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EDITORS' NOTE

As Editors-in-Chief, it gives us immense pleasure to present Issue 2 of Volume 5 of the Comparative Constitutional Law and Administrative Law Journal ("**CALQ**").

IN THE ISSUE

In ***A Natural Law Theory of Constitutional Legitimacy: The Basic Structure Doctrine and "Good Reasons for Action"***, *Anmol Kohli* argues that there has been insufficient analysis of the basic structure doctrine from the perspective of legal theory and constitutional legitimacy. The author delves into the domain of natural law theory and argues that the basic structure doctrine by ensuring unamendability of core values, secures minimum moral goodness and legal procedures. Both of these values make a stronger claim for legitimacy of the Constitution of India. The author strengthens this argument by stating that the basic structure ought to apply to ordinary laws alongside the review of fundamental rights and by envisioning the review of basic structure as a Dworkinian right. The author concludes that the basic structure should only establish a minimum criterion of goodness that all laws must pass along with procedures.

In ***Right to Privacy of Unmarried Couples vis-à-vis Immoral Traffic (Prevention) Act, 1956***, *Srijan Somal & Pratyush Khanna* provide a critical analysis of the Immoral Traffic (Prevention) Act and its provisions, in relation to its misuse for the purpose of moral policing. The authors criticise the primitive nature of the act, especially Section 6 of the act, and the people who use it to corner consenting, unmarried couples. These provisions of the act are weighed against the rights of 'privacy, sexual autonomy and bodily integrity' and are further reinforced by judgements of the High Court and the Supreme Court. There is also an examination of the legal framework from an international perspective. The authors conclude by suggesting that the provisions of the act have the potential to be misused and require amendments.

In ***Prior Restraint vis-à-vis Freedom of Press in India***, *Agneya Gopinath & Vikrant Dere* discuss the balance that has to be maintained between the right to freedom of press and reasonable restrictions on this right so that it is not misused. The authors argue that such restrictions, also known as

prior restraints, impair not only the credibility of the information being disseminated but also have a chilling effect on others who intend to publish information relevant to the public. The authors then discuss this right in the United States, post which parallels are drawn between the situation in the United States and India while contrasting the same as well. The authors conclude that this right ought to be unlimited as it is in the United States, with restraint only being exercised in the most extreme cases.

In ***Sons of Soil: A Constitutional or Covenant Federalism? An Analysis of the Haryana State Employment of Local Candidates Bill, 2020***, *Romit Nandan Sahai* examines the constitutionality of the Haryana State Employment of Local Candidates Bill, 2020. The author argues the constitutionality of the bill on two grounds: first, the constitutionality of domicile reservation; second, the implementation of that reservation to the private sector. The author concludes by criticising the bill's definition of domicile and lack of economic soundness. The author argues that the courts ought to take a more active role as a result of which such a bill ought to be struck down.

In ***Social Rights vis-à-vis Right to Food: A Comparative Study of Laws in India and South Africa***, *Khushal Gurjar & Kanishka Mishra* discuss the issues that may be present with respect to food security by providing for a comparative analysis of the right to food in India and South Africa. The authors state that the right to food, while enshrined in many international treaties and agreements, is not a justiciable, substantive right in many nations. The authors also provide guidelines they believe will improve the state of food security and its many aspects in these two nations in question. The authors further state that South Africa, even after having a clear constitutional mandate, made little effort to legislate upon the right and India, even after having a judicial recognition of the right to food as a fundamental right and having a separate law for that, fails to mention it in the Constitution explicitly. Thus, the authors conclude that both countries may learn from their mistakes while continuing to make progress.

In ***State of Punjab v. Davinder Singh: A Step Towards the Transfiguration of Sub-Classification of Scheduled Castes***, *Pratik Kumar* analyses Article 341 of the Constitution while also examining the historical viewpoint as a result of which scheduled castes have been viewed

as a separate social and cultural group. The author proceeds to analyse the case of *E.V. Chinnaiah v. State of A. P.*, where it was held that sub-classification of SCs by states is not permissible and would be unconstitutional. The author examines the case of *E.V. Chinnaiah* in contrast to the case of *State of Punjab v. Davinder Singh*, due to the latter overruling the former, while trying to discern whether a blanket ban on sub-classification of SCs as held in *Chinnaiah* is proper. The case comment concludes that the earlier approach as laid down in *Chinnaiah* was narrow and dogmatic, and commends the deviation brought forth by *Davinder Singh*.

In ***Review of Gautam Bhatia's The Transformative Constitution and Tripurdaman Singh's Sixteen Stormy Days***, *Aakash Singh Rathore* tries to understand what makes the Constitution and the modern principles of justice sacred by trying to contrast Tripurdaman Singh's *Sixteen Stormy Days: The Story of the First Amendment to the Constitution of India* and Gautam Bhatia's *The Transformative Constitution: A Radical Biography in Nine Acts*. The author first analyses *Sixteen Stormy Days* which traces the politico-socio-legal background of the incidents leading up to the first amendment of the nascent Constitution of India, within sixteen months after coming into existence. The author is highly critical of Singh's book and its depiction of Jawaharlal Nehru and its failure to capture the different motivations and interests of the several cabinet members who supported Nehru's amendment. However, praise is reserved for recounting the events unfolding in 1950 and early 1951 elegantly. The author contrasts this with Bhatia's *Transformative Constitution*, which recognizes the Indian Constitution as an embodiment of India's destiny to break free from the linear continuity of political order from the past, which has been illustrated through the course of nine significant judgments under the theme of equality, liberty and fraternity. The author notes that, unlike Singh, Bhatia does not believe that the Indian liberal democracy was dead on arrival. Instead, the constitutional essentials upon which our Republic was founded are ready to be reanimated.

Finally, the last contribution is a ***Review of Tyranny of Merit: What's Become of the Common Good by Michael J. Sandel***, by *Ravi Shankar Pandey*. The author breaks down the book and praises the questions poised and the solutions proposed by Sandel. However, there is recognition given

to the fact that *Tyranny of Merit* focuses more on making a sociological and philosophical claim than touching the domains of constitutional and administrative law. The author concludes by strongly recommending the book due to its vision of ensuring the common good that resonates with all the constitutional conceptions.

ACKNOWLEDGEMENT

The onset of the COVID-19 pandemic has caused us to face considerable challenges during which we have found ourselves looking for solid ground. In these moments, the support provided by the Hon'ble Vice Chancellor of our University, Prof. (Dr.) Poonam Pradhan Saxena kept us going. The guidance and support provided by our University's Registrar, Mrs. Neha Giri, was also unparalleled.

We take this opportunity to thank Prof. (Dr.) I.P. Massey, Director, Centre for Comparative Constitutional Law and Administrative Law, for having dwelled and deliberated on every aspect of this issue to further the vision of the journal. We owe our gratitude to the IT Department of our University, for the consistent efforts made by Mr. Gyan Bissa, which have ensured that the journal is equipped with the best of resources at all times. We also extend our gratitude to the Students Section of the University and Mr. Piyush Kumar Dave. Their valuable efforts have ensured the smooth functioning of our centre, the Centre for Comparative Constitutional Law and Administrative Law ("**Centre**").

We thank everybody in the editorial team for the immense effort they have put in to enable the timely publication of this issue. Ayush Mehta, Prakhar Raghuvanshi, Ojaswini Mandhan, Eeshan Krishnatria, Piyush Sharma, Raajash Kulmi, Rashi Jeph, Aditya Maheshwari, Falguni Sharma, Garima Chauhan, Karunakar, Kirti Harit, Maitreyi Singh, Akshay Tiwari, Ayush Mangal, Lipika Singla, Palak Jhalani, Rachana Rashmi Rammohan and Sharia Shoaib, have all been integral to this endeavour. We thank them for their consistent initiative, enthusiasm and dedication. We also thank the authors for their contributions and their cooperation during the editorial process.

With the publication of Volume 5, we are glad to have witnessed the triumphs and tribulations that CALQ has gone through and to see the

progress we have made this year. Despite the difficulties that we have faced as a Board during the times of the COVID-19 pandemic, not only have we seen immense growth from all our members, but we have also succeeded in re-invigorating the CALQ Blog and activities of our Centre. With the help of the CALQ Blog, we seek to provide a more comprehensive platform for the discussion of contemporary issues relating to constitutional and administrative law and invite contributions from all members of the legal fraternity. We are elated to have kick-started our Centre's activities, with the successful hosting of a virtual guest lecture with Justice P.S. Bhati that saw a participation of over 119 attendees, ranging from students to legal practitioners. Furthermore, we have seen significant and steady growth in our social media presence and outreach with the help of consistent efforts and contributions from our editorial team. We have no doubt that the editorial team will continue to keep up this trajectory of growth and eagerly look forward to seeing CALQ touch greater heights.

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

Aditya J. Nair & Sandhya Swaminathan
Editors-in-Chief

A NATURAL LAW THEORY OF CONSTITUTIONAL LEGITIMACY: THE BASIC STRUCTURE DOCTRINE AND "GOOD REASONS FOR ACTION"

ANMOL KOHLI[1]

The basic structure doctrine has been one of the most influential doctrines adopted by the Supreme Court of India. However, there has been insufficient analysis of the doctrine from the perspective of legal theory and constitutional legitimacy. This paper argues that the doctrine creates a claim for the legitimacy of the Constitution of India from the perspective of natural law theory. This is because the basic structure posits moral values and legal procedures that enable reflection on said values. The doctrine, to create constitutional legitimacy, should ensure that the "minimum goodness" of a constitution is maintained. This "minimum goodness" guarantees citizens that their most serious moral concerns would not be violated under the Constitution.

It is argued that the basic structure doctrine is essential to protect constitutional identity in the face of "temporary unreason": majoritarian neglect of the reflection that makes democratic coexistence possible. Without some form of unamendability, there is no permanent claim towards constitutional legitimacy. Therefore, the core values of all legal systems, at a sufficient level of abstraction, should be unamendable. This level of abstraction should be one that does not prevent progressive thinking about basic values over dynamic social contexts, which is the cause of transformative constitutionalism.

To further strengthen the claim of constitutional legitimacy built on the basic structure doctrine and natural law theory, two suggestions are considered. Firstly, the doctrine should apply to ordinary legislation. This ensures that ordinary laws violating basic values are not protected due to being outside the "core of settled meaning" of constitutional provisions like fundamental rights. Secondly, the author considers whether basic structure review can be conceptualised as a Dworkinian moral right with the citizen.

INTRODUCTION

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[1] Anmol Kohli is a third year student pursuing B.A. LL.B. (Hons.) at National Law School of India University, Bangalore. The author may be reached at <anmolkohli@nls.ac.in>.

** The author would like to thank Prof. Kunal Ambasta, Prannv Dhawan, Heramb Mishra, and the Editorial Board for their helpful comments on earlier drafts of this article.

A NATURAL LAW THEORY OF CONSTITUTIONAL LEGITIMACY: THE BASIC STRUCTURE DOCTRINE AND "GOOD REASONS FOR ACTION"

The basic structure doctrine has arguably been the most important constitutional development since the adoption of the Constitution of India in 1950. The doctrine postulates that certain basic features of the Constitution must prevail over constitutional amendments; thereby rendering some features of the Constitution unamendable. This doctrine was established in the period when the Constitution was being changed so extensively that it could no longer be recognised as the same Constitution adopted in 1950. This kind of change in the constitutional identity carries with it an inevitable risk of constitutional illegitimacy. Conceptualising the basic structure doctrine as a tool for maintaining constitutional legitimacy therefore becomes important.

This paper argues that the basic structure of the Constitution of India creates a claim for constitutional legitimacy as it provides preconditions of minimum moral goodness for choosing among "*good reasons for action*"[2] in a democracy, and accords legitimacy to the choice. The indeterminacy of the basic structure and the ambiguity of what is morally good, however, challenge this claim to legitimacy.

First, this paper asks what makes a constitution legitimate. It concludes that legitimacy is derived from both constitutional values and resultant procedure. *Second*, it argues that "*temporary unreason*" can corrupt, and therefore weaken the legitimacy of constitutional order in the absence of some unamendable basic features. Rigid amendment procedures can be fallible in the face of this majoritarian unreason. *Third*, it answers potential counterarguments by highlighting how the transformative and aspirational character of the Indian Constitution rests on its basic structure. *Fourth*, it draws implications from the above discussion, for how the basic structure doctrine should operate to strengthen its claim to constitutional legitimacy.

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[2] John Finnis, *Natural Law: The Classical Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 2 (Jules L. Coleman et al. eds., Oxford University Press 2004). This paper largely follows Finnis' conception of natural law theory, though it does not restrict itself to the same. It also borrows from theorists like Lon Fuller and Ronald Dworkin for its understanding of natural law theory, how it may contribute to the basic structure doctrine and ultimately, constitutional legitimacy.

It concludes that a natural law theory of constitutional legitimacy, grounded in its belief in the existence of objectively good values,[3] would support the basic structure doctrine. Reasserting this doctrine becomes necessary to maintain legitimacy in a period of worrying constitutional reform and a weak judiciary.[4]

WHAT MAKES A CONSTITUTION LEGITIMATE?

Legitimacy refers to the authority of a sovereign to rule over citizens and create obligations among them.[5] All laws trace their legal legitimacy to their constitutionality.[6] Whereas, constitutional legitimacy cannot rest on the mere existence of the constitution irrespective of its content or context.[7] There is something deeper *about* constitutions that creates legitimacy.

Constitutions tend to rely on popular sovereignty for their legitimacy claims.[8] However, contemporary scholarship rejects popular sovereignty in unanimous consent as impossible on both technical and social grounds. Technical grounds include the fact that "*we, the people*" can only be bound by real and unanimous consent, which is impossible as the entire population cannot be bound to a meaningful constitution in its entirety.[9] By social grounds, the issue that "*the people*" cannot speak together as a corporate body, due to the pluralism inherent in our societies.[10] Reliance

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[3] *Id.* at 3. Finnis seems to argue that these values need not necessarily be objective. Instead, they may include what people consider reasonable on prolonged reflection, as opposed to what appears instinctively reasonable. Drawing the line between instinct and reflection, and consequently subjectivity and objectivity, is difficult, if not impossible. It is a line, however, that the natural law theory has always claimed to draw.

[4] *See* Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETHICS HUM. RTS. 49 (2020).

[5] Aishwarya Bagchi, *Exploring Constitutional Legitimacy*, 2 PUB. INT. L. J. N. Z. 166, 168 (2015).

[6] A.W. BRADLEY ET AL., CONST. & ADMIN. L. 3 (16th ed. Pearson 2015) defines constitutional law as "*the law about law*".

[7] NIGEL SIMMONDS, LAW AS A MORAL IDEA 4 (Oxford University Press 2008).

[8] Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 115 (2003).

[9] *Id.* at 113.

[10] Simone Chambers, *Democracy, Popular Sovereignty, and Constitutional Legitimacy*, 11(2) CONSTELLATIONS 153 (2004).

on other forms of consent is also considered unsatisfactory.[11] The Indian Constitution, in any case, cannot make a satisfactory consent-based claim for legitimacy.[12]

Randy Barnett, rejecting all consent-based claims for legitimacy, argues that legitimacy rests on a constitution providing "*procedural assurances of justice*".[13] He distinguishes this from a natural law theory perspective, where constitutional legitimacy, according to him, would rest on the *content* of the law passed through just procedures.[14]

Barnett, therefore, equates constitutional legitimacy in natural law theory with its general legal obligation.[15] This paper, instead, argues that Barnett's "*procedural assurances of justice*" presuppose values. These values, and the procedures that place them in action in both the legal system and consequently in society, create constitutional legitimacy. They form the basic structure.

If citizens do not obey laws passed through these normatively charged procedures, it is due to their competing moral obligations which favour different reasons for action.[16] This is irrelevant to constitutional legitimacy, which concerns only the values of the *preconditions* for choosing these reasons. Simply put, constitutional legitimacy, even within natural law theory, concerns *how* we make laws, and not *what* laws we make.[17] The

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[11] Randy E. Barnett, *Constitutional Legitimacy Without Consent: Do the laws of a Nation State ever Bind in Conscience?*, 90 (2) ARCH. RECHTS SOZIALPHILOS. 197 (2004). The author argues that consent-requirements presuppose a State which asks for consent, and therefore all consent-based claims are paradoxical and unsatisfactory.

[12] *But see* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 8-9 (Oxford University Press 1966) for the argument that the Constituent Assembly, despite its limited franchise, was a microcosm of the nation.

[13] Barnett, *supra* note 8, at 113.

[14] *Id.* at 113-114.

[15] According to Finnis, *supra* note 2, at 22, the general legal obligation in natural law theory would be that only a just law can bind in conscience, and therefore create obligations. For laws possessing no moral content, their being posited creates obligations.

[16] *Id.* at 33.

[17] Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 539 (1995).

difference between constitutional legitimacy and legal obligation in natural law theory is the difference between morally good procedures and outcomes, or the difference between procedural assurances of justice, and actual justice.

However, these two are necessarily interconnected. Good procedures are constitutionalised with the purpose of creating good law. Such good procedure must establish some "*minimum goodness*" that all laws possess.[18] This minimum goodness is established through the basic structure, which establishes the goodness of procedure in the first place. Minimum goodness exists even in laws possessing no intrinsic moral content. They possess the moral content of being posited law (i.e., being constitutionally enacted).[19] If constitutional procedures were not morally good, this moral content would not exist.[20] Hence, the minimum goodness which creates legitimacy is that which makes the law-making procedure reasonable. This minimum goodness should not be confused with the internal morality of law, as famously argued by Lon Fuller.[21] The difference between minimum goodness and Fuller's internal morality is that the former enforces substantive moral values. The very purpose of law under the Indian Constitution is to create the society envisaged under the Preamble.[22] Fuller's internal morality, instead, is the morality of efficiency and consistency that a good legal system requires.[23] This would not be

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[18] Richard Fallon, *Legitimacy and the Constitution*, 118(6) HARV. L. REV. 1787 (2005) argues that constitutions are only "*minimally morally legitimate*", as their indeterminacy and amendability cannot make them morally perfect. The basic structure does, however, restrict indeterminacy by establishing a floor of minimum goodness.

[19] Finnis, *supra* note 2, at 33 refers to this moral obligation arising out of posited law as "*legal-moral obligation*".

[20] Brian H. Bix, *Natural Law The Modern Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 81-82 (Jules L. Coleman et al. eds., Oxford University Press 2004) provides three replies to H.L.A. Hart's critique of Lon Fuller's idea of the "*internal morality*" of law. These attempt to prove that procedures following Fuller's eight principles can promote some moral values. This paper, instead, allows for procedures to be normatively charged beyond values promoting mere efficacy. Due to the basic structure doctrine, the inner morality of Indian constitutional law has been increased manifold into incorporating substantive moral values.

[21] LON L. FULLER, THE MORALITY OF LAW 33 (Yale University Press 1969).

[22] Satya Prateek, *Today's Promise, Tomorrow's Constitution: Basic Structure, Constitutional Transformations, and the Future of Political Progress in India*, 1(3) NUJS L. REV. 417, 463 (2008).

[23] FULLER, *supra* note 21, at 39.

sufficient, by itself, to create constitutional legitimacy.

In the Indian context, the Preamble and the values behind the fundamental rights are themselves the criterion of minimum goodness which creates constitutional legitimacy.[24] Beyond procedural assurances of justice, it offers assurances of other social goals as well. A legislation weakens constitutional legitimacy when it violates this minimum goodness. It may violate basic procedural norms like legislative deliberation when passed through ordinances[25] or questionable voting mechanisms.[26] Even if it passes basic procedural norms, it may violate basic values. These legislations should not be viewed as aberrations. Instead, they are symptoms of a bigger malady—disregard for the constitution. Positing basic values promotes constitutional legitimacy by enforcing minimum regard for the constitution that all lawmakers must have.

However, simply positing these values on paper is surely not enough. Our law-making and adjudicating procedures must reflect these values in action. A strong claim to constitutional legitimacy can be made only when this is secured. Basic structure review is a step towards ensuring such a strong claim, yet it cannot satisfy such a claim in its current form.

Therefore, a constitution is made legitimate by values which, by animating its law-making and adjudicating procedures, promote reason. These values guarantee that laws will not violate certain "*basic human goods*" desired by all reasonable individuals.[27] A basic structure should, hence, guarantee two things. *Firstly*, only those legislations governing society that satisfy some minimum goodness pass legislative deliberation. *Secondly*, that the deliberation is itself reasonably conducted.

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[24] Prateek, *supra* note 22, at 464.

[25] *See* Shubhankar Dam, *Constitutionally Lawless: Ordinance Raj in India*, CENTRE FOR THE ADVANCED STUDY OF INDIA (Mar. 10, 2014), https://casi.sas.upenn.edu/iit/shubhankardam.

[26] *See* S.N. Sahu, *The Way Farm Bills Passed in Rajya Sabha Shows Decline in Culture of Legislative Scrutiny*, THE WIRE (Sept. 21, 2020), https://thewire.in/politics/farm-bills-rajya-sabha-legislative-scrutiny.

[27] Finnis, *supra* note 2, at 28.

PROTECTING AGAINST "TEMPORARY UNREASON"

The basic structure of the Indian Constitution, therefore, consists of values as well as some basic procedures.[28] The interconnectedness of values and procedures can be explained through the example of secularism.[29] Secularism is a basic value that our constitution promotes. However, if secularism was not a part of our basic structure, it would affect our law-making procedure itself. Speakers may systemically favour legislators from dominant religious communities. This would, in turn, impact our model of parliamentary democracy by effectively doing away with the representation of minority communities. Our legislative deliberation would become unreasonable as it would become undemocratic and exclusionary.[30] In essence, taking away a basic value from our constitution directly impacts law-making procedure and consequently leads to widespread injustice that can contribute to constitutional illegitimacy.

Such a state of affairs would not be sustainable in the long term. If minorities are not represented in the legislature, they would rightly adopt other means for being heard. They may protest and ultimately cause a breakdown of the unjust constitutional order. The new order should then, given historical experience, be built on secularism.

Jeremy Waldron, similarly, argues that constitutional rights *create* democracy.[31] They must, therefore, come before democracy. Waldron gives an example of how the right to free speech makes the democratic (or constitutional amendment) process legitimate.[32] It follows that the values and resultant rights which create democracy should be kept out of bounds

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[28] Procedures included under the basic structure broadly include the separation of powers, limited government, judicial review, among others. These are considered basic procedures under the constitution as they regulate legislative deliberation and other aspects of governance and do not involve any value judgments by themselves.
[29] S.R. Bommai v. Union of India, AIR 1994 SC 1918 (holding that secularism is a part of the basic structure of the Indian Constitution).
[30] *See Politics of Minority Accommodation in Postcolonial India*, *in* PETER RONALD DSOUZA ET AL., DEMOCRATIC ACCOMMODATIONS: MINORITIES IN CONTEMPORARY INDIA (Bloomsbury 2019), which traces the downfall in the treatment of Indian minorities from the Constituent Assembly to the contemporary Parliament.
[31] JEREMY WALDRON, LAW AND DISAGREEMENT 282 (Oxford University Press 1999).
[32] *Id.* at 285.

for democracy.

To keep these basic values in reach of democracy is to expose them to "*temporary unreason*".[33] This is a situation where law-making procedures, themselves amended to go against basic values, fail to bring out the reason in lawmakers. In the earlier example, the unreason of not following secularism is *temporary*. A change in constitutional orders after revolution brings reason.[34] While temporary, the unreason causes disastrous costs. We can avoid these costs by being reasonable while drafting constitutions.[35]

Rigid amendment procedures can serve as limits against unreason. No procedure, however, can be rigid enough to risk basic values over it. Kenneth Wheare argues that no matter how rigid an amendment procedure is, if enough people want an amendment, it will occur.[36] Furthermore, the fundamental reason for all constitutional amendments is "*to reflect the present reality, values, aspirations, and identities*" of people.[37] The basic structure doctrine is, instead, an attempt to regulate reality through unamendable basic values. Natural law theory consists of believing in the goodness achieved through these basic values as essential to optimal lived experiences. The question of their amendment should, therefore, never arise.

Admittedly, binding future generations to the reason of the constitutional framers might appear unfair. The substance of their binding, however, consists of basic values. If they reject these values, they lose legitimacy

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[33] Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 196 (Jon Elster & Rune Slagstad eds., Cambridge University Press 1988).

[34] Natural law theory believes that all humans are capable of reason. All unreason must, therefore, be temporary, existing until humans realise their potential. Learning from historical mistakes should promote this realisation.

[35] Therefore, the reasoning of the framers need not be objective, or even detached from reality. The limited reason required to establish the minimum goodness of a basic structure is foresight on ensuring stability and coexistence in the society governed by the Constitution.

[36] KENNETH WHEARE, MODERN CONSTITUTIONS 17 (Oxford University Press 1951).

[37] RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 36 (Oxford University Press 2019).

from the perspective of the natural law theory. More importantly, given the abstract and fundamental nature of the values mandated by the doctrine, their rejection invites a constitutional crisis. Stephen Holmes argues that this "*pre-commitment*" of democracy to constitutional values is only illegitimate if it "*stifles one's sense of learning*".[38] Therefore, a basic structure creates constitutional illegitimacy if it impedes the development of a higher reason. If our pre-commitment to equality as a value does not let us envisage affirmative action as a *restatement* of equality itself given the social context of existing inequalities, such a pre-commitment would be illegitimate.

For example, in *Lal Zenda Coal Mines v. Western Coalfields Limited*,[39] Justice Chaudhari enforced the basic value of fraternity against mine workers who did not wish to give a portion of their wages to a disaster relief fund. Here, the court interpreted "*fraternity*" in a manner that necessitated deprivation of one's wages.[40] Its incorrect interpretation did not let us envisage the economic independence of marginalised labourers as a *restatement* of fraternity itself. It should have envisaged such an interpretation given a social context of economic inequality. Instead, its enforcement of a fraternity that is completely isolated from social circumstances only furthered a lack of fraternity.

How can basic structures combat this, while maintaining constitutional legitimacy? They should consist of values to the highest possible level of abstraction, while retaining their substance.[41] This requires the promotion of critical morality and rejection of conventional morality.[42] Every generation can *reasonably* interpret these values, provided that their interpretation is not contrary to the value itself (*unreasoned*). It would, in reality, be exceedingly difficult to draw the line between reasonable (restating the basic value in the given social context) and unreasonable (contrary to basic value in any social context) interpretations. Are special

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38 Holmes, *supra* note 33, at 195.

39 Lal Zenda Coal Mines Mazdoor Union (CITU) v. Western Coalfields Limited, AIR 1950 Bom R 168.

40 *Id.* ¶ 15.

41 SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 133 (Oxford University Press 2009) defines the basic features of the Constitution as "*constitutional values identified at a level of abstraction*".

42 H.L.A. HART, LAW, LIBERTY AND MORALITY 20 (Stanford University Press 1963).

rights granted to religious and linguistic minorities not contradictory to the value of formal equality, and therefore in violation of the basic structure?

The line between reasonable and unreasonable interpretations of the basic values is drawn by the common law method of the Supreme Court.[43] The doctrine of precedent which turns on bench strength and the presence of polyvocal courts can promote the reason necessary for basic structure adjudication.[44]

The basic structure doctrine requires judges to have both, a grasp of social conventions and the ability to step back from said conventions, or to *reflect* on them.[45] Lon Fuller argued that a common-law method could never lead to "*the perfect realization of iniquity*".[46] This is because of the "*internal morality of law*": the fact that "*law*" carries intrinsic moral weight, which lawmakers and adjudicators uphold through justifying their actions. Applying this idea to basic structure adjudication, we may say that due to the doctrine of precedent, judges cannot entirely disregard the basic values they are bound to apply due to earlier judgments. Judges are bound to reflect on earlier decisions and take an informed opinion.

The temporary unreason of democratic fervour is, therefore, reined in by the reflection inherent in the judicial process. Institutional characteristics of the Supreme Court like the doctrine of precedent and polyvocality may further this process of reflection. However, surely this is too optimistic a

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[43] KRISHNASWAMY, *supra* note 41, at 150.
[44] Polyvocal courts, however, may also be problematic. This is because they can provide differing interpretations of the same value, and therefore create confusion in basic structure adjudication. The doctrine of precedent acts as a counterbalance to the problems of polyvocality by ensuring that an interpretation favoured by a greater bench-strength prevails. *See* Gautam Bhatia, *Potential for Chaos in India's Polyvocal Supreme Court*, IACL-AIDC BLOG (May 21, 2018), https://blog-iacl-aidc.org/crisis-at-the-supreme-court-of-india/2018/5/20/potential-for-chaos-in-indias-polyvocal-supreme-court.
[45] SIMMONDS, *supra* note 7, at 7 captures this dual nature of adjudication when he compares the empirical "l*aw*" with the ideal "*justice*". While the latter usually demands "*stepping back*" from existing social conventions, the former is perceived to require no such reflection.
[46] Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71(4) HARV. L. REV. 630, 636 (1958).

perspective. Constitutional crisis and judicial deference to the executive are realities and cannot be obscured by theorisation. In a later section, this paper will consider how the basic structure doctrine can be modified to protect constitutional morality in India.

BASIC STRUCTURE DOCTRINE AND TRANSFORMATIVE CONSTITUTIONALISM

Constitutional legitimacy cannot be answered by a simple *yes or no* question. Legitimacy is, instead, something that is *strengthened* or *weakened* in degree. When popular democratic forces work for its weakening, the situation is considered a constitutional crisis. This section considers how the basic structure doctrine can theoretically make a strong argument for constitutional legitimacy. As this argument would be within the framework of natural law theory, its strength would rest on the moral goodness of the values that the basic structure doctrine protects and the extent of implementation of these values in the legal system.

A. BASIC STRUCTURE, FUNDAMENTAL RIGHTS AND UNAMENDABILITY

Some of the values that form our basic structure are applied in the fundamental rights and the Preamble. Both of these, however, can be amended. Nonetheless, they serve the function of protecting current interpretations of basic values.

Firstly, take the example of fundamental rights. Legislative supermajorities can amend them.[47] Sudhir Krishnaswamy argues that basic structure review requires a higher threshold of proof than fundamental rights review.[48] Fundamental rights are violated on any "*soft incompatibility*" with their text whereas basic structure violation requires a "*hard unconstitutionality*".[49] The judiciary, therefore, enforces these current interpretations of basic values against any (even minor) unreason in ordinary laws, while enforcing basic values when the interpretation itself becomes (majorly) unreasoned. Assuming fundamental rights and other constitutional provisions to be current interpretations of basic values, fundamental rights review is a

[47] INDIA CONST. art. 368, cl. 2.
[48] KRISHNASWAMY, *supra* note 41, at 72.
[49] *Id.* at 110-11, 120.

stricter review that invalidates any ordinary law deviating in *any* manner from fundamental rights. Basic structure review, instead, is less strict as it only comes into effect when constitutional amendments violate basic values in their entirety.

