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EDITORIAL: SECOND CHANCES AND DIGITAL ERASURE: DO FORMER CONVICTS HAVE THE RIGHT TO BE "FORGOTTEN" IN INDIA?

SONSIE KHATRI[1] AND TASNEEM FATMA[2]

The Right to be Forgotten gained traction in India's mainstream privacy discourse following the landmark judgement in K.S. Puttaswamy v. Union of India, which recognized it as an aspect of the Right to Privacy under Article 21 of the Indian Constitution. Earlier, the Court of Justice of the European Union had affirmed this right in the Google Spain case, thereby establishing its legitimacy in the EU. In India, the persistent issue with the Right to be Forgotten has been the lack of a developed criteria for its application. Until the introduction of the Digital Personal Data Protection Act, 2023, there was no specific law remotely addressing this right. This legislative vacuum led to several attempts by the judiciary to account for it, albeit unsuccessfully. Reform in criminal cases lags even further behind, as it has been left entirely contingent on developments in the constitutional arena.

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EDITORIAL: SECOND CHANCES AND DIGITAL ERASURE: DO FORMER CONVICTS HAVE THE RIGHT TO BE "FORGOTTEN" IN INDIA?

INTRODUCTION

The Right to be Forgotten (**"RTBF"**), refers to the notion that personal information, which is irrelevant, outdated or inaccurate should not be readily accessible to the public.[3] It is a highly contested legal concept which continues to raise not only moral and political issues, but technical and institutional problems as well.[4]

Currently, the Digital Personal Data Protection Act ("**DPDP**") incorporates the right in a limited sense, by relegating it to Section 12 of the Act.[5] Section 12 includes the right of the '*Data Principal*'[6] to correct, complete, update or crucially, erase personal data which they may have earlier consented to be collected for the purpose of further processing in accordance with any law.[7] However, this right of erasure is limited as it is subject to the condition that the erasure of data will not be possible in cases where the data is necessary for compliance with a specific law.[8]

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[3] Eli Edwards, *Libraries and the Right to be Forgotten: A Conflict in the Making?*, 2 J. INTELL. FREEDOM & PRIV. 13, (2017).

[4] Kieron O'Hara, Nigel Shadbolt & Wendy Hall, *A pragmatic approach to the right to be forgotten*, 26 GLOBAL COMMISSION ON INTERNET GOVERNANCE (2016).

[5] The Digital Personal Data Protection Act, 2023, The Gazette of India, pt. II sec. 2 (Aug. 11, 2023).

[6] A data principal is primarily considered to be the natural person or individual to whom the data relates i.e., the person whose data is being processed (collected, stored, shared, etc.).

[7] The Digital Personal Data Protection Act, 2023, § 12, The Gazette of India, pt. II sec. 2 (Aug. 11, 2023).

[8] The 2018 and 2019 versions of the bill adopted a more expansive and all-encompassing framework toward data protection. Many rights and obligations have been either diluted or discarded including the right to be forgotten which has been recast to a simpler right to "erasure".

This is the case with the EU's General Data Protection Rules (**"GDPR"**) as well.[9] The concepts of "*right to erasure*" and "*right to be forgotten*" within the GDPR encompass different ideas. The former empowers individuals to limit the illegal use of their personal information, whereas the latter grants individuals the ability to manage how their personal data is used, including the option to revoke their consent.[10]

However, the question remains – What is the current scope of RTBF? Does this concept of control over one's personal data refer to an absolute right to remove personal data, or is it still limited by other factors?

This question becomes especially relevant when distinguishing between data collected under specific laws, such as the DPDP Act, which emphasises on data to be collected with the data principal's consent, and data related to a crime, which may be collected and be made public without the accused's consent. This paper aims to address the application of RTBF in this regard in the criminal justice system in India.

Some scholars argue that RTBF is a misnomer as "information cannot be deliberately forgotten". RTBF, by this line of reasoning, can never be considered as a guarantee for the complete erasure of personal data. Initially, RTBF was envisioned as a broader right, broad enough to include the remedies of erasure, delisting/deindexing, de-ranking, flagging, correction and updating information[11], but now there are concerns as to whether such a right even exists in the first place.[12] While a person may have the right to have certain private information removed from public databases, that cannot be translated into an absolute right to manipulate public records to one's liking i.e., selected removal of information. In this sense, the current conception of the right to be forgotten is distinct from

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[9] Cecile de Terwangne, *The Right to be Forgotten and Informational Autonomy in a Digital Environment,* in ALESSIA GHEZZI, ÂNGELA GUIMARÃES PEREIRA & LUCIA VESNIĆ-ALUJEVIĆ (eds.), THE ETHICS OF MEMORY IN A DIGITAL AGE 82 (Palgrave Macmillan, 1st ed., 2014).

[10] Vini Singh, *Striking the Right (to be forgotten) Balance: Reconciling Freedom of Speech and Privacy – Dignity – Autonomy*, 8(1) NLUJ L. REV. 1 (2021).

[11] *Id.* at 13.

[12] Christiana Markou, *"The Right to Be Forgotten": Ten Reasons why it should be Forgotten*, in SERGE GUTWIRTH, RONALD LEENES, PAUL DE HERT (eds.), REFORMING EUROPEAN DATA PROTECTION LAW, 211-226 (Springer Nature, 1st ed., 2014).

an absolute right of erasure. A narrower and more realistic approach to the issue is required.

"De-indexing," also known as delinking, involves the removal of Uniform Resource Locators (URLs) from search engine results.[13] De-indexing does not eliminate information; it merely reduces its retrievability. This practice is often associated with the RTBF as it diminishes the accessibility of certain information. While the information remains available online, the connection between a person's name and the relevant information is effectively severed, making it harder to locate via search engines. Other remedies include '*de-ranking*' which only makes a search result less prominent[14], '*flagging*' which marks a search result as unreliable or incorrect as the case may be, and remedies of rectification/correction of incorrect[15] or outdated data.[16]

This distinction between the remedy of de-indexing and an absolute right to erasure is crucial, as it explains why the Indian courts have been inconsistent in their application of RTBF. A complete erasure of data would mean deliberately cutting access to court documents necessary to maintain transparency in the 'open court system' which has now become foundational to our justice system.

