributed to the fact that fundamental rights regulate the relation between the State vis-à-vis an individual whereas purely private institutions are considered to be devoid of any State-like character. Furthermore, the test of financial, functional and administrative domination for determining whether a body falls under the ambit of State leaves no scope for a body with no government aid to be adjudged as a State. Hence, no action for the violation of fundamental rights can be brought against unaided private educational institutions. However, an action for the violation of legal right can still be brought against such institutions as these have been made amenable to the writ jurisdiction

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[26] All India Sainik Schools Employees Association v. Sainik Schools Society, A.I.R. 1989 S.C. 88 (Supreme Court of India, Two Judges' Bench); Manmohan Singh Jaitla v. Commissioner, Union Territory of Chandigarh, A.I.R. 1985 S.C. 364 (Supreme Court of India, Two Judges' Bench).

[27] *Supra* note 25.

[28] P. K. Biswas v. Indian Institute of Chemical Biology, (2002) 5 S.C.C. 111 (Supreme Court of India, Seven Judges' Bench).

[29] *Supra* note 5.

[30] Dr. Uttam Kumar Samanta v. KIIT University 2014 (2) O.L.R. 852; Indian Jute Industries Research Association v. Debabrata Sarkar, 2006 (4) C.H.N. 741 (Calcutta High Court, Two Judges' Bench); M.K. Gandhi v. Director of Education, 2005 (4) E.S.C. 2265 (Allahabad High Court, Three Judges' Bench).

[31] Raja Soni v. Air Officer, A.I.R. 1969 S.C. 667 (Supreme Court of India, Two Judges' Bench); Jiby P. Chacko v. Principal, Medicity School of Nursing, 2002 (2) A.L.D. 827 (Andhra Pradesh High Court, Single Judge's Bench).

under Article 226 by virtue of the fact that they perform the public function of imparting education.[32]

However, as far as the possibility of bringing a deemed University under the ambit of Article 12 is concerned, until the 2015 decision in *Janet Jeyapaul v. SRM University*[33], there was no case which had ever held such a University to be State. In the *Janet Jeyapaul* case, the Supreme Court declared SRM University, a deemed University as State under Article 12. The cases viz. *Praveen Kumar v. Jain Vishva Bharati Institute* and *Yogesh Rajput v. State (Education Department)*[34] which earlier dealt with this issue had clearly answered this question in negative. The Court, in *Janet Jeyapaul*, held that:

*"Firstly, respondent No. 1 is engaged in imparting education in higher studies to students at large. Secondly, it is discharging "public function" by way of imparting education. Thirdly, it is notified as a "Deemed University" by the Central Government under Section 3 of the UGC Act. Fourthly, being a "Deemed University", all the provisions of the UGC Act are made applicable to respondent No. 1, which inter alia provides for effective discharge of the public function – namely education for the benefit of public. Fifthly, once respondent No. 1 is declared as "Deemed University" whose all functions and activities are governed by the UGC Act, alike other universities then it is an "authority" within the meaning of Article 12 of the Constitution. Lastly, once it is held to be an "authority" as provided in Article 12 then as a necessary consequence, it becomes amenable to writ jurisdiction of High Court under Article 226 of the Constitution."*

The Court here, instead of going into the analysis of functional, financial and administrative test, seems to have based its decision on *first*, the public function character of an educational institution and *second*, the fact that it is regulated by the UGC Act with certain powers conferred upon the institute for holding it a State.

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[32]J.P. Unni Krishnan v. State of Andhra Pradesh, (1992) 3 S.C.C. 666 (Supreme Court of India, Five Judges' Bench); R. Kumar v. The State Of Tamil Nadu, A.I.R. 2005 Mad. 278 (Madras High Court, Two Judges' Bench); K. Krishnamacharayulu v. Sri Venkateswara Hindu College Of Engineering, [1997] I.N.S.C. 210 (Supreme Court of India, Two Judges' Bench); Suter Paul v. Sobhana English Medium High School, 2003 (3) K.L.T. 1019 (Kerala High Court, Two Judges' Bench).

[33] *Supra* note 8.

[34] Praveen Kumar v. Jain Vishva Bharati Institute, R.L.W. 2004 (4) Raj. 2528 (Rajasthan High Court, Single Judge's Bench); Yogesh Rajput And v. State (Education Department) SB(C) W.P. No.8082/2012 (Supreme Court of India).

However, the decision has become problematic as it is being cited and interpreted in a fashion where all private educational institutions, by the virtue of the sole reason that they perform a public function of imparting education, can be read as State under Article 12 and be brought under the purview of the writ jurisdiction of the High Courts under Article 226, thus developing an altogether parallel jurisprudence[35] from the line of Article 12 cases that prescribe the structural test for a body to be a State.[36]

## PART C: AIDED AND UNAIDED MINORITY EDUCATIONAL INSTITUTIONS

Article 29 and 30 of the Indian Constitution envisage special rights for minorities. Article 29 of the Indian Constitution grants citizens the right to conserve their culture, script or language by establishing educational institutions and prevents the denial of admission in State-maintained and State-aided educational institutions on grounds only of religion, race, caste, language or any of them. Article 30, on the other hand, provides a unique position for minority educational institutions and confers upon them special rights in comparison to non-minority educational institutions. These special rights guaranteed under Article 30 allow a minority educational institute to exercise autonomy in administration and providing admissions.[37] The right under Article 30(1) is subject to the right of individuals under Article 29(2), i.e. while exercising autonomy in its affairs, a minority educational institute cannot deny admissions on any or all the grounds under Article 29.[38]

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[35] Ms. Suryaben Dhanjibhai Katara v. Viksat C/SCA/14562/2016 (Gujarat High Court, Single Judge Bench); M. Jumma Khan v. The All India Council W.P.Nos.11855 of 2015 (Madras High Court, Single Judge Bench); Jayanti Mondal v. State Of West Bengal WP 33593 (W) of 2013 (Calcutta High Court, Single Judge Bench).

[36] *Supra* note 5.

[37] Guidelines for determination of Minority Status, Recognition, Affiliation and related matters in respect of Minority Educational Institutions under the Constitution of India, GOVERNMENT OF INDIA NATIONAL COMMISSION FOR MINORITY EDUCATIONAL INSTITUTIONS (Apr. 1, 2016), http://ncmei.gov.in/WriteReadData/LINKS/e1bd5603d1-cd8b-4a4b-8969-f3597beb34fa99c0e645-cbca-4250-a6a8-f2df33e0cf21.pdf.

[38] D.A.V. College v. State of Punjab, A.I.R. 1971 S.C. 1737 (Supreme Court of India, Five Judges' Bench).

## ESTABLISHING A CASE FOR DIRECT HORIZONTAL APPLICATION OF THE RIGHT TO EDUCATION UNDER ARTICLE 21 OF THE INDIAN CONSTITUTION

The functional test and the structural test form the essential basis of the State Action doctrine enshrined under Article 12 of the Indian Constitution for the purpose of holding entities, governmental or otherwise, accountable for the violation of fundamental rights.

The State Action doctrine has been formulated to impose restrictions on government power only and not on private power. An inherent disability of the State Action doctrine is that it allows the State to be held accountable for its actions but not for its inactions. In cases of infringement of fundamental rights by private actors, the fact that the action was not State Action becomes the conclusion of the enquiry and, thus, the violation is not addressed at a constitutional level. This further shifts the focus from protection of substantive constitutional rights or the State's constitutional duty of protecting rights to a refrain in action against the body that is not 'State'.[39] That being said, there are arguments in favour of going beyond the State Action doctrine and applying a different standard for holding entities accountable for the violation of fundamental rights.

The cardinal issue of enquiry in State Action cases should be "*whether the Constitution imposes certain duties upon the government in circumstances of infringement of substantive constitutional rights?*". By saying that the Constitution applies (to a great extent) only to the government and not to private entities, the inference derived is that constitutional freedoms do not permeate the private sphere. Consequently, a number of entities which are capable of controlling rights of the people will have unfettered powers to do so in the absence of any checks and balance.

Thus, these shortcomings with the State Action doctrine require the exploring of other avenues through which the substance of Fundamental

[39] MARK TUSHNET, STATE ACTION IN 2020, THE CONSTITUTION IN 2020, 69 (Balkin & Siegel eds., 2009); MAIMON SCHWARZSCHILD, VALUE PLURALISM AND THE CONSTITUTION: IN DEFENSE OF THE STATE ACTION DOCTRINE, 121 (1988); FOX, THE SUPREME COURT AND THE CONFUSION SURROUNDING THE STATE ACTION DOCTRINE 48, 1571 (1979); Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CAL. L. REV. 146 (1976).

Rights can be applied against non-State Actors. Article 21 provides for one such possibility in the Indian context. State's duty, under Article 21, to not violate the Right to Life of the people, makes a case for holding the State accountable at instances when it fails to protect the Right to Life of the people against acts of private parties.

The Constitution (86th Amendment) Act, 2002[40] introduced Article 21A in the Constitution of India as a consequence of the Supreme Court's decision in *JP Unni Krishnan v. State of Andhra Pradesh* (**"Unni Krishnan"**).[41] Article 21A reads as:
*"**21A Right to education:** The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."*

This Article casts an obligation on the State to provide for a free and compulsory education to children from the age of six to fourteen years[42]. Albeit this article reads as 'Right to Education', the right enumerated under it confines itself only for the purpose of catering the educational needs of children.

The roots of this provision can be traced back to the *Mohini Jain*[43] case in which the Court relied upon Article 41 and Article 45 to conclude that the Right to Education could be read under Right to Life under Article 21. In the very next year, the *Unni Krishnan*[44] judgment overruled *Mohini Jain* to the extent it provided for a blanket right to education emanating from Article 21 and held as under –
"*Right to education understood in the context of Articles 45 and 41, means. (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development*."

[40] The Constitution (86th Amendment) Act, 2002.
[41] *Supra* note 32.
[42] TMA Pai Foundation v. State of Karnataka, (2002) 8 S.C.C. 481(Supreme Court of India, Eleven Judges' Bench).
[43] Mohini Jain v. State of Karnataka, (1992) 3 S.C.C. 666 (Supreme Court of India, Two Judges' Bench).
[44] *Supra* note 41.

The Court's conclusion in this case depended heavily on Article 41 and 45 of the Directive Principles of State Policy (**"DPSPs"**). Thus, it becomes imperative to comprehend these two DPSPs for a holistic understanding of this right. Article 41, as discussed in the previous section, provides that the State shall, within the limits of its economic capacity and development, make effective provisions for securing the Right to Education. Article 45 further obliges the State to provide free and compulsory education for all children until they complete the age of fourteen years within 10 years of the commencement of the Constitution. Since Article 41 expected the State to act bearing in mind its economic capacity and Article 45 had contemplated a time limit for securing education for children, the Court concluded that Article 45 would take precedence over Article 41, and this formed the basis of the eighty-sixth Constitutional Amendment.[45]

It can be discerned from the above-quoted extract that there lies a scope of a right to education other than a right to education for children from the age of six to fourteen years (which for the sake of convenience will be called as 'Universal Right to Education'). The reasoning in favour of there being a universal right to education is further augmented by the fact that various judgments which were delivered subsequent to the insertion of Article 21A have mentioned the Right to Education as a right available under Article 21 i.e. the Right to Life.[46]

As far as Article 21 is concerned, Courts have interpreted 'life' to not connote mere animal existence. Life has a much wider meaning and it includes meaningfulness of life along with human dignity.[47] A life with dignity has been envisaged under the ambit of Article 21 of the Indian Constitution so as to ensure that human personality can be enlarged to its

[45] *Supra* note 40.

[46] Sanjay Singh v. State of Uttar Pradesh, (2013) 1 UPLBEC 758 (Allahabad High Court, Single Judge's Bench).

[47] Olga Tellis v. Bombay Municipal Corporation, 1985 (3) S.C.C. 545 (Supreme Court of India, Five Judges' Bench); Charles Sobraj v. Supdt. Central Jail, Tihar, A.I.R. 1978 S.C. 1514 (Supreme Court of India, Three Judges' Bench); Bandhua Mukti Morcha v. Union of India, (1984) 3 S.C.C. 161 (Supreme Court of India, Three Judges' Bench); Port of Bombay v. D.R. Nadkarni, (1983) 1 S.C.C. 124 (Supreme Court of India, Two Judges' Bench); Vikram Deo Singh Tomar v. State of Bihar, (1988) Suppl. S.C.C 734 (Supreme Court of India, Three Judges' Bench); R. Autyanuprasi v. Union of India, (1989) 1 Suppl. S.C.C. 251 (Supreme Court of India, Two Judges' Bench).

full blossom. A facet of a dignified life is education as it correlates to the social, political and economic needs of the people of a developing nation, provides for an instrument to bring about social change and ensures intellectual advancement of a person.[48] The Supreme Court has observed that education is a prerequisite for the development of the personality of a person and that it also provides for the process of acquisition of knowledge and skill.[49]

The Supreme Court has held that the Right to Education springs from the Right to Life[50] and placed education on such a high pedestal that it opined that the dignity of an individual cannot fully be appreciated without the Right to Education.[51] The importance of education cannot be subject to overemphasis and it has been visualized to be the cure for the ever-widening gap between the rich and the poor.[52] Beyond the enjoyment of right to a dignified life under Article 21, other rights under Article 19 such as the Right to Freedom of Speech and Expression can be fully enjoyed and appreciated only when the individual is educated.[53]

Thus, it can certainly be said that the Right to Education is an inseparable part of the Right to Life under Article 21 and is a prerequisite for an individual to lead a dignified life. However, it must be borne in mind that the notion of a universal Right to Education cannot be practically understood to be a blanket right that allows individuals to, by exercising their fundamental right, demand education from the State, as was held in the *Mohini Jain* case.[54] The universal Right to Education must be understood as a negative right that is triggered in cases of denial of access

[48] Maharashtra State Board of Secondary And Higher Secondary Education v. K. S. Gandhi, 1991 SCALE (1) 187 (Supreme Court of India, Two Judges' Bench).
[49] State of Orissa v. Mamata Mohanty, (2011) 3 S.C.C 436 (Supreme Court of India, Two Judges' Bench).
[50] Election Commission Of India v. St. Mary's School, (2008) 2 S.C.C. 390 (Supreme Court of India, Two Judges' Bench).
[51] Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P., A.I.R. 2015 S.C. 326 (Supreme Court of India, Two Judges' Bench).
[52] Shri Dilbagh Singh v. Delhi Transport Corporation, 123 (2005) D.L.T. 318 (Delhi High Court, Single Judge's Bench).
[53] Grace Rural Middle School v. The Government Of Tamil Nadu, A.I.R. 2007 Mad. 52 (Madras High Court, Two Judges' Bench); S. Mazhaimeni Pandian v. The State of Tamil Nadu, (2002) 3 MLJ 513 (Madras High Court, Two Judges' Bench).
[54] *Supra* note 43.

to education, myriad forms of discrimination, racial or sexual harassment, infringement of free speech and expression on campus, etc.

It is pertinent to note that certain fundamental rights, by virtue of their language or on account of the significance conferred upon them by constitutional courts, have been construed to have a direct horizontal application. The same can be gathered from *People's Union For Democratic Republic v. Union Of India,*[55] wherein the Supreme Court, being faced with an issue pertaining to workmen being paid remunerations lesser than the minimum wage, decided that such labour was 'forced labour' and in breach of Article 23 of the Constitution[56]. The Court also held that though fundamental rights were incorporated to restrict the power of the State, some of these rights can be enforced against private entities as well. These rights can be found, inter alia, in Article 17, 23 and 24. Another instance of direct horizontal application is seen in the case of *Indian Medical Association v. Union of India*[57] wherein the Supreme Court dealt with a matter related to admissions of students and held that Article 15(2) would apply to private, non-minority higher educational institutions as they fell under the definition of 'shops' as contemplated by that Article.

The Supreme Court has recognized certain fundamental rights to be so intrinsic to a meaningful human existence and not "*a mere animal existence*"[58] that they have been applied in a direct horizontal fashion. In this context, even Article 21 has been given direct horizontal application by the Supreme Court in *Consumer Education & Research v. Union Of India & Others.*[59] In this case, the Court, while addressing the issue of the Right to Health of industry workers, held that the Right to Health was an integral facet of the Right to Life enshrined in Article 21 and it applied it in a direct horizontally fashion by issuing directions to the industries to ensure good health of workers.

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[55] People's Union For Democratic Republic v. Union Of India, 1983 S.C.R. (1) 456 (Supreme Court of India, Two Judges' Bench).
[56] INDIA CONST. art. 23.
[57] Indian Medical Association v. Union of India, (2011) 7 S.C.C. 179 (Supreme Court of India, Two Judges' Bench).
[58] Consumer Education & Research v. Union Of India & Others, A.I.R. 1995(1) S.C. 637 (Supreme Court of India, Three Judges' Bench).
[59] *Id.*

An instance where Right to Life provided under Article 21 has been given direct horizontal application in the context of education, too, has can be witnessed in the judgment of *Sobha George Adolfus v. State of Kerala.*[60] In this case, while dealing with the possibility of subjecting aided or unaided minority educational institutions to the Non-Detention Policy (**"NDP"**) envisaged under Section 16 of the RTE Act, the Court was faced with the question of exempting aided and unaided minority educational institutions from the application of the NDP. At the outset, the Court seems to have delved into the question of applying Article 21 through Section 16 of the RTE Act in an indirect horizontal fashion i.e. applying Article 21 against a private entity through a statute[61]. This can be gathered from the following paragraph:

"18. *Thus, as rightly argued… RTE Act has no application in a minority school, whether aided or unaided. However, the Court has to examine whether Section 16 of RTE Act is a mere statutory right or can be treated as a fundamental right expressed in the form of statutory provision. If it is a mere statutory right, no relief can be granted to the petitioner's grandchild, as he is admittedly undergoing his studies in 6th standard in an unaided minority school. However, if the right, as referred above under Section 16 can be considered as a fundamental right, forming part of 'life,' as envisaged under Article 21, the issue would survive for consideration in the writ petition*."

However, the Court did not delve into this question further and taking Article 21 as the touchstone of enquiry, resorted to applying it in a direct horizontal application against minority institutions. The Court, in paragraph 26 of the judgment, held that:

"26…*, denial of promotion upto elementary school level in minority schools also would amount to denial of fundamental rights of the child, as it would have a direct bearing on the right to life of the child guaranteed under Article 21 of the Constitution*."

