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**EDITORIAL: WHAT MAKES A JUDGE? UNDERSTANDING  
SUPREME COURT'S DECISION IN ANNA MATHEWS V.  
SUPREME COURT OF INDIA**

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*Atharva Chandra*<sup>1</sup>

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*“The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by.”*

- Justice Benjamin Cardozo

## INTRODUCTION

The celebrated quality of any democratic institution is that it places the responsibility of checks and balances, against arbitrariness and injustice, in procedures rather than on people. Such an endeavour is based on the notion that any democratic polity must be governed by the rule of law and not by the whims of the people. However, we often come across allegations of arbitrariness against such institutions, perhaps because ultimately the responsibility of their functioning falls in the hands of humans, and to err is human, in both wilful and negligent ways. One such instance was the judgement of the Supreme Court of India (“**the Supreme Court**”) in the case of *Anna Mathews v. Supreme Court of India*<sup>2</sup> (“**Anna Mathews**”), wherein a challenge was made to the appointment of Justice Victoria Gowri to the Madras High Court on the basis of her past political links to the then government and the alleged discriminatory statements made against certain

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<sup>2</sup> *Anna Mathews v. Supreme Court of India*, (2023) 5 SCC 661.



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minority communities.<sup>3</sup> The judgement which followed, dismissed this challenge and allowed for her appointment, leading to a series of criticisms against its rationale, the functioning of the Collegium system responsible for the appointment of judges in India, and the lack of fairness and reasonableness in the process. Furthermore, the concerns pertaining to purportedly unjust/unfair appointments were aggravated after the pronouncement that judicial appointments are not subject to judicial review on the grounds of “suitability” of a prospective candidate, by the Supreme Court of India. This led to doubts regarding thorough examination of political and other biases in a candidate inferred *via* their past conduct and whether the same should be ignored, leaving only the mechanical eligibility of a prospective candidate as the sole criterion for appointment through the Collegium system, as prescribed under Article 217 of the Constitution of India.

This becomes a matter of paramount importance, especially in an era where the legislature’s effectiveness as a check on the executive has decreased owing to the overwhelming majority and diminishing representation of opposition in the legislature. Therefore, the appointment and presence of qualified judges becomes crucial to ensure the democratic nature of the State.

The present editorial aims to analyse and address these issues, wherein *first*, it will evaluate and critique the rationale provided by the Supreme Court in *Anna Mathews*, arguing in favour of examining the suitability of a candidate in the process of judicial appointments. *Second*, it shall address the concerns regarding violations of administrative law principles in the current structure and procedures of judicial appointments by the Collegium system and the subsequent claims for judicial review of the same.

## **ANALYSING THE RATIONALE OF ANNA MATHEWS**

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<sup>3</sup> The Wire Staff, *Victoria Gowri Takes Oath as HC Judge; ‘Not Entertaining Writ Petitions’ Against Appointment, Says SC*, WIRE (Feb. 07, 2023), <https://thewire.in/law/supreme-court-victoria-gowri-petitions>.

In *Anna Mathews*, the Supreme Court essentially places a limit on the scope of judicial review of judicial appointments made by the Collegium. This is done by the Supreme Court by drawing a distinction between “eligibility” and “suitability” of a candidate, stating that the “*evaluation of the worth and merit of a person is a matter entirely different from eligibility of a candidate for elevation.*” The Supreme Court provides that the scope of judicial review for judicial appointments limits itself to the eligibility criterion of a candidate under Article 217(2) of the Constitution, specifically the minimum threshold which a candidate must fulfil in order to qualify as a prospective candidate for judgeship, which includes holding judicial office or practising as an advocate in the respective High Court for a minimum of ten years and so on.<sup>4</sup>

The court laid down that, “*Eligibility is an objective factor which is determined by applying the parameters or qualifications specified in Article 217(2). Therefore, when eligibility is put in question, the question would fall within the scope of judicial review. However, the question whether a person is fit to be appointed as a judge essentially involves the aspect of suitability and stands excluded from the purview of judicial review.*”<sup>5</sup> The given reasoning is further substantiated by the characterisation of “eligibility” as the sole objective measure of evaluating a judge-candidate.

The Supreme Court recognises that while Article 217(2) provides for the minimum threshold for eligibility, the preceding clause in Article 217(1) provides for the procedure of appointing a judge-candidate for the High Court, stating that the same is “*designed to test the fitness of a person so to be appointed; her character, her integrity, her competence, her knowledge and the like.*” To support its reasoning, the court relies on the landmark judgement of *Supreme Court Advocates-on-Record Association v. Union of India*,<sup>6</sup> which established that while the judiciary has primacy in appointing judges, the involvement of multiple judges, including the Chief Justice of India, in the appointment process serves as a natural check against possible arbitrariness. The court further reasons that the logic of judicial review, which is typically used as a mechanism to check executive excesses, cannot be applied in the same manner to the process of judicial appointments, as opening up the given

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<sup>4</sup> INDIA CONST. art. 217, cl. 2.

<sup>5</sup> *Anna Mathews v. Supreme Court of India*, (2023) 5 SCC 661.

<sup>6</sup> *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441.

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process to litigative debate may compromise judicial independence. Furthermore, the Supreme Court cites its previous decision in *M. Manohar Reddy v. Union of India*,<sup>7</sup> attempting to reinforce the above-mentioned distinction between “eligibility” and “suitability”, wherein, drawing from the judgement, it provides that “*the consultative process envisaged under Article 217(1) is to limit the judicial review, restricting it to the specified area, that is, eligibility, and not suitability.*”<sup>8</sup>

The interpretation, and particularly the emphasis, by the Supreme Court on “eligibility” under Article 217 as the exclusive criterion for establishing a locus for challenging a judicial appointment diminishes the evaluation of judicial appointments to mere fulfilment of procedural requirements. This perspective is outlined by the court when it provides that “*...judicial review lies when there is lack of eligibility or ‘lack of effective consultation’. Judicial review does not lie on ‘content’ of consultation.*”<sup>9</sup>

The Supreme Court’s confidence in the appointment process, including the checks by its functionaries and the balances present in the procedural requirements, suggests that a judge-candidate only needs to meet the minimum threshold of “eligibility” as defined in *Anna Mathews* to be appointed. This begs the question as to whether the baton of democratic decisions should be entrusted to the Supreme Court and its Collegium, with their promised infallibility, or whether it should be placed in the Constitution, which acts as the supreme balancing force, both in text and spirit, against any possible instance of arbitrariness.

Although many may believe in the former, our honourable judges and other respected functionaries of the government are not infallible. This has been highlighted by the works of Abhinav Chandrachud, which emphasises that some judges, in addition to evaluating the merit of a candidate, also consider socio-religious factors and personal motivations when making

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<sup>7</sup> *M. Manohar Reddy v. Union of India*, (2013) 3 SCC 99.

<sup>8</sup> *Anna Mathews v. Supreme Court of India*, (2023) 5 SCC 661.

<sup>9</sup> *Id.*

judicial appointments.<sup>10</sup> This assertion is not meant to undermine the exceptional competence and integrity with which the said functionaries carry out their duties, but rather to emphasise the importance of upholding the substantive principles laid down by the Constitution of India, which serves the best safeguard against arbitrariness. In order to advance this notion, I invite the readers to consider a crucial aspect of the *Anna Mathews* judgement, wherein the Supreme Court acknowledges Article 217(1) as the procedure to evaluate the fitness of a judge-candidate.

## I. ELIGIBILITY V. SUITABILITY

In the reasoning provided by the Supreme Court for limiting the scope of judicial review for judicial appointments, a certain essential aspect of the procedure has been overlooked, wherein it is stated in sub-clause (b), that a judge may be removed from office by the President as per the procedure under Article 124(4) of the Constitution of India. Article 124(4) provides that:

*“(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity”.*<sup>11</sup>

The grounds for “*proven misbehaviour*” or “*incapacity*” constitute the factors that may initiate the process for the removal of judge. This implies that these grounds are linked to the erosion of the judicial qualities of a judge, in particular, their ability to provide unbiased, effective, and holistic decisions in the face of questions of law. This raises the question of whether a judge’s appointment can proceed while disregarding past conduct that may involve “*misbehaviour*” or “*incapacity*” before the judge-candidate assumes office. This approach contrasts starkly with the reasoning of the Supreme Court in *Anna Mathews*, which excludes the

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<sup>10</sup> ABHINAV CHANDRACHUD, SUPREME WHISPERS, CONVERSATIONS WITH JUDGES OF THE SUPREME COURT OF INDIA 1980-1989 (Penguin, 1st ed., 2018).

<sup>11</sup> INDIA CONST. art. 124, cl. 4.

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“*suitability*” of a judge-candidate from the scope of judicial review with respect to their appointment.

While the Constitution may not provide us with an exhaustive definition of “*misbehaviour*”, the same can be reasonably interpreted from the discourse arising out of legal challenges which have led to the evolution of the interpretation and application of Article 124(4). The first and foremost case that defines “*misbehaviour*” is *Krishnaswamy v. Union of India*<sup>12</sup> (“***Krishnaswamy***”), wherein the Supreme Court defined “*misbehaviour*” as misconduct that involves wilful abuse of judicial office, wilful misconduct within the office, corruption, lack of integrity, or any other offence that demonstrates moral turpitude.

It is also established that such misconduct extends to the conduct of the judge outside of the judicial office. While every negligent error may not constitute a charge of “*misbehaviour*”, wilful misconduct involving intentional acts does expose a judge to the charge of “*misbehaviour*”. Similarly, in *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee*,<sup>13</sup> the Supreme Court recognised that the standards of conduct for a judge, both in the official and personal space, must be defined by the absence of any and every kind of impropriety. It is stated that “*Society is ... entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences.*”<sup>14</sup> The presence of impropriety in the conduct of a judge will eventually lead to the decline of societal trust in the judiciary and an increase in doubts regarding its institutional legitimacy. The test of a judge is not on the basis of their intelligence or their credentials, but their ability to provide judgements free from any form of bias.

The understanding of what constitutes “*misbehaviour*” was further expanded on by the Law Commission of India, as it attempted to define the same after applying the findings of the P.B. Sawant Committee, which was constituted to inquire into the conduct of Justice V. Ramaswami, the first

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<sup>12</sup> *Krishna Swami v. Union of India*, (1992) 4 SCC 605.

<sup>13</sup> *C. Ravichandran Iyer v. A.M. Bhattacharjee*, (1995) 5 SCC 457.

<sup>14</sup> *Id.*

judge against whom impeachment proceedings were initiated in independent India.<sup>15</sup> The definition arrived upon by the Law Commission closely aligns to the definition provided in *Krishnaswamy*, wherein “*misbehaviour*” encompasses conduct or a pattern of behaviour that brings dishonour or disrepute to the Judiciary, eroding public's trust and confidence. It is not just limited to acts prohibited by law, or ones directly related to the judicial office, but includes the public and private activities of a judge as well. The act or omission must be intentional, and this intention can be evidenced through culpable recklessness, negligence, or disregard for established rules or code of conduct. While a single act is not sufficient evidence to prove intention, a series of acts can lead to the inference that the intention existed. The important aspect of this definition is the addition made to the existing notion of “*misbehaviour*”, which provided the understanding that “*misbehaviour*” is not limited to the conduct that occurs after a Judge assumes their current judicial office. It can also encompass acts or omissions during prior judicial offices, if those acts or omissions render the judge ineligible of holding their present judicial office.

This broad interpretation of “*misbehaviour*” is not proposed solely for the sake of argument, but it may also find authority when the provisions of the Constitution are juxtaposed against each other. The provisions relating to the impeachment of a judge from the higher judiciary under Article 124 are starkly different from those for the impeachment of the President under Article 61. The ground for impeaching the President, specifically “*violation of the Constitution*,” is much narrower compared to the broader range of misconduct that can fall under the category of “*misbehaviour*,” which would naturally include “*violating the Constitution*”<sup>16</sup> as well. The process for impeaching the President, outlined in Article 61, is self-contained and comprehensive, unlike the procedure for impeachment of a Supreme Court judge under Article 124(4) and (5), which grants the Parliament the authority to regulate the process for presenting an address and establishing proof of misbehaviour or incapacity. This reflects the idea that the standard of ascertaining the correctness of a judge’s conduct, whether during their tenure, or prior to it, was intended to be subjected to more stringent checks

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<sup>15</sup> Law Commission of India, The Judges (Inquiry) Bill, Report No. 195 (January 2006), available at [https://lawcommissionofindia.nic.in/report\\_seventeenth/](https://lawcommissionofindia.nic.in/report_seventeenth/).

<sup>16</sup> Justice R. K. Abichandani, *Judicial Independence of Dependent Judiciary*, 1 GNLU L. REV. 3 (2008).

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than those provided by the present scheme outlined by the Supreme Court in *Anna Mathews*, especially due to the importance and authority attributed to them in the constitutional design.

The justiciability of the result presented by the Inquiry Committee constituted by the Parliament during the impeachment proceedings of a judge of the higher judiciary has been examined by the Supreme Court in *Sub-Committee on Judicial Accountability v. Union of India*.<sup>17</sup> Therein, it declared that there lies no scope for judicial review of the result of an impeachment proceeding as conducted by the Parliament under Article 124(4) as this would undermine the constitutional provision granting Parliament the authority to impeach higher judiciary judges. However, this rationale cannot be applied to the justiciability of the appointment process of a judge, as it lacks sufficient checks and balances and is tainted by the allegations of lack of transparency.<sup>18</sup>

Therefore, it is essential that the scope of judicial review for the process of judicial appointments extends beyond the “*eligibility*” of a candidate, which merely involves meeting the minimum threshold and the procedural requirements for appointment of a judge-candidate, as outlined by the Supreme Court in *Anna Mathews*. The review should also encompass “*suitability*” of a judge-candidate, taking into account, their conduct in both personal and professional spheres, and assessing whether the same aligns with the judicial standards of integrity, moral vigour and ethical firmness.

## II. EFFECTIVE CONSULTATIONS V. CONTENT OF CONSULTATIONS

Another restriction imposed by the Supreme Court on the scope of judicial review for judicial appointments is the exclusion of issues related to “*content of the consultation*” as a ground for challenging the said appointment, essentially recognising only two grounds for justiciability, which are “*eligibility*” and “*effective consultation*”.<sup>19</sup> While the earlier part of this article

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<sup>17</sup> *Sub-Committee on Judicial Accountability v. Union of India*, (1991) 4 SCC 699.

<sup>18</sup> *Id.*

<sup>19</sup> *Anna Mathews v. Supreme Court of India*, (2023) 5 SCC 661.

focused on the concept of “*eligibility*”, this section will focus on the merits of excluding the “*content of consultations*” from the scope of justiciability, primarily on administrative grounds.

The Supreme Court characterises an “*effective consultation*” as a consultation that is procedurally sound, as envisaged under Article 124(1) of the Constitution. The current appointment scheme is characterised by a process of dialogue between the Collegium, consisting of the Chief Justice of India along with the four senior-most judges of the Supreme Court, and the executive.<sup>20</sup> This process involves gathering inputs from intelligence agencies, particularly the Intelligence Bureau, for a background check of the judge-candidate, as well as considering comments from the government. The Collegium reviews these inputs and also seeks written opinions and comments of judges familiar with the concerned High Court.<sup>21</sup> After due consideration, the Collegium makes its final recommendations to the government.

In light of the questions raised against the above-mentioned process and whether the same ensures neutralisation of any possible arbitrariness in the appointment procedure in *Anna Mathews*, the Supreme Court provides, drawing from its earlier judgement in *Supreme Court Advocates-on-Record v. Union of India*,<sup>22</sup> that involvement of multiple judges in the formation of the final recommendation serves as a safeguard against the possibility of arbitrary decisions, even subconsciously. With the judicial element playing a significant role in appointments and transfers, the necessity for additional judicial review, as seen in other executive actions, is eliminated. The extent of discretion is minimised through effective written consultation and adherence to prevailing norms. This must be kept in mind as we proceed to delve into the issue of expanding the scope of judicial review based on issues relating to “*content of the consultation*,” which is ultimately the foundation of the merit of any judicial appointment.

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<sup>20</sup> DEPT’ OF JUSTICE, GOV’T OF IND., MEMORANDUM OF PROCEDURE OF APPOINTMENT OF SUPREME COURT JUDGES, (2021), <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/>.

<sup>21</sup>Explained Desk, *Debate over the collegium system: How are SC and HC judge appointed?*, THE INDIAN EXPRESS (Oct. 08, 2022), <https://indianexpress.com/article/explained/debate-over-the-collegium-system-how-are-sc-and-hc-judges-appointed-8158195/>; *Id.*

<sup>22</sup> Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441.



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*First*, it is important to remember that the challenge against the appointment of Justice Gowri in *Anna Mathews* was made on the ground that the Collegium was not aware of certain issues relating to her publicly expressed socio-political opinions, which could have potentially influenced her conduct thus raising questions regarding the merit of her appointment. While the absence of awareness regarding the given issues during the appointment process was acknowledged by the Chief Justice in open court before the listing of the matter,<sup>23</sup> the same was disregarded by the bench of the court constituted to hear the matter, on their own accord, and without issuing any notice of clarification to the Collegium.<sup>24</sup>

While this article does not delve into the complications of finding why the events occurred as they did, it does shed light on the possibility that the functionaries of the appointment process may not be aware of every relevant fact pertaining to a judge-candidate during their appointment procedure. This provides a basis for expanding the scope of justiciability with respect to the “*content of the consultation*” on administrative law grounds.

The application of administrative law in the given matter must be allowed, as the Collegium system is considered to be performing an administrative function while making judicial appointments.<sup>25</sup> It involves a structured process, consultations, and decision-making procedures, akin to administrative procedures found in other areas of governance. The functions of the Collegium, involving the evaluation of judge-candidates and consultation with executive agencies, resemble administrative processes such as screening, evaluation, and decision-making exercised by administrative bodies in various contexts. Furthermore, the Collegium system also involves interactions and consultations with the government

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<sup>23</sup> Krishnadas Rajagopal, *Victoria Gowri appointment | Two views emerge from Supreme Court on what Collegium considered*, THE HINDU, (Feb. 07, 2023), <https://www.thehindu.com/news/national/victoria-gowri-appointment-two-views-emerge-from-supreme-court-on-what-collegium-considered/article66481159.ece>.

<sup>24</sup> *Anna Mathews v. Supreme Court of India*, 2023 5 SCC 661..

<sup>25</sup> Gautam Bhatia, *The L. Victoria Gowri Elevation Controversy: Structural Issues with Judicial Appointments*, I. CON. L. & PHIL., (Feb. 07, 2023), <https://indconlawphil.wordpress.com/2023/02/07/the-l-victoria-gowri-elevation-controversy-structural-issues-with-judicial-appointments/>.

and intelligence agencies, where relevant inputs and considerations are sought. This interaction with the executive branch reflects the administrative nature of the Collegium system. It is important to note that this administrative function is distinct from the judicial function of the judiciary. The Collegium system serves as an administrative mechanism to ensure that qualified and suitable individuals are appointed as judges, while the judiciary itself exercises its judicial powers independently and impartially.

Therefore, the process of judicial appointments is subject to the checks of administrative law, which further scrutinises the “*content of the consultation*” taking place during the process of judicial appointment, as under the doctrine of legitimate expectations, if a public authority creates a legitimate expectation in an individual through its words, conduct, or established practices, they are generally required to fulfil that expectation. This means that the authority cannot act in a manner that is unfair, arbitrary, or in violation of the individual's legitimate expectations without providing a valid and justifiable reason. The doctrine of legitimate expectations acts as a safeguard against arbitrary or unfair administrative actions, thereby promoting fairness, transparency, and good governance.<sup>26</sup>

The doctrine of legitimate expectations finds relevance in relation to judicial appointments, as individuals, particularly aspiring judges and the general public, have a legitimate expectation that the appointment procedure will be fair, transparent, and reasonable. The judiciary plays a crucial role in upholding the rule of law, ensuring justice, and safeguarding fundamental rights. Therefore, the process of appointing judges is of significant public interest, and there is a legitimate expectation that it will be conducted in a manner that maintains the integrity and independence of the judiciary. The doctrine of legitimate expectations requires that the appointment procedure for judges be carried out without arbitrariness, bias, or undue influence. It includes expectations for the establishment of clear criteria, merit-based selection, transparency in the evaluation process, and adherence to established natural justice norms and principles. If there are departures from these legitimate expectations, the decision may attract

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<sup>26</sup> I.P. MASSEY, ADMINISTRATIVE LAW 285-292 (Eastern Book Company, 5th ed., 2001).

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a challenge to the appointments on the grounds of legitimate expectations.<sup>27</sup>

Furthermore, if certain facts about a judge-candidate's political background or potential political bias or any other relevant aspect of their conduct, are not considered during the appointment process, a cause for judicial review can arise on the grounds of irrationality under the *Wednesbury* test.<sup>28</sup>

According to the *Wednesbury* test, a decision can be deemed unreasonable if it is so irrational that no reasonable person would have made it. One of the factors that can contribute to demonstrating unreasonableness is the failure to consider all relevant information before making a decision. This includes failing to consider factors that may indicate potential bias or conflicts of interest, such as a judge-candidate's political background. In the context of judicial appointments, decision-making bodies such as the Collegium or any other relevant authority have a duty to consider all relevant information about a candidate.<sup>29</sup> This includes not only an assessment of their qualifications, experience, and legal expertise but also taking into account any potential political bias that may impact their impartiality in the adjudication of a case. If it is later discovered that the decision-making body did not adequately consider all relevant information about a judge-candidate's political background or potential political bias, it can be argued that the decision was irrational. By failing to consider all relevant information, the decision may be deemed unreasonable and thus open to challenge through judicial review.<sup>30</sup>

Therefore, it is advanced that the “*content of the consultation*”, particularly its completeness and comprehensiveness, or lack thereof, may attract a challenge under the contours of administrative law and create the scope of judicial review for the appointment of a judge.

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<sup>27</sup> *Id.*

<sup>28</sup> *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 KB 223.

<sup>29</sup> Bhatia, *supra* note 25.

<sup>30</sup> *Id.*; MASSEY, *supra* note 26.

Lastly, the rationale of the Supreme Court in limiting the scope of justiciability, whether on the grounds of “*suitability*” or “*content of the consultation*” may have been justified, but precedent holds that these are very relevant considerations made by the functionaries of the appointment process while evaluating a judge-candidate, which is evident from the nature of the evaluation that took place during the episode involving advocates R. John Sathyan, Saurabh Kirpal, and Somasekhar Sundaresan and their possible appointment as judges in various High Courts back in January, 2023. While the Collegium advanced their recommendation, the executive rejected it on several grounds which were absolutely unfair and arbitrary in nature, ranging from the given candidates publicly criticising the government of the day in the past to having a foreign national as a partner and the openness of their sexual orientation.<sup>31</sup>

The nature of such qualitative factors which find their way into the evaluation of a judge-candidate during the appointment process reveals that the “*suitability*” of a candidate and the “*content of the consultation*” involves aspects ranging from the intimate aspects of their lives to the conduct they have exhibited in the past, personally and publicly. Furthermore, it would be irresponsible to assume that the structural plurality of the appointment process provides a well-enough check against any possible arbitrariness in the consultations regarding a judge-candidate as, which arises from a birds-eye view of the events which took place leading to *Anna Mathews*, particularly the admission of the Chief Justice of India in open court regarding the unawareness of her previous political statements which would have been essential to her evaluation. This can be best explained by the observations made by Rushil Batra, in his article analysing the judgement and the events leading up to it, wherein he puts forth “*a rather pertinent question does emerge, which is that if the Intelligence Bureau can otherwise give the Collegium adverse reports about other candidates because they shared an article that was critical of the Prime Minister, it is very hard to believe that the premier intelligence gathering body was simply unaware of the alleged hate speech at issue. Was this then, a deliberate withdrawal of information from the Collegium? Unfortunately, we shall never*

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<sup>31</sup> The Wire Staff, *SC Reiterates Saurabh Kirpal’s Appointment as Judge, Rejects Govt Objections About Sexuality*, THE WIRE, (Jan. 19, 2023), <https://thewire.in/law/saurabh-kirpal-appointment-supreme-court-collegium-reiterate>.

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*know.*<sup>32</sup> Therefore, this not only makes evident the fact that there exists scope for arbitrariness with respect to the aspect of consultations in the present scheme of judicial appointments, but it also creates a ground for expanding the scope of judicial review of the same.

## CONCLUSION

In democracies, we often find that the seeds of arbitrariness flourish in the soil of opacity. To secure the principles of a healthy democracy, it is crucial that such arbitrariness be dealt with at its root. The root of such arbitrariness in judicial appointments in India lies in the opaque nature of the process. In its effort to establish a procedure which prevents executive bias in the appointment of judges and ensures judicial independence, the judiciary has unfortunately developed a procedure which is characterised by its lack of transparency. This lack of transparency not only affects appointments, but also the transfer of judges, which is reflected in the dubious transfers of judges who have not toed the line of the establishment. Examples of the same may be found in the transfer of Justice Muralidhar, who was transferred a day after his direction to the Delhi Police to investigate allegations against persons linked to the government of the day and their involvement in instigating the Delhi riots in 2020,<sup>33</sup> or the transfer of Justice Banerjee, who initiated a strict policy of zero tolerance for corruption in the Madras High Court.<sup>34</sup>

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<sup>32</sup> Rushil Batra, *Guest Post: From Translucence to Opacity: Judicial Appointments after the Victoria Gowri Case*, I. CON. L. & PHIL., (Feb. 14, 2023), <https://indconlawphil.wordpress.com/2023/02/14/from-translucence-to-opacity-judicial-appointments-after-the-victoria-gowri-case/>.

<sup>33</sup> The Wire Staff, *HC Judge Who Pulled Up Delhi Police Over Riots Shunted Out by Modi Govt*, THE WIRE, (Feb. 27, 2023), <https://thewire.in/law/modi-government-wastes-no-time-moving-justice-muralidhar-out-of-delhi-high-court>.

<sup>34</sup> Special Correspondent, *Law Ministry notifies transfer of Madras HC Chief Justice Sanjib Banerjee to Meghalaya High Court*, THE HINDU, (Nov. 16, 2022), <https://www.thehindu.com/news/national/law-ministry-notifies-transfer-of-madras-hc-chief-justice-sanjib-banerjee-to-meghalaya-high-court/article37512350.ece>.

The sore of opacity has been further festered by the judgement of the Supreme Court in *Anjali Bhardwaj v. CPIO, Supreme Court of India*,<sup>35</sup> wherein it was decided that the proceedings of the Collegium for the appointments of judges are not subject to public availability under the provisions of the Right to Information Act, 2005. The reasoning provided for the same was that the final resolution of the Collegium reflects the considerations made while taking the decision of appointment, along with possible obstacles in the free expression of the involved functionaries while putting forward their reservations regarding a judge-candidate in the deliberations leading up to the appointment.

The entirety of the legal conflict which occurred in *Anna Mathews* could have been avoided if the recommendations, deliberations, and other information related to the appointment of a judge-candidate via the Collegium system had been made public. This would have enabled the appointment functionaries to be aware of any and every piece of relevant information related to the judge-candidate in the course of their appointment.

The fields of constitutional law, administrative law and their comparative aspects demand academic rigour from both the authors and the editors. Together, we are in a position to deliver something meaningful to the academic discourse. It gives us immense pleasure to introduce Issue I of Volume VIII of our journal to the readers.

## IN THIS ISSUE

Tania Groppi in *Constitutional Jurisdictions in the ICT Revolution: Looking for legitimacy through communication* explores the escalating significance of constitutional and supreme courts communication with public opinion, highlighting the transformative role of new technologies. The author examines generators, objects, tools, and recipients of communication across 27 constitutional jurisdictions globally and deploys three key methods: website and social media analysis, a dedicated questionnaire for scholars, and a review of limited publications on the subject. The author reveals a notable shift in communication strategies by analysing courts over the last fifteen years. The conclusion

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<sup>35</sup> *Anjali Bhardwaj v. CPIO, Supreme Court of India*, (2023) 4 SCC 784.

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delves into reasons for this transformation, associated risks, particularly amid democratic backsliding, and addressing a crucial gap in constitutional democracy that merits scholarly attention.

In *Scope of 'Minority' Under Articles 29 & 30 of the Constitution of India with reference to the Sikh, & Jain Minority Case*, Shubham S. Dayma delves into the contentious issue of granting minority status to Sikhs in Punjab by the state government, a matter present before the Five-Judge Bench of the Supreme Court of India. The Hon'ble High Court of Punjab & Haryana, in the case of *Sabil Mittal*, struck down the state notification allowing Sikh minority status, leading to the present challenge. The dispute hinges on the reconsideration of the *Bal Patil* case, exploring the definition of 'minority' under Articles 29 & 30 of the Constitution. The author aims to illuminate the challenges in determining minority status, emphasising the crucial factors relevant to the pending questions before the Supreme Court.

Shivank Verma & Nitish Dubey, in *Constitutionality of Caste Based Reservations: Uncovering Loopholes and Inconsistencies*, Shivank Verma & Nitish Dubey scrutinise the loopholes in India's current reservation policies. The authors explore the applicability of Article 14 to Article 341 and its notifications, revealing a theoretical aspect in the absence of specific parameters for Scheduled Caste designation. Subsequently, it draws distinctions between Scheduled Castes and Other Backward Classes, emphasising considerable overlapping criteria. Further, the authors also question the executive's potential of caste designation as a colorable exercise of power, contradicting Article 341(2). Lastly, the authors contend that Article 16(4) reservation's test is not class backwardness but inadequate representation, often overlooked. The authors propose remedies to address these concerns and rectify existing reservation system lacunae.

In *Judicial Appointments in India and Pakistan: The Need for Responsive Judicial Review and Institutional Dialogue*, Rushil Batra addresses the persistently debated issue of Judicial Appointments. The author critiques the 2015 judgement of Supreme Court of India which held

the NJAC to be unconstitutional on the touchstone of *Nadeem Ahmed*, a Pakistani Supreme Court Judgement which faced a similar question like NJAC and opted for institutional dialogue instead of nullification. Drawing from Pakistani jurisprudence, the author suggests alternative approaches the Supreme Court of India could have taken. The author then compares and contrasts the SCP's stance with the SCP's, advocating for institutional dialogue on “non-democratic minimum core” matters like judicial appointments.

And finally, Afreen Afshar Alam reviews Achyut Chetan's *Founding Mothers of the Indian Republic: Gender Politics of the Framing of the Constitution*, recommending it to understand the contribution of Indian Women in the drafting of the Indian Constitution. The author praises the book for shedding light on the distinctive moral vision of the women towards drafting the Indian Constitution and dispelling the preconceptions associated with the term “founding fathers” which have significantly influenced constitutional interpretation.

## **CCAL ACTIVITIES**

Over the last five months, CCAL has undertaken several activities aimed to foster interest and development in the field of constitutional law and administrative law.

In 2022, CCAL started hosting the *Writ[e] & Talk* podcast. With the help of this podcast, the Centre aims to bring clarity and build discussion when it comes to writing on Constitutional Law and Administrative Law. We aim to interview authors of academic papers on varied subject matters that the journal deals with. We seek to go in-depth with the theme of their piece, the arguments they raise in their article, their journey of discovering the topic, the methods and techniques used by them to derive their arguments and so on. This initiative is an attempt to increase dialogue, discussion and engagement with legal writing.

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



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This semester, we had the pleasure of hosting Dr. Seema Kazi, an Assistant Professor and Fellow at Centre for Women's Development Studies. This episode discusses her paper titled "*Women, Gender Politics, and Resistance in Kashmir.*" The paper dissects the impact of Article 370's revocation on Kashmiri women, probing beyond political ramifications. Unveiling the disparity between state claims and women's rights, it unravels the misogynist gendered narratives in hyper nationalist rhetoric post-revocation and unveils the collective resistance of Kashmiri women through local reporting.

We are also delighted to announce the successful completion of the National Seminar on Constitutionalism in Contemporary Times, orchestrated by the Centre for Comparative Constitutional and Administrative Law and the Constitutional Law Society at National Law University, Jodhpur, was a resounding success on September 23rd and 24th, 2023. The event, marked by an inspiring inaugural address by Hon'ble Justice J.B. Pardiwala and further enriched by the contributions of Prof. Dr. Harpreet Kaur, Prof. (Dr.) IP Massey, and Asst. Prof. Sayantani Bagchi, set a remarkable tone. Panels exploring socio-economic rights, gender equality, transformative constitutionalism, judicial activism, and democratic governance fostered enriching discussions and featured paper presentations by esteemed panellists such as Dr. Sanjit Kumar Chakraborty, Professor Dipika Jain, Professor Yogesh Pratap Singh, Dr. Rangin Pallav Tripathy, Dr. Shameek Sen, and more, offering multifaceted insights into India's constitutional framework. The valedictory session, led by Dr. S.Y. Quraishi and Prof. (Dr.) IP Massey, added scholarly depth, while Asst. Prof. Sayantani Bagchi concluded the event, thanking the participants and contributors for their invaluable perspectives and comprehensive discussions on contemporary constitutional challenges in India.

The endeavour of the Centre to encourage discourse on the subject matter of constitutional and administrative law is furthered by the bi-annual publication of CALJ, guest lecture events, *Writ[e] & Talk* podcast and the regular publication of articles on topics of contemporary relevance on our blog "*Pith and Substance: The CCAL Blog*".

## ACKNOWLEDGMENT

The editorial board of CALJ (“**Board**”) worked on the issue over the last five months with utmost dedication and determination. The process was a learning experience for us and provided us with the opportunity to bond with the entire team.

The publication of this issue would not be possible without the guidance of our Patron, Hon’ble Vice-Chancellor of National Law University Jodhpur, Prof. (Dr.) Harpreet Kaur and our Director Prof. (Dr.) IP Massey. At this juncture, we would also take the opportunity to thank our faculty advisors—Asst. Prof. Sayantani Bagchi & Asst. Prof. Vini Singh for their constant support, mentorship and engagement with every initiative we undertake. The Registrar of National Law University Jodhpur has also ensured smooth functioning at every stage, and we are thankful for it.

We would also like to thank every member of the Board for working on the issue and ensuring that the standards of our journal improve constantly. Members of the Board — Himanshi Yadav, Rachana R. Rammohan, Atharva Chandra, Akshay Tiwari, Sourabh Manhar, Mihir Nigam, Prithvi Raj Chauhan, Akshat, Anjali Sunil, Bharati Meena, Krishangee Parikh, Sinchan Chatterjee, Sonsie Khatri, Sri Janani S., Tasneem Fatma, Aarushi Gupta, Dhruv Singhal, Kovida Bhardwaj, Mohak Dua, Paavni Dua, Palash Singhal, Rishi Dev, Srishti Pandey & Vaibhav Singh —have been assets to our team.

We would like to express our gratitude to Mr. Gyan Bissa and the University’s IT department for maintaining our website and providing us with sufficient resources. The Board also recognises the vital part performed in processing each application and ensuring the efficiency of the process by the University’s Students Section.

On behalf of the Board, we must also thank our authors for taking the time to contribute to this issue. The topics covered in this issue are of contemporary relevance to Indian Constitutional Law as well as comparative constitutional law. We are grateful to the writers for their persistence and cooperation throughout the editing process, which made the timely and smooth release of this issue possible.

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The Board hopes that readers will find this issue to be a useful resource and that it will encourage informed discussion on the topics of administrative law and constitutional law. Should our readers have any queries, suggestions or feedback for us, write to us at: **editorcalq[at]gmail[dot]com**.