In this paper, we delve into the jurisprudence surrounding the application of RTBF in India to specifically address the scope of the right for former convicts. Our analysis focuses on the practical implications of RTBF, including issues like rehabilitation, privacy concerns, and the tension between individual rights and public interest. Additionally, we dissect the current landscape of RTBF in India, identifying legislative gaps and judicial responses. By comparing these findings with international practices, we analyse challenges surrounding the rehabilitation of former convicts and look at other alternate public remedies.

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[13] *Questions on the right to delisting*, COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS (Oct. 8, 2021) https://www.cnil.fr/fr/node/84400.
[14] Edward Lee, *The Right to be Forgotten v. Free Speech*, 12 J. L. & POLY. 85, 105 (2015).
[15] EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679, art. 16.
[16] *Id.*

THE GOOGLE SPAIN CASE & INTERMEDIARY LIABILITY

When information is in the public domain, do data intermediaries like Google have the obligation to take it down if the court orders so? And if yes, does Google even have the power to remove data in such a manner?

The observations in the landmark *Google Spain SL, Google Inc v. Agencia Española de Protección de Datos (AEPD), and Mario Costeja González* [*Google Spain*] judgement[17] on this matter are helpful here.

First, the Court of Justice of the European Union (**"CJEU"**) considered the contention by Google and Google Spain that there is a distinction between search engines and other third parties which may operate as data controllers. It was pointed out that even if the activities of Google may be classified as 'data processing', the operator of a search engine should not be regarded as a 'controller' in respect of that processing since it has no knowledge of that data and does not exercise control over the data.[18] The Court in response, admitted that the activity of search engines can be distinguished from that of the original publisher's website, which must have primary liability in RTBF matters.[19]

Second, it was contended that search engines like Google lack the power to erase information in the public domain. In this regard, the court noted that search engines play an important privacy-related function by collating search results on a single web page.[20] Furthermore, the court held that the processing of personal data by search engines is distinct and "additional" to the actions of website publishers, who upload the data on an internet page.[21] This draws a clear distinction between the function of search engines and other data controllers. However, by using the term "additional(ly)", the Court seems to have emphasised that search engines can exacerbate infringements on fundamental rights. While their role may

[17] Case C-131/12, Google Spain SL, Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González, [2014] Q.B. 1022 (*Google Spain Case*).
[18] *Id.* at 22-24.
[19] *Id.* at 25-28.
[20] *Id.* at 28.
[21] *Id.* at 35.

be distinct from other data controllers, it can have an even greater impact on individual privacy.

As a result, the CJEU presented a solution-based approach to this conundrum. The court followed the approach of "*practical obscurity*" which the US Supreme Court had upheld earlier, in that requests made by individuals to access law enforcement data with respect to another citizen could not be considered as a part of their right to their Freedom of Information (akin to RTI in India).[22] The information would continue to be available to them due to its public nature but only as long as the one making the request is not interested in seeking information with respect to a particular person(s).[23]

The critics of RTBF often rely on this line of argumentation, which is now referred to as the "library argument", where an attempt is made to liken a search engine like Google to a library's catalogue of books.[24] Since the internet now appears to operate like a shared library, the removal of information from the internet is like making a book disappear from the library for eternity. The analogy serves as a potent narrative tool, aimed at evoking a collective and understandable apprehension towards censorship and loss of information.[25]

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[22] U.S. Dep't of Justice. v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989); *see also* BLACK'S LAW DICTIONARY, 1419 (Thomson West, 11th ed., 2019).

[23] The case held that computerised accessibility of previously hard-to-access information that "would otherwise have surely been forgotten" has threatened to undermine the privacy interest in maintaining the practical obscurity of the information.

[24] *See, e.g.*, Eloise Gratton, *Forget about bringing the 'right to be forgotten' to Canada*, FINANCIAL POST (May 9, 2016), http://business.financialpost.com/fpcomment/forget-about-bringing-the-right-to-be-forgotten-to-canada; David Drummond, *We need to talk about the right to be forgotten*, THE GUARDIAN (Jul. 10, 2014), http://www.theguardian.com/commentisfree/2014/jul/10/right-to-be-forgotten-european-ruling-google-debate; *On being forgotten*, THE ECONOMIST (May 17, 2014), http://www.economist.com/news/ leaders/21602219-right-be-forgotten-sounds-attractive-it-creates-more-problems-it solves-being.

[25] Chris Prince, Micheal Vonn and Lex Gill, *The Aleph Bet: Debating Metaphors for Information, Data Handling and the Right to be Forgotten*, 16 CAN. J.L. & TECH. 171, (2018).

The CJEU's approach to the matter seems like a middle-way approach, which aligns with the idea that while a shared library exists, simply making a book harder to find would not hinder someone's right to access it and there is no true "information loss" since the book will continue to be in its place.

The 'library argument' also has its critics.[26] They suggest that there is suspicion that the advocates of freedom of expression paint a bleaker picture than reality warrants. Their scepticism revolves around two main points. *First*, they argue that search engine results are not akin to a traditional library catalogue; rather, they are highly customised based on factors such as past site visits, search history, and individual browsing habits.[27] Therefore, there is no singular 'default' Google library or universally standardised search system. *Second*, the library analogy implies a centralised repository for all digital information, which is not the case. Instead, digital information is dispersed across numerous regional indices, with indexing and search efforts decentralised across tens of thousands of servers globally.[28]

The metaphor and imagery employed for the act of forgetting information and its subsequent digital recall are highly relevant as they give a clear idea as to the ideological underpinnings of RTBF and its criticism. The library argument has become outdated due to the reasons pointed out above, but it continues to be comfortingly familiar to courts and legislators, and that is precisely why it misleads. On the other hand, RTBF's endorsement as a value or an ethical need for erasure also requires reconsideration as its foundation remains murky.