As discussed previously, the Indian Constitution, both in its original form and as it stands today, places paramount importance on educational rights, especially those of minorities and children, and adequately brings out the requisiteness of education in reaching the Constitutional goal of justice, liberty and equality as contemplated by the Preamble to the Constitution.

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[60] Sobha George Adolfus v. State of Kerala, 2016 (3) K.L.T. 271 (Kerala High Court, Single Judge's Bench).

[61] *Supra* note 3.

There is a constitutional obligation on the State to create conditions that guarantee fundamental rights. The Right to Education is one such requirement to guarantee that a majority of the population enjoys its fundamental rights under Part III.[62]

In light of there being a scope for harmonious interpretation of the universal Right to Education under Article 21 vis-à-vis Article 41,[63] relying on the importance of education in the Indian context and the precedents allowing the direct horizontal application of fundamental rights, there lies a possibility to construe Article 21 to include a universal Right to Education against educational institutions.

This avenue of safeguarding a universal Right to Education by directly approaching a constitutional court under writ jurisdiction for the violation of Article 21 can substitute the reliance on the State Action doctrine which limits the types of educational institutions against whom recourse can be taken through Constitutional Courts.

In spite of the remedy contemplated under Article 21, it is true that alternate civil remedies are available and there may also be bodies or authorities, let us say, contemplated by Legislation, established in the educational institution which are specially equipped to address the issues which can also be dealt with by direct horizontal application of Article 21 if and when they arise. For instance, the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989[64] (**"SC/ST Act"**) has been enacted to curb discrimination against the marginalized Scheduled Caste and Scheduled Tribe people. Under this act, a criminal complaint can be filed directly against the perpetrator of discrimination. Furthermore, subject to certain exceptions[65], other remedies must be exhausted before a

[62] State of Kerala v. Scheduled Caste-Scheduled Tribe Welfare Society of Kerala, A.I.R. 2007 Ker. 158 (Kerala High Court, Two Judges' Bench).
[63] *Supra* note 32. In the *Unni Krishnan* case, the need of a harmonious interpretation of Fundamental Rights with DPSP was pointed out.
[64] Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, Act No. 33, Acts of Parliament, 1989.
[65] Commissioner of Income Tax v. Chhabil Dass Agrawal, (2014) 1 S.C.C. 603 (Supreme Court of India, Two Judges' Bench).

particular issue is taken to a Constitutional Court under writ jurisdiction[66]. Thus, in cases where a statutory remedy or a remedy of like nature is available, such as the case of the SC/ST Act, the Constitutional Court might ask for exhausting the alternate remedy before the matter can be decided on merits under its writ jurisdiction and an argument which as to the utility of such a remedy under Article 21 might arise. However, all the aspects of the universal right to education are not encapsulated under statutory protection and there exists the possibility of a situation in which remedy under ordinary law might not be sufficient.

Hence, an effective Constitutional safeguard to protect the universal Right to Education can certainly be read into Article 21, grounded in the logic of existing jurisprudence; and the requirements of satisfying the tests under Article 12 while approaching Constitutional Courts can, to an extent, be done away with. However, it is imperative to bear in mind that the universal Right to Education should be treated as a negative right which will be triggered only in cases of denial of access to education, myriad forms of discrimination, racial or sexual harassment, infringement of free speech and expression on campus, etc. In other words, this right should not be construed as enabling individuals to demand education from the State in terms of providing adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their educational needs.[67] Doing so would result in opening the floodgates of litigation before the Constitutional Courts.

## CONCLUSION

The case of *Janet Jeyapaul* presents a clear shift in jurisprudence surrounding the treatment of educational institutions Whereas, earlier cases have brought only purely State maintained institutions under the ambit State, the 2015 case of *Janet Jeyapaul* has made even purely private educational institution amenable to writ jurisdiction under Article 32 by relying on the fact that they perform a public function by providing education, and are a

[66] Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra, (2001) 8 S.C.C. 509 (Supreme Court of India, Two Judges' Bench); Pratap Singh v. State of Haryana, (2002) 7 S.C.C. 484 (Supreme Court of India, Two Judges' Bench); GKN Driveshafts (India) Ltd. v. ITO, (2003) 1 S.C.C. 72 (Supreme Court of India, Two Judges' Bench).

[67] As was construed in *Mohini Jain* case, *supra* note 43.

State under Article 12. High Courts have followed the holding in *Janet Jeyapaul* to directly apply the public function test and conclude that the body/institution in question is State under Article 12.[68]

In the world of constant technological advancements, education is the lynchpin to growth; it serves and shall continue to serve an instrumental role in human development as we progress into the third decade of this millennium. In the past, courts have relied upon Article 21 to horizontally apply intrinsic rights that allow a human existence to the people. Upon examination of the great emphasis placed on the importance of education by the Indian Constitution and various precedents present in Constitutional Law jurisprudence, there lies a possibility of going beyond the State Action test and ensuring the protection of the Universal Right to Education by way of direct horizontal application of the right under Article 21, as envisaged in the Indian Constitution. That being said, it is imperative to keep in mind that the universal right of education can only be enforced as a negative right and not to be used as a belligerent enforcing mechanism against educational institutions.

[68] *Supra* note 35.

# A FRAMEWORK TO REFORM THE APPOINTMENT PROCEDURE AND DISCRETIONARY AUTHORITY OF THE GOVERNOR

**SURYA RAJKUMAR**[1]

*The recent instances of gubernatorial (the term means anything pertaining to the Governor) excess in the formation/dismissal of state governments has rekindled the debate on the institution of the Governor, where some are questioning its very existence. From the days of the Government of India Act, 1935 till date, gubernatorial actions have been subject to severe criticism. With successive instances of the misuse of gubernatorial authority, the controversy surrounding the Governor's post is unlikely to abate. Given the importance affixed to the Governor's role in upholding the constitutional machinery in the state, doing away with the post seems undesirable. It is also not in the interest of democracy that the institution of the Governor remains as it stands. This article is hence, an effort to provide a modest framework to reform gubernatorial authority in India.*

*The office of the Governor has two facets, namely the occupant and the powers vested in them. Thus, any measure to reform the post must include changes to the appointment process as well as to the degree of powers vested with Governors. In a similar vein, with the background of the events that occurred in the immediate aftermath of the Karnataka state elections in 2018 and the Maharashtra state elections in 2019, the following paper attempts to provide a framework to (a) reform the process of appointments to the office and (b) constrict the role and powers derived therefrom. In doing so, the paper engages with: (a) the history of the Governor's post in its modern form; (b) uncodified conventions that give sanction to certain arbitrary actions of the Governor; (c) a conspectus of judicial decisions and recommendations from various commissions; and (d) systems of gubernatorial authority in Australia and Canada.*

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# A FRAMEWORK TO REFORM THE APPOINTMENT PROCEDURE AND DISCRETIONARY AUTHORITY OF THE GOVERNOR

## INTRODUCTION

The Governor of the State of Karnataka, His Excellency Vajubhai Vala's handling of events post the state elections in May 2018 prompted strong criticism from politicians and academicians alike. The Governor's invitation to the single largest party to form the government, when an alternative alliance of parties had the requisite mandate along with the grant 15 days' time to the single largest party to prove its majority as opposed to the requested 7 days (a leeway that was seen as creating conducive circumstances for horse trading), culminated in the Supreme Court's intervention that ordered a Pro-tem Speaker to conduct the floor test a day after the election result.[2] Similarly, the Governor of the State of Maharashtra, His Excellency Bhagat Singh Koshyari's invitation to and swearing-in of leaders–who did not have the requisite numbers in the legislature to form the government after the Maharashtra State Assembly elections in 2019 has also attracted severe criticism.[3] In a *déjà vu* of sorts akin to that of Karnataka, the Supreme Court of India (**"Supreme Court"**) ordered the Pro-tem Speaker to conduct a floor-test on the subsequent day *"to curtail unlawful practices such as horse trading."*[4] Unsurprisingly, the Supreme Court relied on its own judgement delivered in the aftermath of the Karnataka State Assembly elections, while deciding the matter involving the Maharashtra State Assembly elections. The turn of events in Karnataka and Maharashtra have rekindled the debate on the gubernatorial position in India. In the aftermath of the Karnataka State Assembly elections in 2018, while some had demanded clipping the Governor's *wings*, some had called into question the very existence of the office.[5] As with Karnataka

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[2] Dr. G. Parameshwara and Anr. v. The Union of India Through its Secretary and Anr., 2018 (7) SCALE 594.

[3] Manuraj Shunmugasundaram, *Gubernatorial restructuring*, The Hindu (Nov. 28, 2019), https://www.thehindu.com/opinion/op-ed/gubernatorial-restructuring/article30099616.ece; Editorial, *Constitution Day: on Fadnavis' exit*, THE HINDU (Nov. 27 2019), https://www.thehindu.com/opinion/editorial/constitution-day/article30090205.ece.

[4] Shiv Sena and Ors. V. Union of India and Ors, (2019) 10 S.C.C 809.

[5] While senior lawyer and former Union Minister Kapil Sibal had demanded the reduction in discretionary powers of the Governor, legal scholar Gautam Bhatia has called into question the very existence of the post. *See*: Kapil Sibal, *Draw the line for Speakers and Governors*, The Hindu (Jun. 11, 2018), https://www.thehindu.com/opinion/op-ed/draw-

and Maharashtra, the recent actions of the Governor of (the then) State of Jammu and Kashmir, in addition to the use of the post as a conduit to make constitutional changes to Article 370 of the Constitution of India (**"Indian Constitution"**) have also been called into question.[6] These, however, lie beyond the scope of this article.

Since independence, various commissions and court judgements have deliberated and delineated measures to wrestle the arbitrary exercise of power by the Governor, but to no avail (a troubling reminder being the chain of events in Karnataka and Maharashtra). Thus, in this article, I shall examine and propose mechanisms to reform the institution of the Governor. In this effort, *first*, I discuss the history of the post in its modern form, as the very fears that were expressed over it in the pre-independence days have materialized in recent times. It may be noted that there are two facets to the office, namely the occupants and the powers vested in them. *Second*, I shall attempt to suggest a framework to (a) reform the process of appointments to the office and (b) constrict the role and powers derived therefrom. At last, there are certain powers vested with the Governor, including those that could decide the fate of state governments, (powers) which emanate not from the constitution but the uncodified conventions. It is these conventions, that give the Governor excessively discretionary powers that are susceptible to abuse, as was seen post the Karnataka State Assembly elections in 2018 and the Maharashtra State Assembly elections in 2019. Thus, I will endeavour to highlight a standard procedure, which constricts such discretion, as its abuse is inextricably linked to the political nature of gubernatorial appointments in India.

## THE HISTORICAL CONTEXT OF THE GOVERNOR'S POST

India's experience with the post of the Governor dates as far back to 272 BCE, when the Mauryan Empire governed its provinces through a

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the-line-for-speakers-and-governors/article24130330.ece; *Also see*: Gautam Bhatia, *Do we need the office of the Governor?*, The Hindu (May 24, 2018), https://www.thehindu.com/opinion/lead/do-we-need-the-office-of-the-governor/article23971800.ece.

[6] Gautam Bhatia, *The Article 370 Amendments: Key Legal Issues*, Indian Constitutional Law and Philosophy Blog (Aug. 05, 2019) https://indconlawphil.wordpress.com/2019/08/05/the-article-370-amendments-key-legal-issues/.

Governor.[7] The exercise of power through the post of the Governor continued to exist as an instrument of imperial cohesion during the reign of the Mughals.[8] However, the controversy surrounding the post in its modern form materialized only after the passing of the Government of India Act, 1935 (**"1935 Act"**).

Section 49(1) of the 1935 Act provided:
*"The executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him."*[9]

Further, Section 51(1) of the 1935 Act provided:
*"The Governor's ministers shall be chosen and summoned by him, shall be sworn as members of the council, and shall hold office during his pleasure."*[10]

In practice, this meant that the council of ministers held office at the pleasure of the confidence of the legislature, akin to the ministers in British Dominions of Canada and Australia, where the Governor was a mere constitutional figurehead with the real authority vested in elected representatives.[11] Further, in these dominions, the dismissal of the council of ministers by the Governor was occasioned only when the former lost popular-will (which was reflected through a vote of confidence).[12] However, the same was not the case in India. The most controversial among ample instances of the misuse of the Governor's post to saturate popularly elected provincial assemblies in India was the dismissal of the Sind Premier by the Governor of Sind in the October 1942. The Governor of Sind was of the opinion that the former lacked the latter's confidence.[13] The real reason for this loss of pleasure was the Sind Premier, Allah Bux's

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[7] *Ashoka and his Successors,* Encyclopaedia Britannica https://www.britannica.com/place/India/Ashoka-and-his-successors.

[8] GRANVILLE AUSTIN, WORKING OF A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 575, OXFORD UNIVERSITY PRESS (2005).

[9] Section 49 (1), Government of India Act, 1935, No. 26, Acts of Parliament,1935 (United Kingdom).

[10] Section 51(1), Government of India Act, 1935, No. 26, Acts of Parliament,1935 (United Kingdom).

[11] Dr. B.M. Sharma, *An Interpretation of Section 51 of the Government of India Act, 1935: A Provincial Governor's Power to Dismiss his Premier*, 4(3) IND. J. POL. SCI. 304 (1943).

[12] *Id.*, at p. 311.

[13] *Id.*, at p. 315.

move to renounce his titles in order to protest repression in British India in the name of law and order through the publication of a letter he wrote to the Viceroy.[14]

Prominent constitutional scholar, K.T. Shah criticized the nature of the post then, observing that the Governor by virtue of the 1935 Act was more than a constitutional figurehead, possessing powers and responsibilities that make *"his role far more active than that of the British King."*[15] In the Constituent Assembly however, the discretion of the Governor was received with mixed reactions. While Prof. Shibban Lal Saxena argued against vesting discretionary powers with an unelected entity, Brajeshwar Prasad sought not only discretionary powers but also felt *"the Governor is not bound to act according to the advice tendered to him by his Council of Ministers"* and *"the Governor should be vested with the power of special responsibilities which the Governor under the British regime were vested in this country."*[16]

## THE CURRENT SCHEME

The scheme surrounding the Governor in the Indian Constitution is very similar to that of the 1935 Act. Under Article 154(1)[17] of the Indian Constitution, the executive power of the state is vested with the Governor, a construction that bears striking similarity to Section 49(1) of the 1935 Act. Further, under Article 163(1)[18], there shall be a council of ministers headed by a Chief Minister to aid and advice the Governor in the exercise of his functions, another provision that bears similarity with Section 51 of the 1935 Act. This similarity in Article 163(1)[19] was also brought to the notice of the Constituent Assembly by member H.V. Kamath who said: *"it appears from a reading of this clause that the Government of India Act of 1935 has been copied more or less blindly without mature consideration."*[20] In the post-

[14] *Id.*

[15] Arvind Elangovan, *Provincial Autonomy, Sir Benegal Narsing Rau, and an Improbable Imagination of Constitutionalism in India, 1935 – 38*, 36 (1) COMPARATIVE STUDIES OF SOUTH ASIA, AFRICA AND THE MIDDLE EAST 66, 80 (2016).

[16] Constituent Assembly Debates, 1st June 1949, Volume VIII available at http://164.100.47.194/Loksabha/Debates/cadebatefiles/C01061949.html.

[17] INDIA CONST. art. 154 cl. 1.

[18] INDIA CONST. art. 163 cl. 1.

[19] *Id.*

[20] Constituent Assembly Debates, 1st June 1949, Volume VIII available at http://164.100.47.194/Loksabha/Debates/cadebatefiles/C01061949.html.

independence era, the Governor, their appointment, their powers and their relationship with the state fall within the purview of Chapter III, Part VI of the Indian Constitution. However, the susceptibility to the arbitrary exercise of powers by the Governor has not vanished post-independence, perhaps the only change seems to be the shift in the centre of power from the British to the Central Government.

Throughout history, the composition of the gubernatorial post, the powers derived therefrom, and the duties imposed thereupon have seen a tremendous amount of change, but one aspect of the office since the Mauryan era remains intact, namely its employment as a long arm of an imperial centre. While one might tend to deny such a characteristic in the post-independence era, as will be seen hereinafter, New Delhi's imperial tendencies have manifested in the myriad ways in which the powers of the Governor have been abused so much so that, even former occupants have criticized it.[21]

## APPOINTMENT AND TENURE

The occupant of a State Capital's Raj Bhavan plays a pivotal role in the exercise of gubernatorial authority. Unlike, in the Nehru era, when as a matter of convention, the states' Chief Ministers were consulted in the process of appointment, post-1963 the Centre has tended to appoint ruling party members often disregarding the states' concerns.[22] One cannot hence dispense with an occupant's past while analysing their role. It is imperative in this regard to examine His Excellency Vajubhai Vala's past. Caught between loyalty to the party to which he owed allegiance for over 3 decades and constitutional responsibility was His Excellency, who noteworthily, vacated the Rajkot seat for Prime Minister Narendra Modi when he was appointed the Chief Minister of Gujarat in 2001.[23] He then, served in many capacities including as state Finance Minister (of Government of Gujarat); president of his party's state unit; and as the Speaker of the state assembly

[21] Austin, *supra* note 8, at 574.
[22] M.G. Khan, *Federal System in India and Switzerland Recent Trends*, 70(2) IND. J. POL. SCI.569, 577 (2009).
[23] Special Correspondent, *Governor is an old BJP hand*, The Hindu (May 15, 2018) https://www.thehindu.com/elections/karnataka-2018/governor-is-an-old-bjp-hand/article23896338.ece.

in Gujarat.[24] As soon as the party (with which his political affiliation lied) came to power in 2014, he was appointed as the Governor.[25] Given his history and his indelible relationship with the party to which he belonged (to which he also gave the mandate after the election results), it is difficult to preclude the role that partisan considerations might have played in his actions post the Karnataka assembly elections. As with His Excellency Vajubhai Vala, Maharashtra Governor, His Excellency Bhagat Singh Koshyari too had an illustrious political career, serving *inter alia* as the national vice president of his party; the Chief Minister of the State of Uttarakhand; and as a Member of Parliament in the Rajya Sabha.[26] Given His Excellency's background, one would hesitate to rule out the role that partisan considerations would have played in swearing-in a member of a party (to which he formerly belonged) as Chief Minister.