"*Hard unconstitutionality*" violates the minimum goodness of laws that the basic structure establishes. Fundamental rights establish some good beyond this minimum. This excess good is established by bringing basic values into reality and exposing them to social context by interpreting them. Articles 14 and 15 could satisfy the basic value of equality and create the minimum moral goodness required for constitutional legitimacy. However, it was felt necessary to expand beyond positing the value of equality and take further measures to ensure it, given social context. For example, it was recognised that in Indian society, inequality is often perpetuated by private citizens in a dominant social position. Article 17 is, therefore, available against citizens. Such interpretation and application of normative basic values, given social context, is what is meant by transformative constitutionalism and the progressive realisation of justice.[50]

Secondly, consider the Preamble. Its ideals constitute the basic structure.[51] It has only been amended once, to include "*socialist*" among other terms.[52] The constitutional framers, however, did not wish to impose any economic system through the Preamble.[53] Therefore, they realised that the Preamble must be abstract, minimal, and subject to interpretation. Ambedkar further recognised how the values in the Preamble rest on each other.[54] If any one of equality, liberty, or fraternity were taken away, the whole system would

[50] AMARTYA SEN, THE IDEA OF JUSTICE 7 (Harvard University Press 2009).
[51] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (Justice Reddy held that the basic features of our Constitution are laid out in the Preamble).
[52] The Constitution (Forty-Second Amendment) Act, 1976.
[53] 9 CONSTITUENT ASSEMB. DEB. (Sept. 18, 1949), http://loksabhaph.nic.in/writereaddata/cadebatefiles/C18091949.html (where the amendment for India to be a "*Union of Indian Socialistic Republics*" was rejected).
[54] 11 CONSTITUENT ASSEMB. DEB. (Nov. 25, 1949), http://loksabhaph.nic.in/writereaddata/cadebatefiles/C25111949.html.

become unjust.[55] Therefore, the constitutional framers considered the Preamble to perform the duty of a basic structure to the Constitution. This interpretation has been upheld by the Supreme Court as far back as *Sajjan Singh*, where the basic features specified in the Preamble were considered as having been granted *permanency* by the Constituent Assembly.[56] The Apex Court effectively told the legislature:

> "*You may have a constitution without these basic features. Yet it would not be the Constitution of India adopted in 1950, which grants powers to both you and us.*"[57]

In *Kesavananda*, the Supreme Court took this to its logical conclusion by holding that because the legislature is granted powers *under* the constitution, it cannot create what would effectively be a *new* constitution.[58] Hence, it must be bound by the basic features that give the constitution its identity. These features would be those given by the framers, as interpreted by the court.

Therefore, some form of permanency in core constitutional values must follow if a constitution is to retain its core identity over time. A constitution that does not grant this risks instability, crisis, and illegitimacy.

B. UNAMENDABILITY IN CONSTITUTIONAL LITERATURE AND LEGAL THEORY

This sub-section engages with constitutional literature and legal theory to contribute to the argument that an unamendable basic structure, grounded in the logic of natural law theory, creates constitutional legitimacy. Constitutional literature begins with the framing of the constitution by the Constituent Assembly. To assume that the framers embodied perfect

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[55] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS (HarperCollins 2019) argues that this distils the "*heart and soul*" of the Constitution.
[56] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845, ¶ 61.
[57] *Id.* ¶¶ 63, 67.
[58] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 556.

reason is unrealistic.[59] Yet they avoided biases in the basic features of the Constitution. They placed basic values in the Preamble, applied them in fundamental rights, and kept future goals as directive principles.

The Indian Constitution is an aspirational project.[60] The Constituent Assembly debated different ideas of what India *should be* and sought to create new realities.[61] It worked on the assumption of a break from the past, allowing the framers to inhabit a "*constitutional moment*". These moments, especially in the drafting of transformative constitutions, are an exercise in natural law reasoning.[62]

Deliberate transformations are built on asking if things could be better. They are, therefore, attempts at fulfilling human potential.[63] To not transform, or *evolve*, would be unreasonable.[64] The entire constitutionalisation process can, indeed, be viewed as intelligence binding the sub-rational passion of power.[65] Regressions occur when people are motivated by "*sub-rational passions*", as opposed to intelligence.[66] A good basic structure ensures that we only move forward, by settling basic values and subjecting

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[59] Vatsal Naresh, *Pride and Prejudice in Austin's Cornerstone*, *in* THE INDIAN CONSTITUENT ASSEMBLY (Udit Bhatia ed., Routledge 2018) argues that passions created by Partition and ethnic violence influenced the framers.

[60] MADHAV KHOSLA, INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY 3-4 (Harvard University Press 2020) (argues that the constitutional framers aimed to create "*democratic citizens through democratic politics*" and transform subjects into citizens).

[61] RAMACHANDRA GUHA, INDIA AFTER GANDHI 103 (HarperCollins 2007) highlights the starkly different "*ideas of India*" entertained by the Constituent Assembly.

[62] ULRICH PREUß, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 31 (Humanities Press 1995) (argues that constitutions are "*a call to alter reality to correspond to ethical principles*").

[63] Finnis, *supra* note 2, at 1.

[64] This would be true even from a teleological perspective.

[65] Holmes, *supra* note 33, at 196, 227-228 (illustrates this through the story of Ulysses and the Sirens. Ulysses ties himself to the mast of his ship to stay away from the enchanting, yet fatal, Sirens. He instructs his companions to not untie him, even if he asks them to do so. While the Sirens represent the sub-rational passions of democratic fervour, Ulysses chooses the self-controlled reason of constitutionalism, or more accurately, the basic structure doctrine).

[66] Finnis, *supra* note 2, at 3 discusses this distinction in the context of the works of Plato.

them to interpretation through dynamic social contexts.

Rohit De argues for understanding our constitutional practice as an "*arena for struggle*" instead of an elite "*teleological project*".[67] However, an unregulated arena would reproduce in law the injustice of social conventions contrary to the framers' project i.e. to establish *through* law new social conventions.[68] The eliteness of the teleology does not change the goodness of the basic values they chose, and the impact those values aimed to have on reality.

Legal positivists may argue that the basic structure also comes from some social conventions, which are now posited as law.[69] However, this cannot answer the question of constitutional legitimacy. It cannot answer *why* certain conventions were chosen, and consequently, why we should be obligated by a system built on such conventions. Legal positivists have emphasised that for legal obligations to be created, the "*ultimate rule of recognition*" of a constitution must be assumed valid.[70] This assumption presupposes the basic structure doctrine to be legitimate, as the doctrine is the ultimate rule of recognition of our constitution. However, this does not answer *why* a citizen should follow a legal system based on the doctrine. Assuming the validity of the basic structure doctrine, therefore, cannot provide an answer to constitutional legitimacy. It is only the natural law theory that recognises the basic structure doctrine as a morally good reason for the legitimacy of the Indian Constitution.

The conventionality thesis directly conflicts with the logic of the basic structure doctrine. The thesis recognises that as social conventions change, laws change following them. Instead, the basic structure doctrine is a *permanent* endeavour of subjecting all subsequent social conventions to pre-existing moral values. Admittedly, the doctrine is indeterminate. Courts have the freedom to reconsider what constitutes the basic structure. In doing so, however, they must undertake a moral reading of the

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[67] ROHIT DE, A PEOPLE'S CONSTITUTION: THE EVERYDAY LIFE OF LAW IN THE INDIAN REPUBLIC 21 (Princeton University Press 2018).
[68] AUSTIN, *supra* note 12, at 64-65 (highlights this "*social revolution*" through the horizontal application of fundamental rights).
[69] *See* H.L.A. HART, THE CONCEPT OF LAW 58-59 (2d ed. Oxford University Press 1994).
[70] JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 8 (Oxford University Press 2012).

Constitution.[71]

Classical natural law theorists have focussed on what is essential to humanity and characterised the same as "*basic human goods*". These are discoverable through reflection, yet always pre-existing even if there is no such reflection.[72] Similarly, the basic structure doctrine empowers judges to decide what is essential to the Constitution and characterise the same as "*basic features*". In doing so, they must also consider the values behind both the Preamble and the fundamental rights for the purposes of interpretation. These basic values would exist even if judges did not discover them in their moral readings of, or reflections on, the Constitution. Due to the common law method, later judges have the possibility of discovering basic values that precedent did not find. Unlike other legal doctrines, it allows judges—those in a position to reflect on social conventions which are brought to them for adjudication—to interpret the core values of their adjudicating tool (the Constitution) and enforce their reflections on reality.

C. PUBLIC MORALITY, CONSTITUTIONAL MORALITY, AND LEGITIMACY

Richard Fallon divides constitutional legitimacy into legal, sociological, and moral legitimacy.[73] He concludes, following HLA Hart, that legal legitimacy rests more on variable sociological legitimacy and less on the procedure of constitutional framing or ratification.[74]

The distinction between moral legitimacy and sociological legitimacy can be considered analogous to that between constitutional morality and public morality. Outside of specific situations where public morality acts as a posited exception to a right, it is irrelevant to the bindingness of any

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[71] *See* Abhishek Sudhir, *Discovering Dworkin in the Supreme Court of India – A Comparative Excursus*, 7(1) NUJS L. REV. 13, 33-34 (2014) (for the argument that Dworkin's theory of a "*moral reading of the Constitution*" best explains basic structure review).

[72] Finnis, *supra* note 2 (argues that "*natural*"criteria are normative prior to any human choices. Therefore, such standards possess moral goodness prior to human reflection which arrives at such standards).

[73] Fallon, *supra* note 18, at 1790-1791.

[74] *Id.* at 1848.

constitutional right. These specific situations include Article 19, where decency and morality act as reasonable restrictions under Articles 19(2) and 19(4). The Delhi High Court in *Naz Foundation*[75] elucidated the distinction between public morality and constitutional morality. It held that public or *popular* morality, based on "*shifting…notions of right and wrong*", could never be a ground for restricting fundamental rights.[76] Constitutional morality, which is the morality of the core values upheld by the constitution, must outweigh all public morality, even when the latter is the majoritarian view.[77]

Public morality may, however, reflect itself in public electoral choice. This electoral choice, in turn, reflects itself in constitutional amendments. Therefore, the distinction between constitutional morality and public morality outlined above necessitates some unamendability. Otherwise, the constitution can be amended beyond recognition, eventually equating public morality with constitutional morality. If we keep certain rights, or the core values behind them, beyond the purview of public morality, we must also keep these core values beyond constitutional amendment. These core values, instead, constitute the basic structure. While rights may be amended, the values behind them must remain unchanged and cannot be rendered otiose.

This public morality may, instead, be that of their representatives. Wojciech Sadurski argues that judicial review may not go against democratic legitimacy.[78] This is because courts may be able to reflect public opinion without the influence of interest groups and other considerations that impact representatives' decisions. This idea can be traced back to Alexander Hamilton, who argued that the constitution as interpreted by courts is the will of the people. In contrast, ordinary laws are that of their representatives.[79]

Even though our first-past-the-post electoral system ensures that the true diversity of public morality is never accurately captured in Parliament, we

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[75] Naz Foundation v. Govt. of NCT of Delhi, (2009) 160 DLT 277.
[76] *Id.* ¶ 79.
[77] *Id.* ¶ 86.
[78] Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22(2) OXFORD J. LEGAL STUD. 275, 281 (2002).
[79] Alexander Hamilton, *Federalist No. 78*, *in* THE FEDERALIST PAPERS 379, 381 (Lawrence Goldman ed., Oxford University Press 2008).

cannot ignore the role representatives play in shaping common political discourse. Representatives play the role of limiting possible answers to popular questions and presenting these pre-decided answers as the subject of the debate itself. Anti-constitutional political actors can manufacture sociological illegitimacy, and any legal system that does not envisage such manufacturing invites constitutional crisis. Legal legitimacy, if derived from general obedience, rests on uncertain grounds of constitutional autochthony and a lack of formal ratification.[80] In periods of a constitutional crisis, the legal positivist tradition, with its reliance on sociological legitimacy, cannot provide an answer that protects the existing constitutional order. The only *permanent* legitimacy that the Constitution possesses is moral, dependent on the basic structure. Therefore, constitutional legitimacy ultimately rests on the goodness of the basic structure. Natural law theory, recognising the morally good aims of law-making as a valid criterion for a claim to constitutional legitimacy, would uphold the legitimacy of the Indian Constitution due to its basic structure.

IMPLICATIONS

A. THE BASIC STRUCTURE DOCTRINE AND ORDINARY LAW

Today, constitutional legitimacy is weakened not through amendments, but through ordinary legislation which are seldom subjected to judicial review on merits. Significant scholarship has been devoted to whether controversial legislations like the Citizenship Amendment Act, 2019[81] are constitutional. Applying basic structure review to these legislations would enable courts to answer this question using core constitutional values.

In this section, this paper argues that the basic structure doctrine must apply as a strong review to ordinary legislation and executive orders. A potential benefit of such application can be the protection of issues of

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[80] Shivprasad Swaminathan, *India's benign constitutional revolution*, THE HINDU (Jan. 26, 2013), https://www.thehindu.com/opinion/lead/India%E2%80%99s-benign-constitutional-revolution/article12318419.ece.

[81] The Citizenship (Amendment) Act, 2019, The Gazette of India, pt. II § 1 (Dec. 12, 2019).

constitutional importance not protected by fundamental rights due to "*constitutional problems of the penumbra*".

HLA Hart's theory of the "*problems of the penumbra*'[82] – that all rules are subject to the open texture of language and the indeterminacy of human aims – has been subject to many critiques. Lon Fuller's important critique of the same is that a rule is penumbral not because of the problems of interpreting language, but because its application to a case is contrary to the *purpose* of the rule. This is so despite any linguistic interpretation that we may adopt.

However, purposive interpretation may not sufficiently explain rights that have been expanded by judicial interpretation. The socio-economic rights interpreted under Article 21 may not have been within its purpose.[83] Instead, this is one example where Hart's second criterion for a problem to be penumbral is more suitable. Life cannot be exhaustively defined by any framer and must always be subject to new human aims. As social conventions change, new human actions in life have been brought to the court for adjudication. Courts have recognised new human actions as applying within the right to life when they are sufficiently grave enough to be essential to human persons.[84]

Hart's solution to penumbral issues is to grant judicial discretion to apply any extra-legal considerations, including social policies and the judge's morality.[85] This solution cannot be feasibly accepted for constitutional problems of the penumbra. Substituting constitutional law with a judge's opinion on extra-legal issues violates its fundamental nature. Furthermore, it provides no answer to the problem of "*immoral moralities*" that Hart himself recognises in his critique of non-formalism elsewhere.[86] The

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[82] HART, *supra* note 69, at 126.

[83] 7 CONSTITUENT ASSEMB. DEB. (Dec. 6, 1948), http://loksabhaph.nic.in/writereaddata/cadebatefiles/C03121948.pdf (demonstrates that Article 21 was only understood as a limit against extra-legal deprivation of life or liberty. The framers did not envisage the socioeconomic rights subsequently interpreted under Article 21).

[84] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (These actions need not be "*new*", only their increased prevalence or acceptance in social conventions is suggested).

[85] HART, *supra* note 69, at 130.

[86] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71(4) HARV. L. REV. 593, 613 (1958).

judge's considerations, therefore, need to be restricted *through* a posited higher law. These considerations ensure that the judge's morality is not immoral enough to violate the minimum goodness of constitutional legitimacy. It is argued that the basic structure review, on applying to ordinary legislation, can fulfil this role.

First, the legal consensus on the application of basic structure review to ordinary legislation and executive orders must be addressed. There is no clear consensus, though some recent judgments have leaned towards applying the doctrine to ordinary law. Both positions may be summarised here.

Judgments that have argued for such application include *Madras Bar Association*[87] and *State of West Bengal v. Committee for the Protection of Democratic Rights*.[88] In both these judgments, it was held that ordinary legislation that contravenes the basic structure should be struck down. This is also supported by the opinion of Justice Khehar, given in the *NJAC* case.[89] They rely on the logic that ordinary legislation would be subject to constitutional enactments. Therefore, breaching the constitution would make the legislation unconstitutional. The basic structure, being unamendable, cannot be altered by constituent power. Hence, allowing ordinary legislation that violates the basic structure frustrates the purpose of having this doctrine in the first place. It is submitted that there is no reason why this logic cannot also apply to executive orders.

The opposition to the above arguments is presented in judgments like the majority opinion in *Indira Gandhi v. Raj Narain*,[90] which was later upheld by a seven-judge bench in *State of Karnataka v. Union of India*.[91] A more recent affirmation of this position is in the opinion of Justice Lokur in the *NJAC*

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[87] Madras Bar Association v. Union of India, (2014) 10 SCC 1.
[88] State of West Bengal v. Committee for the Protection of Democratic Rights, (2010) 3 SCC 571, ¶ 44.
[89] Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 1, ¶ 265.
[90] Indira Gandhi v. Raj Narain, AIR 1975 SC 2299.
[91] State of Karnataka v. Union of India, AIR 1978 SC 68.

case.[92] These judgments limit the grounds for reviewing ordinary legislation to legislative competence and Articles 13(1) and 13(2) of the Constitution. This is based on the understanding that applying the doctrine to ordinary legislation would equate ordinary law-making power with constituent power, as the same doctrine would test the validity of both.[93]

It is argued that an excessive emphasis on the formal exercise of constituent power should not distract us from the constitutional ramifications of many ordinary legislations. The judgments in favour of applying the doctrine to ordinary legislations understand that when these laws violate the basic structure, they become a law with constitutional ramifications. If the unamendability of the basic structure is to be protected, these legislations cannot be valid. The following argument builds on this understanding.

In penumbral cases involving ordinary legislation alone, it is clear that if any law applies at all, it has to be only the given ordinary law. In constitutional problems of the penumbra, instead, we have both ordinary and constitutional rules, and the issue is whether the fact situation is a penumbral case of the latter. If so, constitutional rules must prevail.[94] It is settled, however, that the situation is within the ordinary rule's *core of settled meaning*. Therefore, it is only the ordinary rule which is explicitly being adjudicated upon. Whether the constitutional rule applies (i.e., whether the case is a constitutional problem of the penumbra) is a separate legal issue.

For penumbral constitutional problems, according to Hart, a successful ruling which ensures the survival of the legal system is sufficient: "*Here all that succeeds is success*".[95] This paper has attempted to establish that constitutional legitimacy rests on the moral goodness of a constitution's basic structure and the extent to which said basic structure is achieved in society. Accordingly, Hart's notion of success at the fringe of the fundamental legal rules must be rejected. Instead, a broader view of success

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[92] Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 1, ¶ 932.

[93] Pathik Gandhi, *Basic Structure and Ordinary Laws (Analysis of the Election Case & The Coelho Case)*, 4 INDIAN J. CONST. L. 47 (2010).

[94] INDIA CONST. art. 13.

[95] HART, *supra* note 69, at 153.

– not just of the legal system, but of the Constitution and its values – must be adopted. The ruling must only be considered successful when it upholds constitutional values. This is achieved through basic structure review.

Basic structure review must, therefore, also apply to ordinary laws *alongside* fundamental rights review, as alternative submissions. It would act as a check for maintaining minimum goodness when fundamental rights cannot protect a particular fact situation due to the case being penumbral. This is a conception of the basic structure doctrine as an answer to the constitutional problems of the penumbra. It ensures that when ordinary laws involve issues of constitutional importance which contradict basic values at a sufficient level of abstraction, the question of penumbral constitutional rules does not prohibit judges from protecting constitutional morality when it is most vulnerable.

B. BASIC STRUCTURE REVIEW AS A DWORKINIAN STRONGLY HELD RIGHT

Conceptualising basic structure review as a Dworkinian right enables us to apply Dworkin's test for conflict between strongly held rights. Dworkin argues that in such cases, it is the job of the government to uphold the right which is more morally serious.[96] Applying this to basic structure review, we can understand that courts must uphold the basic value that is more seriously contravened.

Basic structure review may not satisfy the Dworkinian conception of "*rights as trumps*".[97] Instead, it may be better understood as a shield against substantive violations of basic values. The previous sections have largely maintained this understanding of basic structure review as maintaining the minimum goodness of constitutional order. However, it is also possible to conceptualise the doctrine in a radically different manner, as a moral right held by a citizen to the basic values guaranteed under the Constitution. However, it will be based on the same core idea of protecting minimum

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[96] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 194 (Harvard University Press 1977).
[97] *Id.* at xv.

goodness against temporary unreason.

Ronald Dworkin is often understood as arguing that citizens have pre-existing moral rights against the government. However, he explicitly states that he does not argue *for* such a thesis.[98] Instead, he only explores the implications of this thesis for those governments that accept it.[99]

Unamendable laws exist *before* the government. However, the government must also ensure their implementation in order not to violate the said unamendable laws. This is akin to pre-existing moral rights.[100] The basic structure doctrine is, therefore, a governmental acceptance of a thesis similar to the one Dworkin explores.

A right to basic structure review is not equal to a right of the majority to have its laws enforced, which Dworkin rejects.[101] This is because the basic structure doctrine is not based on general interest. Minor difficulties to the general public do not violate the minimum goodness protected by basic structures.[102] Instead, it requires sufficiently grave actions taken against an individual which violate basic constitutional values.

This becomes imperative to constitutional legitimacy as Dworkin argues that the institution of rights creates faith among minorities that they will be respected on issues of most serious concern to them.[103] Conceptualising basic structure review as a Dworkinian strongly held right further strengthens this faith, which is ultimately faith in constitutional legitimacy.

CONCLUSION

In 1976, the Supreme Court took away the power of citizens to move writ petitions during an emergency.[104] The basic structure doctrine had been established in 1973.[105] A critique of the doctrine is apparent: does it exist if

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[98] *Id.* at 184.
[99] *Id.*
[100] *Id.* at 186.
[101] *Id.* at 193.
[102] *Id.* at 196.
[103] *Id.* at 205.
[104] ADM Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207.
[105] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

courts do not invoke it? We are today facing this question with many constitutional protections.[106]

There is a need for a theory of constitutional legitimacy which protects, and implements in society to the fullest extent, the constitutional order. This paper has argued for such a theory, which rests on the goodness of the basic structure. If the basic structure is morally good, it acquires an existence independent of the basic structure doctrine. Citizens can exert moral pressure on officials to apply the basic structure to maintain constitutional legitimacy, and consequently, make their offices legitimate.[107]

The invocation of the basic structure by the courts whenever applicable, becomes a moral right that the citizen may claim.[108] The basic structure doctrine, in this manner, becomes a posited right representing the moral idea of the basic structure. Constitutional legitimacy is maintained when this morally good idea is reflected in the doctrine applied by the courts, and ultimately, in the legal system itself.

To rest legitimacy on goodness is possibly dangerous. Therefore, this paper has argued that basic structures should only establish a minimum criterion of goodness that all laws must pass along with procedures. They should be as minimal as possible to secure such goodness. The unamendable basic structure of a constitution is its permanent identity and creates the minimum goodness necessary for constitutional legitimacy. In order to not violate the good of democracy, basic structures should be abstract, and subject to reasoned interpretation. These interpretations, by influencing laws, give constitutions their transformative character. This transformative character, in turn, will be furthered by the suggestions of applying the basic structure doctrine to ordinary legislation and viewing the doctrine as a Dworkinian moral right.

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[106] *See* Khaitan *supra* note 4; s*ee also*, Gautam Bhatia, *A Constitutionalism Without The Court*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Aug. 1, 2020), https://indconlawphil.wordpress.com/2020/08/01/iclp-turns-7-a-constitutionalism-without-the-court/.

[107] The reading of the Preamble during the protests against the Citizenship (Amendment) Act, 2019 can be understood as such an exertion of moral pressure.

[108] DWORKIN, *supra* note 96.

RIGHT TO PRIVACY OF UNMARRIED COUPLES VIS-À-VIS IMMORAL TRAFFIC (PREVENTION) ACT, 1956

SRIJAN SOMAL[1] & PRATYUSH KHANNA[2]

Society is often uncompromising with regard to its ideas around morality. In some situations, these stringent ideas lead to moral policing. One such example is the arrest of unmarried couples by the police from hotels/lodges accusing them of prostitution, obscenity and public indecency. Certain provisions of the Immoral Traffic (Prevention) Act, 1956 ("ITPA") allow room for such action by the police. Special focus has been placed on Section 6 of the ITPA which disregards consent before sexual relations and can easily be misused against consensual couples. The present article is an attempt by the authors to critically analyse these provisions against the principles established by the Constitution of India. The authors have systemically argued that the half-baked and short-sighted provisions of ITPA are in gross violation of individuals' right to privacy and sexual autonomy in the light of various judgments by Indian courts. After an intricate discussion of previous attempts at changing the law and the international framework around the matter, certain recommendations are made which must be implemented in order to ensure that sexual rights of these couples are upheld.

INTRODUCTION

India as a society, despite its evident "*modernist*" trends, has had a rather parochial view on societal behaviour.[3] Over the last few years, Indian courts have given a slew of progressive judgments seeking to change this outlook

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[1] Srijan Somal is a fourth year B.A.LL.B. (Hons.) student at Dr. Ram Manohar Lohiya National Law University, Lucknow, Uttar Pradesh. The author may be reached at <srija nsomal.13@gmail.com>.

[2] Pratyush Khanna is a third year B.A.LL.B. (Hons.) student at Faculty of Law, Marwadi University, Rajkot, Gujarat. The author may be reached at <khannapratyush98@gmail.c om>.

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[3] G. Sampath, *Indian youth look modern, but inclined to conservatism and intolerance: survey,* THE HINDU (Apr. 5, 2017), https://www.thehindu.com/news/national/youth-modern-in-look-conservative-in-outlook-survey/article17819664.ece.

and make our society more inclusive.[4] These judgments have led to the inclusion of several rights including right to privacy,[5] right to sexual autonomy and bodily integrity,[6] right to education,[7] and right to clean and safe environment[8] within the scope of Part III of the Constitution. Although this has given us a glimmer of hope for a libertarian India, the country's deep-rooted preoccupation with archaic ideas of ideal societal behaviour still subsists.[9] One of such notions is the discouragement of pre-marital sex between consenting adults. [10]

Society, in general, frowns upon the idea of an unmarried couple indulging in sexual intercourse.[11] Such couples are often looked down upon, publicly shamed, and even shunned by their families.[12] Sometimes, such cases also result in honour killings.[13] What makes the situation worse is that the law enforcement agencies also harass such couples.[14] There have been a multitude of reports of unmarried couples being arrested by the police from hotels in the name of public indecency and prostitution. In a recent incident of February 2020, the Ludhiana police was accused of arresting

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[4] Mohan V. Katarki, *It's now safe to say that Supreme Court of India is a liberal court*, THE LEAFLET (Oct. 3, 2018), https://www.theleaflet.in/its-now-safe-to-say-that-the-supreme-court-of-india-is-a-liberal-court/.

[5] Justice K.S Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 83.

[6] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321, ¶ 59; *see also* Joseph Shine v. Union of India, (2019) 3 SCC 39.

[7] Mohini Jain v. State of Karnataka, AIR 1992 SC 1858, ¶ 17.

[8] Vellore Citizens' Welfare Forum and State of Tamil Nadu v. Union of India, (1996) 5 SCC 647.

[9] Sampath, *supra* note 3.

[10] Shivani Bahukhandi, *No Sex Until Marriage! The Hypocrisy Around Premarital Sex*, FEMINISM IN INDIA (Aug. 31, 2017), https://feminisminindia.com/2017/08/31/hypocrisy-premarital-sex/.

[11] *Id.*

[12] *Id.*

[13] Kaushambi Kaushal, *No Honour in Honour Killing: Comparative Analysis of Indian Traditional Social Structure vis-à-vis Gender Violence,* 5 ANTYAJAA J. W. S. 1, 9 (2020).

[14] Kannalmozhi Kabilan, *Access Denied: Chennai couples recall horrendous experiences of moral policing*, THE NEW INDIAN EXPRESS (Feb. 12, 2020), https://www.newindianexpress.com/cities/chennai/2020/feb/12/access-denied-chennai-couples-recall-horrendous-experiences-of-moral-policing-2102091.html.

consensual couples during a raid conducted in the hotels.[15] In 2019, an OYO rooms' lodge in Coimbatore was sealed off by the authorities for allowing unmarried couples to book rooms.[16] In another incident a few years ago, the Mumbai police conducted raids in several hotels and arrested over twenty couples.[17] There were reports of detained couples being humiliated during their arrest, which caused quite the commotion on social media.[18] People called this action out as an act of moral policing and excessive state interference.[19]

The tool often used by the police to harass unmarried couples is the Immoral Traffic (Prevention) Act, 1956 ("**ITPA**").[20] ITPA was brought in with an aim to protect the fundamental rights of the victims of human trafficking and forced prostitution,[21] however, due to sloppy drafting, a myopic amendment and gross misapplication by state machinery, it has become a symbol of tyranny.[22] ITPA has been turned into a weapon of snatching away people's fundamental rights.[23] It is ridden with several issues and has been under scrutiny multiple times.[24] However, the discussion in this paper is primarily focused on how certain provisions of

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[15] Payal Dhawan, *Flesh trade: Residents question police raids on hotels*, THE TIMES OF INDIA (Dec. 5, 2020), https://timesofindia.indiatimes.com/city/ludhiana/flesh-trade-residents-question-police-raids-on-hotels/articleshow/74036291.cms.

[16] *Bizarre: OYO Rooms' Coimbatore lodge sealed for allowing unmarried couples,* THE INDIAN EXPRESS (Jun. 26, 2019), https://www.newindianexpress.com/states/tamil-nadu/2019/jun/26/bizarre-oyo-rooms-lodge-sealed-for-allowing-unmarried-couples-1995417.html.

[17] *India police face fire for arresting couples in hotel,* BBC NEWS (Aug. 11, 2015), https://www.bbc.com/news/world-asia-india-33860253.

[18] *Id.*

[19] Adam Taylor, *The latest target of India's morality police: Unmarried couples in hotel rooms*, THE WASHINGTON POST (Aug. 11, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/08/10/the-latest-target-of-indias-morality-police-unmarried-couples-in-hotel-rooms/.

[20] Aarthi Pal et al., *Comments on Trafficking of Persons (Prevention, Protection and rehabilitation) Bill, 2018* 18-19 (Alt. Law Forum, Working Paper No. 1, 2018), https://altlawforum.org/publications/coalition-for-an-inclusive-approach-on-the-trafficking-bill-2018/.

[21] Shantanu Lakhotia, *Immoral Traffic Prevention Act, 1956, An Example of 'Legislate in Haste Amend at Leisure'*, LIVE LAW (Nov. 9, 2020), https://www.livelaw.in/columns/immoral-traffic-prevention-act-1956-an-example-of-legislate-in-haste-amend-at-leisure-165681.

[22] *Id.*

[23] *Id.*

[24] Rajalakshami Ramprakash, *Delinking Prostitution from Trafficking - A look at India's Immoral Traffic Prevention Act, 1956,* 22 CANADIAN WOMEN'S STUD. J. 110, 112 (2003).

the ITPA are used to torment consenting couples, namely Sections 6, 14, and 15.

The courts in India have held multiple times that a live-in relationship between two consenting adults is not an offence[25] and consequently "*occupation of a hotel room by an unmarried couple shall not attract criminal provisions.*"[26] Furthermore, these raids and arrests by the police, in our opinion, are a gross violation of such individuals' right to personal liberty, right to privacy, and right to sexual autonomy and bodily integrity. In light of the same, the authors have systemically argued that these provisions read together, go against constitutional morality and values.

Firstly, the authors shall deal with the issue of social and legal hostility against pre-marital sex. *Secondly,* the authors shall substantiate on how certain provisions of ITPA allow for the harassment of unmarried couples with reference to their fundamental rights. *Thirdly*, the authors will discuss the international framework of law surrounding this topic. *Fourthly*, the authors shall analyse the governments failed attempts at amending the ITPA. *Lastly*, the authors shall propose changes for the way forward and conclude the discussion by highlighting the urgent need of reforms.