THE RTBF SPECTRUM: THREE LEVELS OF PROCESSING

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[26] *Id.* at 176.

[27] *Personalized Search for Everyone*, GOOGLE BLOG (Dec. 4, 2009), https://googleblog.blogspot.ca/2009/12/personalized-search-for-everyone.html; ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (Penguin Books, 1st ed., 2011).

[28] *See* Google Transparency Report, *European privacy requests for search removals* (May, 2016), https://www.google.com/transparencyreport/removals/europeprivacy/; *See also*, Google, "FAQ", https://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=en.

Essentially, any request for erasure of data can be processed at three levels.[29] The *first level* involves the delisting, or de-indexing, of an individual's name from search results. This means that when someone searches for the person's name, it no longer appears in the displayed results. This approach seems to be effective, as it is expected to reduce issues related to reputation and employability. Consequently, individuals facing these concerns should no longer experience them to the same extent, as a simple search by the average person no longer directly links to their name.

Interestingly, the Argentinian Supreme Court, in a recent decision pointed out issues with de-indexing as well, and how the same could possibly have a *cascading effect* and impact the overall accessibility of information for the common man.[30] This raises questions about delisting being accepted worldwide as a proportional solution to most RTBF requests.

The *second* level is where the person might claim the removal of their name by digital reporters other than the official court websites themselves. These include reporters such as *SCC*, *Manupatra*, *LiveLaw* and *IndianKanoon*. Most of these reporters have been involved in such cases due to their refusal to accept a request for removal.[31] They claim that since the State publishes court documents *via* its websites, it gives reporters an adjacent right to report on these documents for public accessibility.[32] This scenario is more complicated as it brings in the public versus private interest debate since the reporters' defence relies on public accessibility raising questions of public interest before the State is even involved.

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[29] V Sreedharan, *Transparency, Good Governance and the Right to be Forgotten*, NLSIU BLOG LEGAL LITERACY AND LEGAL AWARENESS (Apr. 5, 2022), https://ceerapub.nls.ac.in/transparency-good-governance-and-the-right-to-be-forgotten/#_ftnref6. The levels of processing are a hypothetical construct solely used for the representation of ideas and don't present a factual statement about RTBF claims.

[30] Case N° 50016/2016, Denegri and Natalia Ruth v Google Inc. (Aug 11, 2020) (Arg.).

[31] R. Rajagopal v. State of Tamil Nadu (1994) 6 SCC 632; Zulfiqar Ahman Khan v. Quintillion Businessman Media Pvt. Ltd & Ors (2019) SCC OnLine Del 8494; Virginia Shylu v. Union of India WP(C) 6687/2017, Ker HC.

[32] Devdutta Mukhopadhyay, *Indian Kanoon defends the right to provide access to court records*, INTERNET FREEDOM FOUNDATION, (Jan. 5, 2021), https://internetfreedom.in/indian-kanoon-kerala-hc-right-to-be-forgotten/.

The *third* level refers to a case where the person is requesting either complete anonymisation or removal of official court documents from the public domain altogether. While complete anonymisation has been granted to victims in the past, specifically in cases of rape,[33] most requests at this level are denied, because they gravely impact public interest by limiting accessibility and hampering the right to information.[34]

REHABILITATION AND INSTITUTIONALISED FORGIVENESS UNDER RTBF

In order to address the scope of the application RTBF in criminal cases in India, it is crucial to understand whether there exists a connection between the rehabilitation of a past convict and their RTBF, with respect to the crime they had committed in the past.

It is argued by some that rehabilitation cannot be associated with being forgotten, as one's actions can be forgiven over time but not wiped from public memory.[35] Attempts at institutionalising forgiveness often fail as the implementation of RTBF usually depends on a case-to-case analysis of facts and circumstances which prevents the underlying value of forgiveness from translating permanently into the justice system.[36] Despite this, it must be acknowledged that the Internet has significantly intensified the social effects of not forgetting, which leaves little to no space for forgiveness, and as a result, for the rehabilitation of the individual.[37]

There is also merit in acknowledging that forgetting in the psychological sense is morally neutral, as opposed to RTBF, which is a morally charged guarantee.[38] While RTBF is not a natural right and has no historical precedent before the age of the internet, the practice of maintaining

[33] Subhranshu Rout v. State of Odisha (2020) SCC OnLine Ori 878.
[34] Dharamraj Bhanushankar Dave v. State of Gujarat (2017) SCC OnLine Guj 2019; Sri Vasunathan v. The Registrar General (2017) SCC OnLine Kar 424.
[35] PAUL RICOEUR, MEMORY, HISTORY, FORGETTING, (University of Chicago Press, 1st ed., 2004).
[36] Kieron O'Hara, Nigel Shadbolt & Wendy Hall, *A pragmatic approach to the right to be forgotten*, 26 GLOBAL COMMISSION ON INTERNET GOVERNANCE 3-4, (2016).
[37] V. MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE, (Princeton University Press, 1st ed., 2009).
[38] O'HARA ET AL., s*upra* note 36, at 2.

complete records in a bureaucracy is also far from natural.[39] Initially, records were kept to manage the complexities of increasing data but with the advent of the internet, this permanence in record-keeping can cause irreparable damage to a person's reputation in society long after they have served their punishment or faced public humiliation on the internet. In such cases, the internet essentially dictates when a person's "sentence" ends.

The institutionalisation of forgiveness, specifically for those who have already served their sentence, has gained traction in the past years. Apart from major criminal offences, most countries allow the removal of names or information in favour of those with spent convictions.[40] This helps the reintegration of the individual back into society.

However, the scope for rehabilitation through RTBF is still narrow and the protection for the spent convict or past accused is quite limited. Such requests to be left alone may not be entertained at all depending on the facts and circumstances. There are no fixed criteria yet. There is an immediate need to decouple the intensifying social impact of mass information storage on individuals.