As per Article 155[27] of the Indian Constitution, the President appoints the Governor and under Article 157[28] any person who is a citizen of India and is above 35 years of age is eligible to hold the office. Further, under Article 156(1)[29], the Governor serves at the "pleasure" of the President implying that the occupant can be removed by the President on political considerations.[30] The inherent arbitrariness in the use of the word "pleasure" is borne by the holding of the Supreme Court that *"the Governor can be removed from office at any time without notice and without assigning any cause"* by the President who acts on the advice of the Union Council of

[24] *Id.*
[25] *Id.*
[26] *Bhagat Singh Koshyari appointed Governor of Maharashtra*, ANI (Sept. 01, 2019) https://www.aninews.in/news/national/general-news/bhagat-singh-koshyari-appointed-governor-of-maharashtra20190901152433/.
[27] INDIA CONST. art. 155.
[28] INDIA CONST. art. 157.
[29] INDIA CONST. art. 156 cl. 1.
[30] Om Narain Agarwal v. Nagar Palika, Shahjahanpur, A.I.R 1993 SC 1140; It is worthy of mention that the original draft of the Constitution provided for the impeachment of the Governor for violation of the Constitution by both houses of parliament, but later only to be omitted and replaced by the current Article 156(1) amidst fierce criticism by members of the constituent assembly, *See*: Constituent Assembly Debates, 31st May, 1949, Volume VIII, http://164.100.47.194/Loksabha/Debates/cadebatefiles/C31051949.html.

Ministers.[31] That the Governors change with governments is hence no secret.[32]

This constitutional scheme however, gives rise to the following issues:
(1) Articles 155 demonstrates the unbridled power vested in the Centre vis-à-vis the state in a Governor's appointment as the President is very unlikely to turn down the Centre's choice;
(2) Under Article 157, any person irrespective of their political or professional background above the age of 35 can be appointed, including those ill-suited to perform the tasks that the post requires;
(3) Since Article 156 (1) allows the President to remove Governors without any procedural qualification, there is no stability in the tenure, which puts Governors between the proverbial Scylla of removal from office and Charybdis of compliance with the Centre's diktats.

A common thread that runs through the aforementioned issues is a dearth of a mechanism to check for political considerations in appointments. One cannot but say that partisanship is alive today more than ever in the appointment of Governors. The appointments and transfers made in August 2018 are testament to this. All the 7 appointees to the offices of Governor in various states had been members of the ruling party in the Centre and have served in the government in some capacity by virtue of their membership.[33] Further, the new appointments made to the post of the Governor in 5 states in August 2019 are also of those who either belong to or have belonged to the current ruling party.[34] While a bipartisan process in the given scheme is a desirable utopia, the arbitrary exercise of power by

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[31] B.P. Singhal v. Union of India, (2010) 6 S.C.C 331.
[32] P.S. Ramamohan Rao, *Governors and Guidelines*, The Hindu (Apr. 02, 2015) t https://www.thehindu.com/opinion/op-ed/Governors-and-guidelines/article10753822.ece.
[33] FP Staff, *Ram Nath Kovind appoints 7 new governors: From socialist Satya Pal Malik to ex-Vajpayee aide Lalji Tandon; all you need to know*, First Post (22nd August, 2018) https://www.firstpost.com/politics/ram-nath-kovind-appoints-7-new-governors-from-socialist-satya-pal-malik-to-ex-vajpayee-aide-lalji-tandon-all-you-need-to-know-5013331.html.
[34] Liz Mathew, Deeptiman Tiwary, *New Governors for five states, Arif Mohammed Khan will head to Kerala*, The Indian Express (Sep. 02, 2019) https://indianexpress.com/article/india/new-governors-five-states-arif-mohammed-khan-kerala-5957356/.

political appointees is far worse than the partisan-ridden procedure of appointment.

## CONVENTION AND DISCRETION

It was under the power vested in the Governor by virtue of Article 164(1), that Their Excellencies Vajubhai Vala and Bhagat Singh Koshyari exercised their "discretion" to invite the Bhartiya Janta Party (**"BJP"**) to form the Government in Karnataka and swear-in the Chief Minister of Maharashtra respectively. This discretion is derived from Article 164(1) which provides that the Chief Minister and the Council of Ministers shall be appointed by the Governor and shall serve at the pleasure of the Governor.[35] The discretionary power herein is non-justiciable.[36] The Supreme Court has thus observed that the Governor is not answerable to any court for the exercise of his powers.[37]

This immunity is owed to Article 361 of which provides that the *"Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office..."*[88] Further, the Madras High Court has crystallized this immunity in the exercise of discretionary power when it held that the Governor acts in his own discretion while appointing the Chief Minister, and is not answerable to any court for the exercise of such discretion.[39]
Though, the Apex Court has held that the Governor is enjoined by the Constitution to honour popular will in the formation of government[40], such a holding is a mere convention which is dishonoured from time to time, the latest instance being the Government formation in Karnataka and Maharashtra. The discretionary convention in the constitutional scheme bestows upon the Governor the power not just to install governments that do not have the requisite numbers in the State Legislatures, but also to grant time to manufacture majorities, often engineered through horse

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[35] INDIA CONST. art. 164 cl. 1.
[36] DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 6154 (8th ed., 2009).
[37] Rameshwar Prasad v. Union of India, A.I.R 2006 SC 980.
[38] INDIA CONST. art. 361 cl. 1; Under Article 361 (1), *"The President or Governor……, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties".*
[39] S. Dharmalingam v. His Excellency the Governor of Tamil Nadu, A.I.R. 1989 Mad 48.
[40] Rameshwar Prasad v. Union of India, A.I.R. 2006 SC 980.

trading.[41] The respite here, however, is the exercise of judicial review and intervention by way of ordering floor tests. The Patna High Court held that although the Indian Constitution doesn't speak of a floor test, the Governor may ascertain whether the council of ministers enjoy the support of the majority by ordering a vote of confidence in the state assembly, as it is implicit in the constitutional scheme that the Governors must satisfy themselves that those who they invite to form the Government command the majority support in the state legislative assembly.[42]

It is by ordering floor tests from time to time, that courts have ensured that this constitutional scheme is complied with, the most recent examples being in Karnataka and Maharashtra. But as acknowledged by the same Patna High Court the Constitution does not however, refer in express words to a vote of confidence and again, the discretion of the Governor is unfettered.[43] Thus, even floor tests are uncodified conventions. They, however, have a degree of consistency not enjoyed by other conventions as at no instance has a Governor disregarded a winning mandate from a floor test. As with appointment even dismissal is vested with the discretion of the Governor. It is instructive to note that under Article 164(1), the Chief Minister and Ministers hold their offices during the pleasure of the Governor.[44] The logical corollary hence is that they lose office at the withdrawal of pleasure by the Governor. In the same vein, the Calcutta High Court held that the Governor has absolute, exclusive, unrestricted and unquestionable discretionary power to dismiss the Council of Ministers and appoint a new one.[45] This gives ample scope for misuse as in the case of minority governments, Members of Legislative Assembly (**"MLAs"**) can be traded all through the incumbent's term to topple the government by inviting the Governor's displeasure. It is then, the electoral mandate that becomes the victim in this arbitrary exercise of power, more so in circumstances where as an extension of the discretionary power in times of

[41] Kapil Sibal, *Draw the line for Speakers and Governors*, The Hindu (Jun. 11, 2018) https://www.thehindu.com/opinion/op-ed/draw-the-line-for-speakers-and-governors/article24130330.ece.
[42] Sapru Jayakar Motilal C.R. Das v. Union of India, A.I.R. 1999 Pat 221.
[43] *Id.*
[44] INDIA CONST. art. 164 cl. 1.
[45] Mahabir Prasad Sharma v. Prafulla Chandra Ghose, A.I.R 1969 Cal 198.

a fractured mandate, President's rule is imposed under Article 356.[46] Thus, a political appointee exercising discretion to meet partisan ends is sufficient to eviscerate the spirit of the federal structure contemplated in the constitution. It is this that calls for a relook at the appointment process and the powers vested with the office of the Governor.

## A PROPOSED FRAMEWORK

As stated earlier, a host of commissions have made umpteen number of recommendations to reduce the powers of the Governor as well as to reform the process of appointments. The aim of the author here, is to lay down henceforth, with reference to these recommendations, first the changes that need to be made to reduce the discretionary powers of the Governor and second the mechanisms that can root out partisanship in the process of appointments and consequently stabilize the tenure of the Governor. As for the appointment of the council of ministers, the suggested qualification is simple: in choosing the Chief Minster, the Governor should invite the party or combination of parties which commands the widest support in the legislative assembly, and in cases of an alliance, it must be irrelevant whether it was formed before or after the election.[47]

One sees no reason to have an alternate mechanism as the same method is followed for the appointment of the Prime Minister under Article 75 (1).[48] Such a procedure would have paved the way for the JD(S)-Indian National Congress alliance to gain a rightfully deserved invitation in the first instance post the Karnataka assembly elections. Further, on the removal of a state's council of ministers, as recommended by the Rajamannar Committee, the council of ministers should not depend on the pleasure of the Governor and must instead continue to fulfil their duties function, till their government commands a majority in the state legislative assembly and the only grounds that should allow the dismissal of the ministry as recommended should be either non-confidence or a complete breakdown

[46] There are ample instances of the imposition of the imposition of Presidents Rule following election results with fractured mandates including those imposed in Rajasthan in 1967, in Orissa in 1971 and in Bihar in 2005; *See*: Khan, *supra* note 22 at 575-576.
[47] This was initially suggested in the report of the National Commission to review the working of the Constitution; *See* Basu, *supra* note 36, at 6156.
[48] INDIA CONST. art. 75 cl. 1.

of law and order and the constitutional machinery.[49] With respect to appointments, it is to be noted that in recent times, the post of the Governor has been reduced to a retirement package for politicians who stayed faithful to the central government of the day.[50] In contrast, it is suggested that the states must be consulted in the appointment process as suggested by the First Administrative Reforms Commission.[51] Further, as recommended by the Sarkaria Commission, the appointee ought to be (a) eminent in some walk of life; (b) a person who is not domiciled in the state of appointment and (c) detached from the local politics.[52] In extension of the M.M. Punchhi Commission's recommendation of that the Governor must not have participated in active politics for at least 2 years before appointment, it is suggested that the prerequisite be extended to 10 years.[53] The eminent person doctrine is criticized by those who argue that it would create a sycophantic intelligentsia who genuflect to the demands of the government of the day.[54] To overcome this issue, it is suggested that a five-member panel comprising the Prime Minister, the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the concerned State Chief Minister, and the Leader of Opposition in the concerned state assembly be constituted to facilitate bipartisan appointments (appointment must include appointments by virtue of transfers and additional charge). As regards the security for the tenure of the Governor, it is suggested that in congruence with the M.M. Punchhi Commission's recommendations, the Governor shall serve a fixed five-year term and as the former Prime Minister, Nehru aspired, no Governor shall have more than one term.[55]

In addition, it is suggested that a provision be made to allow the state legislature to impeach the Governor, based on a two-thirds majority, on

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[49] The Report of the Centre-State Relations Inquiry Committee, 1971.

[50] Agnidipto Tarafder *Governance and the* Governor, The Hindu (Jun. 05, 2018) https://www.thehindu.com/todays-paper/tp-opinion/governance-and-the-governor/article24083339.ece.

[51] Austin, *supra note* 8, at 578.

[52] Sarkaria Commission, Chapter IV, *Role of the Governor*, http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIV.pdf.

[53] The Report of the Commission on Centre-State Relations, Volume II, *Constitutional Governence and Management of Centre State Relations*, http://interstatecouncil.nic.in/wp-content/uploads/2015/06/volume2.pdf

[54] Tarafder, *supra* note 50.

[55] The Report of the Commission on Centre-State Relations, *supra* note 53.

specific grounds of misfeasance instead of leaving any misdemeanor on the occupant's part to be decided as to whether it brings displeasure to the President. This would serve as an effective mechanism of checks and balances where the state legislature acts as a watchdog of gubernatorial action and ensures that the Governor acts in the best interests of the state. In addition, the practice 'Governors changing with governments' will not sustain in case their removal entails impeachment by the state legislature. While Constitutional Amendments need to be made to effect the suggestions made hereinabove. It is also suggested that violation of the procedures of appointment of the Council of Ministers, their dismissal, the appointment of Governors and their dismissal be subject to judicial scrutiny by way of prerogative writs to be filed before the Supreme Court. However, judicial review with respect to the appointment/dismissal of council of ministers must be confined to directions to conduct floor tests and ensuring their compliance.

## A COMPARATIVE ANALYSIS

In the spectrum of different models of gubernatorial authority, at one end lies the United States of America and on the other end lies the systems in Australia and Canada. The process of appointment to the Governor's post and the power vested with the Governor in India tilts more towards Canadian and Australian models. This is because unlike in the United States, where the Governors are elected and wield real executive power in the States by virtue of enjoying the popular mandate[56], in Canada and Australia, the Lieutenant Governors and State Governors respectively are representatives of the Queen (the equivalent of the President in India).[57] Whereas in Canada, the lieutenant Governor is appointed by the Canadian Governor-General acting in the advice of the Prime Minister, in Australia, the Governor is appointed by the Queen acting on the advice of the concerned state's premier.[58] The appointment process that has been suggested in this paper is a blend of the Canadian and Australian system

[56] *Governor's Power and Authority*, National Governor's Agency https://www.nga.org/consulting/powers-and-authority/.

[57] John T Saywell, *Lieutenant-Governor*, The Canadian Encyclopaedia (Feb. 7, 2006) https://www.thecanadianencyclopedia.ca/en/article/lieutenant-governor ; Campbell Rhodes, *What does a state governor do?*, MUSEUM OF AUSTRALIAN DEMOCRACY (Apr. 30, 2019) https://www.moadoph.gov.au/blog/what-does-a-state-governor-do/#.

[58] *Id.*; Constitution Act, 1867, No. 30 & 31, Acts of Parliament, 1867 (United Kingdom) Section 59.

where the elected governments at the state concerned and the Centre have a say. With respect to government formation, in Canada as well as in Australia, it is the Governor's duty to appoint a council of ministers, which commands a majority in the State Assembly.[59] In similar vein, it must be sufficient for a ministry to command a majority in the state legislature and it must be immaterial if the majority is one of a coalition, and where it is a coalition the Governor's decision must be impervious to whether it was a pre or post-poll coalition. In four of the six states in Australia, the Governor does not have a fixed term and serves at the Queen's pleasure.[60] The ostensible Queen's pleasure in reality means the state premier's pleasure and the Governor's tenure can be shortened or the Governor can be removed from office on the advice of the premier.[61] Under Section 59 of the Constitution Act, 1867, the Lieutenant Governor in Canada holds her office for a fixed five-year term and can be removed from office by the Governor-General acting on the advice of the Prime Minister, for an assigned cause.[62]

As regards the removal, the framework offered in this article tilts towards the Australian model where the state has a say in the removal of the Governor. While a few traces of the Australian and Canadian models have found mention in the framework offered in this paper, it is submitted that the measures to reform the institution of the Governor may have to go beyond current system in overseas' jurisdictions, owing to the sheer peculiarity of gubernatorial power in India, where the Governor exercises power directly on behalf of the federal government especially during President's rule.

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[59] *Role of the Governor*, The Governor of New South Wales, https://www.governor.nsw.gov.au/governor/role-of-the-governor; Author Unknown, *The Lieutenant Governor's Roles*, Government of Ontario (24th September, 2014) https://news.ontario.ca/opo/en/2014/09/the-lieutenant-governors-roles.html.

[60] *Governor's Role*, Governor of Victoria, https://www.governor.vic.gov.au/victorias-governor/governors-role. ; *Role of the Governor*, Government House South Australia https://governor.sa.gov.au/node/14 ; *Role of the Governor*, Government House Western Australia https://govhouse.wa.gov.au/role-of-the-governor/ ; *Role of the Governor*, The Governor of Tasmania https://www.govhouse.tas.gov.au/the-governor/function-of-the-governor.

[61] *Id.*

[62] Rhodes, *supra* note 57.

## CONCLUSION

Admonishing the discretionary power of the Governor in the constituent assembly as a reminder of a humiliating past, Prof. Shibban Lal Saxena had remarked *"I am afraid that if these words are retained, some Governor may try to imitate the Governors of the past and quote them as precedents, that this is how the Governor on such and such an occasion acted in his discretion. I think in our Constitution as we are now framing it, these powers of the Governors are out of place."*[63] The concern of Prof. Saxena was a subtle reference to the dismissal of the Sind Premier in 1940, which was later highlighted by member Rohini Kumar Chaudhari.[64] That Prof. Saxena's concerns regarding the misuse of gubernatorial discretion have materialized post-independence require little elaboration with each successive Karnataka and Maharashtra-like mishap. While doing away with the post seems desirable, it must be noted that it is the Governor who acts as a vital link and a channel of impartial communication between the states and the Centre in addition to ensuring the protection and sustenance of the Constitutional machinery in the state.[65] Consequently, Governors must act as benevolent representatives honouring the constitutional duty vested upon them rather than as imperial hegemons furthering the exigencies of a partisan Centre.

[63] Constituent Assembly Debates, 1st June 1949, Volume VIII, Lok Sabha, http://164.100.47.194/Loksabha/Debates/cadebatefiles/C01061949.html .
[64] *Id.*
[65] S.R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918.

# ALTERING THE SUPREME LAW OF THE LAND: A CONSTITUTIONAL DICHOTOMY BETWEEN INDIA AND AUSTRALIA

**AAKASH LAAD[1] & HARSH SINGH[2]**

*The Constitution of a country reflects the fundamental values and the norms of governance of that country. It is imperative to consider dynamicity of time and values during formulation of such norms. A norm made fifty years ago may not remain relevant in the contemporary times. Simply put, "You must make the Constitution flexible so that it is able to bend as per the social change, because if it does not bend, people will break it".*[3]

*The authors shall compare the process of Constitutional amendment of Australia and India. In doing so, the authors encounter two distinct methods. On one hand, the authors weigh the advantages and disadvantages of 'referendum' as a means to amend the Constitution (Section 128 of the Australian Constitution). While on the other hand, the authors lay emphasis on the nuanced approach of amendment as prescribed under Article 368 of the Indian Constitution. The authors then dwell upon the fundamental difference between the two systems, where the Indian democracy consigns powers (from its citizens) to their representatives, whereas, in Australia, the citizens are involved in the decision making.*

*The authors shall then conclude that the procedure of constitutional amendment as prescribed under the Indian Constitution is better in comparison to that of the Australian method, owing to, inter alia, presence of judicial review vis-a-vis constitutional amendment in the Indian Constitutional Amendment framework while the same being absent from that of Australia's.*

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[3] Constituent Assembly Debates, IX ¶ 526 (17th Sept., 1949).

