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EDITORIAL: THE PARTIAL AND INCONSISTENT IDEA OF FRANCHISE AND DEMOCRACY

Ayush Mehta[1] *& Prakhar Raghuvanshi*[2]

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INTRODUCTION

Elections are the crux of democracy and reflect on its health. As Padma Bhushan Bhikhu Parekh points out—elections and public deliberation are essential components of democracy. Together they ensure that political power is exercised by those authorised by the people for the purpose achieved through public discussion.[3] A third component of democracy, protest, acts as a bulwark against the misuse of political power.[4] In this context, one must engage with the literature on voting rights. Upon engaging, we are posed with the question—what is the nature of voting

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[3] Bhikhu Parekh, *The Dialectic of Elections in* THE GREAT MARCH OF DEMOCRACY (SY Quraishi ed., Penguin 2019). Bhikhu Parekh has also warned about the perils of treating elections as the sole vehicle of democracy.

[4] *Id.*

rights in India? Is the right to vote merely a statutory right and thereby its existence itself is subject to the whims of the legislature? Is it a constitutional right which may be regulated by the legislature?

The only logical answer to this question would be that the right is indeed a constitutional one. Unfortunately, the settled jurisprudence on the point refers to the right as a statutory right, pure and simple. Recently, a constitution bench of 5 judges headed by Justice KM Joseph set up to decide an independent mechanism to appoint the Election Commissioner observed that the Constitution contemplated giving a right to vote and only the question of whether it is a statutory right needs to be addressed by the bench. It is against this backdrop that we find it prudent to examine the true nature of this right.

We have attempted to cover a broad topic while keeping the piece short to remain within the limits of an editorial. In the first part, we have briefly touched upon the historical background and Constituent Assembly Debates relating to universal adult franchise in India. In the second part, we have discussed the jurisprudence developed by the SC on this point to decipher the settled principle of law. In the next part, we give our arguments against the settled position i.e., the right to vote is merely a statutory right. Our arguments are rooted in the constitutional origin of the right, inherent limitations on the legislature to restrict franchise and the intrinsic/instrumental characteristics of the right.

ANTECEDENTS TO FRANCHISE

The call for universal adult franchise was reflected in India's struggle for independence. Beginning with Tilak's Swaraj Bill of 1895[5], a major articulation of constitutional imagination in India,[6] universal adult franchise was envisaged in the Motilal Nehru Report of 1928[7], the Karachi

[5] The Constitution of India Bill, 1895, *§29*,: "*29. Every citizen has a right to give one vote for electing a member to the Parliament of India and one to the Local Legislative Council.*"

[6] Rohit De, *Constitutional Antecedents, in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 27–45 (2016).

[7] Art. 9, The Motilal Nehru Report, 1928, <https://www.constitutionofindia.net/historical_constitutions/nehru_report__motilal_nehru_1928__1st%20January%201928>: *"9. The House of Representatives shall consist of 500*

Resolution of 1931[8] and the Sapru Committee Report of 1945.[9] Consequent to the constant demand, a limited franchise was extended by the Government of India Act of 1919 which was liberalised in 1935.[10]

Thus, it was only natural that the Constituent Assembly opted for a universal adult franchise,[11] despite all odds and doubts[12] regarding the feasibility primarily on account of the majority of the population being illiterate.[13] It is pertinent to note here that Dr. BR Ambedkar argued for the inclusion of the right to vote as a fundamental right. For him, franchise was the principal thing of the Constitution.[14] Initially, in 1947, the Fundamental Rights Sub-Committee had included the right to vote as a fundamental right.[15] Ambedkar's argument was in light of the exclusion of the right to vote from the fundamental rights chapter by the Advisory Committee of the Constituent Assembly.[16] The Advisory Committee gave an assurance to Ambedkar that it would recommend the inclusion of franchise in other parts of the Constitution.[17] The inclusion of franchise

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members to be elected by constituencies determined by law. Every person of either sex who has attained the age of 21, and is not disqualified by law, shall be entitled to vote. Provided that Parliament shall have the power to increase the number of members from time to time if necessary." Similar provision was envisaged for provincial legislatures in Article 31.

[8] The Karachi Resolution, 1931, CADIndia Project, Centre for Law and Policy Research, <https://www.constitutionofindia.net/historical_constitutions/karachi_resolution__1931__1st January 1931>

[9] Art. 9(f), Sapru Committee Report, 1945: "*9(f) For the Union Assembly there shall be adult franchise, for seats other than those reserved for special interests.*"

[10] David Arnold, *How India Became Democratic: Citizenship and the Making of the Universal Franchise, by Ornit Shani*, 134(568) EMG. HIST. REV., 759–760 (June, 2019).

[11] 11 CONST. ASSEMB. DEB. (November 23, 1949), https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-23.

[12] MADHAV KHOSLA, INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY 6-8 (Harvard University Press 2020).

[13] MANJEET RAMGOTRA, INDIA'S REPUBLICAN MOMENT IN THE INDIAN CONSTITUENT ASSEMBLY: DELIBERATIONS ON DEMOCRACY 196-221 (Routledge 2018).

[14] *See* Shefali Jha, *Representation and Its Epiphanies: A Reading of Constituent Assembly Debates*, 39 ECON. & POL. WKLY. 4357, 4357–60 (2004).

[15] *Id.*

[16] *Id.*

[17] *Id.*

came through articles 81 and 170 providing for direct election to the Parliament and state legislatures, respectively. Post-adoption of these articles, Article 326 was debated on 16 June 1949 which clearly laid down the principle of adult suffrage. The article was not passed without opposition. Certain members of the assembly argued that universal franchise presupposes an educated and enlightened electorate which was not the case with India and hence, it was a "*gross violation of the tenets of democracy*".[18] There were others in the assembly who supported the idea and argued for limited franchise for the initial few years.[19] However, since articles 81 and 170 were already adopted and contained the principle of adult suffrage, the motion for insertion of Article 326 was adopted without much debate.[20] Post adoption of adult suffrage, during the Third Reading of the Draft Constitution, RK Sidhva with an optimistic outlook said[21]:

> "*The adult franchise is the greatest risk which the Constituent Assembly has taken. I may tell the House it is the greatest risk for this reason that 85 percent of our population is illiterate and it is even now doubted whether the adult franchise will be successful. Whatever it may be, Sir, successful or not successful, we have taken the risk rightly. We had to take the risk and we have taken the risk. A democracy without adult franchise would have no meaning….*"
>
> *(emphasis added)*

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[18] 8 CONST. ASSEMB. DEB. (June 16, 1949), https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-06-16.

[19] 11 CONST. ASSEMB. DEB. (November 22, 1949), https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-22.

8 CONST. ASSEMB. DEB. (June 02, 1949), https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-06-02.

[20] 8 CONST. ASSEMB. DEB. (June 16, 1949), https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-06-16.

[21] 11 CONST. ASSEMB. DEB. (November 17, 1949), https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-17.

Two conclusions may be drawn from the aforesaid discussion. First, the framers of the constitution did not intend the right to vote to be a fundamental right. Second, the debates do not reflect the status of the right to vote. They only accept the principle of adult suffrage and direct elections to the Parliament and state legislatures. In light of these two conclusions, one must undertake a study of franchise since independence.

FRANCHISE SINCE INDEPENDENCE

Franchise was a matter of constitutional debate since independence. There are two sides to the argument—one claiming that the right to vote is merely a statutory right and the other claiming it to be a constitutional one. The statutory provision containing the right to vote is Section 62 of the Representation of the People Act, 1951 ("**RPA**"). The section provides for the disqualification of voters who are debarred: on grounds mentioned in Section 16 of the Representation of the People Act, 1950, due to casting their vote in one constituency for an election and due to imprisonment. The provision provides merely restrictions while being titled as "*right to vote*". Some argue that this might have been done as the right per se is already guaranteed under the Constitution.[22]

Whereas Article 326 provides for adult suffrage subject to certain limitations. The phrasing of the provision is in terms of entitlement to be registered as a voter.[23] The debate is rooted in whether Article 326 read with other provisions of the Constitution provides for the right to vote or whether the right comes from Section 62 of the RPA.

The question first came before the SC in *NP Ponnuswami v Returning Officer (1952)*,[24] the Court held that the right to vote is a creation of a statute and shall be subject to limitation imposed by it. The Court was not oblivious to the importance of the right to vote, however, aligned with its skewed interpretation in further judgments as well. In *Jyoti Basu v Debi Ghoshal (1982)*[25] Chinnappa Reddy, J. categorically stated that the right to vote is

[22] Aditya Sondhi, *Elections*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 196–212 (2016).

[23] INDIA CONST. art. 326.

[24] NP Ponnuswami v. Returning Officer, AIR 1952 SC 686.

[25] Jyoti Basu v. Debi Ghoshal, (1982) 1 SCC 691.

fundamental to democracy but anomalously it is neither a fundamental right nor a common law right. This right did not exist outside the RPA. The interpretation continued in landmark judgments relating to election law even in the 21st century. In *People's Union for Civil Liberties v Union of India (2003)*,[26] the majority reiterated that the right to vote only constitutes a statutory right in India and not a constitutional one.

STATING THE OBVIOUS: CONSTITUTIONAL ROOTS OF RIGHT TO VOTE

It is unfortunate that the status of the right to vote as a constitutional right is still debatable. In this section, we aim to provide a few reasons and perhaps inconsistencies in the reasoning of the court to make an argument for recognition of the right to vote as a constitutional right.

A. CONSTITUTIONAL ORIGIN OF THE RIGHT

The right to elect/vote even though not mentioned explicitly in the Constitution originate from provisions of the Constitution scattered throughout the document. In *PUCL v Union of India (2003)*,[27] Reddi, J. concluded that while the right to vote may not be fundamental, it is not merely a statutory right in the purest sense. It exists because of a constitutional imperative.[28] A pre-existing right (the right to vote) is shaped by the RPA. However, this was a minority opinion only and does not provide the force of the law.[29]

In addition to this, Chelameswar, J. in *Desiya Murpokku Dravida Kazhagam v Election Commission of India (2012)*[30] observed that certain constitutional provisions are sources of the right to elect in the Constitution. He referred to Article 326 which provides for adult suffrage, Article 325 which is an anti-discrimination clause with respect to the inclusion of names in the

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

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

[28] *Id.*

[29] Shubhankar Dam, *People's Union for Civil Liberties v Union of India: Is Indian Democracy Dependent on a Statute?*, PUB. L. 704 (2004).

[30] Desiya Murpokku Dravida Kazhagam (DMDK) v. Election Commission of India, (2012) 7 SCC 340.

electoral roll and Articles 81 & 170 which mandated direct election to Lok Sabha and Legislative Assemblies respectively. Collectively, they grant all citizens (age 18 and older) the right to vote, subject to any legal restrictions that may be put in place by the Parliament.[31] However, Chelameswar, J. wrote a dissenting opinion in this case. In *Rajbala v State of Haryana (2016)*,[32] Chelameswar, J. referred to this opinion and stated that the other two judges did not express any disagreement regarding the conclusion of the right to vote as a constitutional right. Thus, the principle ought to be accepted by the judges and forms a legally binding opinion of the court. He drew similar observations regarding the opinion of Reddi, J. in *PUCL* and stated that one of the judges agreed with the conclusion while the other did not express disagreement. Shubhankar Dam, in his analysis of *PUCL,* has stated that the judgement remained muddied.[33]

While the conclusions drawn by Chelameswar, J. find a place in the constitutional paradise, we believe they do not provide a strong precedential value and are capable of being distinguished by future benches. As Gautam Bhatia has pointed out, precedents are disregarded by future benches by distinguishing the cases every now and then,[34] this constitutional question cannot and should not be settled with a weak precedent. The Law Commission in its Draft Report on Simultaneous Elections called the right to vote 'a constitutional right at most' after analysing these judgments of the SC.[35]

B. LIMITATION ON POWER OF THE LEGISLATURE AND THE PRESUPPOSITION OF RIGHT

[31] Desiya Murpokku Dravida Kazhagam (DMDK) v. Election Commission of India, (2012) 7 SCC 340.

[32] Rajbala v. State of Haryana, AIR 2016 SC 33.

[33] Dam, *supra* note 29.

[34] Gautam Bhatia, *What is the Role of a Judge in a Polyvocal Court*, INDIAN CONST. L. PHIL. BLOG (April 01, 2017), https://indconlawphil.wordpress.com/2017/04/01/what-is-the-role-of-a-judge-in-a-polyvocal-court/.

[35] Law Commission of India, Draft Report on Simultaneous Elections (Aug. 30, 2018), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/09/2022092639.pdf.

The court held in *NP Ponnuswami* and *Jyoti Basu* made two relevant observations with respect to the right to vote. First, it was a statutory right and subject to statutory limitations. Second, outside the statute, there is no right to elect. We may refer to Article 326 at this stage to understand the issue better. The article reads as:

> "***326. Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.—****The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than [eighteen years][36] of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.*"
>
> *(emphasis added)*

There are three parts to this provision, for ease of understanding we are dividing them as follows:

i) Declares that elections to Parliament and state assemblies will be on the basis of adult suffrage. (Enabling part)
ii) Provides disqualification: a) as per the constitution; and b) as per law made by parliament *on grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice.* (Disqualification part)
iii) Entitles every citizen above 18 years to be registered as a voter. (Prerogative part)

With respect to the first observation of the court that the right to vote is subject to statutory limitations. The power of the Parliament (or appropriate legislature) to impose limitations is guided by the 'disqualification part' in Article 326. Any law made by Parliament may restrict the prerogative part only on four grounds: a) non-residence; b)

[36] Originally the age was twenty years.

unsoundness of mind; c) crime; and d) corrupt or illegal practice.[37] Thus, the argument accepted by the court is partly correct that these are subject to statutory limitations. The court refrained from engaging with the idea that the power to impose limitation is itself limited.

C. INSTRUMENTAL AND INTRINSIC CHARACTERISTICS

As per the second observation, an entitlement to be registered as a voter carries a presupposition of a right to vote.[38] It is only logical that any right or entitlement has instrumental as well as intrinsic characteristics.[39] Intrinsic characteristic is the inherent value of that principle, irrespective of its utility. Instrumental characteristic on the other hand is dependent on the utility of that value i.e., the ability of that principle to be utilised as a means to an end.[40] The entitlement to be registered as a voter has intrinsic value for a constitutional democracy. The primary purpose of the electoral roll is to enable the exercise of vote. Therefore, the instrumental value of a constitutional entitlement to be registered as a voter would be absent without a constitutional entitlement to vote.

In *PUCL*, while deciding on the issue relating to the disclosure of information by candidates, it was held that the right to know the antecedents of the candidate was included within Article 19(1)(a) as a facet of the right to information.[41] In 2013 in *People's Union for Civil Liberties v*

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[37] Justice KM Joseph in an ongoing constitution bench proceeding adopted similar reasoning. Anoop Baranwal v. Union of India, WP(C) 104 of 2015; *"Right To Vote Is A Constitutional Right": Justice KM Joseph Disagrees With Election Commission Of India*, LIVELAW (Nov. 23, 2022), https://www.livelaw.in/top-stories/right-to-vote-is-a-constitutional-right-justice-km-joseph-disagrees-with-election-commission-of-india-214864.

[38] SONDHI, *supra* note 22.

[39] Per Chandrachud, J. K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1, ¶ 298 (discussion on intrinsic and instrumental values of privacy) and Per DY Chandrachud, J. in Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (discussion on intrinsic and instrumental values of public consultation).

[40] Michael J. Zimmerman & Ben Bradley, *Intrinsic vs. Extrinsic Value (Stanford Encyclopedia of Philosophy)*, STANFORD.EDU (2019), https://plato.stanford.edu/entries/value-intrinsic-extrinsic/.

[41] *See* Virendra Kumar, *Citizen's Right to Vote: Role of The Supreme Court in Empowering Citizenry to Bring About 'A Systemic Change' Through Nota for Cleansing Our Body Politic (A Juristic Critique of Constitutional Developments)*, 56(1) J. IND. L. REV., 25–46 (2014).

Union of India[42] the SC held that the right of an elector to cast his or her vote without fear, duress, or coercion, as well as protection of the voter's identity, is included within the principle of free and fair elections, which is part of the basic structure of the constitution and beyond the power of the Parliament to amend. Here as well, the question regarding the instrumental value of these rights remains. Furthermore, a voter's incidental rights, which let them exercise their right to vote in an educated manner, are protected by the Constitution, thus, to say that the right to vote is just statutory is illogical.

CONCLUSION

Parliamentary democracy is part of the basic structure of the Constitution of India. The right to vote is considered as an essential component of parliamentary democracy. In light of the same, it is important to question why the right to vote is not considered as a constitutional right, which could enable a citizen to move to the SC under Article 32 for its enforcement. Thus, through this editorial we have attempted to argue that the right to vote should be mandated as a constitutional right and not a statutory right under the RPA.

As highlighted in part III of this paper, the right to vote, while not explicitly stated in the text of the Constitution, traces its origin from provisions throughout the Constitution. Article 326 of the Constitution provides for adult suffrage. It can be divided into three parts, those being, the enabling part, the disqualification part and the prerogative part. From an understanding of this Article, it is argued that while the right to vote is subject to statutory limitations, the power to impose limitation itself is limited. Secondly, the entitlement to be registered as a voter would intrinsically carry a constitutional entitlement to vote, i.e., providing for a right to vote as a constitutional right.

The debate over whether the right to vote is a statutory right or a constitutional right is an important one. While the courts till date have declared the right as a statutory one, they have not explicitly disagreed with the notion that the right to vote is a constitutional right as well. However, as argued, this does not provide for a strong precedent and a constitutional

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

question of such importance should not be settled with a weak precedent. Therefore, there remains a need for an authoritative judgement from the Apex Court settling the position once and for all and declaring the right to vote as a constitutional right. Till such recognition, the idea of democracy is only partial and inconsistent in India.

IN THIS ISSUE

The field 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. As the Editors-in-Chief of the Comparative Constitutional Law and Administrative Law Journal ("**CALJ**") under the Centre for Comparative Constitutional Law and Administrative Law ("**CCAL**"), it gives us immense pleasure to introduce Issue I of Volume VII of our journal to the readers.

Rangin Pallav Tripathy and Suman Dash Bhattamishra in ***The Future of Equal Pay in Sports***, discuss the challenges involved in ascertaining the notion of equal pay in sports. The authors first provide an outline of the essential components of any legal claim for equal pay by providing instances from various jurisdictions. Subsequently, the authors contend that a straitjacket demand for equality misses the legal nuances and complexities involved. Noting the reality of the situation, the authors suggest that a recourse to political solutions would be a more viable alternative by addressing the historical neglect of women's sports and providing a financial as well as a political platform for women's sports to succeed in order to ensure equality of pay in sports.

Taking forward the idea of equality at an individual level, Manwendra Tiwari talks about equality at a community level i.e., secularism. In ***Law, Politics, and the Erasure of the Secular Constitutional Identity of India*** the state of Indian polity in the contemporary world vis-à-vis secularism is discussed by the author. While the analysis may not be empirical, it provides multiple instances to advance the argument that the textual presence of transformative constitutional values does not guarantee protection. The author has *inter alia* discussed the politics of cow protection, laws on religious conversions, use of Hindu rituals in public events, especially inaugural ceremonies and argued that the principles of

secularism are engaged in a constant struggle against the pre-constitutional non-secular polity of India. Relying on the role of constitutional courts in the infamous dispute of Ayodhya (Ram Janmabhoomi Temple Case), religious conversions laws and so on, Dr. Tiwari argues that the judiciary has been inadvertently complicit in the failure to realise the true character of a secular nation.

Our next author picks up the role of constitutional courts in informally changing the constitution itself. Anujay Shrivastava undertakes a comparative study of India, Bangladesh, Honduras and the United States of America and illustrates the unconstitutional informal constitutional changes ("**UICC**") by courts (constitutional courts) in these jurisdictions. UICC is an informal amendment of the constitution through executive action, legislative enactments, judicial interpretation and so on. Shrivastava has highlighted two significant and diametrically opposite results of UICC. On one hand, they might result in transformative constitutionalism which furthers egalitarian principles of the constitution. On the other hand, they may result in constitutional dismemberment i.e., unmake the constitution and thus be destructive for the constitution itself. We believe that ***Mapping 'Unconstitutional Informal Constitutional Changes' by Constitutional Courts—A Comparative Study*** is an extremely rich and comprehensive source of literature which will surely enhance and encourage discourse on UICCs.

Pradhyuman Singh in ***India's Adoption of the Doctrine of Occupied Field: A Comparative Study with Australia***, analyses the recognition of the doctrine of occupied field in India. The discussion around the doctrine in this article is centric to Article 254 of the Constitution. The author attempts to delve into the constitutional text, the historical context of the doctrine as well as judicial pronouncements which led to the adoption of the doctrine in India. The author however argues that the Supreme Court has failed to provide a well-reasoned argument for the adoption of the doctrine. The Court has instead relied heavily on Australian jurisprudence present on the doctrine. Since the justification of the doctrine stems from Australian jurisprudence, the author subsequently makes a comparative analysis with the Australian Constitution. Through this paper, the author attempts to provide a doctrinal basis for the recognition of the doctrine of occupied field in India.

Constitutional developments happen in legislatures and courts. These developments flow from and to *the people*. Hence, it is imperative to discuss the engagement of the people with this document. Namrata Jeph and Rajesh Ranjan undertake this task in ***Constitutional Ownership in India: A Case Study from Maharashtra and Rajasthan*** and discuss the notion of constitutional ownership in India by placing reliance on empirical on-ground research through case studies from the states of Maharashtra and Rajasthan. The authors first define and review the conceptions of constitutional mobilisation and constitutional change. Subsequently, the authors argue that the citizens of the country act as a defender of the Constitution and have provided detailed accounts of a few individuals showcasing instances of constitutional ownership. The authors demonstrate that citizens can effectively use the Constitution as a tool to assert their constitutional rights, raise awareness of constitutional values, and participate in deliberation on constitutional issues which affect them.

Citizen engagement is influenced by authors and hence, books occupy a pivotal position in civilised societies. Critical engagement with these books is equally important. With this approach, our author, Aditya Rawat reviews J Sai Deepak's ***India That is Bharat: Coloniality, Civilisation, Constitution***. Rawat has criticised Sai Deepak for ignoring recent works of constitutional history as well as for primarily engaging with western scholars which blends with his rendition of decoloniality. Rawat also states that Sai Deepak has adopted a superficial approach while criticising concepts like constitutional morality and transformative constitutionalism, which require layered argumentation. Nonetheless, the author calls for engagement with the work.

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.

CCAL has hosted an online guest lecture with Mr. Arvind Narrain on the topic "*The Principle of Non-Retrogression and Queer Rights*". Mr Narrian elucidated the timeline of the evolution of Section 377 of the Indian Penal Code, 1860 right from 1994 to 2018. He further went on the analyse the judgment on its key aspects, namely the emphasis on Freedom to Choose

in the Intimate Sphere, expansive interpretation of Privacy and Dignity, and the recognition of the Right to Love. The discussion was based on the elaborate context of constitutional morality and the idea of transformative constitutionalism.

With the return to on-campus working, we replaced our lecture series with 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.

The first podcast was recorded with *Prashant Narang and Jayana Bedi,* the authors of the article titled "***Assessing State School Education Laws on Administrative Safeguards***" for CALJ Volume VI Issue II analysing seventy state education laws. 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. Our second podcast will be released in December 2022, where we are hosting *Aishwarya Singh & Meenakshi Ramkumar*, the authors of "***The Road Not Taken: India's Failure to Entrench Opposition Rights***". The authors discuss the importance of opposition in parliamentary democracies with special reference to South Africa.

The Centre, under the aegis of the *Department of Legal Affairs, Ministry of Law & Justice*, conducted an intra-university essay competition to commemorate the adoption of the Constitution of India on November 26, 1949. The essay competition was based on two themes, the first being *Women in Indian Constituent Assembly: Reflections on Diversity in Constitution Making* and the second *B.N Rau: The Unsung Architect of the Indian Constitution*.

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

This issue the editorial board of CALJ ("**Board**") faced a new challenge of shifting back to on-campus working in entirety. The Board has worked on the issue over the last four months with utmost dedication. The process was a learning experience for us and provided us with the opportunity to bond with the 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.) Poonam Pradhan Saxena 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—Falguni Sharma, Palak Jhalani, Garima Chauhan, Karunakar, Aditya Maheshwari, Vishnu M, Akshay Tiwari, Atharva Chandra, Ayush Mangal, Himanshi Yadav, Rachana R. Rammohan, Revati Sohoni, Siddhant Rathod, Siri Harish, Akshat, Anjali Sunil, Krishangee Parikh, Sinchan Chatterjee, Sonsie Khatri, Sourabh Manhar, Sri Janani & Tasneem Fatma—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.

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**.

Ayush Mehta & Prakhar Raghuvanshi
Editors-in-Chief

THE FUTURE OF EQUAL PAY IN SPORTS

SUMAN DASH BHATTAMISHRA[1] & RANGIN PALLAV TRIPATHY[2]

Over the last decade, there has been a steady and unmistakable rise in the popularity of women's sports and female athletes in general. Most of the viewership records for major women's sporting events have been set in the last decade. With increased attention to women's sports, there has also been heightened scrutiny on the pay gap which exists between men and women playing the same sport. While in some select sporting competitions, such as the All-England Tennis Championships (Wimbledon), women and men are now paid equal amounts of prize money, there still exists a significant difference between the financial incentives afforded to men and women. This paper looks at the feasibility of ensuring equal pay through the judicial process. We argue that a judicial route would involve greater hazards in the pursuit of equal pay. Instead, the pressure of public opinion and consequential changes in policy formulation by administrators present a better opportunity to mitigate the pay gap that exists between men and women. We further argue that even if judicial decisions favour the cause of equal pay, in the current climate, political mobilisation offers a more enduring solution than judicial intervention.

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INTRODUCTION

In July 2022, news broke[3] of a historic agreement between the New Zealand Cricket Association, the six Major Associations, and the New Zealand Cricket Players Association. Under this Master Agreement, male and female players will receive the same amount in match fee for both domestic and international matches.[4] Such an agreement is a first by any national cricket association. The significance of this agreement can be understood by looking into the extent to which the match fee for men and women differed prior to it. In 2019, the standard match fee for a male player playing in a One-Day International match and a T20 International match were $3682 and $2407 respectively.[5] At the same time, a female player received a match fee of $420 for One-Day International matches and $310 for a T20 match.[6] The disparity was even more glaring when it came to domestic matches. Prior to 2019, female players did not receive any match fee for domestic matches other than $55 as a non-travelling day meal allowance. At the same time, a male cricketer was paid $575.[7]

A couple of months before, in February 2022, an agreement between the U.S. Women's soccer team and the U.S. Soccer Federation brought to an end a legal dispute over equal pay that had spanned more than half a decade.[8] The U.S. Soccer Federation, through the Collective Bargaining Agreement, will offer men and women equal economic terms. In golf, the Australian Open started offering equal prize money to male and female golfers in 2022. To put it into perspective, in 2019, the female winner of

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[3] *The New Deal: Cricket's Ground-Breaking Agreement*, NZC (Jul. 5, 2022), https://www.nzc.nz/news-items/the-new-deal-cricket-s-ground-breaking-agreement.

[4] NZCPA, MASTER AGREEMENT 2022-2027: INFOGRAPHICS (2022), https://www.nzcpa.co.nz/uploads/3/8/5/8/38581077/agreement_infographic.pdf.

[5] Jacob Karimpan, *Salaries of Cricketers from Around the World*, CHASE YOUR SPORT BLOG (Aug. 18, 2020), https://www.chaseyoursport.com/Cricket/Salaries-of-Cricketers-from-around-the-world/1864.

[6] *Spotlight on Stark Gender Pay Gap in New Zealand Domestic Cricket*, WISDEN (Jan. 21, 2019), https://wisden.com/stories/womens-cricket/mcglashan-new-zealand-pay-inequality.

[7] *Id.*

[8] *US Women's Soccer Team Reach Landmark $24m Settlement in Equal Pay Battle*, THE GUARDIAN (Feb. 22, 2022), https://www.theguardian.com/football/2022/feb/22/us-womens-team-reach-landmark-24m-settlement-in-equal-pay-battle.

the Australian Open got prize money worth $1,95,000/-[9] whereas the male winner of the Australian Open got prize money worth $2,70,000/-.[10] In October 2022, the Board of Control for Cricket in India announced the offering of an equal match fee to male and female players in all kinds of international matches.[11] These developments on equal pay are encouraging signs of a change in the way women's sports is viewed by those who administer the sport.

At a time when there is greater recognition of the historical neglect towards women's sports in general, there is also a consequential push to ensure parity of remuneration for female athletes. There cannot be any doubt that two persons who do the same work of equal value for the same duration should be paid equally, regardless of gender. In legal parlance, this is articulated in the principle that equals should not be treated unequally.[12] The corollary to this principle is the rule that people in unequal positions should not be treated equally. To do either would be unfair and unjust. However, the challenges involved in ascertaining equality of circumstances are not always as simple and straightforward as one would like them to be. A straitjacket demand for equality misses the legal nuances and complexities involved in such disputes.

In this paper, the authors contend that judicial recourse to secure equal pay is likely to open further fault lines in the progressive movement towards addressing the historical neglect of women's sports and its accumulated effects. Instead, a more viable strategy might be to opt for political solutions, since such solutions will provide a more enduring transformation in the economic climate of women's sports.

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[9] *2019 ISPS Handa Women's Australian Open Purse, Winner's Share, Prize Money Payout*, GNN (Feb. 16, 2019), https://thegolfnewsnet.com/golfnewsnetteam/2019/02/16/2019-isps-handa-womens-australian-open-purse-winners-share-prize-money-payout-112439.

[10] *2019 Emirates Australian Open Purse, Winner's Share, Prize Money Payout*, GNN, (Dec. 7, 2019), https://thegolfnewsnet.com/golfnewsnetteam/2019/12/07/2019-emirates-australian-open-purse-winners-share-prize-money-payout-116650/.

[11] *Equal Pay for Men and Women Cricketers: How BCCI's Policy Compares with Other Countries Sports*, THE INDIAN EXPRESS (Oct. 29, 2020), https://indianexpress.com/article/explained/explained-sports/how-bccis-pay-equity-change-for-womens-cricket-compares-with-other-sports-8235148/.

[12] *See generally*, Air India v. Nargesh Mirza AIR 1981 SC 1829.

We first provide an overview of the fundamental elements of any legal claim for equal pay across a variety of jurisdictions and then present the challenges involved in complying with some of the elements in the area of sports. The study of challenges focuses primarily on the difficulties in proving the elements of 'equal work' and 'unequal pay'.

While discussion on the former is supported by rules on playing conditions in different sports, the case of *Morgan v. U.S. Soccer Federation Inc.*[13] forms the core around which the difficulties of proving 'unequal pay' have been analysed. In the final phase of our argument, we put forth the need to look beyond the law to solve the gender pay gap by highlighting the limitations of the legal system in sustaining enduring change.

TECHNICAL BOUNDARIES OF EQUAL PAY CLAIMS

Regardless of jurisdiction, any claim for equal pay would require some standard elements to be proved. *Firstly*, it needs to be proved that both men and women are engaged in the 'same work'. This would mean that the work performed by men and women demands the same degree of skill and efficiency. *Secondly*, it needs to be established that men and women are not receiving equal 'pay' for the same work. *Thirdly*, there has to be a determination that no other factor apart from 'gender' sufficiently explains the rationale for the different pay.[14]

For example, the Equal Pay Act, 1963 of the United States of America makes it illegal for any employer to pay lower wages to women when the work performed by women is similar to the one performed by men in terms of skills, effort, and responsibility.[15] Similarly, the Transparency in Wage Structures Act in Germany guarantees that men and women who do equal work or work of equal value will receive equal wages.[16]

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[13] Morgan v. U.S Soccer Federation Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020).

[14] Shamier Ebrahmin, *Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom*, 19 POTCHEFSTROOM ELEC. L. J. 1, 3 (2016). While Ebrahmin does not deal particularly with equal pay claims based on gender discrimination, the commonality of criterion across jurisdictions is evident.

[15] Equal Pay Act, 29 U.S.C., ch. 8 § 206(d) (1963).

[16] Transparency in Wage Structures Act, Jun 30, 2017, Vom. 30 (Ger.).

In South Africa, the Employment Equity Act[17] prohibits differential terms of employment between employees who perform the same or substantially the same work or work of equal value. In India, the Equal Remuneration Act provides that employees cannot be paid different wages if they are performing the same work or work of a similar nature.[18]

In this paper, the authors will not delve into the problem of sustaining an equal pay claim under the existing statutory framework in terms of the definitions of 'employer' and 'employee'. Instead, the focus is on the current understanding of the way in which proving the similarity of work and disparity in pay would be challenging when it comes to sports.

DETERMINING EQUAL WORK

Determining that men and women perform the same work when playing the same sport, depending on the sport, is inherently the trickier aspect of an equal pay claim. For example, the playing conditions prescribed by the International Cricket Council for men's and women's T20 games have significant variances. For women, the playing conditions prescribe[19] that the size of the boundary should be between 50.29 and 64 metres measured from the centre of the pitch.[20] Although the minimum size of the boundary is 50.29 metres, the playing conditions recommend a boundary size of 54.80 metres as a matter of preference.

For men,[21] the minimum boundary size is 59.43 metres, and the maximum boundary size is 82.29 metres.[22] Similarly, the weight of the ball used by women has to range between 140 and 151 grams, and the circumference

[17] The Employment Equity Act 55 of 1998 § 6(4) (S. Afr.).

[18] Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa, AIR 1987 SC 1282.

[19] ICC, ICC WOMEN'S TWENTY20 INTERNATIONAL PLAYING CONDITIONS, 2020, https://resources.pulse.icc-cricket.com/ICC/document/2021/01/12/95fcfe7b-02c0-4b3a-a5bf-8ad0dca69d55/Womens-T20I-Playing-Conditions-December-2020.pdf.

[20] *Id.*, at Cl. 19.1.3.

[21] *Id.*

[22] *Id.*, at Cl. 19.1.

has to be between 21.0 and 22.5 centimetres.[23] For men, the weight of the ball has to be a minimum of 155.9 grams and a maximum of 163 grams. The circumference has to be between 22.4 and 22.9 centimetres.[24]

It is important to contextualise this variance. The regulations regarding the weight and dimensions of the bats and the pitch remain the same for both men and women. Cumulatively, this framework of playing conditions makes the scoring of boundaries more attainable for women players by compensating for the gap between women and men in general in terms of physical attributes.

Table 1- Playing Conditions for Men and Women in International T20 Matches

Metric	**Men**	**Women**
Minimum Boundary Size	59.43 metres	50.29 metres
Maximum Boundary Size	82.29 metres	64 metres
Minimum Weight of The Ball	155.9 grams	140 grams
Maximum Weight of The Ball	163 grams	151 grams
Minimum Circumference of The Ball	22.4 cm	21.0 cm
Maximum Circumference of The Ball	22.9 cm	22.5 cm.

[23] ICC, ICC WOMEN'S TWENTY20 INTERNATIONAL PLAYING CONDITIONS, 2020, https://resources.pulse.icc-cricket.com/ICC/document/2021/01/12/95fcfe7b-02c0-4b3a-a5bf-8ad0dca69d55/Womens-T20I-Playing-Conditions-December-2020.pdf.

[24] ICC, ICC MEN'S TWENTY20 INTERNATIONAL PLAYING CONDITIONS (2021), https://resources.pulse.icc-cricket.com/ICC/document/2021/07/05/874a426e-fe06-4415-b0f5-5148a4aa0ef8/ICC-Playing-Conditions-05-Men-s-Twenty20-International-May-2021.pdf.

Let us also consider the situation in lawn tennis. As we have seen, in grand slam tournaments, women already receive the same prize money as men. The size of the tennis court is the same for men and women.[25] Also, there are no separate specifications for women when it comes to the dimensions of the tennis racket or the tennis ball. However, in grand slam tournaments, men play matches which are contested as the best of five sets, and women play matches which are contested as the best of three sets.[26] This difference in the number of sets per match also has a direct bearing on the duration of the matches involving men and women and on the physical demands that are involved in such matches.

The standard duration of a best-of-five-sets match played by men is significantly longer than the best-of-three-sets match played by women. For example, in the 2022 U.S. Open Grand Slam Tennis Tournament , while the average duration of matches between men was 2 hours and 52 minutes, the average duration of matches between women was 1 hour and 46 minutes.[27] Similarly, for men, the longest three matches in the same tournament clocked at 5 hours and 15 minutes,[28] 4 hours and 36 minutes[29] and 4 hours and 23 minutes.[30] For women, the duration was 3 hours and 12 minutes,[31] 3 hours and 10 minutes[32] and 3 hours and 5 minutes.[33]

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[25] Utathya Nag, *Everything You Need to Know About Tennis Courts*, OLYMPICS NEWS (Jun. 5, 2022), https://olympics.com/en/featured-news/tennis-court-markings-dimensions-size-types-variety-surface-hard-grass-clay.

[26] Whiteside D & Reid M, 12(6) *External Match Workloads During the First Week of Australian Open Tennis Competition*, INT'L. J. SPORTS PHYSIOL. AND PERFORM. 756, 757 (2016).

[27] Calculation based on data available at *US Scores Index*, US OPEN, https://www.usopen.org/en_US/scores/index.html?promo=subnav.

[28] *US Scores Men's Singles- Quarter Finals*, US OPEN, https://www.usopen.org/en_US/scores/stats/1503.html.

[29] *US Scores Men's Singles- Round 1*, US OPEN, https://www.usopen.org/en_US/scores/stats/1136.html.

[30] *US Scores Men's Singles- Round 3*, US OPEN, https://www.usopen.org/en_US/scores/stats/1308.html.

[31] *US Scores Women's Singles- Round 1*, US OPEN, https://www.usopen.org/en_US/scores/stats/2103.html.

[32] *US Scores Men's Singles- Quarter Finals*, US OPEN, https://www.usopen.org/en_US/scores/stats/2223.html.

[33] *US Scores Women's Singles- Round 3*, US OPEN. https://www.usopen.org/en_US/scores/stats/2316.html.

There is also evidence that the physical demands on men are qualitatively different than those on women.[34] Men endure greater physical strain during the course of a tournament, which is directly linked to the fact that they play longer matches because of the nature of the contest being the best of five sets.[35]

These differences in time and physical strain seem to have had direct impact on the competing capacities of men and women in terms of contesting both singles and doubles matches. Top-seeded women tennis players regularly compete for both doubles and singles titles in grand slams. The same is not true for men. To put things in perspective, Serena Williams, the most successful female player of the last two decades, has won 23 singles titles and 14 doubles titles in grand slam tournaments.[36] Many of the victories were in the same tournaments as well. In 2016, she won the Wimbledon title in both singles and doubles.[37] In 2009, she won the Australian Open in singles and doubles.[38] By comparison, Rafael Nadal, the most successful male player over the last two decades (22 singles titles), has never contested a doubles final in any of the grand slams.[39]

The loss of competing opportunities in the same competition has an obvious effect on the earning opportunities that men and women have access to.

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[34] Whiteside & Reid, *supra* note 26.

[35] *Id.*

[36] *Serena Williams: 23 Grand Slam Singles Titles and Much More*, TENNIS.COM (Aug. 9, 2022), https://www.tennis.com/news/articles/serena-williams-23-grand-slam-singles-titles-and-much-more.

[37] *Id.*; *Pause, Rewind, Play: When Serena Williams Went Level with Steffi Graf at Wimbledon 2016*, SCROLL.IN (Jun. 22, 2022), https://scroll.in/field/1026651/pause-rewind-play-when-serena-williams-went-level-with-the-great-steffi-graf-at-wimbledon-2016.

[38] Richard Aikman, *Serena Crushes Safina to Claim Fourth Australian Open Singles Title*, THE GUARDIAN (Jan. 31, 2009), https://www.theguardian.com/sport/2009/jan/31/australian-open-final-serena-2009.

[39] *Rafael Nadal- Events*, ULTIMATE TENNIS STATISTICS, https://www.ultimatetennisstatistics.com/playerProfile?playerId=4742&tab=events&level=G&result=W.

DETERMINING PAY DISPARITY

The other critical aspect of any equal pay claim is the calculation of 'pay' and the proof that it is not equal. The calculation of what constitutes pay is not always straightforward. 'Pay' is not always a consolidated and static amount. Rather, it may include several components, the value of which are dependent on dynamic parameters. The considerations involved in equalising pay in some of the components might not be applicable to the other components.

For example, in a case filed by the U.S. Women's Soccer players against the U.S. Soccer Federation for equal pay,[40] the term 'wage' was understood to include "*all forms of compensation whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance or some other name*". The court additionally held that wages also included fringe benefits such as medical, hospital, accident, and life insurance, retirement benefits, profit sharing and bonus plans, leave and other such components.

The recent developments on equal pay reflect the complexity of the concept of 'pay' as the supposed equalisation of pay generally happens only in limited components of the overall 'pay'. For instance, in relation to the equal pay agreement finalised by the New Zealand Cricket Association, while the match fee for every match played is the same for men and women, there is a substantial difference in terms of other components. The annual retainer that is paid to players is linked to the commercial value that they generate, and there are significant differences in the same with respect to male and female players. While the annual retainer of a top-ranked male player is more than $250,000, for a top-ranked female player, it is less than $63,000.[41] With the stark disparity in the revenue generated by male and female players, such gaps are likely to persist. Trying to equalise components of pay that are intrinsically linked to volatile and dynamic elements such as revenue, is not a financially sustainable model for any administrator. The fact that sports is a commercial commodity means that the norms within the world of sports are controlled fundamentally by

[40] Morgan v. U.S. Soccer Federation Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020).