HOW ITPA DISPARAGES COUPLE'S RIGHT TO PRIVACY

ITPA was originally introduced in 1956 by the name of the Suppression of Immoral Traffic in Women and Girls Act ("**SITA**") as an instrument to counter immoral human trafficking.[27] SITA was subsequently amended in 1986 to enhance penalties and renamed as ITPA.[28] While the title of the act bares the terms "*immoral traffic prevention*", the term "*human trafficking*"

[25] S. Khushboo v. Kanniammal, (2010) 5 SCC 600, ¶ 29.
[26] My preferred Transformation and Hospitality (P) Ltd. v. District Collector, Coimbatore, (2020) 1 Mad LJ 63, ¶ 6.
[27] R.K. Raizada, *The Suppression of Immoral Traffic in Women and Girls Act, 1956: Some Socio-Legal Problems*, 8(1) J. INDIAN L. INST. 96, 96-97 (1966).
[28] Prabha Kotiswaran*, How did we get here? Or a short history of the 2018 Trafficking bill,* ECON. & POL. WKLY. ENGAGE (Jul. 18, 2018)*,* https://www.epw.in/engage/article/how-did-we-get-here-or-short-history.

has not been used even once throughout the scheme of ITPA. Instead, the act goes on to criminalize prostitution-related activities.[29]

The 64th Law Commission report also noted that the scope of ITPA is narrow as it seeks to tackle trafficking for the purpose of commercial sexual exploitation, not trafficking or prostitution.[30] The report also highlighted that the widening of the scope of ITPA is not advisable due to several reasons including the corresponding law in other common law countries, international standards, and lack of prior statutory basis.[31] However, the Justice J.S. Verma committee observed in its report that the term "*trafficking*" was undefined under ITPA, or under any other Indian law,[32] and thereafter recommended that the definition of the term "*trafficking*" from United Nations Palermo Protocol[33] be adopted.

There has been a lot of debate on the matter especially relating to the harassment of consenting sex workers by law enforcement agencies.[34] Earlier, under SITA, "*prostitution*" was defined as "*the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind.*"[35]

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29 Immoral Traffic (Prevention) Act, 1956, §§ 3-8, No. 104, Acts of Parliament, 1956. [hereinafter *ITPA*]

30 LAW COMMISSION OF INDIA, THE SUPPRESSION OF IMMORAL TRAFFIC IN WOMAN AND GIRLS ACT, 1956, 64, 1975, https://lawcommissionofindia.nic.in/51-100/report64.pdf.

31 *Id.*

32 VERMA COMMITTEE, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, 2013 at 165, https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf.

33 *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention against Transnational Organized Crime,* G.A. Res. 25 (XXV), U.N. G.A.O.R, 55th Sess., U.N. Doc. A/Res/55/25, (2000) [hereinafter *Palermo Protocol*]; (Article 3(a) defines "*Trafficking in persons*" as the "*recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation*").

34 Malini Bhattacharya, *Why it's time to repeal and replace the Immoral Traffic Prevention Act with new law*, THE NEWS MINUTE (Jul. 19, 2019), https://www.thenewsminute.com/article/why-it-s-time-repeal-and-replace-immoral-traffic-prevention-act-new-law-105768.

35 Suppression of Immoral Traffic in Women and Girls Act, 1956, § 2 cl. f, No. 104, Acts of Parliament, 1956.

By virtue of the amendment in 1986,[36] the definition of "*prostitution*" was subsequently changed to "*the sexual exploitation or abuse of persons for commercial purposes and the expression 'prostitute' shall be construed accordingly*". This amendment has been seen as a bad move, since other provisions of ITPA were not amended consequently in accordance with the change made in the definition of the term "*prostitution*".[37]

Sex work has always been considered a deviant behaviour by the society and law alike.[38] Although it is not explicitly stated to be illegal under any law, the Supreme Court on multiple occasions has called prostitution an immoral act.[39] In the case of *Gaurav Jain v. Union of India*, the Supreme Court even went on to state: "*eradication of prostitution in any form is integral to social weal and glory of womanhood*".[40]

ITPA PROVISIONS AGAINST UNMARRIED COUPLES

The police often subject consensual unmarried couples to public humiliation[41] and arrests on charges under ITPA.[42] It is noteworthy that the offences under ITPA are cognizable[43] which means that the special police officer appointed under ITPA may arrest individuals without a warrant. Moreover, Section 15 of ITPA allows the special police officer to conduct search of a premises if he/she has "*reasonable grounds*" to believe that an offence under ITPA has been or is being committed. It is pertinent to note that ITPA provides no guidelines for the exercise of these powers by the special police officer. Clearly, these provisions entrust unguided powers in the hands of such officers as a result of which, they have been

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[36] Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44, Acts of Parliament, 1986.
[37] Lakhotia, *supra* note 21.
[38] Karen E. Rosenblum, *Female Deviance and the Female Sex Role: A Preliminary Investigation*, 26 THE BRIT. J. SOCIO. 169, 179 (1975).
[39] Vishal Jeet v. Union of India, (1990) 3 SCC 318, ¶ 6; *see also* Gaurav Jain v. Union of India, (1997) 8 SCC 114, ¶ 16.
[40] *Gaurav Jain*, (1997) 8 SCC 114, ¶ 16.
[41] Kabilan, *supra* note 14.
[42] Pal, *supra* note 20.
[43] *ITPA*, § 14.

regularly misused to harass not only sex workers but also consenting unmarried couples staying at hotels.[44]

However, the most preposterous provision of ITPA in this regard is Section 6 which criminalizes "*detaining a person in premises where prostitution is carried on*". Albeit *prima facie* it may seem rather straightforward and even well-placed, but clause (1)(b) of the Section 6 is extremely problematic. It states:

> "*Any person who detains any other person, whether with or without his consent in or upon any premises with intent that such person may have sexual intercourse with a person who is not the spouse of such person shall be punishable…*"[45]

Looking at the dictionary meaning of the word "*detain*", it is defined as "*to hold or keep in*"[46] or "*to delay that person for a short period of time*".[47] It is pertinent to note that the section stipulates that consent is immaterial if a person is detaining another. Another tricky phrase in this provision is, "*with intent that such person may have sexual intercourse with a person who is not the spouse of such person*." For instance: A man asks his partner (female) (both being over 18 years of age) to stay in a hotel and have sexual intercourse with him, to which she agrees. The man can very well be charged under Section 6(1)(b) considering they were not married to each other and he "*detained*" his partner (with her consent) with an intent of having sexual intercourse.

The situation becomes trickier when a homosexual couple is considered in place of a heterosexual couple, in the example above. After the historic judgment in *Navtej Singh Johar v. Union of India*,[48] homosexuality has been effectively decriminalized in India; however, same sex marriage is still not legally recognized. Consequently, despite the scrapping down of Section 377 of the Indian Penal Code (insofar as it criminalized homosexuality), the police may still use this provision to harass homosexual couples. With

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[44] Taylor, *supra* note 19.
[45] *ITPA*, § 6.
[46] *Detain*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/detain.
[47] *Detain*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/detain.
[48] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

the already prevalent stigma around the matter,[49] this makes things all the worse for LGBTQI+ community.

Section 6 has only been amended once, in the last sixty-four years in 1986; when it was made gender neutral.[50] Shockingly, not even the courts have paid heed to the potential harm such a provision could pose in a modern world. Use of the word "*spouse*" is especially absurd considering the courts have long since recognized the concept of live-in relationships.[51] Now that the offence of adultery has been decriminalized, a provision denying sexual rights to individuals on the basis of their marriage is an apparent violation of such individuals' right to privacy, sexual autonomy and bodily integrity. On the other hand, the ambiguous definition of the term "*public place*" does not help the situation; it is further misappropriated to charge innocent couples for public indecency and obscenity.[52]

CONSTITUTIONAL MORALITY SHOULD PREVAIL

The above-discussed sections seem to be aimed at upholding "*social morality*" at the cost of individual autonomy. It has been well established by the Supreme Court that constitutional principles must neither be guided, nor be trampled by the obscure notions of "*public morality*".[53] The Supreme Court elaborated on the concept of constitutional morality in the *Navtej Singh Johar* case[54] as:

> "*It needs no special emphasis to state that whenever the constitutional courts come across a situation of transgression or dereliction in the sphere of fundamental rights, which are also the basic human rights of a section, howsoever small part of the society, then it is for the constitutional courts*

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[49] Michael Safi, *'There are few gay people in India': stigma lingers despite legal victory*, THE GUARDIAN (Mar. 13, 2019), https://www.theguardian.com/global-development/2019/mar/13/gay-people-india-stigma-lingers-despite-legal-victory.
[50] Suppression of Immoral Traffic in Women and Girls (Amendment) Act 1986, No. 44, Acts of Parliament, 1986.
[51] Payal Sharma v. Nari Niketan, AIR 2001 All 254; *see also* S. Khushboo v. Kanniammal, (2010) 5 SCC 600.
[52] Lakhotia, *supra* note 21.
[53] K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 46.
[54] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 121.

> *to ensure, with the aid of judicial engagement and creativity, that constitutional morality prevails over social morality*."

Decisional autonomy is now read within Article 21 of the Constitution[55] and hence, Section 6 which evidently promotes the notions of "*public morality*" ought to be declared unconstitutional by the courts, insofar as it prohibits sexual relationship between two consenting adults. In the landmark case of *K. S. Puttaswamy v. Union of India*,[56] the Supreme Court has held:

> "*the dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information*."

This notion has been further reinforced by the judgments in the *Shafin Jahan* case[57] and the *Shakti Vahini* case.[58] The Supreme Court has stipulated in *Joseph Shine*[59] and *Navtej Singh Johar*[60] that the right to privacy must be interpreted in a broad sense encompassing the decisional autonomy over one's own body as well. It has been further held that the right to privacy must be construed as containing the right to sexual autonomy, bodily integrity, and self-determination.[61] The State must not only scrape laws violating such rights but also take positive steps in order to ensure their protection. However, it dejects us to see the state machinery use statutes like ITPA to violate the aforementioned rights of young unmarried couples. In this context, the idea of "*Minimalist State*" or "*Night-Watchman State*" seems quite relevant.[62]

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55 *K. S. Puttaswamy*, (2017) 10 SCC 1.
56 *Id.* ¶ 368.
57 Shafin Jahan v. K. M. Ashokan & others, (2018) 16 SCC 408, ¶ 19.
58 Shakti Vahini v. Union of India, (2018) 7 SCC 192, ¶ 27.
59 Joseph Shine v. Union of India, (2019) 3 SCC 39.
60 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 155.
61 *K. S. Puttaswamy*, (2017) 10 SCC 1.
62 James M. Buchanan, *Utopia, the Minimal State and Entitlement*, 23 PUB. CHOICE 121 (1975).

Libertarian philosopher Robert Nozick developed the concept of "*minimalist state*" deriving from the Lockenian philosophy.[63] He argued that every individual has certain rights that are inviolable in nature, like liberty, life, justice, and property.[64] According to Nozick, there is a need for a state to protect these rights, although he was very keen to limit its role.[65] This minimalist state, as Nozick argues, would have very limited power for providing only the most basic resources namely, law and order, police, army, et cetera.[66] In a nutshell, the minimalist state must use legitimate power just to protect the inalienable rights of the individual. It can also be derived from the above that the state should limit itself by not interfering with every aspect of its citizen's life to protect individual rights and liberty; otherwise, it would be the beginning of the police state where the law enforcing organ of the state is not subject to rule of law and in such situation no individual rights can be guaranteed.[67]

The idea is relevant in the present context to the extent that the state organs use ITPA to categorically harass young unmarried couples,[68] thus denuding them of their fundamental rights. It is apparent that Indian law has not been much sympathetic towards unmarried couples as the age of consensual sex is kept as 18 years[69] (as opposed to 15-16 years in many other common law countries).[70] Acting as salt on a sore wound, the State even fails to protect the rights of consensual unmarried couples (both over 18 years of age) from its own police. The police have, at times gone to the extent of publicly shaming the couples or threatening to inform their family

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[63] *Id.*
[64] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (New York: Basic Books, 1974).
[65] Randall G. Holcombe, *Government: Unnecessary but Inevitable*, 7 INDEP. REV. 325, 329-330 (2004).
[66] Cheyney Ryan, Book Review, 102 MIND J. 403 (1993) (reviewing JONATHAN WOLFF, ROBERT NOZICK--PROPERTY, JUSTICE, AND THE MINIMAL STATE (1991)).
[67] BRIAN CHAPMAN, POLICE STATE (Macmillan International Higher Education, London, 1971).
[68] NIRANTAR TRUST, EARLY AND CHILD MARRIAGE IN INDIA: A LANDSCAPE ANALYSIS 60-61 (2015).
[69] PEN. CODE, § 375.
[70] Akanksha Yadav & Srijan Somal, *POCSO and the Age of Consensual Sex in India*, 4 HNLU J. L. & SOC. SCI. 264 (2018).

and friends.[71] This act is not only violative of their rights but can be considered downright unlawful behaviour.

The *grundnorm* of Indian legal system is that the Constitution and constitutional principles must be upheld[72] and we believe that obscure notions of "*public morality*" cannot be used by the state machinery to trample individuals' decisional autonomy; constitutional morality must prevail over social morality. In the succeeding section, we will proceed to conduct a comparative analysis of these provisions with international law as well as the position in other common law countries.

INTERNATIONAL FRAMEWORK

There are various international instruments that seek to safeguard the people against the vice of human trafficking.[73] Among all, the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others ("**1949 Convention**") is the primary international document focusing on "*immoral trafficking*". After its ratification by India, the government enacted ITPA, following the obligations of this convention.[74] The 1949 Convention requires the signatory states to punish "*any person who procures, entices, or leads away*" another person into prostitution or exploits the prostitution of another person even with consent.[75] It also makes financing of brothels[76] and renting a building for such purpose an offence and states are duty-bound to punish the individuals convicted of the same.[77] It is to be noted that these two are the only substantive provisions under the convention.

The convention reflects the abolitionist approach of the drafters, which proclaims that prostitution as an institution itself constitutes a human

[71] Taylor, *supra* note 19.
[72] Khyati Sharma, *The Efficacy of Grundnorms in Legal Systems of India and UK: A Comparative Study,* 2 INT'L. J. L. MGMT. & HUM. 1, 8-9 (2019).
[73] Anupam Jha, *The Law on Trafficking in Person: The Quest for an Effective Model*, 8 ASIAN J. INT'L. L. 225, 225-226 (2018).
[74] G.A. Res. 317 (IV*), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (Dec. 2, 1949).
[75] *Id.* art. 1, cl. 2.
[76] *Id.* art. 2, cl. 1.
[77] *Id.* art. 2, cl. 2.

rights violation and should be abolished.[78] The document focuses more towards eliminating the profession of prostitution than protection of persons from immoral trafficking, since it terms all sex workers as victims who need to be rehabilitated.[79] The most recent development on the issue is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children ("**PPSPTPEWC**"), supplementing the United Nations Convention against Transnational Organized Crime[80] to which India is a signatory.[81] However, the PPSPTPEWC still conveys the language of the 1949 Convention as it has failed to distinguish between forced and unforced prostitution.[82] The biggest drawback of the 1949 Convention is that it lacks a comprehensive set of guidelines regarding offenses and procedures and even proper definitions of crucial terms; resulting in the rise of a half-baked legislation like ITPA.

PROTECTION OF SEXUAL RIGHTS UNDER INTERNATIONAL LAW

The issues plaguing the 1949 Convention have only further escalated in ITPA. For all its vices, in our opinion, the convention never allowed room for the harassment of innocent couples. A lackadaisical drafting has left ITPA with countless absurdities,[83] with the most prominent being Section 6. As deliberated in the previous section, this provision violates basic human rights of the individual which are guaranteed by the Constitution as well as under international law.

International documents like the Universal Declaration of Human Rights ("**UDHR**") and the International Covenant on Civil and Political Rights ("**ICCPR**") prohibit any arbitrary interference with an individual's right to

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[78] JO BINDMAN & JO DOEZEMA, REDEFINING PROSTITUTION AS SEX WORK ON THE INTERNATIONAL AGENDA (Anti-Slavery International, 1997).
[79] A JUDICIAL COLLOQUIUM - HIV/AIDS AND THE LAW (Dipika Jain, Laya Mendhini & Rachel Stephens et al. eds., Human Rights Law Network, 2007).
[80] Palermo Protocol, *supra* note 33.
[81] Dipa Dube et al., *The Anti-Trafficking Bill, 2018: Does it Fulfill India's Commitment to the International Community?*, 7 J. HUM. TRAFFICKING 224 (2021).
[82] Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 8 HUM. RTS. BRIEF 30, 31 (2001).
[83] Lakhotia, *supra* note 21.

privacy.[84] Moreover, they also stipulate that no person shall be subjected to attacks upon his honour and reputation and everyone has the right to be protected by law against any such interference.[85] In addition to this, the International Planned Parenthood Federation declaration ("**IPPF declaration**") was adopted specifically for the protection of the sexual rights of people.[86] This declaration seeks to protect the highest possible standards of human rights in the context of sexual conduct.[87] Article 5 of the IPPF declaration asserts sexual freedom, including the opportunity for individuals to choose their sexual partners and to decide upon the matters pertaining to their sexuality without anyone's control.[88]

LEGAL FRAMEWORK IN OTHER COMMON LAW COUNTRIES

It is important to reiterate here that consensual sexual intercourse between two adults in a private space is not an offence under Indian law.[89] It is the poorly drafted provisions which result in its misuse by the police against consensual couples.[90] Laws against immoral trafficking and commercial sexual exploitation exist in several common law countries. For example, in the United Kingdom ("**UK**"), Section 24 of Sexual Offences Act, 1956 stood as a counterpart to Section 6 of ITPA. Section 6 prohibited detention of any woman "*against her will*" for the purposes of sexual intercourse with any man,[91] however, it was repealed in 2003.[92] Even when Section 6 was in force, it was not applicable to consensual detention for sexual intercourse,

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[84] G.A. Res. 217 (lll) A, *Universal Declaration of Human Rights*, art. 12 (Dec. 10, 1948); *International Covenant on Civil and Political Rights*, art. 17, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171.
[85] *Id.*
[86] Eszter Kismödi et al., *Sexual Rights as Human Rights: A Guide for the WAS Declaration of Sexual Rights*, 29 INT'L. J. OF SEXUAL HEALTH 1, 2 (2017).
[87] Int'l Planned Parenthood Federation, *Sexual Rights: International Planned Parenthood Federation Declaration,* Preamble (Oct. 2008), https://www.ippf.org/sites/default/files/sexualrightsippfdeclaration_1.pdf.
[88] Int'l Planned Parenthood Federation, *Sexual Rights: International Planned Parenthood Federation Declaration*, art. 5 (Oct. 2008), https://www.ippf.org/sites/default/files/sexualrightsippfdeclaration_1.pdf.
[89] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321, ¶ 252.
[90] Pal, *supra* note 20.
[91] Sexual Offences Act, 1956, 4 & 5 Eliz. 2 c. 69, § 24, sch. 2.
[92] Sexual Offences Act, 2003, Eliz. 2 c.42, § 141, sch. 6, ¶ 11(a).

thus eliminating any chances of misuse.[93] The laws in the UK affirm paramount importance to the right to privacy and autonomy, as given under the European Convention of Human Rights.[94] It is prohibited for a public authority to act in a way incompatible with a right prescribed in the convention, and aggrieved individual may seek remedy against such authority.[95] Lord Hoffman in the *Campbell* case[96] stated that privacy under human rights law has been identified as something worth protecting against the State as well as private persons. This framework ensures that laws are not misused by the state machineries to violate people's rights.

Privacy and sexual autonomy are valued rights in the United States of America ("**USA**") as well. First recognized in the case of *Griswold v. Connecticut*,[97] these rights have only grown with the overall development of human rights jurisprudence in the country.[98] Similar protection has been guaranteed under the laws of Canada,[99] and many other common law countries. With the above discussion, we acknowledge that the Indian Constitution now confers the right to privacy and sexual autonomy to individuals.[100] However, we believe that the lack of an appropriate executive framework hinders the protection of these rights in practice and results in their infringement at the hands of state machinery.

RECOMMENDATIONS FOR CHANGES IN THE FRAMEWORK

Section 6 of the ITPA comes off as the most problematic provision, often being misused against consensual unmarried couples, thereby violating the constitutional principles of our country as discussed earlier. On that note, one ought to wonder as to why such an unreasonable provision is still a

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[93] Sexual Offences Act, 1956, 4 & 5 Eliz. 2 c. 69, § 24.

[94] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

[95] Human Rights Act 1998, Eliz. 2 c. 42, § 7.

[96] Campbell v. M. G. N. Ltd., [2004] 2 AC 457.

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

[98] David A. J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 (4) HASTINGS L. J. 957 (1979).

[99] Canadian Charter of Rights and Freedoms, § 8.

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

good law. Neither the legislature nor the judiciary have assessed this aspect of the statute.

The amendment of the ITPA in 1986[101] was short-sighted; it further complicated the problems of ITPA as discussed earlier. Although the amendment bill brought in 2006[102] intended to make substantial changes, it was referred to the Parliamentary Standing Committee on Human Resource Development and never became an act.[103] Certain changes were suggested in the draft bill, including scrapping down of the offense of soliciting clients by prostitutes[104] and inclusion of certain offenses relating to "*trafficking in persons*" rather than prostitution.[105] However, no substantial changes were proposed in Section 6(1)(b) by the draft bill. In fact, in a sense it would have further escalated the problems as the bill recommended that the rank of "*Special Police Officer*" be lowered from "*Inspector*" to "*Sub-inspector*".[106] ITPA vests exceptional power in the hands of the special police officer and delegation of the same to an even junior officer would increase the odds of misuse of such power.

In 2018, another bill was proposed to counter human trafficking titled – Trafficking of Persons (Prevention, Protection, and Rehabilitation) Bill 2018. The draft bill focused on trafficking as a whole and included provisions regarding "*trafficking for forced labour, bearing children, begging, or for inducing early sexual maturity*" within its ambit.[107] However, it was never intended to take ITPA's place, rather it was brought in addition to the already existing trafficking related laws, including ITPA.[108] Keeping in mind

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[101] Suppression of Immoral Traffic in Women and Girls (Amendment) Act 1986, No. 44, Acts of Parliament, 1986.
[102] The Immoral Traffic (Prevention) Amendment Bill 2006, Bill No. 47 of 2006 (May 22, 2006).
[103] *Legislative Brief: The Immoral Traffic (Prevention) Amendment Act, 2006,* PRS LEGISLATIVE RESEARCH (Sep. 25, 2006), https://www.prsindia.org/uploads/media/1167469313/legis1167477521_Legislative_Brief_Immoral_Traffic_Amendment_Bill2006.pdf.
[104] The Immoral Traffic (Prevention) Amendment Bill 2006, § 9, Bill No. 47 of 2006 (May 22, 2006).
[105] *Id.* § 6.
[106] *Id.* § 11.
[107] *Legislative Brief: The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018*, PRS LEGISLATIVE RESEARCH, https://prsindia.org/files/bills_acts/bills_parliament/Legislative%20Brief_Anti-trafficking%20Bill%20-%20For%20Upload.pdf.
[108] Kotiswaran, *supra* note 28.

the above-discussed constitutional values, it is the need of the hour that certain changes be made to ensure that unmarried couples' rights remain protected. However, it cannot be achieved merely by scrapping Section 6 of ITPA.

We recommend that ITPA be completely repealed as it stands as an outdated piece of statute promoting archaic ideas. With the Committee for Reforms in Criminal Law currently deliberating over the issues plaguing criminal law jurisprudence in India, ITPA must be looked into. In the event the ITPA is not repealed, drastic changes must be introduced to certain provisions of the act, promptly.

First, an amendment must be made to Section 6 of the ITPA. As discussed earlier, Section 6 bears two problematic elements – use of the word "*spouse*" and disregard for the consent of the detainee. This section must be altered to the extent that it does not affect consenting couples having sexual intercourse. To that end, it is suggested to narrow down the scope of the section by making it applicable only to cases wherein a person is forcibly detained for prostitution related activities, as defined under ITPA.

Second, the special police officer under ITPA, in our opinion, has been given unfettered discretionary powers to arrest without a warrant and conduct search of a premises when he has "*reasonable grounds*" to believe that an offence under this act has been committed. Such unguided discretion in the hands of an authority births arbitrariness.[109] Hence, the checks and balances over the powers of the special police officer, as given in ITPA must be reassessed. In addition to this, certain guidelines may be prescribed for the officer to follow while exercising his discretionary powers under ITPA.

Third, besides Section 6, the definition of "*public place*"[110] when read with Section 294 of the IPC also creates room for misuse by police. Section 294(a) of the IPC prohibits obscene acts to the annoyance of others in any public place. The lack of clarity on the phrase "*annoyance to others*" in Section 294 of the IPC makes the section very subjective, leading to police

[109] Kishan Chand Arora v. Commissioner of Police, AIR 1961 SC 705, ¶ 30.
[110] *ITPA*, § 2(h).

interference even in non-obscene activities like holding hands and eating in a parked car.[111]

Lastly, the state must also take positive steps to safeguard the privacy and autonomy of young couples. A major step in this regard could be conducting regular sensitization sessions for the police officers on the issue. The State may also introduce a direct remedy against the public authorities in case of a violation of an individual's privacy, somewhat on the lines of Section 7 of the Human Rights Act, 1998 in the UK.[112] This would go a long way in establishing a congenial environment for unmarried couples, where they can exercise their choice.

CONCLUSION

Indian society is witnessing a steady shift in its outlook.[113] It is gradually becoming more inclusive and accepting.[114] However, a major portion of the society is still sticking to their archaic moral values and refusing to accept liberal ideas such as pre-marital sex.[115] Moreover, the current legal regime, as discussed in this paper, only reinforces the social stigma around pre-marital sexual relations. The social disregard towards pre-marital sex is bad as it is;[116] police actions worsen the situation manifold.

Edwin M. Schur (1965) has explained the concept accurately as "*the criminalization of deviance*".[117] He argues that criminalizing an act is the ultimate form of stigmatization.[118] Terming a specific behaviour as "*deviant*" has intense impacts on the persons engaging in it. [119] On the other hand, criminalizing such behaviour takes it one-step further and may even take

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[111] Kabilan, *supra* note 14.
[112] Human Rights Act 1998, Eliz. 2 c. 42, §7.
[113] Devendra Pal Verma, *Social change in India*, 20 INDIAN J. OF POL. SCI., 335 (1959).
[114] *Id.*
[115] Ruben Banerjee, *Two-third of Indian youth are not fine with pre-marital sex*, OUTLOOK (Jun. 17, 2019), https://magazine.outlookindia.com/story/business-news-politicians-more-dangerous-than-terrorists-youth-survey-reveals-startling-details/301729.
[116] *Id.*
[117] EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOUR AND PUBLIC POLICY – ABORTION, HOMOSEXUALITY, AND DRUG ABUSE 5 (Prentice Hall Inc., 1965).
[118] *Id.*
[119] *Id.*

such persons toward a "*criminal career*".[120] A criminal behaviour invites social reactions, which in turn may result in further criminal actions.[121] In the present context, arresting or publicly calling out an unmarried couple for having sexual intercourse in a private space (a hotel room) and accusing them of obscenity, prostitution, or indecency may have a long-term impact on their lives. Such instances may harshly affect their social life, education, careers as well as mental health.

In any case, the state must ensure that the provisions of ITPA, which have the potential to be misused, are amended to that effect. It is high time the Indian State realizes that individuals' rights and interests must not be neglected in the face of social morality. If we ever wish to reach the zenith of societal development, that is.

[120] *Id.*
[121] *Id.*

PRIOR RESTRAINT VIS-À-VIS FREEDOM OF PRESS IN INDIA

AGNEYA GOPINATH[1] & VIKRANT DERE[2]

"If liberty means anything at all, it means the right to tell people what they do not want to hear." - George Orwell

The importance of the right to freedom of speech and expression is established as a sine qua non of any healthy and functional democracy, with India being no exception. As a natural corollary, it would also flow that the freedom of press is of paramount importance to instil within the citizenry a feeling of participation in the working of democracy. This is a multi-faceted right, with a harmonious blend of the right to report on the part of the press, and the right to receive information from the public at large. However, this freedom has off-late been subject to certain disproportionate restrictions which are popularly known as "prior restraints". Such restrictions not only impair the credibility of the information being disseminated but also have a chilling effect on others who intend to publish information relevant to the public. Through this article, the authors intend to shed light on the genesis of this doctrine in India, and examine the constitutionality behind such practices, while also elucidating its occurrence in contemporary situations. A brief comparison between the permissibility of prior restraint in the United States of America and India is also highlighted, to serve as a guiding light for the Indian model, after of course, adhering to its existing exigencies and restrictions. Lastly, the authors have mentioned the role of the press along with its possible misuse, however, at the same time stressed upon the need for self-censorship and the important task of courts in defending civil liberties.

INTRODUCTION

The right to freedom of speech and expression is indispensable and is the crux of a vibrant and healthy democracy. It guarantees the right to freely express ideas, thoughts, opinions, and views without any fear of adverse action by the government.[3] In India, this right has been enshrined under

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1 Agneya Gopinath is a fourth year BLS LL.B. student at Pravin Gandhi College of Law (Mumbai University). The author may be reached at <agneyagopinath000@gmail.com>.

2 Vikrant Dere is a fourth year B.B.A. LL.B. student at Symbiosis Law School, Pune. The author may be reached at <vikrantdere@gmail.com>.

3 Amish Devgan v. Union of India, (2021) 1 SCC 1, ¶ 86.

Article 19(1)(a) and Preamble of the Constitution of India and has also been upheld by a plethora of Supreme Court jurisprudence.[4] The Constitution of India has been greatly influenced by the Universal Declaration of Human Rights,[5] which also, coincidentally under its Article 19, provides for the freedom of opinion and expression.[6]

This freedom of speech and expression implicitly contains the right to press.[7] Right to press encompasses within itself the right and corresponding duty to report matters of national interest.[8] This ensures that the citizenry is aware and informed of the affairs of the nation and the world alike, which is exemplified as the "*citizens' right to know*".[9]

These rights, although not absolute,[10] have a wide scope and ought not to be suppressed,[11] unless the particulars of the speech fall under any of the reasonable restrictions mentioned under Article 19(2) or are expressly barred by any law in force. However, in the past few decades, this constitutional right has been blatantly abused by those in power[12] by imposing "*prior restraints*" as was seen during the infamous emergency declared by the then Prime Minister, Indira Gandhi in 1975. This was independent India's first experience of blatant censorship.

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[4] Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788; Tata Press Ltd. v. Mahanagar Telephone Nigam Limited, AIR 1995 SC 2438.
[5] P. Balakrishnan v. The Government of Tamil Nadu, 2020 SCC OnLine Mad 637.
[6] G.A. Res. 217 A, *Universal Declaration of Human Rights,* art. 19 (Dec. 10, 1948).
[7] 7 CONSTITUENT ASSEMB. DEB. (Dec. 2, 1948) (remarks of Dr. B.R. Ambedkar), http://loksabhaph.nic.in/writereaddata/cadebatefiles/C02121948.html [hereinafter *Dr. B.R. Ambedkar*].
[8] Indian Express v. Union of India, AIR 1986 SC 515, ¶ 32.
[9] *Id.* ¶ 68.
[10] INDIA CONST. art. 19, cl. 2.
[11] Tehseen S. Poonawalla v. Union of India, (2018) 9 SCC 501, ¶ 21.
[12] § 33 cl. (1)(wa)(i) of the Bombay Police Act, 1951 permits the making of rules to impose prior restraints on 'musical, dancing, mimetic, theatrical or other performances for the public amusement, including melas and tamashas' by the Commissioner of Police (amongst other persons); Indibility Creative Pvt. Ltd. and Ors. v. Govt. of West Bengal and Ors, AIR 2019 SC 1918 (The Bengali Movie *Bhobishyoter Bhoot* was unlawfully obstructed and removed from public exhibition by the West Bengal Government, which was finally remedied by the Supreme Court).