JUDICIARY'S ROLE IN DEFINING THE SCOPE OF RTBF

The lack of an explicit regulatory framework dealing with RTBF makes it crucial to analyse the judicial evolution of the right. While the CJEU acknowledges RTBF as a part of the fundamental right to data protection, India, bases its protection on the lines of dignity, autonomy and honour as outlined in *Puttaswamy*. At the core of this issue lies the tension between two fundamental rights enshrined in the Constitution: the right to dignified rehabilitation and reintegration into society, derived from Article 21 and

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[39] *See* JAMES B. RULE, PRIVATE LIVES AND PUBLIC SURVEILLANCE: SOCIAL CONTROL IN THE COMPUTER AGE, 300 (Oxford University Press, 1st ed., 1974).

[40] *See* CAL. PENAL CODE (1872), § 1203.4; Tex. CODE CRIM. PROC. ANN. (1965), art. 55.01 – 55.06; X (formerly known as Mary Bell) & Y v. News Group Newspapers Ltd. & Ors., [2003] EWHC 1101 (QB); AUSTRALIAN HUM. RTS. COMM'N, DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF CRIMINAL RECORD, Article C, (2004); Rehabilitation of Offenders Act 1974, c.53 (eng.).

often exercised through RTBF and the public's right to access court documents, stemming from the right to information under Article 19.

The issue of RTBF was first addressed by the Gujarat HC in 2017, in a case wherein the request for removal of content was not allowed and the petitioner had been accused of culpable homicide amounting to murder.[41] The offence was grave and despite the petitioner's contention that the decision was "unreportable", his petition was dismissed.[42] The decision was attributed to a lack of any legitimate right to data protection under Article 21 and further, that publication by third party websites is not a violation of the right to privacy as court judgements are public documents.[43]

In 2017, the Karnataka HC tried to make references to the expansion of RTBF in 'Western Countries'[44], specifically to benefit women in sensitive cases[45], based on the protection of their modesty and reputation but no concrete principle was developed.

In 2017, in Puttaswamy, contrary to popular belief, the Court didn't actually justify the use of the term RTBF. It instead used the phrase '*right to be left alone*' and connected it to the autonomy and dignity of the individual.[46] It's unclear whether the '*right to be left alone*' is similar or identical to RTBF, but by recognizing the role of the GDPR and its exceptions the Court does indirectly acknowledge the importance of the EU's version of RTBF. However, this offers no clarity on the current status of RTBF in India.[47]

In 2019, in contrast, the Delhi HC recognised RTBF as an 'inherent right' under the Right to Privacy under Article 21.[48] The court ruled in favour of the petitioner, who requested the removal of online articles addressing sexual harassment allegations during the #MeToo Campaign. No concrete reasoning was offered as to how a reasonable balance of rights has been maintained or as to why RTBF is applicable in the matter, apart from the

[41] Dharmaraj Bhanushankar Dave v. State of Gujarat (2017) SCC OnLine Guj 2019.
[42] *Id.* ¶ 4.
[43] *Id.* ¶ 7.
[44] Sri Vasunathan v. The Registrar General (2017) SCC OnLine Kar 424.
[45] *Id.* ¶ 9.
[46] Justice K.S. Puttaswamy (Retd.) v. Union of India (Privacy), (2017) 10 SCC 1 ¶ 176.
[47] *Id.* ¶ 69.
[48] Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd (2019) SCC OnLine Del 8494.

recognition that the petitioner's future would be 'tarnished' if these articles continue to exist on the internet.

In 2021, the Delhi High Court reaffirmed the RTBF by ruling in favour of a plaintiff who requested the removal of a judgement related to his case from sources such as Indian Kanoon and Google, citing employment disadvantages.[49] The Court acknowledged the need to balance 'the right to privacy of an individual,' 'the right to information of the general public,' and 'the maintenance of transparency in the judicial system.'[50] However, the decision to grant relief was primarily motivated by the desire to protect the plaintiff's social life and career prospects and to prevent irreparable harm.[51] This ruling indicates a shift towards prioritising individual dignity, though it did not establish concrete principles for future cases.

CONFLICT BETWEEN THE PRINCIPLES OF OPEN COURT VERSUS THE ACCUSED'S RTBF

In the debate surrounding the nature of the third level RTBF requests (those dealing with the removal of public records), the major concern is the conflict between the accused's RTBF and the idea of maintaining an open court system which is deemed integral to the functioning of a democracy. This is precisely why RTBF cannot be exercised against court documents.

In 2021, the Madras HC considered whether a person who has been on trial and later acquitted can exercise RTBF.[52] Specifically, it considered the scope of the application of the right to limit the accessibility to court documents.[53]

In its interim order, the Court for the first time articulated the need to balance "*the right to privacy of the petitioner*" with "*the right to information of the*

[49] Jorawer Singh Mundy v. Union of India, 2021 SCC OnLine Del 2306.
[50] *Id.* ¶ 8.
[51] *Id.* ¶ 11.
[52] Karthick Theodre v. Registrar General, (2021) SCC OnLine Mad 2755.
[53] *Id.* ¶ 17.

public and the maintenance of transparency in judicial records."[54] This marked a pivotal moment, as it was the first instance where the court analysed these conflicting interests extensively, which are central to this debate. The court upheld the petitioner's RTBF and granted interim relief to prevent further "irreparable prejudice" to his social life and career prospects. In its final decision, however, the Court reversed its interim order, recognizing that a broad application of RTBF for accused persons would contradict public policy.