Falguni Sharma

**Editor-in-Chief**

## CONSTITUTIONAL JURISDICTIONS IN THE ICT REVOLUTION: LOOKING FOR LEGITIMACY THROUGH COMMUNICATION

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TANIA GROPPI<sup>1</sup>

*The article discusses the growing importance of the communication of constitutional and supreme courts with public opinion and how new technologies are transforming this relationship. It highlights the need for an empirical analysis of court communication, due to the scarcity of norms regulating these activities. The author examines the generators. The object, the tools, and the recipients of the communication of 27 constitutional jurisdictions worldwide.*

*The research was conducted using three types of tools. First, an examination of the courts' websites and social media platforms. Secondly, a dedicated questionnaire was submitted from scholars of the respective jurisdictions. Finally, the publications on the subject were considered, although they are rather limited and sporadic.*

*The main findings of the research are that in the last fifteen years, almost all the analysed courts have changed their communication strategies. In many cases, these changes have been promoted by some prominent chief justices, and they covered both the communication tools (there was a shift from communication through websites and press releases to social networks), its content (which extended from judicial to extrajudicial activities, and*

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\* Cite it as: Groppi, *Constitutional Jurisdictions in the ICT Revolution: Looking for legitimacy through communication*, 8(1) COMP. CONST. & ADMIN. L. J. 1 (2023).

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\*\* I thank Giacomo Giorgini Pignatiello and Fernando Gustavo Ruiz Dueñas, PhD students at the University of Siena, for their precious help in the research, as well as all the colleagues who replied to the questionnaire (see attachments). A special thanks to Anna-Maria Lecis Cocco Ortu, for the continuous discussion on this issue. I also thank the participants of the seminar organised in November 2023 by Micaela Alterio at the ITAM, Mexico City, to discuss this paper, and especially Vanessa MacDonnell. The article is inspired by the paper I presented at the seminar organised by the Italian law journal "Quaderni Costituzionali" in December 2022 and published in number 1/2023 of the same journal. All the links have been checked in January 2023. When no sources are quoted, the information comes from the answers to the questionnaire.

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*especially to the promotion of constitutional literacy), and the recipients of the communication (which are more and more the general public).*

*It concludes by discussing the reasons for this change, the risks, and the potentialities it involves, especially in the context of the democratic backsliding that many democracies are experiencing. The tendency of the courts to resort to extrajudicial activities to promote the constitution is a symptomatic element of a gap in constitutional democracy, i.e., the need to strengthen the instruments to promote the constitution, including through educational and institutional innovations, a gap that should be taken seriously and addressed by scholars.*

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## INTRODUCTION

The question of the relationship between constitutional jurisdictions (whether they are specialised constitutional courts or supreme courts with constitutional review functions) and public opinion is, by its very nature, interdisciplinary.

However, while studies concerning the communication *on the courts* are usually the prerogative of other social sciences, the communication *of the courts* is assuming growing importance among legal scholars.<sup>2</sup> This issue, in turn, is placed at the crossroads of multiple issues, and it is especially

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<sup>2</sup> Especially in the United States: See R. DAVIS, JUSTICES AND JOURNALISTS: THE US SUPREME COURT AND THE MEDIA (Cambridge, 1st ed., 2011); earlier, DL Grey, *The Supreme Court as Communicator*, HOUS. L. REV. 405 (1968). Even the communicative attitude of the Supreme Court of Canada has been a subject of study for some time: F. SAUVAGEAU, THE LAST WORD: THE MEDIA COVERAGE OF THE SUPREME COURT OF CANADA (University of British Columbia Press, 1st ed., 2006).

correlated to the relationship between courts and politics. There are countless references in scholarship to the link between the judiciary's search for visibility and their effort to strengthen their legitimacy,<sup>3</sup> accompanied by the inevitable citations of the *Federalist Papers*<sup>4</sup> and Alexander Bickel's influential book<sup>5</sup>. The underlying principle is the one expressed by Stephen Breyer, albeit in the context of the United States, that if citizens do not understand how the courts work, "*the judiciary cannot independently enforce our Constitution's liberty-protecting limits*".<sup>6</sup> Indeed, maintaining legitimacy through a strong reputation with the public is considered essential for the functioning of any judiciary and, above all, for compliance with its decisions.<sup>7</sup>

Since the creation of their websites at the end of the 1990s and early 2000s, several legal studies on the impact of new technologies on the communication of the courts have been developed.<sup>8</sup> Scholars have begun to reflect on the repercussions of court relations with public opinion, academia, the media, political decision-makers, the ordinary courts, supranational and international jurisdictions, and also the constitutional courts of other countries. A rich field of studies touched on the supposed

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<sup>3</sup> P. Passaglia, *Institutional Communications as a Means to Strengthen the Legitimacy of Constitutional Courts*, in P. Pinto de Albuquerque & K. Wojtyczek (eds), *JUDICIAL POWER IN A GLOBALIZED WORLD: LIBER AMICORUM VINCENT DE GAETANO*, 359 (Springer International Publishing, 1st ed., 2019).

<sup>4</sup> THE FEDERALIST NO. 78 (Alexander Hamilton); "The judiciary (...) cannot influence either the sword or the purse, it cannot direct either the strength or the wealth of society and it cannot reach any truly decisive decision. It can rightly be said that it has neither strength nor will, but only judgement and will have to resort to the help of the government even to enforce its own judgments".

<sup>5</sup> On the fact that the courts can only benefit from society's willingness to accept its own decisions: A.M. BICKEL, *THE LEAST DANGEROUS BRANCH. THE SUPREME COURT AT THE BAR OF POLITICS* 204 (Yale University Press, 2nd ed., 1986).

<sup>6</sup> BREYER, STEPHEN G., *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (Alfred A. Knopf, 1st ed., 2010).

<sup>7</sup> N. GAROUPA & T. GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* 19-22 (University of Chicago Press, 1st ed., 2015).

<sup>8</sup> Mathieu Disant, *Les cours constitutionnelles face aux enjeux de la communication*, 4 ACCF 59 (2003).

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“*dialogue between the courts*”<sup>9</sup> and scholars pointed out the existence of a real “*judicial diplomacy*”<sup>10</sup>.

The studies on the use of new communication tools, such as social media by the courts, are much more contemporary, however limited.<sup>11</sup> These studies date back to the last few years (the COVID-19 pandemic seems to have had a certain influence, although it is not easy to identify a precise date). The same can be said for broader studies, examining the incidence of the “*Fourth Industrial Revolution*”<sup>12</sup> (or ICT revolution) on other aspects of the activity of the courts, such as “*online constitutional justice*”<sup>13</sup> or the role of the constitutional jurisdictions in the promotion of “*constitutional literacy*”<sup>14</sup>. At the same time, references to issues previously less engaged with regard to constitutional justice, such as those of “*transparency*”, “*open*

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<sup>9</sup> T. GROPPi & M. C. PONTHEAU, *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES*, (Oxford, Hart Publishing, 1st ed., 2013).

<sup>10</sup> David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927 (2015); Gregory Davies, *The rise of judicial diplomacy in the UK: aims and challenges*, LEG. STUD. 40, 77–94 (2020). Soojin Kong, *The Two Modes of Foreign Engagement by the Constitutional Court of Korea*, 16 ASJCL 338 (2021); Philipp Meyer, *Judicial diplomacy of the German Federal Constitutional Court: bilateral court meetings as a novel data source to assess transnational communication of constitutional courts*, Z Vgl Polit Wiss, 15, 295–323 (2021).

<sup>11</sup> A. Sperti, *The Impact of Information and Communication Revolution on Constitutional Courts in THE IT REVOLUTION AND ITS IMPACT ON STATE*, CONSTITUTIONALISM AND PUBLIC LAW 183 (Oxford, Hart Publishing, 1st ed., 2021); J. Bonnet, *La communication juridictionnelle, nouvel objet du droit*, 33 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 13 (2018); The essays contained in R. DAVIS, D. TARAS, *THE GLOBAL PERSPECTIVE JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE*, (Cambridge University Press 2017); limited to the Australian context, with regard to state courts, J. Johnston, *Courts' Use of Social Media: A Community of Practice Model*, 11 INT.L.J. COMMUNICATION 669 (2017). When this article is about to be published, a new book is announced: A. SPERTI, *CONSTITUTIONAL COURTS, MEDIA AND PUBLIC OPINION* (Oxford, Hart Publishing, 2023).

<sup>12</sup> K. SCHWAB, *THE FOURTH INDUSTRIAL REVOLUTION* (New York, Crown Business, 2017).

<sup>13</sup> Venice Commission, *Observatory of situations of emergency in Venice Commission member States*, CDL-PI(2020)003, 2020, <https://www.venice.coe.int/files/EmergencyPowersObservatory/T14-E.htm>.

; E. Sammaciccio, *The Court and the telematic process: Evaluations and perspectives after the pandemic*, CONSULTA ONLINE (Jun. 18, 2022),

<sup>14</sup> M. De Visser, *Promoting Constitutional Literacy: What Role for Courts?*, 23 GLJ 1121 (2022).

*justice*”, “*civic engagement*”, are becoming more and more frequent, especially in the context of the Global South.<sup>15</sup>

Against this assorted, but still limited, set of studies, this article aims to present an empirical analysis of the communication of the constitutional jurisdictions, focused on the use of new technologies. It is an unavoidably vague topic, given the complexity of what is meant by “*communication*”.<sup>16</sup> If the word expresses the action of putting something “*in common*”, as shown by its etymology (from the Latin *cum* + *munis*), many possibilities remain open, as we will see, regarding the subject, the object, the tools and the recipients of this *communio*. The empirical analysis is made necessary by the scarcity of rules that regulate this activity, not without much difficulty for legal scholars. This does not come without a few exceptions, which will be dealt with in the article.

In the following paragraphs, the results of the research are presented. After a brief methodological introduction, several aspects of the communication of the courts are examined. *First*, the subjects of the communication are considered, dealing with the relationship between the Chief Justice of the court, the Court itself, the individual justices and the administrative apparatus. Then, the object of the communication is analysed, focusing especially on the two main categories of activities of the courts which are communicated, judicial and extrajudicial. *Third*, the communication tools are examined, with special attention paid to social media. The target of the communication of the courts is then considered, including both the general public and specific audiences (such as journalists, lawyers or students). The rules on courts’ communication were then examined in the few countries where they exist or are accessible to scholars. Some considerations on the influence of the normative and factual context in which the courts operate follow to conclude discussing the impact of these transformations on the role of constitutional jurisdictions.

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<sup>15</sup> See E. Bodnár, *The Concept of Open Justice in the 21st Century - Publicity and Transparency of Courts from a Comparative Constitutional Law Perspective* (2018) (Habilitation Thesis, ELTE Eötvös Loránd University)(on file with the author).

<sup>16</sup> A. Sperti, *Corte costituzionale e opinione pubblica*, 4 DIRITTO E SOCIETÀ 735 (2019).



# CONSTITUTIONAL JURISDICTIONS IN THE ICT REVOLUTION: LOOKING FOR LEGITIMACY THROUGH COMMUNICATION

## EMPIRICAL RESEARCH ON THE COMMUNICATION OF CONSTITUTIONAL JURISDICTIONS

Any comparative empirical research on constitutional jurisdictions has to face a dilemma: case selection. This dilemma arises from the incredible success of constitutional justice in the second half of the 20<sup>th</sup> century. Constitutional justice has had an almost global diffusion, extending beyond liberal democracies.<sup>17</sup>

The incredible success of constitutional justice explains the difficulties comparative law scholars are experiencing. Any research aimed at exploring all, or at least a relevant number, of courts requires a big international research team. A study of the communication strategies of the constitutional jurisdictions would have needed many more resources than those mobilised for any such occasion.

In this study, it was therefore necessary to carry out a selection of cases that took into account two main elements. On the one hand, it was deemed essential to go beyond the “*usual suspects*” (European or, in any case, Western legal systems) to include many experiences from the Global South because of the universality of constitutional justice. It is in these contexts, and above all in Latin America, that the most *creative* courts can be found, also in terms of communication. On the other hand, an attempt has been made to consider courts which operate only in sufficiently stabilised democracies<sup>18</sup>. On this basis, the following constitutional or supreme courts were examined:

*Albania (Constitutional Court); Austria (Constitutional Court); Australia (High Court); Belgium (Constitutional Court); Brazil (Supreme Court); Canada (Supreme Court); Chile (Constitutional Court); Colombia (Constitutional Court); Costa Rica (Sala constitutional of the Supreme Court); Ecuador (Constitutional Court); France*

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<sup>17</sup> World Conference on Constitutional Justice, created under the Venice Commission, has 118 courts as members, [https://www.venice.coe.int/WebForms/pages/?p=02\\_WCCJ&lang=EN](https://www.venice.coe.int/WebForms/pages/?p=02_WCCJ&lang=EN).

<sup>18</sup> It is quite difficult to define what a “stabilized democracy is”. See S. LEVITSKY & A. L. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* (Cambridge University Press, 2010), for an attempt to give a definition.

*(Constitutional Council); Germany (Constitutional Court); Greece (Council of State and Supreme Court); Hungary (Constitutional Court); India (Supreme Court); Israel (Supreme Court); Italy (Constitutional Court); Korea, Republic of (Constitutional Court); Mexico (Supreme Court); Portugal (Constitutional Court); Romania (Constitutional Court); South Africa (Constitutional Court); Spain (Constitutional Court); Switzerland (Federal Supreme Court); Taiwan (Constitutional Court); United Kingdom (Supreme Court); United States (Supreme Court).*

The research was conducted using three types of tools. *First*, an examination of the courts' websites and social media platforms. For the latter aspect, mapping was carried out, as provided in Annexure 1. *Second*, a dedicated questionnaire (Annexure 2) was submitted to scholars of the respective jurisdictions (Annexure 3), also taking advantage of a pre-existing research group<sup>19</sup>. Finally, the publications on the subject were considered, although they are rather limited and sporadic. With the exception of some issues of the *Bulletin* edited by the Association of French-speaking constitutional courts (which has dealt with the subject three times since 2004),<sup>20</sup> a monographic issue of the 2018 “*Annuaire Internationale de Justice Constitutionnelle*”<sup>21</sup> and a collective volume edited by Davis and Taras in 2017<sup>22</sup>, to which mainly communication experts contributed, there are no attempts to cover a significant number of

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<sup>19</sup> Cross-Judicial Fertilization: The Use of Precedents by Constitutional Judges, IACL-AIDC Research Group (Feb. 3, 2022), <https://www.academiaidh.org.mx/crossjudicialfertilization>.

<sup>20</sup> Constitutional Courts facing communication challenges, ACCF, Bulletin No. 4 (2004), <https://accf-francophonie.org/publication/bulletin-n4/#la-communication-une-demarche-necessaire-pour-les-cours-constitutionnelles>; Constitutional Courts and the media, ACCF, Bulletin No. 11 (2014), <https://accf-francophonie.org/publication/bulletin-n11/> and Writing Decisions, ACCF, Bulletin No. 13 (2017), <https://accf-francophonie.org/publication/bulletin-n-13/>.

<sup>21</sup> Xavier Magnon, *Juge constitutionnel et interpretation des norms- Le juge constitutionnel face aux transformations de la democratie*, 33 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE (2017), [https://www.persee.fr/issue/aijc\\_0995-3817\\_2018\\_num\\_33\\_2017](https://www.persee.fr/issue/aijc_0995-3817_2018_num_33_2017) e.

<sup>22</sup> R. DAVIS, D. TARAS, *THE GLOBAL PERSPECTIVE JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE* (Cambridge University Press, 1st ed., 2017).

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countries and, above all, to make a comparison that leads to at least some form of classification, if not to propose typologies and models.<sup>23</sup>

A summarisation of the main result of the research is that in the last fifteen years, almost all the analysed courts have changed their communication strategies.<sup>24</sup> These changes have concerned both the communication tools (there was a shift from communication through websites and press releases to social networks) and its content (which extended from judicial to extrajudicial activities). These are *de facto* developments, which in most courts occurred outside of any regulatory provision and which generally have not attracted the attention of the scholars.<sup>25</sup> As written in the response to the questionnaire of the Colombian experts (among whom is the communication manager of the Colombian Constitutional Court), “*El salto de cualidad de la estrategia de comunicación de la Corte es muy sobresaliente*” [The leap in quality of the communication strategy of the Court is very outstanding].

In some cases, this change of strategy was explicitly underlined by utterances of the president of the respective court. Perhaps the best-known example is that of the Supreme Court of Canada, where Chief Justice Beverly McLachlin used an expression that has become famous to indicate the relationship between courts and media, saying that they need each other, linked in a “*mutual, if sometimes uncomfortable embrace*”<sup>26</sup> Serving as the

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<sup>23</sup> It is significant that the encyclopaedic volume by G. Tusseau, *Contentieux Constitutionnel Comparé*, LGDJ 1138 (2021), does not go beyond the issue of the publication of decisions, and renounces addressing the question of the communication of the courts.

<sup>24</sup> See the first question in the questionnaire, Annex 2. Negative response was given only about Greece, Romania and the United States, among the countries analysed. Among other things, a similar trend is taking place in regional human rights courts: See the interesting empirical research by S. Steininger, *Creating loyalty: Communication practices in the European and Inter-American human rights regimes*, 11 GLOBAL CONSTITUTIONALISM 161 (2022).

<sup>25</sup> Among the few exceptions, in addition to Italy, where these studies have developed enormously in the last few years, there is also German experience. See C. Fuchs, *Das Verfassungsgericht und die (Medien) Öffentlichkeit*, in C. GRABENWARTER et al., *VERFASSUNGSGERICHTSBARKEIT IN DER ZUKUNFT – ZUKUNFT DER VERFASSUNGSGERICHTSBARKEIT* 101 (2021).

<sup>26</sup> The Relationship Between the Courts and the Media: Remarks of the Right Honourable Beverley McLachlin, PC Chief Justice of Canada, Carleton University, Ottawa, Ontario,

Chief Justice from 2000 to 2017, she began her tenure with a press conference and invited a group of reporters to the judges' private dining room two months before her official swearing-in. In this unprecedented event, she made it clear that better communication would be one of her key priorities for the Court<sup>27</sup>. This communication strategy has also been adopted by her successor and seems to have the support of all the judges of the Supreme Court of Canada.<sup>28</sup>

During a reception of the French *Conseil constitutionnel* at the Elysée on January 5th, 2017, President Laurent Fabius presented in a very open way his communication strategy, considering the “*traditional activities*” (such as the publication of the decisions) together with completely new tools, such as competitions for students or performances and shows. It is worth reporting his exact words:

*“The heart of our mission is and will remain, of course, to provide justice. But it is also up to us to make the activity of the Conseil and the fundamental principles of our Republic better known. Hence our decision to publish an annual activity report every 4 October, the anniversary of the 1958 Constitution. Hence also the publication on our website - redesigned in the second half of 2017 - of all the acts of our deliberations. Starting this year, we will also be organizing a competition with the Ministry of National Education, ‘Let’s discover our Constitution’, in order to make school pupils aware of the main constitutional principles throughout the territory. The Conseil must be a privileged place for meetings and exchanges: in this context, we will organize a ‘Night of Law’ at the Palais-Royal in the last*

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Supreme Court of Canada, (Jan. 31, 2012) <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>.

<sup>27</sup> S. Harada, *The “Uncomfortable Embrace”: The Supreme Court and the Media in Canada*, in R. DAVIS & D. TARAS, JUSTICES AND JOURNALISTS. THE GLOBAL PERSPECTIVE 85 (2017); E. MACFARLANE, GOVERNING FROM THE BENCH. THE SUPREME COURT OF CANADA AND THE JUDICIAL ROLE 177, Vancouver-Toronto: UBC Press (2013); L. David, *The Face of an Institution: Beverley McLachlin’s Reinvention of the Role of the Chief Justice of Canada*, Int’l J. Const. L. Blog (Dec. 07, 2017), <http://www.iconnectblog.com/2017/12/david-on-chief-justice-mclachlin/>.

<sup>28</sup> Cristin Schmitz, Chief Justice Wagner improves public communication, brings new ideas, change to top court, CJC and NJI, Law360 Canada (Feb. 7, 2019), <https://www.law360.ca/ca/articles/1747524/chief-justice-wagner-improves-public-communication-brings-new-ideas-change-to-top-court-cjc-and-nji>.

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*quarter of 2017 during which discussions will take place in the presence of a large audience on the major issues of the debate public*<sup>29</sup>.

Already in 2013, the then-President of the Constitutional Court of the Republic of Korea, Han-Chul Park, had underlined the need to strengthen the communication strategies of the court, pointing out the importance of directly communicating with the general public. Here as well, it is worth quoting his own words. In an interview with a specialised newspaper, he said, *“I think that communicating with all walks of life on various issues is necessary for constitutional jurisdictions. Communication with people outside the Court is just as important as communication within the Court”*. As an example, he cited a short text titled *‘Easy-to-Understand Constitution’*, published by the Constitutional Research Institute of the Court, written in simple language to help the layman. He said, *“This booklet has been well received by the public in general and by members of the National Assembly. There are even requests for additional publications”*<sup>30</sup>.

Even in the controversial Hungarian context of democratic erosion, the President of the Constitutional Court has highlighted the need to communicate in a new way. In an interview in 2019, President Tamás Sulyok pointed out the necessity of directly communicating with the people, linking to this goal the use of new communication tools. She said that:

*“...at the moment we are gradually opening up to the public, making the language of our communication more accessible and the texts of public announcements more concise and understandable. We want to bring our messages closer to the people. We welcome high school and university students to the Constitutional Court. Our Facebook page is becoming more and more popular, with short and attractive content, in Hungarian and English. We post about all important events and decisions, in a format which is also accessible to a wider audience. At the same*

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<sup>29</sup> Ceremony of greetings from the President of the Republic to the Constitutional Council (Jan. 05, 2017), <https://www.conseil-constitutionnel.fr/actualites/ceremonie-de-voeux-du-president-de-la-republique-au-conseil-constitutionnel-3>.

<sup>30</sup> Interview of Chief Justice Park Han-cheol, 2013, <https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=74448> (content of the interview excerpted and translated by Soojin Kong).

*time, we also communicate with the specialist public through a newsletter, which we plan to publish soon in English*".<sup>31</sup>

One of the courts most reluctant to open up to new communication techniques, the Constitutional Court of Portugal, which uses almost exclusively press releases relating to judgements and yearbooks published on its website, has recently changed its communication strategy. Following the election in February 2021, of President João Pedro Barrosa Caupers, as he himself underlined by launching an innovative and captivating e-book presenting the Court, "*the Court has placed the objective of improving its communication, giving an account of its activity, and bringing different types of audiences together*".<sup>32</sup>

Starting from these premises, this article will present the main aspects of the Courts' communication. It will try to keep them distinct, for illustration purposes, despite the inevitable interweaving and overlapping. On each theme, some of the most significant examples will be examined, without any claim to exhaustiveness.

#### **A. THE GENERATORS OF THE COMMUNICATION: TOWARDS GROWING PROFESSIONALISATION**

In a study that intends to examine the communication *of the* constitutional jurisdictions and has expressly excluded the communication *on the* courts themselves, it would seem superfluous to ask questions about the generators of the communication. On the contrary, this is probably the key question. In fact, what distinguishes the communication *of the* courts from the communication *from the* courts is a very complex issue. Where the first (communication *of the* courts) indicates the communication attributable to the institution as a whole, while the second (communication *from the* courts) the communication coming from the individual components. For both,

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<sup>31</sup> K. Cseh, P. Hancz, *Ha valaki önmagából sokat ad másoknak, még többet fog visszacapni*" – interjú Dr. Sulyok Tamással, ["If you give a lot of yourself to others, you will get even more back" - interview with Dr. Tamás Sulyok], (Feb. 05, 2018), <https://arsboni.hu/ha-valaki-onmagabol-sokat-ad-masoknak-akkor-meg-tobbet-fog-visszakapni-interju-dr-sulyok-tamással-az-alkotmanybirosag-elnokevel/>.

<sup>32</sup> Relatório de, *Tribunal Constitucional Relatório de Atividades 2021*, TRIBUNALCONSTITUCIONAL.PT (2021), [https://www.tribunalconstitucional.pt/tc/content/files/tc\\_ebook\\_relactiv\\_2021/2/](https://www.tribunalconstitucional.pt/tc/content/files/tc_ebook_relactiv_2021/2/)

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different, further questions are raised and addressed in a varied way in the courts presented in this article.

For the communication *of the* courts, the central question is that of the relationship between the president and the collegial body. In most cases, the former is responsible for the communication activity, usually in application of the rules which entrust the president with the representation of the institution.<sup>33</sup> Only rarely have disagreements been reported between the president and some members of the college regarding communication choices. This is the case of Portugal, where the president's innovative initiatives appear not to be shared by all members of the court.<sup>34</sup> When it comes to communicating individual decisions, the judge-rapporteur may be involved. In Germany, the procedure to adopt press releases is regulated by the rules of the court, according to which press releases are submitted for approval by the president of the relevant Senate (one of the two chambers of the Court) and the rapporteur.<sup>35</sup> In some countries, even in the absence of specific regulation, it is the college that takes the decision to adopt the press release, as in Belgium, where the draft press release is then drawn up by the head of press relations, who sends it to the legal advisors of the rapporteurs of the case, to then be sent to the college at least half a day before the decision.<sup>36</sup>

Furthermore, another aspect that receives different solutions is that of the technical bodies carrying out the communication activity. The communication offices, which have different names, as well as their managers (chief press officer, communication manager, spokesperson,

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<sup>33</sup> Tusseau, *supra* note 23, at 663.

<sup>34</sup> See the response by Teresa Violante to the questionnaire.

<sup>35</sup> Rules of Procedure of the Federal Constitutional Court of 19 November, 2014 (Federal Law Gazette, 2015 I p. 286), Art. 32 “§ 32 (1) Official information on decisions that have been issued must be approved by both the reporting Justice of the Senate and the presiding Justice and cannot be published until it can be assumed that the decision has been received by the parties to the proceedings.”

<sup>36</sup> On the Court's relations with the press, J. Spreutels *et al.*, *Cour constitutionnelle de Belgique. Les enjeux des relations entre les cours constitutionnelles et les médias*, in ACCF, *Les Cours constitutionnelles et les médias*, Bulletin, 11, (2014), <https://accf-francophonie.org/publication/bulletin-n11/.s>

etc.),<sup>37</sup> have been multiplying, in parallel with the expansion of the communication activities of the courts.<sup>38</sup> This in turn implies various aspects, starting from the selection of personnel, the characteristics, the type of contract, and the relationship with the judicial body (or with its president). It is not always easy to reconstruct such data on the basis of the information present on the websites, nor do the questionnaires contain detailed answers.

For example, who manages social media is rarely specified, although some courts take care to do so. An instance of the same is the Twitter account of the Austrian Constitutional Court, where it is expressly indicated that “*it is the spokesperson of the Court who tweets*”, and it is her photo that appears in the profile. Nor is it easy to verify whether the position is covered, as usually happens, by journalists, or, more rarely, by lawyers. Nor if they are linked to the court by fixed-term contracts or are part of its permanent administrative structure<sup>39</sup>. A unique case seems to be that of the Belgian Constitutional Court, one of the most prudent in communication, whose Media Unit is constituted of legal advisors (*référéndaires*), i.e., lawyers employed by the court.<sup>40</sup> Also in Korea, the director general of the Public Information Office, in charge of communication, is chosen among the ‘rapporteur judges’ (who are constitutionalists employed by the Court, a role similar to study assistants) for two years and works under the

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<sup>37</sup> On the contrary, in a court which, like that of Romania, does not communicate with ICT, communication with the media is entrusted to the Department of external relations, relations with the press and protocol, made up of a single person who deals with relations with the press.

<sup>38</sup> The growing professionalisation of court communication is underlined, albeit with reference mainly to international jurisdictions, by Steininger, *supra* note 24, at 175.

<sup>39</sup> For example, see the Taiwan Constitutional Court's Rules on the Department of Information and Promotion of the Rule of Law, <https://www.judicial.gov.tw/en/cp-1668-84500-f8dba-2.html>. Its main functions include: 1. Liaison with the press and dissemination of important decisions, events and official activities of the President of the Court, 2. Compile and analyse public opinion reports on judicial matters, coordinate the treatment of said reports and give an immediate response to public opinion, 3. Plan, coordinate, and supervise the dissemination of information by the Court to all agencies in the country, 4. the planning and promotion of the political incidence of the Court, 5. promoting education on the rule of law, 6. planning, promotion and coordination of dialogue programs between the judiciary and society, 7. Other matters related to press communication and dissemination.

<sup>40</sup> Spreutels, *supra* note 36.



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supervision of the President of the Court, with a staff of ten<sup>41</sup>. The recent decision (2021) of one of the least communicative courts, the Portuguese Constitutional Court, to make use of a private communications company, which is in charge also of the communication of a football team and of some politicians, has been highly criticised.<sup>42</sup>

Relations between courts, in particular the president, or the college, and the technical bodies responsible for communication usually develop through little or no formalised practice. Even where some written rules are established (for example relating to the identification of the decisions to be considered most important and to which to dedicate a press release, or to the relationship between the communication manager, the president and the judges in drafting the same), as in Switzerland, a lot of leeway is left to informal interpersonal relationships.<sup>43</sup>

The case of the Supreme Court of the United Kingdom (“**SCUK**”) is unique, as it is the only one among the “*great*” constitutional jurisdictions to have been established when the new media already existed (in 2009). Since the inception of ICTs, the SCUK has found itself navigating its turbulent sea and has taken full advantage of them<sup>44</sup>. In particular, the SCUK collectively adopted a clear communication strategy as part of the annual business plan, which is carried out by the administrative apparatus.<sup>45</sup> Policy decisions are adopted by a Strategic Advisory Board created in 2016, which includes the President and Vice-President of the SCUK, another judge appointed by the President, the Chief Executive, the Director of Corporate Services, the Registrar and the two Non-Executive Directors of the SCUK. In particular, in the latest Strategic Plan available, the third point

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<sup>41</sup> Organization Chart, Constitutional Court of Korea, <https://english.court.go.kr/site/eng/01/10102070000002020081304.jsp>.

<sup>42</sup> Communication and Public Affairs, <https://www.wlppartners.pt/>, is one such private company.

<sup>43</sup> P. Josi, *Medienarbeit des Bundesgerichts*, 2 JUSTICE – JUSTIZ – GIUSTIZIA 6 (2018).

<sup>44</sup> L.J. MORAN, *Judicial Institutional Change and Court Communication Innovations: The Case of the UK Supreme Court*, in R. DAVIS, D. TARAS, *THE GLOBAL PERSPECTIVE JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE* 255 (Cambridge University Press, 1st ed., 2017).

<sup>45</sup> R. Cornes, *A Constitutional Disaster in the Making? The Communications Challenge Facing the United Kingdom's Supreme Court*, PUBLIC LAW 266 (2013).

is that of “*Promoting the visibility and helping to maintain the reputation of the Supreme Court and the JCPC*”.<sup>46</sup> The 2022-2023 business plan envisages the various activities to be carried out in order to ensure that “*our work is visible and accessible and that our role in applying the law is understood as an essential part of a healthy democracy*”.<sup>47</sup>

An interesting solution in the direction of collegial management of communication strategies is that of the Supreme Court of Canada,<sup>48</sup> which since 1981 has had a committee of two or three judges, in rotation, who meet with the Registrar (the head of the administration of the Court, also displaying quasi-judicial functions, who reports directly to the Chief Justice) and the Executive Legal Officer (a jurist, lawyer or academic, hired from outside the Court, in charge of communication) to verify the measures adopted, including the adequacy of press releases and website content. The committee meets annually with media representatives to discuss possible needs together.<sup>49</sup>

As for the communication *from the courts*, the question essentially arises about the space that is left to individual judges, a topic that would lead to the very complex issue of the status of constitutional judges and their impartiality, also affecting the freedom of expression and academic freedom, a tension rarely addressed by the regulatory framework.

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<sup>46</sup> Strategic Priorities for the Administration of the UKSC / JCPC: April 2016 to March 2020, <https://www.supremecourt.uk/docs/strategic-priorities-2016-20.pdf>, provides under “Promoting the visibility and helping to maintain the reputation of the Supreme Court and the JCPC”, the following; 1. Continuing to develop our openness and accessibility by using special events such as “open days” and temporary exhibitions to encourage the public to visit the court. 2. Continuing to develop our educational outreach activities with special in-depth programs for sixth formers and students in further education. 3. Increasing the number of educational visits from Scotland, Wales and Northern Ireland. 4. Encouraging use of, and monitoring any possible improvements or extensions to, the Court's on-line and streaming facilities”.

<sup>47</sup> The Supreme Court of the United Kingdom and the Judicial Committee of the Privy Council Business Plan, 2022-23, <https://www.supremecourt.uk/docs/uksc-and-jcpc-business-plan-2022-2023.pdf>.

<sup>48</sup> E. Bodnár, *The McLachlin Court and the Concept of Open Justice*, in V. GRUBEN ET AL., *CONTROVERSIES IN THE COMMON LAW: TRACING THE CONTRIBUTIONS OF CHIEF JUSTICE BEVERLEY McLACHLIN* 287 (University of Toronto Press, 2022).

<sup>49</sup> Harada, *supra* note 27, at 86.

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As the rules are scarce, it is necessary to refer to practices or customs.<sup>50</sup> In most countries, the use of social media by individual judges for communications relating to their judicial activity is rare. Interviews in the media are also infrequent. In addition, it is difficult to know whether they were previously agreed upon with the president or with the college. More common is participation in educational activities, even outside those undertaken by the court, such as conferences, lessons, etc., as well as publications, especially for judges with an academic background.

In a few cases, such as in Germany, the communication of individual judges has been regulated. The 2017 code of conduct<sup>51</sup> provides, among other things, that the judges must avoid behaviours that could give rise to doubts about their independence and impartiality, but that, within these limits, they can participate in the public debate.<sup>52</sup>

In only some countries, such as Brazil or Mexico, where the communication *of the courts* is particularly developed, the communication of individual judges also appears to encounter no limits, a fact which can give rise to controversies or difficulties.<sup>53</sup> For example, the former

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<sup>50</sup> In France, for example, according to Article 7 of the 1958 ordonnance and Article 2 of the 1959 décret, the obligation of confidentiality prohibits members of the Conseil «de prendre aucune position publique sur les questions ayant fait ou susceptibles de faire l'objet de décisions de la part du Conseil».

<sup>51</sup> On the role of the opinions of individual judges in the public debate in Germany, see Thomas Hochmann, *La communication de la Cour constitutionnelle allemande*, A.I.J.C. 17 (2018).

<sup>52</sup> Code of Conduct for the Justices of the Federal Constitutional Court, Translation provided by the Federal Constitutional Court. The Code establishes: “4. Without prejudice to the secrecy of the deliberations, the judges respect confidentiality in relation to the proceedings in the Federal Constitutional Court.” “6. Federal Constitutional Court judges exercise appropriate restraint with respect to criticism of other legal opinions or positions. This applies, in particular, to the decisions of this Court, but also in relation to other national, foreign or international courts”. In interacting with the media, then, “the judges of the Federal Constitutional Court ensure that the type of statements made, and the format are compatible with their duties, the reputation of the Court and the dignity of their office”. See the Code here: [https://www.bundesverfassungsgericht.de/EN/Richter/Verhaltensleitlinie/Verhaltensleitlinien\\_node.html](https://www.bundesverfassungsgericht.de/EN/Richter/Verhaltensleitlinie/Verhaltensleitlinien_node.html).