"*Prior restraint*" can be defined as an action to prevent speech or other expressions before such speech or expression has taken place.[13] The general rule prevailing is that such restraint on one's freedom of speech is not permissible, other than for exceptional circumstances.[14] Censorship is the denial of the right to freedom of press and the right to freedom of speech.[15] Therefore, prior restraint is a sort of censorship, but one that is carried out in the name of precaution, citing that dissemination of such material may cause harm in the future.[16]

PRIOR RESTRAINT IN INDIA DURING THE COLONIAL ERA

Resembling a few outdated laws in India, *prior restraint* too is a concept bequeathed by the British. During the colonial era, several restrictions were placed to curtail the freedom of speech and expression of Indians. One of the earliest and most blatant forms of *prior restraint* was the implementation of the Censorship of Press Act, 1799,[17] by Lord Wellesley. This act was passed to keep a check on growing nationalistic tendencies, especially during the anticipation of a French invasion. Under this act, the names of persons involved in publishing the material in question were required to be printed, and prior certification by the secretary of censorship was compulsory.[18] This draconian act continued to be in force even after such danger had elapsed, thereby implying an ulterior motive regarding its implementation. This was the beginning of a long journey towards incessant press censorship with the passing of various acts, including the Licencing Act, 1867, the Vernacular Press Act, 1878, the Newspaper (Incitement to Offences) Act, 1908 and the Press Regulation Act, 1942.

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[13] Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 YALE L.J. 648 (1955).
[14] Halvi K.S. v. The State of Kerala and Ors., 2020 SCC OnLine Ker 3759, ¶ 24.
[15] *Censorship,* BLACK'S LAW DICTIONARY (4th ed. 1968); *see also* Esquire v. Walker, 55 F. Supp. 1015, 1020 (D.D.C. 1944).
[16] Firoz Iqbal Khan v. Union of India, (2021) 2 SCC 591.
[17] 9 WILLIAM CORBBETT, CORBETT'S POLITICAL REGISTER, 373-374 (1806), https://babel.hathitrust.org/cgi/pt?id=uc1.b3494131&view=1up&seq=217. [hereinafter *Censorship of Press Act, (1799)*].
[18] 2 ROBERT ROUIERE PEARCE, MEMOIRS OF THE MOST NOBLE RICHARD MARQUESS WELLESLEY 282 (Richard Bentley 2d ed. 1847), https://babel.hathitrust.org/cgi/pt?id=umn.319510024129316&view=1up&seq=326.

The Indian press during the colonial era played a crucial role in developing political consciousness among the masses,[19] which is inferred from the regressive steps taken by the British authorities to curb growing dissent. Therefore, while drafting the Constitution of India, great emphasis was laid on concepts of the United States of America ("**US**") pertaining to the Bill of Rights, under the first amendment to the US Constitution ("**First Amendment**").[20] In particular, the terms "*speech and expression*" were expressly mentioned in Article 19(1)(a)[21] to accord a broader construction which includes the right of a citizen to communicate information, ideas, and beliefs through any medium such as print, word of mouth, pictures, films, et cetera.[22]

POST-COLONIAL DEVELOPMENTS

Once the Constitution of India came into force, the right to freedom of speech and expression was considered one of the most crucial fundamental rights. Furthermore, in *Sakal Papers v. Union of India*, the Supreme Court emphasised that the right of press emanating from this right to freedom of speech and expression is instrumental for the smooth functioning of democracy.[23]

However, the Constitution of India was amended to limit Article 19(1)(a) against the abuse of freedom of speech and expression,[24] paving the way for the government to impose "*reasonable restrictions*" on the freedom of expression in the interest of the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation, or incitement to an offence.[25] Without this amendment, it was difficult for the government to place restrictions on

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[19] Kesari, the Marathi newspaper founded by Lokmanya Bal Gangadhar Tilak in 1881; The Bombay Chronicle founded by Pherozeshah Mehta in 1913; Young India Journal started by Mahatma Gandhi are some publications which helped spread nationalistic propaganda against the British.
[20] DURGA DAS BASU, COMPARATIVE CONSTITUTIONAL LAW 87–88 (3d ed. 2014).
[21] INDIA CONST. art. 19, cl. 1(a).
[22] Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.
[23] Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842; Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788.
[24] Parliamentary Debates, Vol. XII, Part 2, ¶¶ 8815-16 (1951).
[25] INDIA CONST. art. 19, *amended by* The Constitution (First Amendment) Act, 1951.

speech which could possibly lead to hostility between different groups (caste, gender, et cetera.), resulting in large-scale violence. Furthermore, the members of Parliament were disturbed by the observations made by Justice Sarjoo Prasad of the Patna High Court in the case of *Bharati Press v. C.S. Government of Bihar*.[26] In the said case, the Hon'ble Judge had expressed that the right to free speech also envisaged the right of a citizen to preach or incite the act of murder and other heinous crimes, along with the lurking fear of demands for cessation.[27] However, the intention of his statement was not to make any declaration of law; but rather to bring to light the anomalous position prevalent in the provisions.[28]

Moreover, courts then, interpreted the rights enshrined under Article 19(1)(a) liberally; to the extent that it could even protect individuals advocating acts of violence or murder.[29] Therefore, to combat such harmful, liberal interpretations of Article 19(1)(a), there now exist "*reasonable restrictions*" provided under Article 19(2)[30] of the Constitution of India, against the right of freedom of speech and expression.[31]

THE CONSTITUTIONALITY BEHIND PRIOR RESTRAINT

On a plain reading of the Constitution of India, the stance of prior restraints is rather ambiguous because the rights conferred by Article 19(1)(a) are immediately curbed by the restrictions placed under Article 19(2). Therefore, through several judicial precedents, the courts have attempted to define the scope, extent, and objective standard for such censorship, and have laid out instances wherein such restraint can or cannot be permitted.

As stated earlier, censorship or restraint, as it may appear, must ideally never be a precautionary action and may be taken at a later stage, save in

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[26] Bharati Press v. C.S. Government of Bihar, AIR 1951 Pat 12.
[27] ABHINAV CHANDRACHUD, REPUBLIC OF RHETORIC: FREE SPEECH AND THE CONSTITUTION OF INDIA, 76 (2017).
[28] TRIPURDAMAN SINGH, SIXTEEN STORMY DAYS: THE STORY OF THE FIRST AMENDMENT TO THE CONSTITUTION OF INDIA, 82 (2020).
[29] *Bharati Press*, AIR 1951 Pat 12.
[30] INDIA CONST. art. 19, cl. 2.
[31] V. Govindu, *Contradictions in Freedom of Speech and Expression*, 72 INDIAN J. POL. SCI. 641–42 (2011).

certain exceptional situations.[32] To propound this doctrine, the Supreme Court of India has expressed a similar opinion in the landmark case of *Romesh Thapar v. Union of India,*[33] wherein a weekly magazine critiquing the policies of the then government was censored to the extent that its circulation was restricted under the Madras Maintenance of Public Order Act, 1949.[34] The Apex Court stated that without circulation, publication would be of little value, and the restrictions encapsulated under Article 19(2) must not be attracted in such cases, but only where the potential speech is likely to have an adverse effect of overthrowing the government.[35]

Another landmark judgment outlining the surge of prior restraint in India was the case of *Brij Bhushan v. State of Delhi,*[36] wherein the state of Delhi had the authority to seek scrutiny prior to publication, to ensure "*public safety*" and "*public order*", under the East Punjab Public Safety Act, 1949.[37] While the Apex Court struck down the order of the commissioner, it simultaneously opined that such scrutiny was permissible under the Constitution of India provided that the restraint fell under the restrictions as prescribed under Article 19(2). Similarly, it has been held that prohibiting a newspaper from publishing its views about any burning topic of the day is a serious encroachment upon their rights, except when the same attracts the provisions of Article 19(2).[38]

It is pertinent to note that in both the cases i.e., of *Romesh Thapar* and *Brij Bhushan*, the parties had sought action against the constitutionality of the statute and not against the action taken by the executive.

In the case of *K.A. Abbas v. Union of India,*[39] the Supreme Court of India upheld the validity of pre-censorship of films stating that films ought to be treated distinctly, as compared to other forms of media as they had higher

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32 Halvi K.S. v. The State of Kerala and Ors., 2020 SCC OnLine Ker 3759.
33 Romesh Thappar v. Union of India, AIR 1950 SC 124.
34 Madras Maintenance of Public Order Act, 1949, § 9 (1-A), No. 23, Acts of Madras State Legislature, 1949.
35 *Romesh Thapar*, AIR 1950 SC 124, ¶ 4.
36 Brij Bhushan v. State of Delhi, AIR 1950 SC 129.
37 East Punjab Public Safety Act, 1949, § 7(1)(c), No. 5, Acts of East Punjab State Legislature, 1949 (*repealed*).
38 Virendra v. State of Punjab, AIR 1957 SC 896.
39 K.A. Abbas v. Union of India, AIR 1971 SC 481.

capabilities, potential to stir up emotions, more intense than any other form of art. This proposition of law was reiterated in the case of *S. Rangarajan v. P. Jagjevan Ram*,[40] wherein it was stated that prior restraint might be necessary for films. The Supreme Court also added that that mere open criticism of the government policies and operations is no ground for restrictions.[41]

Another important milestone in this quest to establish the true nature and implication of prior restraint was the landmark case of *R. Rajagopal v. State of Tamil Nadu*.[42] In the said case, the Supreme Court opined that the government has no authority to impose a prior restraint upon publication of defamatory material against its officials and there is no law empowering the state or its officials to prohibit or to impose a prior restraint upon the press or media. The press is very much entitled to publish anything, in so far as it appears from public records, and they make all possible attempts to reasonably verify the truthfulness of all the facts.[43]

Therefore, in light of the early development of the concept, it may be observed that prior restraint is held to be permissible, but only in rare and exceptional cases, and is largely frowned upon with reference to newspapers, magazines, and other forms of print media. With movies and other such audio-visual mediums, however, the law is slightly different owing to the line of judgments that uphold prior restraint for the purpose of maintenance of public order.

The courts, as the sentinel on the *qui vive,* have indeed proved to be satisfactory in this role. However, we continue to be apprehensive of the governmental stance on this topic.

CONTEMPORARY ISSUES AND PRIOR RESTRAINT: MEDIA TRIALS

In recent times, the role of the press as the fourth pillar of democracy assumes greater importance. However, the absolute freedom of press has

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40 S. Rangarajan v. P. Jagjevan Ram, (1989) 2 SCC 574.

41 *Id.*

42 R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

43 *Id.*

always been a contentious issue dealt with by courts in many instances. The courts have strived to attain a balance between the rights of media and other counterpart rights like the right to a fair trial or the right to privacy.

FREEDOM OF PRESS OR A MEDIA TRIAL

There have been numerous instances where the freedom of media has been misused, primarily with reference to the growing onslaught of *fake news* and the lurking fear of *media trials* in controversial cases.

For instance, in *Sahara India Real Estate Corporation v. SEBI,*[44] owing to a large amount of unsolicited media attention, the Supreme Court held that it has the inherent power and jurisdiction to prohibit temporarily, statements being made in the media that would hinder the administration of justice in a given case pending before any court.[45] Therefore, the Supreme Court observed that in such controversial matters, the right to a fair trial of the aggrieved and the right of others to receive information must be balanced.[46] It is in lieu of such balance that a decision to either temporarily prohibit publication may or may not be granted. An aggrieved person may therefore approach any constitutional court of appropriate jurisdiction, seeking relief against the constant vilification by the media in a sub-judice matter, which could possibly be detrimental to the administration of justice.[47] The court then ought to balance the right to a fair trial[48] and Article 19(1)(a) rights, while considering the principles of necessity and proportionality. Moreover, the court in this case also held that such postponement of publication must be for a short duration and must be applied only in case of apparent risk of prejudice to the administration of justice.

The importance given to freedom of speech in light of media gag orders has been exemplified in the decision of the Bombay High Court in the case

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[44] Sahara India Real Estate Corporation v. SEBI, (2012) 10 SCC 603.
[45] Gautam Bhatia*, Judicial Censorship, Prior Restraint and the Karnan Gag Order*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, (May 9, 2017), https://indconlawphil.wordpress.com/2017/05/09/judicial-censorship-prior-restraint-and-the-karnan-gag-order/.
[46] *Sahara India Real Estate,* (2012) 10 SCC 603.
[47] *Id.*
[48] INDIA CONST. art. 21.

relating to the alleged fake encounter. In *Sohrabuddin Sheikh,*[49] the court opined that the special CBI court did not have the requisite authority to ban press media from publishing information about the court proceedings and ruled in favour of the petitioners, classifying the press as "*the most powerful watchdog of public interest in a democracy*".[50]

Similar decisions have also been witnessed, for instance, when the Supreme Court set aside the media ban imposed by the Patna High Court while reporting on the *Muzaffarpur Shelter Home* case[51] and also by the decisions of various other High Courts setting aside similar media bans.

However, it must also be noted that the approach of the court has not always been in favour of this freedom. In the infamous contempt proceedings of Justice Karnan,[52] the Supreme Court issued an order restraining the media from printing or publishing anything said by him. The reasoning behind this order was that the contemnor in question had publicly levelled several baseless allegations against numerous constitutional functionaries and not provided even a shred of evidence to substantiate the same.[53] According to the court, this would shake the confidence of the public in the sanctity and efficacy of the judiciary and, therefore, did not amount to bona fide exercise of one's freedom of speech and expression. However, in our opinion, this appears to be an erroneous decision, as the court itself has detracted from its self-developed principle of ensuring transparency in delivering justice by issuing such an order under the garb of protecting the integrity of the institution itself.

FREEDOM OF PRESS V. RIGHT TO PRIVACY

Indian courts have been faced with a dilemma as to which right shall supersede the other. In the case of *Kanimozhi Karunanidhi v. Thiru. P. Varadarajan,*[54] the Madras High Court, opined that in light of the recent decision in the *Puttaswamy* case,[55] the obsolete or redundant notion that

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[49] Sunil Baghel v. The State of Maharashtra, 2018 CriLJ 4298.
[50] *Id.* ¶ 34.
[51] Nivedita Jha v. State of Bihar, 2018 SCC OnLine SC 3409.
[52] Justice C.S. Karnan v. The Supreme Court of India, (2017) 7 SCC 1.
[53] *Id.* ¶ 46.
[54] Kanimozhi Karunanidhi v. Thiru. P. Varadarajan, 2018 AIR CC 3118.
[55] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

prior restraint on media cannot exist has been diluted, stating that the media cannot publish anything they like, in the guise of public interest.

Interestingly, in the *Puttaswamy* case, the court delved into the aspect of prior restraint with reference to the *Autoshankar* case,[56] as mentioned earlier. With the right to privacy being inducted as an integral aspect of Article 21, a question may arise as to which right may prevail in case of a conflict between an individual's privacy and the press' right to report. In this regard, it must be noted that an individual has a right to be forgotten,[57] as has also been recognized by the Indian courts.[58] In our view, perhaps the answer to this dilemma would be to balance the individual's privacy with respect to whether such information is necessary for the public interest. Accordingly, the prejudice caused to either party will have to be considered, with either the restriction or dissemination of information, as the case may be. For instance, the Bombay High Court[59] examined the responsibility of the media with regard to reporting of matters, which may undoubtedly bring in soaring TRP ratings, but will, in turn, lead to interference with the administration of justice and may irreparably harm the accused's case.

In the case of *Union of India v. Association of Democratic Reforms*,[60] the Supreme Court observed that the information concerning the criminal record, educational background, and assets of election candidates has to be disclosed to the public. This would enable the public to arrive at an informed decision about their electoral candidates.[61]

Hence it may be concluded, that with regard to prior restraint, the judiciary has certainly taken a proactive role in ensuring that the right of the media is not curbed owing to the malicious intent of those in power. In these cases, the judiciary has been called upon to balance between several rights.

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[56] R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

[57] Case C-131/12, Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González, [2014] Q.B. 1022.

[58] Vasunathan v. The Registrar General, High Court of Karnataka, 2017 SCC OnLine Kar 424; Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd., 2019 SCC OnLine Del 8494.

[59] Nilesh Navalakha v. Union of India, (2021) 2 AIR Bom R 179.

[60] Union of India v. Association of Democratic Reforms, AIR 2001 Delhi 126.

[61] *Id.*

In some instances, the right of media is overtaken by other rights. For instance, the Delhi High Court[62] and subsequently the Supreme Court[63] proceeded to issue an injunction, thereby prohibiting the further telecast of a programme called *Bindaas Bol*, by a television channel named *Sudarshan News*. This was done because the content of the said programme was prima facie in gross violation of the Cable Television Networks (Regulation) Act, 1995 read together with the Code of Ethics and News Broadcasting Standards Regulations. If the said programme was telecasted, it would have caused irreparable damage to the petitioners by openly vilifying a religious community in public.

Therefore, the proactive role of the judiciary in protecting the right of the media is not free from critique, as it may appear that the courts are not applying an objective standard and may be influenced by their own personal subjective views.

The fear however is that the right to media may be treated as the right to privacy, with the advent of legislation such as the Personal Data Protection Bill, 2019,[64] which treats a judicially recognised fundamental right as a mere legal right. This bill has certain self-defeating provisions, permitting the centre to exempt its agencies from the application of the legislation,[65] which may have many far-reaching harmful implications in the future. We believe that this fundamental right of privacy has been reduced to a mere statutory right by such provisions of this bill. Therefore, we fear that the same can be done to the right to press.

PRIOR RESTRAINT IN THE UNITED STATES OF AMERICA

To gain a better insight into the permissibility of such restraint, it is important to understand the stance of this doctrine in the US, especially because the rights conferred under Part III of the Constitution of India have been borrowed from the US Constitution.[66]

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[62] Syed Mujtaba Athar v. Union of India, 2020 SCC OnLine Del 1091.
[63] Firoz Iqbal Khan v. Union of India, (2021) 2 SCC 591.
[64] Personal Data Protection Bill, 2019, No. 373, Acts of Parliament, 2019.
[65] *Id.* § 35.
[66] 3 CONSTITUENT ASSEMB. DEB. (Apr. 29, 1947) (remarks by Alladi Krishnaswami Ayyar), https://eparlib.nic.in/bitstream/123456789/762962/1/cad_29-04-1947.pdf.

Similar to the case of India, the animosity towards British rule grew when the Americans felt that their liberty was under threat.[67] Initially, various scholars were of the opinion that freedom of press also encompasses the doctrine of prior restraint;[68] however, the founding fathers of the US Constitution strongly believed that prior restraint would serve as an antithesis to a well-informed and healthy democracy.[69]

This was the key belief behind the First Amendment,[70] under which it expressly mentions "*freedom of press*" as opposed to the Constitution of India which does so implicitly, as interpreted from the assembly debates.[71] The key similarity of law between these two constitutions was dealt with by Justice Bhagwati when he opined that the rights under Article 19(1)(a) were largely based on the First Amendment, and, therefore, judgments rendered by the US Supreme Court can be referred for its better interpretation.[72] Therefore, it may also be contended that the Indian authorities must not misuse the provisions of Article 19(2) and must avoid imposing prior restraints, just as their US counterparts.

The application of the free speech doctrine in the US is absolute, by virtue of the First Amendment. This is in contrast to its application in India, which is subject to the restrictions given in Article 19(2).

To bring out the difference in the judicial application of the free speech doctrine, the aspect of advertising as an exercise of freedom of expression, may be considered. The Supreme Court of India has previously held that commercial advertising or commercial speech is protected under Article 19(1)(a).[73] However, the Bar Council of India Rules[74] prohibit an advocate from advertising or soliciting any kind of work, directly or even indirectly. The Supreme Court of India has, while upholding this prohibition on advertisement, opined that the practice of law is not a trade and that

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[67] Government of Andhra Pradesh and Ors. v. P. Laxmi Devi, (2008) 4 SCC 720, ¶ 89.
[68] Daniel Baracskay, *Prior Restraint*, THE FIRST AMENDMENT ENCYCLOPAEDIA (May 20, 2020), https://www.mtsu.edu/first-amendment/article/1009/prior-restraint.
[69] *Id.*
[70] U.S. CONST. amend. I (amended 1791).
[71] Dr. B. R. Ambedkar, *supra* note 7.
[72] Express Newspapers (Private) Ltd. v. Union, AIR 1958 SC 578.
[73] Tata Press Ltd. v. Mahanagar Telephone Nigam Limited, AIR 1995 SC 2438 at 25.
[74] Bar Council of India Rules, r. 36 (1975).

commercial competition would vulgarize the legal profession.[75] This bar, therefore, stems from the restrictions given under Article 19(2).

Conversely, the US Supreme Court has taken the stance that the right to advertise would also be available to licensed attorneys and has opined that the belief that lawyers are somehow above "*trade*" is an anachronism.[76] The reasoning given by the Court was that the traditional mechanism of advertising in a free-market economy would, in turn, benefit the administration of justice and that as long as the advertisement was not misleading, it will be protected by the First Amendment.[77]

From the aforesaid, it is evident that there arises a difference in not only the application of the free speech doctrine but also public morality vis-a-vis how a liberal expression of free speech would be perceived by society at large.

The freedom of speech in the context of the US has received wide public acclaim owing to the complete freedom given to its citizens, and the bold decisions in cases such as *Near v. Minnesota,*[78] which was one of the initial moves against the prior restraint doctrine, and was supplemented by the decision in *New York Times Co. v. United States,*[79] in which the US Supreme Court placed the freedom of speech and expression at a high pedestal by lifting the restraint on publication, even on matters pertaining to the confidential "*Pentagon Papers*".

Although the rights under Article 19 of the Constitution of India are not absolute, as opposed to the United States, the approach of Indian courts should be akin to the principles adopted by the US and in consonance with Justice Bhagwati's observation.[80] We also cannot be oblivious of the fact that these rights have been borrowed from the US Constitution. The position of freedom of speech and expression under the US Constitution is ideal. However, the stance for this right in India and the US differ due to the prevailing socio-cultural factors and the manner in which society is

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75 The Bar Council of Maharashtra v. M.V. Dabholkar, AIR 1976 SC 242.
76 Bates v. State Bar of Arizona, 433 U.S. 350 (1977).
77 *Id.*
78 Near v. Minnesota, 283 U.S. 697 (1931).
79 New York Times Co. v. United States, 403 U.S. 713 (1971).
80 Express Newspapers (Private) Ltd. v. Union of India, AIR 1958 SC 578.

perceived. The approach followed by the US pertaining to this right need not be followed blindly or strictly in India but should be taken as a guide.

CONCLUSION

In our opinion, it is rather disturbing that an individual is capable of being punished not as a consequence of what he or she has said, but on the presumption that what may be published prospectively could be detrimental to public order. It is unsettling that the media can be stripped of their right to voice their opinions, ideas, or information in such a manner.

It is a sorry state of affairs to have the fourth pillar of our democracy struggling to stand tall and fearless, without the support of the government. However, the government may not miss an opportunity to cast blows on this edifice, whenever the information disseminated shows the authorities in a bad light. The government should maintain a position of non-interference with respect to media, especially when it comes to pre-publication censorship. In our humble opinion, the only thing worse than unchecked and unbridled media is state-controlled media.

With India's increasing threat of preventive laws, the civil liberties of the citizens are largely affected. The last thing that our democracy needs is more laws that curb the freedom of press in the country. Restraint is mostly faced in those situations where the information can prove to be detrimental to those in power, and hence immediate coercive steps are taken to curb the same. This goes against the concept of the right to receive information as has been expressed in various cases[81] where the Supreme Court has said that in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government.

Furthermore, if there is a constant check on the content of the material that is being published, especially by an interested party such as the state, the very essence of the role of media as an important functionary of

[81] Dinesh Trivedi, M.P. v. Union of India, (1997) 4 SCC 306; Association for Democratic Reforms v. Union of India, AIR 2001 Del. 126; State of U.P. v. Raj Narain, (1975) 4 SCC 428.

democracy will be rendered defunct. This will result in a largely state-owned media which is a definite precursor to an undesirable Orwellian dystopia.

When a matter comes up before a court pertaining to such cases, the test as postulated in the *Sahara* case[82] must be applied to adjudge the long-term effects of such publications, without resorting to any blanket bans. Any restrictions so imposed must only be temporary. In certain matters, if the situation arises that confidential information, which the public ought not to know is being addressed, those stages of proceedings may be held in camera and the media may be selectively restrained from publishing the particulars of such evidence, as has been done in the case of *Ratan Tata v. Union of India,*[83] pertaining to a series of recorded telephonic conversations. Moreover, to prevent the growing onslaught of media trials, certain points from the 200th Law Commission Report on media trials[84] may be considered to formulate reasonable amendments in the law keeping in mind the sensitive particulars of sub judice matters before courts.

This report offered several recommendations as regards the Contempt of Court Acts, 1971,[85] to prevent sensitive, sub-judice matters from being sensationalized by the press. This would entail an expansive reading of the word "*publication*", so as to encapsulate all forms of dissipation of information.

Additionally, a need was felt to amend the contempt law, especially in terms of Section 3,[86] to deem that a criminal proceeding would be said to be "*pending*" when an arrest is made, as opposed to when the charge sheet is filed. The commission also suggested that media personnel be trained in certain aspects of law as part of their curriculum, in order to boost media standards and maintain professional ethics.

With reference to prior restraints, the law commission report suggested that the powers of postponement of publication be vested only with

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82 Sahara India Real Estate Corporation v. SEBI, (2012) 10 SCC 603.
83 Ratan N. Tata v. Union of India, (2014) 1 SCC 93.
84 LAW COMMISSION OF INDIA, TRIAL BY MEDIA – FREE SPEECH AND FAIR TRIAL UNDER CRIMINAL PROCEDURE CODE, 200 (1973), http://lawcommissionofindia.nic.in/reports/rep200.pdf.
85 The Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971.
86 *Id.* § 3.

constitutional courts and that such postponement would not mean absolute prohibition. In this regard, the commission also noted that prior restraint is a serious encroachment on the right of the press,[87] and must not be interfered with, save when there is a significant risk or a serious prejudice that may be caused.

Furthermore, with reference to reporting of other events, a mere critique of the government and its officials should not serve as a bar to impose prior restraint, under the garb of maintenance of public order and tranquillity. The intention of the person who disseminates such information ought to be considered, with the plea of truth and public importance being enforced in their absolute terms.

Whereas, with regard to certain obscene or offensive material, the old Hicklin's test[88] is no longer a valid criterion for measuring the same[89] and hence courts must again assess the influence that the piece in question will have on society, without imposing any blanket bans, which are of course not within the purview of the pre-existing law.

Having made these observations, the authors are by no means implying that the media must be allowed to proceed without any checks or fear of consequences. The advent of *fake news* is a serious concern and poses as much a threat to a functioning democracy as does blatant censorship. The press ought to adhere to all their self-established guidelines such as the Norms of Journalistic Conduct implemented by the Press Council of India[90] and must practice disciplined self-censorship.

Therefore, as stated earlier, the intention of the disseminators ought to be considered, which can be established and ascertained at the time of trial. Furthermore, a caveat may be given as a deterrent to keep such malicious acts in check. However, a prior form of censorship wherein each publisher is required to obtain prior approval from a certain body/authority is neither

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[87] Reliance Petrochemicals Ltd. v. Proprietors of Indian Express, (1994) 4 SCC 592.

[88] R v. Hicklin [1868] LR 3 QB 360 (The test laid down in this case, permits a publication to be judged for obscenity on the basis of isolated passages considered out of context, and their apparent influence on the most susceptible of minds).

[89] Aveek Sarkar v. State of West Bengal, AIR 2014 SC 1495.

[90] PRESS COUNCIL OF INDIA, NORMS OF JOURNALISTIC CONDUCT (2010).

practical nor is permissible under the prevailing jurisprudence in the context of prior restraint.

We further believe that instances, such as pandemics and emergencies may call for special provisions. However, citizens must be aware that such situations can be misused to further impose restrictions. The failure to lift such restrictions even after such testing times have passed will cause further impairment to the rights of the people as was done by the British with the enactment of the Censorship of Press Act, 1799, even after the danger of invasion had passed.[91] However, if at all such situations arise, the duty will fall on the broad shoulders of the courts to protect the fundamental rights of its citizens. An instance of the same was observed when the Supreme Court refused to impose any restrictions pertaining to the dissemination of "*fake news*", stating that the media ought to report responsibly and only publish the official version of developments;[92] a practice that the authors believe is the most appropriate manner of dealing with cases wherein rights of two such individuals are pegged against each other.

[91] Censorship of Press Act (1799), *supra* note 17.
[92] Alakh Alok Srivastava v. Union of India, 2020 SCC OnLine SC 345.

SONS OF SOIL: A CONSTITUTIONAL OR CONVENIENT FEDERALISM? AN ANALYSIS OF THE HARYANA STATE EMPLOYMENT OF LOCAL CANDIDATES BILL, 2020

ROMIT NANDAN SAHAI[1]

Over the years, India has witnessed an alarming trend of domicile reservations being enacted in its states at the relegation of the unitary citizenry mandated by the Constitution. One of many such legislations is the Haryana State Employment of Local Candidates Bill, which was tabled and passed in 2020. The bill has been controverted on two counts—the ambiguous legality of the domicile-based reservation that it creates and the implementation of such reservation to the private sector. The aim of this paper is to firstly, highlight the premise of domicile reservation and the extent of its precarious constitutionality. Subsequently, the paper shall explore the discourse of rationality through the lens of reasonable differentia to see whether the reservation provided holds any merit to its object and purpose. Finally, the paper shall showcase the implications of such a policy on India's wheel of economy and argue a defence as to why such policies are not in tandem with the interests of the country.

INTRODUCTION

In the month of November of 2020, the Janayak-Janta Party in a bid to fulfil one of its manifesto covenants[2] passed the Haryana State Employment of Local Candidates Bill, 2020[3] ("**Bill**"), mandating seventy-five per cent reservation in all local jobs, private or otherwise, for its domiciled residents. In my opinion, this Bill is an attempt to relieve the state populace by relegating employment opportunities within the confines of a self-erected provincial enclosure that fraught the peripheries of the Constitution and public policy. The salience of the Bill lies in its mandate

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[1] Romit Nandan Sahai is a third year B.B.A. LL.B. student of Vivekananda Institute of Professional Studies. The author may be reached at <romitsahai@gmail.com>.

[2] Gaurav Vivek Bhatnagar, *Haryana's Bill Providing 75% Local Quota in Private Sector Jobs May Run into Legal Hurdles,* THE WIRE (Nov. 6, 2020), https://thewire.in/labour/haryanas-bill-providing-75-local-quota-in-private-sector-jobs-may-run-into-legal-hurdles.