Relying on the Apex Court's ruling in *Dilip Kumar Sharma And Ors. v. State of Madhya Pradesh,* the HC noted that an order of acquittal passed on merits gives the accused a right of '*automatic expungement*' of all records, especially those in public domain.[55] Crucially, the court drew distinctions between India's criminal justice system and a system like the one the US has, where automatic expungement is the norm due to an extensive criminal records system. It admitted that in India, during acquittal the court strikes off the accused's name from the final order to indicate acquittal from all proceedings. While in the US, owing to the rights in the US constitution, the acquitted person has a "*right to clean slate*" and can fill "nil" while filling out the space for criminal records in public documents like job application forms.[56]

However, the HC also emphasised caution in the US approach and noted that simply removing an acquitted person's name from final judgments or orders is insufficient. This is because other publicly available materials from the beginning of the criminal proceedings could still tarnish the person's reputation, further leaving them unable to prove their acquittal due to the redaction. [57] Hence, granting the RTBF in isolation would be in most cases counterproductive, as it wouldn't address the broader issue of reputational damage from other sources. To deal with this, it was finally noted that more comprehensive reform is required.[58] While ruling specifically on the question of the existence of an independent RTBF against court

[54] Karthick Theodre v. Registrar General, (2021) SCC OnLine Mad 2755. (Interim Order).
[55] Karthick Theodre v. Registrar General, (2021) SCC OnLine Mad 2755 ¶ 12.
[56] *Id.* ¶ 10-12.
[57] *Id.* ¶ 11.
[58] *Id.* ¶ 31.

documents, no answer was provided. It considered the finer details to be beyond its powers to adjudicate.

The court's conclusion underscores the delicate balancing act. While recognizing the importance of the right to be forgotten (RTBF) for accused persons, they caution against establishing a broad principle that could inundate the courts with similar cases.[59] This highlights the necessity for carefully crafted safeguards and procedures to ensure that the implementation of RTBF respects both privacy concerns and the public's right to information.

In the meantime, the HC clarified the scope of its own powers. Under Article 226, during the trial, the court can take all kinds of measures to maintain the privacy of the individual by ensuring non-disclosure of identity, especially if there is "substantial and real" risk to the same.[60] Further, it can defer disclosure of identity by issuing "postponement orders", for a fixed period of time. These powers are restricted to the trial itself and cannot be exercised by the court after it's over.[61]

In *R. Rajagopal vs. State of Tamil Nadu*, a judgement extensively discussed in the *Puttaswamy* case, the SC while recognising the right to privacy is implicit in Article 21, as early as 1994, simultaneously held that no right to privacy exists for matters on public record.[62] A version of this argument also presents itself in *IndianKanoon*'s counter affidavit filed before the Kerala HC, cautioning against the creation of RTBF through judicial intervention, as it could undermine access to court documents.[63]

However, the principles enshrined in *Rajagopal* require reconsideration in light of modern technological developments. Back then, legal information wasn't as accessible as it is today. Sources like *IndianKanoon* have advanced legal literacy. Previously, accessing specific records required the technical expertise to navigate court websites. Now, court documents are easily

[59] *Id.* ¶ 9.
[60] *Id.* ¶ 23.
[61] *Id.* ¶ 28.
[62] R. Rajagopal v. State of Tamil Nadu (1994) 6 SCC 632.
[63] MUKHOPADHYAY, *supra* note 32.

searchable, making legal information more accessible to the public.[64] Therefore, while public records might be crucial for judicial transparency, it can no longer be argued that the publication of court documents by reporters in such huge numbers in the public domain does not hamper privacy.

The demand for a comprehensive review as put forth in the 2021 Madras HC judgement, needs to be answered better, with a solution which does not prejudice the rights of the acquitted person and other parties involved in the case.

COMPARATIVE REVIEW OF REMEDIES WITH OTHER JURISDICTIONS

A. THE REMEDY FOR DE-INDEXING

In Argentina, even first-level requests are processed with care. Any decision to cut access to digital information is to be preceded by an examination of the content to determine its legality.[65] A limited liability rule operates for data intermediaries on the principle of "*effective knowledge*". They are not held liable unless they have been notified of the harm caused and have failed to act upon it.[66]

Reliance was placed in the Argentinian decision on the *Report of the Special Rapporteur* to argue that blocking content altogether is an extreme measure and the presumption of protection for protected forms of speech must be rebutted to control its accessibility in any form.[67] For instance, if the content is clearly illegitimate, then private parties can be asked to remove the content immediately and be held liable in a time-bound manner. However, if an individual is simply requesting the removal of information

[64] Robert Richards, *Indian Kanoon: Sushant Sinha on Innovation and Free Law in India*, SLAW (Jun. 1, 2011) https://www.slaw.ca/2011/06/01/indian-kanoon-sushant-sinha-on-innovation-and-free-law-in-india/.

[65] Case 99.613/06, Rodriguez, María Belen v. Google Inc., National Supreme Court of Justice, Oct. 28, 2014 (Arg.); *See* Pablo Palazzi and Marco Rizzo Jura do, *Search engine liability for third party infringement: a keenly awaited ruling*, 10(4), J. INTELL. PROP. L. & PRAC 244 2015.

[66] *Id.* 13.

[67] UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/17/27/Add.1, 20.

from the past that they now find embarrassing, such a right cannot be exercised without due process. The legitimacy of such requests is determined through judicial adjudication.

Earlier, de-indexation used to be limited to the removal of URLs from search results linking a person's name to certain information but now it has extended beyond the same.[68]

For instance, in India, in the case of *Jorawer Singh Mundy v Union of India*, the Delhi High Court, in its interim order, directed Google and Google LLC to remove the judgement from their search results.[69] Additionally, the court instructed *IndianKanoon* to restrict access to the judgement through their search engine.[70] Thus, the court attempted to provide relief through a combination of level one and level two processing requests, involving both de-indexing and removal of content by secondary sources that report public records. This approach leads to confusion, as no rationale was provided for this combination of relief, nor was the proportionality of the measures discussed.