<sup>53</sup> Pedro Salazar, *Deben o pueden nuestros jueces ser influencers?* <https://www.elfinanciero.com.mx/opinion/pedro-salazar/2022/10/12/deben-o-pueden-nuestros-jueces-ser-influencers/>

President of the Supreme Court of Mexico, Arturo Zaldívar, in addition to making extensive use of his social networks, including TikTok, holds a monthly press conference, which can be followed live through Justicia TV and Court social media, where he answers questions posed by the press after his statements.<sup>54</sup>

Against this backdrop, the experience of the Supreme Court of the United States stands out. A powerful court, considered the very prototype of constitutional justice, has been the object of intense communication *on the court* for centuries. But, as far as the communication *of the court* is concerned, it is one of the least communicative courts.<sup>55</sup> A very unattractive website, a total absence from social media and scarce use of press releases, which are addressed to the press and not to the general public, limiting themselves with an official tone to giving news on upcoming hearings and on the rare changes in the composition of the Court. The introduction of *syllabuses* to allow easier knowledge of decisions is relatively recent, and they remain long and complex summaries of a technical nature. The administrative apparatus of the Public Information Office, made up of only six people, is essentially aimed at making the materials of the trials available to the media and at organising the participation of the press at the hearings. The hearings are not broadcasted live and only a transcript is available which is published on the website the same day<sup>56</sup> along with the audio recordings for some time.<sup>57</sup>

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The individual judges are allowed to communicate. Some of the Court's Justices have social media accounts, such as Chief Justice Arturo Zaldívar (Facebook, Twitter, Instagram, TikTok), Justice Yasmín Esquivel Mossa (Twitter), and Justice Ana Margarita Ríos Farjat (Twitter).

<sup>54</sup> Supreme Court of Justice of the Nation (@SCJN), at 17:00, following #EnVivo the 10th Press Conference, 2022. Minister President @ArturoZaldivarL [published on Twitter, Oct. 19, 2022], <https://bit.ly/3TBpbs0>. Recordings of the press conferences are available on Justicia TV's official website: <https://bit.ly/3Sqr0XP>.

<sup>55</sup> F. Malhière, C. Richaud, *La communication de la Cour suprême américaine*, ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 45 (2018); B. Sullivan & R. Feldbrin, *The Supreme Court and the People: Communicating Decisions to the Public*, 24 U. PA. J. CONST. L. 1 (2022).

<sup>56</sup> Argument Transcripts, Supreme Court of the United States, [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcript/2022](https://www.supremecourt.gov/oral_arguments/argument_transcript/2022).

<sup>57</sup> Argument Audio, Supreme Court of the United States, [https://www.supremecourt.gov/oral\\_arguments/argument\\_audio/2022](https://www.supremecourt.gov/oral_arguments/argument_audio/2022).

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In the United States, communication *from the court* prevails, i.e., that of individual judges,<sup>58</sup> to the point that one of the tasks of the Public Information Officer is to maintain contact between the press and individual judges. As written in the information note produced by this office, “*The Justices generally do not grant interviews. However, each Justice has his/ her own policy on this matter*”.<sup>59</sup>

It is through the many publications and interviews of the members that the contact of the Court with general public opinion develops, an activity in which the illustration and promotion of the Court are inextricably intertwined with the presentation of the point of view of the individual judges, who seem to mainly use these utterances to talk to each other (“*lobbying each other through the press*”, as has been said).<sup>60</sup> They have increased their visibility, to the point of becoming real media stars, especially in recent years (an illustration of the same is that of “*Notorious RBC*”, which became a pop culture icon).<sup>61</sup>

### **B. THE OBJECT OF THE COMMUNICATION: FROM JUDICIAL TO EXTRAJUDICIAL ACTIVITIES**

The primary object of the communication *of the courts* is obviously constituted by judicial activity. Therefore, the calendar of the proceedings, the summary of the decisions and the complete text of these, the parties’, and the *amici curiae*’s briefs, etc.

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<sup>58</sup> R. Davis, *Symbiosis: The US Supreme Court and the Journalists Who Cover it*, in R. DAVIS, D. TARAS, *THE GLOBAL PERSPECTIVE JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE* 288 (Cambridge University Press, 1st ed., 2017).

<sup>59</sup> The Public Information Office, <https://www.supremecourt.gov/publicinfo/PIOServices.pdf>.

<sup>60</sup> Davis, *supra* note 58, at 292.

<sup>61</sup> See S. Aridi, *How Ruth Bader Ginsburg Lives on In Pop Culture*, N.Y. TIMES (Sep. 26th, 2020), <https://www.nytimes.com/2020/09/26/at-home/ruth-bader-ginsburg-pop-culture-rbg.html>.

Some courts, such as those in Belgium, India, and Israel, focus almost exclusively on the communication of this activity.<sup>62</sup> It follows preference for tools such as press releases, newsletters, and websites.

Furthermore, there is no shortage of information on the organisation and functioning of the courts, which are often the subject of downloadable books and brochures as well as specific sections of websites, which have gradually become more attractive, even in the most reticent courts, such as the Portuguese one.<sup>63</sup>

Remaining in the field of judicial activity, there are an increasing number of courts that allow the transmission of hearings through their website, a YouTube channel, or special television channels. This is the case of the German Constitutional Court (BverfG), on the basis of an explicit provision introduced in the law on the Court<sup>64</sup>. The reading of the decision in public can further contribute to its diffusion.

It is foreseen in various jurisdictions, either by the president (as in Germany)<sup>65</sup> or by individual judges (as in the USA). This category can also include public deliberation, often further emphasised by live television broadcasting as it happens in Latin American courts (Brazil, Mexico).<sup>66</sup>

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<sup>62</sup> The communication of the Supreme Court of India remains focused on these activities; e-Committee, Supreme Court of India, <https://ecommitteesci.gov.in/> and the same applies for the Supreme Court of Israel. For Belgium, see J. Spreutels *et al.*, *Cour constitutionnelle de Belgique. Les enjeux des relations entre les cours constitutionnelles et les médias*.

<sup>63</sup> See the brochure of the Portuguese Constitutional Court, [https://www.tribunalconstitucional.pt/tc/content/files/tc\\_ebook\\_guardiaodaconstituicao/](https://www.tribunalconstitucional.pt/tc/content/files/tc_ebook_guardiaodaconstituicao/).

<sup>64</sup> Art. 17a: (1) Hearings before the Federal Constitutional Court, including pronouncements of decisions, shall be public. Audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall only be permissible 1. during oral hearings, until the Court has established that the parties are present, 2. during public pronouncements of decisions. By order of the presiding Justice, audio transmissions to a workspace for persons reporting for the press, radio, television or other media may be authorised.

<sup>65</sup> Art. 30 “1 If an oral hearing was held, the decision and the main reasons for the decision shall then be publicly pronounced”.

<sup>66</sup> See F. Pou, *Changing the Channel: Broadcasting Deliberations in the Mexican Supreme Court*, in R. DAVIS, D. TARAS, *THE GLOBAL PERSPECTIVE JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE* 209 (Cambridge University Press, 1st ed., 2017), at 209; On the

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However, the most striking finding is that communication tends to be dedicated with increasing frequency, in almost all courts, to extrajudicial activities,<sup>67</sup> in particular to those of study and research, as well as to those relating to networking and international relations and even to communication activities (for which we must also deal with communication about communication, introducing a further element of fluidity in the classifications used here).

The point has been grasped by scholars, especially French, who have begun to distinguish two components in the communication of the courts, “*institutional communication*” and “*decision-making communication*”. The first is oriented towards disseminating the functioning and role of the institution. The second is dedicated more directly to judicial functions; “*to a certain extent, it is the communicative extension of the principle of the authority of res judicata*”.<sup>68</sup>

Many courts do not hesitate to explain the aims pursued in their communication, in statements by the presidents, in the introductory pages of websites, and if present, in the guidelines on communication policy. Among those aims, it is frequent to find, in the words of the Supreme Court of Brazil, those of, “*promoting respect for the Constitution and the laws; contribute to the strengthening of the institutional image; increase the Court's credibility*

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extraordinary visibility of the Supreme Court of Brazil, see MC Ingram, *Uncommon Transparency: The Supreme Court, Media relations, and Public Opinion in Brazil*, in R. DAVIS, D. TARAS, *THE GLOBAL PERSPECTIVE JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE*, Cambridge University Press 58 (Cambridge University Press, 1st ed., 2017); On the advantages and disadvantages of deliberation in public, see R. DAVIS, D. TARAS, *THE GLOBAL PERSPECTIVE JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE* 71 (Cambridge University Press, 1st ed., 2017).

<sup>67</sup> This dual soul of communication is also underlined in the Italian context, see D. Stasio, *The Court's sense of communication*, QUESTION JUSTICE (Sep. 9th, 20220), <https://www.questionegiustizia.it/articolo/il-senso-della-corte-per-la-comunicazione>. In this sense the reports by the presidents Grossi, Lattanzi, Cartabia, Amato, Sciarra: <https://www.cortecostituzionale.it/jsp/consulta/link/conferenze.do>.

<sup>68</sup> D. Mathieu, *La communication du Conseil constitutionnel : Évolution, organisation, méthodes*, 33 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 59, 62 (2018).

*with society, with the dissemination of information that contributes to a better understanding of its judicial and administrative activities”*.<sup>69</sup>

In short, as pointed out by a former President of the Italian Constitutional Court in 2019, “*the Court has gained the awareness that it must leave the Palace, where it must make itself known and known, it must make itself understood and must also understand why it must make itself known and making oneself understood means making the Constitution known and understood*”.<sup>70</sup>

A particularly delicate aspect, not only in terms of classifications, concerns the development of non-judicial activities aimed at ‘*communicating*’ the constitutional principles and values which go beyond the communication of the jurisprudence which has applied these principles and values. These activities can be qualified as ‘*educational*’ or ‘*pedagogical*’. Recently, they have been categorised as aimed at improving ‘*constitutional literacy*’.<sup>71</sup>

In some countries, the courts have specific structures dedicated to these activities. For example, the Constitutional Court of Ecuador makes use of a “*Centro de Estudios para la Difusión del Derecho Constitucional*”, which regularly organises training activities for lawyers, students, and ordinary judges.<sup>72</sup>

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<sup>69</sup> Resolucao N370, Diario Da Justica Eletronico, Supremo Tribunal Federal, Republica Federativa Do Brasil (Apr. 08, 2021), <https://www.stf.jus.br/ARQUIVO/NORMA/RESOLUCAO730-2021.PDF>.

<sup>70</sup> CORTE COSTITUZIONALE, LA COMUNICAZIONE DELLA CORTE COSTITUZIONALE (The communication of the Constitutional Court, report carried out in the meeting held in Karlsruhe from 26 to 28 June 2019), available at [https://www.cortecostituzionale.it/documenti/news/Germania\\_Lattanzi.pdf](https://www.cortecostituzionale.it/documenti/news/Germania_Lattanzi.pdf). On the new communicative attitude of the Italian Constitutional Court since 2017, see G. Amato. D. Stasio, *Storie di diritti e democrazia. La Corte costituzionale nella società*, Milano, Feltrinelli (2023).

<sup>71</sup> Visser, *supra* note 14. On the communication activities for pedagogical purposes of the Constitutional Courts, see A.M. Lecis Cocco Ortu, *La Cour constitutionnelle italienne et le public : à la recherche d'une confiance renouvelée entre oeuvre pédagogique et légitimation*, 35 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 37, 37 (2020).

<sup>72</sup> Centro de Estudios y Difusión del Derecho Constitucional | Quito, FACEBOOK.COM (2023), <https://www.facebook.com/CedecEcuador/>.



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The Supreme Court of Mexico is one of the most active in this field and offers free courses through its *Centro de estudios constitucionales*<sup>73</sup> and the General Directorate of Human Rights.<sup>74</sup> Issues explored through human rights training include gender perspective, children's rights, migrants, torture, disability, sexual orientation and gender identity, among others.<sup>75</sup> In this regard, efforts to establish links between the Supreme Court and academia are also noteworthy. The *Centro de estudios constitucionales* (The Centre for Constitutional Studies), “*seeks to become a cutting-edge academic institution capable of improving the administration of justice in Mexico*”, “*trigger original academic discussions*” and “*contribute to the most innovative debates in the field, to nationally and globally*”.<sup>76</sup> Through this body, the Supreme Court of Mexico organises research stays and publishes a journal every six months with the participation of experts in constitutional law and related topics.<sup>77</sup> To ensure free access to legal knowledge, the Supreme Court of Mexico has made available to the public virtually and free of charge the publications of the Center for Constitutional Studies along with the Jurisprudence Papers, and the various products of the research programs on the Court's jurisprudential lines on the matters of equality, family, scientific evidence, judicial precedents, and the environment.<sup>78</sup>

In addition, legal experts and civil society can access the documentary archives, and participate in jurisprudence research and consultation workshops, participate in analysis roundtables, conferences, and discussion

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<sup>73</sup> Centro de Estudios Constitucionales, *Cursos*,  
<https://www.sitios.scjn.gob.mx/cec/cursos>.

<sup>74</sup> Supreme Court of Justice of the Nation, *Formation*,  
<https://www.scjn.gob.mx/gw/#/derechos-humanos/formación>.

<sup>75</sup> Supreme Court of Justice of the Nation, *Capacity*,  
<https://www.scjn.gob.mx/derechos-humanos/capacitaciones-inicio>.

<sup>76</sup> Centro de Estudios Constitucionales, *El Centro*,  
<https://www.sitios.scjn.gob.mx/cec/el-centro>.

<sup>77</sup> Centro de Estudios Constitucionales, *Revista Digital*,  
<https://www.sitios.scjn.gob.mx/cec/revista-digital>.

<sup>78</sup> The *Jurisprudence Notebooks* seek to publicise the Supreme Court's precedents, particularly about human rights, in a clear, simple, and complete manner. This collection is organised into three series Human Rights, Family and Law, and Selected Topics of Law. For more information, see Centro de Estudios Constitucionales, *Cuadernos de Jurisprudencia*, <https://www.sitios.scjn.gob.mx/cec/cuadernos-jurisprudencia>.

forums in the Houses of Legal Culture (i) created in the 1990s.<sup>79</sup> Other actions carried out in these centres include the organisation of events in coordination with other bodies and areas of the Supreme Court of Mexico, such as the presentation of the Jurisprudence Notebooks, organised by the Constitutional Studies Centre along with the organisation of the International Congress of Constitutional Law and the organisation, together with the Directorate General of Human Rights, of a seminar on rulings on the subject called “*The Reasons of the Court*” and of the diploma course “*The Supreme Court and Human Rights*”.<sup>80</sup>

Also in Latin America, the Constitutional Court of Colombia is directly involved in constitutional pedagogic activities. Starting in 2017, it has launched a “*modernization*” project, aimed at getting closer to citizens, “*to make the Constitution within the reach of children and adolescents, to make the Constitution within the reach of ethnic communities, to information in simple language through social networks*”.<sup>81</sup>

In Korea, the Constitutional Research Institute of the Constitutional Court, created in 2010 with an amendment to the law on the Court, provides numerous training and research activities.<sup>82</sup> The institute is managed by the court. The President of the Court appoints the president of the Institute, following a resolution of the college. The rules of the Court also govern the functioning and activities of the Institute. It is an institution with a large staff of up to forty people, which develops a rich activity both in support of the jurisdictional competences of the court (this is the case

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<sup>79</sup> Between 1995 and 1996, the Supreme Court of Justice decided to install the General Archives of the Federal Judiciary in each state to rescue and organise the collection of documents generated by jurisdictional bodies. In 1998, once this organisation was solved and taking advantage of the facilities of the General Archives, it was decided to create an information centre in each state which would be called the House of Legal Culture (Casa de la Cultura Jurídica). See Supreme Court of Justice of the Nation, Historia, *Casas de la Cultura Jurídica*, <https://www.sitios.scjn.gob.mx/casacultura/historia>.

<sup>80</sup> The activities organised in these centres can be consulted on its YouTube Channel, <https://bit.ly/3n2ISuc>.

<sup>81</sup> Inform De Rendicion De Cuentas, Corte Constitucional, Republica De Colombia (2021), <https://www.corteconstitucional.gov.co/Transparencia/publicaciones/INFORME%20DE%20RENDICION%20DE%20CUENTAS%202021.pdf>.

<sup>82</sup> The Constitutional Research Institute, Constitutional Court of Korea, <https://ri.court.go.kr/site/engcri/main.do>.

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of studies and research, also of comparative law, aimed at individual decisions), and training (for legal professions, civil servants, and schoolteachers, but also for court personnel themselves).

The Institute organises seminars and conferences in collaboration with Korean universities and a moot court. Furthermore, it develops promotional activities aimed at the general public, especially through popular publications. The title of the presentation booklet is significant, “*The cradle of the constitutional spirit affecting the lives of Koreans*”.<sup>83</sup> The Court also organises a program of lessons for students from rural areas. The president, judges, rapporteurs, and court employees visit schools in remote areas to lecture on the Constitution and the constitutional judging system.<sup>84</sup>

There are many “*pedagogical initiatives*” (as defined on the website) of the French *Conseil constitutionnel*.<sup>85</sup> Among them, the “*Découvrons la Constitution*” (Discovering the constitution) project since 2016 has led the *Conseil* to meet school groups and students from elementary to high school. The *Conseil* started in 2011 with the Georges Vedel competition, a sort of Moot Court on QPC (concrete review) dispute. Other initiatives may be mentioned, such as the prize for the best doctoral thesis in constitutional justice (since 1997) and more recently the “*Nuit du droit*” open-door initiative, to which we will return later.

The educational activities carried out by the Supreme Court of the United Kingdom are very rich. They are collected in a special “*Education*” section of the website and include not only the possibility of inviting a Judge by

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<sup>83</sup> THE CRADLE OF THE CONSTITUTIONAL SPIRIT AFFECTING THE LIVES OF KOREANS, CONSTITUTIONAL RESEARCH INSTITUTE, CONSTITUTIONAL COURT OF KOREA, <https://ri.court.go.kr/site/engcri/01/1010300000002022092702.jsp>.

<sup>84</sup> For more information, see THIRTY YEARS OF THE CONSTITUTIONAL COURT OF KOREA, CONSTITUTIONAL COURT OF KOREA 134 (2018).

<sup>85</sup> Studying the Constitution: new resources made available to teachers, Conseil Constitutionnel (May 12th, 2021), <https://www.conseil-constitutionnel.fr/actualites/etudier-la-constitution-de-nouvelles-ressources-mises-a-la-disposition-des-enseignants>).

schools,<sup>86</sup> but also a two-week online course<sup>87</sup> and a series of “*Legal Landmark films*” produced by the Royal Holloway University of London, hosted on the Court’s website.<sup>88</sup> The “Journey to Italy” of the Italian Constitutional Court, carried out in agreement with the Ministry of Education, consists of judges giving lectures in schools. This activity is carefully documented on the webpage of the Court.<sup>89</sup>

The Australian High Court was once defined as “*a real ivory tower*”.<sup>90</sup> Instead, today it carries out not only an extensive communication of its judicial activity but also of an educational nature. Recently, one of the judges, in a speech with the significant title of “*Court Education Is Not Just For Lawyers*”, considered that “court education” is an essential part of civic education and necessary to preserve the rule of law through active citizenship.<sup>91</sup>

In the annual report on the Court’s activity, a specific chapter is dedicated to “*Public Information and Education*”. The 2020-2021 report, the latest available, points out very well the strategy of the Court and its goals:

*“The Court’s public education and visitor programs seek to enhance awareness of its constitutional role and the rule of law. The Court provides extensive information on its website, publishes judgment summaries and offers specialized educational programs and activities in the High Court building in Canberra. It also hosts the Australian Constitution Center Exhibition which traces the history and evolution of the Australian Constitution, illuminates some of its fundamental principles, and explores the role and history of the Court. It also*

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<sup>86</sup> The Supreme Court, *Ask a Justice at the Supreme Court and JCPC - The Supreme Court*, SUPREMECOURT.UK (2023), <https://www.supremecourt.uk/ask-a-justice.html>.

<sup>87</sup> Online Course, The UK Supreme Court, <https://www.supremecourt.uk/online-course.html>.

<sup>88</sup> Legal Landmarks, History Hub, [https://www.youtube.com/playlist?list=PLSegY\\_gUYIeCjbuO1dii9Oc4eCX2sx6D](https://www.youtube.com/playlist?list=PLSegY_gUYIeCjbuO1dii9Oc4eCX2sx6D).

<sup>89</sup> CORTECOSTITUZIONALE.IT (2018), <https://www.cortecostituzionale.it/viaggionellescuole2023/>.

<sup>90</sup> R. SPENCER, COMMUNICATION BEYOND THE JUDGMENTS: THE AUSTRALIAN HIGH COURT, SPEAKING FOR ITSELF, BUT NOT TWEETING 39, (Cambridge University Press, 1st ed., 2017).

<sup>91</sup> J. Gleeson, *Court Education Is Not Just For Lawyers* (Oct. 22, 2022), <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/gleesonj/Court%20Education%20Is%20Not%20Just%20For%20Lawyers.pdf>.

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*welcomes visitors to appreciate the unique architectural, design and artistic aspects of the Court building*".<sup>92</sup>

Only rarely are these activities expressly provided for by the norms (heteronomous or autonomous) on constitutional justice. In Germany, a reference can be found in the code of conduct of constitutional judges:

*"Due to the status of the Federal Constitutional Court as a constitutional organ and the social and political significance of its decisions, members of the Court primarily fulfill the duties and obligations that arise from their judicial function, yet also participate in presenting and imparting knowledge of the Court's status and functioning as well as its case-law, both in national and international contexts"*.<sup>93</sup>

Activities of this type are also conducted by courts considered more reserved (ones which may not admit dissenting opinions) such as the Austrian Constitutional Court, which in 2020 launched an educational program in collaboration with schools.<sup>94</sup> However, they cannot be found in some courts, such as the Belgian one, where a report (dating back to ten years ago) drawn up by the presidents of the time specified that:

*"The Belgian Constitutional Court does not organise promotion or enhancement activities such as the anniversary ceremony of the Constitution or of the institution, the distribution of booklets, a "legal book fair" or the awarding of research prizes. Following a long tradition among judicial bodies, the Court has never felt the need to become prominently visible"*.

### C. THE COMMUNICATION TOOLS: THE RISE OF SOCIAL MEDIA

The communication tools represent a turning point for almost all the courts examined. If for several decades communication was carried out through "*in presence*" activities, such as public hearings or press conferences,

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<sup>92</sup> ANNUAL REPORT 2020-21, HIGH COURT OF AUSTRALIA (2021), [https://www.hcourt.gov.au/assets/corporate/annual-reports/HCA\\_Annual\\_Report\\_2020-21.pdf](https://www.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2020-21.pdf).

<sup>93</sup> Code of Conduct for the Justices of the Federal Constitutional Court of Germany, art. 2.

<sup>94</sup> Anna Gamper, response to the questionnaire.

or through the dissemination of press releases via fax, to then move on to some timid contacts with the television networks, the ICT revolution has made a variety of tools available. Many courts have decided to take full advantage of them, while some are more reluctant.

The Supreme Court of Canada can be taken as a symbol of this new course. It is a court which for a long time has given specific attention to transparency and communication<sup>95</sup> but, in recent years, has decisively modified its communication strategy in two directions. The Court decided to fully enter the world of new technologies and to introduce an innovative form of presence on the territory, with hearings held outside the capital (in Winnipeg and Quebec City, respectively, in 2019 and 2022). Chief Justice Wagner highlights the importance of communication activity right from the Court's presentation page on the website. He links the strategy of the Court to the necessity of making people aware of the role of the Court in their lives. It is worth quoting his precise words:

*“The decisions we make here affect the lives of all Canadians, and that of your family and community. It's important to us that you understand the work that we do, and why it matters. The Supreme Court's essential task — to make independent and impartial decisions about issues that matter to Canadians — hasn't changed since the Court was created in 1875. But much else has. The Court, its judges, and staff are dedicated to finding ways to better serve you. We're leveraging technology and new media to better communicate with you, wherever you live, in both of Canada's official languages. This website is part of that effort. Feel free to browse the site, but here are some quick links you may find useful: Case Information — search engine for information about a specific case (or you can view information about recently-filed cases directly); Cases in Brief — summaries explaining our decisions in plain language, so everyone can understand them; Role of the Court — an explanation of what the Court does; Year in Review — an overview of the Court's work in the last calendar year; The Judges of the Court — learn more about the nine judges. And don't forget to follow us on Twitter, Instagram, LinkedIn and Facebook! Enjoy your virtual visit, and remember that you can visit us in person for a tour or to watch a hearing at any time”.*<sup>96</sup>

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<sup>95</sup> Harada, *supra* note 27, at 81.

<sup>96</sup> Message from the Chief Justice, Richard Wagner, Supreme Court of Canada, <https://www.scc-csc.ca/court-cour/welcome-bienvenue-eng.aspx#video>.

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Some of the tools used by the courts to communicate will be presented in this paragraph, even if the fluidity of the categories used (primarily that of tools or means of communication) has to always be kept in mind.

First of all, there is the Court's website, which deserves a specific analysis, not only in terms of content, but also in terms of graphics. Furthermore, the choice of subjects entrusted with the drafting and implementation of the site seems significant and worthy of further study, as we pointed out in the previous sections.

Almost all courts use social media, but there are a few exceptions. For example, the Constitutional Chamber of Costa Rica, although it has highly developed communication in terms of press releases and a website, does not use social networks, apparently to avoid controversy and attacks, especially by the government, in a context in which political actors even use trolls against the judiciary. The Portuguese Constitutional Court, until recently a court reluctant to communicate, also does not use social media.

Most of the courts started using social media from 2015 (even earlier for some particularly communicative courts, such as the French Constitutional Council which has been on Twitter since 2011, or the Supreme Court of Canada, on Facebook since 2011, the Supreme Court of Brazil, on Twitter since 2009 or the Constitutional Court of Ecuador, on Twitter since 2010), or from a more recent date. Twitter (now X) seems to be the most popular social network, but Facebook, Instagram, and LinkedIn are also popular. Only the Supreme Court of Brazil uses Tik Tok (in Mexico the former president Zaldivar makes extensive use of his Tik Tok account). The German Federal Constitutional Court's short appearance on Instagram was highly controversial and it ended in a silent exit from the social media platform.<sup>97</sup>

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<sup>97</sup> See S. Steininger, *Swipe up for the German Federal Constitutional Court on Instagram: Judicial Storytelling in the Era of Social Media*, VERFBLOG (Aug. 19th, 2021), <https://verfassungsblog.de/the-gfcc-on-instagram/>; See also Dr. Markus Schl, *BVerfG schaltet Instagram-Account ab: Schon wieder Schluss*, LEGAL TRIBUNE ONLINE (Jan. 5th, 2022), <https://www.lto.de/recht/justiz/j/bverfg-instagram-account-abgeschaltet-justiz-twitter-oeffentlichkeitsarbeit-social-media-tv/print.html> .

On social networks, the courts generally communicate the adoption of decisions, usually through references to press releases, but some courts also communicate extrajudicial activity, such as educational activities, conferences, exhibitions, travel and study visits, extracts from the president's speeches, or communications related to national celebrations, and so on. The quantity of communications and followers is very varied. To give some examples, the BVerfG, which has been on Twitter since 2015, has 76.9K followers and 977 Tweets; the Supreme Court of Canada on Twitter since 2015, has 2636 Tweets and 42.9 K followers; the Constitutional Court of Ecuador, since 2010, 20.4 K Tweets and 123K followers; the Austrian Constitutional Court, since 2014, 885 Tweets and 11.9K followers; the Supreme Court of Brazil, on Twitter since 2009, 24.4 K Tweets and 2.6 million followers; the French CC, since 2011, 4102 Tweets and 175.9 K followers; Mexico Supreme Court, as of 2009, 29.2K Tweets and 814.4K followers; the Spanish Constitutional Court, since 2017, 1433 Tweets and 29.6 K followers.

It is generally possible for the public to leave comments (but not, for example, on the BVerfG account) and in some cases, this leads to genuine debates but also to aggressive and hateful comments.<sup>98</sup> Some courts (such as the Supreme Court of Brazil) have a specific policy in this regard, which can lead to the blocking and deletion of comments.<sup>99</sup> In Ecuador, it has been reported that comments on social media are considered an important tool for dialogue by the public and the court.<sup>100</sup> The same happens in Taiwan, where the court engages directly with the public through Q&A sessions on Instagram.

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<sup>98</sup> This happened on the Twitter account of the Italian Constitutional Court in the case of the anticipatory press release of the sentence on compulsory vaccination, which received 3156 comments, almost all, very negative, <https://twitter.com/CorteCost/status/1598389331634565131>. The decision of the French *Conseil Constitutionnel* on the reform of retirement, in 2023, got also very angry and hateful comments on Twitter, [https://twitter.com/Conseil\\_constit/status/1646908374217285632](https://twitter.com/Conseil_constit/status/1646908374217285632).

<sup>99</sup> Social Media Use Policy, Supremo Tribunal Federal of Brazil, <https://portal.stf.jus.br/textos/verTexto.asp?servico=politicausoredessociais>.

<sup>100</sup> Daniela Salazar, response to the questionnaire.



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For non-English-speaking courts, the language used is usually the local one (for example, German, Spanish, French, etc.), but some courts also have an English translation of all or some messages.

Furthermore, news is also communicated through newsletters, which are received by subscribing to a mailing list, a relevant form of communication, especially for courts less inclined to use social media.<sup>101</sup>

Some courts have developed their own apps. This is the case of the French *Conseil constitutionnel* or the Supreme Court of India (the latter limited to jurisprudence). The Constitutional Court of Korea also maintains a blog.<sup>102</sup>

Spotify is used for podcasts by the Constitutional Court of Colombia (from September 2021: there are currently 91 podcasts) and by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica (from May 2022: to date, there are 7 podcasts, classified as “*constitutional justice for everyday life*”).<sup>103</sup> The Italian Constitutional Court uses “*Spreaker*” for its podcasts. Podcasts are used by various courts: for example, at the UK Supreme Court, judges present the Court.<sup>104</sup> In Colombia, the most important decisions are illustrated with brief audios of about four minutes.<sup>105</sup> In Taiwan, the Constitutional Court produces its own podcast show called “*Law Room*” and broadcasts it on various podcast streaming platforms such as Apple Podcast. The show mainly consists of interviews with judges.

Most courts have their own YouTube channels. The videos present are dedicated both to illustrating jurisprudence and to the educational activities of the courts. Conferences or reports held by the judges are also reproduced. Some courts (Israel, South Africa, and Korea) also use YouTube for the recordings of hearings. So also the Constitutional Court

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<sup>101</sup> Use of the newsletter has been reported in the cases of India and Hungary, according to the answers to the questionnaire.

<sup>102</sup> Blog Naver, Constitutional Court of Korea, [blog.naver.com/ccourtukorea](http://blog.naver.com/ccourtukorea).

<sup>103</sup> All those data, as the others presented in this article, are a result of our empirical research from the social media and webpages of the courts.

<sup>104</sup> Learning resources, The Supreme Court of UK, <https://www.supremecourt.uk/learning-resources.html>.

<sup>105</sup> Podcast Constitucional, Corte Constitucional, Spotify, <https://open.spotify.com/show/4WGGxfK0ykP3Csczggc4Wv>.

of Romania, which does not use social media but has posted some videos of the hearings on the YouTube channel.

The French *Conseil constitutionnel* uses its own dedicated Dailymotion channel for videos (of hearings, of specific events related to extra-jurisdictional activities, or of an informative nature).<sup>106</sup>

Some courts (Brazil, Mexico) have been using, for many years now, special television channels managed directly: it is the case of the Supreme Court of Brazil since 2002, and of the Supreme Court of Mexico since 2006.<sup>107</sup> Those channels not only broadcast the hearings, but also carry out pedagogical activities. For example, the programming of Justicia TV in Mexico includes programs aimed at examining in detail the decisions issued by the Supreme Court and making known their effects on people's daily lives ("*Ya lo Dijo la Corte*"-: the Court said), at analysing human rights issues from different perspectives, to disseminate knowledge among the population in a clear and accessible way ("*Tus Derechos*": your rights), at encouraging the expression of opinions, including critical ones, by young scholars on Supreme Court decisions ("*Derecho a Disentir*": right to dissent), as well as at promoting discussion on issues relating to equality and non-discrimination ("*Espacio Diverso*": diverse space); at reflecting on the rights of refugees and asylum seekers ("*Con los Refugiados*": with refugees) and analysing the different political and social issues on the country's public agenda ("*En el Círculo*": in the club).<sup>108</sup>

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<sup>106</sup> Conseil Constitutionnel, DAILYMOTION <https://www.dailymotion.com/conseil-constitutionnel>.

<sup>107</sup> In 2005, the first live transmission of the Plenary of the Mexican Supreme Court took place on 16th June through a restricted television channel of the Secretariat of Public Education. In December of that same year, the Supreme Court obtained authorization to access the satellite capacity assigned to the Mexican government and to have a restricted television channel. The Judicial Channel (Canal Judicial) officially began its transmissions a few months later in May 2006. In 2019, the Judicial Channel became Justicia TV. Justicia TV, *Sobre Nosotros*, <https://bit.ly/3aKZGQA>.

<sup>108</sup> See Justice TV, *Programas*, <https://bit.ly/3vq5Fny>. These programs have addressed, among other issues, the rights of persons with disabilities, indigenous persons and peoples, afro descendant persons and communities, LGBTI+ persons, children and adolescents, migrants, refugees and asylum seekers, and domestic workers. Likewise, some of the topics that have been analysed include access to justice, gender equality, gender violence, freedom of expression, sexual and reproductive rights, abortion, recreational

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Videos presenting courts or judgements, as well as educational video materials, are present on almost all sites. The Italian Constitutional Court presents 100-second videos on the “*Decisions that have changed the lives of Italians*”, where the constitutional judges each illustrate a decision.<sup>109</sup> In addition, as part of the “*The words of the Constitution*” project, the judges created short videos broadcast by RAI, in which each one illustrates a constitutional concept based on a chosen word.<sup>110</sup> The Constitutional Chamber of the Supreme Court of Costa Rica made videos on some sentences under the title “*The Chamber changed my life*”, where the appellants themselves are the ones who present the decisions that guaranteed their rights.<sup>111</sup>

Recently, the Portuguese Constitutional Court launched a series of documentaries published on its website, “*Série documental Guardiã da Constituição*”, aimed at illustrating the activity and history of the Court for the general public.<sup>112</sup> In some cases, documentaries are co-produced by the courts and television broadcasters. In 2021, the *Conseil constitutionnel* was the subject of the documentary entitled “*Le Conseil constitutionnel au temps de la présidentielle*”. In the words of the *Conseil*:

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marijuana use, transparency, social and economic rights, environment, poverty, the right to truth, and non-discrimination, among many others. Recordings of these and other programs are also available on Justicia TV's YouTube channel: <https://bit.ly/3gzObs8>.

<sup>109</sup> *Sentenze Che Hanno Cambiato La Vita Degli Italiani: La scelta dei Giudici in 100 secondi* (Sentences that have changed the lives of Italians: The choice of judges in 100 seconds), CORTE COSTITUZIONALE, [https://www.cortecostituzionale.it/jsp/consulta/rapporti\\_cittadini/vita2.do](https://www.cortecostituzionale.it/jsp/consulta/rapporti_cittadini/vita2.do).

<sup>110</sup> The videos have been broadcast on Rai Scuola and Rai Tre since February 12 and are available online: <https://www.raisplay.it/programmi/lespokedellacostituzione>. Private channels have also dedicated programs to the Constitutional Court: see in particular *Alla scoperta della Corte costituzionale*, LA7 (Feb. 26th, 2020) <https://www.la7.it/dimartedi/video/alla-scoperta-della-corte-costituzionale-26-02-2020-309620>.

<sup>111</sup> *La sala cambió mi vida*, SALA CONSTITUCIONAL <https://salaconstitucional.poder-judicial.go.cr/index.php/la-sala-cambio-mi-vida>.

<sup>112</sup> See the response by Teresa Violante to the questionnaire. The series has been also presented by the public television channel RTP: see Rogério Gomes, *Tribunal Constitucional: 40 anos a Cumprir o Futuro*, RTP EXTRA (May 22nd, 2023) <https://media.rtp.pt/extra/estreas/tribunal-constitucional-40-anos-a-cumprir-o-futuro/>.