[3] The Haryana State Employment of Local Candidates Bill, 2020, No. 33, Bill of Haryana State Legislative Assembly [hereinafter *Bill*].

upon all business entities operating within Haryana, with ten or more persons in its workforce,[4] to observe a seventy-five per cent reservation for employment of local candidates in posts within the salary slab of fifty thousand rupees as remuneration.[5] The Bill is to run for a ten-year period upon commencement[6] and provide this seventy-five per cent pre-empted preference in employment to all those who are domiciled in the state of Haryana.[7] The Bill's postulation of reservation in private sector jobs is still very nascent but by no means is this a first of its kind.[8] In the past three years, there has been a growing trend in several states coming out with policies bearing similar semblance.[9]

Madhya Pradesh was the first state to introduce a domicile quota in government jobs and partially in private companies enjoying aid from the government.[10] This was soon followed by Andhra Pradesh in 2019, which passed a law providing seventy-five per cent reservation to its local population in all private factories ("**Andhra Pradesh Act**").[11]

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[4] *Id.* § 1(5).
[5] *Id.* § 4.
[6] *Id.* § 1(4).
[7] *Id.* § 2(g).
[8] Quint Group, *Haryana-Assembly-Passes-Bill for 75% Quota for Locals in Pvt Jobs,* THE QUINT (Nov. 5, 2020), https://www.thequint.com/news/india/haryana-assembly-passes-bill-for-75-quota-for-locals-in-private-jobs#read-more.
[9] Forbes, *Times Face-Off: State After State is Passing or Proposing Job Reservation for Locals,* TIMES OF INDIA (Apr. 23, 2021), http://timesofindia.indiatimes.com/articleshow/82094665.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst; *see also* TOI Staff, *Why Job Reservation for Locals don't work*, TIMES OF INDIA (Mar. 22, 2021), https://timesofindia.indiatimes.com/india/why-job-reservation-for-locals-does-not-work/articleshow/81606787.cms.
[10] Kumar Anshuman, *Govt Jobs and resources of MP reserved for people of state: CM Shivraj Singh Chouhan,* THE ECONOMIC TIMES (Aug. 19, 2020), https://economictimes.indiatimes.com/news/politics-and-nation/government-jobs-in-madhya-pradesh-only-for-local-residents-shivraj-singh-chouhan/articleshow/77613875.cms?from=mdr.
[11] The Andhra Pradesh Employment of Local Candidates in Industries/Factories Act, 2019, No. 29, Act of Andhra Pradesh State Legislative Assembly [hereinafter *Andhra Pradesh Act*].

The Andhra Pradesh Act, is now under challenge.[12] Karnataka too attempted to mull a local reservation policy; first in 2018 by providing a blanket reservation which was later scrapped due to its questionable legality and then once again in 2020, provided reservation only for Kannadigas citing their backward class.[13] The latest promulgation of the state government of Haryana, therefore, is a perfect window of opportunity to examine the legality of such reservation policies.

DOMICILE QUOTA: A SUBTRACTION FROM THE COMMON CITIZENRY?

The foremost impetus into the legality of such policy is to see whether a domicile-based distinction is constitutional or not. The Constitution of India consecrates the oneness of the country, where the concept of domicile seemingly has no place in, by creating single citizenship.[14] The concept of single citizenship implies that citizens of India are entitled to freely move within its territory and to reside and settle in any part of it.[15] Article 16 explicitly affirms that domicile discrimination is impermissible through its words "*place of birth*" and "*residence*" while Article 15 partly upholds this position through its inclusion of "*place of birth*" only. Dr. B.R. Ambedkar felt that the insertion of "*residence*" would be redundant as Article 16 sufficiently covers the implications of its exclusion.[16] This inadvertence has, however, become a major scar on the faceted unanimity as depicted by the Constitution because of its brazen abuse by politicians to cede to public pleasing.[17]

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[12] Varinder Bhatia, *Explained What Haryana's Move to Reserve 75% Private Jobs Means for Companies,* INDIAN EXPRESS (Nov. 12, 2020), https://indianexpress.com/article/explained/explained-what-haryanas-move-to-reserve-75-private-jobs-means-for-companies-6995688/.

[13] Manu Aiyappa Kanthananda, *Karnataka Govt to Move Bill on Quota for Kannadigas,* TIMES OF INDIA (Dec. 15, 2019), https://timesofindia.indiatimes.com/city/bengaluru/karnataka-govt-to-move-bill-on-quota-for-kannadigas-in-next-session/articleshow/72662154.cms.

[14] INDIA CONST. arts. 5-11.

[15] INDIA CONST. art. 19.

[16] 8 CONSTITUENT ASSEMB. DEB. (Nov. 29, 1948) 650-700, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29.

[17] Bhatnagar, *supra* note 2, ¶ 4.

The Apex Court for the first time, examined the permissibility of domicile-based discrimination, in the case of *D.P. Joshi v. State of M.B.*[18] wherein, it observed that the occurrence of the word "*residence*" in one provision and not in the other, clearly shows that such distinction is not only contemplated but also permissible under Article 15. It held so on the ground that "*domicile*" or "*residence*" is different from both citizenship and place of birth. Under English jurisprudence,[19] "*domicile simpliciter*" means the permanent home of a person. While every person receives their domicile at the place of their birth, the two are different owing to the reason that a person's permanent home can change but not vice-a-versa.[20] Domicile is also not second citizenship insofar as nationality is the political status of a person while domicile is the identity of his civil rights.[21] Both of these are two distinct yet parallel legal statuses where the former denotes the laws of the country one is subjected to while the latter denotes the private laws governing his character namely—marriage, succession, testacy et cetera.[22] The Apex Court by placing reliance on the same observed that because states are empowered to legislate on matters relating to succession, marriage et cetera. for its territory, it is hence possible for different states to have different domiciles.[23] Thus, it held by a 4:1 ratio that a domicile based distinction is not hit by Article 15.[24]

This justification of the Apex Court was however flawed on two counts: *firstly*, it confused domicile with personal laws and *secondly*, both domicile and single citizenship cannot co-exist without contravening the Constitution. *Jaganndhadas J.* in his dissenting judgment rightly pointed out that what constitutes private or civil laws in English jurisprudence are nothing but the personal laws under the Indian jurisprudence which connotes to one's faith, creed or religion and any discrimination on that

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18 D.P. Joshi v. State of M.B., AIR 1955 SC 334.

19 A. V DICEY, CONFLICT OF LAWS, at 87-91 (6th ed. 1949); *see also*, LORD HALSBURY, HALSBURY'S LAWS OF ENGLAND, at 198 (3d ed. 1952).

20 Walter Whicker v. Joseph Hume, (1858) 7 HLC 124 (UK).

21 *D.P. Joshi*, AIR 1955 SC 334, ¶ 11.

22 Somerville v. Somerville, (1801) 5 Ves Jun 750.

23 INDIA CONST. sch. VII List III Entry 5.

24 *D.P. Joshi*, AIR 1955 SC 334, ¶¶ 22, 45.

basis is strictly prohibited.[25] If domicile based discrimination is allowed, then a contradicting paradigm would be created wherein the outsiders of a particular domicile who have been vested the fundamental rights by virtue their citizenship could be deprived of it because of a state-created domicile based discrimination. Such a scenario, is akin to what is happening under the Bill—those who are not domiciles, are denied their freedom to reside and settle which also includes the right to freely seek employment,[26] because of a state domicile conferring this right exclusively to those who are domiciles.

Realising these flaws nearly nineteen years later, the Apex Court in the case of *Pradeep Jain v. Union of India*,[27] held that an Indian has only one domicile—a domicile of the territory of India. It observed that the solemn resolve of the Preamble is to impart equal status to all its subjects.[28] The Apex Court further observed that the Constitution has, with great deliberation, declared that India is a "*union of state*s" enjoined by common citizenship.[29] It was also held that a domicile is not independent of the citizenry as it distinguishes the citizens of the same country as either belonging to a certain state or as an outsider to it; and to regard anyone as an outsider is to deny him his constitutional right of equal status and to freely reside and settle within the country.[30] The Court thereby reasoned that any form of domicile would derecognize the essence of unity and integrity of the nation.[31]

It is however important to note that the Apex Court, in this verdict pronounced only domicile-based distinction as unconstitutional and not one based purely on residence.[32] While domicile means permanent residence, its concept has more to do with determining the customs and personal laws of a person belonging to a particular place of residence.[33] Thus, along with partially affirming the verdict of *D.P. Joshi*,[34] the Supreme

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[25] *Id.* ¶ 25 *(Dissenting judgment proffered by Jaganndhadas J.)*.
[26] INDIA CONST. art. 19.
[27] Pradeep Jain v. Union of India, (1984) 3 SCC 654.
[28] *Id.* ¶¶ 3-4.
[29] INDIA CONST. art. 1.
[30] INDIA CONST. art. 19, cl. 1(d), art. 19, cl. 1(e).
[31] *Pradeep Jain*, (1984) 3 SCC 654, ¶ 7.
[32] *Id.* ¶ 10.
[33] *Id.* ¶ 9.
[34] *Id.* ¶ 10.

Court also laid down the true test of such distinction wherein, what has to be seen, is whether the minced word "*domicile*" confers an altogether different status or a simple classification on the basis of residence where the former, i.e., a separate status would be bad in law but the latter, i.e., a classification on residence will be permissible in all reasonable circumstances except public employment as mandated by Article 16.[35] Over the years, this affirmation has been the genesis for validating several residence-based discriminations in state institutions, especially in education where this pre-condition of residence for a certain quota is viewed not as a reservation but merely as sources from which induction into such institutes is to be carried out.[36]

Therefore, if one is to try and understand the true legality of the Bill, one must negate the *litera-legis* of its verbose text to see what the word "*domicile*" truly convenes. The Bill defines its would-be beneficiaries: "*local candidates*" only once as those who are domiciled in Haryana, in any of its districts.[37] Thus, the same has to be accorded its ordinary meaning which is that any person who has resided permanently within any district of Haryana for fifteen years is considered its domicile and eligible for obtaining a domicile certificate, in contrast to three years in the Union-Territory of Delhi and other surrounding states.[38] The definition of "*domicile*" in the Bill is not at all *in tandem* with the rationale meaning of "*local residents*", because of which a majority of citizens of India would simply be debarred from seeking any form of employment within the state of Haryana. This would in turn unreasonably violate their right to freely reside and settle in the country.[39]

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[35] *Id.* ¶ 5.
[36] D.N Chanchala v. State of Mysore, (1971) 2 SCC 288, ¶ 302; *see also,* Jagdish Saran v. Union of India, (1980) 4 SCC 95.
[37] Bill, *supra* note 3, § 2 cl. g and § 4.
[38] India TV News Desk, *Haryana Passes Bill Providing 75 Per Cent Reservation for Locals in Pri vate Sector jobs,* INDIA TV (Nov. 5, 2020), https://www.indiatvnews.com/news/india/har yana-passes-private-jobs-reservation-bill-to-75-percent-people-from-state-662682; *see also,* Marlin Priya, *Domicile Certificate of Haryana,* INDIA FILINGS (Jan. 18, 2020), https://www.indiafilings.com/learn/domicile-certificate-of-haryana/.
[39] INDIA CONST. art. 19.

While the Bill is not hit by Article 16 since it covers only public employment, it nevertheless, in the author's opinion, is bad in law because of its blanket and unreasonable restriction on employment of outsiders in all private jobs. Such blanket restriction has been put in place without any deliberation on the purpose for prescribing such classification between domiciles of the state and outsider. It also has no nexus between the residence requirement and the jobs so pre-conditioned to it as mandated by Article 14. In fact, the Bill fails to mention even once that this domicile reservation is to provide a certain quota of employment to its residents, as claimed by Dushyant Yadav, the Deputy Chief-Minister of Haryana who tabled the Bill.[40]

Indian courts have observed that any distinction based on residence has to be accompanied by a meaningful, purposeful and rational definition of "*local residents*".[41] The highly arbitrary definition of local candidates and the arbitrary restriction on the outsiders in all private jobs deprive them of their constitutional right to employment. It is evident that the Bill's intended distinction is not based on residence, rather on the premise of an altogether separate and secondary domicile different from the common citizenship, which in other words, is almost like a subservient citizenry for the states' residents.

REASONABLE DIFFERENTIA: A FANCIFUL FORETHOUGHT?

It was held in *Pradeep Jain* that even valid discrimination based solely on residence cannot be sustained if it is unreasonable.[42] Hence, the test of reasonability of such a differentia under Article 14 of the Constitution would ultimately determine the constitutionality of the Bill.

The courts have weighed different considerations differently for ascertaining whether a classification on residence is reasonable or not. In *D.P. Joshi*[43] the Apex Court was of the view that residence-based reservation, which is in the interest of the state, fulfils the test of Article

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[40] Press Trust of India, *Haryana Assembly Passes Bill on 75% Job Quota in Private Sector for Locals,* THE WIRE (Nov. 5, 2020), https://thewire.in/labour/haryana-assembly-passes-bill-on-75-job-quota-in-private-sector-for-locals.

[41] Prashant Vidyarthi v. Jharkhand, (2005) 1 JLJR 210 (HC).

[42] Pradeep Jain v Union of India, (1984) 3 SCC 654, ¶ 27.

[43] D.P Joshi v. State of M.B., AIR 1955 SC 334, ¶ 33.

14. The Court reasoned that because the state incurs expenditure in imparting education, it is only fair that the taxpayers and the state incur some benefit from it and so a reservation in admissions to medical college for its residents to promote education within the state is a reasonable classification.[44] By the same rationale, a law which is to promote employment within the state should also qualify as reasonable. The Bill however, suffers from one noticeable defect; the Apex Court upheld the classification in *D.P. Joshi* because it pertained only to medical colleges whereas under this Bill, the classification has been made in respect of all private jobs without any clear categorization.[45] In contrast to the Bill, the Andhra Pradesh Act provided for reservation only at floor-level jobs in private factories and industries.[46]

In yet another instance of domicile-based reservation, the courts created a rather new sanction for domicile-based reservation that rested on the claim of backwardness.[47] The Apex Court *per-incuriam* was of the opinion that because of different social and cultural set-ups, different states and districts do not stand on equal footing with each other in matters which are open to all. Thus, in such a scenario, a residence-based reservation serves as a reasonable tool in mitigating such inequalities.[48] If the same principle is extended to this Bill, then it could be very well argued in its defence that it is to facilitate employment opportunities for the poor in lower-wage jobs, but the Bill doesn't even stand that scrutiny. The Bill, however, cannot be said to be making an intelligible differentia on inter-regional disparities, as

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[44] *Id.* ¶ 31.
[45] *Id.* ¶ 22.
[46] Press Trust of India, *Andhra Pradesh Passes Bill Giving 75% Job Reservation for Local Youths, Factories Three Years' Time to Fulfil Requirement,* FIRST POST (Jul. 24, 2019), https://www.firstpost.com/politics/andhra-pradesh-passes-bill-giving-75-job-reservation-for-local-youths-gives-factories-three-years-time-to-fulfil-requirement-7051291.html.
[47] State of Uttar Pradesh v. Pradeep Tandon, (1975) 1 SCC 267.
[48] *Id.* ¶ 23.

it does not distinguish between its developed cosmopolitan megacities like Gurgaon and Faridabad and its other less developed districts like Mewat.[49]

Additionally, the Bill also does not take into consideration educational backwardness. There is no demarcation between skilled and unskilled workers for the purposes of the reservation, despite the earlier representation that it would be restricted to unskilled workers.[50] The only inferable backwardness that can be seen as forming the basis for the Bill is the fifty thousand rupees salary slab, however, even that is a very stretched consideration. This pre-condition of remuneration operates on the presumption that only factory and blue-collar jobs fall within it,[51] but in reality, almost sixty per cent of the jobs available irrespective of the work, come within the prescribed remuneration. In fact, the median salary for India's population is below forty thousand rupees,[52] moreover as much as fifty per cent of the jobs in Haryana are covered in this salary sphere of fifty thousand rupees or less.[53]

Therefore, the categorized salary on which such reservation is provided would keep almost half of the available jobs out of the reach of a large majority of the citizens of India not domiciled in Haryana, especially from the densely populated neighbouring National Capital Territory. Even if we were to ignore the absurdity of such pay-scale classification, courts have opined that mere financial marginalisation cannot be the sole consideration for the test of backwardness.[54]

When a domicile-based reservation could not be sustained by the courts on the ground of backwardness, a detour from the prospect of logic was

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[49] Pankaj Vashisht & Nidhi Mittal et. al, *Inter Regional Disparities in Haryana,* INSTITUTE OF DEVELOPMENT & COMMUNICATION – DEPARTMENT OF PLANNING: GOVERNMENT OF HARYANA (Jul. 2014), http://esaharyana.gov.in/Portals/0/iri.pdf.

[50] Bhatnagar, *supra* note 2, ¶ 6.

[51] Forum IAS Staff, *Reservation For Locals in Private Jobs,* FORUM-IAS (Nov. 9, 2020), https://blog.forumias.com/reservation-for-locals-in-private-jobs/.

[52] Press Trust of India, *India's Per-Capita Income Rises 6.8 per cent to Rs 11,254 a Month in FY20,* THE PRINT (Jan. 7, 2020), https://theprint.in/economy/indias-per-capita-income-rises-6-8-per-cent-to-rs-11254-a-month-in-fy20/346119/.

[53] Salary Explorer Staff, *Average Salary in Haryana 2021,* SALARY EXPLORER (Jan. 3, 2021), http://www.salaryexplorer.com/salary-survey.php?loc=44&loctype=2.

[54] Janki Prasad v. State of Jammu & Kashmir, (1973) SCR (3) 236, ¶ 27.

embarked in the case of *Jagadish Saran*,[55] wherein extraneous reasons were taken into account by the Apex Court for the saving of domicile reservations in Delhi University. The Apex Court adopted the view that while there was no discernible backwardness in the advanced capital city, its population faced inequality because of state domicile reservation in other state universities and none in Delhi University, greatly prejudicing their interests.[56] Hence, a domicile reservation for them was deemed fair and reasonable.[57] Through this, the Apex Court laid down an altogether baffling *eye for an eye* approach wherein one discrimination could justify another discrimination. However, even if we were to accede to this notion, the present Bill cannot be substantiated loosely on three counts.

Firstly, the absence of any other reservation policy in private jobs of such magnitude as this Bill would lead to a *prima facie* existence of discrimination against the domiciles of Haryana. *Secondly*, the ambiguity on the meta with which the Bill was introduced. This move of the state government came in the backdrop of a huge surge in Haryana's unemployment rate to twenty-seven point three per cent in contrast to the national average of only six point nine eight per cent[58] as per the Centre for Monitoring Indian Economy ("**CMIE**"). While the Bill can be construed as a rationale response to the above precarity, because of the underlying provision that gives it a validity of ten years, it can hardly be accepted that its promulgation was motivated by the increasing rate of unemployment and not otherwise. *Lastly*, even if we ignore the above reasons and consider the Bill in its own self-contained sphere, the Bill would still not be rubberstamped into existence because of the Bill's lack of any immediate nexus with its object. The Statement of Objects and Reasons of the Bill state that the domicile reservation is an attempt to deter the proliferation of slums in urban areas

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[55] Jagdish Saran v. Union of India, (1980) 4 SCC 95.
[56] *Id.* ¶ 787.
[57] *Id.*
[58] CENTRE FOR MONITORING INDIAN ECONOMY, MONTHLY REPORT: UNEMPLOYMENT IN INDIA (Mar. – Apr., 2021), https://unemploymentinindia.cmie.com; Prashant K. Nanda, *Haryana's job quota bill will be economically counterproductive,* LIVE MINT (Nov. 6, 2020), https://www.livemint.com/news/india/haryana-s-job-quota-bill-will-be-economically-counterproductive-11604655488156.html.

due to the influx of migrant workers seeking low-paid jobs.[59] But the Bill neither restricts its operation to urban areas nor does its supposition of domicile reservation as the answer to proliferating slums hold any reasonable plausibility.

As discussed above, the wide gamut of the postulated salary threshold covers the majority of the jobs; most of which employs the middle-class segment rather than the impoverished slum dwellers.[60] More importantly, the major *would-be* affected job-hubs of Haryana are situated at the borders of cosmopolitans like Delhi NCR. These job-hubs see itinerant workers who travel into Haryana during working hours and then return back to their *state of domicile* on a daily basis; thereby having no correlation to the growth of slum dwellers. The Bill seems to hold no rationality whatsoever under the various implications of its validity. The very decision of domicile reservation is aberrant to its intention of deterring slums and preventing the social and economic degeneration of the state and rather is an abdication by the state government of its duties which would be discussed below.

WHITTLING DOWN THE EASE OF DOING BUSINESS: AN ECONOMIC JETTISON?

The central government is trying to create an environment conducive for businesses to thrive and operate through policies like *One Nation One Tax* and *Start-up India*.[61] The private sector is trying to revive the economy by trying to bring their operations back on track in a post-COVID-19 world.[62] At such time, the move of compulsory reservations in jobs comes as a dismay to a lot of core stakeholders of the business regime; conveying their apprehension of serious repercussions that might follow if the reservation is put in action. The Confederation of Indian Industries ("**CII**"), a prominent body representing the automotive components manufacturers made a representation to the Haryana Government to reconsider the

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59 Bill, *supra* note 3, Statement of Objects & Reasons.

60 Bill, *supra* note 3, § 4.

61 Sonal Khetarpal, *Haryana Jobs Reservation 'ill-informed', Harms Ease of Doing Business,* BUSINESS TODAY (Nov. 6, 2020), https://www.businesstoday.in/current/economy-politics/haryana-jobs-reservation-ill-informed-harms-ease-of-doing-business/story/421310.html.

62 *Id.*

proposal for reservation in private jobs, citing that it will not make industries competent and drive unneeded hurdles.[63] The executive Vice President of Teamlease Service – a staffing and HR Firm in Haryana said that the Bill would severely impact the industrial belt of Manesar, Gurugram and its allied economy.[64] Several other organizations like Maruti Udhyog, NASSCOM and CIEL situated in Haryana have vociferously spoken against this reservation.[65] The Bill is being lamented over because of the various obstacles it erects in business affairs.

A restriction on sources of employment for companies would mean that more time would be required to find candidates. This would mean that businesses would not be elastic enough to scale their operations and modulate their manpower which would, in-turn, disrupt the manufacturing segment. This would affect the agriculture and service sector thereby dismantling the entire wheel of the economy. While the Bill provides a bailout to companies that cannot find candidates,[66] the exemption is subject to the discretionary approval of a designated officer.[67] This has the potential to induce further delays and frustrate the entire recruitment process. Thus, the Bill gravely reduces the mobility and free flow of labour.

The threat of a rising *Inspector Raj*[68] looms in Haryana where bureaucracy interferes with the business operations at the burden of private entities that have to bear the brunt of endless compliances. Every employer is required to register each of his/her local employees at a particular portal,[69] furnish

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[63] Nanda, *supra* note 58, ¶ 3.
[64] HT Correspondent, *Haryana Assembly: Private sector quota Bill passed,* THE HINDUSTAN TIMES (Nov. 6, 2020), https://www.hindustantimes.com/chandigarh/haryana-assembly-private-sector-quota-bill-passed/story-8QFHpkXYGo3saMB9PCcaBN.html.
[65] Ratna Bhushan et. al, *Haryana's Private Job Reservation Law Worries Companies*, THE ECONOMIC TIMES (Mar. 3, 2021), https://economictimes.indiatimes.com/news/company/corporate-trends/private-job-reservation-law-in-haryana-worries-companies/articleshow/81304833.cms.
[66] Bill, *supra* note 3, § 5.
[67] *Id.* § 5.
[68] Karunjit Singh, *Industry: Haryana Quota Law Will Slow Recovery, Cut Jobs, Bring Inspector Raj*, THE INDIAN EXPRESS (Mar. 5, 2021), https://indianexpress.com/article/business/industry-haryana-quota-law-will-slow-recovery-cut-jobs-bring-inspector-raj-7214705/.
[69] Bill, *supra* note 3, § 3.

a quarterly report of the appointed and employed locals,[70] and facilitate inspections and verifications.[71] In case of contravention of the provisions of the Bill, employers are made liable to penalties ranging from fifty thousand rupees up-to two lakh rupees.[72] Many small private entities do not have a proper recruitment system that might have such domicile data, especially the small and medium sized enterprises and the unorganized sector that experience frequent and seasonal changes in their labour force.[73] However, because of the Bill, they would be forced to set up a mechanism to undertake the burden of data compilation of all their employees.

In this era where scouting for global talent is the key to gaining competitive advantage, the short-sighted and ill-informed strategy of the Bill severely robs the private companies of their freedom to recruit employees as per their needs.[74] Under the Bill, the companies are either forced to sacrifice skill or their efficiency. The Bill also empowers civil servants to coerce the employers into providing training in case the candidate lacks the requisite skill.[75] While companies along with the state government have an obligation to impart training,[76] the state government, through this Bill, has now completely shifted this obligation onto the companies. Usually, companies after a few months of employing a candidate, when assured of his/her suitability, take the initiative to invest in improving his/her skills. However, this Bill's dicta of investing before affirming suitability of the candidate would render the mobilization of manpower a costly endeavour. This has the potential to backfire as companies would now be forced to either opt for capital-intensive methods or leave the state of Haryana. It is also a delegation of the state government's duty to invest in and improve the skill-

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[70] *Id.* § 6.
[71] *Id.* §§ 7, 8.
[72] *Id.* §§ 10-14.
[73] Sonal Khetarpal, *How Will Haryana's 75% Job Quota Impact the SME Sector?,* THE FINANCIAL EXPRESS (Mar. 5, 2021), https://www.financialexpress.com/industry/sme/how-will-haryanas-75-job-quota-impact-the-sme-sector/2206825/.
[74] DHN Staff, *Haryana Job Quota for Locals Wrong*, DECCAN HERALD (Nov. 10, 2020), https://www.deccanherald.com/opinion/first-edit/haryana-job-quota-for-locals-wrong-913601.html.
[75] Bill, *supra* note 3, §§ 5, 22.
[76] Bhushan, *supra* note 65.

based or vocational education and training of its people;[77] the result of which is a trade-off where an employer can either incur costs and bear risks of skill upgradation of an unfamiliar candidate or compromise in talent. Such a law is almost antithetical to a booming business regime and can over time, kill the pace of economic growth and private investments.

JOB MARKET JOLT: ENDOGENEITY OF EMPLOYMENT QUOTA AND LABOUR FORCE OUTCOME

India has had a long history of aggressive affirmative action in the public sector which has had an unproductive outcome on employment opportunity, to such an extent that it rendered government and institutional jobs unfruitful for the unreserved[78] and labour experts fear that the private sector may be headed in the same direction.[79] The labour market force has only just begun to recover from the retrenchments and downsizing because of COVID-19.[80]

Any form of local employment quota would hamstring new hirings and significantly upset this recovery,[81] transposing the economy's phase of job losses to a phase of joblessness.[82] The causal impact of reservations in jobs is a decrease in the labour force outcome.[83] Any form of job quota not only

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[77] TFE, *Haryana Should Focus on Getting Industry to Create More Jobs Than Shackling it with Domicile Quota*, THE FINANCIAL EXPRESS (Mar. 5, 2021), https://www.financialexpress.com/opinion/job-reservation-for-locals-in-private-sector-domicile-quota-wont-help-haryana/2206547/.

[78] Nishith Prakash, *The Impact of Employment Quotas on the Economic Lives of Disadvantaged Minorities in India*, 180 J. ECON. BEHAV. & ORG., 494-509 (2020).

[79] Editorial, *Elusive Employment*, THE INDIAN EXPRESS (Jan. 15, 2019), https://indianexpress.com/article/opinion/editorials/10-percent-reservation-quota-jobs-unemployment-in-india-5538435/.

[80] Neha Alawadhi & Arnab Dutta, *Haryana Job Reservation Law to Shrink Talent Pool, Says Industry*, BUSINESS STANDARD (Mar. 5, 2021), https://www.business-standard.com/article/economy-policy/haryana-job-reservation-law-to-shrink-talent-pool-says-industry-121030500045_1.html.

[81] *Id.*

[82] Khetarpal, *supra* note 61.

[83] Prakash, *supra* note 78, ¶ 4.

dilutes competition,[84] which in turn reduces the incentive for investing in human capital. This may also lead to a downfall in efforts of the labour force to gain employment, especially if the reservation is as high as seventy-five percent.[85] Senior Advocate Ashok Arora also holds the view that meritocracy will take a seat-back and dwindle competition which would demotivate the youth and hold back productivity and competency.[86]

There is also a severe trade-off in efficiency due to the nearly absent employable workforce in Haryana, especially during a time when demand for talent is outstripping-supply.[87] Due to the dearth of skill availability in Haryana,[88] the region was heavily dependent upon its nearby metropolitan areas for the workforce, and the artificial boundaries created by the Bill would only fragment the labour markets. More than one-fourth of the graduates across the state are unemployable, a number which is twice the national average.[89] Without any strategy for instilling skills in the youth and creating enough job opportunities for the locals, the private job quota could become unviable and even prove fatal to the economic wheel of Haryana, observed labour economist expert K.R. Sundar.[90]

The silence of the Bill of its effect on the existing non-domicile employees could have a regressive effect on job security and bring down overall employment.[91] If the Bill is to apply to the existing workforce in

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[84] PTI, *FICCI says Haryana Job Quota Will Spell Disaster for Industrial Development in the State*, THE ECONOMIC TIMES (Mar. 4, 2021), https://economictimes.indiatimes.com/news/economy/policy/ficci-says-haryana-job-quota-law-will-spell-disaster-for-industrial-development-in-the-state/articleshow/81332121.cms?from=mdr.

[85] Bhushan, *supra* note 65, ¶ 12.

[86] Gaurav Vivek Bhatnagar, *Haryana's 75% Domicile Quota in Private Sector 'Excessive', 'Unconstitutional': Experts*, THE WIRE (Mar. 5, 2021), https://thewire.in/labour/haryana-govts-75-percent-quota-private-sector-jobs-locals.

[87] Khetarpal, *supra* note 61.

[88] Yuthika Bhargava, *Haryana's New Job Quota Rule Spells Disaster Says India Inc.*, THE HINDU (Mar. 4, 2021), https://www.thehindu.com/business/Industry/haryanas-new-job-quota-rule-spells-disaster-says-india-inc/article33991908.ece.

[89] Prabhjote Gill, *Haryana is the Most Recent State to Try and Implement Job Reservations for the Private sector – But That's Easier Said Than Done,* BUSINESS INSIDER (Mar. 8, 2021), https://www.businessinsider.in/india/news/heres-a-quick-look-at-states-who-have-tried-to-reserve-jobs-for-locals-in-the-privates-sector-and-the-hurdles-theyre-still-facing/slidelist/81390318.cms.

[90] Khetarpal, *supra* note 61, ¶ 5.

[91] Alawadhi & Dutta, *supra* note 80.

employment, then the private sector would be forced into layoffs or into excessive hiring to overhaul its workforce to meet the criteria.[92] And if it is to apply to future recruitments, it could face the inability to find suitable candidates to fill its vacancies and hamper its expansion, resulting in the loss of possible future jobs. The private sector might even be compelled to make use of capital-intensive methods[93] and even child labour[94] just to meet its requisite human capital. Thus, the entire Bill could lead to a dip in labour productivity, a rise in labour cost and give rise to an exploitative labour market.

CONCLUSION: AN OUTLINE OF THE WAY FORWARD

At a time when India is being pitched as the alternative place for global manufacturing by the central government, the Haryana government that is in coalition with the central ruling party[95] is ironically sending wrong signals to businesses and investors, especially when the economy is looking for positive triggers for its revival and growth. Haryana's Bill is laden with legal infirmities because of its provisions that divest the citizens of India of their constitutional right, because of the arbitrary reticent definition of "*domicile*" and due to the utter irrationality and unreasonableness of the restrictions introduced by it. The Bill also suffers from having any remote economic soundness; its strategies are more likely to shrink employment opportunities and deter economic growth in the region.

The courts need to take *suo-moto* cognizance of bills bearing similar semblance to this Bill and stay their implementation until their validity is determined. The parliament should also amend Article 15 to include the word "*residence*" so as to put an end to these perilous bills. The state's reforms and initiatives should be aimed at facilitating a conducive business environment and boosting employment. Instead of introducing hurdles

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92 Bhushan, *supra* note 65.

93 Prakash, *supra* note 78, ¶ 13.

94 *Id.* ¶¶ 16, 18.