This has now become a common trend which raises several concerns with respect to the balancing act between public interest and an individual's right to privacy across most jurisdictions. This balancing act is ideally supposed to follow the "*proportionality review standard*" set out in *Puttaswamy* and has been discussed in multiple other contexts as well. Even, the *European Court of Human Rights* [ECtHR] and the *Inter-American Court of Human Rights* [IACtHR] have helped develop a three-part proportionality test in international human rights law for the protection of freedom of speech.[71]

The common elements across jurisdictions seem to be elements of proximity and proportionality which require that both the right to be

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[68] *Does Our Past Have a Right to Be Forgotten by the Internet*, *in* SPECIAL COLLECTION OF THE CASE LAW ON FREEDOM OF EXPRESSION 6, 28 (Ramiro Álvarez Ugarte ed., 2022).
[69] Jorawer Singh Mundy v. Union of India, 2021 SCC OnLine Del 2306.
[70] *Id.* ¶ 12.
[71] ECtHR, Fressoz and Roire v. France, HUDOC. App. No. 29183/95 (Jan. 21, 1999) (Fr.); IACtHR, Eduardo Kimel vs. Argentina, ser. C 177 (May 2, 2008) (Arg.); IACtHR, La Colegiación Obligatoria De Periodistas, ser. A 5/85 (Nov. 13, 1985) (Costa Rica).

forgotten and the exceptions to safeguard speech and expression are tailored narrowly to effectively safeguard the underlying rights. However, the application of such a balancing mechanism seems to be absent in the Indian jurisprudence surrounding RTBF.

The application of de-indexing to RTBF requests is widely considered as the most suitable option, both in academic discourse and in practical terms, as it's perceived as the least intrusive measure available. However, since de-indexing does not find place in a clearly defined legislation, it has now transformed into the use of a combination of remedies that do not take into account the public interest being jeopardised at multiple stages. This is solely a result of the uncritical application of the remedy of de-indexing.

The use of the remedy in such a manner marginally impacts the freedom of expression and the freedom of the press. Removal of search results can have a *cascading impact* on journalistic efficiency in presenting the complete picture since the RTBF request removes only a portion of the story from the public domain.[72] Further, a de-indexing request can also lead to unintended liability for a data intermediary[73] and no involvement of the original publisher whose information is at risk of deletion.[74]

In India, courts have ordered intermediaries to remove content where the consent of the individual has been retracted at a later point in time by means of an RTBF request. However majority of such cases have involved content blatantly violating the privacy of a victim of sexual violence[75], and

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[72] Andrea Gonsalves & Justim Safayeni, *Privacy Commissioner's Draft Report on a "Right to be de-indexed" is Cause for Concern*, CENT. FOR FREE EXPRESSION, (Mar. 26, 2018), https://cfe.torontomu.ca/blog/2018/03/privacy-commissioners-draft-report-right-be-de-indexed-cause-concern.

[73] Peter Fleischer, *The Right to Be Forgotten, or How to Edit Your History, Privacy . . .* ? (Jan. 29, 2012), BLOGSPOT, http://peterfleischer.blogspot.com/2012/01/right-to-be-forgotten-or-how-to-edit.html; Vinod Sreeharsha, *Google and Yahoo Win Appeal in Argentine Case*, N.Y. TIMES, (Aug. 20, 2010), https://www.nytimes.com/2010/08/20/technology/internet/20google.html.

[74] Biancardi v. Italy, 77419/16,; *See* Jacob van de Kerkhof, *Biancardi v. Italy: A Broader Right to Be Forgotten,* STRASBOURG OBSERVERS, https://strasbourgobservers.com/2022/01/07/biancardi-v-italy-a-broader-right-to-be-forgotten/ for other cases with similar rulings.

[75] Subhranshu Rout v. State of Odisha (2020) SCC OnLine Ori 878; X v. Y, (2021) SCC OnLine Del 4193. In X v. Y, while recognising RTBF and the plaintiff's entitlement "to protection from invasion of her privacy by strangers and anonymous callers" (¶ 22) the

as a result, the courts have been quick to affirm the need for legislative action as well. Despite this, there is a clear pattern of hesitancy in India in recognizing a right due to the lack of statutory backing.

B. THE PRIVACY VERSUS FREE EXPRESSION DEBATE

While considering the issue of public interest, while evaluating RTBF requests, the Supreme Court of Spain created a standard for itself. Where the contents of a publication continue to be relevant for the general public, they cannot be removed unilaterally if the interest in them is recurrent and the information is not obsolete.

#MeToo Movement

In *D. Segundo v. Google*, the court declined to order the removal of past complaints against a realtor.[76] The allegations were deemed 'protected speech' and considered relevant for future consumers assessing the quality of his services. In similar cases, other considerations have included the legality of the alleged practices[77], the time elapsed since the allegations were made[78], and the acquittal status.

If one were to extend this logic to the common plea requesting the removal of past sexual harassment allegations, the illegality of such actions and the prevailing public interest in the possible involvement of a person in such an activity in the past would most definitely mean that publications of such allegations should not be taken down. However, this is not the case. In multiple cases across numerous jurisdictions, allegations of sexual assault or harassment, are taken down due to the possibility of 'tarnishing' one's societal reputation.[79] Then how is public interest to be determined here? If despite acquittal, professional complaints and fraudulent activities continue

Court again chose to pass only a simple order of "removal/pull down" of the videos (¶ 32), based on the facts of the case.

[76] Case STS 2873/2020, Don Segundo v. Google LLC, (Sep. 17, 2020) (Spain).

[77] Case STS 2918/2020, Don Dionisio v. Google, (Sep. 17 2020) (Spain).

[78] Case 1 BvR 276/17, The Case of Mrs. B, (Nov. 6, 2019) (Ger.).

[79] Subodh Gupta v. Herdsceneand (2019) SCC OnLine Del 11209.

to demand public attention, then on what principle are allegations of sexual misconduct to be differentiated?

In India, the Delhi HC on the subject matter has ordered the removal of 'defamatory articles', and ordered not only for de-indexing of search results but also a permanent injunction for taking down the original publications.[80] This is another case where the remedy of de-indexation was expanded to the point where any other publisher was preemptively disallowed from publishing articles on the subject.