*“Broadcasted by the television channels LCP-AN and TV5 Monde, this documentary can be viewed on the website of the Constitutional Council. Through interviews with President Fabius, President Badinter, Mrs Schnapper and Mrs Levade, through archive images and through an immersion in the contemporary functioning of the Constitutional Council, this documentary shows, in an unprecedented and lively way, the diversity of the missions of the institution”.*<sup>113</sup>

Another example of television collaboration is that of the Supreme Court of the United Kingdom, which has contributed to the making of two documentaries which are primarily based on interviews with judges and have a large viewing figure. One presents the work of the Court from the perspective of the parties raising the issues, and it is available free on a digital channel. Another, produced by the BBC as part of a series of broadcasts on justice, focuses on the work of the Court.<sup>114</sup>

*“Decisions in Cartoon”* is an initiative of the Constitutional Court of Korea, where 26 judgements of the Court are presented using comics.<sup>115</sup>

Several courts have organised exhibitions, both on site and on the road, on the history and activities of the court. This was the case of the Austrian Constitutional Court in 2020 and 2022, which first organised an exhibition to celebrate the centenary, travelling throughout the country, and then an onsite exhibition, on site, on Hans Kelsen and the Austrian constitution.<sup>116</sup> In 2022, the Supreme Court of Brazil dedicated an exhibition to the accession to the Inter-American Convention.<sup>117</sup> Some, such as the High

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<sup>113</sup> *Diffuser la culture constitutionnelle*, CONSEIL CONSTITUTIONNEL, <https://www.conseil-constitutionnel.fr/rapport-activite-2022-numerique/annee-conseil-diffuser-culture-constitutionnelle.html>.

<sup>114</sup> IJ MORAN, *supra* note 44.

<sup>115</sup> *Decisions in Cartoon*, CONSTITUTIONAL COURT OF KOREA, <https://english.court.go.kr/site/eng/ex/bbs/List.do?cbIdx=1089>.

<sup>116</sup> See *Der VfGH stellt sich und die Verfassung vor – Ausstellung auf der Freyung in Wien*, VfGH, (Sept. 16th, 2021) [https://www.vfgh.gv.at/medien/Eroeffnung\\_Info\\_Point\\_Wien.php](https://www.vfgh.gv.at/medien/Eroeffnung_Info_Point_Wien.php); See also *Eine Ausstellung über Hans Kelsen im VfGH*, VfGH (May 4th, 2023) [https://www.vfgh.gv.at/medien/Eroeffnung\\_Kelsen\\_Ausstellung.php](https://www.vfgh.gv.at/medien/Eroeffnung_Kelsen_Ausstellung.php).

<sup>117</sup> O PORTAL DO STF, <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=497600&ori=1>.

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Court of Australia, the Constitutional Court of South Africa, and the Supreme Court of Brazil,<sup>118</sup> have museums on a permanent basis.

In 2021, the German Federal Constitutional Court celebrated its 70<sup>th</sup> anniversary with new initiatives, such as the videos that “*offer insight into the activity and history of the Court*”, the art installation on the market square of Karlsruhe (a glass cube showing the red robes inside), the names of the judges projected on the facade of the Court, and the collaboration with the Federal Agency for Civic Education for the activities of judges in schools.<sup>119</sup> By doing so, the Court pointed out its aim to celebrate the anniversary “*by engaging with as many people as possible*”.<sup>120</sup>

The Twitter profile, the online transmission of the hearings, and the participation of the president and the judges in television programs are now part of the daily life of a court that, since the 1990s, has fully assumed the leadership of communication on constitutional justice.<sup>121</sup>

Among the educational activities, several Anglo-Saxon courts organise Moot Courts for university students (Australia, UK, but also Korea). In Hungary, the Court organises a competition for law students, based on cases decided by the Court.<sup>122</sup>

The venue is used for guided tours by school groups or the general public, in person or virtually, with the latter experiencing a sharp increase because of the pandemic. Some courts (e.g., the Australian High Court, the French *Conseil constitutionnel*, the Italian Constitutional Court) also organise concerts and shows. The *Conseil constitutionnel* carries out a special initiative (“The

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<sup>118</sup> O PORTAL DO STF, <https://portal.stf.jus.br/textos/verTexto.asp?servico=sobreStfAcervoMuseu>.

<sup>119</sup> For a full picture of the communication techniques of the BVeGe, see C. RATH, *Pressearbeit und Diskursmacht des Bundesverfassungsgerichts*, in HANDBUCH BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM 403-412 (Springer VS 2nd ed., 2015).

<sup>120</sup> 70<sup>th</sup> Anniversary of the Federal Constitutional Court, BUNDESVERFASSUNGSGERICHT, [https://www.bundesverfassungsgericht.de/EN/70-Jahre/70-Jahre\\_node.html](https://www.bundesverfassungsgericht.de/EN/70-Jahre/70-Jahre_node.html).

<sup>121</sup> RATH, *supra* note 119.

<sup>122</sup> Országos Alkotmánybírósági Szimulációs Verseny, ABSZI(M) MATHIAS CORVINUS COLLEGIUM, <https://abszim.mcc.hu/>.

night of Law’),<sup>123</sup> on 4<sup>th</sup> October, on the anniversary of the promulgation of the 1958 Constitution, in which it invites prominent speakers to debate an emerging issue in the international or domestic debate, accompanied by musicians and broadcast live on the website. In 2022, the chosen theme was “*The war in Ukraine*”. Taiwan’s Constitutional Court hosts the annual “*Judicial Humanities Salon Series*”, which is open to the public and mainly covers the legal aspects of social issues. For example, the second 2023 conference, “*The Aging Multiverse: How Society and Justice Should Respond to Aging*,” combines hospital physicians and lower court presidents to discuss judicial consensus and imagination on care obligations in an ageing society.

Scholars have long underlined the importance, in symbolic and communicative terms, of the architecture of the court’s buildings (especially in reference to ad hoc buildings, as in the cases of Israel, South Africa, Germany). The Constitutional Court of South Africa, in the part of the website on the visit to the building, presents it as follows:

*“The Court has extended an invitation to the public to explore the history of South Africa’s political transition. Everyone is invited to view the artwork, watch the judges at work in Court or simply soak up the atmosphere of one of the world’s most progressive constitutions. This Visitors’ Brochure provides additional information about the work of the Constitutional Court, as well as about its building and art collection. If you can’t get to the Court in person, then take a virtual tour of the building”*.<sup>124</sup>

Furthermore, some courts have started the practice of decentralised hearings, in which they leave the court’s building to travel throughout the territories, meeting the general public directly.

Chief Justice Wagner said at the Supreme Court’s first outing, from Ottawa to Winnipeg, Manitoba, in 2019, “*I am very glad to see so many people here to watch the proceedings and learn more about our justice system. I often say that the Supreme Court isn’t an ivory tower. Every Canadian is welcome to walk through our doors and sit in our courtroom. Part of the reason we’re here today is to make that a*

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<sup>123</sup> La Nuit du Droit, CONSEIL CONSTITUTIONNEL, <https://www.conseil-constitutionnel.fr/la-nuit-du-droit>.

<sup>124</sup> The Building, CONSTITUTIONAL COURT OF SOUTH AFRICA, <https://www.concourt.org.za/index.php/about-us/the-building>.

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*little easier for people who can't easily travel to Ottawa to see Canada's highest court in person*".<sup>125</sup> The *Conseil constitutionnel* has started this practice since 2019 (Metz, Nantes, Pau et Lyon, Bourges),<sup>126</sup> with the aim to "*raise awareness of its missions of monitoring the conformity of laws with the Constitution and, in particular, the procedure for constitutional questions (QPC)*". The Constitutional Court of Colombia travelled in 2022 to the remote region of La Guajira, to meet with indigenous peoples and hold a hearing there on the implementation of its previous decisions relating to children of the Wayuu community.

As for the "*old tools*", they too have received a new life as a result of the web and social media.

Thus, the reporting of the most important issues that will be examined,<sup>127</sup> the summaries of the decisions,<sup>128</sup> as well as the press releases, have today a diffusion unthinkable in the past, when they were mainly aimed at journalists.<sup>129</sup> Their publication on the website, dissemination through social media, translation into English, archiving and the possibility of doing a search on the website itself have profoundly changed their nature.<sup>130</sup>

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<sup>125</sup> Words of Welcome on the occasion of the Court's first sitting outside of Ottawa: Remarks by the Right Honourable Richard Wagner, P.C. Chief Justice of Canada, SUPREME COURT OF CANADA (Sept. 25, 2019) <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2019-09-25-1-eng.aspx>.

<sup>126</sup> *Supra* note 113.

<sup>127</sup> Thus, for example, the "media alerts" used by the Supreme Court of the United Kingdom for matters of "wide public interest": see, MORAN, *supra* note 44.

<sup>128</sup> The Constitutional Court of Colombia has recently extended the obligation to accompany sentences with a summary to all decisions, even the shortest ones (providencias), with an internal circular from the president (Sept. 16, 2022), which states, among the other, that: "*One of the purposes of the Constitutional Court is to strengthen the dissemination of its jurisprudence to all citizens. The inclusion of a summary chapter in the provisions contributing to this purpose can facilitate knowledge of the main content of judicial decisions and the dissemination activities and juridical pedagogy that the Corporation carries out*".

<sup>129</sup> Some courts continue to contact the press agencies directly: this is the case of the Belgian Constitutional Court, which transmits to the "Belgian Agency" the agenda of future sittings and the rulings adopted.

<sup>130</sup> Even in those courts, such as the Belgian Constitutional Court, which have been slower in adopting this practice: Press releases concerning the judgements, CONSTITUTIONAL COURT <https://www.const-court.be/fr/media/press-releases-concerning-the-judgments?with-archive=true>.

Nonetheless, important differences remain in the press releases with regard to the style, the object, and the procedure with which they are adopted. In fact, if press releases usually concern decisions and accompany them at the time they are published, some courts resort to anticipatory press releases, aimed at announcing decisions taken but not yet released and published.<sup>131</sup> This phenomenon is frequent, for example, in the case of the Constitutional Court of Colombia, one of the most authoritative courts in Latin America and one of the most active in the field of communication. Scholars have greatly discussed this practice, above all due to the delay, even of a few months, in the publication of the decisions. On the contrary, in Greece, in a very underdeveloped judicial communication scenario, there was discussion of the leak of news by the Council of State on the decisions adopted, before publication, and on the opportunity to anticipate the news through a press release. As for the style, we find courts that prefer to resort to long and detailed press releases, real summaries of the sentence, with merely descriptive titles (such as the BverfG or the Supreme Court of the United Kingdom), and courts that instead use shorter press releases, with more effective titles, addressed to public opinion rather than to the press, such as the *Conseil constitutionnel*<sup>132</sup> or the Italian Constitutional Court. There are a great variety of solutions regarding the procedure for adopting press releases, as regards the role of the court in its collegiality, the president, the judges, the judges' assistants, and the communication offices.<sup>133</sup>

As for the annual conferences of presidents, as well as the annual reports that accompany them, they appear to have limited impact, and in any case, are much smaller than they were before the advent of the internet and social media.<sup>134</sup> They deserve a more detailed study aimed at verifying their

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<sup>131</sup> *E.g.*, in Chile, where this use of press releases has aroused criticism of the doctrine, especially for the lack of legal foundation. The same problem arises in Colombia. *See* also the experience of Switzerland, where no particular problems regarding anticipatory communications are reported: Josi, *supra* note 43.

<sup>132</sup> We note the criticism by the media of the communiqués, considered excessively complex, of the Supreme Court of the United Kingdom, and the invitation to follow the style of the EDH Court: *see*, MORAN, *supra* note 44.

<sup>133</sup> The theme has been studied in depth, especially in relation to the German experience, in several articles by Philipp Meyer. Among them, P. Meyer, *Judicial public relations: Determinants of press release publication by constitutional courts*, 40(4) *POLITICS* 477 (2020).

<sup>134</sup> Moreover, some courts do not organise annual press conferences. This is the case of the Belgian Constitutional Court: “*The Court does not hold press conferences or issue statements.*”



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style, the form through which they are disseminated (written text, registration) on web pages or on social networks, as well as the accompanying materials (statistical data, jurisprudence summaries, reports on communication etc.). More and more courts publish annual reports in a form that is easily accessible to citizens; they result in attractive yearbooks aimed at communicating all the activities, both judicial and extra-judicial, carried out by the court during the year. For example, the Supreme Court of Canada started the publication of the “*Year in review*” in 2018, with the creation of a special web page dedicated to the activities carried out during the year. It highlights that, since the decisions “*affect all Canadians, and so it’s important that the Court’s work is accessible to everyone. The Court’s judges and staff have worked hard to make that happen*”.<sup>135</sup>

In some courts, press conferences are organised on the occasion of the filing of particularly important decisions. Although in great variety, they are usually led by the president. This is what happens in the United Kingdom, where some of these conferences, on the occasion of the most controversial cases (think of the decisions on Brexit), have acquired great resonance.<sup>136</sup>

Periodical publications, such as legal journals, edited by some courts, such as the *Conseil constitutionnel* or the Constitutional Court of Colombia, also reach a wide audience nowadays, thanks to the web. Precisely from this perspective, since 2018, the *Conseil* has published a new magazine “*Titre VII*”, free of charge and solely online, which has taken the place of the classic “*Cahiers du Conseil constitutionnel*”. In addition to articles, it also contains videos, and expressly has the aim, as indicated by the president of the Conseil Fabius in the presentation of the first issue, to allow “*everyone to improve their information on these debates [of our time] and to participate fully to our constitutional life*”.<sup>137</sup> Some courts, then, as is the case of the Austrian and

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*On this point, the Court seems to stick to the strict guidelines it has applied since its creation. Only the presidents have the ability to conduct interviews*”: J. Spreutels et al., *Cour constitutionnelle de Belgique*, Bulletin No. 11, ACCF 150 (2016).

<sup>135</sup> Year in Review: 2018, SUPREME COURT OF CANADA, <https://www.scc-csc.ca/review-revue/2018/court-cour-eng.aspx#wb-cont>.

<sup>136</sup> MORAN, *supra* note 44.

<sup>137</sup> Titre VII, CONSEIL CONSTITUTIONNEL (OCT., 2023), <https://www.conseil-constitutionnel.fr/publications/titre-vii>.

German Constitutional Court, have collaborated with the project of disseminating the constitution through a magazine, for sale in newsagents and bookshops. In the project, it is expressly stated that it is a presentation of the constitution “*in a completely new way: as a magazine, with a contemporary and easy-to-read design*”.<sup>138</sup> The same type of publishing operation had been carried out in Germany with the *Grundgesetz* in 2019, apparently without the direct involvement of the BverfG.<sup>139</sup>

Finally, the merchandising of the courts can be traced to the communicative activities. Many courts equipped themselves with boutiques within the headquarters, dedicated not only to the sale of books and publications, but also souvenirs. In addition to the United States Supreme Court, which boasts a long tradition, the British Supreme Court also has its own gift shop, where mugs with the Court logo are said to be enjoying great success.<sup>140</sup>

#### **D. THE RECIPIENTS OF THE COMMUNICATION: FROM EXPERTS TO GENERAL PUBLIC**

In the background, with respect to the communication of the courts, there is the question of the recipients. Communication implies the transmission, in the sense of “*sharing*” of something by a subject with a recipient. Among other things, very often it is a process that is not one-way but is bidirectional, also involving communicative feedback from the addressee to the subject.<sup>141</sup>

The communication *of the* courts, which has varied objects and is developed through multiple instruments, also has various recipients: journalists, jurists, politicians, other domestic, international, or foreign courts, and increasingly, public opinion. Indeed, we could say that most of the communication relating to extra-jurisdictional activities, of an educational or pedagogical nature, is addressed precisely to the general public. The courts try to make their jurisprudence more and more easily accessible to

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<sup>138</sup> 11x11 Verfassungs – Texte Im Kunstdruck, UNSERE VERFASSUNG <https://www.verfassung-magazin.at/>.

<sup>139</sup> DAS GRUNDGESETZ ALS MAGAZIN, <https://www.dasgrundgesetz.de/>.

<sup>140</sup> MORAN, *supra* note 44.

<sup>141</sup> SPERTI, *supra* note 16.

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all, accompanying it with summaries that are understandable even to non-experts or with video or audio presentations.

Journalists have been the main addressees of the courts' communication since the very beginning. Some courts are used to identify a group of accredited journalists, recipients of privileged and early forms of communication.

This was, until recently, the case of the BVerfG, which confidentially anticipated press releases to journalists of the private association “*Justizpressekonferenz Karlsruhe eV*”,<sup>142</sup> while other media representatives who are not members of it received the information, as well as the parties, only when the decision was officially communicated.<sup>143</sup> This practice has changed since September 1, 2023, when, also as a result of requests from some media and two judicial appeals against it, proposed by the far-right party AfD, the Court has begun to publish on its website a “weekly outlook”. Each Friday at 9:30 a.m., the Court will announce the decisions, which will be published in a press release the following week. There will no longer be information in advance about the content of the decisions,<sup>144</sup> thus putting all stakeholders in a condition of parity. In future, press releases will be preceded by a one-page summary in generally understandable language. This should help to quickly understand the content, especially in the case of very long press releases (which can include up to twelve pages in the case of complex decisions).<sup>145</sup>

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<sup>142</sup> In a critical sense, see Frederik Schindler, *Verfassungsgericht bevorzugt einige Journalisten – jetzt rügt das ein Bundestags-Gutachten*, WELT, (Nov. 14th, 2022) <https://www.welt.de/politik/deutschland/plus242125977/Verfassungsgericht-bevorzugt-einige-Journalisten-jetzt-ruegt-das-ein-Bundestags-Gutachten.html>.

<sup>143</sup> Rolf Lamprecht, *Kooperation und Konfrontation. Das Bundesverfassungsgericht und die Medien – Nähe und Distanz*, ZRP 152 (2012).

<sup>144</sup> The Court had put an end to this practice at the end of March 2023: *Presseinformationen*, BUNDESVERFASSUNGSGERICHT (Mar. 28, 2023) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2023/bvg23-035.html>.

<sup>145</sup> Dr. Christian Rath, *Die neue Karlsruher Wochenvorschau*, LTO, (Sept. 1, 2023) <https://www.lto.de/recht/hintergruende/h/bverfg-pressearbeit-vorabinformation-neue-karlsruher-wochenvorschau/>.

Since 2006, the Supreme Court of Canada has also systematically resorted to the “*lockup*”, allowing accredited journalists (Press Gallery) who request it fifteen minutes to read the decisions before the official communication. A forty-five-minute meeting follows with the Executive Legal Officer for an exchange of questions and answers. Then, at 9.45 a.m. on the day of filing, the decision is officially communicated to the public. The Supreme Court of Canada has also developed the practice of meeting accredited journalists once a year in an informal dinner which has become a moment of mutual knowledge, characterised, according to the testimonies, by “*a genuine warmth*”.<sup>146</sup>

Furthermore, within public opinion, it is possible to identify some categories of targeted recipients, usually children and young people, to whom specific communicative activities are addressed. Thus, even a very reticent Court such as the Supreme Court of the United States, in addition to providing, like almost all courts, visits for school groups, makes available on its uninviting web page a series of specific and attractive materials (colouring books, games, and puzzles) on the history and functions of the Court.<sup>147</sup>

Among the courts examined, the only ones that seem to address the category of prisoners are the Italian Constitutional Court, which, as part of the “*Journey to Italy*” also organised a “*Journey to Prisons*”, and the Constitutional Court of South Africa, which, although it does not have specific jurisdiction in criminal matters, has been carrying out prison visits since 2010.<sup>148</sup>

In Italy, the “*Journey to the prisons*”, decided on May 8, 2018, began in October 2018 with a meeting in the Rebibbia prison in Rome.<sup>149</sup> The

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<sup>146</sup> Harada, *supra* note 27, at 81. A similar practice is used by the British Supreme Court: MORAN, *supra* note 44.

<sup>147</sup> Activities for Students & Families, THE SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/visiting/activities.aspx> ; see also, *Learning Resources*, THE SUPREME COURT OF THE UNITED KINGDOM <https://www.supremecourt.uk/learning-resources.html>.

<sup>148</sup> Constitutional Court Judges’ Prison Visits, CONSTITUTIONAL COURT OF SOUTH AFRICA, <https://www.concourt.org.za/index.php/judges/prison-visits>.

<sup>149</sup> Donatella Stasio, Viaggio nelle carceri. Il viaggio del “Viaggio”, CORTE COSTITUZIONALE, [https://www.cortecostituzionale.it/jsp/consulta/vic2/vic\\_home.do](https://www.cortecostituzionale.it/jsp/consulta/vic2/vic_home.do).

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meetings with the detainees were not only recorded for the YouTube channel but also for a true documentary film, presented at the Venice Film Festival.<sup>150</sup> The meetings and debates that accompany the screening of the film, both in Italy and abroad, are themselves documented.<sup>151</sup>

In South Africa, the Constitutional Court established a system of prison visits in 2009, which came into force in 2010. Each judge has a certain number of prisons available to visit during the year. The process involves the judge usually informing the prison of the visit, inspecting it and compiling a report. The enabling provisions are subsections 99(1) and (2) of the Correctional Services Act 111 of 1998. These provide that “*a judge of the Constitutional Court, the Supreme Court of Appeal or the High Court and a magistrate in his area of jurisdiction may visit a prison at any time*”.<sup>152</sup>

Another specific audience is the international or foreign one. External communication of the courts is undergoing rapid development in many jurisdictions, as evidenced by the English translations of websites, judgements, press releases and messages transmitted via social networks. The Constitutional Court of Korea is particularly noteworthy: an entire section of the website is dedicated to “*constitutional justice worldwide*” and refers to the fact that the Court tries to project (at the domestic level) the image of a court fully integrated into the networks of global and regional constitutional justice.<sup>153</sup>

An exceptionally communicative court such as the Supreme Court of Mexico has undertaken various activities specifically addressed to civil society organisations operating in the field of human rights, as well as to other social groups deemed strategic (artists, academics, students, lawyers, and managers), to explain them the role of the judiciary and the impact of

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<sup>150</sup> Directed by Fabio Cavalli, the film was presented at the 76th edition of the Venice Film Festival. Donatella Stasio, *In Italia e all'estero, per coinvolgere la cittadinanza.*, CORTE COSTITUZIONALE, <https://www.cortecostituzionale.it/jsp/consulta/vic2/vic-comunicato.do>.

<sup>151</sup> A. M. Lecis Cocco- Ortu, 35 *La Cour constitutionnelle italienne et le public: à la recherche d'une confiance renouvelée entre oeuvre pédagogique et légitimation*, ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE, 37-52, (2020); *Id.*

<sup>152</sup> *Supra* note 148.

<sup>153</sup> Law, *supra* note 10.

decisions in people's daily lives. Among them is the travelling forum *A Federal Judge in your Life (Una Jueza y un Juez Federal en tu Vida)*<sup>154</sup>, launched in February 2022 by the then president Zaldívar. Culminating in October 2022, it reached more than 8,500 people across the country's 32 states.<sup>155</sup>

## E. THE (STILL SCARCE) LEGAL SOURCES ON COMMUNICATION

The search for the rules governing constitutional justice is always complex; there is a lack of collections and translations of the laws on the courts, and even more of their internal rules. In this context, it must be recognized that the communication *of the courts*, especially in accessible languages, is not very satisfactory, nor is it able to make up for the communication *on the courts* (not even that, in many ways, very developed, of the Venice Commission).<sup>156</sup>

Therefore, it is difficult to go beyond the level of the legislation on constitutional courts. In addition, the questionnaires show that in most countries, there are no rules at all on communication activities. At most, in the internal rules of the courts some provisions on the administrative organisation can be traced.<sup>157</sup>

In Germany, one of the few countries where the sources are fully available in English on the web page, the law of the Constitutional Court does not

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<sup>154</sup> Suprema Corte de Justicia de la Nación, El programa “*Una Jueza y un Juez Federal en tu Vida*” nos permitirá avanzar hacia un país más justo: Ministro Arturo Zaldívar, Press Communication No. 038/2022, (Feb. 10, 2022), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6758>. See also, Suprema Corte de Justicia de la Nación, *Una Jueza Federal en tu Vida*, <https://www.scjn.gob.mx/un-juez-en-tu-vida/> for more information on the program.

<sup>155</sup> Supreme Court of Justice of the Nation (@SCJN), TWITTER (Oct. 10, 2022, 7:00 AM), <https://twitter.com/SCJN/status/1579645602241347585>.

<sup>156</sup> CODICES, THE INFOBASE ON CONSTITUTIONAL CASE-LAW OF THE VENICE COMMISSION, <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

<sup>157</sup> E.g., in Romania: Pursuant to Article 13 of the Regulation on the organisation and functioning of the Constitutional Court (part of the annex to the Decision of the Plenary Assembly of the Constitutional Court No. 6 of 7 March 2012), the Department of External Relations, relations with the press and the protocol is subordinate to the president and coordinated by the magistrate-deputy director of the Cabinet of the President of the Constitutional Court (article 14).

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contain any specific provisions on communication. The regulation of the Court introduced a specific provision, Art. 17a, however, relating only to the audio and video transmission of the hearing. And even for a very limited matter, such as the procedure for accrediting journalists, reference should be made to instructions published on the website close to the hearings. Communication by individual judges is governed by the Code of Conduct for Constitutional Judges.<sup>158</sup>

The Swiss Federal Court offers an interesting example of self-regulation. The internal rules explicitly attribute the responsibility for communication activities to the president. They also define the role of the offices and establish some guiding principles, such as the identification of the decisions to be accompanied by press releases.<sup>159</sup>

A more detailed regulation can be traced in some Latin American countries. In Brazil, communication through social networks has recently been regulated by a resolution of the president, which establishes guidelines,<sup>160</sup> that must be implemented by the administrative body in charge, the *Secretaria de comunicação social*. In Colombia, there are several regulatory acts, starting with the Court's regulation, which, in addition to regulating the organisation of the office, exclusively concerns press releases.<sup>161</sup> In Mexico, the organisation of the communication sector is governed by internal regulation, while the President has the power to authorise the policies and guidelines for the elaboration of the social communication strategy and the annual program of the Court, as well as to approve the dissemination of extraordinary messages.<sup>162</sup> The General Secretariat of the Presidency of the Supreme Court authorises, coordinates, supervises and evaluates the social

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<sup>158</sup> Code of Conduct for the Justices of the Federal Constitutional Court, BUNDESVERFASSUNGSGERICHT, <https://www.bundesverfassungsgericht.de/EN/Richter/Verhaltensleitlinie/Verhaltensleitlinie.html>.

<sup>159</sup> Josi, *supra* note 43.

<sup>160</sup> Resolution No. 730, Federal Republic of Brazil (Apr. 08, 2021).

<sup>161</sup> Agreement 02/2015, Oficina de Divulgación y Prensa, Colombia, which disposes of the obligations between others; . Circular 01/2017 for press releases.

<sup>162</sup> *Reglamento Orgánico en materia de Administración de la Suprema Corte de Justicia de la Nación*, art. 4, fracc. XIV, in DIARIO OFICIAL DE LA FEDERACION (May 06, 2022), <https://bit.ly/3TfoXa8>.

communication strategy and the annual program proposed by the General Directorate of Social Communication.<sup>163</sup>

In Greece, a country where constitutional justice is underdeveloped, a bill is under discussion which provides for the obligation of the three supreme courts with judicial review powers to organise communication offices and to each choose a judge responsible for such activity.<sup>164</sup> Once the bill is approved, press releases should be regulated by internal rules. Until now, this activity is based on practice.

In Belgium, discussions concerning the website, the appointment of press officers, and the publication of an annual report are expressly referred to in the minutes of the administrative meetings of the Court, they did not come to the approval of a dedicated regulation.<sup>165</sup>

## COMMUNICATION STRATEGIES “IN CONTEXT”

If empirical research has provided some general indications, in order to pass from a mere *description* of the communicative attitudes of the courts to their *understanding*, it would be necessary to introduce many additional elements related to the normative and factual context. It will not be possible to do so in this article, which only lists the aspects worthy of analysis, paving the way for further and more in-depth works.

First of all, some characteristics of the constitutional justice system must be considered, starting from the legal traditions (along the divide between common law and civil law) and including more specific aspects, such as the way to trigger the court and the possibility for third parties and *amici curiae* to participate in the process.

For example, it does not seem insignificant and should be further investigated, also for the purpose of understanding their “*educational*” attitudes and the role of “*guidance*” that the supreme courts of the Anglo-Saxon legal systems assume within the judicial power. The Latin American

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<sup>163</sup> *Reglamento Orgánico en materia de Administración de la Suprema Corte de Justicia de la Nación*, art. 9, fracc. X, in DIARIO OFICIAL DE LA FEDERACIÓN (May 06, 2022).

<sup>164</sup> See, the answer by Stella Christoforidou to the questionnaire, Annexure 2.

<sup>165</sup> Spreutels, *supra* note 134, at 146.



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systems, then, would seem to indicate a close connection between the openness of the process and communicative attitudes, as well as the German one. This intuition seems to be denied by the case of the Spanish Constitutional Court, which, in the face of “*open*” access to the jurisdiction, is on the other hand, very reluctant to communicate or, at least, it is on a par with courts without direct access, such as the Belgian and Portuguese ones. On the contrary, the “*communicative turning point*” of the Italian Constitutional Court in recent years seems to be related precisely to the search for “*listening*” channels in the absence of direct individual recourse; hence, a vision of two-way communication (“*bidirectional*”), i.e., a relationship with public opinion which is not made up only of outputs but also of inputs.<sup>166</sup>

Another thread to follow is that of the search for transparency. Again, this is a central objective for the Latin American courts. Even the communication of the *Conseil constitutionnel* seems to be framed in a more general desire for openness and transparency, strongly carried forward under the Fabius presidency. The Conseil experienced important changes in the organisation of judicial activity, in the name of a stronger jurisdictionalisation, which saw in 2022 the adoption for the first time of an “*internal regulation for the procedure followed for declarations of conformity*” (“*a priori*” control).<sup>167</sup>

Other courts, however, offer different experiences. For example, the Constitutional Court of Belgium, for the first decades following its establishment (as *Cour d'Arbitrage*) exhibited a prudent (even reticent) attitude in relations with the media, but it tried to make its judicial activity

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<sup>166</sup> Sperti, *supra* note 16. See the words of President Lattanzi on the trip of the Italian Constitutional Court to schools and prisons: “*At first we felt the need to leave the Palace, to make ourselves known and to know the citizens, to know the real country. Along the way, however, the Trip turned out to be more than just an instrument of knowledge, an important opportunity to listen to each other*”. And again, he adds: “*The Court must know the ideas, feelings, moods that agitate and possibly dominate the country and for this reason it must not remain locked up in the Palace*”: Girogio Lattanzi, La comunicazione della Corte costituzionale, CORTE COSTITUZIONALE.

<sup>167</sup> Décision No. 2022-152 ORGA (Mar 11, 2022), <https://www.conseil-constitutionnel.fr/decision/2022/2022152ORGA.htm>.

transparent.<sup>168</sup> In more recent years, while continuing to communicate solely through traditional tools (press releases, annual reports of activity, websites, and press conferences), it has made its entrance into social media, opening a Twitter account in 2019, which to date has 4961 followers and 551 tweets (all related to jurisprudence).<sup>169</sup>

Furthermore, the style of legal reasoning should be considered. Most courts with developed communication also have a thorough and lengthy reasoning style, starting with the German Constitutional Court. However, there are several counterexamples. The Supreme Court of the United States, one of the least communicative courts in the world, is also one of the courts whose decisions are longer and more complex, making them difficult to understand not only for the general public but also for the press, as shown by the erroneous reporting by the media on the decision on health reform (the “Obamacare”), in 2012.<sup>170</sup> On the other hand, the French *Conseil constitutionnel*, which is open to various innovative communication practices, keeps using its traditional cryptic reasoning.<sup>171</sup>

A key issue is then that of collegiality and the possibility for the judges to express dissenting opinions. In courts where individual opinions are allowed and often expressed, such as in the US, the communication of individual judges seems more developed. Another element to be further analysed is the role of the president, also in light of the duration of the presidencies. It is in fact evident that many of the courts analysed the influence that single figures of presidents have had on the communicative breakthroughs of the courts. We could even talk of “*towering communicative judges*”.<sup>172</sup> Perhaps the most emblematic example is that of Canadian Chief

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<sup>168</sup> *Les Cours constitutionnelles et les médias*, Bulletin No. 11, ACCF (2014) <https://accf-francophonie.org/publication/bulletin-n11/#cour-constitutionnelle-de-belgique>.

<sup>169</sup> “*La Cour ne commentera pas ses propres arrêts via Twitter et ne participera à aucune discussion à leur sujet sur cette plateforme. Le compte Twitter a pour seul objectif de transmettre un maximum d’informations à propos de la Cour.*” See, Press Release, Cour constitutionnelle, Désormais, la Cour constitutionnelle communique aussi via Twitter (Oct. 15, 2019), <https://www.const-court.be/public/pbcp/f/pbcp-2019-001f.pdf>.

<sup>170</sup> Sullivan & Feldbrin, *supra* note 55.

<sup>171</sup> Mathieu, *supra* note 68.

<sup>172</sup> TOWERING JUDGES: A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES (Rehan Abeyratne & Iddo Porat eds., Cambridge University Press, 2021).

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Justice Beverly McLachlin, whose 17-year presidency has irreversibly affected the communication of the Supreme Court.<sup>173</sup>

Other aspects to consider concern the consolidation of the constitutional justice system. For example, one may ask whether the age of the constitutional court at the time of the information revolution has any influence. The experience of the Supreme Court of the United Kingdom, which had to establish its position in the British system in 2009, would seem to go in this direction. The need for consolidation, in a difficult, if not hostile, political scenario guided the communication strategies of the Constitutional Court of Korea, which celebrated its 30th anniversary in 2018. The Court immediately sought direct contact with the public, to promote constitutional justice, as it itself highlights in the volume celebrating the thirtieth anniversary (in which a special section is dedicated to “*Promoting constitutional adjudication*”).<sup>174</sup> The search for legitimacy has also led it to expand its international cooperation activities (and related communication), to the point of making it a reference court for all of Asia.

Another theme, even more elusive, is that of the relationship between the activism of the courts and their communication strategies. One could ask whether more activist courts and courts deferential to the legislator communicate differently, or if there is a link between the activism of the courts and the creative use of communication techniques. The Canadian case seems to show a link, as the communication strategy of the Supreme Court changed completely in the 1980s, during the presidency of Chief Justice Dickson, when the Court found itself deciding new and controversial cases following the “*constitutional revolution*” of 1982 and the entry into force of the Canadian Charter of Rights and Freedoms.<sup>175</sup> However, leaving for a moment the jurisdictions analysed in this article, the Supreme Court of Norway seems to be heading in a different direction. It has put transparency and openness at the heart of its communication

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<sup>173</sup> Harada, *supra* note 27, at 81.

<sup>174</sup> *Supra* note 84.

<sup>175</sup> Harada, *supra* note 27 at 81.

strategies while maintaining an attitude of deference to the legislator, in line with the Scandinavian tradition of judicial review.<sup>176</sup>

An issue worthy of further research is courts' communication in contexts of institutional crisis, especially when courts are attacked by the government and its supporters. How the courts are reacting to the democratic backsliding is an extremely relevant topic.<sup>177</sup> When faced with governments' attempts to capture them, by a legal overhaul or by court-packing or other tools, do the courts resort to new communication strategies? Do they seek, in this way, allies in public opinion, academia, foreign courts, or other stakeholders? In this research, we do not have gathered special evidence of previously discrete courts becoming especially talkative in a new, challenging context: the Israeli Supreme Court kept its discrete attitude during the judicial overhaul of 2023, whereas the Supreme Court of Brazil kept its long-standing highly communicative attitude during Bolsonaro's supporters attack. However, a different case selection, including more courts under attack, could lead to different findings.