95 Ajay Sura, *Haryana Passes Bill to Reserve 75% of Private Sector Jobs for Locals*, TIMES OF INDIA (Nov. 6, 2021), https://timesofindia.indiatimes.com/city/chandigarh/haryana-assembly-passes-bill-on-75-job-quota-in-private-sector-for-local-people/articleshow/79065473.cms.

like reservations, it should offer incentives to employers, invest in training and education of its population and remove bottlenecks and red-tapism to attract more businesses in its territory. One such example is that of the Kerala government; it revamped its employment exchange and saw a massive boost in locals' employment without any mandate of reservation.[96]

This is a crucial time for the courts to intervene, avoid setting an incorrect precedent and eradicate this looming threat to national unity. The growing trend of domicile-based reservation has added two more states to the list in 2021; West Bengal, where several of its residents made demands for domicile-based reservation in private jobs to which its MLAs showed their agreeability[97] and Jharkhand, which has drafted a similar bill resounding that of Haryana's Bill providing seventy-five percent local reservation.[98]

Many more states are joining this list, some of whom are bypassing the existing restrictions by prescribing unnecessary language requirements[99] and more will follow if the Bill is not struck down. The courts must forgo their passive approach and adopt a more active stance on the unconstitutionality of domicile reservations if India's *One Nation One Identity* is to be preserved.

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96 Anshul Prakash et. al, *Localism in Private Sector Employment,* LEXOLOGY (Nov. 12, 2020), https://www.lexology.com/library/detail.aspx?g=927a275f-7297-4da4-acce-b377efad1afb.

97 Press Trust of India, *'Bangla Pokkho' Seeks Job, Education Reservation for Bengalis in Bengal,* THE INDIAN EXPRESS (Jan. 17, 2021), https://indianexpress.com/article/cities/kolkata/bangla-pokkho-seeks-job-education-reservation-for-bengalis-in-bengal-7150443/.

98 Satyajeet Kumar, *Soon, 75% Reservation in Private Sector for Locals in Jharkhand,* INDIA TODAY (Mar. 13, 2021), https://www.indiatoday.in/india/story/soon-75-per-cent-reservation-in-private-sector-for-locals-in-jharkhand-1778817-2021-03-13.

99 Apurva Vishwanath, *Domicile-based Job Quota: The Law, SC Rulings and Special cases,* THE INDIAN EXPRESS (Aug. 23, 2020), https://indianexpress.com/article/explained/domicile-based-job-quota-the-law-sc-rulings-and-special-cases-6561814/; *see also,* Sankalp Udgata, *Reservation on the Basis of State Domicile: A Practice Unfair to People and Unexpected of Governments,* SCC ONLINE (Jul. 15, 2020), https://www.scconline.com/blog/post/2020/07/15/reservation-on-the-basis-of-state-domicile-a-practice-unfair-to-people-and-unexpected-of-governments/.

SOCIAL RIGHTS VIS-À-VIS RIGHT TO FOOD: A COMPARATIVE STUDY OF LAWS IN INDIA AND SOUTH AFRICA

KHUSHAL GURJAR[1] & KANISHKA MISHRA[2]

Implementation and justiciability of social rights have always been a source of controversy in many countries of the world because of the artificial hierarchical preference given to civil and political rights. Right to food being one of the most important social rights suffers the same fate. Many countries have included this right explicitly in their constitutions while others have enshrined it as a non-justiciable right. In this paper, the authors shall analyse the current concerns related to social rights with a special focus on the right to food in India and South Africa; its justiciability through the constitution and judiciary, and implementation through laws and policies, in the two countries. The authors in this paper bring to light, through a comparative analysis of pre-existing measures in India and South Africa, lessons that the two nations could learn from each other for an efficient realization of the right to food.

INTRODUCTION

Social rights are a bundle of basic needs that form an integral part of human sustenance. Such rights mainly comprise rights to adequate housing, healthcare, food, water, social security, and education.[3] Though these are essentially needed for basic sustenance, their acceptance as a "*right*" continues to be a matter of discourse. While some of the aforementioned

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[1] Khushal Gurjar is a graduate from National Law University and Judicial Academy, Assam and currently pursuing LL.M. at National Law University, Delhi. The author may be reached at <khushal.gurjar20@nludelhi.ac.in>.

[2] Kanishka Mishra is a graduate from Faculty of Law, Delhi University and currently pursuing LL.M, at National Law University, Delhi. The author may be reached at <mishra.kanishka30@gmail.com>.

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[3] Eric C. Christiansen, *Exporting South Africa's Social Rights Jurisprudence*, 5 LOY. U. CHI. INT'L L. REV. 29, 30 (2007).

social rights such as the right to education[4] are widely recognized and have been able to achieve the stature of fundamental rights, other rights such as the right to food and health are yet to be recognised and addressed properly by most nations.[5] In this paper, the authors shall focus primarily on the realisation of the right to food as a social right.

Right to food emanates from the basic idea of the right to life with dignity, which is inherent to a human being and further includes freedom from hunger, malnutrition, and food insecurity.[6] This right, despite its inherent association with the survival of a human being, is yet to gain explicit recognition across the globe.[7] Nations such as India and South Africa have, however, strived hard to realise the right to food.[8]

Both India and South Africa, having been ruled by oppressive colonial regimes, are aware of the significance of the protection of their social rights.[9] Despite facing the oppression of imperialism, the two nations have incorporated social and economic rights into their constitutions by taking two different approaches. The South African Constitution recognises the right to food explicitly as a fundamental right under Article 27. The makers of the Indian Constitution on the other hand, after much deliberation, considered it appropriate to include the right to food only as a directive principle under Article 47. This background is intriguing for making an inquiry into the protection available under the normative framework of both countries regarding the right to food.

Through the course of this article, the authors will *firstly*, discuss social rights and the problems associated with their proper realisation.

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4 INDIA CONST. art. 21A; Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1.

5 Courtney Jung et al., *Economic and Social Rights in National Constitution*, 62 AM. J. COMP. L. 1043, 1046 (2014).

6 Manoj Kumar Sinha, *Right to Food: National and International Perspectives*, 56 J. INDIAN L. INST., 47–61 (2014).

7 Lidija Knuth & Margret Vidar, *Constitutional and Legal Protection of the Right to Food around the World*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS ROME 14 (2011), http://www.fao.org/3/ap554e/ap554e.pdf.

8 *Id.* at 15.

9 Christiansen, *supra* note 3, at 41.

Subsequently, the authors will proceed to study problems that surround the justiciability of the right to food. The authors will further go on to comparatively and critically analyse the constitutional, judicial, and legislative measures taken by South Africa and India for proper realization of the right to food. *Finally*, in light of such analysis, the authors will propose possible solutions and suggestions for better protection of the right to food in these countries.

SOCIAL RIGHTS: BACKGROUND

The contours of social rights cover the right to a standard of living that is adequate for health and includes food, housing, clothing, education, social security, safe environment, et cetera.[10] The conception of social rights emanates from the most basic elements required for sustenance in society. Social rights are intrinsically associated with the prospects for a minimum and decent standard of life or a bundle of resources[11] that a person needs in order to maintain such standard of life.[12] These resources are said to be essential for the achievement of human capabilities.[13] However, the question of the acceptability of these social rights across various jurisdictions still remains a matter of debate.

An argument offered for the acceptance of social rights is that these rights have an inherent character involving human dignity, as discussed earlier.[14] The idea that social rights are directly associated with the welfare of people takes us to the utility principle.[15] Rawls believed that a social minimum ought to be guaranteed and legally enforceable as a constitutional essential.[16] This argument has obtained a wide range of recognition and support from the international community as a result of which social rights

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[10] G.A. Res. 217A (III), Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948) [hereinafter *UDHR*]; International Covenant on Economic, Social and Cultural Rights, art. 11 (Dec. 16, 1966). [hereinafter *ICESCR*].
[11] JEFF KING, JUDGING SOCIAL RIGHTS, 29 (2012).
[12] *Id.*
[13] Jung, *supra* note 5 at 1044, ¶ 2.
[14] UDHR, *supra* note 10, art. 1. ("*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*").
[15] KING, *supra* note 11 at 24.
[16] *Id.*

have been recognised explicitly in international conventions such as the Universal Declaration of Human Rights ("**UDHR**"),[17] International Covenant on Civil and Political Rights ("**ICCPR**"),[18] and International Covenant on Economic, Social and Cultural Rights ("**ICESCR**").[19]

It is pertinent to note that the UDHR did not recognize economic-social rights and civil-political rights distinctively.[20] However, a divide was created with the implementation of treaties: the ICCPR provides for rights related to personal autonomy and political participation;[21] the ICESCR guarantees rights to essential services and goods.[22]

This divide has been made since social rights have a "*manifesto*"[23] character and are in the nature of progressive realization,[24] while political and civil rights on the other hand are comparatively enforceable to a larger extent.[25] However, this divide can be refuted with the help of Marshall's idea of social citizenship; in order to promote active citizenship, the social rights of the people need to be enforced as well.[26] This concept fosters the idea that people can participate in the common life of society only if their basic needs are met.[27] Specifically, the constant endeavour of the judiciary and academia has reduced the gap between the two rights and hence the strict separation between the two no longer persists.[28]

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[17] UDHR, *supra* note 10.
[18] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. [hereinafter *ICCPR*].
[19] ICESCR, *supra* note 10.
[20] UDHR, *supra* note 10.
[21] ICCPR, *supra* note 18, arts. 1-3; art. 6; arts. 8-10; arts. 18-19; arts. 29-30.
[22] ICESCR, *supra* note 10, art. 11; art. 12; art. 13.
[23] KING, *supra* note 11 at 21.
[24] Jayna Kothari, *A Social Rights Model for Social Security: Learnings from India*, 47 VERFASSUNG UND RECHT IN ÜBERSEE 5, 13 (2014).
[25] This bifurcation resulted in part from disagreement in norm and in part from the politics of the Cold War.
[26] Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 354 (Jan. 1994).
[27] *Id.* at 357 (the argument was made by Marshall).
[28] United Nations Office of the High Commissioner for Human Rights, *Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political*

Though all social and economic rights have seen an increased recognition in national constitutions of various jurisdictions, rights such as the right to education have been granted a higher status than the right to food.[29] Based on the frequency of recognition of various social and economic rights,[30] four subtypes[31] have been framed. These are economic rights,[32] standard social rights,[33] environmental rights,[34] and non-standard social rights.[35] It is pertinent to note that the right to food and water form a part of non-standard rights based on the rarity of recognition of the same in the national constitutions.[36] The rationale behind such differential treatment of the right to food is discussed in the next section.

CONSTITUTIONAL PROTECTION OF SOCIO-ECONOMIC RIGHTS AND THE RIGHT TO FOOD

Only a handful of countries including South Africa, Brazil, Columbia have recognized the right to food explicitly.[37] Some other countries including India, Sri Lanka, Ghana have managed to include it as an aspirational right, obliging the State to ensure food availability.[38] Such categorization is mainly referred to as justiciable or non-justiciable rights, and it has largely been attributed to the legal tradition of a country, its economic recourse to realize the right and regional differences.[39] It is pertinent to note that justiciability of rights means that the rights are recognized and

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rights?, https://www.ohchr.org/en/issues/escr/pages/areescrfundamentallydifferentfromcivilandpoliticalrights.aspx.

[29] Jung, *supra* note 5 at 1043, ¶ 1.

[30] *Id.* at 1054, tbl. 2.

[31] *Id.* at 1054-1055.

[32] The right to a healthy work environment, to form or join a trade union, the right to a fair wage, right to leisure, right to strike, and to employment-derived social security.

[33] Includes social-security, education, child protection and health care.

[34] The right to environmental protection along with a right to a healthy environment.

[35] Jung, *supra* note 5 at 1055.

[36] *Id.*

[37] S. AFR. CONST. art. 27; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 44.

[38] INDIA CONST. art. 47; THE CONSTITUTION OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA art. 27; THE CONSTITUTION OF THE REPUBLIC OF GHANA art. 36(1).

[39] Jung, *supra* note 5 at 1043.

protected by giving effect to them through a judicial or quasi-judicial body.[40]

The justiciability of the right to food may be discussed in terms of negative protection and positive obligation.[41] The negative protection entails the non-interference of the State in an individual's preferred means to feed themselves.[42] This kind of protection is granted under the South African Constitution and it does not involve the utilization of any state resources.[43] On the contrary, positive obligation on the State mandates it to provide a mechanism for ensuring access to food.[44] Under such an obligation, the State is bound to take affirmative action for the protection of such right while under negative obligation, the State just has a duty not to violate the specific right. No affirmative action is required in such a case.

INDIA

The Indian Constitution, rather than explicitly including the right to food under fundamental rights,[45] has placed it under the category of directive principles of state policy[46] which are not justiciable[47] in the court of law but are to act as a fundamental approach for the State while making laws and policies.

The concern regarding conversion of the duty of State into the right of an individual explicitly under the Indian Constitution has been highly contentious as to what extent they are justiciable. However, the Supreme Court of India has now recognised the right to food as a justiciable right by imputing a wider interpretation to Article 21 of the Indian

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[40] Food and Agriculture Organization of United Nations, *The Right to Food Guidelines: Information Papers and Case Studies*, 75 (2006), http://www.fao.org/3/a0511e/a0511e.pdf.
[41] *Id.*
[42] *Id.* at 76 (This kind of protection is granted under the South African Constitution, and it does not utilize any State resources).
[43] S. AFR. CONST. art. 27.
[44] Food and Agriculture Organization of United Nations, *supra* note 40 (This mechanism is found in India under the NFSA).
[45] INDIA CONST. Part III.
[46] *Id.* Part IV.
[47] Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789 (however, this position has changed after the concurring opinion of Justice Bhagwati in this case).

Constitution.[48] However, this view has been constantly attacked by the opponents primarily for the reason that it involves budgetary issues.[49] It has been argued that law should not encroach in the executive domain in deciding the allocation to budget and revenue, as it breaches the wall of separation of power.[50] Another argument that has been put forth to oppose the explicit recognition of right to food pertains to the availability of limited fiscal resources with the State to address the problem of hunger.[51] The aforesaid arguments relating to financial constraints and limited resources were also considered plausible by the makers of the Indian Constitution, which is why they found it appropriate to include such rights under the directive principles.[52] Furthermore, a long period of colonial rule revolving around the individualistic pattern of jurisprudence, largely focusing on the pattern of rights and duty, was also attributed as a reason for the exclusion of social rights, including right to food, from the ambit of justiciable rights.[53]

Although there is no specific mention of the word "*food*", the Indian Constitution places a duty on the State to raise the level of nutrition, the standard of living, improving public health[54] and further securing the right to an adequate means of livelihood for all the citizens.[55] In India, directive principles lay similar duties on the State indirectly through provisions for early childhood care[56] and assurance of a decent standard of life[57] which

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48 People's Union of Civil Liberties v. Union of India, (2013) 10 SCC 1.

49 Christophe Golay, *The Right to Food and Access to Justice: Examples at the national, regional and international levels*, FOOD AND AGRICULTURE ORGANIZATION OF UNITED NATIONS 23 (2009), http://www.fao.org/3/k7286e/k7286e.pdf.

50 *Id.*

51 Harsh Mander, *State food provisioning as social protection: Debating India's National Food Security Law*, FOOD AND AGRICULTURE ORGANIZATION OF UNITED NATIONS, 11 (2015), http://www.fao.org/3/i4957e/i4957e.pdf.

52 7 CONSTITUENT ASSEMB. DEB. (Nov. 19, 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-19 (remarks of Prof. Shibhan Lal Saksena)

53 Shehnaz Meer, *Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa*, 9 S. AFR. J. HUM. RTS. 358, 359 (1993).

54 INDIA CONST. art. 47.

55 *Id.* art. 39(a).

56 *Id.* art. 45.

57 *Id.* art. 43.

have been realised through various state policies and programmes such as the Supplementary Nutrition Program.[58]

SOUTH AFRICA

In South Africa, an International Bill of Rights[59] has been adopted into the South African Constitution which includes the right to food, thereby binding both the government and the judiciary to grant protection under the mandate of its constitution. Hence, the South African Constitution explicitly recognises the right to adequate food and water as a fundamental right.[60] A debate of separation of power and lack of financial resources emerged in the case before the Constitutional Court of South Africa, seeking approval for the insertion of the provisions pertaining to socio-economic rights in the newly proposed South African Constitution.[61] However, the same was dismissed by the Court on the ground that the task of enforcing socio-economic rights including right to food is not so different from enforcing civil and political rights as to breach the separation of power; and that even civil and political rights have similar budgetary issues and such implications cannot act as a bar to accord justiciability to socio-economic rights.[62]

The rationale behind the incorporation of socio-economic rights can be associated with their long struggle against injustice and apartheid,[63] along with their adherence to the concept of "*ubuntu*",[64] which is different from the western liberal approach to rights. This African principle of *ubuntu* emphasizes the community aspect of a right and treats the suffering of one

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[58] *See generally*, Abhilasha Vaid et. al., *Review of the Integrated Child Development Services' Supplementary Nutrition Program: Take Home Ration for Children*, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE (Jul. 2018), http://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/132804/filename/133014.pdf.

[59] UDHR, ICCPR and ICESCR together are known as the International Bill of Rights.

[60] S. AFR. CONST. art. 27, cl. 1.

[61] *In re: Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) at 49-50 (S. Afr.).

[62] *Id.* at 78.

[63] S. AFR. CONST. pmbl.

[64] David Otieno Ngira, *The Implication of an African Conception of Human Rights on the Women Rights Movement: A Bottom-up Approach to Women's Human Rights Protection*, E. AFR. L. J. 128, 139 (2018).

person as the suffering of the whole community.[65] The South African Constitution recognizes the right to food in terms of basic nutrition for vulnerable groups such as children[66] and persons who are accused, detained, or arrested.[67]

ROLE OF THE JUDICIARY IN REALIZATION OF RIGHT TO FOOD

The right to food has been realized in India as a fundamental right through judicial adjudication,[68] which was a result of various efforts by the judiciary to realize socio-economic rights under the broad definition of human dignity.[69] The Supreme Court of India has approached social rights matters in two ways: (i) the comprehensive mandatory order approach ("**CMO**") which obliges states to follow certain instructions compulsorily to ensure that a particular right is fulfilled, which was used in the case of *Olga Tellis v. Bombay Municipal Corporation*;[70] and (ii) continuing mandamus, which includes a series of interim orders specially issued at periodic hearings and aimed to monitor government progress on judicial directions.[71] This approach was used in the *People's Union for Civil Liberties v. Union of India*[72] to ensure better enforcement of the right to food through periodic interventions and status observation.

The Supreme Court of India directed all state governments to ensure that "*nobody dies of starvation*"[73] along with a direction for efficient implementation of various policies and schemes such as the *public*

[65] *Id.* at 139.
[66] S. AFR. CONST. art. 28, cl. (1)(c).
[67] *Id.* art. 35, cl. (2)(e).
[68] People's Union of Civil Liberties v. Union of India, (2013) 10 SCC 1.
[69] Francis Coralie Mullin v. UT of Delhi, 1981 AIR 746.
[70] Olga Tellis v. Bombay Municipal Corporation, 1986 AIR 180. (The court not only recognized the right of slum inhabitants but also mandated the state to ensure substitute accommodation).
[71] Surabhi Chopra, *Legislating Safety Nets: Comparing Recent Social Protection Laws in Asia*, 22 IND. J. GLOBAL LEGAL STUD. 573, 594 (Summer, 2015).
[72] *People's Union of Civil Liberties*, (2013) 10 SCC 1.
[73] *Id.*

distribution system[74] and *mid-day meal scheme*[75] already in place, especially targeting vulnerable sections of the society who are unable to get adequate food and nutrition.

Another approach popularly used by courts is by creating a "*minimum negative obligation*", which refers to a duty not to act i.e., a duty to refrain from violation of human rights.[76] This approach is very different from the previously discussed CMO and continuing mandamus as it does not put the State in any immediate positive obligation to perform any positive action to protect human rights, but rather just creates a negative obligation against violating any human rights. This type of approach is not very successful when it comes to socio-economic rights, as they require an active commitment and positive action from the state for their proper realisation.

Initially, the judiciary in South Africa, through its landmark judgment in the *First Certification* case,[77] observed that there is a minimum negative obligation to protect socio-economic rights from a direct violation[78] which also includes the right to food.[79] However, with time, similar to the Indian scenario, South African courts have also used "*a mandatory order*" as a tool

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[74] Sakshi Balani, *Functioning of the Public Distribution System: An Analytical Report*, PRS LEGISLATIVE RESEARCH (Dec. 2013), https://www.prsindia.org/administrator/uploads/general/1388728622~~TPDS%20Thematic%20Note.pdf.

[75] Ministry of Human Resource Development, Mid-Day Meal (MDM) Scheme, Manual for District Level Functionaries (2017), https://darpg.gov.in/sites/default/files/Mid%20Day%20Meal%20Scheme.pdf.

[76] *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC), ¶ 78 (S. Afr.).

[77] *Id.*

[78] *Id.* ¶¶ 77-78; *see also*, *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council* 2000 (6) W 1 BCLR 625 (S. Afr.) (upholding the constitutional duty of the State to ensure the right to access water).

[79] *Kenneth George and Others v. Minister of Environmental Affairs & Tourism* 2007 (3) SA 62 (SCA) ¶¶ 94, 96 (S. Afr.) (the court protected the right to food proving remedies to the fishing communities and also required government to prepare new legislation accommodating the right of traditional fisheries "taking into account international and national legal obligation and policy directives to accommodate their socio-economic rights").

to uphold these rights actively.[80] Interestingly, in the case of *Grootboom v. Government of the Republic of South Africa,*[81] the Court noted that the South African Constitution includes a specific obligation "*to take reasonable legislative and other measures*" with regard to the right to food, housing, and certain other rights which are to be progressively realized. The Court further issued a declaratory order requiring the State to "*devise, fund, implement and supervise measures to provide relief to those in desperate need*".[82]

CRITICAL ANALYSIS OF NATIONAL LAWS AND POLICIES

A. BACKGROUND AND ORIGIN

Other than the above discussed constitutional and judicial imperative, South Africa does not have any national legislative framework explicitly dealing with the implementation of the right to food.[83] Although the year 2001 saw some efforts by the government towards enacting a food security bill, the bill never saw the light of day.[84] The implementation of the right to food is therefore, left in the hands of various governmental policies and schemes such as the Integrated Food Security Strategy,[85] Social Security Programme,[86] National Policy on Food and Nutrition Security ("**NPFNS**"),[87] the Household Food Production programme - One Home,

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[80] *Minister for Health v. Treatment Action Campaign* 2002 (5) SA 721 (S. Afr.) (The court has mandated the State to comply with multiple actions to ensure easy access of nevirapine, a drug crucial in preventing the communication of HIV from the mother to the foetus, availability of which was restricted by the government earlier).

[81] *Grootboom and others v. Government of the Republic of South Africa and others.* 2001 (1) SA 46 (CC) (S.Afr.).

[82] *Id.*

[83] Food and Agricultural Organisation, *The Right to Food around the Globe*, http://www.fao .org/right-to-food-around-the-globe/countries/zaf/en/.

[84] Josee Koch, *The Food Security Policy Context in South Africa* (International Policy Centre for Inclusive Growth, Country Study No. 21, Apr. 2011) at 16, https://ipcig.org /pub/IPCCountryStudy21.pdf.

[85] Scott Drimie & Shaun Ruysenaar, *The Integrated Food Security Strategy of South Africa: An Institutional Analysis*, 49(3) AGREKON 316 (2010), https://www.tandfonline.com/doi/abs /10.1080/03031853.2010.503377.

[86] Inter-Departmental Task Team on Social Security and Retirement Reform, *Comprehensive social security in South Africa*, 11.9 Discussion Document (Mar. 2012), https:/ /static.pmg.org.za/161128Comprehensive_Social_Security_in_South_Africa.pdf.

[87] Casey Delport, Food and Nutrition Policy in South Africa: the National Vision, Policy Space and Policy Alignment (Apr. 2019) (unpublished MCom thesis, Stellenbosch

One Garden,[88] and National School Nutrition Programme[89] which are flexible and subject to multiple changes according to the whims and fancies of the executive.

In 2014-15, South Africa, apart from ratifying the ICESCR, also adopted the National Policy on Food and Nutrition Security to ensure the affordability, availability, and accessibility of nutritious and safe food at both household and national levels[90] in the light of international scrutiny[91] of their food security system. The emergence of this new policy also comes in the backdrop of the failure of the Integrated Food Security Strategy for South Africa[92] as it gave very limited references to specific parameters or measurements for food security in its policy framework.[93]

India, on the other hand, does not have a fundamental right to food written in the Indian Constitution, but still boasts national legislation, i.e., the National Food Security Act, 2013 ("**NFSA**"), which aims to guarantee nutritional and food security by ensuring access to an adequate quantity of

University), https://scholar.sun.ac.za/bitstream/handle/10019.1/105797/delport_food_2019.pdf?sequence=1&isAllowed=y.

88 Western Cape Government, *One Home One Garden Campaign encourages households to start f ood production unit* (Jun. 30, 2020), https://www.westerncape.gov.za/news/one-home-one-garden-campaign-encourages-households-start-food-production-unit.

89 DEPARTMENT OF BASIC EDUCATION FOR THE REPUBLIC OF SOUTH AFRICA, NATIONAL SCHOOL NUTRITION PROGRAMME, https://www.education.gov.za/Programmes/NationalSchoolNutritionProgramme.asp.

90 DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES, THE NATIONAL POLICY ON FOOD AND NUTRITION SECURITY FOR THE REPUBLIC OF SOUTH AFRICA (2013) at 6, https://www.gov.za/sites/default/files/gcis_document/201409/37915gon637.pdf [hereinafter *NPFNS*].

91 Olivier De Schutter, *United Nations Special Rapporteur on the Right to Food: Mission to South Africa*, HUMAN RIGHTS COUNCIL, A/HRC/19/59/Add.3 (Jan. 13, 2012).

92 DEPARTMENT OF AGRICULTURE REPUBLIC OF SOUTH AFRICA, INTEGRATED FOOD SECURITY STRATEGY FOR SOUTH AFRICA (2002), https://www.gov.za/sites/default/files/gcis_document/201409/foodpol0.pdf [hereinafter *IFSS*].

93 Busiso Moya, Advocating for the Right to Food in South Africa: An Analysis of Judicial Activism, Public Interest Litigation and Collective Action in South Africa as a Strategy to Secure the Right to Food (Mar. 2016) (Unpublished M.A. Dissertation, University of the Witwatersrand, Johannesburg) (on file with author) at 130.

good quality food at affordable prices for people to live a life of dignity.[94] Before NFSA, even in India, food security depended on various governmental policies and schemes under the public distribution system. The mid-day meal scheme was one of the major outcomes of this system which covered a threefold perspective including social equity, child nutrition and education.[95] Lack of effective implementation and reports of continuous starvation of marginalized people led to a huge movement carried out by civil society organizations and further strengthened by judicial activism[96] of the Supreme Court which ultimately resulted in the formulation of NFSA in 2013.

B. DEFINITION OF FOOD SECURITY

While the NFSA defines food security briefly as "*supply of the entitled quantity of food grains*",[97] the NPFNS provides a comprehensive definition under the guidance of various international institutions and local goals. It defines food security in terms of access and control over all the means to ensure sufficient, safe, and nutritious food at all times.[98] It further specifically focuses on the dietary requirements of all its citizens for a healthy life.[99]

On the contrary, the NFSA has a very narrow understanding of food security which is limited to the supply of food grains and meals as specified in Chapter II of the NFSA.[100] This definition ignores the multi-faceted aspects of the right to food such as safety, nutritious value of the food grains, various means of access and control, and minimum dietary requirements for the health of every citizen. A better and broader definition would help to supplement the current quantitative aspect through a qualitative and nutritional aspect of food security which is necessary for the progressive realisation of this right.

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[94] The National Food Security Act, 2013, pmbl., No. 20, Acts of Parliament, 2013 [hereinafter *NFSA*].
[95] Kothari, *supra* note 24 at 17.
[96] PUCL v. Union of India, (2013) 10 SCC 1.
[97] NFSA, § 2(6).
[98] NPFNS at 8, ¶ 6.
[99] *Id.*
[100] NFSA, § 2 (6).

C. IMPLEMENTATION

Interestingly, in South Africa, the lack of central legislation makes it difficult to provide solid entitlements to individuals and vulnerable groups even after a clear constitutional mandate.[101] Most schemes are missing a clear line of responsible authority[102] while their implementation is left to the individual departments under the broad and vague directions of the central policies, which often lacks accountability and implementation.[103] For example, the National Department of Agriculture's Special Programme for Food Security ("**SPFS**") was introduced as a separate programme to establish short term food programmes which were mainly implemented by the Food and Agriculture Organization ("**FAO**") in conjunction with the South African Human Rights Commission ("**SAHRC**"). However, it was not widely adopted and the SPFS did not receive any reports on how the funds allocated were used.[104]

On the contrary, under NFSA in India, the national government is bound to ensure a regular supply of grain to eligible households[105] while individual states are responsible for the implementation of specific food welfare programmes.[106] This includes other responsibilities like ensuring actual delivery of benefits to individuals through public distribution system ("**PDS**") shops, proper storage of food grains, sensitization about their rights to the public, and most importantly identification of the poor and marginalized citizens in need.[107] The NFSA gives entitlement to sixty seven per cent of the population i.e., almost two-third (seventy-five per cent in rural areas and fifty per cent in urban areas) of the population is to receive highly subsidized food grains.[108] As per the Ministry of Consumer Affairs, Food & Public Distribution, under the NFSA, around six hundred and ten

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[101] Moya, *supra* note 93.
[102] Koch, *supra* note 84, at 16.
[103] *Id.*; *see also*, NPFNS at 7.
[104] Koch, *supra* note 84, at 16.
[105] NFSA, § 22, cl 1.
[106] *Id.* § 24.
[107] *Id.* § 10, cl. 1.
[108] Press Release, Ministry of Consumer Affairs, Food & Public Distribution, National Food Security Act (Jul. 2, 2019), https://pib.gov.in/PressReleasePage.aspx?PRID=1576667.

lakh metric ton of food grains are supplied each year to the eligible households.[109] On June 1, 2019 the central stock of food grains consisted of seven hundred and forty one point four one lakh tons of food grains.[110]

D. ACCOUNTABILITY

South Africa exercises accountability mostly through the justiciability of socio-economic rights in courts and other independent bodies such as the SAHRC.[111] Although NPFNS proposes the amalgamation of different entities for food security to form a centralized system, the implementation of such a proposal still feels far from reality.[112]

In India, on the other hand, NFSA provides different mechanisms for holding government bodies accountable in the case of a failure to fulfil obligations; such as the appointment of independent agencies for social audits on welfare schemes,[113] proactive disclosure of food security-related official records,[114] and a grievance redressal system,[115] and most importantly, the formation of an independent food commission[116] to monitor proper implementation of the NFSA. However, their effectiveness is always in question as most of these bodies and mechanisms are either not established yet or not functional. For example, even after almost eight years, all states do not have a state food commission and those who do, are not optimally functional.[117] In fact, only eleven states food

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109 *Id.*
110 *Id.*
111 South African Human Rights Commission, *Right to Food: Factsheet*, https://www.sahrc.org.za/home/21/files/brochure_A3_English.pdf; Koch, *supra* note 84.
112 NPFNS at 17.
113 NFSA, § 2, cl. 20, 28.
114 *Id.* § 27.
115 *Id.* § 14.
116 *Id.* § 16, cl. 1.
117 Press Release, Ministry of Consumer Affairs, Food and Public Distribution, One time financial assistance for non building assets for State Food Commission, https://dfpd.gov.in/financialassistanceforstatefoodcommission.htm#:~:text=Financial%20Assistance%20for%20State%20Food%20Commission&text=Section%2016%20of%20the%20National,of%20implementation%20of%20the%20Act.

commissions have officially received financial assistance from the central government till last year.[118]

E. General Comments

Interestingly, in both countries, providing well-balanced meals to children in schools by means of schemes such as the mid-day meal scheme in India[119] and the National School Nutrition Program in South Africa[120] has been a flagship scheme and a positive step towards the realization of the right to food. While in terms of implementation mechanism and accountability measures, NFSA appears to be providing a better system than South African policies. In practice, the gap in the proper understanding of food security and the inefficiency of the ground level implementation of these concrete laws have made the realization of this right equally difficult in both countries. If we ignore the implementation and accountability problem, then the broad principles of food security as mentioned in NPFNS appears to be a better system for the proper realization of this right.