In contrast, in Chile, the Court of Appeal refused to acknowledge RTBF and plea for de-indexation of search results for allegations of sexual assault and power abuse raised by multiple actresses[81]. The court refused to recognize the liability of search engines for content created independently. It was also noted that no challenges were made as to the truth of the information.

Spent Convictions and Past Acquittals

With respect to spent convictions or acquittals which took place a long time back, the standard again seems to be "*continuing public interest*". The Supreme Court of Italy received a plea against the publication of an article about a man who had murdered his wife and served his time a long time ago.[82] The court held that if no "*existing*" public interest continues in the matter, then the right to privacy of the individual prevails. Further, if the identity of the person no longer has a role in the maintenance of such interest, then names should be mandatorily anonymized.

On the other hand, the Constitutional Court of Spain ruled anonymization as a "disproportionate remedy" but supported de-indexation as a sufficient measure.[83] The matter herein involved complaints made by locals who had

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[80] Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd. (2019) SCC OnLine Del 8494.

[81] Abreu v. Google, No. 135.543-2020 (Braz. 2020).

[82] S.G. v. Unione Sarda S.p.A., No. 19681/2019 (It. 2023); *See* Maria Romana Allegri, *The Right to Be Forgotten in the Digital Age,* in FRANCESCA COMUNELLO ET AL. (EDS.), WHAT PEOPLE LEAVE BEHIND 248 (Springer, 1st ed., 2022).

[83] A&B v. Ediciones El País, 2096-2016, (2018).; Hugh Tomlinson, *Case Law, Spain: A and B v Ediciones El Pais, Newspaper archive to be hidden from internet searches but no "re-writing of history",* INFORRM'S BLOG, (Nov., 19, 2015), https://inforrm.org/2015/11/19/case-law-

been convicted of drug-related offences years back to challenge the re-publishing of news articles regarding the same. The Supreme Court of Chile also gave significant weight to time as a factor which weakens the right to freedom of expression in its conflict with the right to an individual's social reintegration and rehabilitation in society.[84] The Supreme Court of Italy also stressed the importance of "private and sensitive personal information" to be not made available to the public indefinitely without good cause.[85]

In China's first RTBF case, the court held that information in the past that continued to be distinctly relevant to a person's current occupation was not allowed to be de-indexed.[86] But, false and un-updated information was easily struck down if a person had been acquitted of the crime in the past. For instance, in the case of a series of old news pieces about a Turkish citizen's drug conviction, subsequently included in an online archive were considered outdated and no longer a correct representation of the person's current image.[87] In this case, since these articles served no public interest, they were de-indexed on order by the Turkish Constitutional Court.

In Belgium, when a newspaper proceeded to create an online news archive accessible in the public domain, the practice of archiving according to court amounted to a new publication of those news stories, and aggregate data in this format could in their opinion cause disproportionate harm to

spain-a-and-b-v-ediciones-el-pais-newspaper-archive-to-be-hidden-from-internet-searches-but-no-re-writing-of-history-hugh-tomlinson-qc/.

[84] Case 22243-2015, Graziani v. El Mercurio, (Jan. 21, 2016), COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023) (Chile).

[85] Case 6919/2018, Venditti v. Rai, Colum., (6919/2018) COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), https://globalfreedomofexpression.columbia.edu/cases/venditti-v-rai/ (Italy).

[86] Case 09558, Ren Jiayu v. Beijing Baidu Netcom Technology Co., Ltd., COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), https://globalfreedomofexpression.columbia.edu/cases/ren-jiayu-v-baidu/ (China).

[87] Case 7559, P.M.F. c. RCS Mediagroup, C. Cass. (27 Mar. 2020) (Spain).

someone's reputation.[88] As a result, anonymization was considered a necessary remedy in such a case.[89]

The Supreme Court of Japan, in a matter concerning the removal of online articles about a man who had past charges related to payment for child prostitution, denied RTBF, emphasising that the public interest in such matters does not diminish over time.[90] This decision underscores the court's stance that certain information, especially concerning serious criminal conduct, remains of enduring public interest regardless of the passage of time.

Hence, there are crimes for which the concern of rehabilitation cannot be adequately addressed through the remedy of RTBF. The judgements reveal that RTBF cannot be simplistically equated with a past convict or accused's right to be rehabilitated. As soon as the public's interest is involved, the right to social reintegration seems to have been exercised only where the circumstances justify RTBF as an appropriate and proportional remedy. It cannot triumph over the public's right to know in such situations.

OTHER REMEDIES FOCUSED ON REHABILITATION

Rehabilitation for past convicts across the world has also been facilitated by strategically reducing access to information about their convictions once the sentence has been served.

For instance, the UK Rehabilitation of Offenders Act, 1974, provides a framework that allows individuals who have not reoffended and for whom a specified period of time has elapsed since their conviction, to present a clean record when applying for jobs or during civil proceedings.[91] The approach here is aimed at facilitating their reintegration into society by

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[88] Hurbain v. Belgium, App. No. 57292/16, Eur. Ct. H.R. (2021). Hugh Tomlinson & Aidan Wills, *Case Law, Strasbourg: Hurbain v. Belgium, Order to Anonymise Newspaper Archive Did Not Violate Article 10*, INFORMM, (Jul. 7, 2021), https://inforrm.org/2021/07/07/case-law-strasbourg-hurbain-v-belgium-order-to-anonymise-newspaper-archive-did-not-violate-article-10-hugh-tomlinson-qc-and-aidan-wills/.

[89] Christopher Docksey, *Journalism on Trial and the Right to Be Forgotten*, VERFASSUNGSBLOG, (Mar. 9, 2022), https://verfassungsblog.de/journalism-rtbf/.

[90] *See* 2016 (*Kyo*), Minshu Vol. 71, No.1, (Jan. 31, 2017) (Jap.).

[91] Rehabilitation of Offenders Act 1974, c.53 (UK).

legally permitting them to withhold information about past convictions in certain contexts.