The institutional communication carried out by the other public authorities could also have some influence on the attitude of the courts. In Anglo-Saxon legal systems, which lack specialised constitutional courts, it is especially evident the continuum with the rest of the judiciary, to the point that the communication of the supreme courts is often confused with that of the judiciary's "*tout court*". In some contexts, even the communication of the regional supranational courts may have exercised an influence on the communication of the constitutional jurisdictions. This is the case of the Belgian Constitutional Court, which explicitly admitted having followed the communication practices of the European Court of Human Rights, but a circulation of the practices of the Inter-American Court of Human Rights does not seem to be excluded even in Latin America.

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<sup>176</sup> GUNNAR GRENSTAD ET AL., *Norway: Managed Openness and Transparency*, in JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE 235 (R. Davies & D. Taras eds., Cambridge, 2017).

<sup>177</sup> David Kosar & Katarina Sipulove, *How to Fight Court-Packing?*, 6 CONST. STUD. 133 (2020); Alexei Trochev & Rachel Ellett, *Judges and Their Allies Rethinking Judicial Autonomy Through The Prism Of Off-Bench Resistance*, JOURNAL OF LAW AND COURTS 67-91 (2014).

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And again, it would be necessary to consider the context of the recipients of the communication strategies, starting with the media. The crisis affecting the press, for example, means that the resources dedicated to covering the activities of the courts are increasingly scarce; the lack of resources, time, and skills increases the risk of disinformation.<sup>178</sup> In fact, in many cases, starting from the German one, perhaps the best known,<sup>179</sup> but also the Australian,<sup>180</sup> French,<sup>181</sup> British,<sup>182</sup> or Costa Rican<sup>183</sup> one, the change of communication strategy in the direction of a greater direct involvement of the courts is linked to a series of misunderstandings of some decisions by the media, which have had a negative impact on the reputation of the courts in public opinion. Hence, the choice to directly take control of the communication of judicial activity, moving from a passive attitude of mere accessibility and transparency to an active and communicative one.

Furthermore, the characteristics of public opinion should be considered. For example, the use of social media, podcasts, or videos could be aimed at reaching categories of citizens who are not inclined to read. The general environment is even more relevant when one observes the strategies of

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<sup>178</sup> Sullivan & Feldbrin, *supra* note 55.

<sup>179</sup> After a series of judgements that had been misinterpreted and had given rise to negative reactions, among which the famous case of the crucifix in Bavaria: C. HOLTZ-BACHA, *The German Constitutional Court and the Media*, in JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE (R. Davies & D. Taras eds., Cambridge, 2017); A. Sperti, *Constitutional Courts Speak Their Voice. Their Fight Against Fake News and Disinformation on Constitutional Justice*, 1(2) THE ITALIAN REV. OF INT'L & COMP. L., 224 (2021); Judith Blohme, *Berufsvorstellung: Pressesprecherin des Bundesverfassungsgerichts*, BONNER RECHTSJOURNAL 02/2011, 198-201 (2011), [https://bonner-rechtsjournal.de/fileadmin/pdf/Artikel/2011\\_02/BRJ\\_198\\_2011\\_Blohm.pdf](https://bonner-rechtsjournal.de/fileadmin/pdf/Artikel/2011_02/BRJ_198_2011_Blohm.pdf).

<sup>180</sup> The change already took place in the 1990s, following two well-known cases concerning the rights of native peoples: SPENCER, *supra* note 90, at 44.

<sup>181</sup> In France too, a first change in the Conseil's communication took place under the Badinter presidency from 1993, following the criticisms of the decision on la "loi immigration": *supra* note 68, at 59.

<sup>182</sup> Where there was an initial difficulty in understanding the role of the new institution: MORAN, *supra* note 44.

<sup>183</sup> Where the ruling on equal marriage of the Constitutional Chamber found problems of understanding related to the lack of adequate communication, according to the answer to the questionnaire.

communication of constitutional principles and values, attributable to what has been defined as “*constitutional literacy*”<sup>184</sup>.

In this context, the age of the constitution also seems to have an impact, especially when it is recent or needs to take root, as in many Latin American countries. But the same could be said of a constitution now distant from the constituent moment, for which there is a need for a “*passing of the baton between generations*”<sup>185</sup>.

These, and many other aspects, would need to be investigated in a more in-depth way if one wanted to attempt the elaboration of some typology.

## CONCLUSION

In conclusion, it seems that this rapid foray into cyberspace has shown us the presence of some common trends in the communication of the courts, according to what has already been noted by scholars, which have highlighted how “*the growing openness of the supreme courts, the recourse to communication professionals and press offices, as well as the adoption of new web-based technologies, can be seen as part of a trend that seems to be spreading everywhere*”<sup>186</sup>. As has been said, the courts, albeit in contexts (media and not only) that are very different from each other, tend to adopt a proactive attitude, with notable similarities in the methods and strategies they use to communicate with journalists and the public.<sup>187</sup>

The novelty of this attitude goes beyond the changes induced by the application of new technologies to the communication activities already started decades ago by the courts, aimed at facilitating knowledge of their decisions and their role in public opinion, with the primary purpose of strengthening their legitimacy as “*constitutional jurisdictions*”. Certainly, this

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<sup>184</sup> Visser, *supra* note 14.

<sup>185</sup> D. Stasio, Il senso della Corte per la comunicazione, QUESTIONE GIUSTIZIA (Sept. 07, 2020), <https://www.questionegiustizia.it/articolo/il-senso-della-corte-per-la-comunicazione>, cit. 165 refers to a quote of Marta Cartabia, former president of the Italian Constitutional Court: “*Civil progress requires that each generation reappropriate the values handed down by their fathers*”.

<sup>186</sup> DAVID TARAS, *Judges and Journalists and the Spaces in Between*, in JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE (R. Davies & D. Taras eds., Cambridge, 2017).

<sup>187</sup> Sperti, *supra* note 16.

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aspect exists, and, as has been highlighted, it goes in the direction of a “*disintermediation*”, that is towards a strengthening of the direct communication of the courts to the detriment of the indirect one, mediated by the mass media, according to trends that are affecting all the fields of communication.<sup>188</sup> In this, the courts respond to a demand that comes from multiple sectors of society, as shown by the fact that, when they do not directly satisfy this demand, a space opens up that is filled by private subjects (this is what is happening in India<sup>189</sup> and that has always happened in the United States).<sup>190</sup>

However, the variety of communication activities undertaken and the space taken up by those of a “*pedagogical*” nature show that, at least for many courts, there is something more.

In other words, it seems to me that we are faced with a “*qualitative*” change: the courts are increasingly interpreting their role as that of all-round guardians of the Constitution, in the sense of a real “*constitutional magisterium*”, to resume an expression of the Italian prominent scholar Alessandro Pizzorusso.<sup>191</sup>

This leads them to “trespassing” with respect to jurisdictional activity through the development of multiple “extrajudicial activities” that go well beyond the communication of their decisions and instead become “communication” (in the etymological meaning of the word) of the

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<sup>188</sup> Sperti, *supra* note 11.

<sup>189</sup> See the answer to the questionnaire by Antonin Vergnes: “*Independent law websites are used by the Court and judges to communicate with Indian lawyers and the public. This communication is not regulated, this website also broadcasts court hearings live on Twitter. The most prominent website is <https://www.livelaw.in/>, its twitter account is @LiveLawIndia. These communications are not official and are never presented as direct communication from the Court or the judges.*”

<sup>190</sup> RICHARD DAVIS, *JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT IN THE MEDIA AGE* 289 (Cambridge University Press, 2017). Among others, see e.g., the Oyez Project (pronounced OH-yay) — a free law project from Cornell's Legal Information Institute (LII), Justia, and Chicago-Kent College of Law — is a multimedia archive devoted to making the Supreme Court of the United States accessible to everyone. It is the most complete and authoritative source for all of the Court's audio since the installation of a recording system in October 1955: <https://www.oyez.org>.

<sup>191</sup> A. Pizzorusso, *La motivazione delle decisioni della Corte costituzionale: comandi o consigli?*, 13 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 406 (1963).

principles and constitutional rules that they are called to apply.<sup>192</sup> The position expressed years ago by the president of the Italian Constitutional Court, Paolo Grossi, is emblematic, according to which the communication activities “*relate directly to one of the institutional functions of the Court: that of interpreting its role as guarantor also directly feeding, by example and the testimony of dialogue, and with its dissemination, the culture of the Constitution, that is to say the awareness of our being together ( cum-stare )*”.<sup>193</sup>

If these extrajudicial activities, hitherto little investigated by scholars and usually carried out by the courts without any rules (not only constitutional, but often also legislative or self-regulatory) attributing this competence to them,<sup>194</sup> “*trespass*” the courts competences, or can be implicitly traced back to the functions assigned to them by law (and, if so, under what conditions and within what limits) remains an open question.<sup>195</sup>

Personally, I believe that this change requires us to reflect on the continuing adequacy of the traditional dichotomy of a mid-political, mid-judicial nature of constitutional adjudication.<sup>196</sup> The development, alongside the

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<sup>192</sup> Referring to the classification of Nuno Garoupa & Tom Ginsburg, *Judicial Roles in Nonjudicial Functions*, COASE-SANDOR INSTITUTE FOR LAW & ECONOMICS WORKING PAPER NO. 676, 760 (2014), these are the functions attributable to those indicated in points (v) and (vi):

“(v) *Nonjudicial functions that promote law: teaching and writing, working in judicial associations;*  
 (vi) *Social and community activities: involvement with nonprofit activities, participation in nonjudicial associations.*” To these I would add those of networking, not considered by the authors.

<sup>193</sup> P. Grossi, *Corte Costituzionale, Giurisprudenza Costituzionale dell'anno 2017* (2018).

<sup>194</sup> The research conducted by reading the text of the constitutions of the countries examined allows us to exclude the presence of constitutional provisions which attribute to the courts tasks of promoting constitutional principles. Maartje De Visser, Brian & Christopher Jones, *Unpacking constitutional literacy*, GLOBAL CONSTITUTIONALISM 1 (2023), consider the idea of ‘constitutional literacy’ somehow ‘constitutionalized’ by the constitutional provisions «asking citizens to respect or obey the constitution and its contents which presupposes at least a basic familiarity with this document.

<sup>195</sup> In the Italian doctrine an opinion contrary to the development of these activities (which are defined by the author as ‘non-functional institutional activities’) was expressed by Andrea Morrone, *Suprematismo giudiziario. Su sconfinamenti e legittimazione politica della Corte costituzionale*, QUADERNI COSTITUZIONALI 269 (2019). E. Cheli, *Corte costituzionale e potere politico*, QUADERNI COSTITUZIONALI 785 (2019) considers communication within the category of ‘non-judicial institutional activity’.

<sup>196</sup> On the origins of this ‘confused contrast’, which he defines as ‘a bottleneck’, in which Italian doctrine ‘inexplicably’ got stuck for decades, see the considerations of E.



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jurisdictional activity of *protecting* the constitution, of non-jurisdictional activities to *promote*<sup>197</sup> the constitution, in fact, does not bring the courts to the sphere of politics, but to that of *culture*. Participating, in a leading position, in the dissemination of “*constitutional literacy*”, the courts remain fully within the scope of their function as independent constitutional bodies of guarantee - judicial and non-judicial, protection and promotion - of the Constitution.<sup>198</sup> A function that corresponds to the institutional position of constitutional justice, which is neither placed in the policy-making process, guided in democratic systems by popular sovereignty, nor in that of guarantees, where it is a matter of applying the rules to cases independently and impartially. Rather, it is called upon to guard the boundaries between the two processes, defined by a completely *sui generis* normative source, such as the constitution.<sup>199</sup>

The reasons for this change are manifold. While it is undeniable that new technologies open up previously unknown possibilities for promotional activities, it should also be considered that the last twenty years have been the era of the so-called “*democratic backsliding*”. In this context, we are witnessing, in many jurisdictions, the weakening of the integrative force of constitutions in the face of the emergence of populist movements that question the very principle placed at the foundation of constitutional democracy, in the name of a unity of the people (in sometimes defined using, specifically, the term “*nation*”) founded on material and non-juridical bases. It is therefore understandable that the courts feel much more strongly than in the past the need to promote the values of pluralist

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Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana. Nuova stagione, altri episodi*, EDITORIALE SCIENTIFICA 34 (2021). I spoke about it in T. GROPPI, *Paolo Barile e la giustizia costituzionale*, in PAOLO BARILE A VENT'ANNI DALLA SCOMPARSA 107 (Pisa, Pacini Editore, 2022).

<sup>197</sup> In the sense attributed to the expression by N. Bobbio, *Sulla funzione promozionale del diritto*, RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 1313 (1969).

<sup>198</sup> Visser, *supra* note 14.

<sup>199</sup> On the peculiar position of constitutional jurisdictions, *see*, in the Italian scholarships GUSTAVO ZAGREBELSKY, *PRINCIPI E VOTI* 35-40 (Einaudi Editores, 2005); *Id.*, *Corte in politica*, in *Id.*, *Intorno alla legge*, Turin, Einaudi, 2009, 303-309.

democracy among all subjects of the legal system, which they are called upon to protect in jurisdictional settings.<sup>200</sup>

The problem is that these are activities not generally envisaged by the regulatory framework, especially of constitutional and legislative rank, within which the courts operate. Therefore, some risks do exist, both internal and external to the courts, which are not mitigated by regulation. Internally, there is the question of the balance between the different components. In fact, these are activities that risk emphasising the role of the president with respect to the panel or individual judges, or that leave ample room for decisions taken by bureaucratic bodies or technical structures.<sup>201</sup> Externally, there is the question of the content of the communication. It includes the risk of partisan communication, a sort of “*abusive communication*”, which distorts the contents of the constitutional text. This risk becomes particularly high when the courts are captured by political majorities, even more so if they are not democratic. Or, conversely, in contexts of political tension and confrontation, it may happen that particularly communicative courts end up becoming more easily the target of attacks aimed at silencing their “*extrajudicial voice*”, even more than at eluding their jurisprudence.<sup>202</sup>

In conclusion, in the era of the Fourth Industrial Revolution, the challenges to constitutional jurisdictions go far beyond the question of their “*communication*”. Scholars, with very few exceptions,<sup>203</sup> have so far not fully grasped the extent of these developments. The question of the causes of this deficiency remains open. However, we must “*take seriously*” the signals sent by the courts, taking advantage of them to get out of the bottlenecks

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<sup>200</sup> M.C. Ponthoreau, *La confiance du public dans la justice constitutionnelle à l'ère du populisme. Pistes de réflexion*, 35 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 15 (2020).

<sup>201</sup> In this regard, the role of the Secretary General of the French *Conseil constitutionnel* in drafting the *commentaries*, providing a true motivation for the cryptic decisions, is proverbial: Bruno Genevois, *Secrétaire général du Conseil constitutionnel: un témoignage*, *Cahiers Du Conseil Constitutionnel* No. 25, CONSEIL CONSTITUTIONNEL (Aug., 2009), <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/secretaire-general-du-conseil-constitutionnel-un-temoignage>.

<sup>202</sup> In this vein, R. Dixon, *Strong Courts: Judicial Statecraft in Aid of Constitutional Change*, COLUM. J. TRANSNAT'L L. 361 (2021).

<sup>203</sup> Visser, *supra* note 14.

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of a debate on the guarantee of the constitution that seems to have stalled for more than a century around the dispute between Kelsen and Schmitt. The tendency of the courts to resort to extrajudicial activities to promote the constitution is a symptomatic element of a gap in constitutional democracy, i.e., the need to strengthen the instruments to promote the constitution, including through educational and institutional innovations, a gap with respect to which the courts are carrying out a substitute function. Taking advantage of the signals that the constitutional jurisdictions are sending from the most diverse parts of the world to develop innovative ways of promoting the constitution is the duty of the scholars.

**ANNEXURES**

**ANNEXURE 1: COURTS AND SOCIAL MEDIA**

| <b>Name of the Court:</b> | Yes or No | The official website directs to the official social networks<br><br>Yes/No | When? (dd/mm/yyyy) | How many posts since the start? | How many followers? | Is it open to comments?<br><br>Yes/No | Which contents are published? Only announcement of judgments? What else? | Additional comments (if any) |
|---------------------------|-----------|--|--------------------|---------------------------------|---------------------|---------------------------------------|--|------------------------------|
| Twitter                   |           |  |                    |                                 |                     |                                       |  |                              |
| Facebook                  |           |  |                    |                                 |                     |                                       |  |                              |

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|           |  |  |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|--|--|
| Instagram |  |  |  |  |  |  |  |  |
| Tik Tok   |  |  |  |  |  |  |  |  |
| LinkedIn  |  |  |  |  |  |  |  |  |
| YouTube   |  |  |  |  |  |  |  |  |
| Spotify   |  |  |  |  |  |  |  |  |
| Others    |  |  |  |  |  |  |  |  |

**ANNEXURE 2: THE IMPACT OF THE ICT REVOLUTION ON  
CONSTITUTIONAL (AND SUPREME) COURTS**

Name of the Institution: \_\_\_\_\_

Expert: \_\_\_\_\_

**1) Did the Court change its communication strategy in the last 10-15 years?**

*Please answer YES or NOT.*

*Please describe the “traditional” communication techniques (press release, website, press conference etc.)*

**2) If the answer to the question n 1) is YES, please describe the new communication strategies.**

*Does the Court use social media? YES or NOT*

*Does the Court organise educational activities?*

*Please insert also the links to the webpage of the Court dedicated to communication (if any).*

CONSTITUTIONAL JURISDICTIONS IN THE ICT  
REVOLUTION: LOOKING FOR LEGITIMACY THROUGH  
COMMUNICATION

**3) Is there any regulation on the communication of the Court?**

*Please answer YES or NO*

*If YES, could you give the reference to the regulation and a summary of the rules?*

**4) In any case (also if there aren't rules), could you tell how the communication is developed?**

*Please, tell who is in charge of this activity. A journalist? How is he/she hired? A Court Department? Is this activity under the supervision of the President? Or under the supervision of the Court? Are the individual judges allowed to communicate?*

**5) How did the constitutional law scholars react to the new communication strategies of the Court?**

*Please tell about the criticism (if any). If there are academic works, could you give the references?*

**6) Are there relevant statements of the members of the Court in support of the new communication strategies?**

*Please, could you copy here some statements, if any.*

**If you have personal comments, please add them here. Thank you!**

**ANNEXURE 3: EXPERTS**

- Albania (Constitutional Court): Aurela Anastasi (Tirana University)
- Austria (Constitutional Court): Anna Gamper (Innsbruck University)
- Australia (High Court): Margaret Jackson (Emerita, RMIT University, Melbourne)
- Belgium (Constitutional Court), Marc Verdussen (Université Catholique de Louvain)
- Brazil (Supreme Court): Manuellita Hermes Rosa Oliveira Filha (Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa-IDP)
- Canada (Supreme Court): Eszter Bodnár (University of Victoria)
- Chile (Constitutional Court): Jhoanna Froelich (Catolica University)
- Colombia (Constitutional Court): Magdalena Correa, Ivàn Otero, Jorge Roa (University Externado); Juan Rivadeneira (Chef communication office, Colombian Constitutional Court)
- Costa Rica (Constitutional Chamber of the Supreme Court): Haaider Miranda (University of Costa Rica); Alonso Mata Blanco (Chef of the communication, Constitutional Chamber of the Supreme Court)
- Ecuador (Constitutional Court): Daniela Salazar (San Francisco de Quito University and Constitutional Court, judge)
- France (Constitutional Council): Fanny Jacquelot (Jean Monnet University, St.Etienne); Anna Maria Lecis (Science Po Bordeaux)
- Germany (Constitutional Court): Stefan Martini (Christian-Albrechts-Universität, Kiel)
- Greece (Greek Council of State; Supreme Court; Court of Audit): Stella Christoforidou (Aristotle University of Thessaloniki)



CONSTITUTIONAL JURISDICTIONS IN THE ICT  
REVOLUTION: LOOKING FOR LEGITIMACY THROUGH  
COMMUNICATION

Hungary (Constitutional Court): Evelin Burján, (Eotvos Loránd University)

India (Supreme Court): Antonin Vergnes (University of Bordeaux)

Israel (Supreme Court): Suzie Navot (Israel Democracy Institute)

Italy (Constitutional Court): Anna Maria Lecis (Science Po Bordeaux)

Korea, Republic of (Constitutional Court): Soojin Kong (Rapporteur Judge, Constitutional Court)

Mexico (Supreme Court): Roberto Niembro (Universidad Iberoamericana and SCJN)

Portugal (Constitutional Court): Teresa Violante (Friedrich-Alexander-University of Erlangen-Nürnberg)

Romania (Constitutional Court): Simina Tanasescu (Bucharest University and Constitutional Court, judge)

South Africa (Constitutional Court): Christa Rautenbach (Northwest University)

Spain (Constitutional Court): Itziar Gomez (University Carlos III, Madrid and Constitutional Court, legal advisor)

Switzerland (Swiss Federal Court): Peter Josi (Swiss Federal Court, Head of Communications)

Taiwan (Constitutional Court): Yi-Li Lee (National Tsing Hua University)

United Kingdom (Supreme Court): Merris Amos (Queen Mary University, London)

United States (Supreme Court): Angioletta Sperti (Pisa University).

## SCOPE OF ‘MINORITY’ UNDER ARTICLES 29 & 30 OF THE CONSTITUTION OF INDIA WITH REFERENCE TO THE SIKH & JAIN MINORITY CASE

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SHUBHAM DAYMA<sup>1</sup>

*The government of Punjab granted minority status to Sikhs in the State of Punjab, leading to a challenge in the Hon’ble High Court of Punjab & Haryana in the case of Sabil Mittal & Ors. vs. Shiromani Gurudwara Prabandhak Committee (“Sabil Mittal”), where it struck down the impugned notifications thereby disallowing grant of minority status to Sikhs in the State of Punjab. The question, whether Sikhs can be provided minority status in the State of Punjab is now pending before a Five-Judge Bench of Hon’ble Supreme Court of India as the challenge in Sabil Mittal relies upon the judgement of the Apex Court rendered in the case of Bal Patil & Anr. vs. Union of India & Ors. (“Bal Patil”) which is under reconsideration. The issue in relation to Bal Patil is on the definition of ‘minority’ under Articles 29 & 30 of the Constitution whereas the issue in Sabil Mittal is whether Sikhs in particular are a ‘minority’ under Article 30. These issues can be decided only upon a determination of the scope of Articles 29 & 30. In this paper, I shall attempt to highlight the challenges in determination of minorities and the relevant factors that may be used to arrive at an answer on the questions that are currently pending before the five-judge bench of Hon’ble Supreme Court.*

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### INTRODUCTION

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\* Cite it as: Dayma, *Scope of ‘Minority’ under Articles 29 & 30 of the Constitution of India with reference to the Sikh & Jain Minority Case*, 8(1) COMP. CONST. L. & ADMIN. L. J. 63 (2023).

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## SCOPE OF 'MINORITY' UNDER ARTICLES 29 & 30 OF THE CONSTITUTION OF INDIA WITH REFERENCE TO THE SIKH & JAIN MINORITY CASE

The government of Punjab, by way of its notification dated April 13th, 2001 (“**impugned notification**”), declared that Sikh Educational Institutions run by the Shiromani Gurudwara Prabandhak Committee (“**SGPC**”) in the State of Punjab as a minority institution, thereby allowing the SGPC to reserve 50% of its seats for the members of the Sikh community.<sup>2</sup> The impugned notification reads thus:

*“Whereas in terms of the provisions of the Constitution of India, the Sikhs are a minority community in the Country.*

*AND whereas the Governor of Punjab is of the opinion that the Sikh Educational Institutions ought to be treated as Minority Educational Institutions:*

*Now, therefore, the Governor of Punjab is pleased to declare that the Sikh Educational Institutions, run by the Sikh Gurdwara Prabandhak Committee, Amritsar, can reserve upto fifty percent seats exclusively for the members of the Sikh Community; and for furtherance of the interest of the Sikh Community, the aforesaid Committee may, make reservation within the seats, so reserved.”(emphasis author’s)*

The impugned notification came to be challenged before the Hon’ble Punjab & Haryana High Court (“**PHHC**”) in *Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee* (“**Sahil Mittal**”). The argument advanced by the petitioners was that for determination of the “majority” or “minority” status of a community, the “State” must be taken as a unit, and as per the *census* figures (sic), the Sikhs were in majority in the State of Punjab. Therefore, the State Government in the impugned notification, by taking the “Union” of India as the basis for determination of the “majority” or “minority” status of a community has wrongly provided ‘minority’ status

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<sup>2</sup> Punjab Government, Notification No.18/33/2001-GC (6) 4513, (Notified on 13th April, 2001). The primary source is unavailable online. Only source of the notification is the file of the Sahil Mittal case in the high court where it was made an annexure. However, to access it certified copy would have to be applied which can be done either by the party to the lis or its advocate or a new advocate with fresh vakalatnama. This notification is not available online; it only finds mention in the judgement.

to Sikhs in the State of Punjab, since Sikhs are a minority in the Union but not in the State of Punjab.<sup>3</sup>

*Per contra*, the arguments advanced by the respondents were that, firstly, the population of Sikhs that must be considered for the purpose of determining “minority” status is that which is eligible to vote in the electoral college for SGPC elections rather than a mere declaration by any person of them being a Sikh.<sup>4</sup> Secondly, the question of whether the Sikhs are a minority in the State of Punjab is a question of fact which cannot be gone into by the PHHC in its writ jurisdiction. Resultantly, PHHC framed the issue of whether the declaration by the State Government of Sikhs being a minority in the State of Punjab was valid.<sup>5</sup>

The PHHC, while relying upon the decision rendered by the Supreme Court (“**SC**”) in the case of *Bal Patil & Anr. v. Union of India & Ors.*<sup>6</sup> (“**Bal Patil**”) held that the term ‘minority’ has not been defined, and as per the constitutional scheme, it is simply an identifiable group of any community deserving protection from any potential deprivation of their religious, cultural, and educational rights by any other community having the numerical strength to gain political power.<sup>7</sup> While relying upon the decision rendered in the case *TMA Pai Foundation v. State of Kerala*<sup>8</sup> (“**TMA Pai Foundation**”) the PHHC held that the state must be regarded as the unit for determination of minorities.<sup>9</sup> While using the test laid down in the case of *TMA Pai Foundation*, the PHHC held that the Sikh community in the State of Punjab is not a minority and struck down the impugned notification.<sup>10</sup>

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<sup>3</sup> Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee, CWP No. 14646 of 2007, (P&H H.C.) (Unreported), ¶ 8, at 11.

<sup>4</sup> *Id.* at 11-12.

<sup>5</sup> *Id.* ¶ 10, at 13.

<sup>6</sup> *Bal Patil & Anr. v. Union of India & Ors.*, (2005) 6 SCC 690.

<sup>7</sup> Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee, CWP No. 14646 of 2007, (P&H H.C.) (Unreported), ¶ 18, at 21.

<sup>8</sup> *TMA Pai Foundation v. State of Kerala*, (2002) 8 SCC 481.

<sup>9</sup> Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee, CWP No. 14646 of 2007, (P&H H.C.) (Unreported), ¶ 14, at 15-16.

<sup>10</sup> *Id.* ¶ 15, at 16-17.

## SCOPE OF 'MINORITY' UNDER ARTICLES 29 & 30 OF THE CONSTITUTION OF INDIA WITH REFERENCE TO THE SIKH & JAIN MINORITY CASE

The judgement of the PHHC came to be challenged before the SC, and the SC noted that to arrive at its ruling, the PHHC relied upon the decision of the SC rendered in the *Bal Patil* case, which is pending reconsideration. Therefore, the validity of the decision of the PHHC can only be judged properly upon reconsideration of the judgement rendered in the *Bal Patil* case.<sup>11</sup>

### CONSTITUTIONAL PROVISIONS

The relevant provisions of the Constitution of India (“**the Constitution**”) dealing with minorities are Articles 29, 30, 350A, and 350B.<sup>12</sup> Of the four provisions, Articles 29 and 30 are Fundamental Rights in Part III of the Constitution that afford protection to “*any sections of citizens*” and “*minority*” respectively. These two provisions do not enjoin upon the state any duty to protect the language, script, and culture but merely provide “*any section of citizens*” or “*minorities*” the right to protect their culture. Articles 350A and 350B are not fundamental rights but constitutional rights that enjoin upon the state the duty to make an endeavour to provide adequate facilities for instruction in the mother tongue at the primary stage and to appoint special officers for linguistic minorities.<sup>13</sup>

It is noteworthy that, upon a literal reading of the aforementioned four provisions, Article 29 appears to be the broadest in its scope, as it firstly applies to “*any section of citizens*” having a distinct “*language, script or culture*” under clause (1) and secondly affords protection to all citizens in securing admission in state-funded educational institutions by employing the words “*no citizen shall be denied admission*” under clause (2); followed by Article 30, which applies only to “*minorities based on religion or language*”, and finally Articles 350A and 350B being the narrowest of the four in their scope, as they apply only to linguistic minorities. It is pertinent to note that none of the aforementioned provisions define the term ‘minority’.

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<sup>11</sup> *Shiromani Gurudwara Prabandhak Committee v. Sahil Mittal & Ors.*, S.L.P (C) No. 2755 of 2008.

<sup>12</sup> INDIA CONST. art. 29, 30, 350A, & 350B.

<sup>13</sup> INDIA CONST. art. 350A & 350B.

Articles 23 and 23A of the Draft Constitution, which correspond with present-day Articles 29 and 30 of the Constitution, respectively, had some doubts from the Constituent Assembly members on their construction; however, the Constituent Assembly, without defining them, deemed it proper for the Courts to fill in the omission, allowing space for changes in political and value structures.<sup>14</sup> Before proceeding further, it would be relevant to briefly advert to the Constituent Assembly Debates (“**CAD**”) in relation to Draft Article 23.

The Constituent Assembly distinguished the “minority” under Article 29 (“**earlier draft Article 23**”) from a “technical minority”, i.e., a numerical minority, because according to the Constituent Assembly, the minority under the Constitution was not necessarily a minority in the numerical sense but in a cultural and linguistic sense such that even though the number of such a group might not numerically constitute a minority, its culture and linguistics would qualify it as a minority.<sup>15</sup> One of the objectives, according to the Constituent Assembly for framing Article 29 in such words, was to ensure that the migrants, who would otherwise not form a minority in the technical sense, should not be deprived of their cultural and linguistic rights in the country’s other provinces.<sup>16</sup>

Hence, as per CAD, there appears to be a distinction, *first*, between “technical minorities” and “minority” under Article 29 of the Constitution. *Second*, because the Constituent Assembly resolved to delete the term ‘minority’ from Article 29 but did not do the same for Article 30 of the Constitution, there also appears to be a distinction between “minority” as envisaged under Article 29 from the ‘minority’ under Article 30. This is further fortified by the ruling of the SC in the case of *The Ahmedabad St. Xavier’s College Society and Ors. v. State of Gujarat and Ors.*<sup>17</sup> (“**St. Xavier’s College**”) wherein it held:

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<sup>14</sup> DR. ANWARUAL YAQIN, CONSTITUTIONAL PROTECTION OF MINORITY EDUCATIONAL INSTITUTIONS IN INDIA (Deep & Deep Publications, 1st ed., 1982).

<sup>15</sup> B. R. Ambedkar, 7, CONSTIT. ASSEMB. DEB., DEC. 08, 1948, <https://www.constitutionofindia.net/debates/08-dec-1948/>.

<sup>16</sup> YAQIN, *supra* note 14.

<sup>17</sup> *The Ahmedabad St. Xavier’s College Society & Anr. v. State of Gujarat & Anr.*, (1974) 1 SCC 717.

## SCOPE OF 'MINORITY' UNDER ARTICLES 29 & 30 OF THE CONSTITUTION OF INDIA WITH REFERENCE TO THE SIKH & JAIN MINORITY CASE

*“6. ...Article 29 confers the fundamental right on any section of the citizens which will include the majority section whereas Article 30(1) confers the right on all minorities...”*<sup>18</sup>

Having gained a proximate understanding of the intent of the drafters in accordance with cultural and educational rights under the Constitution, it would be relevant to discuss what the point of reference is Union or State, as to determine the “minority” status of a community.

### UNIT TO DETERMINE MINORITY STATUS

In the *Kerala Education Bill*,<sup>19</sup> the Apex Court was deciding whether the proposed control administered by the government over recognized and aided educational institutions, including minority institutions, would be violative of Article 30 and while interpreting Article 30(1) of the Constitution it devised the “less than 50%” method, i.e., “*a minority community means a community which is numerically less than 50%*”.<sup>20</sup> However, the SC framed the question of whether the 50% population is in reference to the entire population of India or the population of the concerned state. The SC answered this question by holding that, when a Bill is passed by the State Legislature, then the point of reference of population must be that of the State, whereas when the bill is passed by the Union, the point of reference of population must be that of the entire country.<sup>21</sup>

The 50% rule suffers from the fundamental issue that the population in a country as diverse as India can be so heterogeneous that no single community constitutes 50% of the state population, such that there exists a majority in relation to which a minority can be recognised.<sup>22</sup> The second difficulty in accepting the 50% rule is that a community may form a minority as per the 50% rule in the Union but may not be a minority in State, similarly, it may form a minority in the State but not within a block,

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<sup>18</sup> *Id.* ¶ 6 at 2.

<sup>19</sup> In Re: Kerala Education Bill, AIR 1958 SC 956.

<sup>20</sup> *Id.* ¶ 39 at 30.

<sup>21</sup> *Id.* ¶ 39 at 21.

<sup>22</sup> KAMLESH KUMAR WADHWA, MINORITY SAFEGUARDS IN INDIA (CONSTITUTIONAL PROVISIONS AND THEIR IMPLEMENTATION), 6-7 (Thomson Press (India), 1975).

ward, or district, within the State, i.e., a community of a religion could be congregated in a particular district of a State to form a numerical majority therein, such as Muslims in Mewat in Haryana, but not in another district, such as Muslims in Gurugram or Faridabad.<sup>23</sup> For further illustration we may consider that the population of Muslims, Sikhs, and Christians in the States of Jammu & Kashmir, Punjab and Nagaland respectively, is above 50% of the State population, but they are less than 50% of the population of the entire country.<sup>24</sup> This is precisely the issue that has arisen in the case of *Sahil Mittal*<sup>25</sup> wherein the Sikhs, who are a majority in the State of Punjab, have been declared a minority within the State of Punjab, on the strength of the ‘minority’ status held by the Sikhs in the Union.

In the *T.M.A. Pai Foundation case*, an eleven-judge bench held that since religious, and linguistic minorities have been put at par under Article 30(1) of the Constitution, the point of reference to determine religious minority would be the same as one used to determine linguistic minority; secondly, because the reorganisation of states was done on a linguistic basis, the unit for determination of ‘minority’ status of a community must be the state.<sup>26</sup>

The position taken in *T.M.A. Pai Foundation* by an eleven-judge bench is different from that taken by a six-judge bench in *Re Kerala Education Bill*, while the latter held that whichever legislature, State or Union, proposes the Bill, would become the unit for determination of minority, the former has held that under Article 30 the minority would not have different meanings on the basis of who is legislating, State or Union.<sup>27</sup> Therefore, as of today the unit for determination of minority on a numerical basis appears to be the State and not the Union as per the eleven-judge ruling made in *T.M.A. Pai Foundation*. This begs the question that if the Unit for determination of a minority is to be the State, then is it the State empowered to declare a community as a minority, or the Union; or both?

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<sup>23</sup> In *Re: Kerala Education Bill*, AIR 1958 SC 956, ¶ 39 at 21.

<sup>24</sup> WADHWA, *supra* note 22, at 7.

<sup>25</sup> *Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee*, CWP No. 14646 of 2007, (P&H H.C.) (Unreported).

<sup>26</sup> *TMA Pai Foundation v. State of Kerala*, (2002) 8 SCC 481, ¶¶ 74-81 at 552.

<sup>27</sup> *Id.* ¶ 81 at 553.