WAY FORWARD

By way of comparative analysis, we understand that both India and South Africa have gaps in their food security system which block their quest for proper realization of the right to food. The way forward towards achieving total food security is to focus on the lessons that the two countries can learn from each other and the international community.

Firstly, both India and South Africa need to adhere to international standards for the proper realization of the right to food. Ratifying the optional protocol for the ICESCR[121] and further adopting laws based on

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[118] *Id.*

[119] *Supra* note 75.

[120] *Supra* note 89.

[121] G.A. Res. 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Mar. 5, 2009).

international models such as the FAO Guidelines on Right to Food[122] can prove to be beneficial for both countries in providing a uniform and comprehensive framework for food security.

Secondly, the Indian Parliament should follow the footsteps of the South African Constitution, and include the right to food in the list of fundamental rights, in a manner similar to what was done in the case of the right to education.[123] The Indian judiciary has already laid the groundwork for the same[124] and an ostensible right in the Indian Constitution would create a clear constitutional mandate for proper realization of this right.[125] According to an FAO study,[126] such a step will be helpful in better implementation of international standards for the right to food.[127]

Thirdly, the judiciary in both countries has approached the problem of food security in different ways. The Constitutional Court of South Africa has hardly discussed any direct positive obligations of State under the right to food but always through some other right or under the larger ambit of socio-economic rights.[128] Even though the South African Constitution actively supports the right to food, courts have not been able to lay down any concrete positive obligation on the State. In this light, the Indian example of continuing mandamus by the court and enactment of NFSA through the combined efforts of the judiciary and civil society organizations can be used by South Africa to press the demand for proper legislation from the government.

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122 Food and Agricultural Organization of the United Nations, *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security* (2005) http://www.fao.org/3/a-y7937e.pdf.

123 INDIA CONST. art. 21 A.

124 PUCL v. Union of India, (2013) 10 SCC 1 (Right to Food falls under the ambit of Right to live with human dignity).

125 Knuth & Vidar, *supra* note 7.

126 *Id.*

127 *Id.* at 12.

128 Ebenezer Durojaye & Enoch MacDonnell Chilemba, *South Africa, Accountability and the Right to Food: A Comparative study of India and South Africa* (DST-NRF Centre of Excellence in Food Security, Food Security SA Working Paper Series No. 3, 2018), https://foodsecurity.ac.za/wp-content/uploads/2018/06/CoE-FS-WP3-Accountability-and-the-right-to-food.pdf.

Fourthly, it has often been observed that policies are jettisoned by the governments to realize their political aspirations. Therefore, it is recommended to have specific legislation in place as repealing and amending them is a far more tedious task as compared to straightaway discarding a policy. This being the idea, it is suggested that South Africa should follow the Indian approach and adopt effective legislation rather than just formulating broad policies and schemes. Although the Indian legislation, i.e., the NFSA has its own set of problems, it still has been able to provide a fixed measure for entitlement to citizens, cast an obligation on the State, and to set up steps to determine accountability for proper implementation, as discussed earlier. What the South African system lacks is uniformity of procedure, obligations, and accountability along with general coordination of too many departments. Proper legislation may offer a definite path towards the firmer realization of the right.

Fifthly, India should amend the NFSA and try to dilute the problems discussed in the previous section. South African policies, even though not binding, still rely on a comprehensive definition of food security based on various international interpretations. On the other hand, the NFSA focuses solely on providing grains to the poor while ignoring other aspects. Such factors need to be taken into account while considering the scope of revision of the legislation.

For the recognition and realization of the right to food, it is necessary that this right not be construed narrowly, as has been cautioned by the UN Committee on Economic, Social and Cultural Rights ("**ESCR**").[129] A narrow construction would fail to take into account both quantitative and qualitative aspects of food and would just focus on the supply of food grains, while ignoring other factors such as nutrition, economic and physical availability and cultural applicability of the particular food item.

Hence, the scope of this right should not be confined only to calories or other nutritional value parameters, rather, it must be expanded so as to ensure unrestricted, permanent and regular access to adequate food and resources, where access also means to produce and ensure self-

[129] *Id.*

subsistence.[130] By expanding the scope of the right to food, it is intended to enable all human beings to have access to food that is "*available in sufficient quantity, nutritionally and culturally adequate and physically and economically accessible*".[131] Thus, an implementation of all the aforesaid elements is quintessential to ensure the proper realisation of the right to food.

It is pertinent to note that both countries have had different journeys in developing their respective food security systems. It is difficult to predict the extent of exportability of different aspects inter-se as discussed. There is a possibility that it may not be feasible for a country to adopt a particular structure just because it has worked for the other. Having said that, the fear of failure must not stop the countries from learning from the effective regimes prevailing therein for achieving the ultimate goal of realizing the right to food.

CONCLUSION

Implementation of socio-economic rights has always been an issue in most modern democratic nations, and the countries under study at present are no exception. In this light, some basic problems that surround the effective implementation of most of the socio-economic rights while focusing on the right to food were identified. The debate between the hierarchy of civil and political rights against socio-economic rights can be seen affecting the proper implementation of the right to food as the implementation of the former remains the primary concern. Most nations do not want to categorise these rights as fundamental rights to avoid the positive obligation that would then be cast on them for the realisation of such rights. Interestingly, in some cases, one socio-economic right has been given importance over another, the reason for which can be found in the political, social, and legal history of the nation. Research[132] by Courtney Jung, Ran Hirschl, and Evan Rosevear has revealed that in most nations, "*right to education*", "*right to social security*" et cetera have been recognised as justiciable rights whereas the entrenchment of the right to food and water is still a rare practice.[133] Some of most basic reasons for the lack of proper

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[130] *Id.*
[131] JEAN ZEIGLER ET AL., THE FIGHT FOR RIGHT TO FOOD, 109–110 (2011).
[132] Jung, *supra* note 5.
[133] *Id.* at 1046, 1054.

realisation of such rights as found through the study are limited availability of resources, lack of political and judicial will, absence of proper efforts by civil society, and most importantly the difference in the historical, social and cultural background of the nations.

The research tried to understand the basic approach of South Africa and India behind the realization of the right to food and the efforts to move towards the sustainable development goal of zero hunger.[134] Both the approaches have their benefits and shortcomings, as discussed throughout the paper. Interestingly, a sharp paradox can be seen in both countries; where South Africa, even after having a clear constitutional mandate, made little effort to legislate upon the right whereas in India, despite the recognition of the right to food as a fundamental right by the judiciary and implementing specific legislation in lieu of the same, the right finds no mention in the Constitution. While the judiciary in both countries has been active, directly or indirectly, the respective government's lack of political will to implement and realize the right to food is evident after reading their laws and policies critically and comprehensively. The role of international institutions working in this field is vital in maintaining a proper international standard for food security. Both the concerned countries, apart from learning from each other's achievements and mistakes, need to follow these international standards for a universally accepted realization of the right to food.

[134] G.A. Res. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (Oct. 21, 2015).

STATE OF PUNJAB V. DAVINDER SINGH: A STEP TOWARDS THE TRANSFIGURATION OF SUB-CLASSIFICATION OF SCHEDULED CASTES

PRATIK KUMAR[1]

Historically, the scheduled castes have been viewed as a separate social and cultural group. Consequently, the modern political and legal setup also reflected this in its working. The Constitution of India, by providing a presidential list under Article 341 incorporated it at the time of its enactment. Since then, they have been accorded a constitutional status as a separate group. In the 90s, a few states attempted to rationalise the classification by preferring a few weaker castes among SCs. This was challenged before the Supreme Court in E.V. Chinnaiah v. State of A. P. wherein it was held that sub-classification of SCs by states is not permissible and it would be unconstitutional. This has been a precedent for nearly sixteen years until the Supreme Court in the present case of Davinder Singh referred this decision to a larger bench for striking it down.

This paper analyses the verdict of Davinder Singh by tracing the argument behind sub-classification and its historical development. First, this paper shall highlight the issue of contention in this followed by its facts and central issues. Next, the historical evolution of the judicial view on sub-classification shall be discussed. This paper will attempt to rebut the reasoning of the Supreme Court in Chinnaiah by regularly pointing to its different views and narrow construction of the law. The conclusion will bring up the issues that the Court faced in this present case and its disagreement with the Chinnaiah. As the present case was a referral decision for rectification of Chinnaiah, this paper will focus mainly on deconstructing the case of Chinnaiah itself.

INTRODUCTION

Within the existing scholarship on affirmative action in India, the exercise concerning the sub-classification of the scheduled castes ("**SCs**") and

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[1] Pratik Kumar is a third year B.A., LL.B student at Dr. Ram Manohar Lohiya National Law University. The author may be reached at <pratikpaul823@gmail.com>.

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application of the creamy layer principle remains widely debated.[2] This debate, which touches the society as a whole instead of confining itself as a hypothetical exercise, has also been moderated through periodical judicial interventions. In all these decisions on affirmative action, courts have had to perform a two-fold exercise; *first*, to adjudicate upon the matter before it and *second*, to bridge the gap between textual interpretation and social reality.

In light of this, the recent judgment of the Supreme Court in *State of Punjab v. Davinder Singh*[3] requires a close examination, wherein a constitution bench substantially disagreed with the established law on the sub-classification as laid down in the 2004 judgment of *E.V. Chinnaiah v. State of A.P.*[4] Addressing the requirement of changed circumstances and marking a notable shift from its earlier position, the Supreme Court in the present case held that the restriction on sub-classification of SCs in the *Chinnaiah* case needs a referral.[5] In upholding this, it further observed that the current setup of their grouping under Article 341 of the Constitution requires a change in light of new empirical data on heterogeneity among the different SCs.[6] At a fundamental level, this decision assumes considerable importance due to its potential effect on the interplay of equality and identity of SCs within the constitutional framework.

Since this case was a review of *Chinnaiah* and an elaborate clarification of the judicial position on sub-classification of SCs, much of this paper will necessarily revolve around the question of sub-classification. It will attempt to address the central question before the Supreme Court in *Davinder Singh*, i.e., whether a blanket ban on sub-classification of SCs as held in *Chinnaiah* is proper *per se*. However, before the proposed analysis, it is pertinent to get through the facts of this case.

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[2] *See*, Anup Surendranath, Judicial Discourse on India's Affirmative Action Policies: The Challenge and Potential of Sub-Classification (2013)(Unpublished Ph.D. thesis, Balliol College, Oxford University)(on file with Oxford University Research Archive).
[3] State of Punjab v. Davinder Singh, (2020) 8 SCC 1.
[4] E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394.
[5] *Davinder Singh*, (2020) 8 SCC 1, ¶ 58.
[6] *Id.* ¶¶ 51, 56-57.

FACTS AND ISSUES

In recent decades, leading scholars have argued that the benefits of reservation given to SCs are largely cornered by the influential castes within them.[7] The basis of their claim was the absence of percolation of the benefits to the relatively weaker castes among the SCs.[8] Keeping this claim in mind, soon after the categorisation of Other Backward Classes ("**OBCs**") as backward and more backward, the attention of the policymakers turned towards rationalisation of the reservation for SCs/Scheduled Tribes ("**STs**"). Consequently, many state governments attempted to develop a systematic mechanism by further sub-categorising them and giving preferential treatment to relatively weaker sections in the SCs based on different committee reports.[9]

However, in 2004, one such attempt by Andhra Pradesh[10] was declared unconstitutional by the Supreme Court in *Chinnaiah*. In this case, soon after its promulgation, the Andhra Pradesh Scheduled Castes (Rationalization of Reservations) Act, 2000 ("**Andhra Pradesh Act**") was challenged by the appellants. The primary purpose of the Andhra Pradesh Act was to categorise the SCs in the state of Andhra Pradesh on the basis of the J. Ramchandra Raju commission report.[11] It was argued on behalf of the appellants that it created micro-classifications within the SC class,[12] thereby violating Article 14 and partly depriving the other groups which received less share of quota in this arrangement.[13] The state on the other hand responded that although the inclusion and exclusion of castes from the presidential list under Article 341 is the sole prerogative of the President or Parliament; an internal adjustment of the castes for facilitating a better

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[7] CHRISTOPHE JAFFRELOT, INDIA'S SILENT REVOLUTION: THE RISE OF THE LOWER CASTES IN NORTH INDIA 199 (2003); *see generally*, SUKHDEO THORAT, DALITS IN INDIA: SEARCH FOR A COMMON DESTINY (2009).
[8] *Davinder Singh*, (2020) 8 SCC 1.
[9] *Id.* ¶ 12.
[10] Andhra Pradesh Scheduled Castes (Rationalization of Reservations) Act, 2000, No. 20, Acts of Andhra Pradesh State Legislature, 2000 [hereinafter *Andhra Pradesh Act*].
[11] E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394, ¶¶ 1-2.
[12] *Id.* ¶ 6.
[13] Andhra Pradesh Act, *supra* note 10 (Four groups of all the SCs of A.P. were made under the impugned Andhra Pradesh Act which shared the 15% SC quota between them. Group A received 1%; Group B- 7%; Group C- 6%; and Group D- 1% respectively).

percolation of benefits is nowhere prohibited in the Constitution.[14] The Apex Court after elaborating judicial pronouncements on the issues, came to observe that while granting reservation, the social objective angle should be followed having regard to the constitutional scheme and not as a political scheme.[15] Accordingly, it held that the legal fiction accorded to SCs as a single class by virtue of Article 341 would be tinkered if they are to be further sub-categorised.[16] Since then, similar measures by other states were held to be *ultra vires*, and it was crystallized that the Parliament alone had the legislative competence to sub-classify them.[17] Finally, in 2014, a three-judge bench of the Supreme Court reviewed its ratio and referred it to a constitutional bench for revision.[18]

This case came up before the Supreme Court through an appeal challenging a Punjab and Haryana High Court judgment.[19] In this judgment, the court had declared Section 4(5) of the Punjab Scheduled Caste and Backward Classes (Reservation in Services) Act, 2006 ("**Punjab Act**") unconstitutional as per the law laid down in *Chinnaiah*. The impugned section had a provision that preferred *Balmikis* and *Mazhabi Sikhs* among SCs by providing them fifty per centes of the seats of the quota.[20] Subsequently, the case came up before the Apex Court which clubbed the question of its constitutionality with the referral order of 2014. The Supreme Court framed three broad issues. The first issue dealt with the constitutionality of the impugned section of the Punjab Act. The second issue was for examining the legislative competence of the state to enact such laws; the third and central issue was whether the decision in *Chinnaiah*

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[14] *Chinnaiah,* (2005) 1 SCC 394, ¶ 8.
[15] *Id.* ¶ 42.
[16] *Id.* ¶ 50.
[17] *See*, Bir Singh v. Delhi Jal Board, (2018) 10 SCC 312, ¶ 101; Atyant Pichhara Barg Chhatra Sangh v. Jharkhand State Vaishya Federation, (2006) 6 SCC 718, ¶ 29 (The court, however, in this case was concerned with OBCs and held the impugned resolution as nullity); *see also*, State of Maharashtra v. Milind, (2001) 1 SCC 4, ¶ 36 (Though the impugned Act dealt with STs, the court also gave its opinion for SCs in general).
[18] State of Punjab v. Davinder Singh, (2020) 8 SCC 65.
[19] Devinder Singh v. State of Punjab, 2010 SCC OnLine P&H 13127.
[20] Punjab Scheduled Caste and Backward Classes (Reservation in Services) Act, 2006, § 4 cl. 5, No. 22, Acts of Punjab State Legislature, 2006.

needed to be revisited or not. As evident, the legality of both issues rested on the third one.

Writing for the Supreme Court, J. Arun Mishra expressed sharp disagreement with the ratio of *Chinnaiah*. He remarked that the current adjustment for SCs as a homogenous class needs modification. In a firm unanimous decision, the bench viewed the earlier decision as detached from the new developments in castes due to affirmative action. In substance, it opined that the restriction placed on their division is hindering the percolation of benefits to the lower strata of SCs.[21] Along with this holding, it referred the case to a larger bench for an authoritative settlement.

The view taken by the court in *Davinder Singh* is a considerable departure from various judicial precedents wherein courts either restrained themselves from engaging with the question of homogeneity of SCs or chose to narrowly interpret it. It is equally important due to its bearing on the status of SCs as a class for the purpose of the constitutional scheme. Therefore, against this backdrop, the author shall now critically examine the metamorphosised judicial position on the homogeneity of SCs and their sub-classification by the state.

CRITICAL ANALYSIS OF THE VIEW TAKEN BY THE COURT

A. LEGAL BACKGROUND OF SCHEDULED CASTES AS A HOMOGENEOUS CLASS

Historically, the position of the SCs, also loosely termed as "*untouchables/Dalits*", in the Hindu society has been determined through various political and legal arrangements. In the pre-independence era, it was the Poona Pact between Dr. Ambedkar and Mr. Gandhi that retained the SCs within the Hindu fold with special treatment meted out to uplift their position. Subsequently, the SCs gained legal recognition by way of the enactment of the Government of India Act, 1935 wherein they were placed under the umbrella term of "*depressed classes*".[22] This term, "*depressed classes*", encompassed within itself a number of lower castes. However, due to the

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[21] State of Punjab v. Davinder Singh, (2020) 8 SCC 1, ¶ 50.

[22] Government of India Act 1935, 26 Geo. 5.c. 2, sch. 1, entry 26(1) (*repealed*).

flawed British caste census methods, some kind of obscurity always surrounded this loosely defined class.[23] As a result of it, marginalized castes, even with substantial differences in their position in the caste hierarchy remained in the same class. Shortly thereafter, Article 341 was enacted which gave constitutional status to this cluster of lower castes. It provided for a list to be issued by the President in consultation with the governors of different states containing different castes, tribes, or part of castes or tribes to be deemed as a separate cluster, namely, SCs.

Once SCs were accorded this status by the presidential notification, they remained in the list until excluded by another notification or parliamentary intervention thereby forming a separate class for the purpose of their treatment by the state. Since the constitutional enactment, this scheme has not been altered and as a corollary to this adjustment, the government and courts treat them as a separate homogenous class as per the list under Article 341.

The working of this scheme came to be scrutinized for the first time in the case of *N.M Thomas v. State of Kerala*[24], where the Apex Court pronounced that for reservation under Article 16(1), SCs in this list cannot be viewed as different castes. In *Thomas*, the court was confronted with a puzzling question regarding the interpretation of Article 16.[25] The State of Kerala had enacted a measure that was not a plain provision giving reservation but in the nature of partial concession given to the SCs. The impugned concession (Kerala State and Subordinate Services Rules, 1958) exempted the lower categories from the need of clearing departmental tests in order to get promoted.[26] The respondents viewed such concessions as discriminatory as many SC clerks were promoted without passing the required examinations.[27] The challenge, therefore, was based on the scope and interpretation of Article 16(1), Article 16(2) and Article 16(4) of the

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[23] Ram B. Bhagat, *Census and caste enumeration: British Legacy and Contemporary Practice in India*, 62 GENUS 119, 134 (2006).
[24] State of Kerala & Anr. v. N.M. Thomas & Ors., (1976) 2 SCC 310.
[25] *Id.*
[26] *Id.* ¶ 7.
[27] *Id.* ¶ 13.

Constitution. Article 16(1) provides for equality of opportunity in matters of public employment subject to reasonable classification in favour of weaker sections. Article 16(4) allows the state to make provisions of reservation in favour of them. On this basis, the Apex Court had to adjudge the question of which among these two provisions would be more appropriate to sustain the impugned measure. After a lengthy analysis, the majority represented by Chief Justice Ray upheld the concession under Article 16(1), which allows reasonable classification of castes by the state in public employment.[28] On the other hand, J. Beg (partially differing on this) also upheld the concession but as a facet of reservation under Article 16(4).[29] This variance in the approach had the seeds of the present conundrum of sub-classification.[30] Once the majority held that the measure was not covered by Article 16(4) which deals only with reservation by state, and not concessions or partial reservation like the impugned one before the court, the judges were forced to reach the conclusion that SCs were a class and not a group of castes in order to justify the measure under Article 16(1).[31] If the majority would have treated them as a bunch of different castes, the measure would have contravened Article 16(2), which prohibits discrimination on the basis of caste, sex and other such grounds.[32] However, J. Beg acknowledged that such concessions or measures also fall in the category of reservation under Article 16(4), thereby, not contravening Article 16(2).[33]

The next landmark case was of *Indira Sawhney*,[34] where a nine-judge bench interpreted the law on classification among OBCs. Although the Apex Court mentioned that the discussion did not cover SCs,[35] a few points in the discussion are important for understanding the rationale advanced by the court. In its discussion, the majority re-affirmed that Article 16(4) is not an exception to Article 16 and also held that in the case of SCs, a *"caste itself*

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[28] *Id.* ¶¶ 28-29 (per C.J. Ray), ¶ 102 (per Justice KK Mathew), ¶ 35, ¶ 165 (per Justice Krishna Iyer), ¶ 185 (per Justice Fazal Ali).
[29] *Id.* ¶¶ 100-102.
[30] Anup Surendranath, *supra* note 2, at 264.
[31] *Thomas*, (1976) 2 SCC, ¶ 46.
[32] Anup Surendranath, *supra* note 2, at 264.
[33] *Thomas*, (1976) 2 SCC, ¶ 100.
[34] Indra Sawhney v. Union of India & Ors., (1992) Supp (3) SCC 217.
[35] *Id.* ¶ 791.

may be seen as a class".[36] This was in sharp contrast with the earlier decisions of the Court wherein it was held that though caste is a dominant factor, it cannot form the sole basis of reservation.[37] Behind this rebuttal, the rationale was that unlike the OBCs, birth itself in a particular caste, especially those included in the SCs list makes the person backward for special treatment.[38] However, the sole criterion of caste for determining backwardness was held to be unreasonable in the case of OBCs.[39]

Aside from these questions, while discussing the central issue in the decision, the Court dealt with the question of sub-classification among the OBCs. In response to it, it ruled that it is permissible to further classify them as "*backward*" and "*more backward*" in order to protect the interests of the weaker groups from the advanced OBC groups.[40] It also agreed that SCs and OBCs could not be placed similarly as the dominant group between these two (OBCs) would usurp the benefits given to backward classes as a whole.[41] It is unclear that why this rationale was not adopted by the Apex Court in *Chinnaiah*, even when Justice Jeevan Reddy (for the majority) in an important observation noted that:

> "*As a matter of fact, neither the several castes/groups/tribes within the Scheduled Castes and Scheduled tribes are similarly situated nor are the Scheduled Castes and Scheduled Tribes similarly situated.*"[42]

Combining this reading with the view of the Court that for SCs, the "*caste is a class in itself*" necessarily gives rise to a new presumption. With a combined reading, it can be implied that the list under Article 341 is nothing but an amalgam of sub-classes. In other words, by accepting that SCs are a group of castes and as "*caste is a class in itself*", it admitted the presence of different sub-classes within the SC class. After this decision, to sustain the argument of homogeneity and rebuttal of the presumption of

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[36] *Id.* ¶ 82.
[37] State of U.P. v. Pradip Tandon, (1975) 1 SCC 267.
[38] *Indira*, (1992) Supp (3) SCC 217, ¶ 82.
[39] *Id.* ¶ 799.
[40] *Id.* ¶¶ 801-802.
[41] *Id.* ¶ 803.
[42] *Id.* ¶ 795.

sub-classes, it became necessary for the Court to come up with new reasoning, i.e., the differences between them are not substantial in nature or the differences are micro-distinctions, and therefore, a thread of homogeneity runs through all these castes. In *Chinnaiah,* the Apex Court based its ratio on the same lines. Cautioning against the sub-classification within SCs, it relied on *State of J&K v. Triloki Nath Khosa*,[43] wherein the Apex Court had observed that:

> "*Classification, however, is fraught with the danger that it may produce artificial inequalities … and Classification, therefore, must be truly founded on substantial differences. Mini classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straightforward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality.*"[44]

Clearly, in the changed circumstances, any decision based on the abovementioned extract appears to be vacuous. Various reasons such as empirical evidence of substantial differences within the SCs as reflected in findings of various government-appointed commissions;[45] gradual "*Sanskritization*" of few castes within SCs;[46] vote-bank politics and asymmetric distribution of benefits;[47] religious conversions have made considerable differences among SCs which were ignored in this case. It was due to similar reasons that the rationale in *Chinnaiah* which inclined towards the presence of homogeneity and negation of substantial distinction among SCs was strongly rebutted by the Supreme Court in *Jarnail Singh v. Lachhmi Narain Gupta*.[48] *Jarnail Singh* is important as it has unsettled the established law on the sub-categorisation and made it an intricate and complex issue. Given this, it is requisite to go into the very heart of this conundrum of

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[43] State of J&K v. Triloki Nath Khosa, (1974) 1 SCC 19.

[44] *Id.* ¶ 31.

[45] Commissions such as the J. Usha Mehra Commission and J. Ramchandra Raju Commission.

[46] Rajesh Sharma & Sandhya Dixit, *Scenario of Sanskritization at Shaktipeeths- A step towards empowerment of Marginalized*, 4(10) IJSRP 1(2014).

[47] Christophe Jaffrelot, *Anxieties of the dominant*, THE INDIAN EXPRESS (Jan. 3, 2018), https://indianexpress.com/article/opinion/columns/pune- maratha- dalit- clash- koregaon-bhima-mahars-protest-5009169/.

[48] Jarnail Singh v. Lachhmi Narain Gupta, (2018) 10 SCC 396.

sub-classification to understand why *Davinder Singh* is a pathbreaking judgment.

B. E.V. CHINNAIAH, THE "MYTH OF HOMOGENEITY" AND THE NEED FOR SUB-CATEGORIZATION

The very idea and spirit of affirmative action was the percolation of its benefits down to the last person in the society.[49] The Constitution mandates that the benefits of steps by the state should reach the downtrodden in the society.[50] The grouping of citizens into OBCs, SCs and STs with a different set of provisions for each of them is reflective of this vision.

At a fundamental level, the working of affirmative action within the SCs works in two ways. Firstly, in SCs as a homogenous class *vis-à-vis* other caste Hindus; and secondly within the SCs themselves. Therefore, as a necessary consideration behind the implementation of the constitutional scheme of categorisation, every angle, including the effect of reservation within the SCs should have formed the part of the discussion in a decision on sub-classification. In recognizing this, one must acknowledge from the appointment of various governmental commissions, that a true ascertainment of benefits to the lower strata within a category can be done only through empirical and sociological evidence. In one sense, it leads us to the conclusion that any decision on sub-classification for widening the scope of benefits must be taken on this empirical basis rather than an abstract or textual interpretation of the law.

For years, these empirical evidences have been an essential part of the decisions of the court. As a settled practice, it was necessary that during judicial scrutiny, beneficiary measures for a group must match with the quantifiable data in favour of their reservation.[51] To put it simply, the state, through the surveys of its commission, had to show that the affected class needed reservation. However, the Apex Court in *EV Chinnaiah* chose not

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[49] State of Punjab v. Davinder Singh, (2020) 8 SCC 1, ¶ 47.
[50] INDIA CONST. arts. 38, 39, 46.
[51] Indra Sawhney v. Union of India & Ors., (1992) Supp (3) SCC 217.

to follow the practice of considering empirical evidence and limited its interpretation by resorting to a textualist approach. As a summary of its judgment, the majority observed that:

> "*The very fact that the members of the Scheduled Castes are most backward amongst the backward classes…a further classification by way of micro-classification is not permissible. Such classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution.*"[52]

At the outset, it appears that the Apex Court doesn't permit micro-classifications that are based on micro-distinctions. However, as the vast statistical and anthropological findings of various commissions show, the differences between the castes within the SC list are no longer based on micro-distinctions only.[53] Seen this way, the reasoning given by the Apex Court in *Chinnaiah*, which incomprehensibly ignored the idea of rationalisation is untenable and opens up the possibility of a narrow interpretation. It must not be forgotten that affirmative action is a matter of legislative policy, and therefore, the rationalisation of the reserved quota falls exclusively within the domain of the state.[54] As a settled practice, generally it is done on the basis of findings of various commissions.[55] In *Davinder Singh*, the Apex Court had accepted this, and noted by relying on *Indira Sawhney* that:

> "*Where to draw the line and how to affect the sub-classification is, however, a matter for the commission and the State—and as long as it is reasonably done, the Court may not intervene.*"[56]

As has been flagged above, the Apex Court in *Chinnaiah* did not engage with the question of the reasonableness of the sub-classification based on the findings of the concerned commission. Thus, in effect, the judgment

52 E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394, ¶ 43.
53 *Davinder Singh,* (2020) 8 SCC 1, ¶ 51.
54 INDIA CONST. art. 16, cl. 4.
55 *See*, Mukesh Kumar v. State of Uttarakhand, (2020) 3 SCC 1, ¶ 18.
56 *Indira*, (1992) Supp (3) SCC 217.

rendered by the Apex Court seems to be an unpersuasive precedent on its face due to its reluctance to engage with statistical and empirical evidence. This was repeatedly pointed out in its review in *Davinder Singh*, where the Apex Court accepted that empirical data as collected by various commissions cannot be ignored which reflects inequality within the SC class.[57] This also seems practical in light of the diversity of SC class spread across the states.

The next infirmity of the decision of the Apex Court in *Chinnaiah* is its perceivable narrow interpretation by adopting a textual stance. As it is commonly understood, provisions regarding serious issues in the Constitution such as affirmative action should be construed liberally so that the benefits may reach the lower strata.[58] The bench, however, held that the interpretation of the Constitution is subject to textual consideration.[59] Advancing its reasoning on the same lines, it opined that:

> "*Article 341 provides that exclusion even of a part or a group of castes from the Presidential List can be done only by Parliament. The logical corollary thereof would be that the State Legislatures are forbidden from doing that....[T]he impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained.*"[60]

From an alternate perspective, in holding so, it practically ended any scope of discussion on future attempts of reasonable sub-classifications. Addressing this shortfall, *Davinder Singh*'s judgment chose to adopt a liberal construction of Article 341 of the Constitution.[61] Rejecting the textual stance of the Apex Court in *Chinnaiah*, the Court produced the following passage from *GVK Industries Ltd.* v. *CIT*:

> "*In interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning*

[57] *Davinder Singh,* (2020) 8 SCC 1, ¶ 51.
[58] GVK Industries Ltd. v. CIT, (2011) 4 SCC 36, ¶ 37.
[59] E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394, ¶ 84.
[60] *Chinnaiah*, (2005) 1 SCC 394, ¶ 43.
[61] *Davinder Singh,* (2020) 8 SCC 1, ¶¶ 40-41.