[41] Master Agreement, *supra* note 4.

market realities. Efforts to pursue norms of social justice within the paradigm of market realities will always be subject to certain inherent limitations.

We can look at the fate of the Rooney Rule as a case in point. The Rooney Rule was introduced by the National Football League in2003. It mandated that while hiring a head coach, at least one person of colour had to be interviewed.[42] At the time of its introduction, it was hoped that this rule would lead to better representation of people of colour in leadership positions in management. However, its implementation has been marred by tokenism, and over a period of time, the representation of coloured people in management leadership has seen a backsliding.[43] The fate of the Rooney Rule reveals the contradiction of trying to fit principles of social justice into a for-profit environment controlled by private entities. In the end, sports administrators are managing business enterprises and their alignment with social justice principles is sustainable to the extent that it does not jeopardise their greater priorities of profit and freedom over critical decisions pertaining to their own businesses.

A. IMPLICATIONS OF THE MORGAN CASE

With the agreement reached between the U.S. Women's soccer team and the U.S. Soccer Federation, the appeal filed by the U.S. women soccer players against the decision of the Federal District Court judge in the Central District of California[44] became infructuous. While this development may have provided a satisfactory resolution to the parties directly involved in the dispute, it means that the nuances of the decision by the District Court did not have the benefit of appellate scrutiny. Thorough appellate scrutiny of the judgement would have provided us with a more crystallised understanding of the consequences of the reasoning

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[42] Scott Neuman, *Why a 20-Year Effort by the NFL Hasn't Led to More Minorities in Top Coaching Jobs*, NPR.ORG (Feb. 3, 2022), https://www.npr.org/2022/02/03/1075520411/rooney-rule-nfl.

[43] Gus Garcia-Roberts, *The Failed NFL Diversity 'Rule' Corporate America Loves*, THE WASHINGTON POST (Oct. 4, 2022), https://www.washingtonpost.com/sports/interactive/2022/rooney-rule-nfl-black-coaches/.

[44] Morgan v. U.S Soccer Federation Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020).

adopted by the Court, as the judgement has important implications for the discourse on the gender pay gap, especially in how 'pay' is to be calculated. The appellate process would have also provided us with a better assessment of the sustainability of judicial remedies to secure equal pay for women. However, the agreement between the U.S. Women's Soccer Federation and the U.S. Soccer Federation foreclosed the possibility of a more detailed elaboration of the contemporary judicial principles concerning equal pay jurisprudence and the feasibility of applying such principles in the domain of sports.

In this case, the claim for equal pay was filed under the Equal Pay Act, which prohibits discriminatory pay based on sex for equal work requiring equal skill, effort and responsibility under similar working conditions.

The suit was dismissed on the ground that there was no proof of any unequal wage. The Court dismissed the fulcrum of the case made by the women players as to how the wage was to be calculated for determining whether the pay was equal or not. Both men and women players are paid as part of the Collective Bargaining Agreement ("**CBA**"), which was negotiated between the U.S. Soccer Federation and the representatives of the Men's National Team ("**MNT**") and the Women's National Team ("**WNT**"). The agreement consists of different kinds of payments to which the players are entitled. The claim of the WNT was built around the bonus payments that men are entitled to for playing different kinds of matches which were lower for women. However, the Court rightly insisted that an equal pay dispute cannot be adjudicated by looking at only one component of the wage. In furtherance of the same, the Court looked into the totality of the financial deal secured by the WNT and found that they had actually received more money than the MNT, both cumulatively and on average, per game.

B. DIFFERENT KINDS OF 'PAY'

The Court found that in negotiating their wages under the CBA, the WNT knowingly prioritised fixed-pay aspects of the financial deal over incentivised bonuses. For example, the WNT wanted a minimum guarantee of payment regardless of the number of matches played by them. It meant that each player would be paid a minimum of $1,00,000 even if they have played less than 20 matches. The MNT's CBA had no such

guarantee. Written correspondence from the representatives of WNT clearly showed that they wanted some specific benefits from MNT's CBA but were not interested in the connected terms and conditions.

In other words, the WNT never wanted the same deal as the MNT. They wanted to pick and choose the terms in the MNT's CBA that they found to their liking and ignore the ones they did not want. For example, apart from the minimum assured guarantee of payment, the WNT's CBA had severance benefits, injury protection, health and dental insurance, guaranteed rest time, partnership bonuses tied to increased viewership, and other such provisions that did not form a part of the CBA negotiated by the MNT. In the words of the court, the WNT wanted all the upsides of the CBA negotiated by the MNT without having any of its drawbacks.

The Court categorised these different priorities within the broad domain of 'fixed pay' and 'performance pay' contracts. While the MNT's CBA had higher bonuses, they did not have the minimum assured guarantee of any kind of payment. Also characterised as a 'pay-to-play' agreement, this form of arrangement is mostly a high risk and high reward. With more matches and better performance, the players stand to earn handsomely but also stand to lose out if things do not remain rosy. The WNT's CBA, on the other hand, prioritised assured security of certain benefits. The WNT categorically rejected a CBA offer to them on the 'pay-to-play' arrangement and turned the assured minimum guarantee of monetary benefits into a cornerstone of their negotiation.

An argument made by the WNT was that in the period under consideration, they 'would have received' more money than they actually did if they had the MNT's CBA. However, in the period under consideration, the MNT would also have received higher pay than they actually did if they were governed by the WNT's CBA instead of their own. The MNT's CBA was predominantly a 'performance pay' contract wherein better performance would have meant better pay. However, in the period under litigation, the men performed horribly and even failed to qualify for the football World Cup. Thus, if they had the kind of 'fixed pay' terms as the women's CBA, they would have earned more. On the other hand, the women's team had a fantastic record and won the World Cup in 2019. Thus, if they had the 'performance-pay' terms as that of the CBA of men,

they would have also received more than they did under their own CBA. However, it was their choice to reject performance-pay terms and prioritise fixed-pay terms.

It is difficult to fault the judgement of the Court in terms of legal reasoning, although the political reaction to it was tinged with indignation.[45] The adverse reaction to the ruling of the Court highlighted how the judgement was assessed in terms of its political outcome and not on the basis of its legal soundness.[46]

A claim for equal pay cannot be ascertained by focusing only on some select components of the 'overall pay' and ignoring the rest of them. The financial agreement between the U.S. Soccer Federation and the U.S. Women's Soccer Team reflected the priorities of the women's soccer team. As the Court noted, the suit was an attempt to 'retroactively' impose the very terms that the women explicitly rejected while negotiating their CBA. The argument of the women players that they would have received more payment if they had the same terms as the men was based on the same false hypothesis of wanting to be governed by terms that they did not consider compatible with their priorities. The aftermath of the case also reflected on how failed judicial claims could diminish the political leverage that players may otherwise come to exert in their efforts to secure equal pay.[47] Ultimately, the collective pressure of the political climate was instrumental in the agreement that the U.S. Soccer Federation reached with its female players in February 2022.[48] The limitations of the judicial route to equal pay are laid bare by the fact that so far, this has been the only legal suit of its

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[45] *Biden Backs Women's Soccer Team after Lawsuit Setback*, REUTERS (May 3, 2020), https://www.reuters.com/article/us-soccer-usa-women-lawsuit-biden idUSKBN22E0S8.

[46] Alisha Ebrahimji, *Joe Biden Threatens to Cut US Soccer's World Cup Funding Unless Women Get Equal Pay*, CNN (May 2, 2020), https://edition.cnn.com/2020/05/02/us/biden-uswnt-equal-pay-trnd/index.html.

[47] Andrew Das, *Can U.S. Soccer and Its Women's Team Make Peace on Equal Pay?*, THE NEW YORK TIMES (May 2, 2020), https://www.nytimes.com/2020/05/02/sports/soccer/uswnt-equal-pay-women-soccer.html.

[48] Andrew Das, *U.S. Soccer and Women's Players Agree to Settle Equal Pay Lawsuit*, THE NEW YORK TIMES (Feb. 22, 2022), https://www.nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html.

kind, and no collective of women in any sport in any jurisdiction has found it prudent to pursue their objective of equal pay by approaching the courts.

LOOKING BEYOND THE LAW

An underestimation of the complexities involved in mounting a legal claim for equal pay in the domain of sports is likely to create further barriers to the objective of securing equal pay for women. It is important to acknowledge that legal claims are not the only way through which the goal of equal pay can be pursued. For example, while the agreement between the U.S. Soccer Federation and the U.S. women's soccer players was preceded by a bitter legal dispute, there was no legal dispute preceding the agreement between the New Zealand Cricket Association and the New Zealand women's cricket players. There was also no legal claim filed by female cricketers in India against the Board of Cricket Control for India. Similarly, no legal dispute preceded equal pay agreements that were finalised in Norway,[49] the Netherlands,[50] and Australia[51] in relation to women soccer players. A similar trend can be seen in lawn tennis. Back in 1973, the U.S. Open Tennis Championships became the first grand slam tournament to offer equal prize money to men and women. Then, in 2001, 2006 and 2007, the same policy was instituted in the other grand slam tournaments (Australian Open, French Open and Wimbledon). None of these measures required the intervention of the courts and was achieved without any legal claim being instituted in any forum.

Although recourse to law has been used as a method of achieving equal rights for women, feminists have sometimes objected to its use for securing this end on several grounds. For instance, Catharine A. MacKinnon argues that law and legal mechanisms are designed by people in power, who are usually men, and therefore these structures are likely to be oppressive

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[49] Aimee Lewis, *Norway's Footballers Sign Historic Equal Pay Agreement*, CNN (Dec. 14, 2017), https://edition.cnn.com/2017/12/14/football/norway-football-equal-pay-agreement/index.html.

[50] *Dutch Women Football Players to Earn the Same as Men in 2023*, DUTCHNEWS.NL (Jun. 4, 2019), https://www.dutchnews.nl/news/2019/06/dutch-womens-football-team-to-earn-the-same-as-men-in-2023/.

[51] *Matildas: Australia Women's Football Team in Landmark Pay Deal*, BBC NEWS (Nov. 6, 2019), https://www.bbc.com/news/world-australia-50311335.

towards women.[52] According to her, such laws endanger the rights of women even more by creating superficially objective rules and regulations that take no cognizance of women's struggles and experiences. In doing so, they not only perpetuate existing inequalities but also aggravate them.[53] MacKinnon's theory is opposed to the sameness-difference theory, which suggests that the rights of women across legal systems are determined with masculinity as the standard.[54] Therefore, the measure of such rights granted to a woman depends on whether she is situated in the same manner as a man or in a manner different from him. By using men as points of reference, the law, as well as law-makers, lose sight of women's unique and independent identity, thereby normalising social inequities.

Along the same lines, Carol Smart argues that feminists give up power to the legal machinery when they engage with it to solve their political problems.[55] In doing so, they fall into an unending trap of frustrations that comes either from feminism's inability to influence the law to change the lives of women or from the perennial pressures on feminism to make space for women within legal structures.[56] Thus, while the non-recognition of an equal space within the law and legal institutions becomes a disability for women, its recognition leads to an assertion of power over them.

THE POLITICAL PATH TO EQUAL PAY

Extraneous factors of an economic ecosystem are especially prominent in the way value is attached to a sport and the athletes playing the sport. When the economic value is tied to streams of revenue, questions of pay are not always linked to the quality of performance or other considerations. Instead, they are linked with the revenue the particular sport generates. When comparing jobs, the value of the work is as important as the nature of the work. Cricketers or footballers from various countries get different match fees from their boards not because they play a different game but

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[52] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 45 (Harvard University Press, 1988).

[53] *Id.*

[54] NANCY LEVIT ET AL., FEMINIST LEGAL THEORY: A PRIMER 20-25 (New York University Press, 2d ed., 2016).

[55] CAROL SMART, FEMINISM AND THE POWER OF LAW 27-41 (Routledge, 1st ed., 1989).

[56] *Id.*, at 21.

because of the commercial value of the team in question. Billie Jean King is rightly hailed as an icon for her efforts to secure equal prize money at the U.S. Open back in the 1970s. We need to remember that her efforts were backed by evidence that the women's game had grown in popularity.[57] She was also able to secure additional sponsorship for the tournament, which made it possible to increase the prize money for women.[58]

Thus, in sports, earnings depend more on viewership and sponsorship than on other factors, such as winning trophies. There are countless examples of teams and players sustaining economic prosperity amidst a wretched stretch of performance.[59] Earnings, as the *Morgan* case shows,[60] also significantly depend on the kind of bargain struck by the players. Within the narrow confines of equal pay claims, it would be difficult to offer a legal justification if women are paid less even after they generate similar revenue. That would be a case of equals being treated unequally. Similarly, it would be difficult to justify, within the current technicalities of the law, if they are to be paid equally when they do not generate similar revenue in terms of such components, which are dependent on the revenue streams.

At the same time, it is also true that the current state of market reality is built on the undeniable history of women's marginalisation and exclusion. The fact that the market for men's sports is more lucrative than the market for women's sports cannot be disassociated from the fact that men have been allowed to play professionally for much longer than women. Those who administer sports have invested much more in ensuring the success of men's sports compared to that of women's. The burden of that inheritance cannot be ignored by simply shifting the onus to market realities. It needs to be acknowledged that the popularity and consequential financial value of a particular sport is not simply about the intrinsic attraction of the sport but is built on extensive planning and investment.

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[57] Lindsay Gibbs, *Why Women Don't Play Best-of-Five Matches at Grand Slams,* THINKPROGRESS (May 27, 2016), https://thinkprogress.org/why-women-dont-play-best-of-five-matches-at-grand-slams-6458f5b803df/.

[58] *Id.*

[59] Stefan Szymanski, *Why is Manchester United so Successful?*, THINK AT LONDON BUSINESS SCHOOL (Jan. 30, 2012), https://www.london.edu/think/why-is-manchester-united-so-successful.

[60] Morgan v. U.S Soccer Federation Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020).

The more durable solution to the current gap in men's and women's sports lies in a systematic effort to redress historical neglect, by investing in the promotion of women's sports. There must be a concerted effort by the governing bodies in different sports to provide the women's games with the best possible opportunities to actualize their potential. Structural barriers to their growth should be removed. Women's sports need to be nurtured and allowed to grow on its own merits and terms so that it can operate as an independent, self-sustaining model. It would be wrong to presume that the only chance of equal pay that women have, lies in taking the question of revenue out of the equation because they cannot generate the same revenue as men. Such a guarantee of equal pay without the foundational upliftment of women's sports will always be perilous.

While the legal concept of equal pay for equal work is well-established, the application of this principle is nuanced in the arena of sports. Therefore, a better approach towards the problem would be to situate equal pay in sports as a political goal. In doing so, women will be able to overcome several hurdles that their dependence on legal structures and mechanisms may pose. For instance, they may be able to avoid the pitfall of laws that are aimed at being only nominal. Likewise, women may find that, despite a certain judgement being in their favour, it may be overturned by courts at some point. The precariousness of securing progressive steps for women primarily through judicial interventions is abundantly evident in the overturning[61] of *Roe v. Wade*,[62] which had assured the right to abortion for women in the United States.

Therefore, a political process based on a sustained generation of public opinion, collective action, the laying out of well-defined policies, and clear legislation would be a better method of accomplishing the goal of equal pay for both genders in sports and securing it for future generations, thereby making such rights more durable and unquestionable for women.

[61] Dobbs v. Jackson Women's Health Organisation, 2022 597 U.S. (2022).

[62] Roe v. Wade, 410 U.S. 113 (1973).

LAW, POLITICS, AND THE ERASURE OF THE SECULAR CONSTITUTIONAL IDENTITY OF INDIA

MANWENDRA TIWARI[1]

Secularism foregrounds the composite culture of Indian democracy. The secular values and ethos forming the constitutional identity, once considered indispensable for a plural society, are now at a crossroads. Neutrality and inclusivity are hallmarks of ensuring a secular democracy in a pluralistic society. The constitutional values of equality, secularism, and rule of law seem to have fallen between the cracks of social and political divisive forces. Law and politics are two significant tools that have fuelled the change in the secular constitutional identity of India. These distortions of our constitutional identity through the law and political acts have altered the fabric of Indian society. Laws prescribing against inter-faith marriages providing for the protection of cows, and political acts of displaying the Hindu religious rituals question the inclusive, secular, neutral and non-discriminatory spirit of the Indian Constitution. India stands divided, fragmented, and weak along these legal and political cracks.

The transformative aspiration of a secular polity, as envisaged by the Constitution, has had to confront the continuity of the non-secular and Hindu majoritarian polity over the years. Seventy years should be sufficient opportunity for the roots of the transformative secular agenda to take root, however, the contemporary political reality foregrounds the enormity of the challenge. What is worrying, though, is that non-political organs like the judiciary also appear to be inadvertently complicit in it by not insisting on the realisation of the constitutional promise of a secular Indian State. This paper argues that the rigidity underlying the continuity of constitutional identity as existential is hard to surpass, and therefore, the theory of constitutional identity cannot just confine itself to the textual promise of the constitutional text but must factor in the extent of acceptance of the constitutional promise within its fold.

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LAW, POLITICS, AND THE ERASURE OF THE SECULAR CONSTITUTIONAL IDENTITY OF INDIA

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INTRODUCTION

Discerning constitutional identity is a complex quest. The quest becomes even more complex when the constitution is transformational. A transformational constitution is aspirational and, therefore, futuristic and endeavours to transform the society from its parent state in accordance with the constitutional prescription.[2] The identity of the Constitution of India as a secular state is also a transformational prescription. The Constitution of India was drafted amidst the horrors of the partition of British India into India and Pakistan.[3] Religion was at the heart of this partition as Pakistan was created to assuage the apprehensions of Muslims who did not feel assured enough of united independent India's transformational promise into a secular State.[4] It is remarkable that despite the secession of Pakistan on religious grounds, independent India decided to not make it a Hindu State as opposed to a Muslim Pakistan.

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[2] *See* Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 at 101, 208; GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION xxiii (Oxford University Press 2019).

[3] Abhinav Chandrachud, *Secularism and the Citizenship Amendment Act*, *2020*, 4 IND. L. REV. 138, 141 (2020); *See also,* AZIZ AHMAD, STUDIES IN ISLAMIC CULTURE IN THE INDIAN ENVIRONMENT (Oxford University Press, 1964); SARAH ANSARI, LIFE AFTER PARTITION: MIGRATION, COMMUNITY AND STRIFE IN SINDH 1947-62 (Oxford University Press, 2005); Peter Gottschalk, *Religion, Science, and Scientism*, *in* RELIGION, SCIENCE, AND EMPIRE (Oxford University Press 2013); Sankaran Krishna, *Methodical Worlds: Partition, Secularism and Communalism in India*, 27 ALTERNATIVES 193 (2002).

[4] *See generally* Justice H. R. Khanna, *The Spirit of Secularism*, *in* SECULARISM IN INDIA: DILEMMA AND CHALLENGES (M. M. Sankdhar ed., 1992).

In India, secularism has been a tool for nation-building after the success of the anti-colonial movement to bring together the diverse groups in Indian society.[5] The promise of the secular nature of the Indian State was extraordinary as an idea of nation-building, and its moral appeal was certainly higher compared to the notion of the Islamic Republic of Pakistan as a homeland for Indian Muslims.[6] From *Sardar Taheruddin Syedna Saheb v. State of Bombay*[7] to *Valsamma Paul v. Cochin University*,[8] 'secularism' has been interpreted in religious tolerance, social stability,[9] inclusivity, integration, and neutrality tones.

Karl Klare describes 'Transformative Constitutionalism' in the context of the South African Constitution in the following words:

> "*By Transformative Constitutionalism, I mean a long-term project of constitutional enactment, interpretation and enforcement committed … to transforming a country's political and social institutions and power relations in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise introducing large-scale social change through a non-violent political process grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase "reform" but something short of different from "revolution" in any traditional sense of the word.*"[10]

According to Gary Jeffrey Jacobsohn, 'constitutional identity' represents "*a mix of aspirations and commitments expressive of a nation's past*", it also "*evolves in*

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[5] ROCHANA BAJPAI, DEBATING DIFFERENCE: GROUP RIGHTS AND LIBERAL DEMOCRACY IN INDIA 94 (Oxford University Press, 1st ed., 2011). For a brief historical and cultural background of Hindu-Muslim conflict in the dynamism of lived secularism in India, *see* RAGINI SEN, WOLFGANG WAGNER & CAROLINE HOWARTH, SECULARISM AND RELIGION IN MULTI-FAITH SOCIETIES: THE CASE OF INDIA (Springer, 1st ed., 2014).

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

[7] Sardar Taheruddin Syedna Saheb v. State of Bombay, AIR 1962 SC 853.

[8] Valsamma Paul v. Cochin University, AIR 1996 SC 1011.

[9] *See generally* Ashis Nandy, *The Politics of Secularism and the Recovery of Religious Toleration*, *in* SECULARISM AND ITS CRITICS (Rajeev Bhargava ed., Oxford University Press, 1998).

[10] Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150 (1998).

ongoing political and interpretive activities occurring in courts, legislature and other public and private domains."[11] Gautam Bhatia discusses the 'Transformative Constitution' as one "*that is consciously designed to transform not merely the existing legal and political system, but also the social and cultural structures that often undergird the law and politics of a society*."[12] The Indian Constitution is transformative as it attempts to make a substantive break with the nation's colonial and pre-colonial past in service of a substantive vision of equality.[13] After seventy-two years of the commencement of the Constitution, certainly, the conscious design by the framers must not be the only lens to examine India's constitutional identity. Its interpretation, enforcement, and evolution, both by the legislature and the courts, to understand its political and legal interpretation of the conscious design must be factored in to comprehend the constitutional identity as has been advocated by Klare and Jacobsohn.

The legal determination of constitutional identity may consider the actual state of the society, but it will largely remain focused on the constitutional assertion of the identity to be gathered from its holistic reading. However, constitutional identity refers to the entrenched, non-derogable nature of the Constitution, which is impervious to formal legal change.[14] The theory of constitutional identity is, therefore, at the heart of the identification of express or implied limits on the legislative powers given under a constitution to enable a constitutional amendment. The theory of entrenched unamendable basic structure, as applied by the constitutional courts of different countries to examine the constitutional validity of constitutional amendments, is based on the rationale that an amendment to the Constitution cannot destroy the essence of the basic structure of the constitution.[15] The theory of basic structure is, therefore, directly related to

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[11] Gary Jeffrey Jacobsohn, *Constitutional Identity*, 68 REV. OF POL. 361 (2006).

[12] Gautam Bhatia, *Freedom from Community: Individual rights, group life, state authority and religious freedom under the Indian Constitution*, 5 GLOBAL CONSTITUTIONALISM 351, 371 (2016).

[13] *Id.*

[14] Identity of a polity is more rooted in the extra-constitutional factors such as religion and culture than in the aspirational constitutional value. Nandy, *supra* note 9, at 364-365.

[15] YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 39 (Oxford University Press, 1st ed., 2017); RICHARD ALBERT,

the theory of constitutional identity which the formal process of a constitutional amendment cannot destroy.

Secularism is one such constitutional identity of the Indian Constitution.[16] It was not stated as an avowed objective in the Preamble of the Constitution when the Preamble was finalised on 26th November 1949. However, the Preamble was later amended by the 42nd Constitutional Amendment to expressly include it in the Preamble as a solemn resolve of "*We the people of India*" to constitute India into a "*Secular Republic*". The constitutional identity can be expressed or implied. Expressed constitutional identity would refer to the text of a constitution which makes certain provisions or principles enshrined in the constitution to be unamendable. The implied constitutional identity refers to the theory of constitutional identity where even in the absence of expressly recognised unamendable provisions or principles by the text of the constitution, certain limits are impliedly read owing to the fundamental principles enshrined in the constitution, which gives identity to the constitution.

However, in terms of the textual matrix, constitutional identity is not generally consistent. A constitutional order, regardless of its largely transformative promise, may still have provisions that are not in sync with the larger constitutional identity. This constitutional text may actually reflect the majoritarian sentiment.[17] The Constitution of India, despite its largely secular identity which is even avowed after the 42nd Constitutional Amendment, contains original provisions which are not coherent with the larger constitutional promise of India as a secular state.[18] Tarunabh Khaitan argues that the Indian Constitution focuses on political insurance for the ethnocultural minority, however, it also accords deference to the populist, illiberal groups who were part of the Constituent Assembly so that they

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CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING AND CHANGING CONSTITUTIONS 19 (Oxford University Press, 1st ed., 2019).

[16] *See* Upendra Baxi, *The Constitutional Discourse on Secularism*, *in* CONSTRUCTING THE REPUBLIC 211 (Upendra Baxi, et al. eds., 1999); Rajeev Bhargava, *What Is Secularism For?*, *in* SECULARISM AND ITS CRITICS (Rajeev Bhargava ed., Oxford University Press, 1988).

[17] *See also* PAUL R. BRASS, THE PRODUCTION OF HINDU-MUSLIM VIOLENCE IN CONTEMPORARY INDIA (University of Washington Press, 1st ed., 2005).

[18] *See generally* ANURADHA DINGWANEY & RAJESHWARI SUNDER RAJAN (EDS.), THE CRISIS OF SECULARISM IN INDIA (Duke University Press, 1st ed., 2007).

don't leave the negotiation table.[19] The Directive Principles of State Policy ("**Directives**") in the Constitution of India, apart from ensuring the prominence of socio-economic rights as a constitutional imperative, also serve as a place of accommodation for ideological dissenters.

Directives are the constitutional directives primarily addressed to the political organs of the State, i.e., the executive and the legislature. The ideological dissenters are encouraged to accept programmatic directives on the assumption that the political realisation of their agenda is a real possibility as it is constitutionally permitted.[20] The opportunity cost of this accommodation is difficult to determine.

In this article, the author will argue that secularism, as a promise of a transformative constitution, is also the product of contestation, as is evident from the above example. The legal requirement of the insistence on secularism as a normative ideal, masks the nature of contestation[21] around the concept. Continuity resists formal change and would only embrace a change that is organic. The accommodation of ideological dissenters in the directives, therefore, also reflects the rigidity of the real identity to resist formal change. Using the law and politics around protection of cows, and some of the judgments of the constitutional courts in India, the author will argue that secularism, as an ascribed constitutional identity of the Constitution of India, finds it hard to overcome the entrenched identity of the Indian polity.

THE LAW AND POLITICS OF COW PROTECTION

Tarunabh Khaitan argues that Dr. Ambedkar, in the Constituent Assembly, used instantiation as a strategy to temper the radical demand.[22]

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[19] Tarunabh Khaitan, *Directive principles and the expressive accommodation of ideological dissenters*, 16 INT'L. J. CONST. L. 389-420 (2018).

[20] *Id.*, at 403.

[21] *See generally* Christophe Jaffrelot, *A De Facto Ethnic Democracy? The Obliteration and Targeting of the Other: Hindu Vigilantes and the Making of an Ethno-State*, *in* MAJORITARIAN STATE: HOW HINDU NATIONALISM IS CHANGING INDIA (Angana P. Chatterji, Thomas Blom Hansen, & Christophe Jaffrelot eds., C. Hurst & Co. Publishers Ltd., 1st ed., 2019).

[22] Khaitan, *supra* note 19, at 409.

Instantiation, as a drafting strategy, is making a radical demand part of a more general and acceptable principle. It also attempts to give a general principle of the controlling role in determining the meaning of the drafted provision. Despite no "*constitutional immunity*"[23] from slaughter, cow slaughter and consumption of beef[24] is a "*highly volatile, emotive and politicised subject in India*."[25] The sacredness of cows and the complexities of the controversy around it involve cultural, socio-ethical, and religious tangents.[26] The demand for protection of the cow from slaughter was accordingly instantiated by the organisation of agriculture and animal husbandry. Article 48 of the Indian Constitution provides for a ban on the slaughter of cows as a directive.[27] The cow is generally revered by Hindus as sacred, but, at the same time, the constitutional directive puts it as a requirement to organise agriculture on scientific lines. According to Khaitan, the correct reading of Article 48 should be that the cow slaughter prohibition is required *only when* doing so is in service of organising agriculture and animal husbandry on modern and scientific lines.[28]

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[23] Upendra Baxi, *The Little Done, The Vast Undone - Some reflections on Reading Granville Austin's The Indian Constitution*, 9 J. IND. L. INST., 323, 347 (1967).

[24] *See* Kancha Ilaiah, *Beef, BJP and Food Rights of People*, ECO. & POL. WKLY. (1996); Shraddha Chigateri, *'Glory to the Cow': Cultural Difference and Social Justice in the Food Hierarchy in India*, *South Asia*, 31 J. S. ASIAN STUD., 10 (2008).

[25] Juli L. Gittinger, *The Rhetoric of Violence, Religion, and Purity in India's Cow Protection Movement*, 5 J. REL. & VIOLENCE, 131 (2017).

[26] For an insightful debate, *see* Marvin Harris, *The Cultural Ecology of India's Sacred Cattle*, 7 CURRENT ANTHROPOLOGY, 51 (1966); Frederick Simoons, *Questions in the Sacred Cow Controversy*, 20 CURRENT ANTHROPOLOGY 467(1979); Gyanendra Pandey, *Rallying Around the Cow: Sectarian Strife in the Bhojpuri Region*, *c. 1888-1917*, *in* SUBALTERN STUDIES, VOL II 60 (Ranajit Guha ed., Oxford University Press, 1983).

[27] INDIA CONST. art. 48 reads as "*The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle*."

[28] Khaitan, *supra* note 19, at 411. Thakur Dass Bhargava who introduced this clause in the Constituent Assembly for insertion in the Constitution insisted that he did not "*appeal to you in the name of religion; I ask you to consider it in the light of economic requirements of the country*" mainly a secure supply of milk. In its response, Syed Muhammad Saiadulla criticised the hypocrisy of the Hindu nationalists using pseudo-scientific arguments to mask to their religious motives, *see* 7 CONST. ASSEMB. DEB., Nov. 24, 1948, 570 (T. D. Bhargava), 7 CONST. ASSEMB. DEB., Nov. 24, 1948, 578 (S. M. Saiadulla). However, the seven-judge constitution bench of the Supreme Court of India in State of Gujarat v. Mirzapur Moti

However, a seven-judge bench of the Supreme Court of India, speaking through a 6:1 majority, has held:

> "*The second part of Article 48 enjoins the State, dehors the generality contained in its first part, to take steps, in particular, "for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.*"[29]

It is clear, therefore, that instantiation as a strategy, used by the framers of the Constitution, has not found favour with the Supreme Court of India, which has read the two parts of Article 48 disjunctively. The second part of Article 48, which prohibits the slaughter of cows, is to be read *dehors* the general mandate of the organisation of agriculture and animal husbandry on modern and scientific lines. The Supreme Court used Article 48 to justify a complete legislative ban on cow slaughter in the State of Gujarat. Interpreting Article 48, the Supreme Court observed that the article provides protection against the slaughter of cattle which have been seized to be milch or draught. The said words 'other milch and draught cattle' take colour from the words 'cows' or 'calves'. Therefore, apart from the slaughter of cows and calves, it also prohibits the slaughter of other milch and draught cattle.

In India, most states have banned the slaughter of cows, with Goa, Kerala, and some north-eastern States as the exceptions. Interestingly, most of the states which ban cow slaughter do not ban the slaughter of buffaloes. The ostensible façade of cow protection laws generally follows the logic underlying the first part of Article 48 referring to agriculture and animal husbandry. The exclusion of the protection from slaughter to buffalo is telling and reveals the fact that cow slaughter protection is for religious reasons. According to the National Dairy Development Board, India produces 176 million tons of milk but of that, about 100 million tons is

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Qureshi Kassab Jamat, (2005) 8 SCC 534, 594, 597 endorsed (6:1 majority) the economic rationale of this provision while endorsing a complete ban on cow slaughter by law.

[29] State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, (2005) 8 SCC 534.

buffalo milk.[30] Buffalo milk contains twice the fat of cow milk and is hence, more valuable.

More than laws banning cow slaughter, it is the politics around it and its socio-economic fallout which is at the epicentre of the discourse on cow slaughter. It is a perception among Hindus that Muslims are predominantly involved in the meat trade in India, including bovine meat. The states that are governed by the *Bharatiya Janata Party* ("**BJP**") government[31] have made laws banning cow slaughter more stringent.[32] In 2020, more than half of the arrests in Uttar Pradesh under the stringent National Security Act were related to cow slaughter.[33] More than the law, the politics over the beef ban and trade has led to violence against Muslims.[34] 85 percent of the people killed in cow-related violence since 2010 are Muslims and 97 percent of these attacks were after the Narendra Modi government came to power in India.[35] A Muslim scholar has argued that a theological denunciation of

[30] Aakar Patel, *The Dark Chronology of India's Cow Slaughter Laws*, ARTICLE 14 (Aug. 16, 2022), https://article-14.com/post/the-dark-chronology-of-india-s-cow-slaughter-laws.

[31] *See* Ishan Marvel, *In the Name of the Mother*, THE CARAVAN (Sept. 2, 2022), https://caravanmagazine.in/reportage/in-the-name-of-the-mother.

[32] *See* The Haryana Gauvansh Sanrakshan and Gausamvardhan Act, 2015, No. 20, Acts of Haryana State Legislature 2015. The law provides for a maximum punishment of 10 years imprisonment for slaughter of cows.

[33] Manish Sahu, *In Uttar Pradesh More than Half of NSA Arrests This Year Were for Cow Slaughter*, THE INDIAN EXPRESS (Jul. 27, 2022), https://indianexpress.com/article/india/in-uttar-pradesh-more-than-half-of-nsa-arrests-this-year-were-for-cow-slaughter-6591315/#:~:text=More%20than%20half%20of%20these,of%20them%20for%20cow%20slaughter.

[34] *See* David Barstow & Suhasini Raj, *Indian Muslim, Accused of Stealing a Cow, Is Beaten to Death by a Hindu Mob*, NEW YORK TIMES (Sep. 2, 2022), https://www.nytimes.com/2015/11/05/world/asia/hindu-mob-kills-another-indian-muslim-accused-of-harming-cows.html.

[35] *86% killed in Cow-Related Violence since 2010 are Muslim, 97% Attacks after Modi Govt. Came to Power*, HINDUSTAN TIMES (Aug. 22, 2022), https://www.hindustantimes.com/india-news/86-killed-in-cow-related-violence-since-2010-are-muslims-97-attacks-after-modi-govt-came-to-power/story-w9CYOksvgk9joGSSaXgpLO.html.

cow slaughter is imperative for the peace and self-preservation of Muslims in India.[36]

Nepal is the only Hindu-majority country, along with India, and in terms of cow protection, provides an interesting parallel. Nepal's 2015 Constitution, while declaring the State secular, continues to grant Hinduism a privileged place and defines the cow as the national animal[37] of Nepal.[38] The Constitution of India of 1950 and the current Constitution of Nepal of 2015 define the State as secular but give the cow a privileged position under the Constitution. However, the link between the cow and Hinduism is not explicit in both the Constitutions.[39] Nepal is an example of "*State framed nationalism*", whereas India instead represents the "*oppositional anti-colonial nationalism*".[40]

Cow protection law is a significant parallel between India and Nepal - two countries with around 80 percent of the Hindu population. India, as a secular nation with no privileged position to Hinduism in its laws, has a constitutional directive mandating a complete ban on cow slaughter, irrespective of the age and utility of cows. Nepal, as a constitutionally mandated secular nation, also bans cow slaughter. This reiterates the rigidity of the identity argument about constitutional identity. Two constitutions with the transformative prescriptive promise of the secular identity are unable to articulate this proclaimed identity in unequivocal terms. This equivocation dilutes even the prescriptive transformative promise of the two constitutions. The normative standard of secularism as a value becomes nebulous by the text of the same constitution and exhibits the contested constitutional reality of secularism.

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[36] Najmul Hoda, *Cow and Conciliation*, THE HINDU (Jun. 19, 2022), https://www.thehindu.com/opinion/op-ed/cow-and-conciliation/article34022009.ece.

[37] NEPAL CONST. art. 9.

[38] Mara Malagodi, *Holy Cows and Constitutional Nationalism in Nepal*, 80 ASIAN ETHNOLOGY 93 (2021).

[39] *Id.*, at 96.

[40] *Id.*, at 97. *See also* WILLIAM GOULD, HINDU NATIONALISM AND THE LANGUAGE OF INDIA (Cambridge University Press, 2004).

HINDU RELIGIOUS RITUALS IN PUBLIC EVENTS

On 11th July 2022, the Prime Minister of India unveiled a 6.5-metre-tall national emblem of India, i.e., Ashok Stambh, atop the under-construction building of the Parliament of India.[41] It was followed by a formal puja by the Prime Minister amidst the chant of Sanskrit shlokas by the Hindu priests. It is important to note that on such occasions, public events of inauguration or foundation laying ceremonies in India, invariably the Hindu puja is performed by the constitutional functionary. Once an important question in this regard was raised before the Gujarat High Court, the question was – whether the offering of prayers at the "*foundation laying ceremony*" called in the popular language "*Bhoomi Pujan*" for the construction of the new building could be said as a non-secular activity.[42] The said *Bhoomi Pujan* in this case was conducted by the High Court in the presence of the judges of the High Court. The petitioners contended that offering prayer in the presence of pandits who chanted Sanskrit shlokas during the event could be termed as the identification of High Court judges who are constitutional functionaries with the Hindu religion. Such an act may hurt the feelings of non-Hindus and such an act is, therefore, non-secular and must be declared unconstitutional. It was emphasised that such an act must be seen from the prism of the fact that secularism is the basic feature of the Indian Constitution.

The Gujarat High Court while rejecting the petitioner's argument held that "*Bhoomi Pujan*" is an act of celebrating the foundation of the building and therefore, a non-secular act. Such an act is for the benefit of all persons, irrespective of caste, religion, and community. Such an act, therefore, cannot be termed a non-secular activity, if "*Manav dharma*" is to be understood in the real sense. The ultimate purpose of offering prayer is the successful construction of the building, irrespective of caste, community or religion. According to the High Court, such an act would fall within the expression "*Vasudeva Kutumbakam*", i.e., welfare to all and hurt to none. The court found the argument of Hindu prayers could hurt the sentiment of non-Hindus, a "*pervert view*". It also held that the prayers offered are not

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[41] *PM Modi Unveils the National Emblem on New Parliament Building*, THE HINDU (Jul. 11, 2022), https://www.thehindu.com/news/national/pm-modi-unveils-national-emblem-on-new-parliament-building/article65626424.ece.

[42] Rajesh Himmatlal Solanki v. Union of India, 2011 SCC OnLine Guj. 1079.

essential or integral to the Hindu religion. Thus, the act can, in no manner, be termed a non-secular act. The court dismissed the petition by imposing a fine of Rs. 20,000/-.

Apart from the decision, the judgement is extraordinary for its bizarre reasoning. The question raised by the petitioner was not whether the prayers were for the successful construction of the building or not. The petitioner also did not mean that offering Hindu prayers would mean that the building is exclusively for Hindus. Abhinav Chandrachud, a scholar and lawyer, has argued that this judgement contributes to the tacit endorsement of Hinduism in India's secular state.[43] The court's reasoning is problematic as equally well-meaning prayers could have been offered by a Muslim, Christian, Sikh, Jain, or Buddhist priest. Ideally, an all-encompassing mode of worship involving the priests of all the major religions of India could have been an ideal way to mark the occasion. Otherwise, the court could have justified its decision by saying that the Hindu prayers on a *Bhoomi Pujan* are a cultural expression embedded in the history of India, and hence it is not a religious or Hindu prayer for the purposes of the Constitution of India. This argument would have meant a preference for the nature of India as a civilisational state signifying the predominance of Hindu culture as Indian, as opposed to the nature of the Indian State as a constitutional republic mandating a secular state. Problematic, notwithstanding, the court would have at least addressed the petitioner's arguments. But the court chose to completely sidestep the issue.

Article 4(1) of the Constitution of Nepal declares Nepal to be "*an independent, indivisible, sovereign, secular, inclusive-democratic, socialism-oriented federal democratic republican State.*" However, the explanation of this provision says that secular means the "*protection of religion and culture being practised since ancient times and religious and cultural freedom.*" Hence, the protection of religion and culture practised since ancient times, i.e., the Hindu religion and largely the Hindu culture is the meaning of secularism in Nepal. The Constitution

[43] Abhinav Chandrachud, *How India's Laws Made It a 'Hindu-Secular' State*, THE QUINT (Dec. 5, 2018), http://www.thequint.com/amp/story/voices/opinion/how-indias-laws-made-it-a-hindu-secular-state#read-more.

of Nepal, alongside the textual commitment to secularism grants special protection to Hinduism.[44]

Therefore, a religious ritual and prayer at a public event are justified in Nepal in accordance with its Constitution. But in India, the transformative promise of secularism is without any privileged place to Hinduism. The Indian approach, in the absence of a constitutionally privileged position to Hinduism, may appear contrary to the secular credentials of the Constitution of India, whereas a similar approach in Nepal would be termed consistent with the Constitution of Nepal. This conclusion is based upon the expressed heightened normative value to the ascribed constitutional identity by the framers. The argument of constitutional identity as continuity could easily explain this ostensible paradox under the Constitution of India. The equivocation in the Nepalese Constitution gives legitimacy to such acts, whereas the absence of equivocation in the Indian Constitution in this respect makes it constitutionally a suspect. But significantly, the origins of equivocation in the case of India have shifted from the framers of the Constitution to the judges of the Constitutional court. This exemplifies the rigidity in constitutional identity and the obstacles in the realisation of the transformational promise. It is also important to note that the Nepalese Constitution is of 2015 and the evolution of Indian practice would have certainly influenced it.