## INTRODUCTION

Laws are subject to the political, social and economic conditions of a society and since they are ever changing, the law needs to be able to adjust and adapt to dynamic circumstances. It has to be altered according to the new problems emerging in the society that are created by the changing socio-economic-political circumstances. The Constitution of a country is considered as the supreme law of the land, the bedrock for all other laws in the country and a touchstone or a yardstick that needs to be passed by other legislations of a country.[4]

Whenever a new law is passed, the first challenge it faces is to pass the test of constitutional validity. In such circumstances, it becomes necessary for a Constitution to be contemporary and adaptive to the present needs of the citizens. Simply put, *"the ideas upon which a constitution is based in one generation may be spurned as old fashioned in the next generation and thus, it becomes imperative to have machinery in place that can make constitution adaptive of the contemporary national needs."*[5]

There could be two modes of adapting to the changing needs into the Constitution- informal and formal.[6] Informal methods include judicial interpretations whereas the popularly followed amendment process given in the Constitution itself, which may as well be called the 'constituent process' is included under formal method.[7]

Informal methods such as judicial interpretation do not alter the black letter text of the law; however, it is the interpretation of that text that undergoes a change to suit the contemporary needs of the people.[8] "The words of the constitution remain the same, but their significance changes from time to time through judicial interpretations."[9] This method is a rather slow process of striking a constitutional change, as it takes time for

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[4] Francois Rigaux, *Hans Kelsen on International Law,* 9 EUROPEAN J. OF INT'L L. 325, 343 (1998).
[5] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1661 (LexisNexis 7th ed. 2014).
[6] *Id.*
[7] K.C. WHEARE, MODERN CONSTITUTIONS 146, 177 (Oxford University Press 2nd ed. 1964).
[8] *Id.*
[9] *Supra* note 5, at 1064.

a particular judicial interpretation to take a solid form after *"analysing a body of judicial precedents."*[10] Though, the process is somewhat slow, yet, the courts in both India and Australia have started to interpret the scope of the constitutions in their respective jurisdictions.[11] However, in both the jurisdictions, the formal method of constitutional amendment takes supreme importance and in the following part of this paper, the authors shall be giving a brief overview of the amendment procedure of both the constitutions. Subsequent to which, the authors shall discuss the concept of judicial review of the constitutional amendment in both the countries, as this allows a form of judicial scrutiny of an amendment. The authors would conclude, thereafter, with a brief analytical comparison of constitutional amending procedure of both the nations.

## FRAMEWORK OF AUSTRALIAN CONSTITUTIONAL AMENDMENT

The Australian Constitution is embodied in the Commonwealth of Australia Act, 1900 that came into force on 1st January 1901.[12] The Commonwealth of Australia Act is a British statute containing nine clauses, where the first eight are called covering clauses (introductory provisions) and the ninth clause contains the Constitution. The Constitution is further divided into eight chapters and 128 sections with Section 128[13] laying down the procedure of amendment. The procedure of amendment is not applicable to Clauses 1-8 of the Australian Constitution Act because these sections establish Australia as a 'Federal Commonwealth' under the British Crown and would require an Act of the British Parliament for succession or dissolution.[14] The Preamble of the Constitution states that even if the British Parliament enacted it, it still is a product of the efforts that were put in by the fellow Australians.[15] The Australian Commonwealth Constitution is the fundamental and the supreme law that lays out the basic rules for the operation of the nation under three distinct and separate titles: the Executive, the Legislature and the Judiciary. The Parliament is a manifestation of the same legislature, which derives its existence from the

[10] *Supra* note 5, at 1662.
[11] *Supra* note 5, at 1605, 1662.
[12] AUS. CONST., § 1 clause 9.
[13] AUS. CONST., § 128.
[14] Statute of Westminster 1931, § 8.
[15] AUS. CONST., Preamble.

Constitution. It provides for a parliamentary set up at the centre where the Governor-General exercises its power on the advice of the Executive Council or the federal ministers.[16] The Australian Constitution is majorly based upon the model of that of the United States of America.[17] The Constitution has expressly defined the powers of the Commonwealth to the powers of the States, which are subject to the Constitution.[18] The States and the Centre have their own respective spheres and they operate within that, without the encroachment of the other. The Constitution does not contain a specific chapter on fundamental rights but all fellow Australians are given basic rights and liberties.[19] It directly postulates only three rights, which are religious tolerance[20] , non-discrimination[21] and just terms on the acquisition of property[22]. It is a federal parliamentary democracy but unlike the Indian Constitution, the states in Australia have their own Constitution along with the amendment powers.

Section 128 of the Australian Constitution lays out the procedure in which a constitutional amendment can be brought about. This section requires that first and foremost a bill must be submitted to the Commonwealth Parliament and after it has been passed by an absolute majority of each House of the Parliament, it shall be submitted to the voters of different states and territories for a referendum.[23] The process of amendment is a peculiar feature of the Australian Constitution. For an amendment to be ratified, it has to be passed by a double majority,[24] i.e., there would have to be a majority in the states and as well as of the Australian voters, who can be divided into two groups i.e., voters of the state and of the territories. The votes received from voters of the territories are only used for

[16] AUS. CONST., § 63.
[17] Patrick Keyzer, *The Americanness of the Australian Constitution: The influence of American Constitutional Jurisprudence on Australian Constitutional Jurisprudence*, 19 AUSTRALIAN J. OF AMERICAN STUD. 25, 35 (Dec. 2000).
[18] AUS. CONST., § 2 & § 51.
[19] George Williams, *The Federal Parliament and the Protection of Human Rights*, Parliament of Australia, 1998-99 Research Paper 20 (May 11, 1999), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20.
[20] AUS. CONST., § 116.
[21] *Id.*, at § 117.
[22] *Id.*, at § 51.
[23] *Id.*, at §128.
[24] *Id.*

determining the nation-wide total and not used in any respect for determining the state's total. The representatives in the Parliament supporting the proposal prepare a 'Yes' document and the remaining members, who oppose it, come up with a 'No' document, which is supplied to all voters so that they read and decide their stand in the referendum.[25]

There are various sections in the Constitution Act that authorise the Parliament to amend certain provisions of the Act in the ordinary course of legislation without any need of a referendum. Provisions involving the voting procedure for Senators[26], qualification and number of federal representatives[27], privileges that are enjoyed by the House[28], appointment of federal civil officials[29], number of State federal ministers[30], creating judicial courts in the centre[31], creation of new states[32], the seat of government[33], jurisdiction of courts at the centre and in the states[34], and the accepted/acquired government of territories[35].

Apart from the aforementioned provisions, other provisions can only be amended in accordance with Sec. 128, which requires that the amendment should be:

(i) Agreed to by either an absolute majority of both the Houses or by an absolute majority of either of the Houses of the Parliament; and
(ii) Approved by a majority of voters both in the state as well as at the centre.
(iii) Thereafter, the bill is presented to the Governor-General for his assent.

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[25] Lynette Lenaz-Hoare, *The History of the 'YES/NO' Case in Federal Referendums, and a suggestion for the future*, *Proceedings of the Australian Constitutional Convention Brisbane, V*ol. II, App. 5, *July 29 & Aug. 1 (1985)* (Standing Committee Reports).
[26] AUS. CONST., § 7.
[27] *Id.*, at § 27 & § 34.
[28] *Id.*, at § 49.
[29] *Id.*, at § 67.
[30] *Id.*, at § 69.
[31] *Supra* note 26, at § 71.
[32] *Supra* note 26, at § 121.
[33] *Supra* note 26, at § 125.
[34] *Supra* note 26, at § 77.
[35] *Supra* note 26, at § 122.

**FRAMEWORK OF INDIAN CONSTITUTIONAL AMENDMENT**

The Constitution of India provides for three broad categories of constitutional amendment in Article 368. The first category includes the provisions, where, simple legislative process and simple majority can give effect to an amendment, similar to what is adopted in the passing of an ordinary legislation.[36] The second category of provisions can be considered more vital and material than the previous one[37], as an "*amendment to these provisions may only be done by following rule of the special majority*."[38] These provisions may include anything that has not been covered by the first category and excludes the expressly provided provisions under the third category. In the third category, the provisions are expressly mentioned in the Article itself and include "*Articles 54, 55, 73, 162, 241, 279-A, lists of the Seventh schedule, representation of States in Parliament, Chapter IV of Part V, Chapter V of Part VI, Chapter I of Part XI and Article 368 of the Constitution of India*."[39] For these aforementioned provisions, the amendment may only be affected after following the special majority rule and additionally, ratification of half of the state legislatures.[40] These provisions may sometimes be referred as 'entrenched provisions'[41] that determine the federal character of the Indian Constitution, owing to their rigid and unique procedure of amendment.

Indian constitution drafters have not adopted the direct and elaborate procedure of referendum, as seen in Australia. The authors are of the opinion that since India's independence came with a devastating partition and a lot of bloodshed along communal lines that shook the very soul of the nation, the policy drafters may have thought to not go with such a machinery that would involve any direct role of the public in the law making and therefore, may have chosen to have representative democracy rather than participatory democracy. Additionally, the drafters must have

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[36] INDIA CONST. art 368 (2).
[37] *Supra* note 5, at 1666.
[38] INDIA CONST. art 368, § 2.
[39] VN SHUKLA, CONSTITUTION OF INDIA 1071 (Eastern Book Co. 12th ed. 2013). *See Supra* Note 5, at 1668,1669.
[40] *Id.*
[41] *Supra* note 5, at 1668.

taken into consideration the plurality of India's population in terms of culture, religion and language, etc. This would have made the drafters anxious over the thought of having a referendum. Moreover, the elections in India are done with Universal Adult Suffrage, which ensures the role of the public. Thereafter, it is up to those elected representatives, who are made responsible for making the law, to ensure the indirect participation of the voters, while also securing the rights of minorities. Referendums may result in a scenario where the majority always stands victorious and the views of the minorities are not represented at all. We are of the opinion that this might have been the reason why the choice of referendum was not made for the Indian Constitution.

Constituent Assembly members, with the exception of Brajeshwar Prasad[42], had acquiesced the fact that our Constitution does not provide for a referendum and that the American model of Constitutional Amendment is being followed in our Constitution, the debate mostly was about the form of majority (simple or special) required for amending the Constitution.[43] The assembly did go for a special majority in most of these cases because of the element of constitutionalism in our Constitution, which asserts that the Constitution not only provides for the powers and functions of the organs of the government but also limit them and make the government accountable to the people of India.[44] Moreover, the composition of future Parliaments made up of elected representatives may have a partisan motive and thus, rigidity in amending procedure is imperative.[45] Therefore, amending a document as fundamental as the Constitution of India should not be done with a 'simple' majority.[46] As far as the question of a referendum is concerned, there can only be speculation that the Assembly members may have thought that the provision of referendum may subvert the representative democracy. It is also to be noted that Dr. Ambedkar side-lined the procedure of a referendum as being too difficult to manifest.[47] The Constitution makers sought to "find

[42] Constituent Assembly Debates, IX ¶ 478 (17th Sept., 1949).
[43] *Id.*, at ¶ 451, 606.
[44] *Id.*, at ¶ 600.
[45] Constituent Assembly Debates, VII ¶ 250 (4th Nov., 1948).
[46] Constituent Assembly Debates, IX ¶ 600 (17th Sept., 1949).
[47] Constituent Assembly Debates, VII ¶ 249 (4th Nov., 1948).

a *via* media between the two extremes of flexibility and rigidity so that the Constitution may keep pace with social dynamism in the country."[48]

## JUDICIAL REVIEW VIS-À-VIS CONSTITUTIONAL AMENDMENT

The role played by the judiciary in a country with a democratic and federal constitution is essential for the smooth functioning of the state and its organs. Judiciary, *inter alia*, serves as independent institution to act as a guardian of the Constitution, by reviewing legislations against the touchstones of the Constitution.

The importance ascribed to Judicial Review in the constitutional scheme has been emphasized upon by Chandrachud J. as-

*"It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water."*[49]

Judicial review is thus, the source of upholding the constitutional mandate, in terms of the scope and exercise of powers by the state. Therefore, it is imperative to ascribe the due importance of judicial review with respect to the amendment of a constitution, given the fact that the power of judicial review in most cases emanates from the Constitution itself. Recognising the sensitivity of balancing the desire of the state to amend the constitution and the mandate of the judiciary to review these changes, the Supreme Court has held that judicial review is a part of the basic structure of the Indian Constitution[50]; therefore, it cannot be abrogated or diluted.

The principle of judicial review is different in both the countries, or rather, it is absent in one of them. In the Australian Constitution, there is no concept of Judicial Review of a Constitutional Amendment and nor the judicial institutions of Australia have interpreted this concept through case laws. However, in the Indian context, the judiciary has played a key role in formulating the concept of judicial review within the constitution and even

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[48] *Supra* note 5, at 1667.
[49] Minerva Mills v. Union of India, (1980) 3 S.C.C. 625.
[50] *Id.;* S.R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918.

placed it under the doctrine of basic structure.[51] This is a key distinction between the two countries with respect to the doctrine of judicial review. In the following part, the authors have discussed how this concept has taken its course in both the concerned countries through a number of relevant case laws.

## ANALYZING (LACK OF) JUDICIAL REVIEW OF AMENDABILITY OF AUSTRALIAN CONSTITUTION

Constitution framers wish to legislate such piece that not only provides for rules and regulations but also on document that evolves with time. The judicial interpretations and review by the High Court of Australia (Superior most court)[52] have repeatedly resulted in the evolution of the Australian Constitution. In fact, the decisions made by the High Court have changed the interpretation of the supreme document without altering any word contained therein. Changing interpretations have resulted in an expansion of Commonwealth powers and in certain instances, its decisions have achieved outcomes that had been expressly rejected at referendums. [53] Having been rejected by the public in referendums, these decisions have given powers to the Commonwealth over corporations[54], and made changes in aviation[55], universal adult franchise[56], marketing schemes for primary products[57].

The High Court has also advanced its interpretation with respect to Section 128 of the Australian Constitution. The High Court in the case of *Attorney General for Commonwealth of Australia v. Colonial Sugar Refining Co.*[58] made an unswerving pronouncement on this issue, "*Section 128 enables Australia to*

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[51] *Supra* note 49.
[52] AUS. CONST., § 71.
[53] Anne Twomey, *Constitutional Interpretation and the High Court: The Jurisprudence of Justice Callinan,* 27 (1) U. OF QUEENSL. L. J. 47 (2008).
[54] New South Wales v. Commonwealth (2006) 229 C.L.R. 1.
[55] Airlines of New South Wales Pty. Ltd. v. New South Wales (No. 2) (1965) 113 C.L.R. 54; Commonwealth v. Tasmania (1983) 158 C.L.R. 1.
[56] Roach v. Electoral Commissioner (2007) 239 ALR 1.
[57] Cole v. Whitfield (1988) 165 C.L.R. 360.
[58] Attorney General for Commonwealth of Australia v. Colonial Sugar Refining Co., (1914) A.C. 237.

*alter the Constitution to endow herself with the largest capacity of dealing with her own affairs, and that too without coming to the mother Parliament*."[59]

The two latest referendums aimed at turning Australia into a Republic[60] and adding a fresh preamble to the Commonwealth Constitution[61] and, like the other majority proposals, they also failed. The last amendment proposal that was successfully passed was in 1977 and is only the eighth amendment to have been passed in Australia since its inception.[62] Australian history denotes that the voters have been conservative at times but have also shown acceptance to change wherever it was required.[63] Irrespective of this, the procedural nuances of referendum involving the public at large are intertwined with various psychological complexities, which bring us to the fallacies involved in such a framework.

*Voting pattern of the masses*

Although the most important part of the amendment process is left to the voters to decide, nothing is done to analyse the voting behaviour of the masses. When huge powers are conferred upon the public, it becomes imperative to keep a watch on the exercise of those powers. This is what lies in between the two extremist views of scholars on the powers granted to the masses. One sect believes that whatever the outcome of a referendum is, it is based on the general awareness and intellect of the people[64] whereas the other sect brands it as their incapability to decide on serious issues because of their ignorance[65]. There is a possibility that the voters may get confused with the complexity of the proposed referendum, which impairs their decision-making ability.[66]

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[59] *Id.*

[60] Constitutional Alteration (Establishment of a Republic) Bill, 1999.

[61] Constitutional Alteration (Preamble) Bill, 1999.

[62] Constitutional Alteration (Retirement of Judges) Act, 1977.

[63] Scott Bennett, The Politics of Constitutional Amendment, Parliament of Australia (2002-03 Research Paper no. 11, 23rd June, 2003), https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp0203/03rp11

[64] MARK COORAY, THE CONSTITUTION AND CONSTITUTIONAL CHANGE 24 (B. Galligan and Nethercote eds.).

[65] DON AITKIN, AUSTRALIA (David Butler and Austin Ranney eds.), *Referendums. A Comparative Study of Practice and Theory*, AMERICAN ENTERPRISE INSTI. FOR PUB. POL'Y RES. 130 (1978).

[66] John Higley & Ian McAllister, *Elite Division and Voter Confusion: Australia's Republic Referendum in 1999*, 41 (6) *EUR. J. OF POL. RES.* 845 (7/2002).

*Double Majority*

Achieving double majority is an uphill task, therefore, for any proposed amendment to pass it has to be ratified by a double majority. Double majority means that the proposal must have a majority in the States (at least 4 out of 6) and an overall majority of the nation. The votes of the territories are counted in the national total and not in any specific State. The threshold of this requirement may be too high. Had it been just half the total number of States (as proposed in the 1974 amendment attempt)[67], there would have been three more successful amendments (Industrial employment (1946)[68], Marketing (1946)[69] and Simultaneous elections (1977)[70])[71] or had it been just the nationwide majority, the 1937 aviation amendment attempt too would have been successful. However, all of these amendments failed because they could not satisfy the other prong of the majority test.