> *the meanings that inhere in the enactment. However, in light of the serious issues it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration.*"[62]

At the same time, the bench in *Chinnaiah* relied on the speech of Dr. Ambedkar where he had said that the object of empowering only the parliament instead of the president to change the list was to "*eliminate any kind of political interferences*".[63] While there is some merit in this argument that sub-classification can turn into a political weapon for electoral benefits, there are other checks on the state. For instance, the Apex Court in *M. Nagraj v. Union of India*[64] had observed that enactments giving reservation must satisfy the quantifiability criterion. In other words, the state has to show that the findings of the government appointed commission should reflect a need for reservation for the backward section.[65] It appears that the Apex Court erred in its interpretation by similarly placing the act of sub-classification with exclusion from the list. Nowhere did the various state laws similar to the impugned Punjab Act, in this case, have excluded the remaining castes from the list under Article 341. In any case, the position of castes in the list remains intact in case of further categorisation without exclusion for the purpose of reservation. Recognizing this argument, the Court in *Davinder Singh* observed that:

> "*The State law of preferential treatment to a limited extent, does not amend the List. It adopts the List as it is. The State law intends to provide reservation for all Scheduled Castes in a pragmatic manner based on statistical data. It distributes the benefits of reservations based on the needs of each Scheduled Caste.*"[66]

Even on a plain reading of Article 341, there appears to be no bar on the states to classify the castes included in the list without denying the benefits of reservation to any caste, even the *creamy layer*. Therefore, such an extreme approach taken by the court through a strict reading of provisions only

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62 *GVK*, (2011) 4 SCC 36, ¶ 37.
63 *Chinnaiah*, (2005) 1 SCC 394, ¶ 14.
64 M. Nagraj v. Union of India, (2006) 8 SCC 212.
65 *Id.* ¶ 107.
66 *Davinder Singh,* (2020) 8 SCC 1, ¶ 51.

defeats the core intention of the makers. A few more observations in *Chinnaiah* through which the Apex Court reached its conclusion appear to be in discord with the idea of affirmative action. It noted in its decision that instead of rationalisation of reservation, the state should give adequate training and provide other facilities like scholarships and hostels to them.[67] Such remarks by the Apex Court only reflect passive insensitivity towards the most downtrodden among the SCs. To put it in a straightforward manner, if the idea of reservation could be supplemented by training and other facilities, there was no need for the categorization of backward classes into OBC/SC/ST in the first place. By advancing such arguments, the Apex Court overlooked the genuine requirements of those SCs who find themselves at the bottom in the guise of false homogeneity. Afterall, the idea behind reservation was not only to remove oppression but also to free individuals from shackles of group identity.[68]

CONCLUSION

In *Chinnaiah*, the primary failure of the Court is apparent from the fact that nowhere in the judgment, has it rebutted the sociological findings through a plausible counter-argument. In doing so, it conveniently sidestepped the question of the genuine need for sub-classification in future cases even if the same can be shown through empirical findings.

As pointed out before, the main issue with its ratio is that even if caste A and B in the SCs list share substantial differences, the state would find itself unable to do anything for caste B due to the bar in *Chinnaiah*. Therefore, in practice, its ratio has paved the way for a blanket ban on sub-classification despite the fact that findings of the government appointed commissions suggest otherwise. Going against judicial precedents wherein courts have reviewed the empirical findings for adjudicating the claims of rationalization of reservation, the decision rendered in *Chinnaiah* seems to diverge from the settled principles of law. This approach of the Court only aggravates the situation. Through such a decision, it neither let marginalized groups come up in the mainstream nor gave any solution or

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[67] *Chinnaiah*, (2005) 1 SCC 394, ¶ 114.

[68] MADHAV KHOSLA, INDIA'S FOUNDING MOMENT 142 (Harvard University Press 2020).

reasoning while doing so. The crux of its position lies in a doctrinal rigidity and an overemphasis on the codification of reservation, which itself is understood in a narrow sense.

Davinder Singh comes as a welcome step towards effectuating the reservation in its true spirit. As the judgment in this case reflects, reliance placed by the courts on a static and textualist decision such as *Chinnaiah* has only served as an impediment towards the upliftment of weaker castes among SCs. Along with this, by holding that the "*State can't be deprived of its concomitant power to make reasonable classification*",[69] it has advanced a step towards the emancipation of weaker sections among the SCs. If the states would be barred from sub-classification of SCs perpetually as the ratio of *Chinnaiah* seeks to do in effect if not in theory, then the benefits of reservation would never trickle down to the lowest caste in the list of SCs. This view found resonance in its holding when it was observed that:

> "*There is cry, and caste struggle within the reserved class as benefit of reservation in services and education is being enjoyed, who are doing better hereditary occupation... In case benefit which is meant for the emancipation of all the castes, included in the List of Scheduled Castes, is permitted to be usurped by few castes those who are adequately represented, have advanced and belonged to the creamy layer, then it would tantamount to creating inequality whereas in case of hunger every person is required to be fed and provided bread. The entire basket of fruits cannot be given to mighty at the cost of others under the guise of forming a homogeneous class.*"[70]

Undoubtedly, the argument put forth by the Apex Court in *Chinnaiah* that "*To overdo classification is to undo equality"* is attractive and appears cogent, but it is equally true that *"to treat unequal equally is to deny equality*". When the various government appointed committees and commissions have reached a common ground that substantial differences exist within the SCs, the maintenance of status quo by not permitting required sub-classification would amount to injustice. The Apex Court repeatedly raised its concern and ultimately observed that:

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[69] *Davinder Singh,* (2020) 8 SCC 1, ¶ 43.
[70] *Id.* ¶ 46.

> "*The social realities cannot be ignored and overlooked while the Constitution aims at the comprehensive removal of the disparities…Various castes by and large remain where they were, and they remain unequals, are they destined to carry their backwardness till eternity?.*"[71]

In supporting its viewpoint, and in proving the precedent laid down in *Chinnaiah* as a bad law, the Apex Court produced a catena of judgments with different holdings.[72] Though its review could have been more structured and pinpointed, nonetheless through its decision, the Apex Court has advanced its step for turning the *de jure* equality into *de facto* equality.

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[71] *Id.* ¶ 47.
[72] *Id.* ¶¶ 36-37.

REVIEW OF GAUTAM BHATIA'S THE TRANSFORMATIVE CONSTITUTION AND TRIPURDAMAN SINGH'S SIXTEEN STORMY DAYS

AAKASH SINGH RATHORE[1]

VALUING, AND REEVALUATING, THE CONSTITUTION

The constitution is re-emerging today as an object of scrutiny and as a subject of study. There is a gradual but steady change, with both global and local causes, in the understanding of the Constitution of India and its status. At a recent talk that I gave at a prestigious technical university in Delhi about the authorship of the Constitution's Preamble and the binding nature of its essential concepts (such as liberty, equality and dignity), a faculty member in the audience challenged my reverential attitude toward fundamental rights, asking, "*What's so sacred about the Constitution?*" This person was no radical leftist revolutionary; she was a right-wing supporter of the government.

Democracies enjoy no monopoly on constitutions. All sorts of state, from left-originating totalitarian regimes to right-wing fascist states, from despotic monarchies to oppressive theocracies, have constitutions. Constitutions of democratic republics, however, are qualitatively different. Democratic constitutions tend to identify the source of sovereignty as the people (rather than emirs or gods) and provide the reasons behind the legitimate existence of the state itself. In a word, they are ontological. That is, if you abolish the constitution of a democracy, the legitimacy of the state

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[1] Aakash Singh Rathore is a philosopher of international repute. He has previously taught at Jawaharlal Nehru University, the Universities of Delhi, Rutgers, Pennsylvania, Toronto, Humboldt Berlin, LUISS-Rome, and O.P. Jindal Global University. He is International Fellow of ETHOS, Rome, and Fellow at the Indian Institute of Advanced Study, Shimla. He has authored several books including *Ambedkar's Preamble: A Secret History of the Constitution of India* (Penguin, 2020). He is also the Series Editor of *Rethinking India* (14 vols, Penguin/Vintage, 2019-21). He is also Chief Editor, *B. R. Ambedkar: The Quest for Justice* (5 vols, Oxford University Press, 2021). The author may be reached at <asrathore@jgu.edu.in>.

disappears too. This is not so for fascist states or for emirates or for theocratic monarchies and the like: if you abolish those constitutions, the sovereign power still remains, and it remains in the hands of the *fuehrer* or leader, the king, the god-man, or what have you, because the source of their legitimacy was not the constitution; rather, their constitutions were merely expressions of their self-imposed limitations on their pre-given sovereign power (whether by the nation, by God, or by natural right). The vast majority of human history, seven thousand or so years, witnessed various kinds of power or state formations that were not legitimized by constitutions but by metaphysical ideas like the nation or God or else by sheer dominance. Thus, the legitimizing constitution of the democratic state, flourishing only some seventy years or so, is a very rare and precious thing, because it interrupts the long-standing priority of the natural right of the dominant to rule, replacing it with the fundamental and inalienable dignity of every human. In the Preamble to the Constitution of India, the dignity of the individual is even lexically prior to the unity of the nation. And it is "*We, the People*" who are recognized as the source of state sovereignty. Important things follow from this.

For example, each time democratic state power violates a citizen's dignity, it oversteps its mandate. And, every time democratic state power exercises sovereignty in an extra-constitutional manner, it does so illegitimately, basically as an anarchic violent junta or a colonizing force. No constitution means no legitimate state. Again, this is unique to democratic constitutions whose source of sovereignty is the people.

THE NEW TRENDS, AND TRENDING NEW BOOKS

At a time when macro-economic challenges under the forces of global capitalism erode the viability of the democratic welfare-state, undermining the ideology of the welfare state would be a natural strategy for both global corporations and democratic nation-states. When the architecture of the welfare state is inbuilt into the constitution itself, undermining the ideology of aspects of the constitution would be a natural strategy, as ironic as it may seem, even for democratic nation-states. For the past two decades, democratic governments have already sought to convince their people of

the need to balance fundamental rights against perceived threats over '*security'*. The acceptance of state exigency as superior to constitutional basics gets hardened with the triumph of the security paradigm (in avatars like National Security Act, 1980; Unlawful Activities Prevention Act, 1967; sedition under the Indian Penal Code, 1860 and so on) over liberty (freedom of expression, habeas corpus, due process of law), or the normalization of invasive surveillance (with global corporations and nation-states in connivance) that tramples citizens' privacy. This helps to catalyse atavism about the nature of state power: a return to the attitudes of the many millennia when we regarded it as the natural right of authorities to rule as they will (that is, not in line with contemporary principles of egalitarian justice). And in a certain sense, I think that behind the question that was posed to me, "*What is so sacred about the Constitution?*", was the question, "*What is so sacred about modern principles of justice?*"

A dizzying spate of new books on the Constitution of India and constitutional jurisprudence in India by top publishers attests to this new environment, probing into the very nature of democratic constitutions and principles. Several studies have recently appeared: Tripurdaman Singh's *Sixteen Stormy Days: The Story of the First Amendment to the Constitution of India*[2], Gautam Bhatia's *The Transformative Constitution: A Radical Biography in Nine Acts*[3], Chintan Chandrachud's *The Cases that India Forgot*[4], Madhav Khosla's *India's Founding Moment: The Constitution of a Most Surprising Democracy*[5], and my own *Ambedkar's Preamble: A Secret History of the Constitution of India*[6]. It is the first two books mentioned that I want to focus on. Tripurdaman Singh's book is exceptionally quick-paced, reader-friendly, and well-written, excepting one dissonant chord repeatedly struck throughout the length of the book. That dissonant chord, or jarring needle-scratch, is the raging animus against Jawaharlal Nehru, the villain of Singh's story. Singh portrays Nehru as "*a dictator*", as the "*authoritarian*" who

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[2] TRIPURDAMAN SINGH, SIXTEEN STORMY DAYS: THE STORY OF THE FIRST AMENDMENT TO THE CONSTITUTION OF INDIA (Penguin 2020).
[3] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS (HarperCollins 2019).
[4] CHINTAN CHANDRACHUD, THE CASES THAT INDIA FORGOT (Juggernaut 2020).
[5] MADHAV KHOSLA, INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY (Harvard University Press 2019).
[6] AAKASH SINGH RATHORE, AMBEDKAR'S PREAMBLE: A SECRET HISTORY OF THE CONSTITUTION OF INDIA (Penguin 2020).

dismantled and permanently foreclosed liberal democracy in India, and much worse. The entire narrative around the First Amendment to the Indian Constitution is constructed to establish Nehru's brazen, egotistical effort to "*have his own way*". So graphic is the character assassination of India's first Prime Minister that the scenes focusing on him evoke the genre of *revenge-porn*, here enacted for the perverse titillation of the right-leaning libertarian gaze.

More dangerously, Singh's book seems to play to the recent efforts to decouple state power from democratic principles of egalitarian justice, by showing how icons earlier revered for championing such principles (especially Nehru), were no different from any other executive seeking to augment their own power at any cost. Such a cynical narrative insidiously supports today's waxing atavism.

The book does have its merits, to be sure. It elegantly recounts the tumultuous events unfolding in 1950 and early 1951 — primarily, the challenges government faced in pursuing its foreign policy (especially with Pakistan) and social justice policies of zamindari abolition and land reform, as well as reservation — as a result of constant excoriating negative press, and a string of judicial pronouncements against the government with regard to freedom of speech and expression, and the rights to private property and to equality. All of this led Nehru and his cabinet to draft the Constitution (First Amendment) Bill, 1951 which the beleaguered Prime Minister introduced to the Parliament on May 12, 1951, pushing it through over the course of some four harrowing weeks — Singh does not clarify, precisely, which sixteen days among these are the eponymous stormy ones.

Also blurred in the book are the different motivations and interests of the several cabinet members who supported Nehru's amendment; obviously, they did not all agree on every aspect — Dr. Ambedkar's primary motivation, for example, arose from the Court's rejection of reservation (meant to undergird substantive equality in a highly inegalitarian society) on the grounds of abstract liberal equality. Singh collapses the varied motivations into a single reduction to being "*hungry for a party ticket*". Throughout the book, only the intentions of Nehru and his party are

subjected to scrutiny and doubt, and most uncharitably so. Meanwhile, all the critiques by the *Times of India* against Nehru and his government's policies are taken as objective and unmotivated, despite the obvious risk that they themselves might have represented class and caste biases against socially progressive reforms (especially, though not exclusively, about reservation policy). Similarly, the author takes the rulings of the High Courts and the Apex Court at face value, ignoring the parallel history of their own rival aim to establish and augment the judiciary's sphere of influence in the emerging Republic. In stark contrast, Gautam Bhatia's dense but lively book could not be more at odds with Singh's. Far from assuming some libertarian ideal for Indian constitutionalism, Bhatia argues that liberty in the Indian context cannot be conceived (as it was during the 18th-century American or French precedents) as a vertical relation between subjugated citizens under an oppressive government. Instead, Bhatia argues that the founders of India's Republic were conscious that private, non-state "*structures and institutions were often sources of domination and authoritarianism*" that had to be tackled constitutionally.

Bhatia's "*transformative*" reading of the constitution traces how liberty, equality, and fraternity have evolved substantively towards a regulative ideal of democratic, egalitarian freedom. The ideal remains unrealized, but it serves to motivate citizens, and hopefully to influence government behaviour, prospectively. Thus, unlike Singh, Bhatia does not believe that Indian liberal democracy was dead on arrival. Rather, the constitutional essentials upon which our Republic was founded still hold ground ready to be reanimated.

This sort of reanimation which Bhatia and others speak of is the essence of transformative constitutionalism. Dr B.R. Ambedkar himself indicated repeatedly that such transformation would be necessary; for example when he remarked in his November 25, 1949 speech to the Constituent Assembly:

> "*We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social*

> *democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life.*"[7]

As Bhatia persuasively argues, such a transformative orientation has been boldly fostered in India within a jurisprudence of transformative constitutionalism, readily perceptible within judgments of Justice V.R. Krishna Iyer, among numerous others to follow, when he stated:

> "*The authentic voice of our culture, voiced by all the great builders of modern India, stood for abolition of the hardships of the pariah, the mleccha, the bonded labour, the hungry, hard-working half-slave, whose liberation was integral to our independence. To interpret the Constitution rightly we must understand the people for whom it is made – the finer ethos, the frustrations, the aspirations, the parameters set by the Constitution for the principled solution of social disabilities.*"[8]

Within such a view, the state must play an active role to ensure liberty, equality, fraternity, and indeed, emancipation. It follows, then, that the arbitrary authoritarianism of executive power need not be taken as inevitable. Our pre-constitutional past does not have to be our constitutional future.

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[7] 9 CONSTITUENT ASSEMB. DEB. (Nov. 25, 1949), http://loksabhaph.nic.in/writereaddata/cadebatefiles/C25111949.html.

[8] Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, (1981) 1 SCC 246 ¶ 23.

REVIEW OF THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD? BY MICHAEL J. SANDEL

RAVI SHANKAR PANDEY[1]

"*The Tyranny of Merit: What's Become of the Common Good*",[2] authored by Professor Michael Sandel is more about making a sociological and philosophical claim than touching the domains of constitutional and administrative law. Both sociological and philosophical claims made by Professor Sandel in the book, cater to the constitutional analysis. As I perceive it, it makes a valid constitutional claim showing us a glimpse of the age-old arguments on affirmative action, equality, common good and an egalitarian society in all aspects.

Professor Sandel starts his discourse by asking us to not be proud of ourselves for having earned everything in our life on our own. He says:[3]

> *"…the more we think of ourselves as self-made and self-sufficient, the harder it is to learn gratitude and humility. And without these sentiments, it is hard to care for the common good".*

When one reads this line, one is suddenly reminded of Malcolm Gladwell's Outliers[4] (2008) where Gladwell talks about the situations not in our control, that lead people towards success. The same goes for Morgan Housel's intriguing analysis in "*The Psychology of Money*".[5] The two prominent texts on the same topic we may cite are Michael Young's satirical yet

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[1] Ravi Shankar Pandey is a third year B.A. LL.B. (Hons.) student at Dr. Ram Manohar LohiyaNational Law University, Lucknow. The author may be reached at <pandey.ravis hankar0007@gmail.com>.

** The author dedicates this contribution to Ms. Himanshi Tiwari; for she demonstrates how compassion, humility and "*common good*" are more impactful than the "*meritocratic*" ideals.

[2] MICHAEL J. SANDEL, THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD? 19 (Farrar, Straus and Giroux 2020).

[3] *Id.*

[4] MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS (Back Bay Books 2011) (2008).

[5] MORGAN HOUSEL, THE PSYCHOLOGY OF MONEY (Harriman House Publishing 2020).

insightful discourse in "*The Rise of the Meritocracy (1958)*",[6] and by Dr. Daniel Markovits in his "*The Meritocracy Trap (2019)*".[7]

While Markovits's analysis is very recent and extensive, it is Young, a British sociologist who is credited with coining the term "*meritocracy*" in his 1958 classic. Young's "*The Rise of the Meritocracy*" is considered to be a dystopian fantasy, alongside landmarks like Orwell's *"1984"*[8] and Aldous Huxley's "*Brave New World*".[9] The dystopia covering the period 1870-2033 predicted some forms and content the world will acquire with time, increasing hierarchy and demarcation amongst norms of education, both primary and secondary, and the employment sector.

We can start with exploring constitutional law ingredients in Sandel's "*The Tyranny of Merit*" for the benefit of the readership of this journal. The term "*constitution*" has not got enough mention in the book.[10] However, the constitutional spirit and the idea of social justice acquires the centre stage throughout the discourse. After all, any discussion on providing equal access to opportunities, not through the back door but the genuine front door is a constitutional concern; Sandel beautifully evaluates the present scheme of discussions in modern society.

The book, divided into seven chapters, explores the gulf between winners and losers, the merit rhetoric, success ethics, the selection mechanism, and themes of morality that support the tyranny of merit. At the very beginning of the book, the reader is forced to ask oneself the idea of affirmative action (as it exists in India) and to analyse how hard it is to get into public institutions in the twenty-first century. The idea is illustrated by the example of parents who seek to shape their child's future by painting a front door picture through unfair means. Such parents include those who pay sports coaches or music teachers for writing false recommendation letters for their children to secure eligibility for sports quota or to falsely

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[6] MICHAEL YOUNG, THE RISE OF THE MERITOCRACY (Routledge, 2d ed. 1994) (1958).
[7] DANIEL MARKOVITS, THE MERITOCRACY TRAP (Allen Lane 2019).
[8] GEORGE ORWELL, 1984 (Amazing Reads 2014) (1949).
[9] ALDOUS HUXLEY, BRAVE NEW WORLD (RHUK 2004) (1932).
[10] The term '*constitution*' occurs only once in the book while referring to John Rawls. *See*, SANDEL, *supra* note 2, at 135.

portray their child's application to be well-rounded with extra-curricular, so on and so forth. Manipulating the application for admission to premier institutes helps in making an impactful submission, and the admission committee then has no choice but to accept such candidates. Sandel calls it the side door technique for getting admitted.

The side door technique can be distinguished from the back door technique in the sense that the back door involves paying a large amount by way of a donation to the college. The money paid through the back door goes to the respective college, which the college then uses to improve the education of other children. Entry through the back door, however, is non-meritocratic. A student enrolled into a premier institute through the back door would not feel proud of himself. His enrolment is solely attributed to his parent's wealth and not the student's calibre. It is hence better to enter through the side door, as one must only manipulate the application by involving academic influences and frame the application accordingly; this would give the candidate equivalent meritocratic honour as that of a front door admission.

While the side door technique is indicative of a drastic change in parenting style, it resembles the idea against which Michael Young warned us. The idea being the propagation of meritocracy where parents fulfil their unfulfilled dreams through off springs. As the idea goes, what good one is doing as a parent if one cannot provide a chance at higher education to their children while keeping his dignity (the so-called *meritocracy*) intact so that he may hold his head high in front of his intelligent peers? As Professor Sandel writes:[11]

> *"From the standpoint of fairness, however, it is hard to distinguish between the 'back door' and the 'side door'. Both give an edge to children of wealthy parents who are admitted instead of better-qualified applicants. Both allow money to override merit. Admission based on merit defines entry through the 'front door' …the front door 'means you get in on your own'. This mode of entry is what most people consider fair; applicants should be admitted based on their own merit, not their parents' money."*
>
> *(emphasis added)*

[11] SANDEL, *supra* note 2, at 15.

Ultimately, the side door technique reduces the scope of admission of those candidates who are not fit for the front door for reasons ranging from having inadequate resources to enrol for music or sports classes to those who do not have stellar academic credentials despite having access to adequate resources. The latter candidates, though not in possession of good academic credentials are undoubtedly better than those getting admitted through the side door technique, is an idea professor Sandel put forward in his seminal contribution "*What Money Can't Buy?*".[12]

The former (a candidate not having resources) has to sacrifice its seats for the back doors; for those who do not have the resources to enrol in extra/co-curricular classes cannot afford to pay the back-door donations as well. We may trace such academic corruption in the Indian scenario in the form of fake caste and disability certificates heavily used for getting supplied with reserved seats.[13] All of this not only goes contrary to the idea of academic integrity and ensuring impartiality in the selection process but increases the divide between privileged and unprivileged class, socially and economically, and hence that term "*the tyranny of merit*".

After setting the context of "*getting in*" in the introduction, Professor Sandel moves to a deeper evaluation of the issue. In chapter I, he delves into the downsides of perfect meritocracy. Professor Sandel remarks that *"the problem with meritocracy is not only that the practice falls short of the ideal"*[14] but also that it is not an efficient method to bridge the gap between the elite and the common masses. In a nutshell, even a perfect meritocracy would fall short of meeting both political and moral ideals. Political ideals because politics cares for the upliftment of all stratum of society, at least in theory and moral ideas because *"meritocratic hubris reflects the tendency of winners to inhale too deeply of their success, to forget the luck and good fortune that helped them on their way."*[15]

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[12] MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (Penguin UK 2013).
[13] Subhash Gatade, *Phenomenon of False Caste Certificates*, 40(43) ECON. & POL. WKLY. 4587, 4587-4588 (2005)
[14] SANDEL, *supra* note 2, at 28.
[15] SANDEL, *supra* note 2, at 28.

And from where does meritocracy germinate? According to Professor Sandel, the manuring of merit is done through quotes *"you can make it if you try"*[16] (no exceptions!); this is the problem Sandel addresses in chapter II and after that.

The decline in the influence of the church after scientific interventions during the industrial revolution in Europe and the United States and the colonies that followed, loosened the beliefs of people on God. What was earlier perceived to be God-given slowly started to be conceived as hard-earned. Be it good events or mishaps, it was only the human mind and labour that was letting such an event happen in the first place. To substantiate his point, Professor Sandel refers to the words of Kate Bowler:[17]

> *"'Blessed' is a term that blurs the distinction between gift and reward. It can be a term of pure gratitude. 'Thank you, God. I could not have secured this for myself.' But it can also imply that it was deserved. 'Thank you, me. For being the kind of person who gets it right.' It is a perfect word for an American society that says it believes the American dream is based on hard work, not luck."*

Chapter III, titled "*The Rhetoric of Rising*", explores the idea of supplying people with opportunities and rewards only when their misery is not a result of their own faults. Such phrases concretise the trend of glorifying success as a direct result of hard work in a meritocratic society. Even the presidential campaigns echo with meritocratic ideals saying that welfare should be restricted to those who were needy *"through no fault of their own"*.[18]

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[16] SANDEL, *supra* note 2, at 29.

[17] Kate Bowler, *Death, the Prosperity Gospel and Me*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/opinion/sunday/death-the-prosperity-gospel-and- me.html.

[18] According to Sandel the trend started with Ronald Reagan and Margaret Thatcher in 80s and grew with time with Barack Obama using the phrase more than the last few presidents combined! Sandel also cites that the loss of Hillary Clinton was due to overuse of this phrase only. As he says, *"This is how Trump voters may have heard Hillary Clinton's meritocratic mantra. For them, the rhetoric of rising was more insulting than inspiring. This is not because they rejected meritocratic beliefs. To the contrary: They embraced meritocracy, but believed it described the way things already worked…This is partly because they feared such intervention would favour ethnic and racial minorities, thus violating rather than vindicating meritocracy as they saw it"*. *See*, SANDEL, at 71.

Success glorification as a direct result of hard work has grown in recent times with recent presidents of the United States of America. For instance, President Obama cited the example of his wife Michelle (who managed to attend Princeton and Harvard despite her middle-class upbringing) to argue how in America, *"if you work hard, if you are willing to take responsibility, then you can make it. You can get ahead"*.[19] Professor Sandel has observed a similar trend among his students and concludes that in all of them *"meritocratic faith has intensified"*.[20]

This is problematic, because the connotation the terms such as "*you deserve!*" carry, is subjective. Even when one believes that they deserve a break after writing a column, the break they deserve is very restricted to the idea of meritocracy they have employed, for it may be different for a productive billionaire and a beggar in India, relatively. This idea resonates in chapters III and IV of the books making it a compelling read. The political incorrectness of showing dreams hard to conceive (forget achieving!) connects with the rhetoric of rising. As Sandel argues:[21]

> *"When the richest 1 per cent take in more than the combined earnings of the entire bottom half of the population when the median income stagnates for forty years, the idea that effort and hard work will carry you far begins to ring hollow"*.

The hollowness leads to two-fold discontent; the first being the frustration that people experience when they do not win the game despite following all rules, the second being the realisation that people have when they start thinking that they have missed the train of merit. This can be quickly compared with the prevailing idea in India, where exams like the National Eligibility cum Entrance Test ("**NEET**"), Indian Institute of Technology-Joint Entrance Examination ("**IIT-JEE**") and Common Law Admission Test ("**CLAT**") are the benchmark of merit.[22] Interestingly, whatever

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[19] SANDEL, *supra* note 2, at 67.

[20] Sandel cites the example of a student having to sell his kidney to buy an iPhone and iPad, which was responded with the blind belief in the institution of meritocracy, displayed by students. *See*, SANDEL, *supra* note 2, at 60.

[21] SANDEL, *supra* note 2, at 72.

[22] *See generally*, Christian Medical Vellore Association v. Union of India, (2020) 8 SCC 705 (the Hon'ble Supreme Court made NEET compulsory for Admission in Private Medical

Sandel argues is what is a common narrative in middle and lower-middle-class households. Yet, Sandel will make a deep and long-lasting impression on them because of intriguing documentation of such narratives backed with statistics. Nevertheless, where is the solution to all these problems?

The solution, if any, is not easily conceivable, as resources being a key factor allow people to be meritoriously superior with their ability to pay for other expenses such as previous year exam papers, coaching, and study material. It creates an income divide resulting in a similar economic dynamic in premier institutes in the United States of America, even with mechanisms like affirmative action.

Sandel keeps the readers clueless until very late in his exploration of the merit phenomenon. The remaining chapters IV-VII titled "*Credentialism: The last accepted prejudice*", "*Success Ethics*", "*The Sorting Machine*", and "*Recognising Work*" respectively are fast-paced. Chapters IV to VII give us extensive insights into what the future may hold for those who romanticise meritocracy and for those who are doomed as a result of the hollowness mentioned above.

The thought that Sandel leaves to the readers resonates with the preambles of constitutions of all leading democracies. As the preamble to the Indian Constitution paints the picture of a just society in solemn affirmation in words:[23]

> "*and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity, and to promote among them all, FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation*".

Unfortunately, the scheme of meritocracy defeats the values enshrined in the preamble and hence Sandel's discourse seems well-placed.

Course stating that *"The quality of medical education was imperative to subserve the national interest, and that the merit cannot be compromised"*).

[23] INDIA CONST., Preamble.

However, what are the solutions to this massive problem? If one refers to the American regime, the right method to solve the problems germinates from adopting the aptest lenses for their examination. One should not appreciate a system of discrimination that can be escaped by earning merit. However, one may praise a system where equality, solidarity, and justice emerges from the public and is not thrust upon them. This seems a well-thought recourse, taking into account the growing world population and limited resources at humanity's disposal. The lesson is about observing contingency in individual success. As Sandel proclaims:[24]

> *"A lively sense of the contingency of our lot can inspire a certain humility: There, but for the grace of God, or the accident of birth, or the mystery of fate, go I."*

Instead of promoting meritocratic conceptions, we need to cultivate civil bonds which last long. As social well-being depends upon solidarity and cohesion,[25] inculcating the idea in the present generation that achieving relative success among the community will create long-term value would be nothing but promoting false ideas which will result in long-term discontent. Consequently, such narratives lead to over-expectations, and thereafter instil a sense of inferiority among those who failed despite their hard work.

The world would be a more just place if we can develop it on the lines of public libraries like the library of congress where *"one sees the seats filled with silent readers, old and young, rich and poor, black and white, the executive and the labourer, the general and the private, the noted scholar and the schoolboy, all reading at their own library provided by their own democracy".*[26] Sandel has been phenomenal in his arguments and justifies why he is referred as the "*rockstar*" of political philosophy. While the book offers concrete solutions only at the end and the whole discussion seems unending, not reaching a meaningful conclusion, Sandel's "*The Tyranny of Merit*" fruitfully contributes to the existing scholarship on notions of "*meritocracy*" which started with Young

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[24] SANDEL, *supra* note 2, at 212.
[25] R. H. TAWNEY, EQUALITY (1931), *quoted in* SANDEL, *supra* note 2, at 209.
[26] JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA (1931), *quoted in* SANDEL, *supra* note 2, at 210.

in 1958. I have many reasons to recommend the book to both the general public and the experts in their fields, because "*The Tyranny of Merit*" is about ensuring the common good and resonates with all the constitutional conceptions i.e., liberty, equality and justice in the true sense.