SCOPE OF 'MINORITY' UNDER ARTICLES 29 & 30 OF THE  
CONSTITUTION OF INDIA WITH REFERENCE TO THE SIKH  
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**POWER TO NOTIFY 'MINORITY'**

As has been discussed in the foregoing paragraphs, post-*T.M.A. Pai Foundation* judgement, the unit for determining a minority is the State and not the Union. The seventh schedule to the Constitution provides the Union, State, and Concurrent Lists which contain the subjects whereupon the Union, State, and both Union and State can legislate respectively. Following are the statutory and constitutional provisions pursuant to the legislative powers of the Union and State as provided in the Constitution that have been employed for granting minority status to certain communities.

**I. NATIONAL COMMISSION FOR MINORITIES ACT, 1992**

One of the statutes that gives the Union the power to declare a community as a minority is the National Commission for Minorities Act, 1992 (“**NCM Act**”) which is a Central Act, the preamble thereof reads thus:

*“An Act to constitute a National Commission for Minorities and to provide for matters connected therewith or incidental thereto.”*<sup>28</sup>

§ 2(c) of the NCM Act defines ‘minority’ and reads thus:

*“Definitions.—In this Act, unless the context otherwise requires,—(c) “minority”, for the purposes of this Act, means a community notified as such by the Central Government.”*<sup>29</sup>

Two conclusions can be drawn from a reading of the preamble and the definition of “minority” as contained in the NCM Act; *first*, the Act was enacted to constitute the National Commission for Minorities and matters incidental to the creation of such Commission; *secondly*, the scope of the term “minority” as contained within the NCM Act is limited to the NCM

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<sup>28</sup> The National Commission for Minorities Act, 1992, Preamble, No. 19, Acts of Parliament, 1992 (India).

<sup>29</sup> *Id.* § 2(c).

Act itself, and the term as contained therein was not intended to apply to those situations that are unrelated to the NCM Act.

Therefore, it appears that the NCM Act exists exclusive of Articles 29 and 30 and does not create any restrictions in the scope of the term “minority” as envisaged under the said Articles. In other words, while assessing a community’s claim under Articles 29 and 30, the absence of recognition as a minority under the NCM Act will not hinder its claim. If this conclusion holds true, then the power to declare a community as a minority for the purposes of Articles 29 and 30 would exist independent of the NCM Act. This begs the question, if the definition of ‘minority’ as contained in § 2(c) of the NCM Act is unrelated to Articles 29 and 30 of the Constitution, what then is the purpose of § 2(c) of the NCM Act?

The answer can be found in § 9 contained in Chapter-III of the NCM Act, titled ‘Functions of Commission’. These functions include evaluating the progress of minority communities in the country,<sup>30</sup> monitoring safeguards provided to minorities,<sup>31</sup> recommending measures for implementation of safeguards,<sup>32</sup> inquiring into complaints of minorities,<sup>33</sup> conducting research on discrimination against minorities,<sup>34</sup> making periodical reports on the status of minorities,<sup>35</sup> etc. Without any declaration identifying the minorities, the functions mentioned in § 9 of the NCM Act, cannot be fulfilled. Hence, the minority as envisaged under § 2(c) might intersect with communities claiming to be a minority under Articles 29 and 30, however, § 2(c) is not the provision that validates the status of a community as a minority for protection under the said Articles.

This position can further be fortified by taking the example of some of the communities that have been notified as minorities under § 2(c) of the NCM Act,<sup>36</sup> namely, Muslims, Christians, Sikhs, Parsis, Buddhists, Jains which are

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<sup>30</sup> *Id.* § 9(a).

<sup>31</sup> *Id.* § 9(b).

<sup>32</sup> *Id.* § 9(c).

<sup>33</sup> *Id.* § 9(d).

<sup>34</sup> *Id.* § 9(e).

<sup>35</sup> *Id.* § 9(f).

<sup>36</sup> Ministry of Human Resource Development, Notification NO.F. 7-5/2005-MC(P), [https://www.education.gov.in/sites/upload\\_files/mhrd/files/Notification18012005.pdf](https://www.education.gov.in/sites/upload_files/mhrd/files/Notification18012005.pdf)

## SCOPE OF 'MINORITY' UNDER ARTICLES 29 & 30 OF THE CONSTITUTION OF INDIA WITH REFERENCE TO THE SIKH & JAIN MINORITY CASE

minorities in the Union but not in certain States. If merely their status as a minority under the NCM Act were to be accepted for granting protection under Articles 29 and 30 of the Constitution, then the entire objective of the drafters of the Constitution would be defeated as the said Articles were enacted only to afford protection to those that are “*not only technical minorities but also cultural minorities*”. In Punjab, Sikhs form 57% of the total population; in Lakshadweep, the Muslims form 96% of the population; and in Nagaland, Christians form 87% of the total population.<sup>37</sup> Hence, a pure reliance on recognition as a minority under the NCM Act would violate the constitutional scheme under Articles 29 and 30.

Another important factor that lends support to the argument that the status of minority under the NCM Act is unrelated to minorities under Articles 29 and 30 is the very fact that there is no restriction on the type of minority under the NCM Act. The NCM Act can include scheduled castes, scheduled tribes, and other backward castes; whereas under Article 29, the minorities can be decided only based on language, script or culture, and under Article 30 the minority can only be decided based on language or religion. Therefore, the NCM Act which though *prima facie* appears to be concerned with minorities, is not the statute that provides either Union or State the power to notify a community as a ‘minority’ for the purposes of Articles 29 and 30. In the absence of any statutory or constitutional provision to this effect, a resort can be made to the Seventh Schedule<sup>38</sup> of the Constitution which contains the three lists that enlist the subjects upon which Union, State, or both are empowered to bring legislation.

## II. SEVENTH SCHEDULE

In *Re Kerala Education Bill*, the Apex Court, while deciding the question of the point of reference for determination of minority, in *obiter*, had noted that Entry 25 of List-III of the Constitution (“**Entry 25**”), makes education a subject of both Union and State legislation.<sup>39</sup> Can the power to declare a

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<sup>37</sup> Office of the Registrar General & Census Commissioner, India, 2011 Census Data, *Population Enumeration Data*.

<sup>38</sup> INDIA CONST., sch. 7.

<sup>39</sup> In *Re: Kerala Education Bill*, AIR 1958 SC 956, ¶ 21, at 19.

community as a minority then be said to emanate from Entry 25? It would be relevant to briefly go through Entry 25 which reads thus:

*“25. Education, including technical education, medical education, and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.”*<sup>40</sup>

Entry 25 of List-III of the Constitution most certainly grants both the Union and the State the power to legislate on education; however, the subject of “minority” is distinct from education; and though the two, minority and education, may overlap with each other as they do under Article 30(1) of the Constitution, the power to legislate over education cannot be interpreted as the power to legislate on minority. What then is the scope of Entry 25 in so far as minorities are concerned?

In *Re Kerala Education Bill*, the Apex Court had held that there can be three types of minority institutions under Article 30(1) of the Constitution, namely,

*“(1) those which do not seek either aid or recognition from the State, (2) those which want aid, and (3) those which want only recognition but not aid.”*<sup>41</sup>

The aforementioned second category was further divided into two parts by the Court, namely,

*“(a) those which are by the Constitution itself expressly made eligible for receiving grants, and (b) those which are not entitled to any grant by virtue of any express provision of the Constitution but, nevertheless, seek to get aid.”*<sup>42</sup>

A marriage of Article 30(1) and Entry 25 of the Constitution allows the Union, or State governments the power to provide aid or recognition to minority institutions without violating the Constitutional Scheme.

Since Entry 25, which provides Union and State Government the power to legislate on education, is not the source to declare a community as a

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<sup>40</sup> INDIA CONST., sch. VII, List III, *Concurrent List*, Item 25.

<sup>41</sup> In *Re: Kerala Education Bill*, AIR 1958 SC 956, ¶ 23, at 19.

<sup>42</sup> *Id.*

## SCOPE OF 'MINORITY' UNDER ARTICLES 29 & 30 OF THE CONSTITUTION OF INDIA WITH REFERENCE TO THE SIKH & JAIN MINORITY CASE

minority, and there is no other item in either of the three lists, namely, Union, State, and Concurrent, that even remotely relates to minorities, Entry 97 of List-I of the Constitution (“**Entry 97**”) could be a source for the Union to declare a community as a minority for the purposes of Articles 29 and 30. Entry 97 reads thus:

*“97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.”<sup>43</sup>*

It is pertinent to note that the powers under Entry 97 can only be invoked by the Union, as they are found in List-I of the Constitution. Hence, even if it is accepted that Entry 97 can be invoked to declare a community as a “minority” under Articles 29 and 30 of the Constitution, there is still no item in either of the aforementioned three lists in the Seventh Schedule that grants state governments the power to declare a community as a minority for the purposes of Articles 29 and 30 of the Constitution.

### ANALYSIS

#### I. ON SCOPE OF PROTECTION UNDER ARTICLES 29 & 30

The legislative intent behind enacting Article 29 of the Constitution was to protect those communities that are not only technical but also cultural minorities. The legislative intent behind Article 29 cannot be assumed to be the same for Article 30, as the term “minority” was not omitted by the Constituent Assembly Members from Article 30. Hence, the scope of “minority” under Article 30 is narrower than Article 29, and its application is also different from Article 29.<sup>44</sup>

Consider that a cultural minority of Maharashtrians in Uttar Pradesh, i.e., a section of Maharashtrians who are lesser in number in relation to the cultural majority of Uttar Pradesh, attempt to conserve Marathi by way of campaigns, movies, etc., and they seek protection under Article 29 from

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<sup>43</sup> INDIA CONST., sch. VII, List I, *Union List*, Item 97.

<sup>44</sup> *St. Xavier's College Society v. State of Gujarat*, AIR 1974 SC 1389, ¶7 (Ray, C.J.), ¶71 (Khanna, J.).

any legislation of the government (Union or State) that hinders their attempt to conserve their language, script or culture. To claim such protection under Article 29, they would only have to show that their culture is distinct from the culture of the majority of the population of Uttar Pradesh. However, if, in the same set of facts, the same section of citizens created an educational institution for Maharashtrians in Uttar Pradesh, then they would have to show that the Marathi speakers in the State of Uttar Pradesh are a technical minority, *i.e.*, Marathi is not spoken by the majority of the population in the State of Uttar Pradesh.

In almost all claims relating to linguistic minorities, there shall be a considerable majority in relation to which a minority can be identified. However, the same may not be true for religious minorities; in which case, none of the communities claiming to be religious minorities would have a right to establish and administer their own educational institution in that state. A question might arise: if there exist multiple communities such that none form a majority and, consequently, none form a minority, would it not be appropriate to allow all such communities the right under Article 30?

The answer is in the negative for the simple reason that the minorities envisaged under Article 30 are technical minorities, which would in all cases have to be determined in relation to a majority, *i.e.*, if community “A” claims to be a minority then it must claim to be so in relation to a larger sum of a population whereof it forms a part such that its population is a minority. In the absence of a majority, there can be no technical minority, and hence, Article 30 cannot be invoked. For example, the State of Manipur comprises Hindus (41%), Christians (41%), Other religions (9%), and Muslims (8%), and the State of Arunachal Pradesh comprises Other religions (39%), Christians (30%), Hindus (29%) and Muslims (2%).<sup>45</sup> Hence, in the States of Manipur and Arunachal Pradesh, protection cannot be granted under Article 30 since there is no majority in relation to which any single section of the population would form a “technical minority”. Would this interpretation violate the legislative intent? H.R. Khanna J. in

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<sup>45</sup> *Supra* note 37.

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the *St. Xavier's College Society case*<sup>46</sup> explained the object of Article 30 of the Constitution while holding thus:

*“75. ... The object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities, to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy...”*

Therefore, the objective behind the enactment of Article 30 of the Constitution was to protect minorities from the vicissitudes of majoritarian politics. In a state where there is no majority community, one cannot reasonably fathom a threat to multiple small communities if the basis for such a threat is based purely on numbers forming a majority.

### II. ON THE BAL PATIL CASE

In the *Bal Patil case*, the SC held that 'minority' for the purposes of Articles 29 and 30 means:

*“an identifiable group of people or community who were seen as deserving protection from likely deprivation of their religious, cultural, and educational rights by other communities who happen to be in majority and likely to gain political power in a democratic form of Government based on election”*.<sup>47</sup>

First, it is not apparent what the source is on the basis of which the SC has devised this definition. Second, as explained in the foregoing paragraphs, there is a difference between “minority” under Article 29 and Article 30 of the Constitution; hence, treating them in the same way can lead to unintended outcomes, as was rightly anticipated in the *St. Xavier's College Society case*.<sup>48</sup> If a “minority” under Article 29 of the Constitution based on culture is afforded protection under Article 30 of the Constitution, then the distinction between the words “any section of citizens” and “minority” would be rendered nugatory, which would also be directly opposed to the legislative intent, as the Constituent Assembly deliberately omitted the

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<sup>46</sup> *St. Xavier's College Society v. State of Gujarat*, AIR 1974 SC 1389, at 771.

<sup>47</sup> *Bal Patil & Anr. v. Union of India & Ors.* (2005) 6 SCC 690, (Dharmadhikari, J.) ¶ 11.

<sup>48</sup> *St. Xavier's College Society v. State of Gujarat*, AIR 1974 SC 1389, at 743.

word “minority” from Article 29 of the Constitution and kept it in Article 30 of the Constitution.

*Third*, the protection under Article 29 is only for cultural minorities whereas the protection under Article 30 is for religious and linguistic minorities. In other words, all religious or linguistic minorities are cultural minorities but not all cultural minorities are religious or linguistic minorities. An equal treatment of the two articles would cause a cultural minority to stand on the same footing as a religious or linguistic minority. This point of distinction is not merely symbolic but also practical, as there can exist a diaspora that shares the same religion and language as the majority of the population in a State but does not share the same culture. The majority of the population in India professes the religion of Hinduism and speaks the language of Hindi, but within Hinduism there exist various cultural differences across the States.

If the minority under Article 29 of the Constitution is put on equal footing as under Article 30, then the cultural difference between Hindi-speaking Hindus from two different states would be sufficient grounds to seek protection under Article 30 of the Constitution, which was only intended to cater to religious and linguistic minorities.

### III. ON THE SAHIL MITTAL CASE

The PHHC relied upon the definition of “minority” in the *Bal Patil case* to hold that Sikhs cannot be granted minority status in the State of Punjab. While the conclusion arrived at by the PHHC is correct, the reasoning is vulnerable to challenge. For the reasons explained in the foregoing paragraphs, the definition of “minority” in the *Bal Patil case* for the purposes of granting protection under Articles 29 and 30 of the Constitution is out of keeping with the true meaning of ‘minority’. It is proposed that the correct reasoning for striking down the State Government’s notification declaring “Sikhs” as a “minority” community in the State of Punjab would be, *first*, the State government does not have the power to grant “minority” status to a community for the purposes of Articles 29 and 30 of the Constitution; *secondly*, though the Sikhs, like any other section of citizens, are entitled to conserve their language, script, or culture under Article 29 of the Constitution, they are not a technical minority in the State of Punjab



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to be entitled to establish and administer educational institutions under Article 30 of the Constitution.

### **IV. ON DEFINITION OF "MINORITY"**

As has been highlighted in the preceding paragraphs, "minority" means different things under Articles 29 and 30. In so far as "minority" under Article 29 is concerned, it is merely a symbolic term because the protection under Article 29 is not dependent on a community's status as a minority. The term used under Article 29 is "any sections of citizens" and the same extends to all sections irrespective of their status as majority or minority, as has been held in the *St. Xavier's College Society* case.

In so far as Article 30 is concerned, it is proposed that rather than devising a blanket definition of "minority", a working definition, only for the purposes of Article 30, must be devised, which deviates from the conventional understanding of what forms a technical minority. As discussed in the foregoing paragraphs, minorities envisaged under Article 30 are technical minorities, which would in all cases have to be determined in relation to a majority. However, if the point of reference for determining minority status is changed from a section of the population to multiple sections of population, then a community can form a minority. For e.g., Muslims in the State of Manipur would not be able to claim technical minority status in relation to another section of the population because no religious community constitutes 51% of the total population in the State. However, if the point of reference is the sum total of all other religions, then Muslims would form a technical minority. This would be in the spirit of the constitution since it does not appeal to reason that while the constituent assembly members enacted a provision to grant protection to technical minorities, they would deny the protection of such a provision to an entire state simply because they do not form a technical minority as per a tool of determination of a technical minority devised by courts.

The intent behind enacting Article 30 was to protect those communities that, due to their smaller numbers, do not enjoy the same political clout as other relatively larger communities and, by virtue of such demographics, stand at risk of exploitation. Therefore, the focus of Article 30 is not

“minority” as much as it is protection against a strong ‘majority’. An endeavour must be made by the legislature to determine what amounts to a strong majority for the purposes of Article 30. A majority *simpliciter* would be any number of people that form more than 50% of the total population. But there can exist multiple permutations of the population of communities within a state such that, though the population of one community is less than 50%, it is nonetheless considerably large enough to exert political influence over other sections of citizens. The underlying principle is that a figure of 50% is not the only method of determining a “majority” in socio-political affairs. A prevailing example of this principle in practice is the “First Past the Post” system of elections in India, wherein a successful candidate does not need to achieve more than 50% of the total votes to be declared successful, but only requires more votes than the other candidate(s).

Once a definition has been arrived at for a majority, a “minority” under Article 30 would include any community that is not a majority in the state where it seeks to establish and administer educational institutions of its own choice. And merely by virtue of there being a strong majority, a presumption would lie in favour of the community claiming to be a “minority” under Article 30. Therefore, the two-pronged test to determine a “minority” under Article 30 would be as follows:

1. Is the community claiming a right under Article 30 a technical minority, *i.e.*, is the number of its associated members less than 50% of the total population of the state?
2. Is there a community (constituted of a single or multiple religions) in that state that forms a strong majority, *i.e.*, a community whose number of associated persons are more than or equal to 50% of the total population of the State?

Only upon finding an answer in the affirmative to both of the above-mentioned questions can the courts recognize a community’s claim under Article 30. At all times, the courts must be mindful of the legislative intent behind Article 30. It is to protect the religious and linguistic interests of a community that may be vulnerable to a strong majority in a state. The Article does not exist to protect minorities from all forms of exploitation or deprivation of civil liberties like ethnic cleansing, discrimination in

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government service, etc. Protection w.r.t. such violations of human rights would be based upon other provisions of the Constitution such as Articles 14, 19, 21, to name a few. Article 30, however, merely provides those communities that are vulnerable to a strong majority the right to establish and administer educational institutions such that their religious and linguistic heritage is not diluted or destroyed over time.

The ruling of the SC in the Sahil Mittal case, which is pending adjudication before a constitutional bench, will first determine whether the test to determine the “minority” status of a community shall be the same under Articles 29 and 30 or different. Secondly, if it is not the same, then what would be the test under Articles 29 and Article 30? If the SC does a literal interpretation of Articles 29 and 30 while referring to CAD then it is likely that in States such as Manipur and Arunachal Pradesh, the religious communities therein would not be able to establish and administer their own institutions. However, if the purpose behind enacting the two articles shall form a consideration for the SC’s ruling, then it is likely that a new definition for the purposes of Article 30 shall be envisaged, which would deal with the dilemma of those communities that don’t form a technical minority but nonetheless face a threat to their religion or language.

## CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

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*This paper explores the loopholes and gaps present in the current reservation policy adopted in India. It identifies four main areas of concern. First, it explores whether Article 341 or a notification issued thereunder is subject to Article 14 of the Constitution of India. Answering this question in the affirmative, it notes that the absence of any specific identifiable parameter for the designation of Scheduled Castes makes the application of Article 14 to the list of Scheduled Castes merely theoretical. Second, in the absence of any specified parameter, the paper draws on the observations of the Supreme Court in the Indra Sawhney case to trace the distinction between the classification of Scheduled Castes and the Other Backward Classes and concludes that there is considerable overlapping between their criteria, and the distinction, if any, is the fact of designation itself. Third, it makes a point that the executive designation of a socially backward caste as an Other Backward Class, thereby entitling it to get the benefit of reservation under Article 16(4) of the Constitution, could constitute a colourable exercise of power in lieu of the fact that Article 341(2) prohibits such designation for a socially backward caste explicitly. Fourth, the paper argues that the test of reservation under Article 16(4) is not the backwardness of a given class, but whether such class is inadequately represented in the services, a condition which is largely ignored. The paper concludes by making suggestions to address the above concerns and rectify the lacunae present in the present system of reservations.*

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## INTRODUCTION

The Right to Equality is guaranteed under Articles 14-18 of the Constitution of India (“**the Constitution**”). It is often said that Article 14 is the genus of which Articles 15 and 16 are the species; they expound upon the same principle given under Article 14. If that is so, all the basic principles, tests and doctrines that are applicable to Article 14, should be similarly applicable to Articles 15 and 16 as well.

Reservations in services are provided to Scheduled Castes, Scheduled Tribes and Other Backward Classes (“**OBCs**”) under Article 16(4) of the Constitution.<sup>3</sup> The list of the Scheduled Castes is drawn in the Constitution (Scheduled Castes) Order, 1950 (“**The Order**”) issued under Article 341.<sup>4</sup> The Other Backward Classes are designated both by the Centre and the States for the purposes of reservation in the concerned services. On the basis of the report of the Second Backward Classes Commission headed by the B.P. Mandal (“**Mandal Commission Report**”), the first Office Memorandum (“**OM**”) was issued by the VP Singh Government to extend reservations to Socially and Educationally Backward Classes or OBCs.<sup>5</sup> This was examined by a nine-judge bench of the Supreme Court of India (“**the Supreme Court**”) in *Indra Sawhney v. Union of India*<sup>6</sup> which upheld the extension of reservations to OBCs subject to the condition that the creamy layer in the OBC must be excluded.

While the Supreme Court has had the opportunity to examine this policy of reservation on many occasions, including setting aside the inclusion of

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<sup>3</sup> INDIA CONST. art. 16, cl. 4.

<sup>4</sup> Ministry of Law, Govt. of India, Gazette Notification No. 27, The Constitution (Scheduled Castes) Order, 1950 (1950).

<sup>5</sup> Ministry of Personnel Public Grievances and Pensions, Department of Personnel and Training, Govt. of India, O.M. No. 36012/31/90-Estt. (SCT) , Recommendations of Second Backward Classes Commission (Mandal Report)—Reservation for Socially and Educationally Backward Classes in services under the Government of India (1991).

<sup>6</sup> *Indra Sawhney & Ors. v. Union of India and Ors.*, AIR 1993 SC 477.

some castes as OBCs on grounds of non-backwardness<sup>7</sup>, however, there are some fundamental questions that the Court in all these cases seem to have largely ignored, and this paper seeks to explore those areas.

This paper is divided into five parts. Part I of this paper undertakes a discussion on whether the list of the Scheduled Castes and Article 341 of the Constitution are subject to the requirements of Article 14 or the basic tenets of equality. We felt that unless this question is answered in affirmative, further analysis of the issue is not possible. This Part also incidentally explores whether original provisions of the Constitution, like Article 341, can be subject to the basic structure of the Constitution and, hence, amenable to the same standards of equality, which forms a part of the basic structure.

Part II of this paper tries to ascertain the clear parameters of the Scheduled Castes and the OBCs separately. In doing so, the paper notes that the criteria of Scheduled Castes and OBCs overlap considerably and in effect, a person who is entitled to be designated as a Scheduled Caste can be designated as an OBC too. Thus, on principle, the Scheduled Castes and OBCs do not constitute two separate classes, and as such there is no basis of classification between them. The absence of the basis of classification negates the existence of intelligible differentia, which is an essential condition for reasonable classification.

Part III of this paper contends that the absence of exclusivity between Scheduled Castes and OBCs allows the government to take advantage of this loophole and exclude parliamentary supervision over the castes to which the benefits of affirmative discrimination are to be extended. This constitutes a colourable exercise of power meant to dilute the requirement under Article 341(2), which mandates that any further amendment in the list of Scheduled Castes can only be done by Parliament. Thus, while States could not amend the list of the Scheduled Castes, it can instead designate the caste as an OBC, therefore, entitling such caste to receive similar benefits as a Scheduled Caste.

Part IV of this paper then argues that as per the constitutional scheme, the ultimate test for providing reservation to a given class is not whether such

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<sup>7</sup> Ram Singh & Ors. v. Union of India, (2015) 4 SCC 697.

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class is backward, but whether the backward class is not adequately represented in the services in the opinion of the State. Thus, those castes, whether classified as a Scheduled Caste or an OBC, if their representation is adequate, are not eligible for reservation.

Part V of this paper concludes by making proposals or recommendations for rectifying the issues that we raised in this paper.

Note: In this article, we have used the words ‘State’ and ‘state’ differently and they should be treated accordingly. ‘State’ means the State as understood with reference to Article 12 of the Constitution, whereas ‘state’ means the constituent states of India. Similarly, the terms ‘SEBCs’ and ‘OBCs’ have been used synonymously with each other. SEBCs stand for Socially and Educationally Backward Classes and this expression is found in the Constitution of India and in general parlance they are called Other Backward Classes.

### **DESIGNATION OF SCHEDULED CASTES UNDER THE CONSTITUTION VIS-À-VIS EQUALITY**

#### **I. ARTICLE 14 AND DESIGNATION OF SCHEDULED CASTES**

As already stated before, the designation of any caste as a scheduled caste is done under Article 341 of the Constitution. As such, under clause (1), the President by a notification draws the list of the ‘castes, races or tribes’ designated as scheduled castes.<sup>8</sup> Once drawn, the said list cannot be modified further by the President, as clause (2) of the Article only vests the Parliament with such power.<sup>9</sup> To put simply, the first list of the Scheduled Castes has to be issued by the President, which subsequently is amendable only by the Parliament.

As mentioned earlier, it is important to analyse whether the requirements of equality under Article 14 can be extended to constitutional provisions like Articles 341 and 342. Article 14 guarantees equality before ‘the law’ and equal protection of ‘the laws’. The Supreme Court has time and again reiterated that amendments to the Constitution fall outside the scope of

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<sup>8</sup> INDIA CONST. art. 341, cl. 1.

<sup>9</sup> INDIA CONST. art. 341, cl. 2.

“law” under Article 13,<sup>10</sup> and hence cannot be challenged merely on the ground that they violate Fundamental Rights, unless they also incidentally happen to violate the basic structure. Since provisions inserted into the Constitution cannot be challenged as law under Article 13, there is no reason why an original provision of the Constitution, like Article 341, should also be amenable to such a challenge. Amendment to the Constitution is not a “law”, neither is the Constitution itself. However, the law under Article 13 does include a “notification”, and since the designation of Scheduled Castes under Article 341 is done by a notification, such notification would be a “law” in the sense of Article 13. Thus, any notification issued under Article 341 cannot take away or abridge the Fundamental Rights. In a sense, it can be argued that Part III of the Constitution provides guidance to Articles 341 and 342; the discretion provided to the President under these Articles is not absolute and must comply with the requirements of Article 14 including reasonable classification.

## **II. APPLICATION OF BASIC STRUCTURE DOCTRINE TO ARTICLE 341**

There is another issue that is incidental to the above discussion. One may argue in the first instance that bringing the notification issued under Article 341 under the scrutiny of Part III will invariably subject the President’s power to a limitation which was neither intended by the framers of the Constitution nor reflected in the bare text of the Constitution. That is to say, because Article 341 does not specify a guideline or parameter to designate Scheduled Castes, it is an entirely discretionary power. Thus, no limitation should be read into the Article where none has been intended. On the other hand, we are contending that the provisions of the Constitution should not be read in a manner which is detrimental to equality, which is the basic structure of the Constitution.<sup>11</sup> One might ask, if a provision of the Constitution is by nature inconsistent with the principle of equality, can it be struck down? In case of provisions that have been inserted into the Constitution by a constitutional amendment, the issue is settled - any amendment that derogates the basic structure of the

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<sup>10</sup> *E.g.*, Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala and Anr., (1973) 4 SCC 225.

<sup>11</sup> *See*, I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861, at 109.



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Constitution in any manner can indeed be struck down.<sup>12</sup> However, what about the original provisions of the Constitution, the ones that have been there as they are since its inception, like Article 341? Certainly, arguing that even the original provisions of the Constitution can be challenged on the ground that they violate the basic structure is difficult for us, because in a way it would suggest a counter intuitive proposition that the Constituent Assembly members enacted a provision against the basic structure of the Constitution. This is illogical, given that the intention of the framers of the Constituent Assembly is one of the determinants of what constitutes the basic structure of the Constitution.<sup>13</sup>

This, however, has not precluded the Supreme Court from examining even the original provisions of the Constitution, in juxtaposition with the basic structure of the Constitution. The approach of the Court in these cases however is not that of examining whether the original provisions of the Constitution violate the basic structure, and if they do so, striking them down as unconstitutional. Instead, if the Court finds that the effects of any such provision might be inconsistent with one or more basic features, it finds a way to ‘radically’ reinterpret it. For instance, in the *Second Judges*<sup>14</sup> case, the Supreme Court invoked the basic structure doctrine to state that since independence of the judiciary is a basic feature of the Constitution<sup>15</sup>, the consultation as mandated by Article 124(2) and Article 217(1) of the Constitution, with regards to the appointment of Judges of the Supreme Court and the High Courts is mandatory upon the President.<sup>16</sup>

Moreover, while Article 124(2) is very explicit in giving the President the freedom to decide which judges other than the Chief Justice they are required to consult with for the appointment of the Supreme Court judges, the Supreme Court effectively eliminated this freedom by introducing the collegium into this Article, which mandatorily includes the four senior-

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<sup>12</sup> *E.g.*, *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCC 159; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1.

<sup>13</sup> *See*, *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala and Anr.*, (1973) 4 SCC 225, at 282-285.

<sup>14</sup> *Supreme Court Advocates-On-Record Assn. & Ors. v. Union of India*, (1993) 4 SCC 441.

<sup>15</sup> *Id.* at 432.

<sup>16</sup> *Id.* at 385.

most judges of the Supreme Court.<sup>17</sup> Thus, the basic structure doctrine was invoked to read Article 124(2), which is an original provision in the Constitution, in a manner that some argue was rewriting the Constitution.<sup>18</sup>

A similar instance was again observed in the recent case of the *CEC Appointments*<sup>19</sup> case wherein the Supreme Court while examining the President's power under Article 324(2) of the Constitution to appoint the Chief Election Commissioner and other Election Commissioners, subject to any law made in that behalf by the Parliament. However, noting that no such law was enacted by the Parliament even after seventy-three years of the adoption of the Constitution which had the danger of compromising the neutrality of an institution entrusted with the function of performing free and fair elections, the Supreme Court invoked the doctrine to state that since free and fair elections form part of the basic structure of the Constitution<sup>20</sup>, the appointment of the Chief Election Commissioner and other Election Commissioners must not vest exclusively with the Executive. Accordingly, to fill in this legislative gap, the Supreme Court laid down the norm that the President shall make such appointment upon the recommendation of the Committee comprising the Prime Minister, Leader of the Opposition or where there is no such leader of the opposition, then, the single largest party in Lok Sabha or the Chief Justice of India or a Judge of the Supreme Court nominated by him, until a law in that respect is made by the Parliament.<sup>21</sup> This has an effect of limiting the scope of Article 74(1)<sup>22</sup>, though no such limitation is present in the text of

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<sup>17</sup> *Id.* at 411. (at 211, the Court notes that introduction of Collegium does not stand in the way of the President making consultations with other judges. However, this allows for a dubious situation where the word 'consultation' and 'consulted' mean different things in the same provision, in the first it means mere consultation without any binding concurrence, while at the other, it means concurrence. Therefore, while the President can consult other judges, such consultation holds no relevance against the decision of the Collegium. Hence, the authors opine that the collegium system effectively eliminates the discretion of the President to consult other judges).

<sup>18</sup> See Ashok H. Desai, *Judicial Overreach: A Critique*, (2013) 9 SCC J-1; RAJU RAMACHANDRAN, A CASE OF SELF-SELECTION: JUDICIAL ACCOUNTABILITY AND APPOINTMENT OF JUDGES, STATE OF THE INDIAN JUDICIARY: A REPORT BY DAKSH (2016).

<sup>19</sup> Anoop Baranwal v. Union of India, (2023) SCC OnLine SC 216.

<sup>20</sup> *Id.* at 329-331.

<sup>21</sup> *Id.* at 314-315.

<sup>22</sup> *Id.* at 209.

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the Article, which prescribes that the President shall act on the aid and advice of the Council of Ministers. Thus, for the appointment of the CEC and other Election Commissioners, the President will act not on what the Council of Ministers advise, but on what the Committee of Prime Minister, Leader of the Opposition and Chief Justice of India recommends.<sup>23</sup>

Thus, while the doctrine of basic structure was propounded with respect to constitutional amendments, this hasn't precluded the Court from extending its scope over the original provisions as well. However, in the latter, the Court's approach has been not to immediately strike down the provision, but to instead interpret it differently, or to modify its operation or applicability. In the end, all provisions are subject to the basic structure of the Constitution, and not otherwise.<sup>24</sup> This should make Article 341 subservient to the basic structure of equality, and not otherwise.

### **SCHEDULED CASTES AND OBCS: WHAT'S THE DIFFERENCE?**

“Is the backward designated as such because it is backward or is it backward because it is designated as such?” This variation of the Euthyphro dilemma<sup>25</sup> is important if we are to ascertain the characteristics of castes (or even the necessity to look for their characteristics) that are included in the lists of Scheduled Castes and OBCs. With respect to Scheduled Castes, it is often opined that the President's list of 1950 is exhaustive of all the Scheduled Castes.<sup>26</sup> Consequently, a member of a caste cannot claim that his caste must be included in the list on the grounds that the backwardness of his caste is comparable or similar to other Scheduled Castes. The list, therefore, cannot be challenged as violative of Article 14<sup>27</sup>,

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<sup>23</sup> *Id.* at 385(1).

<sup>24</sup> See also Rimcy Keshri & Samarth Nayar, *Comparative Analysis of Kelsen's Theory of Grundnorm and India's Basic Structure Doctrine*, 8(1) RGNUL Student Res. Rev. 182, (2021).

<sup>25</sup> The Euthyphro dilemma is found in Plato's dialogue 'Euthyphro' in which Socrates asks Euthyphros, “*Is the pious loved by the gods because it is pious, or is pious because it is loved by the gods?*”

<sup>26</sup> E.g., ANIRUDH PRASAD & CHANDRA SEN PRATAP SINGH, RESERVATION: POLICY, PRACTICE AND ITS IMPACT ON SOCIETY, VOL. 1 167 (Kalpaz Publications, 1<sup>st</sup> ed., 2016); See also Shree Surat Valsad Jilla K.M.G. Parishad v. Union of India, (2007) 5 SCC 360, ¶4.

<sup>27</sup> See Gurmukh Singh v. Union of India, 1951 SCC OnLine Punj 75.

because the determination of the backwardness of a caste is solely the domain of the executive.

Viewed in this way, the definition of the Scheduled Caste in Article 366(24) of the Constitution is more appropriate; Scheduled castes are castes, races or tribes that are deemed as such under Article 341. However, while it can be said that the determination of backwardness is the domain of the executive, it is hard to say that the President's list is exhaustive, given that the clause (2) of Article 341 allows the Parliament to include other castes, races or tribes in the said list. If the list can be altered, and other castes included, do these included castes become backwards only when they are included in the list? Not necessarily. Rather, it is more appropriate to say that when Parliament deems that a given caste fulfils all the criteria for its designation as a Scheduled Caste then it is included in the list. Therefore, the list cannot be challenged as violative of Article 14 by members of other castes for not including them, not necessarily because the list is exhaustive, but because the Parliament is not satisfied with their status for their inclusion.

Backwardness of a Scheduled Caste, therefore, is a status separate from its designation; backwardness precedes designation. While the 1950 list provides no definitive criteria or parameter to determine the basis on which the designation of Scheduled Castes was made, it is permissible for us to fall back to the relevant records to ascertain the true parameter of their backwardness. This is important, not only for us to find the true criteria of the backwardness of a Scheduled Caste, but also to draw a clearer distinction between Scheduled Castes and OBCs. Currently, the Scheduled Castes and OBCs constitute two separate classes, each entitled to different benefits/caps of reservations and having separate mechanisms for their designations.