THE LAW AND POLITICS OF RELIGIOUS CONVERSIONS

In 1977, a constitution bench of the Supreme Court of India held that the right to profess religion under Article 25(1) of the Constitution of India does not include the right to convert someone by force, fraud or undue influence.[45] The Supreme Court, in this case, went further and held that the right to propagate religion did not include the right to convert a person, even if the conversion proceeded voluntarily. The Supreme Court of India while restricting the right of a religious preacher, here, also restricted the right of the listener to hear her conscience and convert to religion by listening to the preacher.[46] In the Constituent Assembly, the term

[44] Malagodi, *supra* note 38, at 94.

[45] Rev. Stainislaus v. State of Madhya Pradesh, (1977) 1 SCC 677.

[46] ABHINAV CHANDRACHUD, REPUBLIC OF RELIGION: THE RISE AND FALL OF SECULARISM IN INDIA 44 (Penguin Viking, 2020).

'propagate' was a subject matter of debate.[47] Amendments were proposed in the Constituent Assembly to delete the word but finally, the amendments were rejected. The rejection was mainly because of the understanding that the propagation of religion is, in any case, covered by the freedom of speech and expression. The judgement of the Supreme Court interpreted propagation under Article 25(1) in a manner that took away the freedom of speech and expression under Article 19(1)(a) to propagate religion. The right under Article 25(1) would now mean profess, practise, but do not propagate.[48]

The Constitution of Nepal, while referring to the right to religious freedom, provides that each person shall be free to profess, practice and preserve their religion according to their faith.[49] The use of the word 'preserve' in place of 'propagate' is significant. Preserve has a connotation which is opposite to the word propagate. Propagation would literally mean increasing the number of believers in the faith, whereas, preserving would mean resistance to conversion. Further, the same provision of religious freedom says that while exercising the rights as provided for by this Article, no person shall convert a person of one religion to another religion or disturb the religion of people.[50] It further says that such an act shall be punishable by law. So, religious conversion is banned by the Constitution of Nepal, and it has been made a punishable offence. Clearly, Nepal has learned from India. A law laid down by the Supreme Court of India is the law of the land and therefore, on the issue of conversion and freedom of religion also, India and Nepal converge. It shows how a transformative identity remains a work in progress for a constitution, where the identity as continuity is entrenched and rigid.

This rejection by the Supreme Court of India to include the right to convert under the ambit of the word propagate under Article 25(1) of the Constitution of India has a legal justification that the laws enacted banning conversion on account, of fraud, coercion or allurement have a direct

[47] *Id.*, at 33-35.

[48] *Id.*, at 23.

[49] NEPAL CONST. art. 26(1).

[50] NEPAL CONST. art. 26(3).

bearing on public order which is ground to subject the right of religious freedom under the provision along with morality and health. The recent legislations[51] in the states of Uttar Pradesh and Madhya Pradesh ostensibly, on the political narrative of the fight against the "*love-jihad*" i.e., the belief that Muslim men are marrying adult, but gullible Hindu women, solely for converting them to the Islamic faith, have taken the meaning of the conversion under the term propagation to another level.[52] Significantly though, the legislation does not use the word "*love-jihad*". This political narrative though has been couched in the following terms legally under the law –

> "*Any marriage which was done for the sole purpose of unlawful conversion by the man of one religion with the woman of another religion either by converting himself/ herself before or after marriage, or by converting the woman before or after marriage, shall be declared void by the Family Court …*"[53]

So, marriage for the sole purpose of unlawful conversion is void under this law. The political narrative is very much built into the structure of law. The law practically rules out the possibility of a party to an impending interfaith marriage to convert to the religion of the other party to be able to solemnise a religious marriage as per the rituals of the marriage of a religion. However, what is noticeable is that even after marriage the conversion of a spouse may make the marriage void. It is a social fact that invariably in India, the girl would convert to the religion of her husband as socially her identity

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[51] For a comparative glimpse into such legislations in various states in India, *see* Vidharti Rao, *Anatomy of Anti-Conversion Legislation in India: A comparative Look at State Laws*, THE INDIAN EXPRESS (Aug. 16, 2022), https://indianexpress.com/article/political-pulse/anti-conversion-laws-himachal-up-karnataka-comparison-8092477/.

[52] In Shafin Jahan v. Ashokan K. M., (2018) 16 SCC 368, 397, 398, the Supreme Court of India debunked this narrative in one such matter where the constitutional right of a 24-year-old girl of Ezhava (part of Hindu) community in Kerala to marry a person of her own choice, who had converted to Islam and married a Muslim man out her own volition, was reiterated. The three-judge bench of the Court in this case unanimously set aside the decision of the Kerala High Court which had declared her marriage null and void while adjudicating a habeas corpus petition filed by the father of the girl. Justice Chandrachud in his concurring opinion lamented that the liberty and dignity of the girl in question has suffered judicial affront at the hands of Kerala High Court. The Kerala High Court had observed that the girl is weak, vulnerable, and capable of being exploited.

[53] The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, § 6, No. 3, Acts of Uttar Pradesh Legislature, 2021.

gets merged with the identity of her husband, severing her identity with her parents. Hence, even though the legal provisions are religion and gender-neutral, it very much follows the political objectives of the ruling political right. Significantly, conversion by a person to his or her immediate previous religion is not conversion under the Act. This is based on another political narrative of '*ghar wapsi*', i.e., non-Hindus, mainly Muslims, whose ancestors converted to Islam as Hindus should come back to the fold of Hinduism.[54] It is important to note that 'immediate previous religion' is based on the assumption that invariably it will be to Hinduism, making conversion to Hinduism, not conversion. Practically, the law is meant to ensure that a Hindu woman must find it very difficult to convert to the religion of her husband, whereas a Muslim woman can easily convert to Hinduism to marry a Hindu man. Likewise, a Muslim man can convert to Hinduism to marry a Hindu woman.

Marriage for the sole purpose of unlawful conversion is void. For the conversion to be lawful, stiff conditions of a formal declaration to the District Magistrate, at least 60 days in advance, are required.[55] The person who has to perform the religious conversion must inform the District Magistrate at least 30 days in advance when the conversion ceremony is to be performed.[56] The District Magistrate will get the matter inquired by the police about the real purpose, intention, and cause of the conversion.[57] Conversion without following the procedure would render the conversion void and it is also a punishable offence.[58] The Act makes no mention of public order, which is the constitutional basis to restrict the right to propagate religion. The Supreme Court of India (while declaring that the right to propagate does not include the right to convert) accepted the

[54] The argument is based on the provision that conversion from Hinduism to Islam would be prohibited but that from Islam to Hinduism is permitted. The argument follows the provision which provides for it. The legislative intent can be inferred from the provision that has been referred to.

[55] The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, § 8(1), No. 3, Acts of Uttar Pradesh Legislature, 2021.

[56] *Id.*, § 8(2).

[57] *Id.*, § 8(3).

[58] *Id.*, §§ 8(4), 8(5).

argument that the propagation of religion by conversion would lead to disruption of public order.[59]

The argument of conversion leading to disruption of public order is based on the low threshold of the Indian society to tolerate the acts of propagation leading to conversion, but the anti-love-jihad law simply prohibits conversion by marriage without going into the argument of public order. The avowed logic here is still unlawful propagation, but marriage resulting in conversion is not *per se* a public order issue. It can only be covered under the exception of 'morality' under Article 25(1). But the morality underlying Article 25(1) must be the transformational constitutional morality and not the continuously existing social morality. The law infantilizes women by denuding them of their agency. The legislation, therefore, is constitutionally suspect but a judicial declaration on its constitutionality is still awaited.

THE CITIZENSHIP (AMENDMENT ACT) 2019

Under the Citizenship Act, 1955 of India, there are multiple routes to citizenship: birth, descent, registration, naturalisation, and acquisition of a foreign territory. In 1985, the Citizenship Act was amended to give effect to the Assam Accord struck between the Indian Government and the leaders of Assam good eve Agitation who were opposed to voting rights being given to illegal migrants from Bangladesh. Under this amendment, the people who arrived in Assam from Bangladesh prior to 1 January 1966 and resided in Assam were eligible to get an Indian citizenship and those who came on or after that date, but prior to 25 March 1971 (beginning of the Bangladesh war), were eligible to get the Indian citizenship without voting rights for the next 10 years and even voting rights after that if they remained in Assam.[60] Anyone who came to Assam after that date was to be deported. However, this provision was not enforced seriously until the Supreme Court took it up to expedite the process of its enforcement in *Assam Sanmilita Mahasangha* v. *Union of India.*[61] After this, the Government of India issued a notification which stated that the members of certain

[59] CHANDRACHUD, *supra* note 46.

[60] The Citizenship Act, 1955, § 6A, No. 57, Acts of Parliament, 1955.

[61] Assam Sanmilita Mahasangha v. Union of India, (2015) 3 SCC 1.

minority communities in Bangladesh and Pakistan viz. Hindus, Sikhs, Buddhists, Jain, Parsis and Christians who were "*compelled to take shelter in India due to religious persecution or fear of religious persecution*", and who entered India before 31 December 2014 could not be deported for illegally entering India or overstaying.[62] In the list of countries, Afghanistan was later added along with Bangladesh and Pakistan.[63]

A National Register of Citizens ("**NRC**") was prepared in 1951 in India. It was not a public document though.[64] In a series of orders, the Supreme Court of India ensured that a court-monitored exercise to prepare the NRC is undertaken in Assam.[65] The court-monitored NRC exercise in Assam resulted in 19,06,657 getting excluded from the list of citizens, while 3.11 crore made it to the list.[66] Against this backdrop, the Citizenship (Amendment) Act, 2019 ("**CAA**") was enacted. The CAA provided a path to citizenship to the identified minority communities.[67] It enabled them to apply for citizenship by registration or naturalisation by relaxing the residence norms. A person who applies for citizenship by naturalisation, generally, must be a resident of India for a twelve-month period prior to the date of his application. Further, the applicant must be a resident of India for 11 out of 14 years prior to the above twelve months period.

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[62] Passport (Entry into India) Amendment Rules, 2015, G.S.R. 685(E), https://indianfrro.gov.in/frro/Notifications_dated_7.9.2015.pdf.

[63] Ministry of Home Affairs Notification G.S.R. 702(E) and 703(E), http://egazette.nic.in/WriteReadData/2016/170822.pdf.

[64] Anil Roychoudhary, *National Register of Citizens, 1951*, 16 ECO. & POL. WKLY (1981).

[65] *See* Assam Sanmilita Mahasangha v. Union of India, (2015) 3 SCC 1; Assam Sanmilita Mahasangha v. Union of India, (2019) 9 SCC 79; Assam Public Works v. Union of India, (2017) SCC Online SC 1885; Assam Public Works v. Union of India, (2018) SCC Online SC 3366; Assam Public Works v. Union of India, (2018) 9 SCC 229; Assam Public Works v. Union of India, (2018) SCC Online SC 1014; Assam Public Works v. Union of India, (2019) 9 SCC 70.

[66] *Over 19 Lakh Excluded, 3.1 Crore Included in the Assam NRC Final List*, HINDUSTAN TIMES (Jun. 20, 2022), https://www.hindustantimes.com/india-news/assam-nrc-1-9-million-names-excluded-from-final-list/story-KOlZwevNzXlKgrhpbDZvlO.html.

[67] The Citizenship Act, 1955, § 6, No. 57, Acts of Parliament, 1955.

However, under the CAA, the residence requirement for the identified community members has been reduced to five years.[68]

The promise of the right to equality under Article 14 is also available to the non-citizens of India.[69] The premise of a transformative agenda of secularism is challenged[70] by the fact that CAA excludes, religious communities like Jews, Bahais, Zoroastrians who are not Parsi by race, Muslim minorities like Ahmediyas and Shias, and even atheists and agnostics, may have been persecuted in Bangladesh, Pakistan and Afghanistan on the grounds of religion.[71] Further, 'illegal migrants' from other neighbouring countries like Rohingya Muslims of Myanmar have also fled to India because of religious persecution.

Moreover, the identified communities in the CAA may have also faced religious persecution in countries like Nepal, Bhutan, and Sri Lanka, but the CAA does not fast-track their citizenship as it does for the identified communities in Bangladesh, Pakistan, and Afghanistan.[72] The object and reasons of CAA state that the identified communities may have suffered religious persecution in those countries.

This argument also stems from the fact that Islam is the State religion in these three countries. But religious persecution can occur even in states without any defined State religion. Further, the other neighbouring

[68] The Citizenship Act, 1955, sch. III, cl. (d) as amended by the Citizenship Amendment Act, 2020.

[69] *See generally* Abhinav Chandrachud, *supra* note 3.

[70] *See* Niraja Gopal Jayal, *Reconfiguring Citizenship in Contemporary India*, 42 S. ASIA J. OF S. ASIAN STUD. 33 (2019); Mihika Poddar, *The Citizenship (Amendment) Bill, 2016: international law on religion-based discrimination and naturalisation law*, 2 IND. L. REV. 108 (2018); Suhrith Parthasarthy, *Why the CAA Violates the Constitution*, THE INDIA FORUM, (Aug. 30, 2022), https://www.theindiaforum.in/article/why-caa-violates-constitution.

[71] Chandrachud, *supra* note 3, at 151.

[72] *See* Jaideep Singh Lalli, *Communalisation of Citizenship Law: Viewing the Citizenship (Amendment) Act 2019 Through the Prism of the Indian Constitution*, 3 UNIV. OXF. HUM. RTS. HUB J. (2020).

countries such as Nepal,[73] Myanmar[74] and Sri Lanka;[75] may not have a state religion but Hinduism in Nepal, and Buddhism in Myanmar and Sri Lanka possesses a heightened significance. Additionally, religious persecution can still happen in a country which has the transformative constitutional goal of secularism. Again, the selection of countries with Islam as a State religion also suggests an insidious political design of levelling the neighbouring Islamic countries and implied vilification of Islam and its followers there. There is no intelligible reason why the CAA excludes the categories mentioned, and there is no rational nexus with the object of protecting minorities in Islamic countries as proclaimed by the CAA.[76] The Assam Accord, which was an agreement between the Government of India and the leaders of the Assam Agitation, was only about the migrants of Indian origin who came to Assam from Bangladesh.

SUPREME COURT'S AYODHYA (RAM JANMABHOOMI TEMPLE CASE) JUDGEMENT

The Supreme Court of India on 9th November 2019 brought an end to the legal battle over the *Babri Masjid/Ram Janmabhoomi* site.[77] Importantly, it also brought to an end the vicious politics over the issue which was always at the centre stage of the Indian political landscape since 1986 when the

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[73] *See* 2021 Report on International Religious Freedom in Nepal by the United States of America's State Department, (Jun. 02, 2022), https://www.state.gov/reports/2021-report-on-international-religious-freedom/nepal/.

[74] The persecution of Rohingya Muslims in the State of Myanmar has drawn widespread global criticism of the Myanmar State. Gambia brought a case against Myanmar on 11 November 2019 for its treatment of Rohingya Muslims at the International Court of Justice. *See* The Republic of Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the court to indicate provisional measures, (Nov. 19, 2019), https://www.icj-cij.org/public/files/case-related/178/178-20191111-PRE-01-00-EN.pdf. The International Court of Justice on July 22, 2022, ruled that it has jurisdiction to entertain the application of the Republic of Gambia under the Convention on the Prevention and Punishment of the Crime of Genocide, (Jul. 22, 2022), https://www.icj-cij.org/public/files/case-related/178/178-20220722-PRE-01-00-EN.pdf.

[75] *See* BENJAMIN SCHONTHAL, BUDDHISM, POLITICS AND THE LIMITS OF LAW: THE PYRRHIC CONSTITUTIONALISM OF SRI LANKA (Cambridge University Press, 2016).

[76] Chandrachud, *supra* note 3, at 154.

[77] M. Siddiq v. Mahant Suresh Das, (2020) 1 SCC 1.

idol of the *Ram Lalla Virajman* (Lord Ram as a child) was opened for worship of Hindu devotees. The 5-judge Constitution bench of the Supreme Court of India unanimously decided that the title of the suit belonged to *Ram Lalla Virajman*. The Court did not stop there, it further ordered the construction of a temple at the site using its powers under Article 142 of the Constitution of India to do complete justice. It even used this power of the Court to order that the Muslims (Central Sunni Waqf Board) be given 5 acres of land in Ayodhya at a separate place for the construction of a mosque by the Government.

The use of Article 142 in the aforesaid manner ostensibly brings out a very equitable approach of the Supreme Court, but the engagement with the reasons advanced by the Court to decree the title suit in favour of the Hindu side raises questions about the way the decision was arrived at. Notably, in this case, the five judges of the Court wrote a unanimous verdict and there is no one author of the judgement. However, there is a separate opinion (addenda) also annexed with the main unanimous judgement which is stated to be the opinion of one of the judges of the bench, whose name has not been disclosed. The addenda are mainly about the point that the Hindus believe that the site is the birthplace of Ayodhya. Significantly, the main judgement proclaims that faith cannot be the basis to determine the title over the property. However, the main judgement itself is riddled with inconsistent averments. The main judgement says that the report of the Archaeological Survey of India ("**ASI**") about the site cannot be the basis to determine the claim of Hindus that the Babri Masjid was constructed by the Mughal emperor Babar after demolishing the Hindu temple, yet it cites the ASI report to conclude that Babri Masjid was not constructed on vacant land and the underlying structure was not of Islamic origin.[78]

What is extraordinary about this judgement is that the Supreme Court chose to ignore the decision of the British who, in the year 1856-57, had decided to bifurcate the property between Hindus and Muslims. The British government had given the inner courtyard to Muslims where Babri Masjid existed, and the outer courtyard was given to the Hindus, along with passage to the inner courtyard to Muslims. The outer courtyard included

[78] *Id.*, at 544.

the sites like *Ram Chabutra* which was earlier believed to be the birthplace of Lord *Ram* and *Sita Rasoi*. But the Hindu attempts of forcible entry and trespass over the inner courtyard were taken as evidence of the fact that the Muslims never had exclusive and peaceful possession of the inner courtyard. The Court even noted the absence of proof of offering of *namaz* at the inner courtyard by Muslims before the year 1856-57 as evidence of the lack of exclusive possession of Muslims. The act of trespass even included the forcible installation of the idol of *Ram Lalla* inside the Mosque in the year 1949, but even this act is taken as Hindus' resistance to the claim of Muslims over the exclusive possession of the inner courtyard.

The Court declared the act of demolition of the Babri Masjid to be illegal, yet passed an order which could only be envisaged and implemented because the Babri Masjid was demolished. Based on the finding of the Court, the mosque existed on the property which belonged to the Hindu side, and therefore, even though the demolition was illegal, it paved the way for the Hindus to construct a temple over it. The Court in this case quoted the judgement of the Supreme Court in *Bommai* that secularism is the basic feature of the Indian Constitution.[79] The judgement appears to have factored in the possibility of its implementation. If given, otherwise, it could not have been implemented, considering the politics around the issue and the association of Hindu sentiment with the cause. The testimony of this could be gauged from the fact that Prof. Faizan Mustafa, a leading contemporary commentator on the issues of Constitutional law, stated that the Supreme Court should have declared the title over the inner courtyard in favour of Muslims, and then it should have applied Article 142 to give it to Hindus with a view to ensure lasting peace.[80] This clearly shows the inevitability of the outcome of the case, the disagreement is mainly in respect of how it was arrived at. The fact that lasting peace could only be ensured by the construction of a temple is a testimony to the levels of tolerance in Indian society as a secular one.

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[79] S. R. Bommai v. Union of India, (1994) 3 SCC 1.

[80] Karan Thapar, *Parts of Ayodhya Judgment Laughable, Different Standards of Proof Unfair*, THE WIRE (Aug. 20, 2022), https://thewire.in/law/watch-parts-of-ayodhya-judgment-laughable-different-standards-of-proof-unfair.

A scholar in his analysis of the judgement has commented that:

> "*The vocabulary of Hindu 'generosity' in 2019 acquired a constitutional language of "complete justice" in the judgement delivered by the highest Court of the land. However, the traces in the legal archive of the 'logic' that underpins this 'generosity' show that the attempts at erasure of historical record and the silences on crucial issues show that this triumphal judgment remains a testimony to the failed attempts of a psychically fragile nation attempting to mask genocide as generosity.*"[81]

CONCLUSION

It is granted that adjudicatory questions may also be political, but the fact that an apolitical judiciary would interpret them ensures that the approach undertaken to answer the political questions would be apolitical and impartial. On the contrary, legislation is political and can very likely be approached politically and partially by the ruling legislative majority.[82] Constitutional aspirations, however, must inform the decision of all the organs of the State, be it the legislature or the State.

The current state of Indian polity, however, is a sad commentary on the state of the transformative promise of a secular India.[83] Dr. Amdedkar had

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[81] Amit Bindal, *"Complete Justice": Silences and Erasures in the Ayodhya Judgment*, 11(1) J. IND. L & SOCY. 48 (2020).

[82] *See generally* Christophe Jaffrelot, *The Fate of Secularism in India,* in MILAN VAISHNAV, THE BJP IN POWER: INDIAN DEMOCRACY AND RELIGIOUS NATIONALISM (Carnegie Endowment for International Peace, 2019).

[83] The question of religious freedom under the Personal Law system and the challenge of making Personal Laws Egalitarian, remains a major constitutional goal in ensuring a secular society. *See* FARRAH AHMED, RELIGIOUS FREEDOM UNDER THE PERSONAL LAW SYSTEM (Oxford University Press, 2016). Apart from this, the fundamental right to profess, practice and propagate under the Indian Constitution still depends upon the essential religious practice test and matters of individual conscience run subservient to it. The essential religious practice test decides the extent of religious freedom both in the case of the relationship between State and individual and religious group/denomination and individual. The essential religious freedom test, despite the expression of doubts about its correctness, is still invoked by the Courts. *See* Indian Young Lawyers Association v. State of Kerala (Sabarimala case), (2019) 11 SCC 1; Resham v. State of Karnataka, 2022 SCCOnLine Kar 315; Anup Surendranath, *Essential Religious Doctrine': Towards an Inevitable Constitutional Burial*, 15 J. NHRC, 159 (2016); Faizan Mustafa & Jagteshwar Singh Sodhi,

pinned hope on elections to ensure that the unenforceable directive principles incorporating core issues of the fulfilment of human needs will be taken seriously. The extent of reliance on the Indian voters more than 70 years from today gets belied by the extent of popularity of anti-constitutionalism in Indian society. The legislature's constituency is voters and therefore, the popular societal echo would be reflected in the legislation. However, it appears that the popular acceptance even bothers the apolitical constitutional courts, and therefore transformative constitutional aspiration of secularism is finding its validation even in the judgements of the constitutional courts. The instances reflected in the paper may not be enough to bring home an empirical conclusion about the State of Indian polity. However, it warns against the worrying signs to not take the textually incorporated ideals at face value, if the same has not found acceptance among the people of India and the institutions of the State. The illustrative account discussed here enables us to see that secularism as a constitutional value remains contested, and therefore, this contestation must be factored in while determining the identity of the Indian Constitution.

Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy, 4 BYU L. REV., 915 (2017); Jacklyn L. Neo, *Definitional Imbroglios: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication*, 16 INT'L. J. CONST. L. 574 (2018).

MAPPING 'UNCONSTITUTIONAL INFORMAL CONSTITUTIONAL CHANGES' BY CONSTITUTIONAL COURTS—A COMPARATIVE STUDY

ANUJAY SHRIVASTAVA[1]

This article attempts to undertake a deeper inquiry into the phenomenon of 'unconstitutional informal constitutional changes' (UICCs) by constitutional courts, which were first highlighted by Dr. Yaniv Roznai. It shall identify and analyse various non-exhaustive illustrations of UICCs by the 'Supreme Courts' in India, Bangladesh, Honduras, and the United States of America (U.S.A.). Thereafter, it shall attempt to briefly highlight the significance of the idea of UICCs when viewed from the lens of 'transformative constitutionalism' and 'constitutional dismemberment'. A glimpse into UICCs from the lens of 'transformative constitutionalism' highlights the position that not all UICCs made by constitutional courts are inherently undesirable or destructive of a Constitution, whereas looking at judicially created UICCs from the theory of 'constitutional dismemberment' (as understood in context of formal constitutional amendments) seems to suggest that much like constitutional amendments, UICCs created by constitutional courts can radically change or destroy a Constitution. Finally, the article concludes by raising important questions for future scholarship on UICCs by constitutional courts.

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INTRODUCTION

The Cambridge Dictionary defines 'change', *inter alia*, to mean "*to make or become different*."[2] In the context of comparative constitutional studies, any *change* to a constitution or its contents (whether codified/written or uncodified/unwritten), i.e., a 'constitutional change', can occur both due to *formal* and *informal* methods.[3] A common example of a '*formal* constitutional change' is the process of making amendments to the text of a written constitution by a competent legislature, known commonly as constitutional amendments.[4] Conversely, an '*informal* constitutional change', in context of a written constitution could occur when the enforceable meaning of a constitution or its contents changes without alterations to its text through ways such as binding judicial interpretations, executive actions, and legislative enactments;[5] or through other forms of fundamental changes or revisions introduced into a Constitution without resort to formal procedure for constitutional amendment, such as changes manifested as a consequence of 'political practices' and 'historical' developments.[6]

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[2] *Change*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/change.

[3] Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 387, 388-89 (2015); Richard Albert & Jonathan L. Marshfield, *The Past, Present, and Future of State Constitutional Change*, 69 ARK. L. REV. 211, 212-3 (2016).

[4] Jonathan L. Marshfield, *Respecting the Mystery of Constitutional Change*, 65 BUFF. L. REV. 1057, 1058 (2017).

[5] *See* Albert, *supra* note 3, 388-389; Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

[6] *See generally* Manon Altwegg-Boussac, *Informal Constitutional Change and Political Law*, *in* MIGUEL NOGUEIRA BRITO ET. AL, THE POLITICAL DIMENSION OF CONSTITUTIONAL LAW 91, 92-94, 96 (Springer International Publishing, 1st ed., 2020). Altwegg-Boussac highlights that political practices and developments in history can create informal changes, essentially arguing that these informal changes create an "*unwritten constitution*". However, the author posits that there could be several things that create or manifest informal changes to written constitutions, e.g., climate change, technological advancements in

Marshfield has observed that informal constitutional changes are commonly considered to be a result of high barriers to introducing constitutional changes using the formal constitutional amendment procedures at least in the context of the U.S.A.'s federal constitution and various state constitutions.[7] Irrespective of whether their nature may be formal or informal, constitutional changes are ubiquitous in democratic and republic nation-states.

The past few decades have witnessed an increase in literature across the globe, focussing on the limits to constitutional changes, most particularly, the limits of constitutional amendments. Amongst attempts to locate limits applicable to constitutional amendments, there has been a significant development of locating constitutional amendments in jurisdictions which may be characterised as 'unconstitutional' in nature,[8] giving increasing prominence to, *inter alia*, the doctrine of *unconstitutional constitutional amendment* ("**UCA**").[9] As lucidly explained by Roznai, the doctrine of UCAs is an innovation by 'constitutional court(s)'[10] that empower those authorised to interpret the constitution, to invalidate any constitutional amendments that have been duly enacted by the legislature or parliament through following the amendment procedure in a written constitution.[11] Much like how constitutional amendments are a form of the formal

societies, changes in socio-religious norms or values, and impact of international conventions or treaties ratified by a nation-state.

[7] Jonathan L. Marshfield, *Court and Informal Constitutional Change in the States*, 51 N. ENG. L. REV. 453, 469-70 (2017).

[8] *See* Gary Jeffrey Jacobsohn, *An unconstitutional constitution? A comparative perspective*, 4(3) INT'L. J. CONST. L., 460-87 (2006).

[9] *See* Joel Colón-Ríos, *Introduction: The forms and limits of constitutional amendments*, 13(3) INT'L. J. CONST. L. 567, 568 (2015); YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 56 (Oxford University Press, 1st ed., 2017); Yaniv Roznai & Tamar Hostovsky Brandes, *Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine*, 14 L. & ETHICS HUM. RTS. 19, 24 (2020).

[10] In the context of the present article, the phrase 'constitutional court' shall refer to any court or judicial authority which is empowered by law of its jurisdiction to interpret a Constitution (whether written or unwritten) or its contents and pronounce/render a binding judicial precedent (whether a judgement, order or otherwise) which affects, upholds or modifies the enforceable meaning of a Constitution or its contents.

[11] Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, 61(3) THE AM. J. COMP. L. 657 (2013).

manifestation of constitutional changes, the UCAs may be understood as a derived species of '*unconstitutional* constitutional changes'. More specifically, an UCA would be categorised as an unconstitutional *formal* constitutional change, since it is an unconstitutional constitutional change manifested by resort to a formal constitutional amendment procedure. Sijoria has argued that the invocation of the doctrine of UCAs by constitutional courts has essentially resulted in protection of their constitutional democracies from *abusive constitutionalism* in the jurisdictions of India, Colombia, and Benin.[12] Conversely, scholars have identified jurisdictions such as France, Georgia, and Turkey, where the respective nation-state's constitutions and constitutional practices have expressly rejected the doctrine of UCA.[13]

Therefore, it appears that the doctrine of UCAs has not become a global norm of constitutionalism and that various jurisdictions may not share the belief that constitutional amendments adopted by formally invoking the amendments procedure to a written constitution can be unconstitutional.[14] Concomitantly, there may be jurisdictions where the doctrine of UCA is not adopted by courts, yet it visibly informs public and intellectual discussions.[15] For present purposes, it is not necessary to delve further into the doctrine of UCAs and the nature of UCAs.

Moving forward, Roznai, in his revolutionary and insightful scholarship, had previously attempted to highlight the need for inquiry into the phenomenon of 'unconstitutional *informal* constitutional change' ("**UICC**")

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[12] *See* Siddharth Sijoria, *Implied Limitation on the Power of Amendment: A Comparative Study of its Invocation in India, Colombia and Benin*, 6(1) COMP. CONST. L. & ADMIN. L.J. 89, 110-5 (2021). Sijoria places reliance on Landau's work while highlighting instances of 'abusive constitutionalism', *see* David Landau, *Abusive Constitutionalism*, 47 U. CALIF. DAVIS L. REV., 189 (2013).

[13] *See generally* Richard Albert et al., *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 HASTINGS L. J. 639 (2019).

[14] *Id.*, at 642-647.

[15] *See* Rehan Abeyratne & Ngoc Son Bui, *Unconstitutional Constitutional Amendments as Constitutional Politics*, *in* REHAN ABEYRATNE, THE LAW AND POLITICS OF UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN ASIA 8 (Routledge, 2022).

by 'courts',[16] which is a form or species of *unconstitutional* constitutional changes distinct from the doctrine of UCAs discussed previously. He sought to answer whether the basic principles or provisions in a constitution can be so radically interpreted and informally amended by a court that they substantially replace such contents of the constitution. Essentially, he argued that courts cannot "*change the essence of the core of the constitution and its basic principles, because such action requires resorting to the primary constituent power*."[17] Furthermore, he stated that as the constitution's guardians, "*courts do not have the competence to destroy the constitution or its basic principles thereby replacing it with a new one*."[18] Consequently, if there exist *implied limitations* on formal constitutional amendments, then there must also exist limitations on *judicially* made informal constitutional changes.[19] Following this line of thought, any exercise of judicial interpretation by a constitutional court which creates a binding *informal* constitutional change that substantially *replaces* or *destroys* a Constitution or its contents would tantamount to engaging in '*unconstitutional* constitutional interpretation'[20] ("**UNCI**") and the result of such interpretations would be UICCs. Theoretically, a single UNCI by a constitutional court could practically result in manifestation of multiple UICCs. It is necessary to clarify that similar to informal constitutional changes, UICCs could also be manifested through ways distinct from binding judicial interpretations, for e.g., executive actions, legislative enactments, and change in the norms, values, customs and practices of a nation-state.[21] Regrettably, apart from Roznai's

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[16] *See* Yaniv Roznai, *Unconstitutional Constitutional Change by Courts*, 51(3) N. ENG. L. REV. 555, 567-570 (2018).

[17] *Id.*, at 570.

[18] *Id.*, at 576.

[19] *Id.*

[20] This phrase was coined by Roznai, *see id.*, at 570.

[21] This phenomenon can be seen through illustrations from various jurisdictions globally. The author would like to demonstrate three illustrations of UICCs that are not *judicially* manifested. *First*, an example of an UICC created due to an executive action is the order issued by the President of India to abrogate Article 370 of the Indian Constitution, i.e., The Constitution (Application to Jammu and Kashmir) Order, 2019 (C.O. 272). Through issue of this order, the President construed the phrase "*Council of Ministers*" in Article 370 (who were then dissolved by the then Governor of Jammu and Kashmir) as "*Governor*" of Jammu and Kashmir, *see* The Constitution (Application To Jammu and Kashmir Order), 2019 C.O. 272, Administration of Union Territory of Ladakh (2019), https://ladakh.nic.in/document/the-constitution-application-to-jammu-and-kashmir-

pathbreaking scholarship, there is a glaring lack of scholarly literature discussing UICCs (including locating UICCs created by the global judicial-organs) and highlighting why these are of important significance in contemporary constitutional studies. Nevertheless, there have been notable countries/nation-states where judicial interpretations have resulted in creation of UICCs.

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order-2019-c-o-272/. Notably, the legality of this Presidential Order is pending adjudication before the Supreme Court of India in the Manohar Lal Sharma v. Union of India, Writ Petition (Civ.) 1013/2019 (Pending) (India), *see Article 370: Manohar Lal Sharma v Union of India*, SUPREME COURT OBSERVER (2022), https://www.scobserver.in/cases/manohar-lal-lohia-union-of-india-article-370-case-background/. *Second*, a potential illustration of an UICC created by legislative enactment would be Unlawful Activities (Prevention) Act, 1967 (India), which has drastically watered down the fundamental rights provided to citizens and individuals by introducing special procedures for trails of those suspected to be involved in economic activities, thus arguably creating an informal *unconstitutional* constitutional change. Interestingly, given that the UK has exited from the European Union (EU), the Human Rights Act 1998 (United Kingdom), which served the purpose of ratifying the UK's treaty obligations as well as making enforceable fundamental freedoms and rights recognised in the EU available to the British Citizens under UK national law could now be argued to be an UICC, especially since UK's exit from EU means that its unwritten Constitution law would revert to its earlier state prior to enactment of the Human Rights Act. *Lastly*, in terms of a hypothetical UICC in terms of values or customs of a nation-state, if the vast majority of a country such as India began understanding and following 'secularism' as understood in the French Jurisprudence (Laïcité), the impact of such value or cultural change would visibly impact the way legislations and executive actions are crafted, impact enforceable meaning of fundamental rights (such as fundamental right to religion or fundamental right to freedom of speech and expression) as well as result in judicial interpretations that borrow this understanding while adjudicating religious matters before them (potentially resulting in parallel judicially-made UICCs). Apart from the foregoing Indian hypothetical, the USA is a great example of a nation where historical changes and practices have pragmatically resulted in modern values and cultural norms that visibly shaped legislative, executive and judicial actions or decisions. After the judicial pronouncement of the "separate but equal doctrine" in Plessy v. Ferguson, 163 U.S. 537 (1896) (USA), various racial segregation laws (commonly known as "Jim Crow" laws) were made, which were eventually either repealed by the US State legislatures as unconstitutional, or were judicially declared to be unconstitutional over the passage of time, *see* Jim Crow Laws, PBS, https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/.

This article is divided into two parts. Firstly, this article seeks to identify and analyse the UICCs by *Supreme Courts* (the highest rank of constitutional courts)[22] in four jurisdictions, *namely*, *India*, *Bangladesh*, *Honduras*, and *the USA*; with a goal to shed greater light on illustrations of the UICCs in comparative constitutional studies. These jurisdictions have been selected as they indisputably represent some form of a *democratic nation-state*; contain a *written constitution* as their primary source of law; and have also witnessed constitutional interpretations by their respective constitutional courts which created UICCs that significantly impacted the *enforceable* meaning of their constitutions. Secondly, this article shall briefly attempt to highlight the significance of the idea of UICCs by constitutional courts from the lens of *transformative constitutionalism* and the theory of *constitutional dismemberment*. Finally, this article concludes by raising important questions that future scholarship on UICCs by constitutional courts must resolve to address.

IDENTIFYING ILLUSTRATIONS OF 'UNCONSTITUTIONAL INFORMAL CONSTITUTIONAL CHANGES' CREATED BY THE SUPREME COURTS

A. INDIA: TEN ILLUSTRATIONS

India is a jurisdiction which has witnessed several informal constitutional changes by its constitutional courts. The Supreme Court of India ("**SCI**") is among the best examples of a judicial institution which has actively introduced several UICCs, significantly shaping and transforming the enforceable meaning of the Indian Constitution. In this segment, the author will highlight and discuss ten significant non-exhaustive instances of UICC creation by the SCI, a vast majority of which do not find explicit support from the written text of the Indian constitution.

In spite of the fact that India's constitutional amendment procedure is easier and more flexible than jurisdictions like the U.S.A., having been exercised over a hundred times,[23] it has witnessed countless informal

[22] *The Supreme Court*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/learner-english/the-supreme-court.

[23] The procedure to make constitutional amendments has been successfully exercised by the Indian parliament at least 105 times, *see* Government of India, *Constitution Amendment Acts 102 to Onwards*, LEGISLATIVE DEPARTMENT, MINISTRY OF LAW AND JUSTICE,

constitutional changes by courts. Thus, this validates Marshfield's claim[24] that it is not necessary for there to exist an inverse relation between easier formal constitutional amendments procedures and informal constitutional changes in a jurisdiction.

Kesavananda Case: The Basic Structure Doctrine

The most significant and impressive instance of the SCI introducing an UICC is the Thirteen-Judge Constitution Bench decision in *Kesavananda Bharati v. State of Kerala* ("**Kesavananda**"),[25] where the court, by a thin majority of 7:6 judges, had declared that the parliament's power to amend any part of the constitution as provided in the Article 368 of the constitution[26] was limited by the 'basic structure doctrine' ("**BSD**"). According to the BSD, the Parliament could not alter, modify or remove any contents of the Constitution which forms a part of its 'basic structure'.[27] The nature, contents and scope of the doctrine as developed by the SCI has been well documented by scholars,[28] including the origins of the BSD which was inspired by works of the German Scholar, Dietrich Conrad.[29] Interestingly, the BSD is noted by scholars to be the most

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GOVERNMENT OF INDIA (2022), https://legislative.gov.in/amendment-acts-102-to-onwards.

[24] Marshfield, *supra* note 7, at 469-70.

[25] Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (India).

[26] INDIAN CONST. art. 368.

[27] Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (India).

[28] *See generally* Satya Prateek, *Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations And The Future Of Political Progress In India*, 1 NUJS L. REV. 417 (2008); SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF BASIC STRUCTURE DOCTRINE (Oxford University Press, 1st ed., 2010); Aratrika Choudhuri & Shivani Kabra, *Determining the Constitutionality of Constitutional Amendments in India, Pakistan and Bangladesh: A Comparative Analysis*, 10(4) NUJS L. REV. 669 (2017).

[29] Interested readers may refer to Polzin's article in order to better understand the German and French origins of the BSD along with references to Conrad's scholarly works, *see generally* Monika Polzin, *The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting*, 5(1) IND. L. REV. 45 (2021).

prominent example of the creation of a doctrine of UCAs,[30] a sentiment echoed by former SCI Judge, Justice A.K. Sikri, who noted the use of BSD by India's courts to be a check against UCAs.[31] In this way, the BSD has become a way to not only exercise the doctrine of UCAs to limit the Indian parliament's power to amend the constitution, but has concomitantly resulted in creation of other UICCs (some of which will be illustrated later).

The author argues that the majority decision in Kesavananda goes against the express text of Article 368 which does not expressly or implicitly create a restriction on amendability of the Constitution or its contents. This is substantiated by use of the phrase "constituent power" instead of a limiting phrase such as 'amending power', as mentioned in the extract "[…] *Parliament may in exercise of its constituent power…*" (emphasis author's) in Article 368(1), may illustrate the constitution drafter's intent to distinguish Indian constitution's amending power to be same as ordinary constituent power at time of creation and adoption of a constitution, i.e. infinite or without limitations. In fact, through earlier Five-Judge Constitution Bench precedents in *Sankari Prasad* v. *Union of India*[32] and *Sajjan Singh* v. *State Of Rajasthan*[33] (which are no longer binding precedents after *Kesavananda*), the SCI had previously opined that the amending power in Article 368 is not a 'legislative power', but in fact is 'constituent power' (as also reflected in its text) and therefore absolute (being able to be exercised both prospectively and retrospectively). In a subsequent precedent in *I.C. Golaknath v. State of Punjab*[34] ("**Golaknath**"), which was partly overruled later by *Kesavananda*,

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[30] *See* Po Jen Yap & Rehan Abeyratne, *Judicial self-dealing and unconstitutional constitutional amendments in South Asia*, 19(1) INT'L. J. CONST. LAW 127 (2021); Roznai, *supra* note 16, 560.

[31] *See* Justice A.K. Sikri, Judge, Supreme Court of India, Address at the H.R. Khanna Memorial Lecture: Role of the Judge in a Democracy (Oct. 13, 2017). An online version of the speech is available (with Justice Sikri's mention of UCA at p. 20) here, *see* Mittal Enterprises, New Delhi, *The Constitution at 67*, SUPREME COURT OF INDIA (Nov. 26, 2017), https://main.sci.gov.in/pdf/AnnualReports/The%20Constitution%20at%2067.pdf.

[32] *See* Sri Sankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458 (India), ¶13 (M. Patanjali Sastri J.).

[33] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845 (India). At ¶16, the (then) incumbent CJI, Justice P.B. Gajendragadkar writing the majority judgement holds that: "*[...] The* ***constituent power*** *conferred by* ***Article 368*** *on the Parliament can also be exercised* ***both prospectively and retrospectively***." (emphasis author's).

[34] I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643 (India).