*Layered questions*

The format of asking questions on the day of the referendum is done on a ballot paper and it has followed a similar pattern for every referendum. The proposed amendment is written on the ballot paper and it asks *'Do you approve of the proposed law for…?'* For example, "*Do you approve of the proposed law for the alteration of the Constitution entitled 'Constitution Alteration (Powers to deal with Communists and Communism) 1951'?*" or "*A Proposed Law: 'To alter the Constitution to insert a Preamble.' Do you approve of this proposed alteration?*" The answer to such questions can only be either a 'yes' or a 'no'. So, those questions where there is a mixture of more than one question, it becomes difficult for voters to give their view because they might want to say 'yes' for one half of the proposal but 'no' to the other. However, this option is not available to voters. They have to just cast a 'yes' or a 'no' vote to the entire proposal, even if it has multiple debatable sub-proposals underlining it. The voters are given combined questions that do not have one straightforward answer.[72] This highlights one of the reasons why only eight amendments have been passed till date. In order to achieve better results,

[67] Constitution Alteration (Mode of Altering the Constitution) Bill, 1974.
[68] Constitution Alteration (Industrial Employment) Bill, 1946.
[69] Constitution Alteration (Marketing) Bill, 1946.
[70] Constitution Alteration (Simultaneous Elections) Bill, 1977.
[71] These three amendments had received more than 50% of the nation-wide total votes but managed to secure majority in only 3/6 states; hence, failed.
[72] LESLIE FINLAY CRISP, AUSTRALIAN NATIONAL GOVERNMENT 51 (1965).

policy makers must either consider adopting a nuanced mechanism for answering multi-layered referenda questions or should restrict the referenda question to a single-layered 'yes' or 'no' answer.

*Political Rivalry*

Australia has a multi-party system. However, only two parties have been able to dominate the political set up of the country i.e., the Labour Party and the Liberal Party. The tussle between the Labour Party and the Liberal Party has led to the passage of many amendment bills and their eventual rejection in referendums.[73] Since 1901, 1/3rd of the time, the Labour Party has been in power and tried to bring about 57% of the total referendums that have taken place but only one attempt was successful.[74] Their agenda has been to centralise the Constitutional power even more but it has always been met with a lot of resistance by the masses.[75] On the contrary, the Liberal Party has often taken the role of the protector of the Constitutional machinery. They have usually opposed the Labour Party's efforts to weaken the federal structure.[76] However, their liberal approach has also proven to be a conservative one by not creating room for Constitutional amendments. Given the political climate, it seems that the voting on referendums has become an ideological contest, thereby, side lining the merit of the amendment.

## TRACING THE HISTORY OF JUDICIAL REVIEW OF AMENDABILITY OF INDIAN CONSTITUTION

Since the inception and adoption of the Indian Constitution, there have been numerous questions on the scope of amendments in relation to the Constitution. The Constitution is the supreme law of the land and it has been often discussed as to what extent it can be altered. The amendment

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[73] Scott Bennett, The Politics of Constitutional Amendment, Parliament of Australia (2002-03 Research Paper no. 11, 23rd June, 2003), https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp0203/03rp11

[74] *Id.*

[75] John McMillan, *Constitutional Reform in Australia*, 13 PAPERS ON PARLIAMENT 70 (Nov. 1991).

[76] Professor Brian Galligan, *Parliament's Development of Federalism*, PARLIAMENT OF AUSTRALIA (2000-01 Research Paper 26, June 26, 2001), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP26.

of the Constitution has been an issue of great constitutional importance and has also traveled a long journey in the Indian Supreme Court. The question of extent of alteration possible was addressed by the Supreme Court in *Kesavananda Bharti v. the State of Kerala*[77], wherein the court adopted the basic structure doctrine that provided an abstract scope of power of the Parliament to amend the Constitution and prescribed that anything in the Constitution may be amended unless it changes the basic structure of the Constitution itself. The range of basic structure since then has been defined and redefined by the apex court through different judgments and opinions. The basic structure doctrine, though was defeated as early as in 1976 through 42nd amendment that added Article 368 (4); however, to this date, the doctrine has been used by the Apex Court to validate any law against the constitutional touchstone[78] and the subsequent governments have been passive in that regard. It is often argued that 44th Amendment to the Constitution removed most of the changes, which were made by the 42nd Amendment and changed the position back to ante-1976; however, "*the stamp of 42nd Amendment on Article 368 still remains*."[79]

There have been amendments in the past, which attempted to curb the scope of the fundamental rights of the citizens; for instance, the 24th Amendment[80] made a distinction between a law and a constitutional amendment to save the latter from the scrutiny of Article 13[81], therefore, making it immune to the test of fundamental rights.[82] This amendment was challenged in the Apex Court in the *Kesavananda Bharti case.*[83] The Court, while upholding the amendment, created a more comprehensive shield in the form of 'basic structure doctrine' in the same case.[84] However, the 44th Amendment[85] in 1978 that removed the right to property as a fundamental right and placed it under Article 300 as a constitutional right could be said

[77] Kesavananda Bharti v. State of Kerala, A.I.R. 1973 S.C. 1461.
[78] IR Coelho v. State of Tamil Nadu, AIR 2007 SC 861; DD BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 187 (LexisNexis, 23rd ed. 2018).
[79] DD BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 189 (LexisNexis 23rd ed. 2018).
[80] The Constitution (Twenty-fourth) Amendment Act, 1971.
[81] INDIA CONST. art 13.
[82] The Constitution (Twenty-fourth) Amendment Act, 1971, § 2.
[83] *Supra* note 77.
[84] *Id.*
[85] The Constitution (Forty-fourth) Amendment Act, 1978.

to be one of the most successful attempts made to curb the fundamental rights. Barring this particular amendment, there have been numerous challenges made to the amendments that tried to curtail the fundamental rights of the citizens and most of them were sustained in the Apex Court. The first challenge to the amendability of the constitution was made in *Shankari Prasad*[86] case, wherein, the court was to examine if an amendment can curtail a fundamental right guaranteed under Part III of the Constitution. Particularly, the right to property[87] was curtailed by the first amendment[88] to the Constitution and the court, surprisingly, did not hold the amendment void and instead agreed with the opinion that the fundamental rights can be violated. It held that Article 13, which talks about any law being in violation of fundamental rights is automatically invalid, applies to ordinary law and not to a constitutional amendment.[89] This view remained the same in the *Sajjan Singh*[90] case as well, however, the minority opinion expressed that fundamental rights do create some limitation on the power of amendment.[91] The minority opinion of the *Sajjan Singh case*[92] was followed as the majority in the *Golaknath*[93] case, wherein, the court held that the Part III of the Constitution that contains the fundamental rights cannot be amended and that the word 'law' in Article 13 includes a constitutional amendment as well. It is necessary to note two things regarding Article 13 at this point; *firstly*, it is not meant to make the whole Act or law inoperative or void, but only the rule or provision under that law, which is in contravention to the Fundamental Rights.[94] *Secondly*, the part of a law that is in contravention of the Fundamental Rights does not become lifeless, but is only overshadowed by the Fundamental Rights until it foregoes its contravening element and become operative again.[95]

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[86] Shankari Prasad Singh v. Union of India, A.I.R 1951 S.C. 458.
[87] INDIA CONST. art 31.
[88] The Constitution (First) Amendment Act, 1951.
[89] *Supra* note 5, at 1670.
[90] Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845.
[91] *Id.*
[92] *Id.*
[93] I.C. Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643.
[94] *For* Doctrine of Severability, *see* A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27.
[95] *For* Doctrine of Eclipse, *see* Bhikaji v. State of Madhya Pradesh, A.I.R. 1955 S.C. 781.

In 1971, the government started an infamous tussle between legislature and judiciary by introducing 24th Constitutional Amendment[96] in 1971 to undo the effect of judgment in *Golaknath* case. The amendment specifically made it clear that Article 13 shall not apply to any amendment under Article 368 and thereby, removing all the doubts and room for interpretation of Article 13 with respect to Article 368. Post this amendment, the 25th amendment[97] was also enacted which further diluted the right to property under Article 31.[98] Now expectedly, both the 24th and 25th amendments were challenged in the Apex Court but this time, the result was different from what was expected. This time, in *Kesavananda Bharti*[99] the court did not outrightly restrict the power of Parliament under Article 368, rather it simply developed a doctrine that prescribes that an amendment changing the basic structure of the constitution may not stand valid but otherwise, anything in the constitution is amendable. However, in this case the basic structure was not defined by the courts and was left on the case-to-case development of the doctrine.

To undo the effect of the judgment in *Kesavananda Bharti*[100], the Parliament enacted the 42nd Amendment that changed Article 368 in a way that the Parliament could be said to have emerged victorious of a decade-long battle between legislature and judiciary. This amendment added a sub-clause (4) in Article 368 giving absolute power of amendment to the Parliament and making such amendment immune to any judicial review. In the *Minerva Mills case,*[101] the apex court, while holding the basic structure doctrine, held the 42nd amendment to be unconstitutional. It was also held that "*any amendment of the Constitution which seeks, directly or indirectly, to enlarge the amending power of Parliament by freeing it from the limitation of unamendability of the basic structure would be violative of the basic structure and hence outside the amendatory power of Parliament.*"[102] Later, the Apex Court in a number of judgments, which

[96] The Constitution (Twenty-fourth) Amendment Act, 1971.
[97] The Constitution (Twenty-fifth) Amendment Act, 1971.
[98] INDIA CONST. art 31.
[99] *Supra* note 77.
[100] *Id.*
[101] *Supra* note 49, at 718.
[102] *Id.*, at 677.

followed the 42nd Amendment, reiterated this doctrine[103], thereby, further nullifying the effects of Article 368 (4) added through the 42nd Amendment. Pursuant to the above-mentioned scenario, the amendment of the Constitution to fulfil the party interest based on majoritarian sentiments by a strong executive may become hard in the future, unless the interest represents that of the nation. At the same time, it is to be noted that, *"Constitution is a national heritage",*[104] and amending it as per the whims and caprices of a party is not permissible under the Constitutional morality of any nation and "*no single party thus, has a right to institute an amendment in the party's interest rather than in national interest.*"[105] Therefore, the judiciary also has to play a pro-active role while protecting the basic structure of the Constitution, as judiciary remains the only pillar of the democracy with no partisan motives.[106]

## CONCLUSION

Both India and Australia have written Constitutions, which are federal in nature. We believe that the supreme law of the nation should not be amended by an ordinary law or a procedure adopted to amend an ordinary law. Thus, a special procedure is required to amend the supreme law of the land. In order to avoid any controversies and friction between the legislative authorities, the Constitution itself provides the manner and procedure of amending itself. Although both countries are modelled on common law, their amendment procedures are drastically different. In one system, the masses give the power to democratically elected politicians to bring amendments while in the other; the democratically elected politicians give the power to the masses via a referendum to bring about an amendment. The issue with both these procedures is that on one hand, the representatives may be said to be considered only with vote bank politics and on the other hand, a huge majority is incapable of understanding whether the proposed amendment is beneficial for them or not.

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[103] Waman Rao v. Union of India, A.I.R. 1981 S.C. 271; Raghunath Rao v. Union of India, A.I.R. 1993 S.C. 1267; R.C. Poudyal v. Union of India, A.I.R. 1993 S.C. 1804; Kihoto Hollohan v. Zachillu, A.I.R. 1993 S.C. 412; K.S. Puttuswamy v. Union of India, (2017) 10 S.C.C. 1.

[104] *Supra* note 5, at 1684.

[105] *Id.*

[106] *Id.*, at 1607.

Article 368 of the Indian Constitution lays down multiple methods of amending the constitution. It states that an amendment by the Parliament can be made by passing a resolution either by simple majority or by two-third majority. Additionally, in issues affecting the federal character of the country, two-third majority of the Parliament is required plus ratification by at least half of the states.[107] The presence of different amendment procedures highlights the relative significance of provisions *vis-à-vis* federalism. However, the amendment procedure of Australian Constitution remains the same for all provisions of the constitution, except provisions related to the rights of states.[108] That however, does not mean that Australian Constitution lacks safeguards to protect its federal character. In order to balance out Australian federalism, the state's participation in referendum is an important feature to check centre's arbitrary exercise of power.[109]

The authors are of the opinion that the method of amendment in the Indian Constitution is more nuanced than the Australian method. Although, Article 368 (3) and Article 13 (4) read in conjunction mention that an amendment is not law for the purpose of Article 13[110] and therefore, cannot be struck down even if it abridges Fundamental Rights. However, the basic structure doctrine of the *Kesavananda Bharti Case*[111] comes to the rescue of the principle of judicial review and allows for a juridical scrutiny of any amendment to the Constitution. On the other hand, there is no such provision in the Australian Constitution that can provide the courts of law, expressly or impliedly, the mandate to review an amendment in the Constitution of Australia. The authors are of the opinion that there are two primary reasons which highlight the importance of judicial review of a constitutional amendment. Firstly, the Parliament of any country consists of the party that has secured majority of votes. Therefore, any law or amendment passed by the Parliament may have a partisan connotation, which can vitiate the law so made to its favour and thus, judicial review

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[107] INDIA CONST. art 368.

[108] Virender Kumar, *Amending Procedure under the Constitution of India- A Comparative Analysis in USA and Australia* (2011) (unpublished thesis, University of Himachal Pradesh) (on file with the Department of Laws, Himachal Pradesh University).

[109] Id.

[110] INDIA CONST. art 13- *Laws in derogation with the fundamental rights are void.*

[111] *Supra* note 77.

becomes imperative as it is unbiased and keeps a check on the sanctity of the Parliament. Secondly, the power of judicial review is a means to an end, the end of achieving supremacy of the Constitution.[112] As affirmed by Hans Kelsen that without judicial review, there would be no supremacy of the Constitution and therefore, to maintain the supremacy of the Constitution, an unbiased judicial review is indispensable.[113]

Further, the method of referendum, as provided in the Australian Constitution is not likely to work in the Indian regime, for the breadth of the cultural diversity and the length of the regional inconsistencies in India may not help the masses in India to come up with an objective law that would suit all. Therefore, the representative democracy instead of participatory democracy helps the issue by thoroughly debating any amendment and putting it through the 'impact and effect' test[114] before finally enacting it.

The authors are of the opinion that by adopting referendum for the purpose of amendment to the Constitution the state exchequer may be unnecessarily burdened. Further, the authors are sceptical about the inherent defects of 'yes' and 'no' model of referendum, as discussed above, as it may not properly capture the sentiments of the diverse Indian population. Furthermore, referendum entails a procedural rigidity because of its sheer magnitude of its exercise and hence, Australia has only witnessed eight successful amendments in its history. [115]

Since, the objective of amending a Constitution is to make it more suitable and relevant as per the changing times and situations- having a procedure as vast and tedious as this, may defeat the whole purpose of having an amendment clause in the Constitution. The Indian Constitution also has a detailed procedure of amendment, however, primarily owing to representative democracy, the procedure becomes less cumbersome as

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[112] Michel Troper, *The Logic of Justification of Judicial Review,* 1 (1) INT. J. CONST. L. 99, 121 (01/2003).
[113] *Id.*, at 105.
[114] "*This test infers that the form of an amendment is not relevant per se, rather the consequence or the impact of that amendment is an determinative factor in nullifying or upholding that amendment*," applied by the Supreme Court in I.R. Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 861.
[115] HOUSE OF REPRESENTATIVES PRACTICE 30 (Elder ed., Department of the House of Representatives Canberra, Australia) (7th ed. 2018).

compared to the Australian one and therefore, as is also evident, there have been more than hundred amendments to the Constitution of India.

The authors feel that both the systems have their own advantages and disadvantages but being countries governed by written constitutions, it is needed that their *lex supreme* is adapted as per the changing times and societal undertones, in order to meet the challenging situations and as well as to fulfil the growing aspirations of their citizens.[116] However, the authors, after analysing both the procedures, conclude that the adaptability of the Indian Constitution with changing times is more suitable than the Australian Constitution, owing to the composite and concentrated procedure of amendment of the former.

[116] Constituent Assembly Debates, IX ¶ 526 (17th Sept., 1949).

# WHIPPING UP THE 'CREAM'?* - INDIAN SUPREME COURT AND ITS DECISION IN B.K. PAVITRA – II

**ANANT SANGAL**[1]

*If there is one common thread which runs through the jurisprudence of the Indian Supreme Court spanning over seven-decades, it will be easy to say that its constant engagement with affirmative action of the state is that thread. Affirmative action for the Scheduled Castes and Scheduled Tribes in India has been subject to a plethora of academic, journalistic, and political discussions. While a substantive part of this debate has significantly been polemical, this case-comment pledges to step out from that loop to analyse two major shortcomings in a recent landmark judgment of the Supreme Court.*

*In this paper, I argue, firstly, that the Court must not give away its power to judicially review the basis on which the State provides reservation to the caste-minorities, and secondly, that the idea of creamy layer for the Scheduled Castes and Scheduled Tribes destabilises the Dalit and Adivasi politics in India and hence, the Court should have used this instance to initiate overturning of a settled position of law, that is of application of creamy layer to these two classes of people.*

## INTRODUCTION

On 10th May 2019, a two-judge bench of the Supreme Court (**"Court"**) delivered a judgment in the case of *B.K. Pavitra & Ors. v. Union of India &*

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* *The title of this paper is conceived to reflect a dual sentiment. While on one hand, it is suggestive of the fact how the 'creamy layer' amongst the Scheduled Castes and Scheduled Tribes will be aroused to agitate after a long line of precedents (including this one) by the Supreme Court; the second inference of the title is that these precedents have acted as a whip for an already suppressed category of people by fleshing out and maintaining the concept of 'creamy layer'. In that sense, the title aims to be a prelude to a much finer argument discussed in the paper.*

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*Ors*[2] (**"*Pavitra-II*"**). The question before the Court was fairly simple and direct, dealing with the constitutional validity of Karnataka Extension of Consequential Seniority Act.[3] The law provided for consequential seniority to persons belonging to the Scheduled Castes and Scheduled Tribes (**"SCs and STs"**) promoted under the reservation policy of the State of Karnataka.

The concept of *consequential seniority* signifies that if a reserved category employee was promoted before a more senior employee (by virtue of the former candidate belonging to the reserved category), in such a case, now it will be the former person who would continue to be senior to the person (belonging to the unreserved category) even when the latter is promoted to the next senior post.[4] In short, for instance, 'A' belongs to a Scheduled Caste but in the public office she occupies, is junior to 'B' (who belongs to an unreserved category). Therefore, tomorrow, when 'A' receives a promotion before 'B' does, by the virtue of Article 16 4(A)[5] and because of A's membership to that Scheduled Caste, because of the principle of consequential seniority, 'A' will continue to be B's senior for the remainder of their service in that office.[6] Consequential seniority principle implied that 'B' will not regain her seniority with respect to 'A' even after receiving promotion.

Within the domain of the Indian Constitution, while the issue of consequential seniority had always been very hotly contested, the same was

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[2] B.K. Pavitra v. Union of India, 2019 S.C.C. OnLine SC 694.