#### **A. CRITERIA FOR SCHEDULED CASTES**

With reference to Scheduled Castes, the Report of the Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes ("Lokur Committee Report") stated in 1962:

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*“The relevant records show that in drawing up the list of Scheduled Castes, the test applied was the social, educational and economic backwardness arising out of the historical custom of untouchability.”*<sup>28</sup>

To arrive at this conclusion, the Lokur Committee states that the 1950 list was a revised version of the list of the Scheduled Castes drawn under the Government of India (Scheduled Castes) Order, 1936, which itself was the continuation of an earliest of Depressed Classes. The Census Commissioner who drew the list of these Depressed Classes had remarked:

*“I have explained depressed castes as the castes, contact with whom entails purification on the part of high caste Hindus.”*<sup>29</sup>

J.H. Hutton, who was the Census Commissioner in 1931 had proposed a series of tests to determine untouchability and its associated disabilities in order to draw the list of Depressed Classes, which further pertain to the same basis – *social backwardness resulting from the disabilities inflicted by untouchability.*<sup>30</sup>

Untouchability as the criterion was further strongly asserted by the first Backward Classes Commission, which in its Preamble to the Questionnaire stated:

*“In the matter of Scheduled Castes, the criterion is clear. Untouchability is the criterion and it being peculiar to the Hindus, those Hindu castes that were regarded as untouchables by societies are included in that particular Schedule.”*<sup>31</sup>

Therefore, there is sufficient basis to conclude that the basis of classification of Scheduled Castes is “social backwardness arising out of the historical practice of untouchability or other disabilities associated with it.”

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<sup>28</sup> DEPT’ OF SOCIAL SECURITY, GOV’T OF IND., REPORT OF THE ADVISORY COMMITTEE ON THE REVISION OF THE LISTS OF SCHEDULED CASTES AND SCHEDULED TRIBES, 5 (1967), <https://indianculture.gov.in/reports-proceedings/report-advisory-committee-revision-lists-scheduled-castes-and-scheduled-tribes>.

<sup>29</sup> Jakob De Roover, *Scheduled Castes Vs. Caste Hindus: About A Colonial Distinction and Its Legal Impact*, 13 SLR 22, 36-37 (2017).

<sup>30</sup> PRASAD & SINGH, *supra* note 26, 130.

<sup>31</sup> LOKUR, *supra* note 28, at 6.

## B. CRITERIA FOR OTHER BACKWARD CLASSES

Who are the OBCs? In simple terms, they are backward classes other than those designated as Scheduled Castes and Scheduled Tribes.<sup>32</sup> Article 16(4) uses a wide phrase “backward classes of citizens” instead of using Scheduled Castes and Scheduled Tribes. This enables the State to identify OBCs of citizens which are covered in the expression.<sup>33</sup>

It was the opinion of one of the members of the Constituent Assembly that these OBCs lie in the middle in terms of degree of backwardness where the upper caste Hindus have the least or negligible backwardness, and the Scheduled Castes having the most backwardness.<sup>34</sup> It was argued that these are castes that are in a better position compared to the Scheduled Castes but are still inferior to the upper class, and hence deserve preferential treatment.<sup>35</sup> In his opinion, therefore, it is the castes only that would comprise the Other Backward Classes. In fact, BR Ambedkar once stated in the Constituent Assembly that backward classes were nothing but a “collection of certain castes”.<sup>36</sup> Thus, while the term ‘class’ was used, it was “caste” that was to play a major factor in the determination of these OBCs.

Initially, the Courts showed resistance to the idea that caste can be relevant, let alone a dominant factor in determining OBCs. For instance, Subba Rao J in *R Chitralkesha* had stated that a caste could not be equated to a class.<sup>37</sup> Therefore, the exclusion of caste as a factor for ascertaining backwardness for the purposes of Article 16(4) is not necessarily bad. A similar opinion was expressed by Chief Justice AN Ray where he had opined that caste

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<sup>32</sup> Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 SCC 458, at 22.

<sup>33</sup> PRASAD & SINGH, *supra* note 26; *see also*, GOV'T OF INDIA, REPORT OF THE BACKWARD CLASSES COMMISSION, VOLUME I (1980), <http://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf>.

<sup>34</sup> PRASAD & SINGH, *supra* note 26, at 21.

<sup>35</sup> *Id.* at 26.

<sup>36</sup> *Id.* at 30.

<sup>37</sup> *R. Chitralkesha v. State of Mysore*, (1964) 6 SCR 368, at 21.

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may be an irrelevant factor for ascertaining the backwardness of any class of citizens. In *State of UP v. Pradip Tandon*<sup>38</sup>, he opined:

*“Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination only on the ground of religion, race, caste, but when a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression “classes” in that case violates the rule of **expressio unius est exclusio alterius**. The socially and educationally backward classes of citizens are groups other than groups based on caste.”*<sup>39</sup>

Despite the initial reluctance of the Supreme Court to recognise caste as a relevant factor for the identification of backward classes, it did state on occasions that, since class means a homogenous section of people grouped together because of common characteristics, caste can indeed be identified as a class.<sup>40</sup> In *State of AP v. USV Balaram*,<sup>41</sup> the Court accepted that even though a given list of backward classes was based exclusively on caste considerations it can be accepted. Hedge J stated in *A Peeriakaruppan (Minor) v. State of Tamil Nadu*<sup>42</sup> that “a caste has always been recognised as a class”. This gradual shift in perspective ultimately culminated in the *Indra Sawhney* case, where the extension of 27 per cent reservation to Socially and Educationally Backward Classes (“SEBCs”) was under challenge before a nine-judge bench of the Supreme Court, in which the Court rejected the contention that the expression “backward classes” exclude caste and hence identification of OBCs on the basis of caste was upheld. In doing so, it emphasised that any caste so identified as OBC must be socially backward and its educational and economic backwardness must be on account of its social backwardness.

### C. DRAWING THE JUDICIAL DISTINCTION BETWEEN SCHEDULED CASTES AND OBCS

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<sup>38</sup> *State of U.P. & Ors. v. Pradip Tandon*, (1975) 1 SCC 267.

<sup>39</sup> *Id.*, at 15.

<sup>40</sup> *M.R. Balaji v. State of Mysore*, 1963 Supp (1) SCR 439, ¶ 22.

<sup>41</sup> *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660.

<sup>42</sup> *A. Peeriakaruppan (Minor) v. State of T.N.*, (1971) 1 SCC 38.

Both Scheduled Castes and OBCs include castes which are socially backward. However, except designation, what is the determinative distinct factor that makes a caste fall into one category and not the other?

There appears to be a tilt reflected in the judicial decisions that the fact of designation itself makes the distinction. For instance, in *Indra Sawhney*, the Court observed that the OBCs are “*composed of persons whose backwardness is in degree and nature comparable to that of the Scheduled Castes and the Scheduled Tribes, whatever be their religion.*”<sup>43</sup> The Court’s focus in the case was more on ascertaining the nature of the backwardness of OBCs, and it did not attempt to distinguish between the OBCs and Scheduled Castes.

In fact, with respect to castes that have converted to other religions, the Court has even drawn an identity of backwardness between Scheduled Castes and OBCs while analysing Para 3 of the 1950 list of Scheduled Castes in the following terms –

*“The ‘backward class’ mentioned in Article 16(4) is a synonym for the classes mentioned in Article 15(4); M.R. Balaji, Janki Prasad Parimoo. These two provisions read with the President’s Order of 1950 (as amended in 1976) show that the benefit of Article 15(4) and Article 16(4) extends to the Scheduled Castes (which expression is confined to those professing the Hindu, the Sikh or the Buddhist religion) and the Scheduled Tribes as well as the backward classes of citizens who must necessarily be such backward classes of citizens who would have, but for their not professing the Hindu, the Sikh or the Buddhist religion, qualified to be notified as members of the Scheduled Castes This means, all those depressed classes of citizens who suffered the odium and isolation of untouchability prior to their conversion to other religions and whose backwardness continued despite their conversion come within the expression ‘backward class of citizens in Articles 15(4) and 16(4).”*<sup>44</sup>

The approach of the Court in this paragraph seems to overlook the fact that the reason Scheduled Castes do not include citizens from other religions is not because Article 341 mandates so, but because it was an earlier conviction that since untouchability is exclusive to Hindus, non-Hindus cannot be included in it. If the Court disagrees with this

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<sup>43</sup> *Indra Sawhney & Ors. v. Union of India*, AIR 1993 SC 477, ¶¶ 267, 294, 323.

<sup>44</sup> *Id.* at 267.



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proposition, the Court should have disagreed with the presence of Para 3 in the Order itself. However, instead the Court, while acquiescing to the idea that in terms of backwardness the status of Scheduled Castes and OBCs is comparable, has failed to draw or identify any clear distinctive basis that distinguishes these two classes. Thus, for both the Scheduled Castes and OBCs, the criterion is the same – “*social backwardness*”, and the distinction, if any, is the designation itself.

This brings us to the question of whether this distinction satisfies the test of reasonable classification. The doctrine of reasonable classification states that while Article 14 prohibits class legislation, it still permits reasonable classification. To constitute reasonable classification, two things have to be satisfied:

- a. There must be an *intelligible differentia*, distinguishing the things or persons grouped together from the persons left out of the group;
- b. Such an *intelligible differentia* must have a rational nexus with the object sought to be achieved.

Surprisingly, the Supreme Court in the cases relating to reservation, including *Indra Sawhney* has barely put the classification between Scheduled Caste and OBCs to this test of reasonable classification. While arguments relating to the exclusion of caste as a factor for determining OBCs have been considered (and rejected), a judicious scrutiny on whether categories of OBC and Scheduled Castes constitute a case of reasonable classification remains pending.

*Intelligible differentia* means that in any classification of persons or things grouped together, what is to be seen is the basis of classification. This basis of classification may either be gathered from the law-making the classification or from the relevant records. In the case of Scheduled Castes and OBCs, we have observed that these classes have the same criteria, or at least that their criteria overlap considerably. In fact, a person who owing to his caste is designated as an OBC can very well be designated as a Scheduled Caste. An illustration of this was provided by Sawant J in his concurring opinion in *Indra Sawhney*:

*“What is further, if the other backward classes are backward exactly in all respects as the Scheduled Castes and Scheduled Tribes, the President has the*

*power to notify them as Scheduled Castes and Scheduled Tribes, and they would not continue to be the other backward classes.*<sup>45</sup>

The emphasis on designation as the distinctive factor between Scheduled Castes and OBCs demonstrates that rather than being a reasonable classification, it is in fact a case of class legislation. Class legislation is a term that is applied to statutory enactments which divide the people or subjects of legislation into classes with reference either to the grant of privileges or the imposition of burdens, upon an arbitrary, unjust or invidious principle of division.<sup>46</sup> Since there is no principle behind the distinction between Scheduled Castes and OBCs, the designation of a caste as either vests with the executive (in the case of OBCs) and the Parliament (for Scheduled Castes). This designation, as an infallible principle of division between two classes, is arbitrary because it is based on no principle<sup>47</sup> and is, hence, violative of Article 14.<sup>48</sup>

### **COLORABLE EXERCISE OF POWER – REVISITING INDRA SAWHNEY**

There is one other aspect that the Court in *Indra Sawhney* missed while analysing whether a socially backward caste can be included as a class. Article 341 prescribes that while the President may draw the list of Scheduled Castes, such list cannot be varied by the President through a subsequent notification. The first O.M. issued by the V.P. Singh in 1990, notified by the V.P. Singh government in 1990 stated that the list of S.E.B.Cs shall comprise of those castes and communities in common with those mentioned in the Mandal Commission and the State's list. While *Indra Sawhney* conceded that these castes were comparable in backwardness to the Scheduled Castes, it did not ask the basic question – if the castes notified as SEBCs were comparable in terms of backwardness to Scheduled Castes, why were they not included in the list of Scheduled Castes and instead in the list of SEBCs?

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<sup>45</sup> *Indra Sawhney & Ors. v. Union of India*, AIR 1993 SC 477, ¶ 447.

<sup>46</sup> BLACK'S LAW DICTIONARY 315 (4<sup>th</sup> ed., 1968).

<sup>47</sup> See *S.G. Jaisinghani v. Union of India*, (1967) 2 SCR 703, at 14.

<sup>48</sup> *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3, ¶85.

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One possible answer is that the process of designating a Scheduled Caste is cumbersome as it can only be done by Parliament by virtue of Article 341(2) and not directly by the executive. The process of notifying SEBCs however, is much more flexible because the designation of SEBCs could be made by the government alone<sup>49</sup> and reliance on the approval of the Parliament was not necessary. This explanation is plausible given the fact that the V.P. Singh government did not have an absolute majority in the Lok Sabha.

The above exercise, however, dilutes the purpose behind clause (2) of Article 341. The said clause prevents the President from including a caste in the list by an executive notification directly. Speaking on the purpose behind the clause, BR Ambedkar stated in the Constituent Assembly that the object of this limitation was to “*eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President.*”<sup>50</sup>

The designation of a socially backward caste as an OBC, however, entitles such caste to receive the benefit of Article 16(4) in the same way that a Scheduled Caste can. It can be argued, therefore, that the executive notifying a caste as OBC where it could not notify it as Scheduled Caste but giving it the benefit under Article 16(4) implies that there is a colourable exercise of power which dilutes the requirement under Article 341(2). An authority is said to colorably exercise power when it does something indirectly under a pretext or disguises what it is not competent to do directly.<sup>51</sup> In a sense, the government instead of amending the list of Scheduled Castes through the parliamentary process, created a new class of OBCs, which includes castes which are socially backward, on a similar parameter or basis as the Scheduled Castes and gave them a similar treatment as Scheduled Castes without resorting to the normal legislative process.

Pursuant to the Constitution (102<sup>nd</sup> Amendment) Act, 2018, parliamentary supervision for the list of OBCs was mandated for the first time in the Constitution. Similar to the list of Scheduled Castes and Scheduled Tribes,

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<sup>49</sup> Indra Sawhney & Ors. v. Union of India, AIR 1993 SC 477, ¶ 736.

<sup>50</sup> B. R. Ambedkar, CONST. ASSEMB. DEB., ¶ 9.143.381, (Sep. 17, 1949), , <https://www.constitutionofindia.net/debates/17-sep-1949/>.

<sup>51</sup> Abraham Patani v. State of Maharashtra, (2022) SCC OnLine SC 1143.

the amendment inserted Article 342A in the Constitution which states that the list of SEBCs shall be issued by the President which cannot be varied by a subsequent notification by the President, but can only be varied by the Parliament.<sup>52</sup> However, after the Supreme Court pointed out in the *Maratha Reservation*<sup>53</sup> that the effect of the amendment was to deprive the states of their power to draw their own lists of the OBCs, the Parliament enacted the Constitution (105<sup>th</sup> Amendment) Act, 2021 which inserted clause (3) in Article 342A allowing the States and Union Territories to maintain its own list of SEBCs, the entries in which can be different from the Central List.<sup>54</sup> The amendment thus restored the power of the states to designate OBCs for their own purposes. However, while there is a parliamentary safeguard against the change in the Central list of OBCs, the amendment did not place a similar limitation for the maintenance of the State's list, in effect, which means that the state list of OBCs can be maintained and varied exclusively by the executive without any scrutiny by the legislature, leaving the scope for the colourable exercise of power by the states to designate socially backward castes intact.

### **OPINION OF THE STATE UNDER ARTICLE 16(4)**

Article 16(4), which enables the States to make reservations, specifies that it can do so for “*any backward classes of citizens, which in the opinion of the State is not adequately represented in the services under the State.*” As already mentioned, the expression “*backward classes of citizens*” includes Scheduled Castes, Scheduled Tribes and OBCs. However, in practice, the latter part of the provision is ignored. A Literal reading of clause (4) would reveal that for the State to provide reservations to any class of citizens, two conditions must be satisfied:

- a. The class must be a backward class;
- b. Such backward class, in the opinion of the State, is not adequately represented in the services under the State.

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<sup>52</sup> INDIA CONST., art. 342A. cl. 1 & 2, *amended by* The Constitution (One Hundred and Second Amendment) Act, 2018.

<sup>53</sup> *Jaishri Laxmanrao Patil v. State of Maharashtra*, (2021) 8 SCC 1.

<sup>54</sup> INDIA CONST., art. 342A. cl. 3, *amended by* The Constitution (One Hundred and Fifth Amendment) Act, 2021.

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However, various notifications for recruitment released by the government indicate that the condition specified in (b) above is largely ignored. Thus, reservation is provided to the members of Scheduled Castes, Scheduled Tribes and Other Backward Classes in direct recruitment at 15%, 7.5% and 27% respectively, without any consideration of whether castes or categories included in these lists are adequately represented or not.<sup>55</sup> In effect, clause (4) of Article 16 is simply read as enabling the State to make reservations for “*any backward classes of citizens*” and the condition stated after that is not given any consideration.

Kuldip Singh J. pointed out in his dissenting opinion in *Indra Sawhney* that the Mandal Commission in identifying backward classes, did not consider those classes that were inadequately represented in the services and also did not demonstrate that 3743 castes identified as SEBCs were inadequately represented in the services.<sup>56</sup> While his concern was legitimate, it is submitted that underrepresentation in the public service has never been considered a deciding factor for determining social backwardness.<sup>57</sup> Identification of backward classes and determining whether they are entitled to reservation under Article 16(4) are two different exercises. This entails that not all backward classes are eligible for reservations, but only those who are not adequately represented in the services provided by the State. Since backward classes include the Scheduled Castes and OBCs, this limitation extends to them as well. In other words, for extending the benefit of reservation to any class, the ultimate question is not whether a given class or caste is socially or otherwise backward, but whether they are adequately represented in the services, in the opinion of the State. To ascertain whether such an opinion was formed, we filed an RTI application with the Ministry of Social Justice and Ministry of Tribal Affairs inquiring

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<sup>55</sup> MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES & PENSIONS, GOV'T OF IND., RESERVATION FOR SCs, STs, OBCs, PwDs AND EWS IN POSTS AND SERVICES IN THE CENTRAL GOVERNMENT, (2022), <https://doptirculars.nic.in/OM/ViewOM.aspx?id=138&headid=6>.

<sup>56</sup> *Indra Sawhney & Ors. v. Union of India*, AIR 1993 SC 477, ¶ 393 (iv).

<sup>57</sup> For e.g., *See* Government of India Report of the Backward Classes Commission, Volume 1 (1980); *See* also Mandal Commission Report, underrepresentation in the public services is not mentioned as a factor for designation of SEBCs.

whether such an opinion<sup>58</sup> was formed with respect to the Scheduled Castes and Scheduled Tribes as to their inadequacy of representation of services.<sup>59</sup> In response, the Ministry of Social Justice and Empowerment as well as the Ministry of Tribal Affairs denied having such an opinion<sup>60</sup> with regards to the Scheduled Castes and Scheduled Tribes respectively. Suffice to say that the formation of such an opinion should involve an extensive survey of each caste or class and its recruitment in the public services. This is one of the exercises that some states do undertake for the designation of Other Backward Classes itself<sup>61</sup> but no such survey or test for the formation of opinion under Article 16(4) is undertaken by the Central Government with respect to the Scheduled Castes and Scheduled Tribes.

## PROPOSALS AND CONCLUSION

The paper identified several key issues that persist with the policy of reservation and designation of backward classes, particularly Scheduled Castes. The paper is not concerned with the effectiveness of any policy of reservation or affirmative discrimination. Whether such practices promote equality and causes of social justice is a question best settled by politics. Our concern was to identify key areas that are ignored in the consideration of these cases.

In Part I, we saw that a notification under Article 341 was said to be immune from the challenge under Article 14 on the ground that the determination of backwardness is solely the domain of the Parliament or the executive. Therefore, despite the fact that notification is a 'law' under Article 13 and is subject to Article 14, such subjection is merely theoretical

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<sup>58</sup> Information under Section 2(f) of the Right to Information Act, 2005 includes an opinion.

<sup>59</sup> RTI Application, registered as MOSJE/R/E/23/00157 (subsequently transferred to Ministry of Tribal Affairs and National Commission for Scheduled Castes, on file with author), PDF copy can be accessed at [https://drive.google.com/file/d/1osEOuxhEE-iMBpVrFwfRDBLhnttZvITP/view?usp=share\\_link](https://drive.google.com/file/d/1osEOuxhEE-iMBpVrFwfRDBLhnttZvITP/view?usp=share_link).

<sup>60</sup> Replies to the RTI Application from various Ministries and Departments (on file with author), PDF copies can be accessed at [https://drive.google.com/drive/folders/1n\\_D8V\\_KgAQmHID7dHG7pqgbQzOskNmMu?usp=share\\_link](https://drive.google.com/drive/folders/1n_D8V_KgAQmHID7dHG7pqgbQzOskNmMu?usp=share_link).

<sup>61</sup> Kerala State Commission for Backward Classes, Criteria for Identifying Backward Classes, Acts & Rules, <https://kscbc.kerala.gov.in/acts-rules/criteria-for-identifying-backward-classes/>.

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in light of the fact that there is no objective criteria or parameter of backwardness, and its determination lies solely with the Parliament. Thus, the Courts are stopped from considering which criteria have been considered and if so, whether other castes which are backward in terms of the said criteria have been excluded from the list. We emphasise that the criteria for determining backwardness for the purposes of Articles 341, 342 or 16(4) must be made more objective so that the application of Article 14 to Article 341 and its notification is not merely theoretical but also practical.

Drawing on the judicial determination of bases of classification of Scheduled Castes and OBCs, in Part II we found that their bases of classification overlap considerably which negates the existence of *intelligible differentia*. There could be an argument that since both of these classifications are receiving similar treatment under Article 16(4), they should not be hit by Article 14. However, this is erroneous on two counts. One, that a classification of two classes made without a sound basis cannot be justified on the count that they both will receive similar treatment; i.e., the absence of an *intelligible differentia* cannot be compensated for by the fact that the classes made under will be treated similarly. Second, as it turns out, there are indeed other ways in which both of these classes are treated differently. For instance, the Constitution provides reservations in the seats of Parliament and State legislatures for the Scheduled Castes and Scheduled Tribes but not for OBCs. Similarly, we have penal statutes like the Prevention of Atrocities on Scheduled Castes and Scheduled Tribes Act, 1989, the provisions of which are attracted only when certain acts of atrocities and hate crimes are committed by a person not being a member of Scheduled Castes or Scheduled Tribes, inflict them upon the persons from the Scheduled Castes and Scheduled Tribes. Thus, while Scheduled Castes and Scheduled Tribes cannot be prosecuted under the Act, OBCs can be. Similarly, while the Act provides Scheduled Castes and Scheduled Tribes from atrocities, the same protection is not provided to members of OBCs despite the fact that they can be similarly situated.

This brings us to the necessity of making the basis of classification of SEBCs and Scheduled Castes exclusive. If socially backward castes are included in Scheduled Castes, then OBCs should not include socially backward castes. Thus, we side with the opinion expressed by AN Ray CJ in *State of UP v. Pradip Tandon* and Subba Rao J in *R Chitralkha v. State of*

*Mysore* who emphasised that SEBCs are groups other than groups based on caste. In the *Jat Reservations* case,<sup>62</sup> the Supreme Court opined that SEBCs can be classes based on disability and gender. It also emphasised that the usage of caste as the sole criterion for the identification of backwardness be discouraged and backed by the development of new yardsticks and standards moving away from the caste-centric definition of backwardness. Kuldip Singh J also stated in his dissenting opinion in *Indra Sawhney* that backward classes of citizens under Article 16(4) are not synonymous with the expression “socially and educationally backward classes of citizens” used in Article 15(4). We believe that this is a good approach, as it enables the state to make reservations for classes which are backward on other considerations like occupation, linguistic advancement, or even the extent of technological penetration in classes of citizens. Thus, the State can target certain kinds of backwardness that might disable the citizens from adequately representing themselves in public services.

In Part III, we observed that *Indra Sawhney* ignored the facet that the determination of the SEBCs by the executive can constitute a colourable exercise of power due to the fact that castes that should be included in the Scheduled Castes are included in the list of SEBCs on the same criteria without parliamentary oversight and thus receive the benefit under Article 16(4). While this flaw has been remedied to some extent by the introduction of Article 342A with regards to the Central list of SEBCs, the state lists of SEBCs are still completely in the hands of the executive. Accordingly in clause (3) of Article 342A, we propose that:

- a. before the words “every State”, the words “the legislature of” be inserted.
- b. before the words “Union territory”, the words “with respect to a” be inserted.
- c. after the words “Union territory”, the words “the Parliament” be inserted.

So that the amended clause reads as:

*“Notwithstanding anything contained in clauses (1) and (2), the legislature of every State or with respect to a Union territory the Parliament may, by law,*

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<sup>62</sup> Ram Singh v. Union of India, (2015) 4 SCC 697.



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*prepare and maintain for its own purposes a list of socially and educationally backward classes, entries in which may be different from the Central List.”*

We believe that the above amendment as proposed above resolves the issue that we raised in Part III.

In Part IV, we pointed out that unless a backward class is inadequately represented in the services under the State, it is not entitled to reap the benefits of reservation under Article 16(4). Accordingly, it is incumbent upon the State to regularly monitor the status of the backward classes and their representation in the services, and those backward classes which are adequately represented therein be specifically excluded. Thus, the recruitment notification of public service can read like “15 percent of the seats are reserved in favour of Scheduled Castes except those which are listed in Annexure-A (where such annexure contains the list of those Scheduled Castes which are adequately represented in the services of the State).” We believe that this greatly extends the capacity of the State to target those classes which are more backward as against those which were backwards in the past but by virtue of their adequate representation have their statuses greatly improved.

Last, we part ways with the observations made by the Supreme Court in the recent case of *Janhit Abhiyan v. Union of India*, where it was reiterated that the reservations cannot be for an indefinite period of time so as to become a vested interest in itself.<sup>63</sup> However, when reservations should cease to operate is a question that is determined by factors other than backwardness, including political considerations.<sup>64</sup> We believe that the safeguards suggested in this paper are sufficient to ensure that reservations do not become a vested interest and remain only a measure of affirmative action.

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<sup>63</sup> *Janhit Abhiyan v. Union of India*, 2022 SCC OnLine SC 540, ¶ 190.

<sup>64</sup> R. Puri, *The Politics of Reservation*, OUTLOOK INDIA, (Feb. 03, 2022), <https://www.outlookindia.com/website/story/the-politics-of-reservation/231422/>.

## JUDICIAL APPOINTMENTS IN INDIA AND PAKISTAN: THE NEED FOR RESPONSIVE JUDICIAL REVIEW AND INSTITUTIONAL DIALOGUE

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RUSHIL BATRA<sup>1</sup>

*Judicial Appointments were and continue to remain a hotly contested issue even after four landmark pronouncements by the Supreme Court. In the latest judgement on judicial appointments in 2015, the Supreme Court of India ('SCI'), in SCORA v. Union of India declared the National Judicial Appointment Commission, brought in by the 99<sup>th</sup> Amendment, as unconstitutional for violating the basic structure. The judgement has been highly criticised by scholars for ignoring the principles of separation of powers and ignoring "parliamentary supremacy" by striking down a constitutional amendment in toto. Interestingly, the Supreme Court of Pakistan ('SCP') was faced with a similar question in Nadeem Ahmed regarding the constitutional validity of the 18<sup>th</sup> Amendment, which, inter alia, introduced a Judicial Appointments Commission. The SCP acted in stark contrast to the SCI by engaging in institutional dialogue as opposed to striking down the Amendment. This paper attempts to provide multiple suggestions and ways as to how the SCI could have decided the case differently by drawing on jurisprudence from Pakistan. The article attempts to compare and contrast the approach adopted by the SCI with that of the SCP and argues for engaging in institutional dialogue on questions like judicial appointments, which do not form the "democratic minimum core" in a democracy.*

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### INTRODUCTION

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## JUDICIAL APPOINTMENTS IN INDIA AND PAKISTAN: THE NEED FOR RESPONSIVE JUDICIAL REVIEW AND INSTITUTIONAL DIALOGUE

The issue of judicial appointments has surfaced in national discourse multiple times over the past few years. However, the most recent criticism comes from the highest constitutional functionaries in the country, who seem to argue that the Supreme Court of India (“**SCI**”) did not follow the principles of separation of powers in its judgement on judicial appointments.<sup>2</sup> In light of these circumstances, it becomes important to relook at the cases involving judicial appointments from the perspective of separation of powers.

As of today, India follows a Collegium system of appointments, wherein the five senior-most judges of the Supreme Court have the ‘*final word*’ on the appointment of judges to the SCI.<sup>3</sup> Primarily due to concerns regarding transparency and opacity, the Parliament introduced the 99<sup>th</sup> Constitutional Amendment in 2015, providing for the establishment of the National Judicial Appointments Commission (“**NJAC**”). This was struck down by the SCI by a 4:1 majority.<sup>4</sup> Notwithstanding the case’s merits, a key and rather unexplored question remains open: were there any other alternative remedies that could have been used by the court keeping in mind the principles of separation of powers? Curiously, the Supreme Court of Pakistan (“**SCP**”), which was placed in a very similar situation, chose to act rather differently. With identical constitutional provisions, the SCP chose to go down the route of institutional dialogue. This paper aims to explore alternative remedies that the SCI *could* have used in the NJAC Case, by looking at the example of dialogic judicial review and its application by the SCP.

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<sup>2</sup> Damini Nath, *VP enters Collegium debate, recalls NJAC repeal: Never too late*, THE INDIAN EXPRESS, (Dec. 05, 2022), <https://indianexpress.com/article/india/v-p-enters-collegium-debate-recalls-njac-repeal-never-too-late-8303333/>.

<sup>3</sup> Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgement in Comparative Perspective*, 49 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 569, 573 (2017). There remains some confusion as to who has the ‘final word’ on the appointment process because of the pocket veto exercised by the executive. For some instances, see Rushil Batra, *From Translucence to Opacity: Judicial Appointments after the Victoria Gowri Case*, I. CON. L. PHIL (Feb. 5th, 2023), <https://indconlawphil.wordpress.com/2023/02/14/from-translucence-to-opacity-judicial-appointments-after-the-victoria-gowri-case/>.

<sup>4</sup> Supreme Court Advocates-on-record Association and Anr v. Union of India, (2016) 5 SCC 1.

This paper *first*, analyses the process of appointment of judges in India and discusses the reasoning of the SCI to declare the 99<sup>th</sup> Amendment Act unconstitutional. *Second*, it discusses the history of the appointment of judges in Pakistan and contrasts the approach adopted by the SCP with its Indian counterpart. *Third*, in light of the two case studies, it analyses the role of institutional dialogue and the need for responsive judicial review in cases relating to judicial appointments, particularly in India.<sup>5</sup>

## THE REASONING ADOPTED IN THE NJAC CASE

Under Article 124 of the Constitution of India, the President is to appoint judges of the SCI in *consultation* with the Chief Justice of India (“**CJI**”).<sup>6</sup> A series of judgements over the years concentrated the power of appointments with the judiciary and the word “*consultation*” was read to mean “*concurrence*”.<sup>7</sup> This paved the way for the establishment of the “*Collegium system*”, consisting of three senior-most judges of the SCI, which was entrusted to decide on the appointment of judges to the SCI.<sup>8</sup> The Collegium’s strength was later expanded to five judges in order of seniority,<sup>9</sup> whose recommendations were said to be binding on the government.

To overcome the idea of giving an unelected group of judges the power to appoint other judges and taking inspiration from various other democracies in the world, a judicial commission model was brought in with the NJAC.<sup>10</sup> The NJAC was to consist of six members, which included three senior-most judges of the SCI, the Union Law Minister, and two “*eminent persons*” who would be selected by a committee comprising the Prime Minister, the Leader of Opposition, and the CJI.<sup>11</sup> The rationale

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<sup>5</sup> This article restricts itself to the appointment of judges only to the Supreme Court due to paucity of space and time.

<sup>6</sup> INDIA CONST., art. 124.

<sup>7</sup> Supreme Court Advocates on Record Association and Others v. Union of India, (1993) 4 SCC 441; In Re: Appointment and Transfer of Judges, AIR 1999 SC 1.

<sup>8</sup> *Id.* A similar process exists for appointment at the High Court level.

<sup>9</sup> *Id.*

<sup>10</sup> Supreme Court Advocates-on-record Association and Anr v. Union of India, (2016) 5 SCC 1 at 86.

<sup>11</sup> Abeyrante, *supra* note 3, at 600.

## JUDICIAL APPOINTMENTS IN INDIA AND PAKISTAN: THE NEED FOR RESPONSIVE JUDICIAL REVIEW AND INSTITUTIONAL DIALOGUE

behind including two representatives from civil society was to ensure accountability and transparency in the process.<sup>12</sup>

The 99<sup>th</sup> Amendment introducing the NJAC had a rather unique aspect that made it *qualitatively* different from other amendments to the Constitution – it got support from all parties across the spectrum, with not a single vote against it.<sup>13</sup> Interestingly, this was not enough to get judicial deference and the SCI still proceeded to strike down the Constitutional Amendment *in toto*. During the course of the hearing, it was agreed by both sides that the independence of the judiciary is a part of the basic structure of the Constitution.<sup>14</sup> The only question left open was whether the primacy of judges in the appointment process is a *sine qua non* to achieve the independence of the judiciary. If the answer was in the affirmative, then it had to be checked whether the NJAC preserved the primacy of the judiciary in the appointment process.

Notwithstanding the many contentions raised regarding the unconstitutionality of the 99<sup>th</sup> Amendment, there were broadly two major reasons for striking down the Amendment. These related to the *composition* and *functioning* of the NJAC.<sup>15</sup> First, the presence of two “*lay persons*” from civil society who could veto an appointment even if the three members from the judicial branch collectively voted for it.<sup>16</sup> Second, the reduced role of judges in the proposed amendment – from a Collegium of five senior-most judges which guaranteed primacy<sup>17</sup> to the judiciary, to the NJAC which comprised three judges alongside the law minister and two eminent persons. In effect, the SCI held that the primacy of the judiciary in the

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<sup>12</sup> Madhavi Divan, *Opening up Appointments: Civil Society Participation in the NJAC*, in *APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY AND INDEPENDENCE* 108 (Oxford University Press, 2018).

<sup>13</sup> Supreme Court Advocates-on-record Association and Anr v. Union of India, (2016) 5 SCC 1 at 117 (Kehar J.).

<sup>14</sup> *Id.* at 332 (Kehar J.).

<sup>15</sup> Chintan Chandrachud, *Debating the NJAC: Framing a Remedy*, I. CON. L. PHIL. (Jul. 27, 2015), <https://indconlawphil.wordpress.com/2015/07/27/debating-the-njac-framing-a-remedy-guest-post/>.

<sup>16</sup> Supreme Court Advocates-on-record Association and Anr v. Union of India, (2016) 5 SCC 1 at 231.

<sup>17</sup> *Id.* at 158.

appointment process was indeed an inviolable part of the basic structure to preserve the independence of the judiciary.<sup>18</sup> Hence, the SCI declared the Constitutional Amendment as unconstitutional primarily because the composition of the NJAC and voting mechanisms violated the independence and primacy of the judiciary, and by extension, the basic structure.<sup>19</sup> Never before had a Constitutional Amendment been struck down in its entirety by the SCI. This unique distinction falls only on the 99<sup>th</sup> Amendment. As we shall see in the next section, this approach is in stark contrast to Pakistan, a country that faced similar issues.