Justice K.N. Wanchoo in his minority opinion held that the power in Article 368 was 'constituent power' and different from ordinary legislative power.[35] In *Golaknath*, writing a dissenting opinion, Justice R.S. Bachawat went further observing that the "*Parliament*" could be understood as recreation of the "*Constituent Assembly*" while exercising the *constituent power* to amend the Constitution.[36]

Furthermore, the remaining provisions and contents of the Indian Constitution do not expressly or implicitly create restrictions on the amendment procedure provided in Article 368. In this way, the creation and use of the BSD to impose judicially identified restrictions on constitutional amendments is an UICC (since the creation of BSD substantially replaces the constitutional amendment procedure by introducing a significant limitation on its exercise). While the BSD in the Indian context is *pragmatically* an unconstitutional constitutional change (since the *Kesavananda* decision appears to judicially *rewrite* the amendment procedure under Article 368 to be subject to the BSD *vis-à-vis* judicial review of constitutional amendments), its vast significance and global influence as noted by scholars is undeniable.[37] It has also protected the democratic nature of India and the sacrosanct features of its constitution against destruction or abuse by authoritarian or majoritarian governments.[38] Thus, one could argue that in spite of being a judicially introduced UICC, the BSD has now become an integral part of the Indian

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[35] *See Id.*, ¶80-81 (K.N. Wanchoo, J.). Wanchoo J. records that, "*An amendment to the Constitution is a constitutional law and as observed in Sankari Prasad case is in exercise of constituent power; passing of ordinary law is in exercise of ordinary legislative power and is clearly different from the power to amend the Constitution... We are, however, of the opinion that we should look at the quality and nature of what is done under Article 368 and not lay so much stress on the similarity of the procedure contained in Article 368 with the procedure for ordinary law making. If we thus look at the quality and nature of what is done under Article 368, we find that it is the exercise of constituent power for the purpose of amending the Constitution itself and is very different from the exercise of ordinary legislative power for passing laws which must be in conformity with the Constitution and cannot go against any provision thereof, unless there is express provision to that effect to which we have already referred.*" (emphasis author's).

[36] *Id.*, ¶238, ¶261 (R.S. Bachawat, J.).

[37] Roznai, *supra* note 11; Abeyratne, *supra* note 15.

[38] *See* Sijoria, *supra* note 12, 110-115.

constitutional jurisprudence and is instead a legitimate informal constitutional change, which has protected the Indian constitution rather than substantially altering or destroying it.

Kesavananda **Case and the Fundamental Right to Property**

It is pertinent to note that the *Kesavananda* decision arguably manifested another substantial UICC apart from the BSD. Before exploring this UICC, it is necessary to briefly discuss the constitutional history of the repealed fundamental right to property ("**FRTP**"), which was originally provided to Indian citizens under Article 19(1)(f) of the original Indian constitution. The zamindari rights of citizens in certain Indian territories, which were sought to be protected by the FRTP, were abolished by the First Constitutional Amendment[39] (which were often protected by Indian courts in favour of citizens as Tripurdaman Singh notes).[40]

In the *Kesavananda* case, it was Justice H.R. Khanna's decision which ultimately cut the Gordian knot, responding to assessment of whether the FRTP enshrined in Article 19(1)(f) was a part of the Indian constitution's basic structure as per the BSD; and if yes, whether the exercise of passing constitutional amendments made to limit or totally exclude this fundamental right through a string of constitutional amendments was valid? Answering the former question itself in negative, Justice Khanna held that the FRTP was not a part of the basic structure of the constitution[41] and that "*the approach of the framers of the Constitution was to subordinate the individual right to property to the social good*".[42] Viewed from the standpoint of doctrine of UCAs, the author respectfully argues that this part of Justice Khanna's judgement is problematic, since it essentially meant that the FRTP was amenable to any form of modifications by the parliament *via* constitutional amendments as per its whims, including theoretically removing it altogether from the original provision enshrined in Article 19(1)(f) of the constitution. Since an UCA is an *unconstitutional* change, it logically follows that an informal constitutional change by a

[39] INDIA CONST. *amended by* The Constitution (First Amendment) Act, 1951.

[40] *See generally* TRIPURDAMAN SINGH, SIXTEEN STORMY DAYS: THE STORY OF THE FIRST AMENDMENT OF THE CONSTITUTION OF INDIA (Penguin India, 1st ed., 2020).

[41] Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (India), ¶¶1496, 1550 (H.R. Khanna, J.).

[42] *Id.*

constitutional court which enables the parliament to introduce an UCA should be classified as an UICC. Indeed, five-years after the *Kesavananda* decision, the FRTP was entirely repealed by the Indian parliament *via* the Forty-Fourth Constitutional Amendment,[43] likely due to repeated enforcement of this fundamental right by litigants against the central and state governments in writ petitions before various courts. Consequently, the *Kesavananda* holding that the FRTP is not a part of the constitution's basic structure created an UICC, one which would enable the Indian parliament to justify continuously weakening this fundamental right and ultimately repeal it.

Subsequent judicial precedents have read Justice Khanna's judgement together not only with the six judges who were in favour of holding that there are implied limitations on amending power and recognising the BSD, but also with the six judges who were in favour of holding that there are no limitations on amending power and that the constitutional amendments limiting the FRTP are valid. Due to the foregoing reason, the entirety of Justice Khanna's judgement in *Kesavananda* is indisputably a settled part of the Indian constitutional jurisprudence, whose legacy has been traced by scholars such as Krishnaswamy.[44]

Interestingly, the constitutional history of FRTP is equally relevant in context of the doctrine of UCAs. In the author's opinion, the deletion of this FRTP by the parliament, subsequent to the FRTP being declared as not being a part of constitution's basic structure in *Kesavananda*, should be construed as an UCA, since the Parliament essentially used the amending power (constituted power) in Article 368 to substantially destroy an essential guarantee of private 'property rights' (observed by later SCI decisions to be an essential *human right*)[45] included in the constitution, which had been included after an exercise of the omnipotent constituent power

[43] INDIA CONST., *amended by* The Constitution (Forty Fourth Amendment) Act, 1978.

[44] *See generally* KRISHNASWAMY, *supra* note 27.

[45] *See* Indian Handicraft Emporium v. Union of India, (2003) 7 SCC 589 (India), ¶111; State of Haryana v. Mukesh Kumar, (2013) 1 SCC 353; B.K. Ravichandra v. Union of India, (2021) 1 CALLT 1 (SC) (India), ¶15.

by people in making this right a basic guarantee to the Indian citizens – one which could be enforced against the state at constitutional courts *via* writ jurisdiction. Notably, though the FRTP for Indian citizens was deleted and rendered completely unenforceable before Indian courts, the parliament concomitantly inserted Article 300A to the constitution,[46] which guarantees to 'persons'[47] an unenforceable *constitutional right* to property.

Golaknath **Case: Unamendability of Fundamental Rights**

A previous landmark precedent of a Eleven-Judge Bench of the SCI in *Golaknath,*[48] which was subsequently overruled by the previously discussed *Kesavananda* decision, stands out as a classic example of an UICC, potentially the primordial or first-known instance of UICCs in India. In *Golaknath*, the constitutionality of the Seventeenth Constitutional Amendment[49] to the Indian constitution which radically introduced changes to property rights was challenged in a writ petition. Amongst other things, the principal challenges to the amendment were made on the fundamental right to equality and the erstwhile FRTP.

The SCI held that a 'constitutional amendment' is *law* under the definition of 'law' provided in Article 13 of the constitution,[50] meaning that the clauses in Article 13 were applicable to it.[51] Consequently, by a thin 6:5 judges majority, it famously held that any 'constitutional amendment' that takes away or abridges the fundamental rights enshrined in Part III of the Indian constitution would be void to the extent of the contravening provisions in the amendment.[52] In this way, an UICC was brought by *Golaknath,* whereby introduction of any constitutional amendment that would remove, limit or be judicially perceived as negatively affecting any of the fundamental rights in the Indian constitution became functionally

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[46] INDIA CONST., art. 300A.

[47] The term 'persons' as used in Article 300-A arguably has a broader scope covering not only human beings, but also juristic persons e.g., companies, deities and Hindu idols, *see* Anujay Shrivastava & Yashowardhan Tiwari, *Understanding the Misunderstood: Mapping The Scope Of A Deity's Rights In India*, 10(1) NUJS IJLPR1, 23, 42 (2021).

[48] I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643 (India).

[49] INDIA CONST., *amended by* The Constitution (Seventeenth Amendment) Act, 1964.

[50] INDIA CONST., art. 13.

[51] I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643 (India).

[52] *Id.*

impossible, though this constitutional position didn't last long – ultimately being reversed by the *Kesavananda* decision.

Maneka Case: Article 21 and Due Process

Moving forward, the landmark decision by a Seven-Judge SCI Bench in *Maneka Gandhi v. Union of India* ("**Maneka**"),[53] which expanded the meaning of the fundamental right to life and personal liberty enshrined in Article 21 of the constitution,[54] is another example of an UICC. In this case, the petitioner's passport was impounded by the Indian government on vague grounds of public interest. The government also declined to furnish reasons for impounding the passport, stating that it couldn't state the reasons in the interest of the general public.

The SCI issued a *unanimous* holding that the fundamental rights enshrined in Part III, most particularly, Article 14 (fundamental right to equality), Article 19 (various freedoms protected as fundamental rights) and Article 21 were not separate water-tight compartments and had to be read together. In reaching this conclusion, it relied on an earlier Eleven-Judge precedent in *R.C. Cooper v. Union of India*,[55] where a clear super-majority of 10:1 judges held that the view of treating fundamental rights as separate water-tight compartments by prior precedents of the SCI (including the precedent in *A.K. Gopalan v. State of Madras*)[56] was the incorrect approach.[57] In summary, the SCI in *Maneka* consequently held that the phrase "*procedure established by law*" which was the inherent limitation to the fundamental rights enshrined in Article 21, had to be read to mean and implicitly include "*due process of law*", akin to the substantive due process clause explicitly provided in the US Federal Constitution[58] and repeatedly protected by the

[53] Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India).

[54] INDIAN CONST., art. 21.

[55] Rustom Cavasjee Cooper v. Union of India, [1973] 3 SCR 530 (India).

[56] A.K. Gopalan v. The State of Madras, AIR 1950 SC 27 (India).

[57] Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India).

[58] U.S. CONST. amend. V, amend. XIV.

Federal Supreme Court of the United States of America ("**SCOTUS**") in a catena of precedents.[59]

Notably, the plain text of Indian constitution (including Articles 14, 19 and 21) does not explicitly mention 'due process', an exclusion which was a product of multiple deliberations between the drafting committee of the constitution who ultimately chose to exclude it from being incorporated into the constitution.[60] In this way, *Maneka* introduced a significant UICC, which transformed the contents of the Indian constitution to include due process and its impact was advanced further,[61] in subsequent SCI precedents.

Forty-Second Constitutional Amendment and the *Bommai* Case: 'Secularism' and the Basic Structure Doctrine

Next, the Nine-Judge Bench decision by SCI in *S.R. Bommai v. Union of India* ("**Bommai**")[62] is of particular significance. Before delving into the *Bommai* decision, it is important to first discuss a constitutional amendment, which is unique for being the only one of its kind to amend the preamble of the Indian Constitution. It is essential to mention that the preamble of the original Indian constitution did not include the words 'socialist' and 'secular', while declaring India to be a "*Sovereign Democratic Republic*". Eventually, through the Forty-Second Constitutional Amendment, the preamble was modified to reflect India's nature as "*Sovereign, Socialist, Secular, Democratic Republic*" (emphasis author's).[63] While majority of the changes introduced by the Forty-Second Constitutional Amendment were heavily modified or deleted by the Forty-Fourth Constitutional Amendment,[64] the parliament opted to retain the words 'socialist' and 'secular' in the preamble.

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[59] Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India).

[60] Rohan Alva, *Article 21 of the Constitution: The Day Due Process Triumphed*, BAR & BENCH (May. 7, 2022), https://www.barandbench.com/columns/article-21-of-the-constitution-the-day-due-process-triumphed.

[61] ABHINAV CHANDRACHUD, DUE PROCESS OF LAW (Eastern Book Company, 1st ed., 2012).

[62] Somappa Rayappa Bommai and Ors. v. Union of India and Ors., AIR 1994 SC 1918 (India).

[63] INDIA CONST., *amended by* The Constitution (Forty Second Amendment) Act, 1976.

[64] INDIA CONST., *amended by* The Constitution (Forty Fourth Amendment) Act, 1978.

The *Bommai* decision, which was pronounced *unanimously* but with separate judgments by various judges, dealt with a plethora of issues under the Indian constitutional jurisprudence, including nature and uses of state emergency power. For present purposes, let us stick to its holdings relating to the 'secular' nature of the Indian constitution. The SCI in *Bommai* held that the 'secular nature' of Indian democracy or 'secularism' as well as 'social pluralism' and 'pluralist democracy', were all established basic structures of the Indian constitution and that this was also the evident intent of the Indian Constituent Assembly.[65] Furthermore, Justice B.P. Reddy in his concurring opinion, had highlighted that it was the *Kesavananda* decision where the 'secular' nature of the Indian constitution was first accepted by judges to be a basic structure.[66] In fact, Justice Reddy is correct as a majority of judges[67] in *Kesavananda* did reiterate this view. Hence, *Bommai* implicitly supported the constitutionality of the insertion of the word 'secular' in preamble to the Indian constitution by a constitutional amendment, thus arguably creating an UICC that modified the enforceable meaning of the Indian constitution to reflect and embody the principles of secularism (though the credit for this transformation should go to the prior precedent in *Kesavananda*). As Jackobsohn[68] suggests, while India through SCI's judicial pronouncements did embrace *secularism* as a "*critical and essential component of its constitutional identity*", this was made apparent only through the constitutional amendment which expressly reflected this principle by modifying India's preamble.

Judicial evolution of the concept of 'Public Interest Litigation'

[65] Somappa Rayappa Bommai and Ors. v. Union of India and Ors., AIR 1994 SC 1918 (India), ¶¶70, 87, 91 (P.B. Sawant & Kuldip Singh, JJ.) and ¶243 (B.P. Jeevan Reddy, J.).

[66] Somappa Rayappa Bommai and Ors. v. Union of India and Ors., AIR 1994 SC 1918 (India), ¶243 (B.P. Jeevan Reddy, J.).

[67] Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (India), ¶¶293, 302, 303 (S.M. Sikri, J.), ¶¶504, 599 (J.M. Shelat and A.N. Grover, JJ.), ¶666 (K.S. Hegde and A.K. Mukherjea, JJ.), ¶1291 (D.G. Palekar, J.), ¶1437 (H.R. Khanna J.), ¶1931 (S.N. Dwivedi, J.).

[68] *See* Jacobsohn, *supra* note 8, at 484.

Another example of a UICC in the Indian constitutional jurisprudence is the concept of 'public interest litigation' ("**PIL**"), developed by the SCI in a catena of judgments. In the landmark case of *Hussainara Khatoon v. State of Bihar* ("**Khatoon**"),[69] a Division-Bench of the SCI allowed a writ petition from individuals other than the under-trial prisoners or their relatives to decide on gross violation of various fundamental rights (especially right to life, right to free legal aid and right to a speedy trial) resulting from the languishing of such under-trial prisoners for many years or decades before their court trials even began. In this way, the court both parted away with the traditional principle of *locus standi* in exercise of constitutional remedies and also created a new form of jurisdiction (i.e., the epistolary jurisdiction), where letters written to constitutional courts or individual judges of such courts could be treated as writ petitions.

Furthermore, individual judges or the collective court could also *suo motu* admit a certain case as a writ petition. Due to her immense role in representing the voiceless undertrials in the *Khatoon* case, Advocate Kapila Hingorani was called the 'mother of PILs' and posthumously became the first woman lawyer to have her portrait featured at the SCI.[70] The SCI ultimately directed the release of thousands of under-trials listed by Advocate Hingorani.[71]

After *Khatoon* was decided, the SCI and High Courts allowed individuals to file PILs in various cases. Subsequently, in the landmark Seven-Judge Bench decision in *S.P. Gupta v. Union of India* ("**First Judges' Case**"),[72] *institutionalised* PILs by noting that "[...] *in public interest litigation -- litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest, any citizen*

[69] Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, AIR 1979 SC 1369 (India).

[70] *See* Divya Narayanan, *'Mother of PILs' Kapila Hingorani becomes first woman to have her portrait in SC library*, THE PRINT (Dec. 5, 2017), https://theprint.in/theprint-primer/mother-of-pils-kapila-hingorani-becomes-first-woman-to-have-her-portrait-in-sc-library/20413/.

[71] Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, AIR 1979 SC 1369 (India), ¶5.

[72] S.P. Gupta v. Union of India and Ors., AIR 1982 SC 149 (India), ¶¶19-23 (P.N. Bhagwati, J.).

who is acting bona fide and who has sufficient interest has to be accorded standing."[73] While affirming and evolving the principles of PIL in India's writ jurisdictions of the SCI and High Courts in the foregoing case, Justice P.N. Bhagwati noted that the concept of PIL was previously developed in US constitutional jurisprudence by a catena of SCOTUS decisions.[74] In this way, the SCI introduced a UICC by expanding writ jurisdictions under Article 32 and Article 226 of the Indian constitution[75] to include PILs (which were never expressly mentioned in Article 32, Article 226 or any other part of the constitution).

Four Judicial Appointments Cases, 'Consultation' requirement under Article 124, and the Collegium System

Pertinently, following the *Kesavananda* decision and its legacy through the BSD, the *Four Judicial Appointments Cases* which transformed the constitutional procedure for judicial appointments to the 'higher judiciary' (i.e., the SCI and all Indian High Courts) are arguably the second-most prominent UICC examples in the Indian jurisdiction. Before delving into the *Four Judicial Appointments Cases*, it is essential to briefly outline the process of judicial appointments as it originally stood prior to the judgement rendered by a SCI Nine-Judge Constitution Bench in *Supreme Court Advocates-on-Record Association v. Union of India (1993)*[76] ("**Second Judges' Case**").

Previous literature has extensively outlined the constitutional history and procedure of judicial appointments to the higher judiciary.[77] Importantly,

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[73] *Id.*, ¶19 (P.N. Bhagwati, J.).

[74] *Id.*, ¶20 (P.N. Bhagwati, J.).

[75] INDIAN CONST., art. 32, art. 226.

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

[77] *See generally* ARGHYA SENGUPTA & RITWIKA SHARMA, APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE (Oxford University Press, 1st ed., 2018); Nick Robinson, *The Structure and Functioning of the Supreme Court of India*, *in* GERALD ROSENBERG ET AL., QUALIFIED HOPE: THE INDIAN SUPREME COURT AND PROGRESSIVE SOCIAL CHANGE (Cambridge University Press, 1st ed., 2019); Anujay Shrivastava & Abhijeet Shrivastava, *Judicial*

as per the first *proviso* to Article 124(2) of the Indian Constitution,[78] it is a mandatory constitutional requirement for the President of India to 'consult' the Chief Justice of India ("**CJI**") prior to making appointments of judges to the higher judiciary. Essentially, while the CJI had to be consulted, the President was not constitutionally bound to follow the CJI's advice or inputs and could appoint any SCI judge as the next CJI as well as appoint whomever as a judge to the higher judiciary per their discretion, subject only to the condition that the proposed judges satisfied the constitutional requirements in the provisions of Article 124. This position remained intact after the decision in the *First Judges' Case*.[79] Subsequently, in the *Second Judges' Case*, the SCI held that the President was *bound* by the consultation of the CJI while making appointments to the higher judiciary and that 'independence of judiciary' was a basic structure in light of *Kesavananda*.[80] Thereafter, the power-dynamics of the higher judiciary's appointment process shifted from the executive organ to the judicial organ of the state, with the CJI exercising the final word on judicial appointments, thus creating an UICC.

Moving forward, the SCI in the *Third Judges' Case*[81] established the present 'collegium system' of appointments, which extends the earlier consultation obligation on the President of India for appointment of judges to the SCI and the High Courts, beyond exclusive consultation with the CJI (by establishing a group of judges that collectively make a binding recommendation on elevation of candidates into the SCI and High Courts to the President).[82] Notably, after the *Third Judges' Case*, the President has to now consult the CJI along with four senior-most judges for judicial appointments to the SCI and two senior-most judges for judicial

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Appointments, Collegium System, and Unresolved Constitutional Enigmas in India: Proposing an 'Emergency Collegium' and the 'Automatic Elevation Alternative', 1(4) JUS CORPUS L. J. 290 (2021).

[78] INDIA CONST., art. 124, cl. 2.

[79] S.P. Gupta v. Union of India and Ors., AIR 1982 SC 149 (India).

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

[81] Re: Special Reference 1 of 1998, (1998) 7 SCC 739 ("**Third Judges' Case**").

[82] For a deeper understanding of the dynamics of the collegium system in India, *see* Shrivastava & Shrivastava, S.P. Gupta v. Union of India and Ors., AIR 1982 SC 149 (India), ¶¶ 293-4.

appointments to the High Courts; both of which comprise the 'collegium' of the SCI.[83] In 2014, the Indian Parliament *via* the Ninety-Ninth Constitutional Amendment[84] attempted to replace the collegium system of judicial appointments by establishing a National Judicial Appointments Commission ("**NJAC**"). A SCI Five-Judge Bench in *Supreme Court Advocates-on-Record Association v. Union of India (2016)* ("**Fourth Judges' Case**")[85] dealt with the constitutionality of the NJAC. In the *Fourth Judges' Case*, the SCI by a clear 4:1 majority declared the Ninety-Ninth Constitutional Amendment and the NJAC as unconstitutional[86], with a majority of three judges further holding that 'primacy of judiciary over judicial appointments' was a basic structure.[87]

Hence, the *Second Judges' Case*, the *Third Judges' Case*, and the *Fourth Judges' Case*, which radically changed the enforceable meaning of the 'consultation' requirement in Article 124(2), to shift the dynamics of judicial appointments over higher judiciary from the executive towards the CJI and the collegium system, stand out as textbook examples of UICCs. Interestingly, the SCI in *Lok Prahari v. Union of India* ("**Prahari**"),[88] had also substituted the 'collegium system' over the previous constitutional process for '*ad-hoc*' appointments of retired judges to the higher judiciary, which has received severe criticism[89] on various grounds including the fact that the

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[83] *Id.*

[84] INDIA CONST., *amended by* The Constitution (Ninety-ninth amendment) Act, 2014.

[85] Supreme Court Advocates-on-Record Association & Anr v. Union of India, (2016) 5 SCC 1 (India).

[86] *Id.*

[87] *Id.*, (J.S. Khehar, A.K. Goel, and Kurian Joseph JJ.). Bhatia has demonstrated that the holding on 'primacy' of the judiciary over higher judicial appointments was endorsed by three out of five judges, thus becoming a binding holding, *see* Gautam Bhatia, *The Primacy of Judges*, SSRN (Mar. 8, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2744838.

[88] Lok Prahari through its General Secretary SN Shukla IAS (Retd.) v. Union of India and Others, 2021 SCC OnLine 333 (India).

[89] *See* Anujay Shrivastava & Abhijeet Shrivastava, *The Peculiar Introduction of 'Collegium Approvals' in 'Ad-Hoc' High Court Judge Appointments*, NLSIU L. SCH. POL. REV. (Apr. 27, 2021), https://lawschoolpolicyreview.com/2021/04/27/the-peculiar-introduction-of-collegium-approvals-in-ad-hoc-high-court-judge-appointments/.

constitutional provisions for ad-hoc judge appointments do not require 'consultation' unlike Article 124 of the constitution, thus becoming another illustration of an UICC. Notably, the Indian parliament has not attempted to restore NJAC and overrule either the *Fourth Judges' Case* or *Prahari*, displaying its submission to the UICCs introduced by the SCI.

Recognition of a 'Constitutional Right' to Vote and Contest Elections

An interesting illustration of an UICC in context of non-enforceable 'constitutional rights' in India is the catena of recent SCI precedents which held that 'right to vote' and the 'right to contest in public elections' are *constitutional rights*, thereby deviating from and overruling earlier precedents[90] which had held these rights to be mere *statutory rights*. In *PUCL v. Union of India* ("**PUCL**"),[91] a Three-Judge Bench of the SCI while adjudicating upon the validity of a legislative amendment[92] to the Representation of the People Act, 1951,[93] resolved various conflicting precedents, ultimately concluding that while the 'right to vote' is not a *fundamental right*, it is indisputably a *constitutional right*. This constitutional 'right to vote' can be understood to have been derived from Article 326 of the Indian constitution, which provides for Indian citizens to be entitled to be registered as a voter for elections to the Parliament and State Legislative Assemblies on the principle of adult suffrage, subject to certain restrictions.[94] However, since Article 326 does not expressly guarantee a *constitutional* right to vote, it wasn't until the *PUCL* decision that the status of this constitutional right was cemented, thus creating an UICC.

Moving forward, a Three-Judge Bench of the SCI in *Javed v. State of Haryana* ("**Javed**")[95] held that the 'right to contest an election' (including Panchayati elections) is a constitutional right. Subsequently, in SCI's decision in *Rajbala v. State of Haryana* ("**Rajbala**"), Justice Chelameswar authored the leading

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[90] *See e.g.*, Mohinder Singh Gill v. Chief Election Commissioner, AIR 1978 SC 851 (India); Shyamdeo Prasad Singh v. Nawal Kishore Yadav, AIR 2000 SC 3000 (India), ¶20.

[91] People's Union for Civil Liberties (PUCL) and Anr. v. Union of India and Anr., AIR 2003 SC 2363 (India), ¶123.

[92] Representation of the People (Third Amendment) Act, 2002 (India).

[93] Representation of the People Act, 1951 (India).

[94] INDIA CONST., art. 326.

[95] Javed v. State of Haryana, AIR 2003 SC 3057 (India).

opinion holding that, "[...] *every citizen has a constitutional right to elect and to be elected to either Parliament or the State legislatures*.",[96] a position supported by the concurring opinion by Justice A.M. Sapre.[97] Pertinently, while the SCI in *Rajbala* did uphold right to vote (elect) and right to be elected (contest) as constitutional rights, the decision has received criticism from scholars who argue that it failed to protect basic civil and political rights of citizens by dismissing the challenge to the constitutionality of the Haryana Panchayati Raj (Amendment) Act 2015.[98] Nevertheless, the precedents in *Javed* and *Rajbala* created an UICC by holding the right to stand or contest for elections (including Panchayat elections) as constitutional rights, especially since the text of the Indian constitution did not expressly recognise such rights.

Judicially imposed limitations on a Fundamental Right: Writ Jurisdiction in Article 32

The catena of SCI holdings which mandate that a petitioner approaching the SCI *via* the writ jurisdiction under Article 32 of the Constitution[99] should exercise any alternative legal remedies, especially Article 226 of the Constitution[100] which provides writ jurisdiction of High Courts, are examples of UICCs. As noted by Bhardwaj and Baheti,[101] earlier precedents of the SCI had consistently upheld the recourse to constitutional remedies under Article 32, which enables any individual to directly file a writ petition before the SCI. In fact, a SCI Five-Judge Bench had explicitly rejected the contentions that recourse to writ jurisdiction in Article 32 should be made after exhausting alternative remedies, even if this may lead to a practice of petitioners regularly directly approaching the SCI, since SCI's jurisdiction under Article 32 is wide and not constrained only to writ remedies as well

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[96] Rajbala and Ors. v. State of Haryana and Ors., AIR 2016 SC 33 (India), ¶40 (Jasti Chelameswar, J.).

[97] *Id.*, ¶101 (A.M. Sapre, J.).

[98] *See generally* Anurag Bhaskar, *Damage to Democracy Elitist Judgment of Supreme Court in Rajbala v State of Haryana*, 51(40) ECO. & POL. WKLY. 47-54 (2016).

[99] INDIA CONST., art. 32.

[100] INDIA CONST. art., 226.

[101] *See* Shrutanjaya Bhardwaj & Ayush Baheti, *Precedent, Stare Decisis and the Larger Bench Rule: Judicial Indiscipline at the Indian Supreme Court*, 6(1) IND. L. REV. 58, 68-69 (2021).

as the very fact that Article 32 guaranteed individuals with recourse to directly approaching the SCI as a fundamental right.[102]

However, the SCI in *Kanubhai Brahmbhatt v. State of Gujarat* ("**Brahmbhatt**")[103] and a catena of recent precedents (some of which have been highlighted by Bhardwaj and Baheti)[104] has held that petitioners can approach it under Article 32 only after exhausting all alternative legal remedies, especially the recourse to approaching High Court's *via* writ jurisdiction under Article 226. Importantly, Article 32 does not explicitly or implicitly require individuals to exhaust alternative remedies. Furthermore, a simple conjoint reading of Article 32, Article 226 and remainder of constitutional provisions would reflect the fact that the two writ jurisdictions are concurrent and not exclusive (although SCI's jurisdiction would inevitably take precedence due to the doctrine of *stare decisis* enshrined in Article 141).[105] Consequently, the string of SCI precedents starting from *Brahmbhatt,* which introduced the requirement of exhausting all alternative legal remedies or approaching a High Court under Article 226, prior to approaching the SCI under writ jurisdiction, have made *UNCIs* and thus created an UICC limiting a significant fundamental right.

Puttaswamy Case: Recognition of a 'Fundamental Right' to Privacy

Lastly, a classic example of creation of a new fundamental right through UICCs is the SCI's declaration that there is a fundamental right to privacy enshrined in the Indian Constitution, through the *unanimous* verdict in the Nine-Judge Bench decision in *Justice K.S. Puttaswamy (Retd.) v. Union of India* ("**Puttaswamy**").[106] Notably, not only does the Indian constitution lack any mention of a fundamental right to 'privacy', the constitution does not mention the word 'privacy' in its entire text.[107] Matthan has attempted to

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[102] Kavalappara Kottarathil Kochunni Moopil Nayar v. The State of Madras and Ors., AIR 1959 SC 725 (India), ¶12 (Sudhi Ranjan Das, J.).

[103] Kanubhai Brahmbhatt v. State of Gujarat, 1989 Supp (2) SCC 310 (India).

[104] *See* Bhardwaj & Baheti, *supra* note 101, at 69.

[105] INDIA CONST., art. 141.

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

[107] *See* Anujay Shrivastava, *The Origins, Jurisprudential Fallacies and Practical Limitations of a 'Right to Be Forgotten' in the European Union*, 10(2) NUJS INT'L. J. L. & POL'Y. REV., 152, 190 (2021).

demonstrate that it was a conscious decision of the drafters of the Indian constitution to exclude adoption of privacy rights.[108] Previously, a SCI Eight-Judge Bench in *M.P. Sharma v. Satish Chandra* ("**Sharma**"),[109] had held that there is no fundamental right to privacy under the Indian constitution, since the fundamental right provisions in India lacked any analogous provisions to the U.S. Federal Constitution guaranteeing such a right.

This position was re-affirmed by SCI in *Kharak Singh v. State Of Uttar Pradesh* ("**Kharak**"),[110] where a Six-Judge Bench by a clear 5:1 majority held that the Indian constitution did not confer any right to privacy, though Justice K. Subba Rao in his minority opinion held that *privacy* was an ingredient of 'personal liberty' under Article 21 of the constitution.[111] As highlighted by Khamroi and Shrivastava, the SCI in subsequent precedents did recognise a limited right to privacy under various fundamental rights provisions.[112]

Moving forward, a writ petition was filed challenging the constitutionality of the Aadhaar legislation,[113] which led to the SCI to constitute a Nine-Judge Bench in *Puttaswamy* to determine whether there exists a fundamental right to privacy in the Indian constitution as well as to gauge the correctness of *Sharma* and *Kharak* decisions. Through six separate opinions in *Puttaswamy*, the SCI *unanimously* held that there exists a fundamental right to privacy under the Indian constitution, which could be identified in various fundamental right provisions[114] such as Article 19 and Article 21, with three

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[108] *See* RAHUL MATTHAN, PRIVACY 3.0: UNLOCKING OUR DATA-DRIVEN FUTURE (HarperCollins India, 1st ed., 2018); Rahul Matthan, *Why did the Framers of the Indian Constitution not Explicitly Include the Right to Privacy?*, SCROLL.IN (Jul. 18, 2018), https://scroll.in/article/886850/why-did-the-framers-of-the-indian-constitution-not-explicitly-include-the-right-to-privacy.

[109] M.P. Sharma and Ors. v. Satish Chandra and Ors., (1954) 1 SCR 1077 (India).

[110] Kharak Singh v. The State Of Uttar Pradesh, AIR 1963 SC 1295 (India).

[111] *Id.*

[112] *See* Anubhav Khamroi & Anujay Shrivastava, *The curious case of Right to Privacy in India*, 2(12) IND. CONST. L. REV. 1, 9-13 (2017).

[113] The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, The Gazette of India, pt. II, sec. I (Mar. 26, 2016).

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

major standards[115] to test claims for violation of the fundamental right to privacy against the state.

Thus, the *Puttaswamy* decision also overruled the *Sharma* and *Kharak* decisions, which adjudicated upon the questions of existence of a fundamental right to privacy from a textualist lens. Hence, the *Puttaswamy* decision is an example of the SCI rendering an UICC by recognising a fundamental right which had no constitutional basis from an originalist view. However, when viewed from a transformative lens, this fundamental right indisputably has a role distinct[116] from other fundamental rights.

B. BANGLADESH THE CURIOUS CASE OF THE "BASIC STRUCTURE" PRECEDENTS AND CONSTITUTIONAL AMENDMENT

A Judicially introduced UICC subsequently legitimised by the Legislature

In contrast to the Indian experience and the USA, Bangladesh has witnessed limited instances of informal constitutional changes by its constitutional courts that could be classified as an UICC. Yet, one instance of creation of an UICC and its subsequent legacy in Bangladesh stands out.

Taking inspiration from the Indian experience, the BSD has been adopted in identical or similar forms by foreign constitutional courts to entrench their country's Constitutions by limiting formal constitutional amendments which may change the identity of a country's constitution.[117] One such instance is the Supreme Court of Bangladesh ("**SCB**") in *Anwar Hossain Chowdhury v. Bangladesh* ("**Anwar**"),[118] where the BSD from the SCI judgement in *Kesavananda* was accepted and made a part of Bangladesh's

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[115] *See* Shrivastava, *supra* note 100, 194-195.

[116] *See* Anubhav Khamroi & Anujay Shrivastava, *Analysing the Practical Implications Of A Right To Privacy: State Surveillance And Constitution*, 8 IND. CONST. L. REV. 99, 105-109 (2019).

[117] *See* Yaniv Roznai, *The Migration of the Indian Basic Structure Doctrine*, *in* JUDICIAL ACTIVISM IN INDIA: A FESTSCHRIFT IN HONOUR OF JUSTICE V. R. KRISHNA IYER 240 (Malik Lokendra ed., Universal Law Publishing, 2012).

[118] Anwar Hossain Chowdhury v. Bangladesh, (1989) 18 CLC (AD) 1 (Bangl.), ¶196, ¶336, ¶417.

constitutional jurisprudence as a check against formal constitutional amendments, specifically ones that would constitute an UCA. The judgement in *Anwar* did not let the textual absence of implied limitations in the Bangladesh Constitution such as the BSD stand a roadblock, thus rendering an UNCI from an originalist lens. Recently, a Seven-Judge SCB Bench in *Government of Bangladesh v. Asaduzzaman Siddiqui* ("**Siddiqui**")[119] affirmed the applicability of BSD borrowed from *Kesavananda* in context of Bangladesh Constitution, thus re-affirming its precedent in *Anwar*. Similar to the SCI's judicial precedents on BSD, the SCB introduced an UICC in the form of restrictions on amendability of the Constitution in Bangladesh. For present purposes, it is not essential to delve into the constitutional history of the *Anwar* and *Siddiqui* cases.

In what might seem like a rare display of comity, the Bangladesh legislature in 2011 amended the Constitution *via* the Fifteenth Constitutional Amendment[120] to incorporate an eternity clause through a new Article 7B which interestingly also included *unamendability* of Constitution's provisions that were a part of the basic structure, though scholars such as Lima have critiqued incorporation of Article 7B on the ground that, "*not all the articles entrenched by it may qualify to be the core ideals of the constitution*."[121] In this way, the use of both constitutional amendments and the judicially created BSD to identify the provisions of Bangladesh's Constitution as a 'basic structure' (outside those already protected by Article 7B and/or those previously declared as a basic structure by the constitutional courts) was legitimised

[119] Government of Bangladesh v. Asaduzzaman Siddiqui, 71 DLR (AD) (2019) 52 (Bangl.: 5 CLR (2017) 214 (Bangl.).

[120] The Constitution (15th Amendment) Act, 2011 (Bangladesh). Article 7B states that: "*7B. Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III,* ***and*** *the provisions* ***of articles relating to the basic structures of the Constitution*** *including article 150 of Part XI* ***shall not*** *be* ***amendable*** *by way of insertion, modification, substitution, repeal* ***or by any other means***." (emphasis author's), *see* BANGLADESH CONST. (1972) art 7B.

[121] Lima Aktar, *Article 7B and the Paradox of Externalising the Constitution of Bangladesh*, IADC-IACL BLOG (May 11, 2021), https://blog-iacl-aidc.org/2021-posts/article-7b-and-the-paradox-of-eternalising-the-constitution-of-bangladesh.

by the legislature.[122] Thus, this development could be inferred both as legislature's nod to the BSD and formal affirmation of the judicially created UICC in *Anwar* and subsequent precedents, while also meaning that there are concurrently two forms of BSD that constitutional amendments are subject to in Bangladesh (judicially created and those legislative encompassed in Article 7B of the Constitution of Bangladesh).[123] Consequently, the BSD in Bangladesh could be argued to have lost its status as an UICC today and acts as a valid form of judicial check against the legislature's power to amend. In this way, a judicially created UICC can subsequently become a legitimate *informal constitutional change* by gaining populist support and legislative recognition *via* formal constitutional amendments.

Bangladesh's Unique Approach in Comparison to India

In stark contrast to the Bangladesh experiences, India's experiences with its judicially created UICCs have been different. In order to demonstrate this, the author would bring attention to the responses to UICC in the following two instances.

Legislative and Judicial Uneasiness with the BSD

It is pertinent to mention that the initial reception to BSD from both the Indian legislature and the SCI itself was unpleasant. *First*, during an ongoing case which was pending in time of India's internal emergency declaration, the CJI, Justice A.N. Ray (who had also authored the leading minority opinion against the BSD in *Kesavananda*), had unsuccessfully attempted to constitute a Thirteen-Judge SCI Review Bench to determine the correctness of *Kesavananda.*[124]

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[122] *See* Anubhav Khamroi, *"Dead Hand" Rule or Constitutional Guardian: A Comparative Analysis Of Judicially Imposed Limitations On Formal Constitutional Change In India, Bangladesh & Israel*, *in* N.K. CHAKRABARTI, GLOBAL THOUGHTS AND OPINIONS ON THE CONSTITUTION AND CONSTITUTIONALISM (R. Venkata Rao et al. ed., 1st ed., 2020).

[123] *Id.*

[124] Arvind P. Datar, *The Case that Saved Indian Democracy*, THE HINDU (Sep. 6, 2020) https://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article12209702.ece.

Second, not only was the affirmation of the BSD in *Kesavananda* by a thin majority of 7:6 judges, only Justice Khanna[125] who had partly joined the six Judges in favour of supporting limits on constitutional amendments had formulated a discussion on the BSD in depth,[126] demonstrating lack of a judicial consensus.

Lastly, Indian Government through the Attorney General had attempted to get *Kesavananda* overturned, hinting at legislature's and executive's (then) strong disapproval of the BSD.[127] Notably, the Indian Parliament has never made an attempt to legislatively either affirm or overrule the BSD through constitutional amendments, due to which the UICC in the form of BSD remains.

Tussle between Legislative and Judicial Organs over Judicial Appointments

As discussed in preceding parts, the Indian Parliament in 2014 had introduced the NJAC *via* a constitutional amendment and had legislatively overruled the UICC of collegium system created by the *Second Judges' Case* and the *Third Judges' Case*, which had given SCI absolute control over judicial appointments. The introduction of NJAC was *unanimously* supported by all opposition parties, with the sole dissenter being Ram

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[125] *See* Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (India), ¶¶1432, 1437,1444-5, 1484, 1496, 1548, 1550 (H.R. Khanna, J.).

[126] Contrary to popular opinion, some of the other judges in *Kesavananda* who upheld the belief that there were implied limitations on amendment powers under the Indian Constitution had also mentioned and briefly discussed the BSD, *see, e.g.*, Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (India), ¶¶ 302-4 (S.M. Sikri, J.), ¶599 (J.M. Shelat & A.N. Grover, JJ.), ¶¶1151, 1163, 1171-74, 1194, 1222 (P. Jagmohan Reddy, J.). However, they did not discuss the BSD in depth unlike the separate judgement by H.R. Khanna, J.

[127] Adil Rustomjee, *The review that wasn't: Forty years after Kesavananda Bharati vs the State of Kerala*, FIRSTPOST (Dec. 22, 2015), https://www.firstpost.com/india/the-review-that-wasnt-forty-years-after-kesavananda-bharati-vs-the-state-of-kerala-2555020.html; *Why Kesavananda Bharati vs State of Kerala case is considered landmark in India's independent history*, INDIA TV (Sep. 6, 2020), https://www.indiatvnews.com/fyi/what-is-kesavananda-bharati-case-vs-state-of-kerala-basic-structure-constitution-fundamental-rights-647544.

Jethmalani, a MLA of the ruling party.[128] As previously mentioned, the SCI in *Fourth Judges' Case*[129] had subsequently declared NJAC as unconstitutional by a clear 4:1 majority and restored the collegium system, consequently upholding the UICCs created by the earlier precedents. Thus, the judicial organ declared that the parliament could not win this tug of war against the SCI over judicial appointments to the higher judiciary, even if it attempted to do so with nigh-unanimous consensus of the members of parliament and political parties.