[3] Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, Karnataka Act No. 21 of 2018 (2018).

[4] Sameer Pandit, "*M Nagaraj v. Union of India: Legal and Theoretical Reflections* ", Vol. 49, No. 2 Journal of the Indian Law Institute pp. 249-259 (2007).

[5] Article 16 4(A) makes way for reservations in promotions for the Scheduled Castes and Scheduled Tribes with consequential seniority (explained above).

[6] This was, however, not the situation before the 85th Amendment to the Constitution took place in 2001 and introduced the principle of 'consequential seniority' to Article 16 4(A). Prior to this, judgments of the Supreme Court such as in Ajit Singh v. State of Punjab, A.I.R 1996 S.C. 1189, introduced the concept of 'catch-up' rule to Article 16 4(A)'s application. By virtue of the 'catch-up' rule, the senior general category candidates who received a promotion after any candidate belonging to the Scheduled Castes or Scheduled Tribes, would regain their seniority over the reserved-category candidates, promoted earlier. The 85th Amendment to the Constitution negated this effect.

finally sanctioned by inserting Article 16 (4A) through the 77th Amendment Act, 1995.[7] While *M Nagaraj*[8] successfully upheld the constitutional validity of this Amendment to the Constitution, the true use of Article 13(2) and Article 32 with respect to legislations under Articles 16 (4A) and 16 (4B) was yet to be undertaken.[9] The question of constitutional validity of the Karnataka legislation as well is one such manifestation. The history of this legislation and the subsequent challenge is, however, slightly chequered.

Initially, the legislation was first enacted in 2002, where, in a subsequent challenge to its constitutionality, the Court had (in *Pavitra – I,*[10] 2017) struck down Sections 3 and 4 of the 2002 Act, holding them to be *ultra vires* of Articles 14 and 16 of the Constitution.[11] This was on the ground that the state did not produce quantifiable data before providing reservation to both these categories of people. This was a mandatory requirement, which had to precede the enactment as was laid down by the Court in *M Nagaraj*.[12] In the Statement of Objects and Reasons of the 2018 legislation, the government makes a mention of multiple things. It refers to, *inter alia*, the decision of the Court in *Pavitra-I*, the need for production of quantifiable data as laid down in *M Nagaraj,* and after placing its reliance on the findings of the Ratna Prabha Committee, it reintroduced the pre-*Pavitra-I* legislation.

The judgment of the Court in *Pavitra-II*, in all certainty, is a step in the right direction towards ensuring equality for the SCs and STs in matters of promotion. Prior to the enactment of Articles 16 (4A) and (4B), people belonging to the above mentioned categories were excluded from offices of significant public importance. This exclusion brews from the assumption that Dalits and Adivasis were meritless and could not be

[7] Constitution (Seventy-seventh amendment) Act, 1995.
[8] M. Nagaraj v. Union of India, (2006) 8 S.C.C. 212.
[9] NCSC, Reservation in Promotion for Members of Scheduled Castes, National Commission for Scheduled Castes, http://ncsc.nic.in/files/Reservation%20in%20Promotion.pdf.
[10] B.K. Pavitra v. Union of India, (2017) 4 S.C.C. 620.
[11] Ashok K.M., Karnataka Law Providing 'Consequential Seniority' To SC/STs On Promotion Unconstitutional: SC, LiveLaw (Feb. 10, 2017), https://www.livelaw.in/karnataka-law-providing-consequential-seniority-scsts-promotion-unconstitutional-sc-read-judgment/.
[12] *Supra* note 8.

trusted with positions of importance.[13] Thus, in the direction of unsettling that narrative, the judgment truly heralds itself as a very promising precedent. In most senses, while the Court attempted to cement a very progressive jurisprudence in a country, where affirmative action is often deemed to be a curse;[14] the two most prominent shortcomings (which I elucidate in the next paragraph) render the entire regime of affirmative action open to attack.

In this commentary, I will attempt to elaborate on the following two failures and point out the dangers that they bring along with. Firstly, by placing its reliance on the decision in *Indra Sawhney,* the Court refuses to go into the merits of the report produced by the state of Karnataka as its justification for the enactment. Secondly, the Court gravely erred while dealing with the issue of *creamy layer* for the SCs and STs.

## THE TWO MISTAKES

In Part E of the judgment, the Court observes, *inter alia*, that the basis on which the State chooses to provide the reservation to the SCs and STs in matters of promotion, such as the Ratna Prabha Committee Report, such report cannot be called into question and hence, is not judicially reviewable. The Court relies on *Barium Chemicals*[15] and *Indra Sawhney*,[16] and holds that the opinion of the government on the 'inadequacy of representation' is solely its prerogative. This, if understood in much simpler terms, it implies that the jurisdiction of the Court is driven out with regard to judicially reviewing or assessing the data which forms the basis of any kind of reservation provided by the State.

This reading imparted by the Court, in my understanding, is flawed because of two distinct reasons. First, the Court relies on *Barium Chemicals* (1966) to hold that the scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively settled, implying thereby that the executive is the final arbiter while drawing any

[13] Balagopal, *Justice for Dalits among Dalits: All the Ghosts Resurface* 40(29), ECON. POL. WEEKLY 3128-3133 (Jul., 2005).
[14] Tanveer Fazal, *Scheduled Castes, Reservations and Religion: Revisiting a Juridical Debate* 51(1) Contributions to Indian Sociology (2017).
[15] Barium Chemicals Ltd. v. Company Law Board, A.I.R. 1967 S.C. 295.
[16] Indra Sawhney v. Union of India & Ors., A.I.R. 1993 S.C. 477.

conclusion. In that line, it could be said that the reliance on *Barium* is incorrect because the discussion in *Barium* relates to the intersection of the Companies Act, 1956 and the Industrial Disputes Act, 1947. The decision of the Court in that case is limited to the aspect of labour law jurisprudence and does not have any connect when seen in the context of requiring adequacy of data for reservations in promotion. The Court's action of using the legacy of labour law while answering a classic question of service cum constitutional law does not have a very firm basis. This is because, as I will discuss towards the end, the Court itself refuses to overlap the principles of constitutional law and service law jurisprudence and rejects such comparison while observing that "*the concept of creamy layer has no relevance to the grant of consequential seniority*".[17]

While it can be argued that the Court in *Pavitra-II* itself drew this reliance from the nine-judge bench decision in *Indra Sawhney*. However, this is a weak argument simply because of the fact that when the decision in *Indra Sawhney* was rendered, Articles 16 (4A) and (4B) were absent from the text of the Constitution and hence, the Court did not have constitution bench decisions like *M Nagaraj* (2006), or *Jarnail Singh* (2018)[18] to rely on. Thus, the lack of authoritative and specific precedent while could be argued for *Indira Sawhney,* but that could not be the case for *Pavitra-II* (2019).

In the first challenge that I mounted against the reasoning of the Court, I argued that the application of decision in *Barium* could be distinguished on the basis of law. However, the second factor, which leaves the situation most vulnerable to attack is misconstruing the binding precedents of the Court. In Part E of the judgment itself, the Court expresses its inability to judicially review the content of the Ratna Prabha Committee Report, which formed the basis of the legislation in question. Instead, the Court relied on paragraph 45 of the judgment of the Court in *Nagaraj* (2006) for this, where the Court had said,

> "**45. [**…**]** The basic presumption, however, remains that **it is the State who is in the best position to define and measure merit in whatever ways it considers it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit**. Similarly,

[17] *Supra* note 2.
[18] Jarnail Singh v. Lachhmi Narain Gupta, (2018) 10 S.C.C. 396.

> the concept of - extent of reservation is not an absolute concept and like merit it is context-specific."[19]

This extract from *Nagaraj* makes a very strong case in favour of the State being the best institution for coming up with ways to assess merit. The extract does not take away the Court's jurisdiction to review the authority of the data that the State has procured, but simply holds why the State is the best authority to make such a decision. This is valid because the legislators are elected actors, who have better legitimacy and grounding as opposed to the unelected judges. Apart from their legitimacy, the fact that the State is vested with all the wherewithal at its disposal which is another feather in its cap. However, after placing its reliance solely on this single extract from the judgment, the Court in *Pavitra-II* made itself devoid of any power to judicially review such method of data collection or the data collected as well. However, the neglect will surface when our attentions are drawn to paragraph 117 of the same judgment. It says,

> "**117.** […] Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which **the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.**"[20]

This was the first instance of neglect of a binding precedent of the Court by the two-judge bench in *Pavitra-II*. However, in *Jarnail Singh* as well, which was on the same point that is dealing with a question of reservation in promotions, the Court had reiterated its earlier stance of *Nagaraj* with respect to the judicial review of the data procured by the state. The Court had said,

> "**30.** […] **Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] on the inadequacy of**

[19] *Supra* note 8.
[20] *Id.*

> **representation, which can be tested by the courts**. We may further add that the data would be relatable to the cadre concerned."[21]

While the Court referred to some parts of the judgment in *Nagaraj,* its complete ignorance of a recent, binding precedent that is *Jarnail Singh* is disconcerting. This attitude of the Court to abandon any kind of duty with regard to scrutinizing data placed before it poses a drastic challenge for future discourse on the issue. If, the Court shuns its responsibility and leaves it completely up to the executive, it may lead to scenarios where the executive might just cherry-pick the data whenever it suits its political needs and end-up providing reservations for the community (most likely at the cost of the real expectants) it feels would best serve its purpose. A classic example, though in a different setting, is that of the *Maratha Reservation.*[22] Since the issue is sub-judice at the apex court, I will not place reliance on what the Bombay High Court has held. However, it will be interesting to note that the real tension came out very well before the Bombay High Court, where the petitioners claimed that with the legislative assembly elections round the corner, the quota was allowed in 2018 for fulfilment of political ambitions.[23] It, therefore, emerges that to an extent and for a certain period of time, the argument of presumption of constitutionality in favour of such legislations might be tenable but for the same to survive when state power is (mis)used repeatedly, the future of such legislations is full of uncertainties and likely to be faced with the harshest of the judiciary scrutiny.

In the discourse on affirmative action in India, the concept of requirement for quantifiable data was ephemeral in most senses. Its birth can be attributed to *Nagaraj* and burial to *Jarnail Singh.* In that duration of time, the jurisprudence it has generated has been monumental. The other dominant phase of the debate on reservations is very closely held by the 'creamy

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[21] *Supra* note 18.

[22] Jishri Laxmnarao Patil v. Chief Minister, 2019 S.C.C. OnLine Bom. 1107.

[23] G. Seetharaman, Maratha community's reservation demand a political headache for CM Devendra Fadnavis, Economic Times (Aug. 20, 2017), https://economictimes.indiatimes.com/news/politics-and-nation/maratha-communitys-reservation-demand-a-political-headache-for-cm-devendra-fadnavis/articleshow/60136071.cms?from=mdr.

layer'. The history of the 'creamy layer' is also not very old, but came out explicitly for the first time in *Indra Sawhney*. Ever since *Indra Sawhney,* the concept has played a crucial role in altering the debates. However, for most scholars and researchers offering different theses on affirmative action, the judgment of the Court in *Nagaraj* was the watershed moment for various reasons. It was in *Nagaraj,* that the Court for the first time spelt out the existence of 'creamy layer' among the SCs and STs. Scholars label *Nagaraj per incuriam* for it being in clear disregard of *EV Chinnaiah* (2004)*,*[24] where the Court had before *Nagaraj,* nullified an Andhra Pradesh legislation which provided for sub-classification among the Scheduled Castes.

*Chinnaiah*, therefore, had established that no kind of sub-classification amongst the SCs and STs was possible. Therefore, for the Court to pronounce the concept of 'creamy layer' for the SCs and STs in *Nagaraj* was an anathema. In *Pavitra-II,* the Court makes some remarkable comments against the whole concept of 'merit' and relies extensively on Professor Amartya Sen's writing for the same. The Court beautifully goes on to opine how merit is a construct and it is unacceptable to assume that the SCs or STs are meritless or compromise with the efficiency of the office they hold.

On the question of 'creamy layer' raised by one of the petitioners, where the petitioners questioned the very concept of applicability of creamy layer to the SCs and STs*,* the Court not only rejected this argument, but went ahead and examined the correctness of applicability of creamy layer to the issue of consequential seniority, as the latter itself was used as a basis to challenge the validity of the Karnataka legislation. In a hasty analysis that the Court offered, it rejected the applicability of creamy layer to the grant of consequential seniority. This might be valid – both factually and morally, but for doing this, the Court used the 'non-applicability of 'creamy layer' to the grant of consequential seniority' as the test.

As I had flagged earlier, in paragraph 139 of the judgment, the Court relies on *Nagaraj* to say that the concept of consequential seniority is purely one of service jurisprudence. Hence, even if it is removed, altered, or changed

[24] E.V. Chinnaiah v. State of A.P., (2005) 1 S.C.C. 394.

in some forms, it will not disturb the 'equality code'[25] in any manner as the latter is purely entrenched in the principles of constitutional law. Based on this, the Court rejected the requirement of application of creamy layer test on the consequential seniority. The Court ignored the binding precedent directly on point, that is *Jarnail Singh*. *Jarnail Singh* held that if the State fails to exclude the creamy layer of the SCs and STs from the pale of reservation in promotions, such enactment would be held to be bad in law.

In Part C of the judgment, the Court chalks out the arguments on the basis of which, the petitioners assail the constitutionality of the legislation. In these submissions, one of the contentions was that the legislation is liable to be struck down when the State did not exclude the creamy layer of SCs and STs from the ambit of reservation. However, while rejecting this argument, the analysis offered by the Court is half-hearted. It places an insufficient reliance on *Jarnail Singh* and is quick to reject the same for its application to the case on hand. This lays the foundation for a weak precedent like *Pavitra-II* by the Court.

The Court is right in rejecting the application of the creamy layer test to the SCs and STs as the application of the creamy layer to the SCs and STs is problematic because the oppression and backwardness ridden amongst the said classes of people cannot be overcome despite their economic welfare. Their backwardness is due to historical reasons and their oppression was a consequence of their identity.[26] Creamy layer, for the Other Backward Classes does make sense because their backwardness, as observed in *Indra Sawhney* could be due to multiple reasons, but it does not flow from the assumption that like Dalits and Adivasis, they are racially impure. In such cases, even if people belonging to these select categories flourish and develop economically, for them to escape the suffocating clutches of caste based discrimination, which in turn is because of their

[25] *See*, State of Kerala v. N.M. Thomas, A.I.R. 1976 S.C. 490; Indra Sawhney v. Union of India, Supp (3) S.C.C. 217 (1992).

[26] Gautam Bhatia, Reservations in Promotions and the Idea of Efficiency: B.K. Pavitra v Union of India, IndConLawPhil Blog (May 10, 2019), https://indconlawphil.wordpress.com/2019/05/10/reservations-in-promotions-and-the-idea-of-efficiency-b-k-pavitra-v-union-of-india/.

group-identity, would certainly feature amongst the tallest of orders for them.[27]

On that note, interestingly, in paragraph 176, Chandrachud J. holds that they are "unable to subscribe to the submission" that Nariman J. in *Jarnail Singh* was *per incuriam* on the issue of 'creamy layer'. In *Jarnail Singh*, Nariman J. holds that the bench in *Nagaraj* was not bound to refer to the decision of the Court in *EV Chinnaiah*. This is because *Chinnaiah* dealt with the legislative incompetence of the legislature of Andhra Pradesh to introduce a further classification in Presidential Lists under Articles 341 and 342. However, *Nagaraj* was a decision which dealt with upholding of constitutional amendments on the basis of the 'width and identity' test.[28] While Nariman J. is certainly correct while saying that *Chinnaiah* did not have even a remote bearing on the issues in *Nagaraj*, but this holding is correct only until we are concerned with situating the debate between reviewing legislative actions (*Chinnaiah*) *versus* reviewing constituent actions (*Nagaraj*).

However, the moment we visit the relevant sections in *Nagaraj*, where Kapadia J. introduces the concept of 'creamy layer' in the SCs and STs[29], the bench in *Nagaraj* was obliged to distinguish the decision in *Chinnaiah* on the basis of law. It was not possible to argue for distinguishing on the basis of facts because with the introduction of the creamy layer for SCs and STs, both these decisions were about sub-classification of the SCs and STs. That said, this brings me back to Chandrachud J.'s position in paragraph 177 of *Pavitra – II,* where he says,

> "**177.** […] In this view of the matter, we are clearly of the view that Jarnail, on a construction of Indra Sawhney holds that the creamy layer principle is a principle of equality."

This finding of the Justice is confusing. Adhering to the trend that was initiated by Kapadia J. in *Nagaraj*, followed by Nariman J. in *Jarnail Singh*,

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[27] *Id.*

[28] Anant Sangal, *Economic Quota and The Basic Structure Doctrine – Exploring The Oddities (Part 1)*, LAW AND OTHER THINGS (Feb 20, 2019), https://lawandotherthings.com/2019/02/economic-quota-and-the-basic-structure-doctrine-exploring-the-oddities-part-1/.

[29] *Supra* note 8, at ¶¶ 6,80, and 110.

Chandrachud J. too relies on *Indra Sawhney (II)*[30], where the Court in paragraph 27 holds that the concept of creamy layer for 'backward classes' is a concept emanating from Articles 14 and 16 (1) and hence, 'is a principle of equality'.

The Court in all these three cases ignores the fact that this idea of creamy layer, which *Sawhney (II)* talks about, is solely for treating the Other Backward Classes as the 'backward classes' and not for the Scheduled Castes or the Scheduled Tribes. This is because the questions in *Indra Sawhney* dealt with the constitutional validity of the Government Orders which provided reservations to the Other Backward Classes of citizens. Thus, it was wrong for the Court to constantly treat the SCs and STs at par with the OBCs for the purposes of introducing the concept of creamy layer in these two communities. The Court in *Pavitra – II* further entrenched this principle.

In such a scenario, the best possible course of action for the Court, which the Court missed, was to leave this point of applicability of creamy layer to the SCs and STs unanswered and refer this question to a seven-judge bench. This would have again thrown open the question of validity of the holding in *Jarnail Singh*. *Jarnail Singh* was just a flash in the pan and could rotate the wheel only by 180 degrees. In such a scenario, what Professor Baxi had said that, "The Little Done, the Vast Undone"[31] will come to our minds immediately.