### **THE SEMINAL CASE OF THE 18<sup>TH</sup> AMENDMENT IN PAKISTAN**

Article 177 of the Constitution of Pakistan provides for the appointment of judges to the SCP.<sup>20</sup> Similar to Article 124 of the Indian Constitution, it provides that judges of the SCP are to be appointed by the President in consultation with the Chief Justice of Pakistan (“CJP”).<sup>21</sup> Even early jurisprudence on this article of the Constitution was similar to that of India, wherein confusion arose as to the ambit and scope of the word “consultation”.<sup>22</sup>

In a series of cases, it was held that there was a nexus between judicial appointments and independence, and Article 177 was interpreted in a way that reduced the role of the executive and increased judicial primacy.<sup>23</sup> The judgement in *Al-Jehad Trust v. Federation of Pakistan* (“*Al-Jehad*”)<sup>24</sup> is strikingly similar to that of the *Second Judges Case*,<sup>25</sup> wherein the Court held that there is an inextricable link between judicial appointments and independence and

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<sup>18</sup> *Id.* at 354.

<sup>19</sup> *Id.* at 238.

<sup>20</sup> PAKISTAN CONST., art. 177.

<sup>21</sup> Sameer Khosa, *Judicial Appointments in Pakistan: The Seminal Case of the 18<sup>th</sup> Amendment*, in *APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE* 243 (Oxford University Press, 2018).

<sup>22</sup> *Id.*

<sup>23</sup> HAMID KHAN, *CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN*, 573 (Oxford University Press, 4th ed., 2019).

<sup>24</sup> *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324.

<sup>25</sup> *Supreme Court Advocates on Record Association and Others v. Union of India*, (1993) 4 SCC 441.

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reduced the role of the executive in the appointment process. Post *Al-Jehad*, only the CJP could recommend names to the President of Pakistan for appointments to the SCP. The only leeway given to the President was that the judgement left open the possibility of the President not going forward with the appointment, but only after giving cogent reasons for the same. Therefore, primacy was accorded to the CJP, akin to the Indian case where primacy was accorded to the Collegium.

This position of primacy accorded to the CJP was sought to be changed by the introduction of the 18<sup>th</sup> Amendment. The 18<sup>th</sup> Amendment altered a total of 97 Articles of the Constitution of Pakistan.<sup>26</sup> It introduced Article 175A, which provided for a judicial commission for the appointment of judges to the SCP. In essence, the article envisaged a two-step process.<sup>27</sup> *First*, the Judicial Commission of Pakistan (“JCP”) was to make the initial selection of the candidates.<sup>28</sup> It would comprise a total of seven members, including the CJP, two senior-most judges of the SCP, a former Judge of the SCP nominated by the CJP, the Minister of Law and Justice, the Attorney General of Pakistan, and a senior advocate nominated by the Bar Council. Hence, out of seven, only three were to be sitting judges of the SCP. *Second*, the same had to be confirmed by an eight-member parliamentary committee which would have members from both the government and the opposition.<sup>29</sup>

The process was such that for each vacancy, the JCP was to nominate names and forward it to the parliamentary committee. The committee would then have 14 days to confirm the nomination failing which the nomination would be deemed approved. The committee could reject a nomination only by a special three-fourth majority, in which case the JCP would have to provide a fresh nomination.

Soon enough, Article 175A was under challenge.<sup>30</sup> Interestingly, the challenge relied upon Indian jurisprudence and was on the grounds that

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<sup>26</sup> KHAN, *supra* note 23.

<sup>27</sup> *Id.*

<sup>28</sup> Khosa, *supra* note 21.

<sup>29</sup> *Id.*

<sup>30</sup> Nadeem Ahmed, Advocate v. Federation of Pakistan, PLD 2010 SC 1165.

Article 175A violated the basic structure of the Constitution, which included the independence of the judiciary.<sup>31</sup> The primary basis for this assertion was that the weight of judicial opinion had been drastically reduced, leaving room for the politicisation of the appointment process. As a result, a bench of seventeen judges was formed by the CJP to decide the case. Like in the Indian case, the key challenges to the 18<sup>th</sup> Amendment were regarding the composition and functioning of the commission.

Historically, the SCP has been rather shy about sitting over judgements challenging the constitutionality of amendments.<sup>32</sup> This deference continued, wherein, after hearing the case on merits in full, the SCP refused to pass a final order. Instead, it passed a stern interim order, giving suggestions to Parliament on how to make the 18<sup>th</sup> Amendment constitutionally compliant. The court there went on to say:

*“We had two options; either to decide all these petitions forthwith or to solicit, in the first instance, the collective wisdom of the chosen representatives of the people by referring the matter for reconsideration. In adopting the latter course, we are persuaded primarily by the fact that institutions may have different roles to play, but they have common goals to pursue in accord with their constitutional mandate.”*<sup>33</sup> (emphasis mine)

It was thus made clear that if the Parliament did not make the required changes, the SCP had the power – and the inclination – to strike down the amendment as unconstitutional.<sup>34</sup> The SCP thus chose to send the matter back to Parliament. Arguably, something that weighed with it was that the Amendment being unanimously passed by the Parliament in a matter that was concerning its own appointment procedure.<sup>35</sup>

In essence, the SCP suggested two changes to the 18<sup>th</sup> Amendment. First, increase the judicial participation in the JCP from two to four. Second, if the recommendation of the JCP was not accepted by the Parliamentary

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<sup>31</sup> KHAN, *supra* note 23, at 574.

<sup>32</sup> Khosa, *supra* note 21, at 242.

<sup>33</sup> Nadeem Ahmed, Advocate v. Federation of Pakistan, PLD 2010 SC 1165 at8-10.

<sup>34</sup> Saroop Ijaz, *Judicial Appointments in Pakistan: Coming A Full Circle*, LUMS L. REV. JOUR. 86, 89 (2014).

<sup>35</sup> Khosa, *supra* note 21, at 246.



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Committee, it had to give cogent reasons for the same and refer the matter back to the JCP for its consideration – whose decision would then be binding on the Parliamentary Committee.

While the Parliament chose to incorporate both these Amendments in the form of the 19<sup>th</sup> Amendment, this essentially meant that judicial primacy was maintained by increasing the number of judges in the JCP. Hence, the SCP was satisfied with the 19<sup>th</sup> Amendment and the Parliament's compliance with its suggestions, and the matter was amicably resolved. However, such an approach leaves room for discussion in the Indian context.

### **THE ROAD NOT TAKEN BY THE SUPREME COURT OF INDIA**

There are many similarities between India and Pakistan in the context of how jurisprudence on judicial appointments came about. *First*, while the textual basis of both used the word “*consultation*” and are almost identical provisions, both courts essentially read the same as concurrence, with minor differences as discussed above. *Second*, both the Parliaments tried to bring in the commission models, which were challenged before their respective Supreme Courts on the same ground. However, the way that both courts reacted presents a rather interesting dilemma of judicial restraint and deference, which further raises questions on separation of powers in India.<sup>36</sup>

Was the SCI wrong in its approach in dealing with the NJAC? Specifically in the case of constitutional amendments, and more so if they have been passed almost unanimously, it is helpful to refer to what Rosalind Dixon calls “*responsive judicial review*”.<sup>37</sup> Dixon argues that courts should be mindful of their own institutional capacities and limits. She argues that when it comes to ideas that go beyond the “*democratic minimum core*” and are rather contestable, it would be wise to adopt a dialogic approach rather than a

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<sup>36</sup> Aileen Kavanagh, *Judicial Restraint in The Pursuit of Justice*, 23, 24 (2010).

<sup>37</sup> ROSALIND DIXON, *RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE* (Oxford University Press, 2022).

“strong” form of judicial review.<sup>38</sup> Hence, in instances like the NJAC, the courts are not protecting the thinnest or the “*minimum core*” of democracy, which would mean independence of the judiciary in this case. Instead, they are deciding rather contested notions of democracy, like whether primacy is the *only* way to achieve the independence of the judiciary. Dixon uses the example of the NJAC judgement itself to put forth her case of the “*democratic minimum core*”. She argues that it is a widely accepted position that judicial independence is indeed a part of the “*democratic minimum core*”. However, the idea that judicial primacy is needed to ensure judicial independence is quite contested. In fact, the Collegium system is unheard of elsewhere and is rather unusual in global terms.<sup>39</sup> Most jurisdictions across the world are going towards the commission model, which includes members of the executive, at least in some measure, while recommending candidates.<sup>40</sup> Another striking feature, and perhaps the most important one, is the fact that judges have to go through a rigorous interview process in most such jurisdictions.<sup>41</sup> For instance, in the United States, candidates are subjected to a televised interview not only on their judicial perspectives but also on their personal lives and views on controversial topics.<sup>42</sup> Similar interviews are conducted in various countries, which allows for transparency and accountability in the process.<sup>43</sup>

Thus, the Collegium system where *only* judges have the right to recommend names is presumptively unnecessary to maintain judicial independence which is part of the “*democratic minimum core*”<sup>44</sup>. Hence, the least that the SCI

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<sup>38</sup> *Id.* at 8.

<sup>39</sup> *Id.* at 86.

<sup>40</sup> Chintan Chandrachud, *Judicialisation of Judicial Appointments? A Response from the United Kingdom* in APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE 212 (Oxford University Press, 2018).

<sup>41</sup> Prannv Dhawan, *Reform That You May Preserve: Rethinking the Judicial Appointments Conundrum*, 9 I. JOUR. CONSTI. L. 186, 193 (2020).

<sup>42</sup> *Id.*

<sup>43</sup> For a detailed account of a comparative appointment process in other jurisdictions, see, SECURING JUDICIAL INDEPENDENCE: THE ROLE OF COMMISSIONS IN SELECTING JUDGES IN THE COMMONWEALTH ( Hugh Corder & Jan Van Zyl Smit eds., SiberInk, 2017).

<sup>44</sup> *Id.* at 86.

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could – and should have – done was exercise restraint instead of striking down the entire Amendment as unconstitutional.

In the Indian context, such restraint can be exercised by a variety of means. When a legislation is challenged on the basis of unconstitutionality, it is fallacious to look at it as a binary – whether to strike down or not to strike down.<sup>45</sup> Rather, courts might as well read down legislation to bring them in conformity with constitutional requirements. The Court has several options, even if *prima facie* it sees the legislation as unconstitutional. In the present instance, there were at least two options that the court could have undertaken.

First, some scholars suggest that the court could have simply *read down* the provisions.<sup>46</sup> For instance, there was a lot of space for judicial craftsmanship in the question of the two “eminent persons”. There were broadly two arguments – malice-based and recklessness-based. In both, two unsuitable people might be picked up who can veto appointments suggested by judicial members. The simple response is that the Court could give a list of qualifications or disqualifications for such an appointment.<sup>47</sup> Another aspect that did not impress the court is the voting mechanism in the NJAC i.e., any two members have a veto over the unanimous opinion of the judicial branch. Some scholars argue that the SC could have read this down to mean that the two-person veto would apply *only* to judges.<sup>48</sup>

The second alternative would be to follow the same model of institutional dialogue that Pakistan undertook i.e., refer the matter back to the Parliament. This is usually done when reading down becomes impossible or when the Court is rather wary of altering the Amendment so much as to change its character.<sup>49</sup> The idea of institutional dialogue, borrowed from

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<sup>45</sup> Chandrachud, *supra* note 15.

<sup>46</sup> Rahul Bajaj, *Debating the NJAC: Framing a Remedy*, I. CON. L. PHIL. (Jul. 27, 2015), <https://indconlawphil.wordpress.com/2015/07/27/debating-the-njac-framing-a-remedy-guest-post/>.

<sup>47</sup> Chandrachud, *supra* note 15.

<sup>48</sup> *Id.*

<sup>49</sup> Chintan Chandrachud, *Beyond Ghaidan and Back: the Supreme Court of India on Rights-Compliant Interpretation*, UK CONSTITUTIONAL LAW ASSOCIATION, (Nov. 30, 2013),

Canadian jurisprudence, means that Courts should recognize their own capacity constraints and the idea of separation of powers before adjudicating constitutional disputes.<sup>50</sup> This becomes important as judicial review presupposes a group of unelected judges overturning decisions made by elected members, who represent – at least in theory – the will of the people.<sup>51</sup> This can take place through various methods, one of which was highlighted in *Nadeem Ahmed* which acts as an excellent example of dialogic judicial review, wherein after nudges from the Court, the executive takes into account its deficiencies in policy and makes suitable changes.<sup>52</sup>

Another way for the SCI to follow the road of institutional dialogue could be to use the Suspended Declaration of Invalidity (“**SDI**”). With an SDI, the Court declares that certain provisions under the current legal regime are unconstitutional as they stand. However, instead of striking them down and thereby creating a possible vacuum, it gives Parliament an opportunity to cure the defect. Hence, the Court still gives directions for the realisation of the right, but suspends its operation for a given time period to allow Parliament to make the impugned provisions constitutionally compliant. Contrary to popular perception, the SCI has in fact used the SDI in numerous cases before.<sup>53</sup>

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<https://ukconstitutionallaw.org/2013/11/30/chintan-chandrachud-beyond-ghaidan-and-back-the-supreme-court-of-india-on-rights-compliant-interpretation/>.

<sup>50</sup> Luc Tremblay, *The Legitimacy of Judicial Review: The limits of Dialogue Between Courts and Legislatures*, (3) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 617, 618 (2005).

<sup>51</sup> *Id.* at 622.

<sup>52</sup> Gautam Bhatia, *Coronavirus and the Constitution – XXXVII: Dialogic Review and the Supreme Court* (2), I. CON. L. PHIL., (Jun. 3, 2021), <https://indconlawphil.wordpress.com/2021/06/03/coronavirus-and-the-constitution-xxxvii-dialogic-review-and-the-supreme-court-2/>.

<sup>53</sup> *Employee Provident Fund Organisation v. Sunil Kumar B.*, 2021 SCC OnLine SC 698; *Indira Sawhney v. Union of India* AIR 1993 SC 477 (Pandian J., ¶ 242); *Sampath Kumar v. Union of India* 1987 AIR SC 386. For an analysis of using the SDI in the Indian context, although in a different context, see Tarunabh Khaitan et al., *A Pathway for the Supreme Court in Ensuring Marriage Equality*, THE WIRE (Apr. 18, 2023), <https://thewire.in/law/a-pathway-for-the-supreme-court-in-ensuring-marriage-equality>.

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This argument of SDI becomes even more significant in light of the controversies surrounding the doctrine of revival.<sup>54</sup> As Professor Jain highlights, whether the doctrine of revival can be applied to unconstitutional constitutional amendments is still *res-integra*. When the Court struck down the 99<sup>th</sup> Amendment, it is unclear how the Collegium was revived, especially since it was a judicially created body having no mention in any statute. Thus, when the Court struck down the NAJC, it practically created a vacuum when it came to the appointment of judges. Hence, it is unclear as to where and how the Supreme Court derives the power to fill that void. It is in such circumstances of a possible vacuum that the SDI becomes even more important.

The idea of providing these alternatives is that once a Constitutional Amendment is passed almost unanimously, with not a single vote against it, it becomes incumbent on courts to participate in meaningful dialogue, and that can be achieved in numerous ways.

### CONCLUSION

In this article, on a comparison of the process of judicial appointments in India and Pakistan, it became evident how two courts on alternate sides of a border reacted very differently to identical questions. The jurisprudence of both India and Pakistan is eerily similar, and both recently made attempts to bring in the judicial appointment commission model. Interestingly, both courts reacted rather differently, with one outright striking down the entire Constitutional Amendment, and the other engaging in institutional dialogue and prompting the Parliament to make the Amendment constitutionally compliant.

The thrust of this article is not to say that India should have replicated Pakistan's model, but is rather an attempt to deliberate on how the court *could* have reacted. The SCI struck down a constitutional amendment that passed unanimously, without a single vote against it. The NJAC attempted to correct a line of jurisprudence that wasn't textually tenable and in a case

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<sup>54</sup> Sanjay Jain, *Debating the NJAC: The Philosophy of Revival*, I. CON. L. PHIL. (Jul. 27, 2015), <https://indconlawphil.wordpress.com/2015/07/27/debating-the-njac-the-philosophy-of-revival-guest-post/>.

that does not impact the “*democratic minimum core*”. Thus, in this case, the court should have gone through with a “*weak*” form of review showing some judicial deference, by either reading down some provisions or engaging in institutional dialogue. It was indeed a missed opportunity, one that could cost the country dearly.<sup>55</sup>

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<sup>55</sup> Indira Jaising, *National Judicial Appointments Commission: A Critique*, 49 EPW 16, 19 (Aug. 30, 2014).

**BOOK REVIEW: FOUNDING MOTHERS OF THE INDIAN  
REPUBLIC: GENDER POLITICS OF THE FRAMING OF THE  
CONSTITUTION BY ACHYUT CHETAN**

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AFREEN AFSHAR ALAM<sup>1</sup>

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**INTRODUCTION**

*“The passing of this Constitution for an Independent India can be called without exaggeration the realisation of a great dream of four hundred million people. For so many years the people of this country had been working for this realisation and today we have actually got what we had been working for.”*

- Ammu Swaminathan (Constituent Assembly, November 24, 1949)<sup>2</sup>

A constitutional bench of the Supreme Court of India (“**the Supreme Court**”) headed by the 50<sup>th</sup> Chief Justice of India, Justice Dr. D.Y. Chandrachud, observed that conventional historic chronicles have spun around the ‘founding fathers’ of the nation which kept most citizens oblivious of the exceptional contributions of women in the framing of the Indian Constitution (“**the Constitution**”) during the Constituent Assembly debates.<sup>3</sup> He said:

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<sup>2</sup> Ammu Swaminathan, 11 CONSTIT. ASSEMB. DEB. ¶ 11.164.206 (Nov. 24, 1948), <https://www.constitutionofindia.net/debates/24-nov-1949/>.

<sup>3</sup> Govt. of NCT of Delhi v. Union of India, (2018) 8 SCC 501.

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*“Traditionally, the dazzling contributions from women, who played a great role in the framing of the Constitution, is not highlighted. Their contributions were invaluable. They made valuable suggestions to improve constitutional provisions, keeping in mind the adverse conditions prevailing for women in those days. We read about Dr. B R Ambedkar, K M Munshi, Alladi Krishnaswami Ayyar's contributions. However, we were not taught in schools or colleges about the great contributions of Durgabai Deshmukh, Begum Aizaz Rasul, Rajkumari Amrit Kaur, and others.”<sup>4</sup>*

Justice Chandrachud had mentioned the founding mothers twice in his concurring opinion in the landmark case of ***Govt. Of NCT of Delhi v. Union of India***.<sup>5</sup> He quoted the prominent constitutional specialist Granville Austin, who mentioned in his book<sup>6</sup> that both the founding fathers and mothers worked together to establish the new Nation's ideals and created processes and institutions to achieve them.

India's Constituent Assembly was established in December 1946, and it had 389 members, including 15 women. It debated and finalised the provisions of the draft Constitution, which was adopted on November 26, 1949. The women in the Constituent Assembly represented diverse socio-cultural and professional practices. Amrit Kaur, Aizaz Rasul, Ammu Swaminathan, Hansa Mehta, Renuka Ray, Purnima Banerji, and Sucheta Kripalani were ardently engaged with the All-India Women's Conference from its establishment in 1927. While G. Durgabai and Dakshayani Velayudhan were not officially affiliated with the AIWC, they played a significant role in advocating for gender equality. Famous freedom fighters and political leaders like Annie Mascarene, Kamla Chaudhry, Leela Roy, Malati Choudhury, Sarojini Naidu, Sucheta Kriplani and Vijayalakshmi Pandit were also part of the Assembly.

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<sup>4</sup> Mahapatra Dhananjay, *Contribution of 'founding mothers' to Constitution need highlighting: Supreme Court*, TIMES OF INDIA, (Jan. 12, 2023), <https://timesofindia.indiatimes.com/india/contribution-of-founding-mothers-to-constitution-need-highlighting-supreme-court/articleshow/96926518.cms>.

<sup>5</sup> *Govt. of NCT of Delhi v. Union of India*, (2018) 8 SCC 501.

<sup>6</sup> GRANVILLE AUSTIN: *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION*, 390 (Oxford: Clarendon Press, 1999).



Achyut Chetan's book, *Founding Mothers of the Indian Republic: Gender Politics of the Framing of the Constitution*, is a vital addition to the feminist legal literature in India. Chetan's work traces the influences of Durgabai Deshmukh, Hansa Mehta, Amrit Kaur, Aizaz Rasul, Kamala Chaudhri, Ammu Swaminathan, Sucheta Kripalani, Dakshayani Velayudhan, Renuka Ray, Purnima Banerji, and Annie Mascarene on the Indian Constitution in an effort to restore their legacy. The book provides an insightful portrayal of the active participation of women, particularly behind the scenes, in expressing the fundamental ideas of equality, freedom, and human rights. The women who helped shape the Indian Constitution are less well-known in the public sphere. While some biographies have attempted to explore each person's life individually, this investigation into the creation of the Constitution is distinctive.

Chetan examined a variety of documents, committee records, and dissenting notes in the Constituent Assembly, along with personal correspondence of these women, to paint a picture of them as the missing mothers of the Republic.

Chetan also explores the ideological differences among these women, who come from various social backgrounds, hold diverse religious perspectives, and embrace different political ideologies.

## **FOUNDING MOTHERS AND THEIR CONTRIBUTIONS**

*“I feel it a great privilege to be associated with the framing of the Constitution. I am aware of the solemnity of the occasion. After two centuries of slavery India has emerged from the darkness of bondage into the light of freedom, and today, on this historic occasion we are gathered here to draw up a constitution for Free India which will give shape to our future destiny and carve out the social, political and economic status of the three hundred million people living in this vast sub-continent”.*

- Begum Aizaz Rasul (Constituent Assembly, November 8, 1948)<sup>7</sup>

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<sup>7</sup> Begum Aizaz Rasul, 7 CONST. ASSEMBLY DEB. ¶ 7.51.60 (Nov. 08, 1948), <https://www.constitutionofindia.net/debates/08-nov-1948/>.

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Constitutions worldwide continue to extol the wisdom of their “founding fathers” who sat in august assemblies to draft their nations’ charters. Figures like B.R. Ambedkar, Jawaharlal Nehru, Vallabhbhai Patel, Rajendra Prasad, and Maulana Azad are popular names that dominate academic and popular discourses in India. Women, however small in number, played important roles in the creation of the Constitution. These women are the Indian Republic’s missing mothers, whose names and achievements have been ignored from the narrative of the Constitution’s creation. The book is divided into seven chapters and ends with a conclusion on how we should remember these founding mothers and their contribution to the Republic of India in general and the Indian Constitution in particular.

Chetan contends in the book that these women were admitted to the Assembly not due to patriarchal favouritism but because they had earned the right to participate in the Republic’s founding. Before they were chosen to serve in the Constituent Assembly, most of them had a long history of involvement in women’s organisations on a national and international level. Ammu Swaminathan formed the Women’s India Association in Madras in later 1910s; Durgabai Deshmukh established the Andhra Mahila Sabha in the 1930s; Begum Aizaz Rasul was elected a member of the Uttar Pradesh Legislative Council from a non-reserved seat in the 1930s; Hansa Mehta was the President of the All-India Women’s Conference in 1945-1946, and she was the Indian representative in the UN Human Rights Commission in the 1947-48 session.<sup>8</sup>

The women who served in the Constituent Assembly were attorneys, reform advocates, and supporters of independence with many of them having been involved in various women’s organisations and feminist movements since the dawn of the 19<sup>th</sup> century. They were either nominated or elected to the Constituent Assembly after the elections of 1945. The presence of these missing mothers ensured that the Constitution included elements of their feminist moral imagination.

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<sup>8</sup> GOURI SRIVASTAVA, *WOMEN ROLE MODELS: SOME EMINENT WOMEN OF CONTEMPORARY INDIA* (Concept Publishing Company, 1<sup>st</sup> ed., 2006).

The founding mothers demonstrated unwavering dedication and strategic acumen in their involvement with many committees, including important ones like the Fundamental Rights Sub-Committee, the Minorities Sub-Committee, the Advisory Committee, and the Steering Committee.<sup>9</sup> In addition to voicing their opinions during the massive task of drafting the Constitution, they also penned a number of dissenting notes signed by certain women. As Chetan puts it, these notes aimed “to resist the erasing march of the collective, oral debates.”<sup>10</sup> The most notable dissenting notes were written by Kaur and Mehta, who collectively addressed freedom of religion and the Uniform Civil Code. Furthermore, Kaur wrote two dissenting notes against reservations for any community.<sup>11</sup>

Throughout the framing process, these women had a distinct presence in the Constituent Assembly and spoke in one authorial voice – overtly feminist, morally robust, and internally consistent, despite intersectional differences.<sup>12</sup>

Before 1946, there had been two decades of constitutional politics, and their voice had a distinct feminist tone. The rich tradition of feminist consciousness in India served as the foundation for this thought. The National Council of Women in India (NCWI) and the All-India Women's Conference (AIWC)<sup>13</sup>, established in the late 1920s, participated in organisational politics that shaped this imagination into a potent discursive force.<sup>14</sup> AIWC was closely associated with the Indian National Congress. Under the leadership of Mahatma Gandhi, AIWC gave its support to many

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<sup>9</sup> Priyadarshini Ravichandran, *The women who helped draft our constitution*. MINT, (Mar. 11, 2016). <https://www.livemint.com/Leisure/dLi6ZIdW6CgswZCGdOA9VM/The-women-who-helped-draft-our-constitution.html>.

<sup>10</sup> Uma Mahadevan-Dasgupta, *Review of Founding Mothers of the Indian Republic — Gender Politics of the Framing of the Constitution: In search of missing mothers*, THE HINDU (May 19, 2023), <https://www.thehindu.com/books/books-reviews/women-politics-india-constituent-assembly/article66842311.ece>.

<sup>11</sup> Amrit Kaur, *Memorandum on Minorities*, in B. SHIVA RAO, II THE FRAMING OF INDIA'S CONSTITUTION 309-312 (Universal Publishing co., 1<sup>st</sup> ed., 2015).

<sup>12</sup> Achyut Chetan, *India's founding mothers made vital contributions*, HINDUSTAN TIMES, (Jan 25<sup>th</sup>, 2023), <https://www.hindustantimes.com/opinion/indias-founding-mothers-made-vital-contributions-101674660009134.html>.

<sup>13</sup> Nirmala Banerjee, *Whatever Happened to the Dreams of Modernity? The Nehruvian Era and Woman's Position*, 33(17) EPW, (1998).

<sup>14</sup> B. SUGUNA, WOMEN'S MOVEMENT (Discovery Publishing House, 2009).

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anti-colonial and national movements including the Civil Disobedience Movement of the 1930's. Mass mobilisation and participation of women were striking features of the Indian independence struggle.<sup>15</sup> Hence, the voice in which these women spoke at the Constituent Assembly (and frequently wrote dissent notes or articles) in the Assembly was established and evolved over years of constitutional politics in AIWC and other organisations from the 1920's to the 1940's.

The addition of Dakshayani Velayudhan to the Constituent Assembly was very interesting. Hailing from the Pulaya caste in Kochi, she achieved the remarkable feat of becoming the first Dalit woman in India to successfully complete her university education.<sup>16</sup> She had opposed the notion of separate electorates and the AISC's call for Direct Action, a large-scale motion of civil disobedience against the Cabinet Mission's plan that might have caused the nation's entire economic system to collapse. She urged a mass movement to carry the Ambedkar movement to its intended goal, which is the acceptance of untouchables as "part and parcel of the Human Society" and compared it to the start of the untouchables' social revolution, which will only lead to the downfall of the Caste Hindus suzerainty.<sup>17</sup> The leaders of the Dalit movement expressed their disapproval of her actions by labelling her as a "traitor" "an unworthy creature" a "turncoat" and a woman who had succumbed to "the depths of moral turpitude."<sup>18</sup> These derogatory terms were employed to undermine her bravery and commitment. Records reveal that Dakshayani gave keen attention to advocating for the Dalits in the Constituent Assembly despite her difference of opinion with policies like separate electorates.<sup>19</sup> She recurrently fetched up issues like the education of the Dalit community, scholarships for students from Scheduled Castes, the defence of Dalits

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<sup>15</sup> RADHA KUMAR, *THE HISTORY OF DOING*, (Kali for Women, 1993).

<sup>16</sup> Meera Velayudhan, *Linking Radical Traditions and the Contemporary Dalit Women's Movement: An Intergenerational Lens*, 119 *FEMINIST REVIEW* 106-125, (2018).

<sup>17</sup> R K KSHIRSAGAR, *DALIT MOVEMENT IN INDIA AND ITS LEADERS 1857-1956* (New Delhi: MD Publications, 1994).

<sup>18</sup> Achyut Chetan, *Unafraid to oppose Ambedkar, Congress—Dakshayani Velayudhan was India's 1st Dalit woman MLA*, *THE PRINT*, (Oct. 13, 2022), <https://theprint.in/pageturner/excerpt/unafraid-to-oppose-ambedkar-congress-dakshayani-velayudhan-was-indias-1st-dalit-woman-mla/1164481/>.

<sup>19</sup> *Id.*

against violence from the higher caste, and the labour and protection of Dalit women.

The founding mothers prepared a number of documents, including the widely acclaimed Report on Woman's Role in Planned Economy (1939)<sup>20</sup>, which declared feminist positions decades ahead of their time. They also presented a memorandum to the International Labour Organisation,<sup>21</sup> petitioned the Hindu Law Committees in 1941 and 1945,<sup>22</sup> and prepared various documents related to women's issues that were presented to the colonial government.<sup>23</sup> The final form of their continuing demands was the outstanding Indian Women's Charter of Rights and Duties, with Hansa Mehta and Renuka Ray emerging as the major contributors<sup>24</sup> Mehta, who was then our country's delegate to the United Nations Human Rights Commission, ran efforts to modify the dialectal of the Universal Declaration of Human Rights from "man" to "human beings" while concurrently participating in the Constituent Assembly.<sup>25</sup>

The Women's Charter was distributed to representatives of Indian legislative assemblies, global feminist organisations, and the United Nations sub-commission on the status of women. This text corpus highlights that a self-assured movement rooted in sound ideas and rhetoric foreshadowed women's appearance in the Assembly. It also demonstrates that the founding mothers had already come to strongly believe in constitutionalism, the idea that a steady set of principles must serve as a steadfast foundation for the turbulence of democratic politics, and the necessity of recognising women as a marginal group suffering from societal

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<sup>20</sup> Maitrayee Chaudhuri, *Citizens, Workers and Emblems of Culture: An Analysis of the First Plan Document on Women*, 29(1-2) CONTRI. TO IND. SOCIO., 211-235, (1995).

<sup>21</sup> J Krishnamurty, *Indian Officials in the ILO, 1919-c 1947*, INDIA & THE INTERNATIONAL LABOUR ORGANISATION, [https://www.ilo.org/wcmsp5/groups/public/---dgreports/--inst/documents/genericdocument/wcms\\_192563.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/--inst/documents/genericdocument/wcms_192563.pdf).

<sup>22</sup> CHITRA SINHA, *EVOLUTION OF THE HINDU CODE BILL, DEBATING PATRIARCHY: THE HINDU CODE BILL CONTROVERSY IN INDIA 1941-1956* (Oxford Academic, 2012).

<sup>23</sup> SUMITA MUKHERJEE, *INDIAN SUFFRAGETTES: FEMALE IDENTITIES AND TRANSNATIONAL NETWORKS* (Oxford University Press India, 1<sup>st</sup> ed., 2018).

<sup>24</sup> Hansa Mehta, *Draft of Indian Woman's Charter of Rights and Duties*, ALL INDIA WOMEN'S CONFERENCE, Information of Sub-Commission, (New York: UN, May 1, 1946).

<sup>25</sup> DEVAKI JAIN, *WOMEN, DEVELOPMENT AND THE UN* (Bloomington: Indiana University Press, 2005).

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incapacities, requiring constitutional protection. Almost all of them were also well-known on a global scale in their own right. The missing mother's involvement in the Constitution-making task can be seen as a continuation of the women's movement's extensive aeons of constitutional politics. They had to grapple with complex issues like minority rights, property rights, fundamental rights, secularism and religion affirmative action, language multiplicity, socialism, the interplay between constitutional rights and human rights, democracy and nationalism, and justice in order to have a feminist, pro-women vision into the language of the Constitution.

An extremely crucial chapter was chapter six, which talked about the position of women in India with regard to old age customs and traditions. The Chapter includes discussion and disclosure of Article 25. Amrit Kaur and Hansa Mehta wrote dissent notes against Article 25 of the Constitution, urging that the right to “freely profess, practise, and propagate religion” not be made a fundamental right; they expressed this from an idealistic perspective, highlighting religion's many negative effects in women's personal lives. The women in the Constituent Assembly pushed for a Uniform Civil Code for all the citizens, they wanted this provision to be in the Part III of the Constitution, i.e., the fundamental rights. It was eventually added as Article 44 of the Constitution. Hansa Mehta's final speech in the Assembly emphasised on the civil code, claiming that it was more important than the national language.<sup>26</sup>

The missing mother's insistence on inter-faith marriages as a fundamental right stemmed from the same ground. Mehta and Kaur requested that the directive principles be “nevertheless fundamental” to the governance in their keynote of dissent, which was, in part, adopted as Article 37, after their demands were rejected. The Chapter mentions their views on the Hindu Law Committee, while the women were hopeful about the bill, they had fear and anxiety about the Hindu Code not being good enough for women, they had disagreements and debates with the other members

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<sup>26</sup> Hansa Mehta, 11 CONST. ASSEMB DEB. ¶ 11.162.119 (Nov. 22, 1949), <https://www.constitutionofindia.net/debates/22-nov-1949/#129893>.

including Dr. Ambedkar on subjects like female succession, adoption, and patriarchal customs.

The Constituent Assembly was only the beginning of their contribution to the Republic. Many became actively involved in administration, political and social organisations, and movements to supplement the ideals they vehemently defended in the parliament. Durgabai joined the Planning Commission, Kaur became India's first health minister and established AIIMS, Ray was appointed to help with refugee rehabilitation in West Bengal, Mehta contributed to the creation of a new national education agenda for women, Rasul was elected to the Rajya Sabha, Naidu was the first female Governor of India, and Kripalani became the first female Chief Minister in India, she was the CM of Uttar Pradesh from 1963 till 1967.

## CONCLUSION

*“The working of the Constitution will depend upon how the people will conduct themselves in the future, not on the actual execution of the law. So, I hope that in course of time there will not be such a community known as Untouchables and that our delegates abroad will not have to hang their heads in shame if somebody raises such a question in an organisation of international nature.”*

- Dakshayani Velayudhan (Constituent Assembly, 29 November 1948)<sup>27</sup>

The book's monumental task at the outset is to dispel the preconceptions associated with the term “founding fathers” which have significantly influenced constitutional interpretation. It demonstrates how the female members of the Indian Constituent Assembly laboriously drafted the Constitution, reflecting a virtuous vision cultivated through a lifetime of feminist politics. It touches upon the ancestors of numerous constitutional provisions to argue that the Constitution would be a shoddier document of rights without the interventions of the women who helped frame it.

Chetan sheds light on the distinctive moral vision of the women who helped draft the Constitution in this notably detailed, carefully investigated,

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<sup>27</sup> Dakshayani Velayudhan, 7 CONST. ASSEMB. DEB., ¶ 7.62.175 (Nov. 29, 1948), <https://www.constitutionofindia.net/debates/29-nov-1948/>.

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and convincingly formulated interpretation of the arguments of the missing mothers of the Indian Constitution. The book showcases the significant contributions of the female members of the Indian Constituent Assembly, highlighting that their role extended beyond being mere “founding mothers” of the Republic. It accomplishes this by contextualising their interventions within the broader framework of Indian feminism, which forms their foundation, and by examining their constant negotiations within the nationalist discourse. Furthermore, the book explores how these interventions align with the human rights discourse of the 1940s.

The ideas and revolutionary spirit of these founding mothers have influenced the country to date. Our Constitution was drafted through the consent and will of our founding fathers and mothers that are still redeemed as the will of this Republic and has stood the test of time.