Author's Comments

The above-mentioned two examples show that India's state organs have continuously been in a tug of war over UICCs introduced by the SCI in the BSD jurisprudence and the judicial appointments tussle dealt with in *Four Judicial Appointments Cases*, with even the judiciary itself showing few instances of being divided or uncertain about the correctness of BSD which is in stark contrast to the constitutional history in Bangladesh. On a related note, Ginsburg's theory of 'tolerance zones'[130] could offer a way of understanding which legislative constitutional amendments overruling judicially created UICCs would likely be subjected to judicial review in India, with the BSD and the judicial appointments or collegium system potentially being placed on the extreme spectrum of constant judicial review against constitutional amendments.

In conclusion, the approach collectively followed by the state organs in Bangladesh with respect to the dual acceptance of BSD by its judiciary and legislature is not only ideal for a secular democracy, but highly commendable. The Bangladesh perspective highlights a significant instance of a beneficial UICC being legitimised as a part of a country's constitutional jurisprudence and any potential conflicts between state organ's separation of powers being resolved amicably. It is a rare instance where a judicially

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[128] *Ram Jethmalani says MPs do not have a clue of what this NJAC is all about. Do We?*, THE NEWS MINUTE (Jul. 8, 2015), https://www.thenewsminute.com/article/ram-jethmalani-says-mps-do-not-have-clue-what-njac-all-about-do-we-31651.

[129] Supreme Court Advocates-on-Record Association & Anr v. Union of India, (2016) 5 SCC 1 (India).

[130] *See generally* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 68, 81-82, 92, 104, 130, 245, 252 (Cambridge University Press, 1st ed., 2003).

created UICC acquired populist support by formal constitutional amendments that were made by an elected parliament.

C. HONDURAS: DANGERS OF "*UNCIs*"

The Honduran jurisprudence has rarely witnessed informal constitutional changes by its constitutional courts when compared to India, Bangladesh and the USA. This is presumably due to two reasons. *First*, its twelfth and current constitution was adopted in 1982, which is much later than the adoption of constitutions in these three jurisdictions.[131] *Second*, the constitutional amendment procedure contemplated in Article 373 of the Honduras's constitution[132] makes it extremely easier for the legislative organ to readily amend the constitution when compared to the other three jurisdictions.[133]

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[131] REPÚBLICA DE REPÚBLICA DE HONDURAS CONST. (1982).

[132] REPÚBLICA DE REPÚBLICA DE HONDURAS CONST. (1982) art. 373.

[133] The Honduras merely requires the *Honduran National Congress* to obtain two-thirds (66.67%) of votes of its members in *any regular session*, and incorporates limitations on tiny number of constitutional matters under Article 374, *see* REPÚBLICA DE REPÚBLICA DE HONDURAS CONST. (1982) art 373, art 374. This is in stark contrast with the procedures in India, Bangladesh and the USA. *First*, in India, Clause (2) of Article 368 of the Indian Constitution requires that either the Lok Sabha (Lower House) and Rajya Sabha (Upper House) must initiate the amendment process by introducing a Bill for constitutional amendment. This Bill must be passed by both Lok Sabha and Rajya Sabha by a majority of the total membership of each House present and voting, meaning that if the Bill fails to attain majority in either Houses, it will collapse. Thereafter, the passed Bill must receive the President's assent and be notified. In case a constitutional amendment seeks to introduce changes in certain provisions or parts of the Constitution, such amendment must be ratified by the legislatures of not less than 50% of all Indian states with a public resolution. Even if a constitutional amendment is passed, it is subject to challenge on grounds of the BSD introduced by *Kesavananda* and for violating fundamental rights enshrined in Part-III of the Indian Constitution, a judicial check absent in Honduras. Therefore, the amendment process in India is significantly tougher than in Honduras. *Second*, in case of Bangladesh, its Constitution mandates that a Bill for constitutional amendment has to be passed by the votes of not less than two thirds of the total number of members of Parliament and to receive the President's assent, *see* BANGLADESH CONST. (1972) art. 142. The amending power is expressly restricted by the judicially created and developed BSD by SCB's precedents as well as the eternity clause in Article 7B discussed previously, *see* BANGLADESH CONST. (1972) art. 7B. Furthermore, Article 7A provides for

Due to this reason, its judicial organ may not feel it necessary to regularly produce informal constitutional changes. Roznai[134] has previously identified a prominent instance of an UICC being manifested by a constitutional court's decision in Honduras which will be discussed hereafter.

In 2015, the Honduran Supreme Court ("**HSC**") in a 2015 judgement[135] had reportedly unanimously struck down provisions of the Honduras Constitution[136] which declared that certain constitutional provisions relating to ban on presidential re-elections were 'unamendable'. Scholars have highlighted the peculiarity in HSC's application of judicial review of Article 42, Article 239 and Article 374, which is that the constitutional provision on unamendability was in fact a part of the original Constitution.[137] In this way, substantive constitutional revision of the

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"*Offence of abrogation, suspension, etc. of the Constitution*", deeming every offence listed in Article 7A as 'sedition' and enabling the Bangladesh legislature to provide for the "highest punishment" against such individuals possible under its national laws, thus acting as a strong deterrent against abuse of constitutional amendments, *see* BANGLADESH CONST. (1972) art 7A. Therefore, the constitutional amendment process in Bangladesh is more challenging than in Honduras, even though both nation-states have one House of Parliament, due to the impact of judicial precedents and constitutional provisions expressly limiting amendment procedure. *Lastly*, in the case of USA, Article V of the US Federal Constitution mandates that two-thirds (66.67%) of both Houses (the Senate and the House of Representatives), or two-thirds of the several States (i.e., two-thirds of the 50 US States or presently 38 US States) must call a Convention for proposing Amendments. This must then be ratified by the Legislatures of three-fourths (75%) of all US States (i.e., 38 US States), *see* U.S. CONST. art. V. Thus, when contrasted with the procedures in Honduras, India and Bangladesh, the US Constitution turns out to be the most difficult to amend. Furthermore, as impressively established by Albert, the US Federal Constitution is empirically and structurally rigid, making it almost impossible to pass constitutional amendments, especially when compared to various nation-states, *see* Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 221-231, 249-52 (2016).

[134] *See* Roznai, *supra* note 16, 570-571.

[135] Corte Suprema de Justicia—Sala de lo Constitutional [Supreme Court of Justice—Constitutional Chamber], F-165, Poder Judicial De Honduras [Judiciary of Honduras] (2015) (Honduras).

[136] REPÚBLICA DE REPÚBLICA DE HONDURAS CONST. (1982) art. 42, art. 239, art. 374.

[137] *See* David E Landau, Rosalind Dixon & Yaniv Roznai, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 8 GLOBAL CONSTITUTIONALISM 40, 42 (2019); David Landau, *Honduras: Term Limits Drama 2.0 - How*

original Constitution by the HSC could undermine a liberal democratic order from a pragmatic perspective.[138] This is especially considering that the constitutional provisions which were held to be unconstitutional were not constitutional amendments, but formed a part of the exercise of the constituent power of the peoples at the time of adoption of the Constitution.[139] There is no shadow of a doubt that the impact of the HSC's interpretation of Article 374, which changes the constitution's enforceable meaning so radically that it subverts a form of election system protected by an eternity clause in the original constitutional provisions, amounts to an *UNCI* resulting in an UICC.

Observing the political backdrop of the judgement, which appears to support interests of the incumbent government,[140] the HSC's decision clearly sets a dangerous precedent where not only does the judicial organ of a country fail to uphold constitutional principles,[141] it submits to the interests of the ruling government who is unlikely to reverse an UICC that favours[142] its regime. Contrastingly, the Bangladesh experience of the Parliament legitimising a beneficial judicially introduced UICC as well as the Indian experience of judicial uncertainty or tussle between the legislative and judicial organs of the State over UICCs serve as examples of a healthy democracy. Conversely, the holding in *Kesavananda*, that FRTP under Article 19(1)(f) of the Indian constitution is not protected by the BSD, is an example of an UICC that could be related to the Honduran

the Supreme Court declared the Constitution Unconstitutional, CONSTITUTION.NET (May. 27, 2015), https://constitutionnet.org/news/honduras-term-limits-drama-20-how-supreme-court-declared-constitution-unconstitutional.

138 *See id.*, at 42-43, 54.

139 *Id.*

140 *See* Leiv Marsteintredet, *The Honduran Supreme Court Renders Inapplicable Unamendable Constitutional Provisions*, INT'L. J. CONST. L. BLOG (May. 1, 2015), www.iconnectblog.com/2015/05/marsteintredet-on-honduras/#_ednref8; Brian Sheppard & David Landau, *Why Honduras's Judiciary Is Its Most Dangerous Branch*, THE NEW YORK TIMES (Jun. 6, 2015), https://www.nytimes.com/2015/06/26/opinion/why-hondurass-judiciary-is-its-most-dangerous-branch.html.

141 Sheppard & Landau, *supra* note 140.

142 *See* Landau, *supra* note 137.

experience, with both instances ultimately resulting in destruction of, *or* enabling erosion of important constitutional provisions.

D. UNITED STATES OF AMERICA (USA): SELECT ILLUSTRATIONS

Amar has called the process of creation and adoption of the U.S. Federal Constitution[143] as "*the most democratic deed the world had ever seen*",[144] though he reminds us that women and slaves were not a part of that process.[145] Albert has highlighted the fact that the U.S. Federal Constitution is empirically and structurally rigid, being extremely difficult to amend compared to many jurisdictions, especially due to its institutional consolidation[146] with the possibility of having an inherently 'unamendable core'.[147] Owing to the extreme difficulty in making a change by recourse to formal constitutional amendments in the U.S.A., the SCOTUS has declared numerous judicial pronouncements[148] which have not only changed the enforceable meaning of the U.S. Federal Constitution by informal constitutional changes,[149] but have also transformed and impacted the course of history over two centuries for U.S. society. Many of these precedents have indisputably influenced global constitutional law developments, though the impact of the U.S. Federal Constitution and SCOTUS precedents on foreign jurisdictions seems to be declining.[150]

Before delving into the American experiences, it is necessary to mention two major limitations in the present article while identifying UICCs in the

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[143] U.S. CONST.

[144] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 2 (Random House Trade Paperbacks, 1st ed., 2006).

[145] *Id.,* at 18.

[146] *See* Albert, *supra* note 133.

[147] *See* Richard Albert, *The Unamendable Core of the United States Constitution*, in RUSSELL L. WEAVER ET. AL., COMPARATIVE PERSPECTIVES ON FREEDOM OF EXPRESSION 13, 24-31 (Carolina Academic Press, 1st ed., 2015).

[148] For a study of significant SCOTUS precedents in US Federal Constitution, *see generally* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (Basic Books, 1st ed., 2012); Marshfield, *supra* note 7, at 484.

[149] Marshfield, *supra* note 7, at 469-470.

[150] David S. Law & Mila Versteeg, *The Declining Influence of The United States Constitution*, 87(3) N.Y. U. L. REV. 762 (2012).

U.S.A. *First*, due to its federal structure, the U.S. has a total of fifty-one (51) constitutions with the *U.S. Federal Constitution* being the primary source of law and binding instrument on the U.S. Federal Government as well as all U.S. states, whereas fifty (50) individual *State Constitutions* only govern their respective states.[151] Presently, our focus shall exclusively be restricted to the U.S. Federal Constitution as interpreted by the SCOTUS, since a study of judicially created UICCs by various U.S. state constitutional courts while interpreting *State Constitutions* would not yield any benefit when comparing these experiences with foreign UICCs by constitutional courts in nation-states. *Second*, in order to maintain relevance with the jurisdictional examples discussed previously, a limited number of SCOTUS decisions shall be discussed. This is especially important as the governance structures of the first world (Global North) nation-state in the U.S.A. may significantly differ from the third-world (Global South) nation-states in India, Bangladesh and Honduras, thus rendering approaches to a comparative analysis unmeaningful (especially when viewed from Hirschl's criticism[152] of universalisation of constitutional law in comparative constitutional law scholarship).

Marbury **Case and Judicial Review**

The earliest and most illustrious of UICCs in the U.S. is arguably the landmark SCOTUS precedent in *Marbury v. Madison* ("**Marbury**"),[153] whose importance as an informal constitutional change has been asserted by scholars.[154] The U.S. Federal Constitution does not explicitly provide for the principle of 'judicial review' of any acts of U.S. Congress or statutes in

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[151] Each of the fifty (50) individual States within the USA has its own Constitution, with some of the current State Constitutions having replaced earlier ones, *see State Constitution*, BALLOTPEDIA (Mar. 2022), https://ballotpedia.org/State_constitution#List_of_state_constitutions. All of these Constitutions are subordinate to the US Federal Constitution. Notably, Rhodes Island's second Constitution adopted in 1986 is the last Constitution adopted in the USA, with the new Rhodes Island Constitution having replaced the earlier Rhodes Island State Constitution adopted in 1843.

[152] *See* Ran Hirschl, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method*, 2 IND. J. CONST. L. 11, 12 (2008).

[153] Marbury v. Madison, 5 U.S. 137 (1803) (U.S).

[154] Marshfield, *supra* note 7, 484; Roznai, *supra* note 16, at 557.

its text.[155] In *Marbury*, the SCOTUS famously held that it was empowered to strike down a statutory law or an act of the U.S. Congress which was inconsistent with or violated the principles laid down in the U.S. Federal Constitution.[156] Hence, the SCOTUS gave itself the power of judicial review and created an UICC, which continued to be upheld, followed and developed[157] over the centuries.

This UICC, *namely*, the principles of judicial review have thereafter become an accepted, entrenched and enforceable part of the US constitutional jurisprudence, one without which the modern USA couldn't be imagined.[158] The *Kesavananda* decision by SCI which came a hundred-and-seventy (170) years after *Marbury* bears an interesting resemblance in the sense that the former precedent also created an UICC which expanded the scope of judicial review over its jurisdiction's constitution, ultimately giving itself powers to exercise judicial review over constitutional amendments *vis-à-vis* the BSD.

Dred Scott **Case: Depriving citizenship of African-Americans and nod to Slavery**

The landmark SCOTUS decision in *Dred Scott v. Sanford* ("**Scott**")[159] is of significance, even though the UICCs it introduced, were subsequently legislatively overruled (starting with the introduction of slavery abolition *via* the XIII[th] Amendment).[160] In the *Scott* case, the SCOTUS had famously, by a 7:2 majority, held that African-American people (whether free or enslaved) are not and were not meant to be included as American citizens by the U.S. Federal Constitution (since the Constitution only recognised people belonging to the white race to be citizens or capable of obtaining citizenship in the USA).[161] Furthermore, the SCOTUS majority lead by

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[155] *See* MICHEAL C. DORF & TREVOR W. MORRISON, THE OXFORD INTRODUCTIONS TO U.S. LAW: CONSTITUTIONAL LAW 24 (Oxford University Press, 1st ed., 2010).

[156] Marbury v. Madison, 5 U.S. 137 (1803) (USA).

[157] WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (University Press of Kansas, 2d ed., 2018).

[158] *See* AMAR, *supra* note 131, 65, 245.

[159] Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857) (USA).

[160] U.S. CONST. amend. XIII.

[161] Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857) (USA).

Justice Roger Taney that the U.S. Congress was constitutionally obligated to allow slavery in the state territories.[162] Notably, not only was the U.S.

Federal Constitution indisputably silent on whether the American citizenship was restricted solely to people belonging to the white race, scholars such as Amar[163] have critiqued the *Scott* holdings noting that the constitution placed no prohibition on the U.S. Federal Government to impose restrictions or bans on slavery, thus making Justice Taney's majority holdings a blatant violation of both the U.S. Federal Constitution and the U.S. history. Consequently, the *Scott* decision was a dreadful result of a crystal-clear *UNCI* and its holdings were UICCs, one which is regarded[164] to have precipitated the U.S. Civil War.

Plessy Case and Doctrine of "Separate, but Equal"

The landmark SCOTUS decision in *Plessy v. Ferguson* ("**Plessy**"),[165] which introduced the doctrine of "*separate, but equal*" ("**SBE**") in U.S. constitutional jurisprudence is an example of an UICC. In *Plessy*, the SCOTUS by a 7:1 majority held that laws enforcing separate railroad compartments for white people and people of other races or mixed races were constitutionally valid and did not violate the racial equality clause in the Fourteenth Amendment[166] to the U.S. Federal Constitution.[167] While reaching this conclusion, the majority of SCOTUS judges developed the SBE and entrenched it in the Fourteenth Amendment which was itself actually inserted by a constitutional amendment and ratified in 1868.

Therefore, the creation of the SBE by SCOTUS is an UICC, which serves as a good example of UICCs created by a constitutional court through an

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[162] *Id.*

[163] *See* AMAR, *supra* note 144, 303, 440, 449.

[164] Martin Magnusson, *"No Rights Which the White Man was Bound to Respect": The Dred Scott Decision*, AMERICAN CONSTITUTION SOCIETY (Mar. 19, 2007), https://www.acslaw.org/expertforum/no-rights-which-the-white-man-was-bound-to-respect/.

[165] Plessy v. Ferguson, 163 U.S. 537 (1896) (USA).

[166] U.S. CONST. amend. XIV.

[167] Plessy v. Ferguson, 163 U.S. 537 (1896) (USA).

UNCI of constitutional provisions introduced by *formal constitutional changes*. Amar has noted that the doctrine of SBE laid in *Plessy* had been eventually enfeebled by, *inter alia*, subsequent SCOTUS precedents beginning from the *Brown v. Board*[168] decision and various acts of U.S. Congress.[169]

Griswold **Case: Fundamental Constitutional Right to Privacy and Contraceptives**

Next, it is pertinent to mention the *Griswold v. Connecticut* ("**Griswold**")[170] case. Bedi has previously highlighted that the U.S. Federal Constitution is silent on whether a right to privacy is available to U.S. citizens.[171] In *Griswold*, the SCOTUS by a 7:2 majority held that the state could not create a law which restricts and punishes a married couple from access to contraceptives and their use.[172] While doing so, the SCOTUS held that the Connecticut state statute was violative of the "*fundamental constitutional right to privacy*"[173] of married couples. In this way, the SCOTUS recognised a fundamental constitutional right to privacy in the U.S. Federal Constitution (which was not expressly mentioned in the constitution's text), thus giving birth to an UICC. This decision was relied by SCI in previously discussed *Puttaswamy*[174] decision while similarly identifying a fundamental right to privacy in the Indian Constitution.

However, one could contest the nature of UICC in *Griswold* by looking at the concurring opinion of Justice Arthur Goldberg who referred to the Ninth Amendment of the U.S. Federal Constitution which states that: "*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*",[175] in order to support the notion that

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[168] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (USA).

[169] *See* AMAR, *supra* note 144, 292-315 (2006).

[170] Griswold v. Connecticut, 381 U.S. 479 (1965) (USA).

[171] *See* Shruti Bedi, *The Contestation Between Right to Be Forgotten and Freedom of Expression: Constitutional Silences and Missed Opportunities*, 6(1) COMP. CONST. L. & ADMIN. L.J. 1, 4 (2021).

[172] Griswold v. Connecticut, 381 U.S. 479 (1965) (USA).

[173] *Id.*, (William Douglas, J.).

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

[175] U.S. CONST. amend. IX.

there exists a fundamental constitutional right to privacy as well as marital couples' right to access and use contraceptives under this right.[176]

This right was subsequently extended by SCOTUS to unmarried couples,[177] all adult women in *Roe v. Wade* ("**Roe**"),[178] and to juveniles (aged sixteen and above).[179] Interestingly, the interpretation of due process and the Ninth Amendment by the majority holdings in *Griswold* was also relied upon in *Loving v. Virginia* ("**Virginia**"),[180] where the SCOTUS recognised the fundamental right to marry for interracial couples – a precedent which became basis for the next SCOTUS case discussed hereafter.

Obergefell **Case and the Fundamental Right to Marry for Same-Sex Couples: An "*Unconstitutional Change*"?**

As highlighted by Barczentewicz,[181] the SCOTUS decision by a thin 5:4 majority in *Obergefell v. Hodges* ("**Obergefell**")[182] is often indirectly cited by some scholars as an example of an *unconstitutional* change (without references to the concept of UICCs). In *Obergefell*, the majority held that there existed a fundamental right to marry for same-sex couples as it existed for heterosexual couples, ordering all fifty US States to perform and register same-sex marriages on identical terms and conditions as heterosexual couples. Among other precedents, the SCOTUS also placed reliance on *Griswold* and *Virginia* precedents. As strict textualists and originalists such as the former SCOTUS Judge, Justice Scalia[183] and an

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[176] Griswold v. Connecticut, 381 U.S. 479 (1965) (USA) (Arthur Goldberg, J.).

[177] Eisenstadt v. Baird, 405 U.S. 438 (1972) (USA).

[178] Roe v. Wade, 410 U.S. 113 (1973) (USA).

[179] Carey v. Population Services International, 431 U.S. 678 (1977) (USA).

[180] Loving v. Virginia, 388 U.S. 1 (USA).

[181] Mikołaj Barczentewicz, *The US Same-Sex Marriage Decision: Unconstitutional Constitutional Change?,* INT'L. J. CONST. LAW BLOG (Jul. 8, 2015), http://www.iconnectblog.com/2015/07/the-us-same-sex-marriage-decision-unconstitutional-constitutional-change.

[182] Obergefell v. Hodges, 576 U.S. 644 (2015) (USA).

[183] *See generally* Grant Darwin, *Originalism and Same-Sex Marriage*, 16 U. PA. J. L. & SOC. CHANGE, 237-80, 239 (2013). Throughout his article, Darwin has highlighted instances where late SCOTUS Judge, Justice Scalia has held the opinion that on a plain 'originalist'

incumbent SCOTUS Judge, Justice Clarence Thomas[184] argue, there is no fundamental right to marry for same-sex couples that emerges from the written text of the US Federal Constitution. Consequently, if one strictly follows this line of thought, then recognition of such a right would be an UICC.

However, the author feels that it is important to highlight that the same textualist or originalist logic could be applied to heterosexual marriages in the US, which have been performed and been legally registered since centuries[185] even though the US Federal Constitution doesn't textually mention them. Furthermore, as rightly pointed out by Barczentewicz,[186] the judgement in *Obergefell* does not attempt to bring a constitutional change, but attempts to merely apply the law as it exists for one class of people or circumstances to another class of people or context – which affects changes only to the law's application. To give a simple example of such an application, one could look at subsequent SCOTUS judgments after the previously discussed *Griswold* case, which extended the fundamental right to privacy *vis-à-vis* access to and use of contraceptives, to a broader category of individuals and couples.[187] Even if one disagrees with the foregoing line

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reading (which Darwin identifies as 'New Originalism' propounded by Justice Scalia), it is clear from the text of the US Federal Constitution that there is no fundamental right to same-sex marriage. This argument by Justice Scalia is refuted throughout Darwin's article.

[184] Justice Clarence Thomas supported this view in his concurring opinion in a recent precedent, which shall be discussed next, *see* Dobbs v. Jackson Women's Health Organization, 2022 U.S. LEXIS 3057 (USA).

[185] *See generally* Cynthia Crossen, *Couples in the U.S. Used to Marry Early, Often and Informally*, WALL ST. J. (Feb. 25, 2004), https://www.wsj.com/articles/SB107766165580138131.

[186] Barczentewicz, *supra* note 181.

[187] There are various such instances, out of which the author will list a few here. In Eisenstadt v. Baird, 405 U.S. 438 (USA), the SCOTUS extended fundamental right to access and use contraceptives to unmarried couples and independent individuals (women), where it recognised their equal status in possessing rights that were recognised for married couples in *Griswold*. In Roe v. Wade, 410 U.S. 113 (USA), Thereafter, through a SCOTUS decision, the fundamental constitutional right to "abort" a child was extended to women (i.e., a fundamental right to undergo surgical and other medical procedures than contraception to avoid birth of a child). In Doe v. Bolton, 410 U.S. 179. (USA), which was delivered on the same day as *Roe* v. *Wade*, the SCOTUS by an 8:1 clear majority held that State laws restricting use of contraceptives and abortion procedures only in cases such as rape, severe foetal deformity, or possibility of severe or fatal injury to mothers, were unconstitutional especially in light of the fundamental right to privacy and decisional

of thought, it is pertinent to remind ourselves that the Ninth Amendment itself is sufficient ground to support the constitutional basis of a fundamental right to marry for same-sex couples. Consequently, the judgement in *Obergefell* does not constitute an UICC.

Dobbs **Case: Overturning of 'Right to Abortion' recognised in** ***Roe*** **and** ***Casey*** **Cases**

Finally, the last illustration of an UICC born in the USA is the recent SCOTUS decision in *Dobbs v. Jackson* ("**Dobbs**")[188], which overturned the landmark precedents in *Roe* and *Planned Parenthood v. Casey* ("**Casey**")[189] that had consistently upheld the fundamental right to abortion. Before delving into *Dobbs*, it is necessary to briefly explain the holdings in *Roe* and *Casey*. In *Roe*, the SCOTUS had relied on the majority judgement and Justice Goldberg's concurring opinion in *Griswold* to declare by a majority of 7:1 judges that there existed a fundamental right to privacy in the US Federal Constitution, recognised by Ninth Amendment and concomitantly protected by the due process clause in Fourteenth Amendment.[190] Consequently, every adult woman had a fundamental right to access and undergo abortion with limited legal restrictions.[191] Simultaneously, it was held that statutes which criminalise abortion for all purposes (excluding life-saving procedures) without regard to stages of pregnancy and other interests involved, would violate the Fourteenth Amendment, thus in effect, automatically and easily invalidating all such statutes which criminalised abortions in every US state. In *Casey,*[192] the correctness of *Roe*

autonomy. In Bellotti v. Baird, 443 U.S. 622 (1979) (USA), the SCOTUS extended limited abortion rights to legal minors, requiring parental consent or approval from a state judge prior to undergoing an abortion procedure, owing to the perceived incapacity of minors to understand and independently decide upon consequences of their actions. Importantly, in Planned Parenthood v. Casey, 505 U.S. 833 (1992) (USA), the constitutionality and legality of Roe v. Wade was upheld, with modifications to the legal standards, which will be discussed briefly in the next segment.

[188] Dobbs v. Jackson Women's Health Organization, 2022 U.S. LEXIS 3057 (USA).

[189] Planned Parenthood v. Casey, 505 U.S. 833 (1992) (USA).

[190] Roe v. Wade, 410 U.S. 113 (1973) (USA).

[191] *Id.*

[192] Planned Parenthood v. Casey, 505 U.S. 833 (1992) (USA).

was upheld, though the SCOTUS replaced the 'strict scrutiny' test and trimester framework laid down in *Roe* with the 'undue burden' standard.

Moving forward, in *Dobbs*, the SCOTUS by a narrow 5:4 majority overruled the precedents in *Roe* and *Casey*, with the majority judgement by Justice Samuel Alito[193] observing that neither does the US Federal Constitution make reference to a right to abortion nor does it implicitly protect it. Consequently, the SCOTUS held that individual states had the power to decide whether abortion should be legal.[194] In a separate concurring opinion, Justice Clarence Thomas went even further and said that SCOTUS precedents in *Griswold*, *Obergefell*, and *Lawrence v. Texas* (decriminalisation of private sexual acts between consenting homosexual adults)[195] should be re-looked into, as "*any substantive due process decision is 'demonstrably erroneous'*."[196] While concurring with the majority judgment, Justice Brett Kavanaugh cautioned that punishing abortions retroactively before *Dobbs* was pronounced would be unconstitutional. He further held that making a state law that prohibits undergoing abortion in another state where abortion is legal would be unconstitutional.[197] Justices Stephen Breyer, Elena Kagan and Sonia Sotomayor who wrote a joint dissenting opinion, *inter alia*, stated that a fundamental constitutional protection evolved over decades was lost,[198] while Justice Roberts *part-concurring* and *part-dissenting* with the majority held that it was absolutely unnecessary to entirely overrule *Roe* and *Casey* precedents in the *Dobbs* case.[199]

While much can be said of the *Dobbs* judgement in various ways, it is a clear example of an UICC for two primary reasons. *First*, while Justice Alito is correct in highlighting that the US Federal Constitution does not expressly guarantee a *right to abortion*, he fails to appreciate the fact that it also does not prohibit or mandate states to prohibit abortion, a fact previously

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[193] Dobbs v. Jackson Women's Health Organization, 2022 U.S. LEXIS 3057 (USA) (Samuel Alito, J.).

[194] *Id.*

[195] Lawrence v. Texas, 539 U.S. 558 (2003) (USA).

[196] Dobbs v. Jackson Women's Health Organization, 2022 U.S. LEXIS 3057 (USA) (Clarence Thomas, J.).

[197] *Id.*, (Brett Kavanaugh, J.).

[198] *Id.*, (Stephen Breyer, Elena Kagan, and Sonia Sotomayor, JJ.).

[199] *Id.*, (John Roberts, J.).

highlighted by the late SCOTUS Justice Antonin Scalia[200] in an extra-judicial speech. *Second*, it manifestly goes against the text of the U.S. Federal Constitution, where Ninth Amendment[201] guarantees U.S. citizens with various rights that are textually unenumerated in the Constitution and protected, which could both textually and originalistically be interpreted to include abortion rights, just as contraceptive rights, privacy rights, interracial marriage rights and same-sex marriage rights have been previously included. Consequently, the majority holdings in *Dobbs* have made an *UNCI* by declaring that there is no fundamental constitutional right to abortion in the U.S.A. and therefore given birth (*pun intended*) to UICCs.

Interestingly, Justice Alito also holds that fundamental rights should necessarily be "*deeply rooted in this Nation's history and tradition*" and "*implicit in the concept of ordered liberty*."[202] If we are to accept this line of reasoning in conjunction with Justice Thomas's opinion on incorrectness of substantive due-process, then one could *mutatis mutandis* argue that *Scott* judgement was correct and that the Thirteenth Amendment[203] and the Fourteenth Amendment[204] (which legislatively overruled *Scott* by introducing racial equality)[205] are UCAs that go against the constitutional history of slave-ownership, white racial superiority and exclusive citizenship to white people. If SCOTUS hypothetically affirmed this belief and restored *Scott*, then Justice Thomas (an African-American himself) would automatically lose his U.S. citizenship. As Jim Obergefell points out, even Justice Thomas's interracial marriage would have no legal standing if his reasoning

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[200] *IN THE COURTS | Scalia Says Constitution Does Not Prohibit, Permit Abortion Rights*, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES (Apr. 28, 2008), go.nationalpartnership.org/site/News2?abbr=daily2_&page=NewsArticle&id=11131&security=1201.

[201] U.S. CONST., amend. IX.

[202] Dobbs v. Jackson Women's Health Organization, 2022 U.S. LEXIS 3057 (USA) (Samuel Alito, J.).

[203] U.S. CONST., amend. XIII.

[204] U.S. CONST., amend. XIV.

[205] *See* AMAR, *supra* note 144, 467.

was applied to re-look into *Virginia* precedent and overrule it.[206] Likewise, none of the four current female SCOTUS judges[207] would have a fundamental right to vote or occupy public offices that they currently hold, since the constitutional amendments that enable these possibilities could be not deeply rooted in U.S. history and tradition, thus being classified as UCAs that should not exist. As Roznai points out, even 'judicial review' introduced by *Marbury* without support from the text of the U.S. Federal Constitution could be considered as against the U.S. history and tradition,[208] thus leaving a dreadful possibility for the SCOTUS reviewing *Marbury* and reverting U.S. to the times where the judicial organ was the weakest. Consequently, the majority opinion in *Dobbs* is a dangerous slippery slope, which if strictly adhered to, could mean that even access to vaccinations, electricity, internet, computer devices etc. would be not protected by the U.S. Federal Constitution—indeed a possibility of countless *UNCIs* leading to countless UICCs.

While vast majority of the above-mentioned judicial precedents in these four jurisdictions are intriguing examples of UICCs and significantly changed or impacted the enforceable meaning of their jurisdiction's Constitutions, it is important to ask oneself whether does simply being an UICC automatically make these informal constitutional changes *undesirable*, or worse, *destructive* of a constitution? The author will attempt to address this question in the following part.

SIGNIFICANCE OF THE IDEA OF UNCONSTITUTIONAL INFORMAL CONSTITUTIONAL CHANGES BY COURTS

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[206] Hannah Getahun, *Obergefell, the plaintiff in the SCOTUS same-sex marriage ruling, said it's 'quite telling' Clarence Thomas omitted the case that legalized interracial marriage after saying the courts should go after other right to privacy cases*, INSIDER (Jun. 25, 2022), https://www.businessinsider.com/obergefell-telling-clarence-thomas-didnt-bring-up-loving-v-virginia-2022-6?IR=T.

[207] *Famous 5: The Women Judges in the US Supreme Court who made History before Ketanji Brown Jackson*, FIRSTPOST (Jul. 1, 2022), https://www.firstpost.com/world/famous-5-the-women-judges-in-the-us-supreme-court-who-made-history-before-ketanji-brown-jackson-10488091.html.

[208] *See* @roznaiy, Yaniv Roznai, TWITTER (Jun. 30, 2022, 4:33 PM IST), https://twitter.com/roznaiy/status/1542463919167528960.

Previously, illustrations of UICCs in India, Bangladesh, Honduras and the U.S.A. were located and analysed. While concluding his scholarly note, Roznai had previously highlighted that further study and theoretical discussions were necessary to explore limits of *informal* constitutional changes, especially UICCs by judicial organs (constitutional courts).[209] In this segment, the author shall briefly attempt to further highlight the relevance of studying UICCs from the lens of *transformative constitutionalism* and *constitutional dismemberment*.

A. TRANSFORMATIVE CONSTITUTIONALISM

While *transformative constitutionalism* is a novel concept which is yet to fully develop globally and acquire a consensus[210] on what set of principles constitute it, in the author's opinion, certain principles encompassed by it as recognised by scholars[211] and constitutional courts (such as the SCI)[212]

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[209] *See* Roznai, *supra* note 16, 577.

[210] In past, authors have noted that the concept of "transformative constitutionalism" is considered *vague* by scholars and the legal communities, though they yet stress on its importance and avoiding over-criticism on grounds such as vagueness owing to its beneficial nature, *see e.g.,* Samuel Friedman and Thiago Amparo, *On Pluralism and Its Limits: The Constitutional Approach To Sexual Freedom In Brazil And The Way Ahead*, in UPENDRA BAXI ET. AL., TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA 276 (Pretoria University Law Press, 1st ed., 2013); Marius Pieterse, *What do we Mean When we Talk About Transformative Constitutionalism?*, 20(1) S. AFR. PUB. L., 155, 159 (2005).

[211] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146 (1998).

[212] The SCI in various judicial precedents has discussed or mentioned the transformative intent and nature of the Indian Constitution, though its views have been often abstract and require further development. Three such non-exhaustive instances are mentioned by the author here. *First*, in the State of Kerala and Anr. v. N.M. Thomas and Ors., (1976) 2 SCC 310 (India), ¶106 (Krishna Iyer, J.), it was recorded by the court that, "*the Indian Constitution is a great social document, almost revolutionary in its aim of* ***transforming*** *a medieval, hierarchical society into a* ***modern, egalitarian democracy****. Its provisions can be comprehended only by a* ***spacious, social-science approach, not by pedantic, traditional legalism***" (emphasis author's). Second, in State (NCT of Delhi) v. Union of India and Anr., (2018) 8 SCC 501 (India), it was observed that: ***" "Constitutional culture" is inherent in the concepts where words are transformed into concrete consequences.*** *It is an interlocking system of practices, institutional arrangements, norms and habits of thought that determine*

show that not all *informal* constitutional changes by constitutional courts that deviate from the contents of a Constitution or the constitutional history of a nation-state (therefore being UICCs), are *undesirable* or *destructive*. Contrarily, one could argue that certain UICCs made by the judicial organ are desirable and even protective of the Constitutions that they are constituted by and concomitantly authorised to interpret.

According to Klare, 'transformative constitutionalism' includes long-term transformation of a nation-state's political and social institutions along with power dynamics towards an *egalitarian direction*.[213] In the Five-Judge SCI Bench decision in *Navtej Singh Johar v. Union of India*, Justice Dipak Misra in his leading opinion had observed that: "*The whole idea of having a constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism*."[214] Furthermore, Justice Misra held that the judicial organ is duty bound by the principle of transformative constitutionalism to "*ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting and enforcing the Constitution... in consonance with the avowed object...*" [215]), though this view has been challenged as incorrect by authors[216] who believe that the court erroneously hinged the 'transformative' intent of Constitutions with "societal progressiveness"

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what questions we ask, what arguments we credit, how we process disputes and how we resolve those disputes (…) The aforestated definition of the term 'constitutional culture' is to be perceived as a ***set of norms and practices that breathe life into the words of the great document.*** *It is the* ***conceptual normative spirit that transforms the Constitution into a dynamic document.*** *It is the constitutional culture that constantly enables the words to keep in stride with the rapid and swift changes occurring in the society.*" (emphasis author's). Lastly, in Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Anr., (2019) 1 SCC 1 (India), "***The Constitution of India incorporated a charter of human freedoms in Part III and a vision of transformative governance in Part IV.*** *Through its rights jurisprudence, this Court has attempted to safeguard the rights in Part III and to impart enforceability to at least some of the Part IV rights by reading them into the former, as intrinsic to a constitutionally protected right to dignity*." (emphasis author's).

[213] *See* Klare, *supra* note at 211.

[214] *See* Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India), ¶107 (Dipak Misra, J.).

[215] *Id.*, ¶122 (Dipak Misra, J.).

[216] *See* Abhijeet Shrivastava, *Evolving Meanings and Judicial Reasonings - Filling In The Silences Of 'Constitutional Morality'*, 10(1) NUJS INT'L. J. L. & POL'Y. REV. 46, 66, 78 (2021).

and "social acceptance". These excerpts help outlining certain contours or principles of transformative constitutionalism.

Furthermore, the SCI's view on the duty of judicial institutions in safeguarding individual's (particularly citizen's) rights and interests against the state, especially while also being cognizant of the changing needs of societies, indicate that *transformative constitutionalism* requires active vigilance from constitutional courts. This is apparent from the ISC judgement in *Justice K.S. Puttaswamy v. Union of India*[217] had stated that, "*As far as citizen-state relations are concerned, the Constitution was framed to balance the rights of the individual against legitimate State interests. Being transformative, it has to be interpreted to meet the needs of a changing society. As the interpreter of the Constitution, it is the duty of this Court to be vigilant against State action that threatens to upset the fine balance between the power of the state and rights of citizens and to safeguard the liberties that inhere in our citizens.*" (emphasis author's)

Consequently, following the foregoing authorities on the idea of transformative constitutionalism, the author posits that an UICC created by a constitutional court which, *inter alia*, transforms a Constitution towards an *egalitarian direction*; has a positive impact by *transforming a society* (including exercise of vigilance and keeping sight of the changing needs of society); and upholds *supremacy* of the Constitution; is not destructive of a Constitution (even if it substantially replaces a particular constitutional provision or procedure), yet contrarily is highly desirable and protective of its legitimacy or supremacy when viewed from lens of *transformative constitutionalism*.

There have been several UICCs in previously mentioned precedents that reflect transformative constitutional changes. These decisions have protected the supremacy of the Constitution by entrenching it, furthering individual rights or giving the judicial organ powers to uphold the Constitution against legislations or UCAs. The SCOTUS decision in *Marbury,* which introduced judicial review in USA, the *Golaknath* decision which protected the Indian Constitution against UCAs that restricted or

[217] Justice K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1 (India).

abridged fundamental rights, and the doctrine of BSD introduced in India by *Kesavananda* or in Bangladesh by *Anwar* stand out as such examples of transformative UICCs. The *Golaknath* and *Kesavananda* instances demonstrated great active vigilance by the judicial institutions in protecting citizen's rights and interests. Concomitantly, the SCOTUS decisions in *Griswold*, *Roe,* and *Obergefell*; or the SCI decisions in *Maneka*, *Khatoon*, *PUCL*, and *Puttaswamy*; all of which expanded fundamental and constitutional rights are example of transformative UICCs which furthered the constitutional jurisprudence in an egalitarian direction and positively transformed societies, while paying attention to the individual and societies' growing needs. Thus, viewed from the lens of transformative constitutionalism, it is established that UICCs by constitutional courts are neither necessarily *undesirable* changes nor *destructive* of a constitution.

B. CONSTITUTIONAL DISMEMBERMENT

Albert has stated that *constitutional dismemberment* can be simultaneously understood to be a phenomenon, concept, doctrine and theory.[218] In context of formal constitutional amendments, he argues that: "*The impetus behind the theory of constitutional dismemberment is that some constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations. They dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old*" [emphasis author's].[219] Consequently, a *constitutional dismemberment* essentially "*unmakes*" a constitution, i.e., it is a constitutional amendment incompatible with the pre-amendment framework, core features of a constitution or existing fundamental rights.[220]

Albert has acknowledged the possibility of *judicial interpretations* leading to constitutional dismemberment.[221] In context of the theory of constitutional dismemberment, the author believes that a study of UICCs is as equally important as the study of constitutional amendments. In the preceding segments, there have been many UICCs rendered by constitutional courts

[218] Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1, 2 (2018).
[219] *Id.,* at 2-3.
[220] *Id.*, at 3.
[221] *Id.*, at 3, 57.

which evidence a significant deviation from or replacement of their nation-state's Constitutions or their provisions, with few being manifestly destructive of a constitution's pre-UICC framework or features. Certain examples from India, Honduras and the USA fall in this category.