In *Jarnail Singh,* neither Lalit J., nor Chandrachud J. formed a part of the constitution bench rendering its unanimous decision. Therefore, the Court in *Pavitra-II* was, at least in terms of its bench composition, completely distinct with the one in *Jarnail Singh*. It did not, therefore, have to worry about the contradictions with what either of the judges could have held had they been a part of the bench in *Jarnail Singh,* thereby going against their holding earlier in 2018. Therefore, the Court could have used *Pavitra-II* as an opportune moment to express its disagreement with *Jarnail Singh* and end the saga instituted by *Nagaraj,* and later perpetuated by *Jarnail*.

[30] Indra Sawhney (II) v. Union of India, (2000) 1 S.C.C. 168.
[31] Baxi, *The Little Done, The Vast Undone"—Some Reflection on Reading Granville Austin's "The Indian Constitution*, 9(3) J. INDIAN L. INST. 323-430 (1967).

Most recently, a five-judge constitution bench of the Court reiterated this position. In *Chebrolu Leela Prasad Rao*,[32] the petitions challenged the constitutional validity of the Government's Office Memorandum 3 of 2000, which provided 100% reservation in respect of appointment to the posts of teachers in the scheduled areas. While the question about the creamy layer status of the SCs and STs was not argued by any of the parties, yet, towards the conclusion of the judgment, the bench says,

> "**153.** Now there is a cry within the reserved classes. **By now, there are affluents and socially and economically advanced classes within Scheduled Castes and Scheduled Tribes.** There is voice by deprived persons of social upliftment of some of the Scheduled Castes/Tribes, but they still do not permit benefits to trickle down to the needy. Thus, there is a struggle within, as to worthiness for entitlement within reserved classes of scheduled castes and scheduled tribes and other backward classes."

In December 2019, a petition was moved by the Central Government, requesting the Supreme Court to refer the question of applicability of the creamy layer to the SCs and STs to a seven-judge bench. In short, the Central Government moved to reconsider the Court's decision in *Jarnail Singh*. The petition was rejected by the Court. Instances of these kind make it amply clear that the Court's commitment to sub-classify the SCs and STs is simply unwavering and therefore, it does not miss on any occasion to further this perspective. By now, it will also be safe to argue how the Court has firmly entrenched this idea within its conscience as well the jurisprudence.

## CONCLUSION

This critique may just be another piece in an already long list of writings on the Indian Supreme Court and its doings on affirmative action. However, while I attempted to not just speak the language many might have rejected to read, I attempted to flag the clamour around the constitutional validity of the Karnataka legislation, register my disagreements with regard to certain aspects of what the bench held, and proceed with a possible structure that might impact and shape the narrative of the future. In *Golaknath,*[33] the act of the Court to significantly prune the powers of the

[32] Chebrolu Leela Prasad Rao v. State of Andhra Pradesh, 2020 S.C.C OnLine S.C. 383.
[33] I.C. Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643.

legislature to amend the Constitution gave Indira a new agenda for resuming her another innings at the South Block in 1971.[34] *Kesavananda*[35] was effectively the culmination of tussle between the executive and judiciary, which had begun with the decision of the Court as early as in 1951, that is with the decision of the Court in *Sankari Prasad v. Union of India.*[36]

While the jurisprudence of the Court on the element of affirmative action dates back to *State of Madras v. Champakam Dorairajan* (1951),[37] the recent years have been tumultuous.[38] In 2015, the act of the Supreme Court to exclude the Jaats of Haryana from the list of the Other Backward Classes (OBC);[39] the Gujarat High Court's decision of 2016, quashing the quota for the Economically Backward Classes, where the Patidars of Gujarat were provided 10% reservation by the Anandiben administration,[40] and other such instances are very telling of the likelihoods of affirmative action becoming the next point of contention and disjuncture between the government and judiciary after they previously locked horns during the socialist revolution of this county.

[34] Sathe, *Review of the Constitution: Need to Keep an Open Mind* 35(28), ECON. POL. WEEKLY 3395-340 (Jul., 2000).
[35] Kesavananda Bharati v. State of Kerala, (1973) 6 S.C.C. 225.
[36] Sankari Prasad v. Union of India.,A.I.R. 1951 S.C. 458.
[37] State of Madras v. Champakam Dorairajan, A.I.R. 1951 S.C. 226.
[38] Neeraj Mishra, Series of Judgements Brings Judiciary in Direct Confrontation with Legislature, INDIA TODAY (Oct 30, 2006), https://www.indiatoday.in/magazine/cover-story/story/20061030-series-of-judgements-brings-judiciary-in-confrontation-with-legislature-782141-2006-10-30.
[39] Smita Gupta, Krishnadas Rajagopal, *SC REMOVES JATS FROM OBC LIST*, THE HINDU (May 6, 2016), https://www.thehindu.com/news/national/supreme-court-sets-aside-jat-quota/article7002786.ece.
[40] Bureau, Gujarat Court Quashes Quota for EBCs, Calls it Unconstitutional, The Hindu Business Line (Jan 17, 2018), https://www.thehindubusinessline.com/news/national/gujarat-court-quashes-quota-for-ebcs-calls-it-unconstitutional/article8942278.ece.

## INTERVIEW WITH JUSTICE (RETD.) SHIVA KIRTI SINGH

*Currently serving as the Chairman of the Telecom Disputes and Settlement Appellate Tribunal, New Delhi* (**"TDSAT"**)*, Justice (Retd.) Shiva Kirti Singh has been recognised as an extraordinary legal-mind with an eye for detail. Justice Singh has previously served as Chief Justice of the Allahabad High Court before being elevated as justice of the Hon'ble Supreme Court of India. In this interview*[1] *for Comparative Constitutional Law and Administrative Law Quarterly* (**"CALQ"**)*, Justice Singh responds to questions on Judicial Reforms and legal issues that have dominated the public discourse. We wish to thank Justice Singh for taking out the time for the interview.*

**CALQ – Justice Singh, you have had an illustrious career in law. From your days as a practicing advocate to Chief Justice of the Allahabad High Court and then as judge of the Supreme Court, to now the Chairman of TDSAT, you have come a long way. When you look back at your journey, what is it that you feel has changed over the years?** ***(For both the bar and the bench)***

**Singh, J. –** Looking back at my professional journey in the Bar and the Bench, I find remarkable change in the quality of the Bar. It is much better than in the yester years, may be because of opening of a number of National Law Schools with serious course content of five years. The Bench largely remains the same. Hopefully the better quality Bar will soon start getting elevated and that may improve the quality of the Bench as well.

**CALQ – Owing to the scepticism around the collegium system for appointment of judges, the executive brought about a change through enacting the NJAC Act, 2014. The Supreme Court though did not have an affinity for the latter. In the present circumstances, where would your inclination lie? With the present collegium system**

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* Cite it as: *Interview with Justice (Retd.) Shiva Kirti* Singh, COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY 81 (2020).

[1] The Editorial Board of CALQ, for the purpose of this interview, had sent the questionnaire to Justice Singh on Oct. 5, 2019 via e-mail. On Oct. 11, 2019, Justice Singh responded to the questions via e-mail. The interview was first published on the website of the journal <**calq.in**> on Nov. 1, 2019.

**or the one prescribed by the now defunct NJAC Act or any other system?**

**Singh, J. –** No system is good or bad, it is the people manning the system who make all the difference. Having said so, I am still inclined in favour of the present Collegium System but with some minor changes such as a right in favour of the Executive to veto any particular proposal for elevation for good reasons which may be made public if the affected person wants to challenge it on the judicial side. The number of veto should be limited to 1/10th of a Court's strength so as not to adversely affect the working strength of higher judiciary to a debilitating stage.

**CALQ – By and large, the proposition that Tribunals/quasi-judicial bodies/ Law Commission of India etc. would benefit from the experience of a former judges of the High Courts and Supreme Courts has found acceptance. Concerns, however, arise when a few of the appointments are made to politically-sensitive posts (Governor of a state etc.). What is your opinion on the issue regarding post-retirement appointments of Supreme Court/ High Court judges? Do you think that there ought to be rules prescribed to deal with this? In your opinion, will a mandatory "cooling-off" period serve us well?**

**Singh, J. –** Post retirement appointments of Supreme Court / High Court Judges should be confined to only judicial posts which, by their very nature, require their experience and expertise. For such posts, a cooling off period of at least six months to a year shall enhance the image of all concerned, at least in public perception.

**CALQ – What are the reforms that you wish to suggest for greater efficiency of the lower judiciary? Do you think All India Judicial Services will be a more efficient mode of recruitment of judges to lower judiciary and is now long due?**

**Singh, J. –** Yes, I am now of the view that at least for lower judiciary it will be beneficial to have an All India Judicial Services. State-wise recruitment should be permitted only when sufficient number of persons do not opt for a particular State to meet its needs.

**CALQ – What are your views on the idea of establishing a separate court of appeals, to lessen the burden of the Supreme Court? Attorney General KK Venugopal has been mooting for this idea for a long time and very recently, Vice President Venkaiah Naidu raised a similar demand. In your opinion is this measure feasible? (If yes) How do we go about transitioning from the status quo to a new beginning?**

**Singh, J. –** In my view also, establishment of a separate Court of Appeals as an adjunct to the Supreme Court shall lessen its burden. The idea is feasible provided experienced Judges and lawyers are engaged to work out a useful compartmentalization of the Supreme Court so as to make it more useful to the people and the Nation but without compromising its Constitutional responsibilities.

**CALQ – In recent times, there have been occasions when the Hon'ble judges have recused themselves from cases without providing any reason. Should there be prescribed rules & procedure to adjudge the need for recusal of a justice from matters before the Supreme/ High Court?**

**Singh, J. –**In my view no prescribed rules and procedure are required to govern the discretion of an Hon'ble Judge in seeking recusal from any specific case. It should be left to the concerned Judge to disclose or not to disclose the reasons.

**CALQ –Sir, since you have served at a High Court as well as the Supreme Court- do you believe that the notion of 'being a High Court Judge in a remote state/ state far from the parent court is a form of punishment' for the sitting judge? If not, in the present system, do you think transfer of a Chief Justice of a 'larger' High Court to a significantly 'smaller' one shall be treated (for lack of better word) a punishment posting?**

**Singh, J. –** Yes, I do believe that sending a High Court Judge to a remote State, far away from the parent Court is a form of punishment but often it helps the concerned Judge in re-building his reputation in neutral

environment. I am of the firm view that transfer of a Chief Justice of a bigger and significant High Court to a smaller one is a form of punishment.

**CALQ – Recently, J. Chandrachud remarked that "impeachment is not necessarily an answer in every situation you can think of regarding judicial demeanour." The idea is that the judges can either be transferred or their judicial work can be withdrawn or they can be impeached. Do you think there is a need for a more nuanced mechanism for greater accountability of judges for 'wrongful behaviour'? If yes, what would you propose as a suitable mechanism?**

**Singh, J. –** I agree with the remarks of Hon'ble Chandrachud J. If a Judge has committed "wrongful behaviour" in matters unrelated to the judicial work, transfer may be in the interest of the Institution as well as the Judge concerned but for a wrongful judicial behaviour, there can be no appropriate punishment than impeachment or removal through any other suitable mechanism which should ensure that the punishment is proposed by a majority of the Judges of the Supreme Court and is not merely on the asking of the Executive.

**CALQ – For long there has been ongoing debate on judicial restraint vis-a-vis judicial activism. While cases like *Vishaka* clearly establish the need for judicial activism, however, there are other cases where the apex court is criticised for overstepping its powers. In your tenure as a justice of the Supreme Court how did you go about balancing these conflicting interests?**

**Singh, J. –** Judicial activism is required to ensure that where there is a right, there must be remedy. However, it should not be used to create new rights and thereby encroach upon powers of the legislature. The Highest Court in India is respected because it has always shown keen awareness of Constitutional limitations in respect of its powers.

**CALQ – Recently, Senior Advocate Harish Salve squarely blamed the Supreme Court for its verdict on 2G Spectrum and Coal Block allocation for the economic slowdown in the country. Do you think**

**the criticism is justified? From your experience, how do the judges take such criticisms?**

**Singh, J. –** I do not agree with the views of Mr. Salve. There can be no such absolute black or white inference from a judicial verdict. Similar view can be taken by someone of effects of demonetization and the strong measures against wrong deeds of several Banks. Like the verdicts, whether these measures will benefit the country or not can be judged only after few decades. Temporarily, such course corrections do create confusion and inconvenience. These kinds of criticisms generally do not affect the Judges and in my view these should not.

**CALQ – A section of the public discourse on the Supreme Court in light of the recent events, has had the tendency to shake the public confidence in the institution. As a former judge of the Supreme Court, are you worried by this trend? Please tell our readers what goes on in the minds of the bench when they encounter such events.**

**Singh, J. –** Yes, as a former Judge of the Supreme Court, I do get worried by the increasing trend of public criticism of the Supreme Court when aimed not at judgments but at specific Judges / Chief Justices. As a policy the Court rightly ignores such public comments till it finds that the comments are with a design and meant to interfere with the dispensation of Justice by the Court. The power to punish for contempt is resorted to sparingly, only when the Judges are convinced that the derogatory comments cannot be by chance but are designed with malicious intention. At that stage, the Court generally does and in my view must act tough with due firmness.

# BOOK REVIEW: THE TRANSFORMATIVE CONSTITUTION BY GAUTAM BHATIA

**SAYANTANI BAGCHI**[1]

Amidst emerging interpretations of rights and liberties, Gautam Bhatia's scholarly masterpiece comes as a glimmer of hope to those who have not been drastically displaced from their roots by the winds of radical progressivism. This scholarly work essentially aids in unlearning constricted ways of interpreting the rights guaranteed under the Constitution of India and subsequently rediscovering novel transformative ways of interpreting the constitutional text. The title of the book - '*The Transformative Constitution*' deserves special attention both in terms of the content it enfolds and in terms of the duration when it was published. At a time, when efforts to triumph over decades of injustice are persistently on the rise, Bhatia's work is perhaps one of the pristine and methodical attempts in that direction.

The book stands on the trilogy of mutually reinforcing principles of Equality, Liberty and Fraternity. Equality and Liberty acquire meaning and worth only in the presence of Fraternity, all of which collectively overcome institutional barriers and ensure genuine participation in democratic politics. A meaningful rendezvous of the triple values of Equality, Liberty and Fraternity was never intended to be empty rhetoric, but an instrument of real change and emancipation for the individual. Indian constitutionalism is distinct in the way it treats individuals and prioritizes their freedoms. The trinity of values entrenched in the Preamble, the Fundamental Rights and the Directive Principles of State Policy inspire every nook and corner of the constitutional text. The State's role is defined in light of the same. While some provisions depict the State as the principal encroacher of individual freedom, some project it as the facilitator of individual rights and freedoms. The drafters have employed balanced methods of securing freedoms of individuals.

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At the outset, while exploring the possible objectives behind the framing of our Constitution, the author weighs two possibilities. On one hand, the Constitution could represent a continuity of the previous legal and political order and on the other, it was destined to break open from the shackles of the past and head towards establishing a new order, principally committed towards the eradication of discrimination. The author maintains that the Indian Constitution reiterates the latter, drawing support from Justice Vivian Bose's avowal in that direction in a 1955 judgment[2]. Barring the details of administration, there was a radical transformation insofar as rights and liberties were concerned. It was not only the foundational moment that embodied the essence of transformation, but also its spirit informed every provision of the document and triggered a thorough societal metamorphosis.

Utmost reliance has been placed on sources and authorities that rationalize the use of transformative techniques by the judges today. Vivid accounts of Constituent Assembly sessions, legendary anecdotes, chronicles of society and culture, archival sources and literary works have collectively equipped the author in the pursuit of his venture. Dr B. R. Ambedkar's liberal outlook, as reflected in his utterances and works, has substantially shaped the contents of this book.

The transformative essence of the Indian Constitution is well captured through a set of nine judgments (both of the Supreme Court and the High Courts, respectively) discussed under three Codes (Equality, Liberty and Fraternity). Nevertheless, it is not the superiority of judicial interpretation alone (as the sole indicator of the transformative spirit of the Indian Constitution) that is being endorsed by the author. Rather the legal sanctions and authority that the judicial decisions command, make them more concrete in terms of reference. The prudent use of dissenting opinions, obiters and overruled judgments as indicators of the transformative vision envisioned in our Constitution is a striking attribute of this book.

It would be relevant at this juncture, to analyse in a nutshell the basic contents of the book. The first part of this book revolves around the theme

[2] Virendra Singh v. State of UP, (1955) 1 S.C.R 415.

of *Equality*. This segment essentially engages with Equality Principles and their role in overcoming societal and institutional barriers that have vanquished people since ages. Condemning the use of legislative techniques to promote sex-based discrimination and fixation of stereotypes and the subsequent endorsement of the same by the Judiciary, the author argues in favour of a transformative reading of the Equality clauses, a technique that discards discriminatory practices based solely on natural differences and polarized notions of '*separate sphere*'. The Legislatures need to adopt an '*effect-oriented test*' (testing a Legislation on the touchstone of the outcome it produces on both the sexes rather than the intent with which they were enacted) becomes more compelling, especially in the wake of the momentous and decisive judgment of the Hon'ble Apex Court in *Anuj Garg v Hotel Association of India*[3]. It is alarming to see how apparently unbiased Legislations are driven by stereotypes and notions of gender-polarization. The thoughtful use of Bankim Chandra's *Samya* and the writings of reformers like Raja Ram Mohan Roy, Ishwar Chandra Vidyasagar, Rukhmabai, all of whom came down heavily upon the erstwhile societal injustices through their literary works, is appealing and evokes a sense of admiration for the researcher in Bhatia.

The conversation on Equality was taken a step further in the form of a convincing analysis of '*sexual orientation*' made in the context of Articles 14 and 15. The path-breaking decision of the Hon'ble Delhi High Court in *Naz Foundation*[4]*,* which opened the doors for unique ways of understanding '*Equality',* constitutes the core of this discussion. Going beyond its celebrated outcome, the judgment ushered in a new era in the Equality Jurisprudence by going into the roots of inequality and non-inclusiveness. The author argues that Article 14 provides reaffirmation to the *Rule against Non-discrimination* as envisaged in Article 15. While the latter could be employed as a cure for discrimination practiced on restricted grounds, the former could be effectively used to curtail discrimination based on analogous grounds that have the potential to affect personal autonomy. It was exemplary to note how the court favoured the idea of '*Constitutional Morality*' over the slippery alternative of '*Public Morality*' that was capable enough to produce hostile outcomes as pointed out by the author. Simultaneously, the author reiterated the court's insistence that the State

[3] Anuj Garg v. Hotel Association of India, (2008) 3 S.C.C 1.
[4] Naz Foundation v. Government of N.C.T of Delhi, 160 D.L.T. 277 (2009).

must defend its action on a proportionality standard. Thus, the combined effect of both the Articles could strike at the very roots of discrimination practiced upon vulnerable groups as the same stood protected by the Constitution's promise of Equality.