Let us first briefly discuss certain UICCs in the context of rights jurisprudence, that can be identified as constitutional dismemberments. In India, the SCI precedent in *Kesavananda* holding that the FRTP enshrined in Article 19(1)(f) of the Indian Constitution is not a part of India's basic structure and the string of SCI precedents from *Brahmbhatt* which held that one must exhaust all alternative legal remedies prior to approaching SCI's writ jurisdiction under Article 32 of the Constitution, serve as examples of UICCs that enabled constitutional amendments that limited a fundamental right (making FRTP susceptible to constitutional amendments without protection from the BSD) or restricted it (limiting access to a fundamental right to approach the SCI under writ jurisdiction) are examples of UICCs that can be classified as constitutional dismemberments. Similarly, the *Dobbs* decision by the SCOTUS in the U.S.A. created a constitutional dismemberment by holding that the U.S. Federal Constitution did not recognise a fundamental constitutional right to abortion. Furthermore, the (now) legislatively overruled SCOTUS decision in *Scott* which declared the black people and non-white people to be non-citizens is a classic example of an UICC which can be identified as a dangerous constitutional dismemberment, since it substituted judicial wisdom over a Constitution's written text and a nation-state's constitutional history, thereby snatching fundamental rights of thousands of individuals in the blink of an eye and precipitating the events leading to the U.S. Civil War.

Next, let us discuss UICCs that caused constitutional dismemberments by changing the pre-UICC constitutional framework or core features of a constitution. In the Indian jurisdiction, the string of precedents in the *Four Judicial Appointments Cases* and the *Prahari* judgement, which significantly altered the judicial appointments procedure for regular and ad-hoc appointments to the higher judiciary in India (both by interpreting the consultation requirement in Article 124 of the Constitution to make it mandatory for the President to be bound by the CJI's views as well as

substituting the pre-existing appointments procedure by the collegium system), stand out as examples of UICCs that could be categorised as constitutional dismemberments. Furthermore, the HSC decision in Honduras which declared the original constitutional provisions of the Honduran Constitution as unconstitutional is an unambiguously clear example of a constitutional dismemberment, whereby a judicial interpretation radically transformed the political and election processes of a nation-state by subverting its Constitution. Thus, not only did the HSC – a constituted authority of its nation-state's Constitution, fail in its task of upholding the basic structures of its Constitution, it also consciously caused the destruction of its Constitution's core features. Landau and Sheppard have gone ahead in terming the HSC's judgement as an instance of "abusive constitutionalism".[222] Unsurprisingly, these examples from India and Honduras are similar to constitutional dismemberments resulting from constitutional amendments as the UNCIs which introduce an UICC essentially result in changes that dramatically change the enforceable meaning of existing constitutional provisions or substitute core features of a constitutional framework in a democratic nation-state.

While certain UNCIs by constitutional courts which create UICCs could be 'transformative' and desirable when viewed from the lens of transformative constitutionalism, the theory of constitutional dismemberment shows us the 'destructive' threat and possibilities that UICCs could pose and cause to a democratic nation-state and its Constitution, with the precedents discussed above being real-life examples. Thus, this opens possibilities to view and study such UICCs as *constitutional dismemberments* by constitutional courts.

CONCLUDING REMARKS

The novel yet significant concept of UICCs by constitutional courts is important in understanding how informal constitutional changes resulting from judicial interpretations affect a democratic nation-state and its

[222] David Landau & Brian Sheppard, *The Honduran Constitutional Chamber's Decision Erasing Presidential Term Limits: Abusive Constitutionalism by Judiciary?*, INT'L. J. CONST. L. BLOG, (May. 6, 2015), http://www.iconnectblog.com/2015/05/the-honduran-constitutional-chambers-decision-erasing-presidential-term-limits-abusive-constitutionalism-by-judiciary/.

Constitution. Through this article, an attempt has been made to identify, analyse and highlight illustrations of UICCs from several judicial pronouncements by Supreme Courts in India, Bangladesh, Honduras and the USA. It is the author's hope that the UICCs identified in the present article would be utilised in future scholarships in order to further the theoretical discourse on UICCs and broaden the understanding of their global impact on Constitutions.

Furthermore, from the lens of *transformative constitutionalism*, it has been demonstrated that not all UICCs are inherently undesirable or destructive of a constitution, but rather could be *protective* of it and *highly desirable*. In this respect, learning from the Bangladesh experience, the legislative organs should strive to identify and formally incorporate transformative UICCs such as the BSD into their Constitutions. Concomitantly, there have been illustrations of UICCs that have significantly altered or substituted the existing constitutional framework; core principles of a Constitution; or restricted or abridged fundamental and constitutional rights; resulting in drastic changes or destruction to a Constitution or its provisions which are comparable to the theory of constitutional dismemberment vis-à-vis formal constitutional amendments, opening the possibility of studying UICCs by global constitutional courts as *constitutional dismemberments*.

An important question that could be raised by viewing UICCs by constitutional courts as 'constitutional dismemberments' is whether it is necessary to *undo* or *remedy* the damage caused by such judicially created UICCs? If the answer to the foregoing question is in affirmative, then what is the best way to pragmatically achieve this objective? Would the legislative organs be best suited to undo UICCs? Or should it be the judicial organ which should first remedy the UICC created by itself by exercising judicial review of its precedents? While attempting to answer these questions, the following observations from the Indian, Honduran and American (U.S.) experiences could be kept in mind.

The Indian experience has demonstrated that the constitutional courts could create constitutional dismemberments which continue remain a part of its constitutional jurisprudence, and in certain cases such as the UICC

in *Kesavananda* which held FRTP to not be a basic structure, could even become a basis of justification for the legislative organ to remove a fundamental right which was a part of the original Constitution and a promise to Indian citizens. In this case, the power to enforce a human right (and a former fundamental right) against the Indian state was permanently lost by its citizens with both the judicial and legislative organs having played a significant role in the outcome. Which institution should the Indian citizens rely on to restore this fundamental right and human right, and how would it take place? Similarly, as discussed in preceding parts, the SCI has made itself less accessible to citizens by holding that all alternative legal remedies must be exhausted before using recourse to writ jurisdiction under Article 32 of the Indian Constitution while simultaneously ignoring its own precedents of larger bench strength,[223] though nothing in the text of Article 32 even implicitly supports such an interpretation. Since the SCI is the final arbiter on questions of constitutional law and has tightly held on to the foregoing position, who would restore a direct access and recourse to this fundamental right to Indian citizens as was intended in the original Constitution prior to judicial precedents? With respect to the previously discussed *Four Judicial Appointments Cases*, the least democratic organ of the state (i.e. the unelected judicial organ) struck down a nigh-unanimous constitutional amendment brought by elected legislators and even went ahead extending the collegium system to ad-hoc judicial appointments in *Prahari*. The judicially created UICCs in India have rewritten the previously simple consultation requirements in various constitutional provisions for judicial appointments and even introduced the collegium in '*ad-hoc*' judicial appointments). On the other hand, the Indian parliament has acted docile and seems unlikely to challenge the judicial precedents creating UICCs, owing to repeated losses from an aggressive SCI which re-asserts and keeps expanding its self-proclaimed power to appoint judges through its UNCIs. In such a case, who do the Indian citizens rely on to remedy these strings of UICCs to make the judicial organ more accountable?

The Honduran experience has demonstrated that a constitutional court could render an UICC to support the political party and actors in power, due to which it seems unlikely that either the elected legislative organ or

[223] *See* Bhardwaj & Baheti, *supra* note 101, at 68-69.

the unelected judicial organ could be entrusted with remedying such an UICC. Furthermore, even a subsequent elected political party or actor in Honduras would be unlikely to remedy such an UICC as it would benefit the incumbent leaders or incumbent governments in power. In this scenario, who would the people of Honduras rely on to protect and restore their Constitution?

In the American experience, it took a Civil War and various constitutional amendments for the U.S.A. to address and end the systemic racism practised in various U.S. States and the UICCs introduced by the majority holdings of the SCOTUS in *Scott*, at least *formally* – since racism against the black people and minorities continues to prevail[224] in the USA and globally. Today, a similar situation arises in the U.S.A. where a conservative majority of the SCOTUS has created an UICC through *Dobbs* while a liberal government is in power yet finding it difficult under existing constitutional amendment structures to overturn broad effects of the SCOTUS precedent in *Dobbs* and restore the fundamental right to access and undergo abortion as upheld in *Roe* and *Casey*.[225] Therefore, the damage caused by the UICCs in *Dobbs* is likely to remain, even though a clear majority of American citizens are pro-abortion rights and disapprove of the *Dobbs* precedent.[226]

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[224] *See* Sara N. Bleich et al., *Discrimination in the United States: Experiences of Black Americans*, 54 HEALTH SERV. RES. 1399 (2019); *United States Events of 2020*, HUMAN RIGHTS WATCH (2021), https://www.hrw.org/world-report/2021/country-chapters/united-states; Nicole Daniels, *What Students Are Saying About Race and Racism in America*, THE NEW YORK TIMES (Feb. 18, 2021), https://www.nytimes.com/2021/02/18/learning/what-students-are-saying-about-race-and-racism-in-america.html.

[225] Akayla Gardner, Nancy Cook & Jordan Fabian, *Biden Backs Filibuster Change to Restore Abortion Rights,* BLOOMBERG (Jun. 30, 2022, 9:38 PM IST), https://www.bloomberg.com/news/articles/2022-06-30/biden-says-he-backs-filibuster-change-to-restore-abortion-rights.

[226] *See* Alison Durkee, *How Americans Really Feel About Abortion: The Sometimes Surprising Poll Results As Supreme Court Overturns Roe V. Wade*, FORBES (Jun. 24, 2022), https://www.forbes.com/sites/alisondurkee/2022/06/24/how-americans-really-feel-about-abortion-the-sometimes-surprising-poll-results-as-supreme-court-reportedly-set-to-overturn-roe-v-wade/?sh=5c0f270d2f3a; Jason Lange, *Broad U.S. support for abortion rights at odds with Supreme Court's restrictions*, REUTERS (Jun. 25, 2022), https://www.reuters.com/world/us/broad-us-support-abortion-rights-odds-with-supreme-courts-restrictions-2022-06-24/; *Majority of Public Disapproves of Supreme Court's*

Thus, the above-mentioned questions are therefore dilemmas that future scholarship on UICCs by constitutional courts must resolve to answer.

Decision To Overturn Roe v. Wade, PEW RESEARCH CENTER (Jul. 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/#americans-views-of-abortion.

INDIA'S ADOPTION OF THE DOCTRINE OF OCCUPIED FIELD: A COMPARATIVE STUDY WITH AUSTRALIA

PRADHYUMAN SINGH[1]

Legislative Relation between the Union and the states is governed by various provisions in Part XI of the Constitution of India. One such provision that regulates law-making power between the Union and the states is Article 254. This law stipulates that in the event the law made by a state is "repugnant" to the law of the Parliament, the former would be void. The expression "repugnant" has been interpreted as a term of art to incorporate the doctrine of occupied field by the Supreme Court of India. This would mean that a "repugnancy" would arise not only when there was a direct inconsistency between laws, but also when the Parliament evinced its intention to oust the law-making power of the states. This reading may not necessarily follow the text of the Constitution. Despite this, in adopting the said doctrine, the Supreme Court has failed to provide any textual, structural, or philosophical justification for the same. The article seeks to account for this lacuna by carrying out a doctrinal and comparative analysis of the issue.

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INTRODUCTION

Article 1 of the Constitution of India describes India as a 'Union of States'.[2] Despite this description, which was inspired by the British North America Act, 1867, we are undoubtedly a nation which has adopted a federal structure.[3] The Constitution has comprehensively established provisions that delineate the relationship between the Union and the individual states. These can be found in Part XI of the Constitution, whose distinct chapters deal with legislative and administrative relations. The provisions that deal with legislative relations have various provisions where territorial jurisdiction has been divided.[4] Furthermore, subject matters have been divided on the basis of the lists found in the Seventh Schedule to the Constitution.[5]

It is imperative for the makers of the Constitution to account for inevitable clashes between laws on different subject matters. This was done by the articulation of Article 246 and Article 254 of the Constitution of India.

Article 246 delineates the power of the Parliament and the state legislatures to make laws based on the subject matter.[6] The three clauses of the provision refer to the Seventh Schedule to the Constitution, where the subject matters for law-making for the Union and the states have been provided.

The clauses clearly provide a hierarchy with respect to one another to account for any inconsistencies that may arise. Clause 1 gives the Parliament exclusive power to make laws on some subjects. Similarly, Clause 3 gives an analogous exclusive power to the states. These powers are exclusively vested with these respective law-making bodies, but despite being exclusively entitled to legislate in their respective fields, they may enact laws that are inconsistent with one another.

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[2] INDIA CONST. art. 1.

[3] S.R Bommai v. Union of India, AIR 1994 SC 1918; Kuldip Nayar v. Union of India, AIR 2006 SC 3127.

[4] INDIA CONST. art. 245.

[5] INDIA CONST. art. 246.

[6] *Id.*

These conflicts are resolved by resorting to the non-obstante and subject clauses of Article 246. The power of a state to make laws under the State List is subject to the power of the Parliament to make laws in the Union List. Therefore, in the event of a conflict, parliamentary law will prevail. A similar hierarchy also exists between laws made by the Parliament under the Concurrent List on one hand and laws made by the state legislature under the State List on the other. In this scenario, the parliamentary law would prevail as per Clauses 2 and 3 of Article 246, read with their subject and non-obstante clauses.[7]

Article 246's scheme, however, is not complete. The provision is silent on the possibility of conflict between parliamentary and state laws pertaining to the Concurrent List. The solution to such a conflict is provided by Article 254(1), which is reproduced[8]:

> "***Inconsistency between laws made by Parliament and laws made by the Legislatures of States.***—*(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.*"

This provision has been interpreted by the Supreme Court[9] to apply only with respect to laws made by the Parliament and state legislatures in the Concurrent List. Some quarters have expressed their disagreement with this proposition by suggesting that the language is broad enough to cover the Union and State Lists as well.[10] Ultimately, what Article 254 provides is

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[7] Godfrey Philips India Ltd. v. State of Uttar Pradesh, AIR 2005 SC 1103; HarakChand Ratanchand Banthia v. Union of India, AIR 1970 SC 1453; Hoechst Pharmaceuticals Ltd. v. State of Bihar, AIR 1983 SC 1019; Professor Yashpal v. State of Chhattisgarh, AIR 2005 SC 2026.

[8] INDIA CONST. art. 254.

[9] State of Jammu and Kashmir v. M.S. Farooqi, AIR 1972 SC 1738; Bar Council of Uttar Pradesh v. State of Uttar Pradesh, AIR 1973 SC 231; K.S.E. Board v. Indian Aluminium Co., AIR 1976 SC 1031.

[10] M.P JAIN, INDIAN CONSTITUTIONAL LAW, 569; Samaraditya Pal & Ruma Pal, (8th ed. LexisNexis 2017).

that parliamentary law prevails when the parliamentary and state laws are "*repugnant*" to each other. This expression may carry one of two constructions:

1. The first is a narrow construction which understands "*repugnant*" to mean something which is *directly inconsistent.*[11] Thus, if two laws are irreconcilably placed and have the effect of being inconsistent with each other, they are repugnant. This paper refers to this approach as the "*doctrine of repugnancy*".

2. The other alternative is to construe the said expression widely, as is done by the Supreme Court of India, to include the doctrine of occupied field.[12] This allows parliamentary law to supersede state laws not only when there is a direct inconsistency, but also when the Parliament evinces *its intention* to exclude the power of the states.

It is the second construction that has been adopted by the Supreme Court. Such a reading may not be apparent from the reading of the bare text, and the court has not provided any substantial logical or legal reasoning to adopt the doctrine of occupied field. This calls for a comprehensive, doctrinal analysis of the possible constructions of the expression "repugnant." The Supreme Court has cited authorities from Australian law, and jurisprudence to justify its stand.[13] Therefore, the law of Australia serves as an ideal jurisdiction to undertake a comparative analysis of this issue. On this basis, a commentary will be made with respect to the adoption of the foreign principle of "*occupied field*" in the context of the Constitution of India. This article will analyse the text of the Constitution, the historical context of the law, and the precedents on the issue. A comparative analysis will then be made with Australian law, as the Supreme Court of India heavily relied on the Australian position to introduce the

[11] *Inconsistent*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/inconsistent; *Inconsistent*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/inconsistent.

[12] Forum for Peoples Collective Efforts v. State of West Bengal, 2021 SCC OnLine SC 361.

[13] Tika Ramji v. State of Uttar Pradesh, AIR 1956 SC 676.

doctrine in India. Accordingly, suggestions and recommendations will be made.

It is pertinent to note here that some authors[14] discuss the applicability of the doctrine of occupied field in relation to the Union and the State Lists as well. They contend that the language of certain entries in the Seventh Schedule[15] of the Constitution, makes them subject to other entries. For example, Entry 2 in the State List is "*Police*," which is subject to Entry 2A of the Union List, which is "*Naval, military and air forces*." Accordingly, if the Union makes a law in relation to Entry 2A, the power of the states to make a law relating to naval, military, and air forces is taken away, despite such subjects otherwise falling within Entry 2 ("Police") of the State List. In this manner, the act of Parliament occupying the legislative field ousts the power of the states.

Such recognition of the doctrine of occupied field is specific to the Entries in the Seventh Schedule and beyond the scope of the paper. The discussion will be centred on the meaning of Article 254 of the Constitution.

TEXTUAL INTERPRETATION OF ARTICLE 254

A. INTERPRETATION OF ARTICLE 254 AND ANALOGOUS PROVISIONS IN THE CONSTITUTION

The starting point of reference for making an analysis is necessarily the text of the Constitution itself. The first relevant indicator of the intention of the makers of the Constitution in this regard is the marginal heading of Article 254. For the sake of convenience, it is reproduced here for reference.[16]-

> "*Inconsistency between laws made by Parliament and laws made by the Legislatures of States*" *(Emphasis Supplied)*

The expression used here is "*inconsistency*." Unlike the word "*repugnant*," which is a term of art and open to more than one construction, this is not

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[14] V. Niranjan, *The Constitution Bench elides repugnance and occupied field,* INDIACORPLAW BLOG (Jul. 14, 2012) https://indiacorplaw.in/2012/07/constitution-bench-elides-repugnance.html.

[15] INDIA CONST. sch.VII.

[16] INDIA CONST. art. 254.

so with the expression "*inconsistency*." The ordinary and plain meaning of this term[17] can only be understood as a *direct conflict*. The marginal headings of the provisions in the Constitution are unlike the headings of statutes, where certain quarters have expressed doubt with respect to their admissibility.[18] The process of drafting the Constitution was carried out with extensive deliberation. It involved close scrutiny of every expression that was employed to convey the intention of the framers. The utility of headings for interpretation has also subsequently been accepted by the courts.[19] These findings equally apply to the marginal heading of Article 254, which can be utilised for indicating the intention of the makers of the law.

Attention must also be drawn to the provisions of Article 13 of the Constitution.[20] Clause 1 of the provision provides that laws in force immediately before the commencement of the Constitution that are "*inconsistent*" with Part III of the Constitution will be void.[21]

The expression used here is "*inconsistent*." This expression has also been used in the provisions of Articles 119,[22] 140,[23] 209,[24] and 227[25] of the Constitution, all of which are unamended, original provisions of the Constitution. In all these provisions, the expression used is "*inconsistent*". Despite the consistent use of this expression, the Constituent Assembly consciously chose to retain the expression "*repugnant*" in the text of Article 254. The provisions of the Constitution were drafted with great precision and nuance by the Drafting Committee. Thus, it may be inferred that a

[17] MERRIAM-WEBSTER, CAMBRIDGE DICTIONARY, *supra* note 11.

[18] R v. Surrey (North Eastern Area) Assessment Company (1947) 2 All ER 276; Raichurmatham v. Prabhakar Dugar (2004) 4 SCC 766.

[19] National Insurance Co. Ltd. v. Sinitha (2012) 2 SCC 356; Mathew Verghese v. M. Amritha Kumar (2014) 5 SCC 610.

[20] INDIA CONST. art. 13.

[21] *Id.*

[22] INDIA CONST. art. 119.

[23] INDIA CONST. art. 140.

[24] INDIA CONST. art. 209.

[25] INDIA CONST. art. 227.

conscious attempt was made to ensure that there is symmetry in the language employed in the Constitution.

Therefore, wherever this symmetry in the language is broken, it would be legitimate to assume that the expression in question carries a different meaning from the norm. This has also been identified as a principle of construction by the Supreme Court.[26] Accordingly, the use of the expression "*repugnant*," as opposed to "*inconsistent*," in other places in the Constitution indicates that a meaning which is broader than the expression "*inconsistent*" has to be adopted. Only the expression "*repugnant*" is capable of being used as a term of art and signifies the usage of the doctrine of occupied field. As opposed to this, the expression "inconsistent" does not carry any special meaning in legal parlance and only connotes its ordinary, plain meaning. For this reason, the employment of the expression "*repugnant*" in contradistinction to "*inconsistent*" in Article 254 indicates that the doctrine of occupied field has been recognised in the said provision by the framers of the Constitution.

B. RELATIONSHIP BETWEEN ARTICLE 254 AND ARTICLE 246 OF THE CONSTITUTION

Another relevant tool of interpretation is to avoid constructions that would lead to absurd or excessively impractical consequences.[27] To further this argument in the context of the issue at hand, a brief exposition of the law is necessary. As mentioned earlier, the issue of conflict of laws in the three Lists of the Seventh Schedule is dealt with by Article 246 and Article 254. Article 246 is concerned with conflicts between

(i) the Union List and the State List

(ii) the State List and the Concurrent List (Parliamentary law); and

(iii) the Union List and the Concurrent List (State law)

Article 254 is only relevant when there is a conflict between a parliamentary and state law, both of which are with respect to *the same matter* in the

[26] Bhogilal Chunilal Pandya v. State of Bombay, AIR 1959 SC 356; Suresh Chand v. Gulam Chishti, AIR 1990 SC 879.

[27] Jagdish Patnaik v. State of Orissa, (1998) 4 SCC 456; Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd., (2003) 2 SCC 111.

Concurrent List.[28] Therefore, even if the conflict is between two different entries in the Concurrent List, Article 254 is not invoked. The issue must pertain to the exact same entry as well. This position was established by the Supreme Court in the case of *Vijay Kumar v. State of Karnataka*.[29] The reasoning of the court was that Article 254(1) uses the expression "*law with respect to one of the matters enumerated in the Concurrent List."* On this basis, the court held that Article 254 would only apply when there was a repugnancy with 'one of the matters' in the Concurrent List and not even if the matters in question (i.e., the entry in the List) were different.

This means that a conflict between *two different entries* from the Concurrent List would also have to be dealt with by Article 246(2). Parliamentary supremacy is recognised under Article 254. Thus, it would be logical to suggest that the congruous intention of the makers would be to allow parliamentary laws to prevail even under Article 246(2) (i.e., when a Concurrent List conflict arises *with respect to different entries*). On this basis, the non-obstante clause in Article 246(2) would have to be interpreted *to also allow* parliamentary laws to prevail.

It would be relevant to note that in Article 246, there is no usage of the expression "*repugnant*" or "*inconsistent*". To account for the conflict of laws between the Parliament and state legislatures, the provision employs non-obstante and subject clauses. Applying the ordinary and plain meaning and the aforementioned clauses would mean that only when there *is direct inconsistency* in the exercise of power between the Union and the states could Article 246 be invoked. This is the legal implication of employing non-obstante and subject clauses as legislative devices, which has consistently been affirmed by the Supreme Court.[30] Consequently, Article 246 in clear and unequivocal terms recognises the doctrine of repugnancy.

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[28] Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and ETIO, AIR 2007 SC 1984.

[29] Vijay Kumar v. State of Karnataka 1990 AIR 2072.

[30] Punjab Sikh Regular Motor Service v. Regional Transport Office, Raipur, AIR 1966 SC 1318; Union of India v. Azadi Bachao Andolan, AIR 2004 SC 1107; TR Thandur v. Union of India, AIR 1996 SC 1963; Iridium India Telecom Ltd. v. Motorola Inc., (2005) 2 SCC 145.

As previously discussed, if the conflict of laws is between the *same entries* in the Concurrent List, Article 254 is attracted, however, if it is between *different entries* in the Concurrent List, Article 246 is attracted. In the latter case, it is abundantly clear that the doctrine of repugnancy would be employed. For the sake of argument, let us assume that Article 254 recognises the doctrine of occupied field. This would lead to a very illogical situation because, merely depending upon the entries involved in the Concurrent List (either the same entries or different entries), two completely different principles would be applicable.

The conflict in both these instances is with respect to the Concurrent List where the parliamentary law prevails. However, if the intention of the law-makers was to give wide powers to the Parliament through the doctrine of occupied field when there is a conflict in the Concurrent List, why would the scope of such powers be lesser when the conflict merely pertains to different entries in the very same Concurrent List? This contradiction results in absurdity, and for this reason, an interpretation that avoids such consequences must be preferred. Hence, this materialises as an argument to recognise the doctrine of repugnancy in Article 254, to ensure there is logical consistency and principled coherence between Article 246 and Article 254.

READING ARTICLE 254 IN A CONSTITUTION WITH A TRANSFORMATIVE PURPOSE

So far, a legal analysis of the issue has been undertaken, and it would be relevant to view the issue from a normative perspective. Prior to the adoption of the Constitution, India was a colony of the British empire. The subdivision of the nation into provinces was not of much significance to the colonial rulers beyond the need of better management. For the colonial rulers, it would naturally be desirable to centralise law-making power to the maximum extent possible.[31]

[31] *See* P. BANERJEA, PROVINCIAL FINANCES IN INDIA (MacMillan& Co. Ltd., London 1939). The author comments on the statement of Lord Chelmsford, the Governor General appointed in 1916 when he said, "*the endowment of British India as an integral part of the British Empire with self- government was the goal of British rule*"; *See generally* BANERJEE, A.C. (Ed.), INDIAN CONSTITUTIONAL DOCUMENTS 1757-1939, (Mukherjee & Co. Calcutta 1949); CHAND, G., THE ESSENTIALS OF FEDERAL FINANCE: A CONTRIBUTION TO THE

For maintaining legislative relations between the Centre and the Provinces, the doctrine of occupied field operates under the aforementioned political assumptions. The doctrine assumes that there exists a superior legislature (i.e., the Parliament) where ultimate power vests and whose mere intention would be sufficient to oust the jurisdiction of the "*inferior legislature*" (i.e., the states), which *only* has administrative utility.

This position was significantly altered by the adoption of the Constitution. An emerging school of thought[32] makes a case for the transformative nature of the Constitution. This means that the shift from the colonial government to the new regime is not merely "*a change in the form of government*",[33] which was nothing more than the "*final step in the process of evolution towards self-government*".[34] The adoption of the Constitution was a meticulous effort to break away from the colonial position of oppression and subjugation.

There was a significant change in societal and political structures that were designed by the colonial rulers to serve their ends. These political institutions are now to be understood as means to create an egalitarian polity which was alien to the nation, prior to independence. To do this, the Constitution introduced the concepts of fundamental rights, universal adult franchise, accountability in governance, rule of law, to name a few. As the Preamble also indicates, the very purpose of the Constitution was to instil the notion of constitutionalism and the true spirit of fraternity.[35]

PROBLEM OF FINANCIAL RE-ADJUSTMENT IN INDIA (Humphrey Milford, Oxford University Press, London 1930). The authors criticised the 'Provincial Financial Settlements' introduced by the British rulers in pre-independent India by saying that federal units existed only for administrative convenience, with maximum possible centralisation of power with the Centre.

[32] Uday S. Mehta, *Constitutionalism*, in THE OXFORD COMPANION TO POLITICS IN INDIA (Niraja Jayal & Pratap Mehra (eds), Oxford University Press 2010); GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS (HarperCollins 2019); *See also* Virendra Singh v. State of Uttar Pradesh, 1954 AIR 447.

[33] State of Gujarat v. Vora Fiddali Badruddin Mithibarwala, 1964 AIR 1043.

[34] *Id.*

[35] Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1; Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

Therefore, this approach must be used when one interprets the provisions of the Constitution.[36]

When such principles are applied to the concept of federalism, it would no longer be normatively tenable to suggest that the states are merely territorial subdivisions. Politically, they have their own identities, which ought to be protected to balance the values of fraternity on the one hand and preserve the identity of the constituent communities on the other. The transformative nature of the Constitution is reflected in the intention of promoting fraternity and liberty. If these qualities are compromised, we will fail to implement the Constitution with the intent with which it was adopted.

Against this backdrop, the *doctrine of repugnancy* would better suit the object with which the Constitution was adopted, given its federal structure. Here, both the Parliament and the state legislatures are considered equal, and only in extremely unavoidable circumstances, where a conflict arises, the concept of repugnancy becomes relevant. In this context, the said doctrine is *merely a tool* to iron out difficulties in governance, while at the same time, there is due recognition of the identity of the states. On this basis, the ideals of fraternity in our transformative constitution are better served by the doctrine of repugnancy.

Having said this, it is imperative to understand that these normative considerations only come into play when there is an ambiguity in the law. Academic literature on this issue[37] has conventionally only made a case from a normative perspective. In discerning the true construction of Article 254, the Constitution must be read as a whole in its context. Therefore, like other tools of interpretation, these normative considerations will always be subject to any contrary intention established by other arguments.

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[36] *See* Kalpana Mehta v. Union of India, AIR 2018 SC 2493. At ¶ 210, Justice Chandrachud in his separate opinion speaks of the transformative nature of the Constitution. Identifying such transformation as its purpose, the Constitution ought to be read to achieve this purpose to the maximum degree possible.

[37] K. Prahlad Bhat, *Constitutional Law,* 26(1) NLS REV. 102 (2014); Arun Sagar, *Federal Supremacy and the occupied field: A Comparative Critique,* 43 PUBLIUS 251 (2013); Suman Lakhani, *Conceptual Comprehension of doctrine of repugnancy and its empirical enactment* (2020) 6(11) J. CONTEMP. ISSUES L. 111 (2020).

HISTORICAL CONTEXTUALISATION OF INCORPORATING ARTICLE 254 IN THE CONSTITUTION OF INDIA

A. POSITION OF LAW IN THE GOVERNMENT OF INDIA ACT, 1935

Before the discussion on the Constitution commenced in the Constituent Assembly, B.N. Rau, the Constitutional Advisor to the Drafting Committee, had prepared the initial draft of the Constitution.[38] This template had its own version of Article 254, which was at that time in the form of Article 184. As per this draft, the provision was an adaptation of Section 107 of the Government of India Act, 1935.[39] The language of the provision is analogous to that of Article 254. In this light, the law laid down by the Federal Court of India, with respect to the interpretation of Section 107, would be relevant to look into. In the case of *Subrahmanyan Chettiar v. Muttuswami Goundan*,[40] the validity of the Madras Agriculturists Relief Act, 1938 was challenged. This was done on a number of grounds, including the law being *ultra vires* Section 107. The judgement was made by three judges, all of whom wrote separate opinions. It would not be relevant to deal with the particular questions of law, but it is relevant to note that Chief Justice Gwyer and Justice Varadachariar opined that Section 107 would not be applicable to the facts of the case. In the minority on this point, Justice Sulaiman expressed that Section 107 would be attracted and, in applying the law, held that the said provision recognises the doctrine of occupied field, similar to the Canadian law. He also stated that the doctrine of incidental encroachment is necessary to resolve inevitable conflicts between laws in the context of Section 100 (the predecessor to Article 246). According to him, the principle that justifies the utilisation of this doctrine also recognises the doctrine of occupied field. Therefore, it would be illogical to import only one of these doctrines without the other. This became the rationale for him to claim that Section 107 was the manifestation of the doctrine of occupied field and not that of repugnancy.

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[38] B. SHIVA RAO (ED.), THE FRAMING OF INDIA'S CONSTITUTION SELECT DOCUMENTS 3 (The Indian Institute of Public Administration 1967).

[39] Government of India Act, 1935, § 107(1), Acts of Parliament, 1935.

[40] Subrahmanyan Chettiar v. Muttuswami Goundan, AIR 1941 FC 47.

This minority opinion was cited with approval in subsequent Federal Court judgments, namely *Bank of Commerce Ltd. v. Amulya Krishna Basu Roy Chowdhury*[41] and in *Bank of Commerce Ltd. v. Kunja Behari Kar*.[42] The law laid down on this point by the Federal Court of India thereby suggested that the doctrine of occupied field be recognised in Section 107. As this provision is the predecessor to Article 254, this may be perceived as an argument for the recognition of the said doctrine in Article 254 as well. The decision of the Federal Court is incorrect and misguided. By interpreting the expression "*with respect to*" in Section 107, it was inferred that the language was broad enough to incorporate the doctrine of incidental powers from Canadian jurisprudence.

However, without any justification, it was claimed that this doctrine is principally allied with the doctrine of occupied field and that the recognition of one must entail the other. This is merely an assertion, and the argument is not founded in law or logic. Doctrines of constitutional law are only guiding principles to help construct and apply concepts. These principles derive their authority *from the text of the Constitution itself*.

Section 100 of the Government of India Act, 1935, provides that the respective legislatures may make laws "*with respect to*" the respective lists. The expression "*with respect to*" may be read to have any of the following two interpretations:

(i) There is a requirement for *a close and proximate relation* between the legislation and the subject matter in the list, or

(ii) There may also be *an indirect relation* between the law to be made and the subject matter of the list.

Therefore, on the basis of proximity, the language of Section 100 may be considered as the source of the doctrine of pith and substance and incidental powers (both of which concepts relate to the question of *proximity*). But the ordinary meaning of the said expression does not in any way relate to the doctrine of occupied field. For no reason, the Federal

[41] Bank of Commerce Ltd. v. Amulya Krishna Basu Roy Chowdhury, AIR 1944 FC 18.

[42] Bank of Commerce Ltd. v. Kunja Behari Kar, AIR 1945 FC 2.

Court incorporated foreign principles of Canadian law[43] without giving solid context in relation to the Government of India Act, 1935.

B. PROCEEDINGS OF THE DRAFTING COMMITTEE AND THE CONSTITUENT ASSEMBLY DEBATES

Analysis of previous iterations of Article 254

The second historical aspect that will serve as an interpretive tool are the drafts of Article 254 itself. As mentioned earlier, B.N. Rau prepared his draft, which served as the template on which amendments were then made by the Drafting Committee.[44] His version of Article 254(1) was Article 184, which was exactly identical to Section 107 of the Government of India Act, 1935[45]-

> "*1) If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions- of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void…". (Emphasis Supplied)*

As the law stands today (in the form of Article 254), the highlighted expression is interpreted to qualify-

(i) "*To any provision of a federal law which the Federal Legislature is competent to enact*"; and it also qualifies [Let us call this the "*First Part*" of the provision]

(ii) "*To any provision of an existing Indian law*" [Let us call this the "*Second Part*" of the provision]

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[43] Subrahmanyan Chettiar v. Muttuswami Goundan, AIR 1941 FC 47; *See also* Vince Morabito and Henriette Strain, *The Section 109 "Cover the Field" Test of Inconsistency: An Undesirable Legal Fiction*, 12(2) U. TASMANIA. L. REV. 182, 198 (1993).

[44] B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION SELECT DOCUMENT 3 (Indian Institute of Public Administration 1967).

[45] *Id.*, at 76.

By qualifying both these sets of expressions, which are differentiated by the usage of the word "or" in Article 184 (i.e., the erstwhile version of Article 254), it is only attracted when the conflict is between a federal and provincial law *in the Concurrent List*.

However, as an alternative, if the highlighted portion of Article 184 in the excerpt above qualifies only the expression "*to any provision of an existing Indian law*," Article 184 would also govern cases where there is a conflict between federal and provincial laws belonging to *any List*.

Keeping in mind this position, let us now look at the first draft of the Constitution prepared by the Drafting Committee. This draft was prepared on the 21st February 1948, after several rounds of meetings and discussions within the Committee.[46] This new draft amended Article 184, which is now numbered Article 231.

The amended version of the draft made two significant changes. The first was that the expression "*Concurrent List*" was completely removed from the provision. The second was that *a comma was inserted* after the expression "*Parliament is competent to enact*" in the said provision. The placement of this comma, which was non-existent earlier, is still reflected in Article 254 as it stands today. The meaning of this change was that the expression "*with respect to which Parliament has powers to make laws*" (highlighted above) was meant to qualify only the *Second Part* of Article 231, i.e., only the expression "*to any provision of any existing law*" is qualified by the said highlighted portion. This implies that Article 231 was meant to apply even to conflicts between laws belonging to the Union and States Lists. Therefore, in the event there was a conflict of laws involving the Union List and the State List, *both*, Articles 231 and 217 (the erstwhile version of the present Article 246) would be applicable.

This Draft of the Constitution was then submitted to the Constituent Assembly for a clause-by-clause review. The review of Article 231 came up on 13th June 1949,[47] and the same was accepted without any debate or discussion. However, the draft was returned to the Drafting Committee, to make any further technical, typological, and legal changes that the

[46] *Id.*, at 509.

[47] *Id.*, at 630.

Committee felt were necessary.[48] This process was completed by the Committee and the revised draft of the Constitution was submitted to the President on 3rd November 1949.[49] Amongst the changes that were made, the text of this revised draft renumbered Article 231 to Article 254.

Further changes saw the reintroduction of the expression "*Concurrent List*" in Article 254. Despite the reintroduction of the expression "*Concurrent List*," the comma introduced in the previous revision of the draft was retained. This indicates that ultimately the intention of the lawmakers was to apply *both* Articles 254 and 246 when there are conflicts involving the State List and the Union List. As mentioned earlier, there is no doubt that Article 246 requires the application of the doctrine of repugnancy to resolve any conflict as opposed to the doctrine of occupied field.

However, if the doctrine of occupied field is recognised in Article 254, there would be incoherence between Article 254 (which recognizes the said doctrine) and Article 246 (which recognizes the doctrine of repugnancy). A construction that leads to such incoherence must be avoided, and the law must be interpreted so that the different provisions work together. This is called the rule of harmonious construction, which has been utilised by the Supreme Court in a number of instances.[50] Accordingly, it is submitted that the most suitable construction of Article 254 would be to construct the expression "*repugnant*" to imbibe the doctrine of repugnancy.

C. ANALYSIS OF PROCEEDINGS OF THE DRAFTING COMMITTEE

When the first draft of the Constitution was prepared by the Drafting Committee in February 1948, it was published to invite feedback from the general public. B. Shiva Rao's documentation[51] has recorded the comments that were received and *the response of B.N. Rau* with respect to these

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[48] B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION SELECT DOCUMENT 3 (Indian Institute of Public Administration 1967) 745.

[49] *Id.*

[50] MSM Sharma v. Shri Krishna Sinha, AIR 1959 SC 395; Re under Article 143, Constitution of India (Keshav Singh case), AIR 1965 SC 745; Kailash Chandra v. Mukundi Lal, AIR 2002 SC 829; CIT v. Hindustan Bulk Carriers, AIR 2003 SC 3942.

[51] RAO, *supra* note 44 at 130.

comments. It would be relevant to discuss one such comment that was received for Article 231.

The comment was jointly made by K. Santhanam, M. Ananthasayanam Ayyangar, T.T. Krishnamachari, and Shrimati G. Durgabai.[52] The suggestion made by them in relation to Article 231 was to remove clause (2) of the article. What is important however, is that in the official response to this suggestion,[53] B.N. Rau expressed that the removal of clause (2) will adversely affect the position of the states. As the expression "*repugnant*" has been construed "*widely*," the power of the states with respect to matters on the Concurrent List is limited.

This reference to the wide construction of "*repugnant*" would necessarily have to be in relation to Section 107 of the Government of India Act, 1935. As discussed earlier, whether correctly or incorrectly, the Federal Court also read Section 107 broadly to include the doctrine of occupied field. Acknowledging that this was the law at that time, B.N. Rau confirmed that the expression "*repugnant*" continues to carry the broad meaning it had under the regime of the Government of India Act, 1935. As the Constitutional Advisor's draft served as a template for the Constitution, this remark gives an incredibly strong indication that Article 254 recognises the doctrine of occupied field.

Furthermore, it would be relevant to point out the pre-Independence case of *O.P. Stewart v. B.K. Roy*,[54] where B.N. Rau was the author of the judgement. This judgement too, dealt with the issue of "*repugnancy*" in the context of Section 107 of the Government of India Act, 1935. In his decision, "*repugnancy*" was read broadly to include the occupied field theory.[55] On this basis, it can be further argued that the makers of the Constitution were very well aware of the law preceding the Constitution.

As these arguments are based on various rules of interpretation, they are valid only so far as any contrary intention cannot be established. Being subject to a context to the contrary, it is submitted that *a stronger case* is made for the recognition of the doctrine of occupied field. The historical enquiry

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[52] *Id.*

[53] *Id.*

[54] O.P Stewart v. BK Roy, AIR 1939 Cal 628.

[55] *Id.*, at 632.

into the drafting of Article 254 has allowed us to discover the context in which it was drafted and the various stages it went through in this drafting process. In brief, we can appreciate that the interpretation of Article 254 was affected by numerous factors.

The law laid down by the Federal Court in relation to the Government of India Act, 1935, recognised the doctrine of occupied field. Objectively, this may be accepted or criticised, but the Constitutional Advisor considered it the law of the land. Subsequent to this, they made a conscious decision to retain the interpretation accorded by the Federal Courts. This was seen in the form of the notes of B.N. Rau in relation to Article 254, discussed above. There cannot be stronger evidence as to the intention of the makers of the Constitution than the express notes of the Constitutional Advisor himself.

Another implication of the draftspersons' being aware of the expression "*repugnant*," is that they consciously chose to retain the expression "*repugnant*," in contradistinction to similar words such as "*inconsistent*," otherwise used in the Constitution.

Article 246 has meticulously drafted non-obstante and subject clauses. The Drafting Committee went through this detailed process so that various clauses of Article 246 may be utilised to resolve conflicts between the Union and the states. Therefore, the *very existence* of these clauses in contradistinction to Article 254 indicates that the scope of operation of both these articles is different. This has been construed by the Supreme Court as a tool of interpretation where the express mentioning of one thing impliedly bars the rest (the corresponding Latin maxim is *expressio unius est exclusio alterius*).[56]

If the placement of the comma in the process of drafting Article 254 is construed as an indication to apply Article 254 even when there is a conflict involving the Union and State Lists, the whole scheme of Article 246 is made redundant. This objection is bolstered by the fact that the Federal Court of India also maintained a distinction[57] between applying Section 100

[56] Municipal Council, Palai v. T.J. Joseph, AIR 1963 SC 1561; Delhi Municipality v. Shivshanker, AIR 1971 SC 815.

[57] Subrahmanyan Chettiar v. Muttuswami Goundan, AIR 1941 FC 47.

and Section 107 of the Government of India Act, 1935. It is thus submitted that the mere placement of a comma cannot be used to support an interpretation resulting in a provision becoming wholly redundant. Such a reading that results in a provision of law becoming otiose must be avoided as per canons of interpretation laid down by the Supreme Court.[58]

On this basis, from a textual, structural, and historical analysis of the provisions relating to the legislative relations between the Union and the states, it can safely be concluded that there is a constitutional justification for adopting the doctrine of occupied field.

ANALYSING DECISIONS OF THE SUPREME COURT OF INDIA

Having examined the issue on a first principles basis, it would be pertinent to examine some of the case laws on the point. It is submitted that only the interpretation of Article 254 will be discussed in this segment.

The earliest case to purely deal with Article 254 was *Tika Ramji v. State of Uttar Pradesh*.[59] Justice N.H. Bhagwati, speaking for the unanimous majority of a five-judge bench held[60] that, when the Parliament intended to make a law that was a complete exhaustive code or evinced the intention to cover the whole field, the power of the state legislature to make laws on that subject matter would be ousted.

This finding of the learned judge was based on some authorities cited by him. This included the line of Federal Court judgments discussed earlier. Reliance was also placed on Nicholas' "*The Australian Constitution*."[61] No other reason was given.

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[58] Rao Shiv Bahadur Singh v. State of Uttar Pradesh, AIR 1953 SC 394; JK Cotton Spinning and Weaving Mills v. State of Uttar Pradesh, AIR 1961 SC 1170; Dilawar Balu Kurane v. State of Maharashtra, AIR 2002 SC 564; Ramphal Kundu v. Kamal Sharma, AIR 2004 SC 1039.

[59] Tika Ramji v. State of Uttar Pradesh, AIR 1956 SC 676.

[60] *Id.,* ¶31.

[61] H.S. NICHOLAS, THE AUSTRALIAN CONSTITUTION, 303 (The Law Book Company of Australia, Sydney, 1948).

The next occasion for the Supreme Court to discuss the provision was *Deep Chand v. State of Uttar Pradesh.*[62] Justice Subba Rao was one of the five judges on the bench who wrote a separate opinion that dealt with the interpretation of Article 254. In his judgement, the learned Judge also relies on Nicholas' work and cites *Tika Ramji v. State of Uttar Pradesh* as an authority. He goes on to hold[63] that repugnancy is to be ascertained on the basis of the intention of the Parliament. Laws would not be repugnant only when the provisions were directly conflicting. If the intention of the Parliament is to make a uniform consolidating legislation, the doctrine of repugnancy would apply, and the states' power would be limited.

The judgement makes no elaboration for the adoption of these tests apart from merely mentioning the authorities mentioned above.

The Supreme Court made a decision involving Article 254 in *M. Karunanidhi v. Union of India.*[64] This case discussed the opinions mentioned above and once again, the Court followed a similar pattern of earlier judgments where no logical or legal justification was given. It continued to rely on the authorities[65] that run common to all the aforementioned cases and merely asserted that the doctrine of occupied field found its place in Article 254.

So far, this paper has only discussed some of the prominent decisions in this regard. Apart from these judgments, there were various other decisions of the Supreme Court starting from the year 1950 until 2018 which followed the same trend. These cases have not been discussed separately as all of them similarly incorporate the doctrine of occupied field without substantive explanation.[66]

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[62] Deep Chand v. State of Uttar Pradesh, AIR 1959 SC 648.

[63] *Id.,* ¶61.

[64] M. Karunanidhi v. Union of India, 1979 3 SCC 431.

[65] NICHOLAS, *supra* note 61; Deep Chand v. State of Uttar Pradesh, AIR 1959 SC 648; M. Karunanidhi v. Union of India, 1979 3 SCC 431; Tika Ramji v. State of Uttar Pradesh, AIR 1956 SC 676.

[66] Zaverbhai Amaldas v. State of Bombay, (1955) 1 SCR 799; State of Orissa v. MA Tulloch, (1964) 4 SCR 461; Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45; State of Kerala v. Mar Apparaem Kuri Company Ltd., (2012) 7 SCC 106; Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407.

This finally culminated in the case of *Forum for People's Collective Efforts v. The State of West Bengal*.[67] This judgement of the Supreme Court was delivered by a Division Bench. West Bengal had made a complete law on rent control which was identical to the Real Estate (Regulation and Development) Act, 2016. The question was whether the state law could survive in light of the comprehensive code on the subject matter that was already made by Parliament. Once again, citing the same chain of authorities and relying on the works of Nicholas in his "*The Australian Constitution*",[68] the court came to the following conclusion[69]-

> (i) The first instance of repugnancy would be where there is an irreconcilable conflict. When compliance with one law would result in non-compliance with another, the laws would be repugnant to one another.
>
> (ii) The second instance of repugnancy would be where the Parliament, through its legislation, has expressed its intention to make a complete and exhaustive law to preclude the enactment of any other law made by a state.
>
> (iii) The third instance of repugnancy would be where the law of the Parliament and state legislature regulate the same subject.

Thus, in the second and third instances, the repugnancy does not arise as a result of any conflict, but because the nature of the parliamentary law is to comprehensively occupy the field.

Therefore, what can be observed from the start of the jurisprudence on this issue is that the Supreme Court has omitted to justify the doctrine of occupied field on the basis of text, historical context, and the structure of the Constitution. It is conceded that the Federal Court's opinion on the point was clear. However, the court was never bound by the decisions of the Federal Court in this respect. The court ought to have provided well-

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[67] Forum for People's Collective Efforts v. The State of West Bengal, 2021 SCC OnLine SC 361.

[68] NICHOLAS, *supra* note 61.

[69] Forum for People's Collective Efforts v. The State of West Bengal, 2021 SCC OnLine SC 361 ¶41.

reasoned decisions for relying on the pre-independent law to make any assertion.

Another manifestation of this attitude of the Supreme Court can be seen in its continued reliance on Australian authorities[70] in developing the jurisprudence on the issue. Except in a few exceptional cases,[71] no reason has been given for relying on the Australian law for interpreting the Indian Constitution. Therefore, whilst the doctrine of occupied field has been justified from a textual and historical standpoint in this paper, the courts' simple assertion of the said position was unjustified and irresponsible.

As the fulcrum of justifying the doctrine of occupied field in Article 254 stems from Australian authorities, we are prompted to make an analysis of the Australian Constitution on this issue. This will facilitate a commentary on the usage of this law with respect to our domestic position.

ANALYSIS OF THE POSITION OF LAW IN AUSTRALIA

The law on the Legislative Relation between the Centre and the states will now be done in the context of Australia. First, the position in Australia will be discussed, followed by a direct comparison with the position in India.

A. TEXTUAL ANALYSIS OF THE CONSTITUTION

Akin to the structure of the Indian Constitution, the Australian Constitution also has a federal setup.

(i) Section 52[72] gives the Commonwealth (Central Government) the exclusive power to make laws on certain subjects.

[70] NICHOLAS, *supra* note 61; *Clyde Engineering Co. v. Cowburn*, [1926] 37 CLR 466 (Austl.); *Ex Parte McLean*, (1930) 43 CLR 472 (Austl.); *Stock Motor Plough Ltd. v. Forsyth*, (1932) 48 CLR 128 (Austl.).

[71] NICHOLAS, *supra* note 61, at 489.

[72] *Australian Constitution* s. 52.

(ii) Section 51[73] gives concurrent powers to both the Commonwealth and the states with respect to certain subjects.

(iii) Lastly, Section 107[74] gives power to the states to make laws on every field, barring those that are vested exclusively in the Commonwealth under Section 52.

Naturally, there is a possibility of conflict with respect to the concurrent powers of the Commonwealth and the states. The solution for such conflicts has been provided in Section 109 of the Constitution. It provides[75]-

> "*When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*"
>
> *(Emphasis Supplied)*

The expression used here is "*inconsistent*." Unlike the word "*repugnancy*," the language of the provision is clear. The word only has one meaning, which means contradiction, incompatibility and conflict.[76] Such an understanding of the expression has also been endorsed in Australia to a certain extent.[77]

The first rule of interpretation is quite simple - do not interpret when there is no need to. The plain and natural meaning of expressions ought to dictate their legal meaning as well. It is not appropriate for any judicial authority to forcefully insert some type of ambiguity to enable themselves to carry out any elaborate interpretative exercise. Therefore, in the event no ambiguity exists, it would be legally impermissible to apply any tool of purposive interpretation at all.[78]

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[73] *Australian Constitution* s. 51.

[74] *Australian Constitution* s. 107.

[75] *Australian Constitution* s. 109.

[76] MERRIAM-WEBSTER, CAMBRIDGE DICTIONARY, *supra* note 11.

[77] Tammelo, *The Tests of Inconsistency between Commonwealth and State Laws*, 30, AUST. L. J. 496 (1957); KH Bailey, *Inconsistency with Paramount Law* 2 RES JUDICATAE 9 (1939-41).

[78] Rananjaya Singh v. Baijnath Singh, AIR 1954 SC 749; Dibya Singh Malana v. State of Orissa, AIR 1989 SC 1737; Md. Munna v. Union of India, (2005) 7 SCC 417.

The matter is straightforward enough, logically, there ought to be no place for recognising the doctrine of occupied field in Section 109. "*Inconsistent*" here can only be relevant when one legislation is irreconcilably placed on par with another. The incompatibility of the laws in question is judged by their effects and not their objects. This is a position that has also been recognised in India on various occasions.[79] As the parameter for judging the compatibility of laws becomes the legal or textual effect, they have *vis-à-vis* each other, it is a clear application of the doctrine of repugnancy.

Accordingly, the language and structure of the Indian Constitution are malleable enough to invite a doctrinal and historical enquiry to find the most suitable construction of the law, whereas the Australian Constitution is rigid and clear in its intent.

B. INTENTION OF THE MAKERS OF THE AUSTRALIAN CONSTITUTION

The predecessor of the Australian Constitution that was discussed, altered and finally adopted as the Constitution was the Commonwealth Bill of 1891.[80] Clause 3 of this Bill was the erstwhile version of Section 109. This provision was discussed only twice in the constitutional convention debates during the 1898 Melbourne session of the Australasian Federal Convention.[81] There was barely any discussion on this provision, but from the few comments that were made, it seems that the makers did not give much importance to Clause 3 and felt that it would sparingly be called into question. This can be seen from the comment of Sir George Turner[82]-

[79] Bennett Coleman v. Union of India, AIR 1973 SC 106; Rustom Cowasjee Cooper v. Union of India, AIR 1970 SC 1318; Anuj Garg v. Hotel Association of India, AIR 2008 SC 663.

[80] George Stephen Chapman, *The Draft Bill to Constitute the Commonwealth of Australia,* UNIVERSITY OF SYDNEY LIBRARY (Jun. 12, 2001), https://setis.library.usyd.edu.au/ozlit/pdf/fed0007.pdf.

[81] Convention Debates, Melbourne 1898, at 643-44 and 1911-1913.

[82] Convention Debates, Melbourne 1898, at 1912.

> "*The federal Parliament will not have the power to legislate on matters left entirely to the State. How, then, could the laws be inconsistent?*"

Further, statements were made by some members of the Convention that even if such circumstances of conflict were to arise, they had faith in the High Court to do everything possible to harmonise the inconsistency. This approach would be important because they felt that this provision should not be a reason to impair the power of the states to make any law. This can be inferred from the comments of Mr. Reid who said[83]-

> "*I do not think we propose the Constitution should be so framed that a State law passed on a subject left entirely to the State should 'go down' before a law of the Commonwealth on some other subject without any rhyme or reason, and without any reference to any consequences which may follow.*"

The lack of importance and deliberations on the provision in itself is an indicator that the makers did not envisage it to have wide-reaching ramifications. The extended importance that is given to Section 109 is purely attributable to the artificial judicial tests that have been laid down by judgements. This is a position that is supported by the learned Australian jurist G. Craven.[84]

On this basis, the historical context of the Australian and Indian positions indicates the adoption of the doctrines of repugnancy and occupied field respectively. The language of Section 109 is sufficiently clear to suggest that *direct inconsistency* is the only relevant test that is contemplated. Despite this clarity, however, as one Australian commentator puts it, "*the simplicity of these words has proved deceptive.*"[85] This is because the High Courts of Australia have added the tests of the doctrine of occupied field within the text of Section 109. This test has no basis in the provisions of the Constitution itself and is purely a creation of judicial fiction. In this light, it would be relevant to study some of the decisions of the High Court in adopting the said doctrine.

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[83] *Id.*

[84] AUSTRALIAN CONSTITUTIONAL CONVENTION, FISCAL POWERS SUB-COMMITTEE REPORT 98, at 101 (Jul. 1984).

[85] H. Zelling, *Inconsistency Between Commonwealth and State Laws*, 22, AUST. L. J 45. (1939-41).

C. JUDICIAL PRECEDENT RECOGNISING THE "OCCUPY THE FIELD TEST" IN AUSTRALIA

At the time of the inception of the Australian Constitution, there was only one relevant test of inconsistency in the context of Section 109. This was expressed in a number of cases as the "*simultaneous obedience*" test.[86] This test is the same as that of doctrine of repugnancy wherein only in the event there is a direct conflict in the effect of provisions, would there be any material inconsistency.

Subsequently, the first major case to introduce the doctrine of occupied field was *Clyde Engineering Co. Ltd. v. Cowburn*.[87] In this case, Isaacs J., in his separate and concurring opinion, introduced a new test which changed the course of law significantly with respect to Section 109. The learned judge held[88] that the question to be asked was whether the Commonwealth law *intended* to cover the whole ground. This would be the conclusive test of inconsistency when there is a conflict of laws with another legislature.

This holding by the judge was without any substantial reasoning. Issacs J. made no reference to the Constitution or the history of Section 109 of the Constitution. Unfortunately, a similar trend was found in subsequent cases before the High Court of Australia.[89] Reliance was placed in this case to make an argument for the recognition of the test of "*occupying the field*." There was no attempt to find any attention or basis for making this assertion in the Constitution itself. On another occasion, in the case of *Ex*

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[86] *Federated Sawmill Employees of Australia v. James Moore and Sons Ltd*., (1909) 8 CLR 465 (Austl.); *Australian Boot Trade Employees Federation v. Whybrow 6 Co*., (1910) 10 CLR 266 (Austl.); *Federated Engine Drivers Association of Australasia v. Adelaide Chemical and Fertiliser Co. Ltd*., (1920) 28 CLR 1 (Austl.); *Waterside Workers' Federation of Australia v. Commonwealth Steamship Owners' Association*, (1920) 28 CLR 209 (Austl.); *R v. Licensing court of Brisbane*, (1920) 28 CLR 23 (Austl.).

[87] *Clyde Engineering Co. v. Cowburn* [1926] 37 CLR 466 (Austl.).

[88] *Id.*

[89] *Ex Parte McLean,* (1930) 43 CLR 472 (Austl.); *Stock Motor Plough Ltd. v. Forsyth*, (1932) 48 CLR 128 (Austl.); *Wenn v. Attorney General (Vict.)*, [1948] 77 CLR 84 (Austl.).

Parte McLean,[90] Dixon J., in his separate opinion affirms the position of Issacs J. in *Clyde Engineering v. Cowburn*.[91] The court once again reiterates the same test of repugnancy that was utilised in previous judgments. If the Federal statute showed an intention to cover the subject matter, it would be sufficient for the law made by the "*paramount legislature*" to prevail.

A caveat to the application of the "*occupy the field*" test was given by the High Court of Australia for the first time in *Stock Motor Ploughs Ltd. v. Forsyth*. Evans J. in his judgement opines[92] that the evolved test of repugnancy is ambiguous because subject matters of legislation bear little resemblance to geographical areas. The subject matter being dealt with or the method of dealing with it cannot be read to mean that the Federal authority has adopted a plan to make a comprehensive and self-contained law.

What is necessary to signify repugnancy is that there must be some material hindrance or obstruction created by the state law. In this regard, whilst expressing the concern that the test of "*occupying the field*" can be ambiguous, Evat J. narrowed the scope of the doctrine by introducing this aspect of the "*test of inconsistency*". Bound by the precedent discussed before, Evat J. did not have the liberty to make a contrary finding to any further extent. This ultimate position was affirmed in *Wenn v. Attorney General* (Vic.).[93]

In this fashion, merely by referring to the cases coming before them, successive cases before the High Court of Australia made an artificial recognition of the doctrine of occupied field in Section 109. As argued earlier, none of these cases made any doctrinal, political, or constitutional justifications for this incorporation despite the clear wording of Section 109 of the Australian Constitution. The case law on this point has advanced jurisprudence merely by making unsubstantiated assertions. These successive case laws have accordingly laid strong foundations for an incorrect proposition of the law.

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[90] *Ex Parte McLean,* (1930) 43 CLR 472 (Austl.).

[91] *Id.*

[92] *Stock Motor Plough Ltd. v. Forsyth*, (1932) 48 CLR 128 (Austl.).

[93] *Wenn v. Attorney General (Vict.)*, [1948] 77 CLR 84 (Austl.).

The judicial precedent on this point is uniformly consistent in both India and Australia. The very first instance in which the doctrine of occupied field was applied, was done without any backing in the text, history, or structure of the Constitution. It was a mere assertion and complete judicial fiat in both jurisdictions. The first few decisions of the Supreme Court of India consistently made the same mistake which ultimately bound the future benches. The court has made a blanket assertion by relying on Australian authorities and the rulings of the Federal Court.

The impugned question of law does not simply pertain to the interpretation of an expression. This question has significant ramifications that affect the balance of power between the Union and the states. The choice between the competing theories of repugnancy and occupied field is based on much broader philosophical ideals that have been discussed earlier.

There was a significant change in approach to the adoption of the Constitution, where federalism was not merely a means to an end anymore (the end being efficient governance). As mentioned earlier, a transformative reading of the Constitution would require us to change our approach to understanding constitutional structures and institutions including federalism.[94] Federalism will now stand for political and cultural respect of the states, wherein the values of unity of the nation will have to be balanced with protection of the identities of the states'. As the competing doctrines each represent the approaches of pre- and post-constitutional values, the transformative nature of the Constitution ought to have had a bearing in deciding which doctrine better suits the object of the Constitution. The adoption of the Constitution ought to have been reason enough for the Supreme Court to consider the matter afresh on first principles. Instead, the court chose to unduly rely on the pre-independent position of the law.

CONCLUSION

This paper sought to analyse the recognition of the doctrine of occupied field in Article 254. This was done by studying the Constitutional text, the

[94] MEHTA, *supra* note 32.

historical context of the issue, and the judicial precedent on the point. It was ascertained that there was a lack of reasoning on the part of the Supreme Court to adopt the doctrine of occupied field. The court merely made assertions by relying on certain authorities and importing principles from Australian jurisprudence. This led to an analysis of the Australian position which was then contrasted with the Indian law. A direct comparison shows a stark difference in the text of the Indian and Australian law, as well as the drafting history of the relevant positions.

This paper finds that while it was justified to recognise the doctrine of occupied field in India, the Supreme Court did not make any persuasive doctrinal arguments for the same. This shortcoming is exhibited in all the cases consistently decided by the court. On the other hand, the High Court of Australia used judicial fiat to artificially introduce the doctrine of occupied field into their jurisprudence. Thus, not only has the Australian High Court erred in recognising the doctrine, but it has also failed to do so by employing logical or legal reasoning. In this context, the Supreme Court of India may have been ultimately correct in adopting the doctrine of occupied field, but it did so without any cogent and explained reasons. The opinion expressed in this paper was an attempt to bridge the gap in jurisprudence and provide a doctrinal basis for the recognition of the doctrine of occupied field in India.

CONSTITUTIONAL OWNERSHIP IN INDIA—A CASE STUDY FROM MAHARASHTRA & RAJASTHAN

NAMRATA JEPH[1] AND RAJESH RANJAN[2]

The Constitution of India is both a source of pessimism and optimism, reminding us that it is what we and the coming generations make of it. Constitutional democracies and constitutions are in crisis throughout the world. India has also not remained untouched by this looming constitutional crisis. However, the interesting phenomenon that has been witnessed around the same time is of "constitutional ownership". In India, the phenomenon of constitutional ownership through the use of constitutional symbols is a recent phenomenon, witnessed in different parts of the country. For instance, people have used the symbols of national icons, preambular text & values of the Constitution for resistance and to reclaim the republic in recent times. This article offers empirical studies from Maharashtra & Rajasthan on the engagement of the Indian Constitution by

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marginalised sections for constitutional change and to claim an equal stake in the making of the republic. It also offers instances of constitutional mobilisation, a recent phenomenon in India, which is instrumental in political change. However, India has witnessed revolutionary change. The Indian freedom struggle is a living example of revolutionary change through mobilisation. These case studies from these two states offer hope in a time when the Constitution is facing the challenge of survivability and endurance, mostly by state and state-supported non-state actors. In India, when the line between the state and non-state actors in governance is blurred, citizens are acting as a defender of the nation's first document. This paper narrates the story of such defenders of the Constitution.

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INTRODUCTION

The citizens are at the centre of any discourse in constitutional law, as the document governs their everyday life. Despite this central role of the citizen, most of the scholarship on constitutional law focuses mainly on the state institutions while neglecting people as an institution at the centre of these discourses.[3] In recent times, from the mass protests in India,[4] to the discussions in the courtyards in villages, the Constitution has found its place.[5] The scholarship on the citizen's engagement is scattered, leaving a

[3] ROHIT DE, A PEOPLE'S CONSTITUTION: THE EVERYDAY LIFE OF LAW IN THE INDIAN REPUBLIC (1st ed., Princeton University Press, 2018).

[4] Abhinav Kumar, *Invoking the Preamble in Protest*, THE HINDU BUSINESS (Jan. 26, 2001), https://thehindubusinessline.com/opinion/invoking-the-preamble-in-times-of-protest/article33669141.ece.

[5] Rajesh Ranjan, *Is Indian Constitution an Elite Document? Bheels, Kalbelias Changing this One Song at a Time*, THE PRINT (Aug. 13, 2022), https://theprint.in/opinion/is-indian-constitution-an-elite-document-bheels-kalbelias-changing-this-one-song-at-a-time/1079981.

gap in the constitutional scholarship on mobilisation and the role of citizens in the constitutional change in a democracy. However, a brief survey of the literature on the engagement of the people with the Indian Constitution reveals little but significant involvement of the masses with the document.

Prof. Ornit Shani shows from an archival study that citizens, civic groups, and individuals were directly involved in the constitution-making, even from the margins of society.[6] The recent work by Prof. Rohit De reveals that people in India have been agents of social and legal change, since the inception of the Constitution.[7] Scholars of law and social mobilisation have shown that law (including constitutional law) can support struggles for social justice in a variety of ways and at multiple levels.[8] As evidence from the ground reveals that it supports the marginalised identities, including women, Dalits, and minorities, to advance their rights and assert their dignity.[9] The emphasis on the role of the citizenry in defending the Constitution is rooted in the faith shown by the founding fathers in the people.

Dr. Ambedkar remarked that "*no matter how good a constitution is, it can only be effective when there is the presence of sagacity of individuals and masses; political morality of those who are governing it and the creativity of Judiciary*."[10] The sagacity of the individuals is a closely dominating factor in constitutional mobilisation and is, therefore, relevant to this paper.

Speaking on the sagacity of people, Pandit Nehru in the Constituent Assembly, remarked that "*governments do not come into being by state papers but*

[6] Ornit Shani, *The People & the Making of India's Constitution*, 65 HIST. J. 1102, 1102-1123 (2022).

[7] DE, *supra* note 3.

[8] Balakrishnan Rajagopal, *The Role of Law in Counter Hegemonic & Global Legal Pluralism: Lessons from Narmada Valley Struggles in India*, 18 LEIDEN J. INT'L L., 345-387 (2005).

[9] Rajagopal, *supr*a note 8. *See also,* the subsequent segment on 'Resilience from the ground: living with hope- Case Studies from Maharashtra and Rajasthan'.

[10] Prof. (Dr.) I.P. Massey, *Contemporary Relevance of Ideals of Ambedkar*, lecture delivered on Ambedkar Jayanti at NATIONAL LAW UNIVERSITY JODHPUR (Apr. 14, 2022).

are the expression of the will of the people."[11] Satish K Jha argues that the "*will of the people is the sine qua non of liberal constitutionalism and the foundation of the modern republic and popular sovereignty*."[12] In essence, the presence of constitutionalism provides a space for people to take the stage in the democratic republic. Therefore, the epicentre of the constitutional change, in a constitutional democracy is the citizenry.

The case studies of constitutional changes in Maharashtra and Rajasthan narrate the story of the expression of the will of the people.[13] It ranges from defying caste atrocities to claiming public space by women, to protecting secular values and enhancing social harmony. These stories exhibit the power of the Constitution in the making of the citizenry to the use of innovative means to engage with the Constitution. The fault lines of society are revealed by social research. The case of the Bandhua Mukti Morcha[14] was the first instance wherein social research revealed the fault lines and paved the way for the enhancement of individual and group rights.[15] In this article, we have used the tools of a descriptive interview in empirical studies of social research and documented the stories of the advancement of individual and group rights. Borrowing the term from Satish Deshpande, the social research in this article is an attempt to trace the idea of the *'construction of people*'.[16] The people in this article are the owners of the Indian Constitution and they have owned the Constitution in their own ways, which we call here a phenomenon of "c*onstitutional ownership*".[17]

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[11] *Constituent Assembly of India Debates (Proceedings) Vol- 1*, CONSTITUTION OF INDIA.NET https://www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-13.

[12] Satish K. Jha, *Celebrating the Will of the People*, SEMINAR MAGAZINE, https://www.india-seminar.com/2022/756/756-06%20SATISH%20K.%20JHA.htm.

[13] Ranjan, *supra* note at 5.

[14] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161.

[15] K.D. Gangrade, *Empirical Methods as a Tool of Research*, *24* J. IND. L. INST. 635, 635-654 (1982).

[16] Satish Deshpande, *Constructing 'The People' in India Today*, SEMINAR MAGAZINE, https://www.india-seminar.com/cd8899/cd_frame8899.html.

[17] The Authors reviewed the literature on Constitutional ownership. There is no academic definition of Constitutional ownership. However, Anurag Bhaskar does define it in the context of Dalit ownership of Babasaheb Ambedkar and the Constitution. *See* Anurag

Constitutional ownership is a phenomenon where people claim ownership through the constitutional text and symbols for constitutional change.

In this article, our attempt is to define and document the instances of constitutional ownership, in the background of a democratic recession. In Part I of the manuscript, we define constitutional mobilisation and constitutional change while reviewing the instances of mobilisation from the lens of global scholars. Part II deals with the increasing recession in democratic principles and the necessity of constitutional mobilisation. Part III documents the stories from the States of Maharashtra and Rajasthan to narrate the instances of constitutional ownership in India. It argues that Constitutional ownership is not a singular phenomenon, and actors involved in it manifest it in different ways.[18]

CONSTITUTIONAL MOBILISATION, CONSTITUTIONAL CHANGE & CONSTITUTIONAL REVERENCE

The term 'Mobilisation' suggests setting in 'motion' previously inert entities.[19] According to the 'bottom-up' views on mobilisation, it is self-generated, as like-minded 'individuals' band together around natural sources of solidarity.[20] However, our empirical studies reveal that constitutional mobilisation is not necessarily brought by like-minded individuals, as it can involve actors of different points of view. Constitutional mobilisation is defined by Prof. Son as a process by which social actors employ constitutional norms and discourses to advocate for constitutional change.[21] Constitutional mobilisation happens in a particular political and constitutional environment and that environment provokes constitutional mobilisation.[22] Constitutional change is a diverse and

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Bhaskar, *Ambedkar's Constitution: A Radical Phenomenon in Anti-Caste Discourse?*, 2(1) CASTE – GLOBAL J. ON SOC. EXCLUSION, 109-131 (2021).

[18] See the following section of Resilience from the ground where the people used different values of the Constitution viz- Secularism, Fraternity etc., in owning the Constitution.

[19] Arun R. Swamy, *Political Mobilization*, *in* THE OXFORD COMPANION TO POLITICS IN INDIA 268-269 (Neerja Gopal Jayal & Pratap Bhanu Mehta eds. Oxford India, 2011).

[20] *Id.*

[21] Prof. Bui Ngoc Son defines – "*Constitutional mobilisation*" – as the process by which social actors employ constitutional norms & discourses to advocate for constitutional change.

[22] *Id.*

multifaceted concept that includes socio-political and individual changes that happen due to mobilisation.[23] The role of social mobilisation in driving constitutional change is central to the work of American scholar Jack Balkin.[24] He summarises the role of social mobilisation in driving constitutional change. He argues individuals often make claims about the constitution by organising social movements that construct, develop, and disseminate the constitutional vision. This constitutional vision is also being forwarded by the actors mentioned in this study. These actors are 'mobilised citizenry' as the American scholar Siegel termed it.[25] They get mobilised in the name of the Constitution and use constitutional tools for the advancement of constitutional mobilisation. The answer to why such mobilisation happens varies across diverse opinions with different points of view.

The answer lies in the idea of constitutional reverence.[26] Constitutional reverence is the common understanding among citizens to consider and regard the constitution in its highest form and use it as a common ground of negotiation even with people of opposite views. Thus, constitutional reverence acts as a site for the construction of constitutional meaning while using constitutional texts.

However, constitutional reverence in India is different from the American notion of constitutional reverence, which Thomas Jefferson has referred to as "*sanctimonious reverence*".[27] Sanctimonious reverence considers the constitution so sacred that it cannot be altered for any constitutional

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[23] *Id.*

[24] JACK BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD, 1-4 (1st ed., Harvard University Press, 2011).

[25] Reva B. Siegel, *Text in the Contest: Gender & Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299 (2001).

[26] SANFORD LEVINSON, CONSTITUTIONAL FAITH (1st ed., Princeton University Press, 1988).

[27] Jim Zink, *Individual Reverence for Constitution Acts as a Barrier to Constitutional Change*, LONDON SCHOOL OF ECONOMICS BLOG (Apr. 3, 2017), https://blogs.lse.ac.uk/usappblog/2017/04/03/individuals-reverence-for-constitutions-acts-as-a-barrier-to-constitutional-change/.

change. Contrasting to this, in India, reverence acts as a catalyst for constitutional change.

In the Indian context, constitutional reverence is witnessed due to the change brought by the initiatives of constitutional literacy programmes. Prof. Arun Thiruvengdam calls the change brought by these initiatives a phenomenon of "c*onstitutional faith*".[28] This constitutional faith is the precursor of constitutional reverence, where citizens have faith in the constitution due to certain values prescribed in it. These initiatives of constitutional literacy create a space for dialogue where even contested values like secularism could also be debated, discussed and finally agreed upon as a founding value of the constitution.[29]

The remarkable feature of constitutional faith is that it cannot be compromised, like the other institutions of democracy. Courts, which are to be considered as a last resort for the protection of democratic values, can also be compromised under populist pressure. Therefore, citizens' collective effort in creating a dialogue for constitutional change through mobilisation remains a perennially effective tool, unlike courts. As constitutions across the globe and constitutional democracies are in peril, the endeavour for constitutional change through mobilisation and acts of ownership offer hope[30] to those who have faith in the nation's first document.[31] The increasing democratic recession[32] across the globe and in

[28] Arun K. Thiruvengadam, *Constitutional Faith or Constitutional Idolatry? Insights from recent mass protests in India*, IACL-AIDC (Jan. 26, 2021), https://blog-iacl-aidc.org/cili/2021/1/28/constitutional-faith-or-constitutional-idolatry-insights-from-recent-mass-protests-in-india.

[29] Bhawna Sharma & Rajesh Ranjan, *Conscience Keepers of the Constitution*, DECCAN HERALD (Mar. 1, 2022), https://www.deccanherald.com/opinion/conscience-k.

[30] Hope is a political virtue that allows citizens to pursue democratic goods that are difficult but possible to attain. *See* Blöser C et al*., Hope in Political Philosophy*, 15(1) PHIL. COMPASS (2020).

[31] MARK A. GRABER et al., CONSTITUTIONAL DEMOCRACY IN CRISIS? 620-621, (1st ed. 2018).

[32] *See* Nancy Bermeo, *On Democratic Backsliding*, 27(1) J. DEMOCRACY, 5 (2016).

India makes constitutional ownership a necessary act for constitutional endurance, as well as for the survivability of democracy.[33]

DEMOCRATIC RECESSION & NECESSITY OF CONSTITUTIONAL MOBILISATION

Sachidananda Sinha, the Provisional Chairman of the Constituent Assembly, quoting the Joseph story, remarked that the constitutional structure of the world's newest and largest democracy can only fail due to negligence by its protectors – 'The People.[34] The framers of the Constitution of India posed their faith in the people for the defence of the Constitution from the anti-constitutionalist forces. Our Constitution was framed on the basis that the citizens would be willing to take a continuous and considered part in public life.[35] Therefore, public participation is at the core of the defence of the Constitution.

The recent report of the Freedom House and the Swedish Institute V-Dem reveals a trend of democratic recession around the globe.[36] The global recession of democracy has been accompanied by rising authoritarianism. It includes a range of features, from an attack on civil societies and minorities to the shrinking of individual rights in mature democracies like India and the United States. The health of constitutional democracies is also deteriorating in transformative constitutional democracies like Hungary and South Africa.[37] With the rise of illiberalism and right-wing populism in and around the globe, the necessity of constitutional mobilisation also simultaneously arises. The constitutional democracies in

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[33] Constitutional endurance is the life of the constitution and its sustainability. *See more Constitutional Endurance in* COMPARATIVE CONSTITUTIONAL LAW 112 (Tom Ginsburg & Rosalind Dixon eds., Edward Elgar Publishing, 2011).

[34] *Constituent Assembly Debates (Proceedings) Volume- 1 9 December 1946*, http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C09121946.html.

[35] NANI A. PALKHIVALA, WE THE PEOPLE 33-34 (UBS Publishers 1st ed. 1999).

[36] Vanessa A. Boese et al., *Autocratization Changing Nature? Democracy Report 2022*, V-DEM (Mar. 2022), https://www.v-dem.net/democracy_reports.html. *See also* Saraph Repucci & Amy Slipowitz, *The Global Expansion of Authoritarian Rule*, FREEDOM IN THE WORLD REPORT 2022, https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule.

[37] Thiruvengadam, *supra* note 28.

the world are shrinking and there are no new models of constitutional democracies arising in recent decades. The Freedom House data reveals that seventy-one countries suffered a net decline in political rights and civil liberties, with only 35 countries to have recorded gaining these rights.[38] Notably, over the last 12 years, more than 113 countries have recorded a decline in democracy and merely 61 countries have recorded upward mobility in democracy.[39]

The creation of an active citizenry is only possible when there is a democracy. Therefore, it is vital for democrats around the world to actively engage and advocate for faith in constitutional values. Although democracy is eroding around the globe, it is also a fact that democracy is still ascendant to the people's values and aspirations. It creates a space for engagement and democratic growth. If the current trends of attack on constitutional crisis deepen, it is because of those who can resist but choose not to. Freedom of choice and equal participation can be called a measure to increase the effectiveness of the value of participation in a democracy.[40] These stories of resistance also reinforce our claim that constitutional ownership provides a way to fully participate in the everyday life of democracy and assert their own free choice. Constitutional ownership and public participation are interrelated phenomena. The work of Prof. Tom Ginsburg, Justin Blount and Zachary Elkins further strengthened our claims that participatory processes lead to the formal expansion of rights and increase citizens' role in the daily life of democracy.[41] Gabriel Negretto argues that the involvement of citizens before, during or after the constitution writing enhances the collective ownership over the text and promotes institutional democratic design and the effective enforcement of the text.[42] Involvement of citizens or public participation after the enactment of the constitution here conceives this idea of citizen's participation in the governance for both advancement of socio-economic

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[38] Michael J. Abramobitz, *Democracy in Crisis*, FREEDOM HOUSE REPORT 2018, https://freedomhouse.org/report/freedom-world/2018/democracy-crisis.

[39] GRABER, *supra* note 31.

[40] Chand W. Flanders, *What is the Value of Participation*, 66 OKLA. L. REV. 53 (2013).

[41] Tom Ginsburg, et al., *The Citizens Founder: Public Participation in Constitutional Approval*, 81 TEMPLE L. REV. 361(2008).

[42] Gabriel Negretto, *Constitution-Making and Liberal Democracy: The role of Citizens and Representative Elites*, 18 INT'L J. CONST. L. 206 (2020).

rights and the advancement of individuals while using constitutional values. Therefore, it becomes clear that once citizens own the constitution, they start believing in the text and spirit of the constitution, and ultimately, they use it for participating in everyday governance.

In the next segment, we document such stories of resistance whose choice of resistance has not only strengthened faith in the Constitutional values but also tells the story of citizen's participation through constitutional ownership.

RESILIENCE FROM GROUND: LIVING WITH THE HOPE - CASE STUDIES FROM MAHARASHTRA AND RAJASTHAN

For Dr. Ambedkar, the life of political democracy is dependent on social and economic democracy. In one of his speeches in the Constituent Assembly, he observed:[43]

> "*We are going to enter into a life of contradictions. In politics, we will have equality and in social and economic life we will have inequality…. How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.*"

The success of India's political democracy for over 75 years remains an enigma for many scholars. The ideals laid down by the Indian Constitution in the backdrop of India's socio-economic realities might have seemed to be unrealistic and over-ambitious for her to achieve. The socioeconomic realities of India posed a great threat to the realisation of the textual aspirations of her Constitution. A part of India's constitutional success story lies in the fact that, with time, its text has gained a socially expressive

[43] B R Ambedkar, *Why BR Ambedkar's Three Warnings in his Last Speech to the Constituent Assembly Resonate Even Today*, THE SCROLL (Jan. 26, 2016), https://scroll.in/article/802495/why-br-ambedkars-three-warnings-in-his-last-speech-to-the-constituent-assembly-resonate-even-toda.

value.[44] This function of the Constitution has ensured that its norms do not remain a fiction but are understood and mobilised by ordinary people to realise the constitutional vision of India.[45] This process can be better understood with the empirical research that the authors have undertaken with the objective of understanding how ordinary citizens as well as social activists have engaged with the Constitution.[46]

This phenomenon of constitutional ownership operates in various forms, in accordance with the individual understanding of the actors involved in it. Broadly, the work of these actors involved in our study expands the fundamental rights of individuals and defies the odds of caste, gender and class.

Indian society is gripped with multiple social problems, for instance, casteism and caste atrocities, abject poverty, unorganised sector workers, communal disharmony, among others. Through our case studies, we shall illustrate how individuals working on the ground and tackling these problems have employed and owned the Constitution in their fight against these problems. In Sally Engle Merry's words, these individuals are "*mappers in the middle*" i.e., individuals who give real essence to the text of the Constitution.[47]

A. GENDERING CASTE: STORIES OF DIGNITY AND EMPOWERMENT

Eminent feminist Scholar Uma Chakravarti argues that – "*the emergence of autonomous grassroot movement has forced the scholars to rethink on the issue of women's*

[44] Cass R Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

[45] Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38 (2006).

[46] One of the authors during his Samta fellowship work with Coro India conducted fieldwork for months in 2021-22 to study constitutional literacy in the states of Rajasthan and Maharashtra. The objective of this fieldwork was to connect with people who have explored and adopted different perspectives towards the Indian Constitution and are propagating constitutional values within the Indian society. During this fieldwork, detailed interviews were conducted with social and political actors who are working in the State of Maharashtra and Rajasthan.

[47] Merry, *supra* note 45.

rights."[48] She points out that caste has been successful in dividing the gender and therefore, the issue of gender rights must be studied in intersectionality.[49] The presence of caste makes the constitutional provision of equality an unfinished task, and therefore, these two stories of Jaya Kulkarni and Vidya Singh reveal the assertion and construction of gender rights, while unifying the gender and defying the caste. Intersectionality is a factor in the marginalisation of women.

Dalit women are one of the most marginalised groups, not only in India but across the globe.[50] Dalit rural women face serious challenges in carrying out their multiple roles within their families and communities, in part, due to the lack of rural infrastructure and lack of access to essential goods and services.[51] They have the highest poverty levels and their access to resources or even their efforts to access them are often met with violence.[52] Dalit women are often subjected to direct and structural violence.[53] Rural women are politically marginalised, but rural Dalit women are given even less of a voice in the decision-making process due to the intersection of caste, class, and gender.[54] Another section of society where the intersection of caste and poverty becomes prominent is that of sex workers.[55] Recently,

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[48] UMA CHAKRAVARTI, GENDERING CASTE: THROUGH A FEMINIST LENS (Sage Publication, 1st ed., 2003).

[49] *Id.*

[50] Soutik Biswas, *Dalit Women are Among the Most Oppressed in the World*, BBC INDIA (Oct. 6, 2020), https://www.bbc.com/news/world-asia-india-54418513.