The concluding portion of the Equality Code explores certain vital questions connected with the system of '*Reservations'* in India. Giving utmost credence to the transformative premise accorded by the combined reading of the majority opinion in *State of Kerala v N.M. Thomas*[5], the author postulates two major arguments in this chapter. He first affirms the uncompromising character of the principle of individual Equality as deeply embedded in the Constitutional edifice, whose foundations cannot be eroded by community membership. Second, he skilfully demonstrates how the Directive Principles of State Policy lend support and shape to the abstract principles embodied in the chapter on Fundamental Rights. The code of Equality assumes significance on the above counts.

The second part deals with the idea of '*Fraternity'*, something that according to the author has remained '*marginalized both in judicial and academic discourse*'. The argument that it is from '*Fraternity'*, that the two principles of '*Equality*' and '*Liberty*' derive strength is substantiated through the coherent understanding of issues like Horizontal Discrimination, Religious Freedom and Freedom to Work. The author discusses the viability of importing suggestions drawn from the experiences of Constitutional Courts of countries like United States of America, Canada and South Africa, firmly grounded on the transformative precedents set by *Indian Medical Association v. Union of India*[6]. The author advocates that the solutions lie in the expansive reading of Article 15(2), which contains an inbuilt framework to guard basic rights even against private stakeholders. The significance of the above decision lies in its fidelity to the transformative element of the Indian Constitution. The concern for fraternity is further manifested through an in-depth discussion as to how individuals and communities reconcile their religious claims against each other. Leaning strongly in favour of Justice Sinha's dissenting opinion in the case of *Sardar Tahir Saifuddin v. State of Bombay*[7], the author insists on a '*three-step test*'. The author engages with the

[5] State of Kerala v. N.M. Thomas, (1976) 2 S.C.C 310.
[6] Indian Medical Association v. Union of India, (2011) 7 S.C.C. 179.
[7] Sardar Tahir Saifuddin v. State of Bombay A.I.R. 1962 S.C. 853.

Essential Religious Practices Test and questions its legitimacy in determining which practices conform to the secular spirit of the Indian Constitution. The author draws the attention of the reader towards the '*Anti-Exclusion Principle*' which serves as a possible alternative to the *Essential Religious Practices Test*, as it clearly postulates that both the state and the courts must appreciate the integrity and autonomy of religious groups, barring practices that are grossly discriminatory in terms of economic, social and cultural life or basic human dignity.

The concluding part of the fraternity debate revolves around a *'forgotten, almost vestigial section of the Fundamental Rights Chapter'*- the Right against Exploitation. The author argues on the line of *PUDR v. Union of India*[8] inasmuch as it views the Fundamental Rights chapter as an instrument of not only political freedom, but also economic freedom. In light of the various meanings of the word '*freedom'*, the author endorsed the court's view that '*forced labour was not limited to physical or legal force, but applied equally to compulsion of economic circumstances, which leads no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received is less than the minimum wage."*[9]

Lastly, the author facilitates discussions on the *Liberty* code by delving into significant issues of privacy and free speech. The decision of the Andhra Pradesh High Court in *T.Sareetha v Venkatasubaiah*[10] informs the content of the first chapter which portrays how the case decided way back in 1975, sowed the seeds of privacy and equality within the precincts of 'home', an expression encompassing family, motherhood, procreation, childhood etc. Quoting experiences from foreign constitutions like Ireland (which have influenced the framers of the Indian Constitution considerably) which prioritize 'family' in their constitutional scheme, the author argues that unlike them, the Indian Constitution has conveniently dispensed with the need to extend the rights to the 'family' even though the entire set of personal laws rests on its edifice.

This is followed by a chapter that critically analyses the cases that depict the court's reluctance towards questioning and curtailing laws that trample over

[8] P.U.D.R v. Union of India, (1982) 3 S.C.C 235.
[9] *Id.*
[10] T. Sareetha v. Venkatasubaia, A.I.R. 1983 A.P. 356.

basic civil liberties of the people under the garb of 'exceptional circumstances'. The author relies upon the transformative element in the *Jyoti Chorge*[11] decision and argues against the courts' invincible confidence in executive supremacy manifested in the implementation of anti-terror laws, prevention detention laws and the like.

The liberty code is concluded with a chapter dedicated to an understanding of 'privacy and criminal process'. The Supreme Court's judgment in *Selvi*[12] constitutes the core of this discussion. An analysis of the relationship between the individual and the State in a situation where an individual is made to confront the mighty State power is lucidly portrayed in light of the transformative content of the *Selvi* decision. However, the author concludes with a hope that the rationale advanced in the decision will be taken forward by the Court in the future as reflected in the celebrated judgment of *Puttaswamy*[13].

In the preliminary notes, the author expresses his anguish that though the judgements in *Sabarimala*[14]*, Navtej Singh Johar*[15] and *Joseph Shine*[16] had great potential to shape the content of this book, unfortunately the decisions were delivered after the author had completed writing the book. Though, not a part of a detailed discussion, nevertheless the author has specifically made a mention of the cases in the form of postscripts to the Chapters.

The book is certainly not meant to be appreciated by the laymen having no understanding and depth of the various nuances of the Constitutional Law, but it should most definitely draw the fancy of the academicians and members of the legal fraternity who have a general knack for the cherishing and grasping the diverse and unconventional construal of the different constitutional provisions. At a time when winds of progressivism have led to several fanatical assumptions about the Constitution, this book comes as

[11] Jyoti Bahasaheb Chorge v. State of Maharashtra (2012) 6 A.I.R. Bom. 706.
[12] Selvi v. State of Karnataka, (2010) 7 S.C.C. 263.
[13] Justice K.S.Puttaswamy(Retd.) v. Union Of India, (2017) 10 S.C.C. 1.
[14] Indian Young Lawyers Association and Ors. v The State of Kerala and Ors., 2016 S.C.C. Online SC 1783.
[15] Navtej Singh Johar and Ors. v. Union of India and Ors., (2018) 1 S.C.C. 791.
[16] Joseph Shine v. Union of India, (2018) 2 S.C.C. 189.

a gentle reminder that neither was the Indian Constitution intended to be a dormant text nor did it authorize judges to re-write the Constitution.

# BOOK REVIEW: A PEOPLE'S CONSTITUTION BY ROHIT DE

**ASHUTOSH P. SHUKLA**[1]

The relationship between the citizen politic and the higher judiciary has often been examined and dwelt upon, especially in a country like India, where owing to our peculiar experiences as diversified democratic republic the relationships between the stakeholders – the institutions and the citizens – have constantly been under the spotlight. The developments in India after the 2019 General Elections have led to a renewed interest in examining the foundations of India's institutions using fresh paradigms and challenging the conventional wisdom. *A People's Constitution* by Rohit De is a seminal work in this regard. Mr. De argues that the development of constitutional law in post-colonial India was not entirely led by the political and legal elite, as traditionally presumed. He theorizes that the common, every day, but by no means ordinary, people were the actual driving force behind the development of Constitutional Law in India.

In order to appreciate the premise of this book it is essential to contextualize the Supreme Court of India (**"Supreme Court"**), the seat of judicial and constitutional power, and its role in the post-colonial Indian society. The then framed and adopted Constitution of India (**"Constitution"**) faced several criticisms, even from amongst its framers i.e., the members of the Constituent Assembly, ranging from the heavy adoption of the Government of India Act, 1935, to the lengthy nature of the text itself. Even the ostensibly path breaking provisions of the Fundamental Rights, were criticized as being "framed from the point of view of the police constable".[2] The underlying feeling common to most of the criticisms was that the new Constitution was merely an extension of the

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[2] Somnath Lahiri, *Constituent Assembly Debates*, (Apr. 29, 1947) https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-04-29.

erstwhile legal system prevalent in India, and that the independence has only changed the rulers, without transforming the ills that plagued the governance system. De through his book postulates that the constitutional provisions were almost immediately adopted by the common Indian citizens, and were quite effectively used to enforce their rights – thereby making these criticisms less relevant, if not entirely unfounded.

Before delving into the thematic strands underlying in the book, it is important to mention an interesting aspect *qua* the Research Methodology used by De. Article 129 of the Constitution states that the Supreme Court "*shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself*"; and while this provision is usually considered to be the source of the contempt jurisdiction of the Supreme Court, an essential consequence is often overlooked. By its very definition a court of record is required to maintain physical records of all litigation before it. The Supreme Court Record Room, is the official archives of the Supreme Court of India, and by his own admission De was the first scholar to be granted almost unbridled access to work with these materials. A clear indication of the benefit derived from the research based on actual records of the Court, is evident in the many themes touched upon by De in his book.

The unifying underlying theme of the book can be summarized in De's words as "Constitutionalism from the margins". He uses three relatively well-known legislations and their subsequent challenges before the Supreme Court, to focus on the identity and background of the petitioners. This is a deliberate shift in paradigm from the law and politics centric approach which has traditionally held the fort. De's focus has instead been on defining – *Who* was the petitioner? *What* circumstances compelled them to challenge the law? *Where* were they placed in societal and traditional hierarchies? It is important to note that these cases are based almost immediately after the adoption of the Indian Constitution, and much before the advent of Public Interest Litigations (**"PIL"**), which were heralded as transforming the justice dispensation system from institution centric to individual centric. Indeed, De's hypothesis is that even prior to the primacy given to petitioners by way of PILs, significant changes in the legal system were made as a result of the judicial interaction between an individual petitioner and the constitution court.

To aid his hypothesis, De uses four important cases decided by the Supreme Court, wherein the civil liberties of the citizens were sought to be curtailed by the State, each case being discussed in a distinct chapter - *Behram Pesikaka v State of Bombay*[3] (arising from the prohibition in Bombay), *Hari Shankar Bagla v State of MP*[4] (arising from the commodity control regime under the Essential Supplies Act), *Mohd. Hanif Qureshi v State of Bihar*[5] (arising from the prohibition on cow slaughter), and *State of UP v Kaushaliya*[6] (arising from the restrictions on sex workers imposed by the Suppression of Immoral Trafficking Act).

The story narrated by De is much more than a legal analysis of a reported judgment. It begins well before the individual Petitioners are introduced to the readers. Using examples from popular and government-controlled media of the times, De distinctly and vividly describes the relevant social political situation which led to the germination of such legislation that infringes upon the rights of an individual citizen. The choice of these cases is significant because it showcases the diversity in backgrounds of the Petitioners in the abovementioned cases.

While Behram Pesikaka, a *Parsi,* was a mid-level government servant, Hari Shankar Bagla a relatively well-off *Marwari* trader, Md. Hanif Qureshi was a traditional butcher, and Husna Bai, who initiated the fourth litigation, was a commercial sex worker. These four individuals whose rights under the colonial government were traditionally determined by custom, class, caste, and sex, recognized that the newly enacted Constitution provided them an opportunity to level the playing field, at least in so far as recourse to the law is concerned. However, as is discussed in the book, not every litigation led to a major difference in the petitioners' plights, or indeed their status in the society.

The *Behram Pesikaka* case (Supra) examined the imposition of 'Prohibition' in the erstwhile state of Bombay. De focuses on the importance of procedural requirements to be undertaken by the agents of the State i.e., the

[3] Behram Pesikaka v. State of Bombay, (1955) 1 S.C.R. 613.
[4] Hari Shankar Bagla v. State of MP, (1955) 1 S.C.R. 380.
[5] Mohd. Hanif Qureshi v. State of Bihar, A.I.R. 1958 S.C. 731.
[6] State of UP v. Kaushaliya, (1964) 4 S.C.R. 1002.

police etc. in order to implement a policy decision affecting thousands. The chapter particularly highlights the relationship between individual liberty and community identity, as most of the challenges to the policy of Prohibition were undertaken by the members of the Parsi community – broadly influential, and having long standing interest in the alcohol industry. An echo of the methods used by enterprising tipplers during prohibition can still be found today with the Government of Kerala relaxing the restrictions on alcohol during the Covid-19 induced lockdown, provided a doctor prescribes the same.[7]

The chapter discussing the case of *Hari Shankar Bagla* is a fascinating read. De relies on various films and posters issued by the Press Division, Government of India to outline the status of a trader in the Nehruvian economy. While one might feel that a relatively well-off trader is not marginalized, it is important to contextualize the events on the basis of era in which it took place. The trader was often caricatured as a greedy, unscrupulous individual interested only in personal gain. This "othering" used by the Government machinery to underline the importance of its socialist goals, at a time when resources were scarce, and free enterprise was an almost oxymoron. The chapter discusses the intersection between administrative law and economic reforms, emphasizing the need for and the development of judicial review of administrative action.

The *Hanif Qureshi* case or the Cow Slaughter case looked at old cleavages in society *qua* protection of cows and prohibition of cow slaughter, through the new constitutional framework. Cattle, especially the cow, considered to be holy by the Hindus, formed an important part of the diet of several non-Hindu communities in India. Hanif Qureshi identified himself as a member of the 'Qureshi community and a citizen of India', and that members of the Qureshi community were traditionally involved in butchering and other allied vocations. De points out that this case was perhaps the first class action suit in India, as the number of petitioners in this case was around three thousand – each of them affected by the prohibition on cow and cattle slaughter imposed by the various states. It is important to note that through this case, fundamentally religious differences were sought to be framed

[7] GO(Rt)No.266/2020/TD, Government of Kerala (Mar. 03, 2020) 30.03.2020, https://excise.kerala.gov.in/wp-content/uploads/2020/03/LiquorPass.pdf.

within the framework of economic rights, instead of the traditionally used minority rights.

The *Kaushaliya* case explores the tale of Husna Bai, a commercial sex worker who challenged the provisions of the newly enacted Suppression of Immoral Traffic in Women and Girls Act, 1956 (colloquially referred to as SITA), as being contrary to her right to trade and profession, as well as the freedom of movement across the country. Commercial sex workers have often been said to exist in a legal vacuum, with the state's intent of clamping down on their profession, and the society having shunned them. De postulates that the Constitution enabled these women to engage with civil society and policy makers, and examine the flesh trade within a rights based framework. The chapter brings out the divergent trends within the larger feminist movements in the country, with the educated, elite women who were part of the legislatures and other institutions seeking a complete ban on what they perceived to be an immoral act. However, the unintended consequence of such blanket prohibition was the plight of the thousands of women like Husna Bai, who would have been left with no power or resources to fend for themselves. While the litigation before the Courts was largely unsuccessful it led to the commencement of a dialogue between the various stakeholders, and added new rights based dimension to the issue of prostitution, which was previously, almost entirely examined from a moral perspective.

*A People's Constitution* is a timely examination into the origins of the constitutional law in India. The author, Rohit De has attempted to debunk several long held assumptions and beliefs regarding the development of the rights based discourse in India. He postulates that contrary to popular belief the Indian constitutional experiment does not merely operate in a top-down manner, rather the rights enshrined in the constitution were almost immediately utilized by citizens at the margins, who sought to assert their rights in the newly formed 'Republic of Writs'.

# BOOK REVIEW: THE GREAT REPRESSION BY CHITRANSHUL SINHA

**ABHINAV SEKHRI**[1]

The topic of sedition is one that never seems to go out of fashion in the world's largest democracy, and all too often, it ends up being a weapon to stymie criticism of state policy rather than a tool to secure public order. This, in a nutshell, is the perspective that we are offered in *The Great Repression*, a new book by Mr. Sinha, a lawyer practicing in Delhi. The book is the most recent addition to a new kind of genre in India, Pop-Law, which is driven by the goal of bringing the law down from its ivory tower and making it more accessible to laypersons. Considering the absence of prior works of this nature on the subject, *The Great Repression* is a welcome addition.

The book spans a large historical canvas, beginning its journey in pre-colonial India and ending in 2019. Along the way, it places various milestones to mark important legal developments on the point of sedition, both from the perspective of statutory text and judicial decisions. The sheer scale of this exercise makes it a useful entry point for anyone interested in understanding how the law developed, and also, how it has continued to be utilized in independent India. By the end, the book left me fairly convinced of the point that the use of sedition law in liberal democratic India seems to have striking parallels with how this law was used during the heyday of the British *Raj*.

Often, though, the book labours under the weight of the historical enterprise that it undertakes. There are insufficient references to confirm some assertions that are made, such as *Queen Empress* v. *Joginder Bose*[2] being the first sedition case in India. On what basis is this asserted? Is it because prior works on free speech have asserted this? Or, is it a result of trawling through the archives? There are no explanations on offer in the notes,

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[2] Queen Empress v. Joginder Bose, (1892) I.L.R. 19 Cal. 35.

unfortunately, which makes it difficult to accept the premise. The absence of specific citations in the references is an issue that keeps returning to undermine the strength of research, which while limiting the book's usefulness as a research tool, thankfully does not detract from its readability.

*The Great Repression* focuses on the legal history of sedition primarily through the lens of the substantive penal provision, Section 124-A of the Indian Penal Code of 1860. The narrative would have been more comprehensive had the book also engaged more with the procedural environment in which the law was operating. Indeed, some of the strongest and sharpest critique offered by the book is not in respect of the substantive penal law, but rather in respect of the unsavory procedural law which provides minimal regulation of the police powers of arrest and detention. As these sections highlight, even the most lenient and rights-furthering reading of the sedition offence by a court can be frustrated by an executive with untrammeled powers of arrest.

This criticism becomes a main pillar of argument for the book, and also conveys to us the legal position which the author finds acceptable: A regime where sedition law may well remain on the statute books, but can only be triggered in times of national crisis involving strict restrictions on the ability of police to arrest persons. To this reader, this position implies an acceptance for an offence of sedition in at least some circumstances, and left me uncertain as to the ultimate argument of the book. Rather than offering an argument for repealing the penal provision, one would think that the book offers an argument for toning it down, and bringing the offence to a position palatable in a liberal democratic society that successive governments claim India to be.

*The Great Repression* does not promise to be a comprehensive guide to sedition law in India. It offers a substantial introduction for the un-initiated, and does so in an accessible manner. This ensures that when the next big debate around the topic begins, as it is surely bound to sooner rather than later, it is easier for everyone to have a greater appreciation of the historical and legal context and make more informed arguments, rather than fire stray volleys from loose cannon.