[51] Navsarjan Trust et al., The Situation of Dalit Rural Women, *Submission to Discussion on CEDAW General Comment on rural women* – Article 14 – September 2013 http://idsn.org/wpcontent/uploads/user_folder/pdf/New_files/UN/TB/Joint_Submission_on_Dalit_Rural_Women_-_FEDO__Navsarjan__IDSN_2013.pdf.

[52] CHAKRAVARTI, *supra* note 48.

[53] *Id.*

[54] Aloysius Irudacam et. al., *Dalit Women Speak Out: Violence Against Dalit Women in* India, NATIONAL CAMPAIGN ON DALIT HUMAN RIGHTS (Mar. 2003), http://idsn.org/wp-content/uploads/user_folder/pdf/New_files/Key_Issues/Dalit_Women/dalitwomenspeakout.pdf.

[55] Divyendu Jha & Tanya Sharma, *Caste and Prostitution in India: Politics of Shame and of Exclusion,* 4(1) ANTHROPOLOGY (2016).

the Supreme Court of India has also raised concerns over the challenges faced by them.[56]

The case study of Jaya Srikurni from Kolhapur district of Maharashtra,[57] a Dalit woman (who has served as the head of district administration from 2007 till 2014), exhibits a constitutional engagement for women empowerment, both in grassroots democratic institutions, and in the governance for exercising the basic rights. Her work has addressed the issues of the right to a clean environment and access to education. The initiative of Savitri Abhiyan which is aimed to facilitate access to education for women has helped women from eight villages to complete their education. The initial days of her work witnessed segregation in the Self-Help Group ("**SHG**") meetings.[58] Women turned up in the SHG meetings when it came to the issues for women's empowerment, but not when the discussions were on the Constitution and its principles because they only considered them for the Dalit women. Slowly and gradually, with consistent engagement and discussions on constitutional principles, things have changed. Her efforts culminated into increasing awareness of women with regard to their constitutional rights. Speaking on different associated platforms over this idea of constitutionalism helped all the women from villages to learn about the rights bestowed to them in the Constitution.

The impact of her initiative finally culminated into what is now called 'right-bearing citizens'.[59] Women applied their knowledge of the Constitution in their respective domestic roles. It increased and inculcated deep interest not only in the Jaya's organisation but also in the Constitution. Women started enrolling and associating with their organisations. Currently, she has opened 43 constitutional divisions (societies) with the

[56] Sohini Chowdhury, *Sex Workers not Even Treated as Human Beings Supreme Court Ask Centre about Status of Bill to Protect Trafficking Victims*, LIVE LAW (May 12, 2022), https://www.livelaw.in/top-stories/supreme-court-adopt-recommendations-panel-sex-workers-centre-responsebill-to-protect-trafficking-victims-198983.

[57] Telephonic interview with *Jaya Sri Kurni*, Founder Samvidhan Sakha Sangthan (March 19, 2022).

[58] Self Help Groups are defined as informal associations of people which are self-governed and come together with the aim to improve their living conditions.

[59] Generally, right-bearing citizens are understood as a citizen who understands and asserts their individual rights.

help of women volunteers. These are open platforms where women find their voice to express their issues, irrespective of their caste and class identity. Her efforts have helped bind all these constitutional societies into one united forum that is open to people from all castes, gender, and age groups and helps them understand the essence of constitutional values.

Arendt Lijphart argues that in a deeply divided society like India, democracy is only possible if it is consociational (a political system which is based on shared power).[60] Women, after 75 years of independence, do not find adequate representation in the democratic institution, therefore remain at the periphery in power sharing.[61] Research on the issue reveals that affirmative action coupled with proper education on constitutional rights empowers women to participate in not just politics, but also grassroot level politics.[62]

Another example that the authors would like to present is that of Ms. Vidya Chouhan, whose work reveals a similar pattern of awareness of affirmative action and educational empowerment in the Ajmer district of Rajasthan.[63] She worked with women on diverse issues, including facilitating their participation in the Gram Sabha, educating them about the affirmative action measures available for them, most significantly, acting as a capacity builder to empower them as active citizenry. She used practical and indigenous methods to teach them how the Constitution is connected to their lives in her workshop and small meetings.

B. DEFYING CASTE: STORIES OF CULTIVATING AN EGALITARIAN SOCIETY

[60] Arendt Lijphart, *The Puzzle of Indian Democracy: Democracy: A Consociational Interpretation*, 90 AM. POL. SCI. REV. 258 (1996).

[61] Darshan Devaiyah BP, *Unsung Heroes Tara Krishnaswamy – From Techie to Fighter of Political Rights of Women*, THE INDIAN EXPRESS (Jul. 9, 2022), https://indianexpress.com/article/cities/bangalore/unsung-heroes-tara-krishnaswamy-from-techie-to-fighter-for-political-rights-of-women-8018901/.

[62] Ratna Ghosh et al., *Women's Empowerment and Education: Panchayats and Women's Self-Help Groups in India Policy Futures in Education*, 13(3) SAGE PUBLICATIONS (2015).

[63] Telephonic interview with *Vidya Chouhan*, Secretary Sthayi Vikas Sansthan Ajmer, Rajasathan (May 5, 2022).

Caste is a closed concept. The Dalit activist Kumud Pawade writes that – "*The result is that although I try to forget my caste, it is impossible to forget. And then I remember an expression that I heard somewhere – what comes by birth and can't be cast off by dying is the caste.*"[64] The marginalisation of Dalits and Adivasis remains an important issue for the institutionalisation of equality and non-discrimination. The stories in this segment document the cultivation of equality by using constitutional values. Sampat Desai from Ajara (Kolhapur) Maharashtra, got into social activism by taking inspiration from leading activist Bharat Patnakar.[65]As Patnakar was opposed to exploitation based on caste, class and religion, the work of Mr Desai also gets inspired by his ideals. The social work of Sampat Desai witnessed a shift in 2017, as he started connecting his social movement with constitutional values. During this period, he was working in Dangar, on the forest rights of the tribals. In this context, he says that the right of tribals is related to the right to livelihood.

The emphasis on this correlation leads to shifts in our mass movement as well, where now people demand for fulfillment of their constitutional rights. Mr Desai notes that the impact of his work was exacerbated because of interlinking the people's movement with the knowledge of the Constitution. The knowledge of the Constitution empowered the people, especially workers, to raise questions about their wages and the working condition. Recalling his 40 years of activism, he demarcates the role of knowledge of the Constitution in the effective mobilisation in people's movements.

The contemporary Indian education system, even after so much "*development*", only favours certain English-speaking urban elites. Meritocracy has been upheld as a republican ideal that is a necessary corrective to older hierarchies of status.[66] The categorical distinction between the meritorious/casteless and the reserved class has extensively

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[64] KUMUD PAWADE, ANTAHSPHOT (Sugava Prakashan 1st ed., 2016).

[65] Telephonic interview with *Sampat Desai*, Member Shramik Mukti Dal Ajara Maharashtra *(*March 27, 2022). *See more* Bharat Patankar, *Caste and Exploitation in Indian History*, KAFILA (Feb. 27, 2012). https://kafila.online/2012/02/17/caste-and-exploitation-in-indian-history-bharat-patankar/.

[66] A. Subramanian, *Making Merit: The Indian Institutes of Technology and the Social Life of Caste*, 57(2) COMP. STUD. SOC. HIST. 291 (2015).

shaped the debate around educational equality in India. Despite an overall expansion of educational levels, the domination of twice-born castes (Dwija) prevails at many levels, namely, in universities, institutions and colleges, in the sphere of production of knowledge, in writing chapters of books, producing knowledge with the help of scriptural sources, or producing data from the field and teaching in the classrooms.

In The Tyranny of Merit, Michael Sandel wrote "*that the admission based on merit can be the best possible way to decide who deserves it, but the idea of merit cannot be separated from economic disadvantages*."[67] In the Indian context, the idea of merit cannot be disentangled from the historical injustices that scheduled castes have faced. Discrimination on the basis of caste which is inherent in nature has a consequential impact on the concept of merit.[68]

The case study of Gigraj Neemkathana, (a small town in Sikar district) Rajasthan, exhibits the dominance of caste discrimination in education.[69] However, it also offers a perception that the knowledge of the Constitution can become a ground for the advocacy of an egalitarian society. Casteism in higher education has remained a foremost issue for the realisation of an egalitarian society. The study reveals that casteism is prevalent in higher educational institutes and often wilfully neglected.[70] Gigraj faced the issue of casteism and caste-based discrimination in a nursing college in Jaipur and later confronted it. While confronting the discrimination with college, he was told that "*If not the boys of scheduled caste, who else will do the cleaning work*?". The discrimination against the scheduled castes happens in different forms - from the admission process to daily social interactions in classrooms, hostels and other spaces.[71] This experience, however, shaped

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[67] MICHAEL J. SANDEL, TYRANNY OF MERIT (1st ed., Penguin Random House, 2020).

[68] Damini Kain, *The Tyranny of Merit and Rethinking of Common Good*, THE WIRE (Dec. 03, 2020), https://thewire.in/books/the-tyranny-of-meritocracy-and-rethinking-common-good-with-michael-sandel.

[69] Telephonic interview with *Gigraj*, Founder Samvaidhanik Vikas Manch Neemkathana (Mar. 17, 2022).

[70] Abhishek Hari, *Casteism is Rampant in Higher Educational Institutes but is Wilfully Neglected: Study*, THE WIRE (Oct. 08, 2021), https://thewire.in/education/casteism-rampant-higher-education-institutions-wilfully-neglected-study.

[71] *Id.*

Gigraj and motivated him to start building the forum to fight against caste atrocities. Presently, his platform, *Samvaidhanik Adhikar Manch,* cultivates the vision of equality and non-discrimination. It engages with the administration against caste atrocities and cultivates the vision of equality and defence through constitutional literacy programmes among the youth.

C. DEFENDING CONSTITUTIONAL VALUES AND STORIES OF DEFENDERS OF THE CONSTITUTION

Citizens, in recent times, have emerged as defenders of constitutional values. These case studies reveal the power of the citizens in defending constitutional values. The advocates of the constitutional literacy initiatives argue that citizens liaised with the knowledge of the constitution creates a defence of the core constitutional values.[72] One such story is of Mr. Basant from Jaipur.[73] He said that during his initial days of public life, he was unaware of the Constitution. Later on, when he learned its values and text, he realised that his work revolves around it. Basant's efforts in building communal harmony and defending the value of secularism are exemplary. He works as an intermediary between the police and the people in building peace and harmony. Notably, he remarks that "*the Constitution is a great aid in reaching out to the people.*" Currently, through capacity building in youth and women through constitutional literacy and awareness, he is creating an effective group of citizens capable of promoting constitutional ideology and defending secular values. Fighting for social issues, he realised the importance of constitutional values. In essence, he remarked that constitutional values are not much different from human values. They help one to become a better person.

Mr. Vaishnav Ingole is the founder of 'Path Foundation', an organisation focused on constitutional engagement with the youth in schools and colleges. His work involves creating discourse around the Constitution among school, college and university-going students. The idea is to cultivate constitutional values among the youth so that they can further defend the Constitution. His work is not only limited to awareness but also extends to legal representation, making him both an academic and an

[72] Thiruvengdam, *supra* note 28.

[73] Telephonic interview with *Basant,* Haryana General Sec Rajasthan Nagrik Manch (Mar. 11, 2022).

activist. His work in Gadchiroli maps the barrier of access to justice among the particularly vulnerable tribes.[74] Through a survey among the communities on access to justice, Vaishnav plans to take mitigating measures for the awareness of constitutional and legal rights.

D. UNIQUE EXPERIMENT COMMUNITY ENGAGEMENT WITH THE CONSTITUTION: STORIES OF UNIQUE EXPERIMENT

The growing engagement of different communities with the Constitution through their indigenous or communitarian ways is a recent phenomenon in India.[75] The reflection of these growing engagements is also seen in Sham Sundarji's work. He started his journey as a journalist, by being involved in the enactment of the Anti-Superstition law in Maharashtra and the protests surrounding it.[76] He started engaging with the community and civil society through kirtans. For him, kirtans became the medium to send the message on constitutional values of inclusivity and peace. The kirtans remain an open platform for all and therefore, they have become a site of engagement across the caste and creed identity. A similar story is of Mr. Chandar Lal[77] from Kushalgarh, Rajasthan. Mr. Lal organises "*Public Jagrans*" and informs people about their rights and duties. These Jagrans have become a space for informing the people about various government schemes and their benefits. Mr. Lal uses these Jagrans, more specifically, a song curated on the theme of the Constitution, to impart the values of the Constitution to the people. On this method of imparting knowledge through Jagrans, he says "*Jagran is meant for different things so teaching law and Constitution through these methods was a difficult task in the beginning as people have different expectations from jagrans.*" However, he remains formidable in his approach and uses these social gatherings in the village as a site to teach the values of the Constitution.

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[74] Particularly vulnerable tribes are a separate and distinct category of tribals who are less developed and marginalised than others.

[75] Ranjan, *supra* note 5.

[76] Telephonic interview with *Shamsundarji Maharaj*, Activist Maharashtra (May 9, 2022).

[77] Telephonic interview with *Chander Lal*, Member Varad Mazdoor Kisan Sangthan Rajasthan (Apr. 10, 2022).

The story of Mr. Sidram Gaikwad, a sculptor from the Marathwada district of Maharashtra, narrates a unique experiment of using art to teach constitutional values. Being a graduate and a post-graduate in Art of craft and Art history respectively, he began his journey at the Baba Saheb Ambedkar Institute of Research and Training, Pune.[78] He employed innovative ways to increase engagement with the Constitution and its values i.e., through artistic display. For instance, he uses posters to explain the Constitution in simple and easy terms to the common people, and sculptures based on historical figures such as Ashoka, Tukaram, and Shivaji that align with Constitutional values. He undid the popular misconception of the Constitution being a borrowed document by invoking these figures. He prepared the artistic display of such figures which is to be installed in the Latur and Aurangabad districts of Maharashtra. The objective of such installations is to create "Constitution Points" (*Samvidhan Chauraha*), wherein constitutional ideas and fundamental rights could be propagated. He says that he wishes to see the impact of the Constitution, as ingrained as possible, and to establish the relevance of the Constitution in the lives of the common people.

These stories from Maharashtra and Rajasthan reveal how the Constitution of India has gained meaning in the lives of the people. These encounters of social activists and ordinary citizens with the Constitution are not isolated incidents. It is only such instances of engagement with the Constitution that give the constitutional document life.

CONCLUSION

The conventional notion of democracy views citizenship as a closed concept where the stake of people in the governance is limited to representation in the State's institutions for being a member of that exclusive territory where the State is created. In this article, our attempt is to view citizenship from a participatory viewpoint. Professor Emilios Christodoulidis reaffirms our view of participatory citizenship by stating

[78] Telephonic interview with *Sidram Gaikwad*, Artist & Sculptor, Asst. Prof. JJ School of Art Mumbai (May 9, 2022).

that citizenship not only involves a common membership but relies on that membership to initiate and direct participatory undertakings.[79]

This view of looking at citizenship creates an associational democracy that focuses on creating associations of citizens to claim their space in democracy.[80] Shreds of evidence of the working of these constitutional actors also exhibit that it deepens the value of fraternity in society, while creating associations. Borrowing the term "Free- citizens" from Prof Son, constitutional ownership, creates a conscious class of constitutional defenders, who appropriate their opportunity to play a significant role in constitutional mobilisation and change.

The stories of the activists and citizens from Maharashtra and Rajasthan reveal that they used the Constitution as a tool to assert their constitutional rights, raise awareness of constitutional values, and participate in public deliberation on constitutional issues. It is not an irrefutable fact that the Indian Constitution is an elite document, drafted by the political elites of post-independent India.[81] However, as Professor Nandini Sundar pointed out in her article,[82] the Constitution is a living document, notwithstanding the sterling role played by Dr. Ambedkar and the Drafting Committee, the Constitution as it exists today is an interaction of three elements – the text, courts and above all, the people.

During the Constituent Assembly Debates, Dr. Ambedkar remarked that "*if the Constitution which was given by the people unto themselves in 1949, did not work satisfactorily at any future time, we have to say that it's not the constitution that has failed but that the man was vile*."[83] Therefore, the role of the people in preserving and extending the Constitution goes beyond electing

[79] EMILIOS A. CHRISTOULDIS, LAW AND REFLEXIVE POLITICS, 7-8 (Law and Philosophy Library, 2001).

[80] Associational democracy views the state as a significant other of civil society. *See supra* note 48 at 32.

[81] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION CORNERSTONE OF A NATION, (Oxford India Press, 1996).

[82] Nandini Sundar, *The Constitution is a Living Document*, THE WIRE (Nov. 26, 2019), https://thewire.in/government/constitution-living-document.

[83] PALKHIVALA, *supra* note 35.

representatives, paying taxes, and bringing cases to the courts. Justice Chandrachud while speaking on the "*Role of Courts in protecting Human rights in India*", reminds the citizen that the fulfilment of the ideals of our Constitution and the protections guaranteed under it cannot only be achieved by exercising our role as citizens once every five years.[84] It requires continuous and concerted efforts from people to realise, assert and associate with the values of the Constitution. It encompasses the role of being an active citizen in the making of the republic. People are the fifth pillar of democracy, who initiate conversation and negotiation among diverse societies. The study of constitutional ownership is interdisciplinary, especially in diverse societies like India. It is also greatly influenced by the identity of the constitutional actors involved in the constitutional mobilisation and owning the Constitution.

We did not go into the detailed and nuanced identity and historical understanding of these actors in bringing constitutional change through ownership. However, the indirect reflection of the identity of these actors can be seen in the case studies mentioned in the paper. Our attempt in this paper was to create a discourse on constitutional ownership in the Indian context. The constitutional culture of discussion creates fidelity towards the Constitution as people find their place in the document.

These stories from Maharashtra and Rajasthan are the stories of values embedded in the Constitution, as much as the stories of the place of an individual in the Constitution. As the Indian republic is celebrating the 75th year of its independence, the efforts of constitutional ownership among the citizens would pave the way for an effective realisation of the meaning of 'republic', without which the Constitution would be like a Schrodinger's cat present in the structure of state but not in the nature of citizens.

[84] Print Team, *Rights are Paper Tigers Unless Given Teeth by the Court*, THE PRINT (Jun. 21, 2022), https://theprint.in/judiciary/rights-are-paper-tigers-unless-given-teeth-by-courts-full-text-of-justice-chandrachud-speech/1005691/.

BOOK REVIEW: INDIA THAT IS BHARAT–ENGAGING BUT INCONGRUENT DECOLONIAL EPISTEMOLOGY TO UNDERSTANDING INDIAN CONSTITUTIONALISM

ADITYA RAWAT[1]

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INTRODUCTION

Indian Constitutionalism often finds itself in a befuddled relationship with the lived experiences of Indian society. In early 2022, Telangana Rashtra Samithi ("**TRS**") president and Chief Minister K. Chandrasekhar Rao called for a rewriting of the Indian Constitution.[2] The CM's call was in the context of federalism and the relationship between the Centre and states. However, at the same time, it reinvigorates and entails the *Rashtriya Seva Sangh's* ("**RSS**") assertion about the need for the "*Gana Rajya system*" or 'Hindudom', premised on their understanding of decolonisation and the manifestation of Indic civilisation.[3]

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[2] Special Correspondent, *KCR floats the idea of drafting a new constitution*, THE HINDU (Feb. 01, 2022), https:// www.thehindu.com/news/national/telangana/kcr-floats-the-idea-of-drafting-a-newconstitution/article38361081.ece.

[3] M.S. GOWALKAR, WE OR OUR NATIONHOOD DEFINED 25 (Bharat Publications, 1939); VEER SAVARKAR, HINDU RASHTRA DARSHAN 106 (Prabhat Prakashan, 2015); INDRA PRASKASH, A REVIEW OF THE HISTORY & WORK OF THE HINDU MAHASABHA AND THE HINDU SANGATHAN MOVEMENT (Akhil Bharat Hindu Mahasabha, 1938); Kancha Illiah Shepherd, *Telangana CM's idea of a 'new Constitution' is self-destructive. It echoes RSS propaganda,*

The colonial consciousness embedded in our constitutional framework is one of the most oft-cited causes for this tension. On the other hand, there are also strong arguments that our experience with coloniality is one of the reasons for the endurance of constitutional democracy in India.[4] All of this posits a pressing need for reflection on our understanding of decoloniality and its nexus with Constitutionalism.

J. Sai Deepak, an engineer-turned-lawyer, is trying to locate and reflect on the pervasive effects of Colonial Onto-Epistemology and Theology ("**OET**") on our (i) post-independence constitutional values, (ii) contemporary identity discourses, and more importantly, (iii) *Bharatiya* civilisation through a trilogy of books ("**The Bharat Trilogy**"). His involvement in celebrated cases such as the *Sabarimala Ayyappa* temple case,[5] the *Sri Padmanabhaswamy* temple case,[6] etc., provided him the impetus to embark on this reflexive venture. The first book, *India, that is Bharat: Coloniality, Civilisation, Constitution*, was published in 2021.[7] His core argument is centred around reclaiming the position of Indic civilisational consciousness and presenting it to act as counter-hegemonic to the western normative framework.

As a student of constitutional theory, my reasons for reviewing the work are threefold. *First*, to engage with decoloniality as understood by someone who proclaims that he is different from 'academics working in silos'. *Second*, to explore avenues of reimagining decolonial Constitutionalism, and *last*, the majority of existing reviews are celebratory in nature to the extent that

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THE PRINT (Feb. 22, 2022), https://theprint.in/opinion/Telangana-cms-idea-of-a-new-constitution-is-self-destructive-it-echoes-rss-propaganda/824342/.

[4] SUJIT CHOUDHRY ET AL., *Locating Indian Constitutionalism*, *in* OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 1 (2016); *For more general discussion, see* – Alexander Lee & Jack Paine*, British colonialism and democracy: Divergent inheritances and diminishing legacies*, (47) J. COMP. ECON. 487,503 (2019).

[5] Indian Young Lawyers Association v. The State of Kerala (2017) 10 SCC 689.

[6] Sri Marthanda Varma (D) Th. Lr. v. State of Kerala CIVIL APPEAL NO. 2732 OF 2020.

[7] J.SAI DEEPAK, INDIA THAT IS BHARAT – COLONIALITY, CIVILISATION, CONSTITUTION (Bloomsbury, 2021).

he is portrayed as a forebearer for the restoration of Indic civilizational thought by emancipating us "*from the rut that postcolonial thought has become*".[8] On the other hand, liberal scholars like Professor Priyamvada Gopal and Professor Dibyesh Anand promptly dismissed the work for endorsing Hindu supremacy without warranted critical engagement.[9]

I have structured my book review in three parts. In the first part, I shall give an overview of the book's thematic underpinnings and core arguments. In the second part, I shall address my reservations and criticisms of Sai Deepak's assertions, and in the last part, I will reflect on the significance of this work.

PART I—OVERVIEW OF THE WORK

The book is divided into three sections, namely, Coloniality, Civilisation and Constitution. The book roughly covers the period between the Age of Discovery (Christopher Columbus' expedition of 1492) and the British-made constitution – The Government of India Act, 1919. In the first section, there are five chapters. The first chapter is general, wherein he tries to unpack what he understands by colonisation, colonialism, coloniality and decoloniality. In the second chapter, Sai Deepak traces the origins of western modernity (its religious and racial underpinnings) and its impact on the non-west using the age of discovery as a starting point. In the remaining chapters, Sai Deepak focuses on coloniality's intersection and

[8] Saumya Dey, *India That is Bharat. Breaking Out of the Postcolonial Rut*., CENTRE FOR INDIC STUDIES (Dec. 27, 2021), https://cisindus.org/2021/12/17/india-that-is-bharat-breaking-out-of-the-postcolonial-rut/; *Also see*, DV Sridharam, *'India That Is Bharat' Review: A Book Of Consequence*, SWARAJYA (Nov. 16, 2021), https://swarajyamag.com/books/india-that-is-bharat-review-a-book-of-consequence; Ashish, *India That is Bharat: Coloniality, Civilisation, Constitution by J Sai Deepak – Book Review*, INDIAN BOOK CRITICS (Apr. 06, 2022), https://indianbookcritics.in/non-fiction/india-that-is-bharat-coloniality-civilisation-constitution-by-j-sai-deepak-book-review/; Manik Sharma, *India, that is Bharat book review: J Sai Deepak makes pressing arguments about colonialism*, FIRSTPOST (Aug. 28, 2021), https://www.firstpost.com/art-and-culture/india-that-is-bharat-book-review-j-sai-deepak-makes-pressing-arguments-about-colonialism-9917511.html.

[9] Priyamvada Gopal (@ PriyamvadaGopal), TWITTER (Aug. 27, 2021), https: // twitter.com / PriyamvadaGopal / status /1431169841621315588; Dibyesh Anand (@ dibyeshanand), TWITTER (Aug. 27, 2021), https: // twitter.com / dibyeshanand/status/1431169087023947776.

adverse impact on language, nature, religion, knowledge, traditions, and education. J. Sai Deepak engages with Latin American decolonial scholarship to emphasise upon the stronghold of colonial consciousness and the underlying politics of the so-called universal virtues of modernity and secularism. Decoloniality in Latin America challenges the universal appeal of modernity and its contemporary manifestations such as globalisation and capitalism. Anibal Quijano, a prominent decolonial thinker, in his seminal work, argued that historical racial stratification is all pervasive in the concepts of modernity and globalisation.[10] He also argued that dominant elites of colonised native societies were acculturated in a colonial worldview which allowed deeper seepage of cultural coloniality.[11] Sai Deepak has migrated this conceptual framework in India in two ways: (i) by challenging the immanent colonial consciousness in our constitutional ethos of secularism and (ii) by arguing that native elites in *Bharat* with their aspirational western ideal accentuated "*distorting, stereotyping, eliminating or acculturating the indigenous worldview*" resulting in cultural coloniality even after 75 years of independence. (Page 41)

Through the second section, Sai Deepak brings discourse closer to home. The period covered in this section is between 1600 and 1853. The section is segregated into four chapters. He discusses the impact of coloniality in the realms of religion, colonial formulation of caste and tribes, education, and political apparatuses existing in Indic civilisation. In other words, the theme of this section is to take readers through the subversion of *Bharat's* civilisational consciousness by coloniality. He is highly critical of the post-colonial thought on such subversion and the ways in which post-colonial discourse has further entrenched coloniality by challenging coloniality while remaining within their OET framework. For him, the post-colonial discourse of presenting middle eastern consciousness as native to the Indic consciousness is "*dishonest and without basis in history*". (Page 162)

[10] Anibal Quijano, *Coloniality of power, Eurocentrism, and Latina America*, 1 NEPANTLA: VIEWS FROM SOUTH, 533, 580 (2000).
[11] *Id.*

The primary focus of this section is an examination of European colonialism's adverse effect on Indic civilisation, but he also posits a very interesting point by conceptualising Middle Eastern coloniality. He has used the first wave of invasion and Middle Eastern colonialism as the starting point of the eighth century. Sai Deepak argues that European and Middle Eastern consciousness was informed by the presumption that before their advent, colonised societies were consumed by darkness and ignorance, and both had similar OET concerning the concept of 'one true faith' and heathendom. He buttresses his arguments concerning Middle-Eastern coloniality and its pervasive existence by relying upon Venkat Dhulipalla's work.[12]

The primary thesis of the work, *Creating a New Medina,* is that the partition and creation of Pakistan is not an 'abrupt' disruption or a vague idea that culminated serendipitously as a nation but is a conscious and continuous advancement of middle eastern coloniality, imagined as a nucleus for spreading the community of believers. He urges readers to address this dual coloniality if one wants to reclaim Bharat's civilisational history.

In the last section, there are two chapters. Sai Deepak historicises the Government of India Act, 1858, which proclaimed secularism. He argues that the Act had prominent undercurrents of the Christian understanding of tolerance or neutrality. His more considerable argument, which he acutely brings by taking the readers through parliamentary debates, is that secularism, as we understand it today, should always be understood as 'Christian Secular' since the Christian worldview was inherent to the colonial infrastructure. (Page 387)

In the last chapter of the book, Sai Deepak critically analyses constitution-making endeavours through an analysis of the Montford Reforms Report[13] and, consequently the Government of India Act, 1919. He juxtaposes it

[12] VENKAT DHULIPALA, CREATING A NEW MEDINA: STATE POWER, ISLAM AND THE QUEST OF PAKISTAN IN LATE COLONIAL NORTH INDIA (Cambridge University Press, 2014).

[13] GOVERNMENT OF BRITISH INDIA, REPORT ON INDIAN CONSTITUTIONAL REFORMS (MONTAGUE-CHELMSFORD REPORT) (1918), https: // commons.wikimedia.org/ w/ index.php? title= File%3Areport_on_Indian_Constitutional_Reforms_(Montagu-Chelmsford_Report).pdf&page=5.

with the development of an international legal order in the form of the constitution of the League of Nations.[14] He argues that international law is deeply rooted in Christian OET, especially in terms of the standard of civilization binaries of 'civilised' countries (primarily, Christian or European nations) and 'not-civilised nations'. Sai Deepak dedicates a lot of space to reinforce the argument on the Christian character of the League of Nations by taking readers through multiple excerpts of discussions in the House of Lords concerning the League of Nations.

Later in the chapter, he ties a cord from India's founding membership of the League of Nations with the Government of India Act, 1919, to bring out the coloniality embedded in Constitutionalism. The Act was imbued with a similar Christian OET fabric, i.e., (i) Christian 'secular' underpinnings (Page 387) and (ii) binary of standard of civilisation, hence terms like 'responsible' government instead of 'self-government' as demanded found their way in the legal text. (Page 421)

PART II—CRITICISM OF THE WORK

At the onset of this part, I must admit that I have multiple bones to pick with his version of decoloniality. His decoloniality longs to be 'The version of decoloniality', but he can never quite make it owing to the construct that his conceptual framework of decolonising constitutional consciousness is novel. My first reservation lies in his entry point of exposition of decoloniality and its intersection with Constitutionalism. Sai Deepak, throughout the work, asserted that the native elites surrendered their agency of knowledge production, and they were the first group to believe in the supremacy of European OET and adopted the colonial consciousness. Consequently, the same was reflected in our constitutional virtues. For instance, in the chapter *Coloniality, Civilisation and Constitution*, wherein he examines the inception of Bharat's constitutional journey, he states:

[14] League of Nations, *Covenant of the League of Nations* (Apr. 28, 1919), https://www.refworld.org/docid/3dd8b9854.html.

> "*Over the years, there was no change in the colonial consciousness of the coloniser notwithstanding the setting up of representative legislative bodies. This is because these bodies operated within the political theology of Christianity, as we shall see from the literature, and Indians participated in these institutions, perhaps without paying attention to the unsecular nature of the underlying theology that informed such institutions*". (Page 371)

Similarly, he uses Lala Lajpat Rai's celebrated pamphlet, *Self Determination for India*, to buttress the argument about the seepage of colonial consciousness in native elites, but his disquisition decontextualises the facets of politics of freedom struggle.[15] His terse dismissal of the freedom struggle and native elites will find a fitting challenge in the form of recent works of constitutional history.[16] However, Sai Deepak has consciously decided to avoid engagement with them. It brings me to the second point of my reservations about his work. His corpus of engagement with scholarship is limited. He placed heavy reliance on the works of J. De Roover,[17] Walter Mignolo,[18] Koenraad Elst,[19] Dr. SN Balagangadhar,[20] revivalists like Sitaram Goel[21] and Ram Swarup,[22] etc.

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[15] LALA LAJPAT RAI, SELF DETERMINATION FOR INDIA (India Home Rule League of America, 1918).

[16] *See* MADHAV KHOSLA, INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY (Harvard University Press, 2020) ORNIT SHANI, HOW INDIA BECAME DEMOCRATIC: CITIZENSHIP, AND THE MAKING OF THE UNIVERSAL FRANCHISE (Cambridge University Press, 2018); AAKASH SINGH RATHORE, AMBEDKAR'S PREAMBLE: A SECRET HISTORY OF THE CONSTITUTION OF INDIA (Penguin, 2020).

[17] JAKOB DE ROOVER, EUROPE, INDIA, AND THE LIMITS OF SECULARISM (Oxford University Press, 2015).

[18] WALTER D. MIGNOLO & CATHERINE E. WELSH, ON DECOLONIALITY: CONCEPTS, ANALYTICS, PRAXIS (Duke University Press, 2018).

[19] KOENRAAD ELST, NEGATIONSIM IN INDIA: CONCEALING THE RECORD OF ISLAM (Voice of India, 1992).

[20] S N BALAGANGADHARA, RECONCEPTUALISING INDIA STUDIES (Oxford University Press, 2012).

[21] SITARAM GOEL, HINDU TEMPLES: WHAT HAPPENED TO THEM (Vols., 1 & 2, Voice of India, 1982).

[22] RAM SWARUP, UNDERSTANDING ISLAM THROUGH HADIS – RELIGIOUS FAITH OR FANATICISM? (Voice of India, 1982).

Their scholarship is highly critical of post-colonial studies, strongly asserting the existence of mature native civilisations before colonialism and the continuance of cultural colonisation post-independence. All of it blends perfectly with his rendition of decoloniality. Paradoxically, this work on decoloniality has primary engagement with western scholars. His disregard for Indic scholars like Mahatma Gandhi with his *Hind Swaraj*, KC Bhattacharya's S*waraj*, Ram Manohar Lohia, Kishen Pattnayak, and more contemporary scholars such as Ashish Nandy,[23] Prof. Sudipta Kaviraj,[24] etc. is a glaring and apparent miss. Such manifest disengagement leaves a major and evidently visible lacuna in his understanding, which is reflected throughout the work.

Coming to his understanding of decoloniality, it is amusing that despite reiteratively attacking colonial consciousness, he does not give insight into his formulations of 'Indic consciousness'. He does give a not-so-subtle hint of his understanding of what would constitute decolonisation in *Bharat*, i.e., a revitalisation of 'pristine' Hindu consciousness (*Sanatan*/Sanskritic philosophical traditions which were integral to once-great ancient civilization and using its apparatus to solve civilisational issues plaguing 'impure' India in the 21st century) (Pages 13 & 14).

Aditya Nigam, through his nuanced work on decolonizing theory, has strenuously attacked such approaches (inwardly directed search for some pure, uncontaminated indigenous self).[25] He calls such pursuit a cul-de-sac, one that should be avoided at all costs if we are serious about 'epistemic reconstitution' and 'addressing the challenges of our always-turbulent present'.[26] His conceptualisation of Middle Eastern coloniality is not only

[23] ASHIS NANDY, THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISM (Oxford University Press, 2009).

[24] SUDIPTA KAVIRAJ, THE IMAGINARY INSTITUTION OF INDIA (Columbia University Press, 2010); SUDIPTA KAVIRAJ & SUNIL KHILNANI, CIVIL SOCIETY: HISTORY AND POSSIBILITIES (Columbia University Press, 2001).

[25] ADITYA NIGAM, DECOLONIZING THEORY – THINKING ACROSS TRADITIONS 3 (Bloomsbury, 2020).

[26] *Id.*

skewed but deeply problematic. Yogendra Yadav acutely summed up his disagreements with Sai Deepak's formulation of Middle Eastern coloniality and his cut-off time of the eighth century to recover Indic consciousness.[27] An excerpt is reproduced below-

> "*My problem with this interpretation of decoloniality is not just that I vehemently disagree with its political implications but mainly that this is a product of a typical colonised mind. I cannot think of an expression more colonial than 'Middle East' — Whose east? Middle of what? Similarly, the assumption that there has to be a cut-off date (the eighth century, according to Sai Deepak) that separates authentic indigenous consciousness from impure foreign intrusions is another piece of colonial and colonised history writing. And it would take a perverse colonial mind to completely disregard the role of India's freedom struggle in redefining the civilisational consciousness of our times*".

Lastly, his constant jibes at 'constitutional morality' and 'transformative constitutionalism' as a product of colonial consciousness not only lack merits but are also illustrative of his linear exposition of concepts that deserve more nuanced discourse.[28] His criticism of transformative constitutionalism's reformative gaze as rooted in colonial OET is dismissive of other conceptual dimensions. There is a plethora of recent global academic scholarship on its jurisprudence.[29] For instance, Prof.

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[27] Yogendra Yadav, *India needs to challenge colonialism in its own language. But solution isn't Hindu worldview*, THE PRINT (May 6, 2022), https://theprint.in/opinion/india-needs-to-challenge-colonialism-in-its-own-language-but-solution-isnt-hindu-worldview/944406/.

[28] Abhinav Chandrachud, *The Many Meanings of Constitutional Morality,* SSRN (Jan. 18, 2020), https://ssrn.com/abstract=3521665; Pratap Bhanu Mehta, *What is Constitutional Morality,* SEMINAR (Nov., 2010), https: // www.indiaseminar.com / 2010 / 615 / 615_pratap_bhanu_mehta.html; Nakul Nayak, *Constitutional Mortality: An Indian Framework,* AM. J. COMP. L. (Forthcoming), https: // papers.ssrn.com / sol3/ papers.cfm? abstract_id=3885432; CNBC TV-18, *Panel Discussion on "Constitutional Morality: Applicability and Actionability*

in Recent Constitutional Jurisprudence", FACEBOOK, (Oct. 10, 2018), https: // m.facebook.com / story.php? story_fbid=1455255641285494&id=169218193115587&_rdr; André Béteille, *Constitutional Morality*, DEMOCRACY AND ITS INSTITUTIONS 75-98 (2012); Mahendra Pal Singh, *Observing Constitutional Morality*, 721 SEMINAR (2019), http: // ww.india-seminar.com/2019/721/721_mahendra_pal_singh.htm.

[29] KE Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS, 146, 188 (1998); Michaela Hailbronner, *Transformative Constitutionalism: Not only in the Global*

Upendra Baxi's Transformative Constitutionalism posits a direct challenge to Sai Deepak's formulations. Prof. Baxi states that the core of transformative constitutionalism is that "*we must change*".[30] He, in his peculiar way, states that the Indian Constitution, along with other global south constitutional countries, also carries the burden of transformation and needs to break from colonial OET.[31] Similarly, Indira Jaising, in her speech at National Law School listed down diverse formulations of transformative constitutionalism, including categorical judicial expressions of breaking from colonial lineages (the Rajasthan High Court's mandate of not calling judges as "*My Lord*", the Apex Court's jurisprudence concerning LGBTIQA+, adultery, and privacy, etc.).[32]

PART III—WHY WE MUST ENGAGE WITH THE WORK

Despite all my reservations about his work, there are certainly commendable takeaways from his work and sufficient reasons why it becomes essential to engage with him. First and foremost, he is asking pressing questions that we should ask when it is established that our contemporary understanding of India is dipped in the ink of eurocentrism. Even though the pursuit of emancipation from cultural colonialism is not novel, it is worth remembering and investigating. Moreover, his contention that there is a serious dearth of decolonial scholarship in the intellectual spaces of India is valid. Secondly, Section III of the book (Constitution) is wherein Sai Deepak is more in command owing to his legal training. He acutely brings out the Christian 'civilising' intent and the way it culminated into legislative endeavours, which in mainstream discourse is categorised

South, 65 AM. J. COMP. L., 527, 565 (Fall, 2017); GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS (Harper Collins India, 2019).

[30] Upendra Baxi, *Preliminary Notes on Transformative Constitutionalism*, *in* TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, SOUTH AFRICA AND SOUTH AFRICA 19 (Pretoria University Law Press, 2013).

[31] *Id.*

[32] Indira Jaising, *'For me, it now means personal liberty': Indira Jaising explains Transformative Constitutionalism*, SCROLL.IN (Jul. 30, 2019), https://scroll.in/article/931512/for-us-it-now-means-personal-liberty-indira-jaising-explains-transformative-constitutionalism.

as a predecessor of our Constitutional text. His doctrinal analysis of the Government of India Act, 1858, the Home Rule scheme, the Montford Reforms report, and the Government of India Act, 1919, is admirable. He successfully convinces readers about the colonial consciousness' disdain for the 'other' ways of being, i.e., for preserving the legitimacy of Christian OET and treating anything alien to it as irrational, anti-modern, and grounded in local fundamentalism. (Page 339)

CONCLUDING REMARKS

As a departing note, it would suffice to state that Sai Deepak is asking some real questions, and his work is an interesting addition to the nascent legal scholarship in the field of decolonisation. However, the first part of his trilogy lacks requisite rigour. He has consciously emaciated the concept to suit his narrative and does not make any grounded proposal for epistemic reconstitution to engage with issues plaguing contemporary India. He prefers the quest for aggrandising "*singular and pure indigenous tradition of Indic civilization*", a chimaera beautifully explained through an anecdote given by Indian philosopher, A Raghuramraju in his insightful book, Calibrating Western Philosophy for India.[33] The same is reproduced as below:

> "*Once a passer-by found Mulla Nasrudin searching for something under a light. Upon his return, he still found the Mulla continuing his search. When asked what he is searching for, Mulla replied that he is looking for the key that he had lost. The passer-by joined him in the search to help him, but in vain. He asked Mulla whether he knew where he lost the key. Mulla replied that he had lost it somewhere else. When asked, why then he is searching here, he replied because there is light here*".
>
> Let's hope J.Sai Deepak's next book moves the light to the place where the key is lost.[34]

[33] A. RAGHURAMRAJU, CALIBRATING WESTERN PHILOSOPHY FOR INDIA: ROUSSEAU, DERRIDA, DELEUZE, GUATTARI AND VADDERA CHANDIDAS (Routledge, 2019).

[34] J. SAI DEEPAK, INDIA, BHARAT AND PAKISTAN: THE CONSTITUTIONAL JOURNEY OF A SANDWICHED CIVILISATION (Bloomsbury 2022); The second book of the trilogy released on August 23, 2022.