Certain countries have developed criteria to balance the privacy interests of the past convicts and the general public's freedom of expression and right to know. In Germany, the interests of the offender typically prevail when a sufficient amount of time has passed, the offender is due to be released from prison, and they have not generated new news coverage themselves.[92] Other remedies include anonymisation of names once a sentence is served[93] and removal of selective elements that may hinder a fair trial.[94]

The UK Act also creates a distinction between major and minor offences.[95] Disclosure of convictions of major offences (punishment of 4 years or more) is seen as a justifiable invasion of an individual's privacy for reasons of public safety. This is considered the most suitable criterion for distinguishing between crimes currently across most jurisdictions. Another criterion that may determine the degree to which one is required to expose one's past record is also dependent primarily on one's occupation or job profile.[96]

In the EU, judgements in criminal cases are not made available to the public. An individual needs to show a "legitimate interest" in the matter to access it. For instance, in Spain, the judgement is only served to the parties if it's a matter of public interest.[97] Further, higher courts can bring these to light after anonymizing personal information via the intervention of the *Centre of Judicial Documentation (CENDOJ)* which is responsible for

[92] Siry, L., Schmitz, S., '*A Right to Be Forgotten? - How Recent Developments in Germany May Affect the Internet Publishers in the US*', 3(1) EUR. J. L. AND TECH.., 2012.
[93] Hurbain v. Belgium, App. No. 57292/16, Eur. Ct. H.R. (2021), COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023); P.H. v. O.G., COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023).
[94] LAW COMM'N, Consultation Paper No. 209, Contempt of Court (2012). (UK).
[95] Rehabilitation of Offenders Act 1974, c.53 (UK).
[96] 2016 (*Kyo*), Minshu Vol. 71, No.1, (Jan. 31, 2017) (Jap.).
[97] James B. Jacobs and Elena Larrauri, *European Criminal Records & Ex-Offender Employment*, (New York University School of Law, Public Law & legal Theory, Working Paper No. 15-41, 2015).

anonymizing the personal data of all the parties involved.[98] Data relating to criminal convictions in the EU is not recorded in the form of individual criminal records traceable to one's name in accordance with the *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*.[99] As a result, no commercial entity in the EU is able to sell personalised criminal conviction databases.[100]

While some see the combination of such remedies as forming a legislative foundation for the exercise of RTBF, others are of the opinion that such protections are too weak to be characterised as such.

CONCLUSION

The purpose of this paper is to inquire whether the Right to be Forgotten can be guaranteed to former convicts in India. The inquiry began by clarifying the terminology surrounding RTBF, which is partially confusing due to distinct versions of the right – such as the "right to be forgotten", the "right to erasure" and the "right to be left alone"– each representing different values.

This confusion can be largely attributed to difficulties in reaching a consensus on the social function of 'forgetting'. For years, the operation of human memory has helped balance the ability to learn from one's past while simultaneously moving on from it. However, the advent of the internet and bureaucratic record-keeping has complicated the management of personal information. It has led to severe power imbalances between data subjects, information service providers and the state which create conflicts of interest that are only capable of being resolved through the creation of clear legal principles. In the discussion surrounding RTBF, this involves the main balancing act between individual privacy and freedom of expression, both having their own justifications and limitations.

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[98] *Id.* at 6.

[99] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, (adopted on Jan. 28, 1981, entered into force Oct. 1, 1985), ETS No. 108, 20 I.L.M. 317 (1981) available at http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm.

[100] James B. Jacobs and Elena Larrauri, *Are criminal convictions a public matter? The USA and Spain.* 14(1) PUNISHMENT AND SOCIETY, 3, 2012.

The question of rehabilitation forms a crucial intersection of this research since it dictates the application of this balancing act. The research indicates that, in the case of former convictions, the emergence of specific principles is inevitable. Each of these principles contributes to answering questions regarding the public's legitimate and illegitimate right to access information. Currently, due to the lack of proper jurisprudence and statutory recognition, there is a dearth of these principles leading to ambiguity about what the right entails.

While different jurisdictions may reach different conclusions as to how to balance these two rights, any attempt at justifying any version of RTBF requires serious judicial review. This has not been achieved yet. India has attempted to follow the European courts in order to protect the values of dignity and autonomy under Article 21. However, the landmark *Google Spain* case exposes an attempt by the courts to simultaneously pursue a distinct bureaucratic version of the right, specifically in connection with data privacy. This uncertainty surrounding the objective of RTBF is undesirable, especially for leading any reform rooted in restorative justice. As a result, there is no guaranteed RTBF for former convicts in India. Every case up till now has dealt with the framing of competing issues and underlying principles, and the individual is open to applying for such a right but must eventually be confronted by the imminent possibility of its rejection.

IN THIS ISSUE

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

In ***Role of Contextualism in Constitutional Interpretation: The Expanding Circles from AK Gopalan to in re Article 370,*** Ishwara Bhat

delves into assessing the value of context, in all its aspects – factual, linguistic, textual, historical, structural, political and social – while interpreting the Constitution. While it supplements and gathers support from other rules of interpretation, it cannot supplant them. It is realistic and comprehensive. While the context varies from case to case, enduring constitutional values guide the pursuit of justice. Despite criticisms for lacking an independent theory, the ability to integrate socio-legal values has bolstered its strength and credibility. However, during crises and emergencies, contextualism is prone to yielding to authoritarianism unless grounded in human rights values. Constitutionalism should counteract the types of extra-constitutional authoritarianism witnessed during the emergency period.

Seema Kazi in ***Muslim Women in India: History, Minority and Difference*** explores the issue of minority differences within contemporary nation-states, focusing on Indian Muslims, particularly Muslim women. By employing a cross-comparative historical perspective, it draws parallels between minority exclusion in Europe and post-colonial India, underscoring the limitations of legal equality as adequate protection for minorities. The lasting impact of Partition on the marginalisation of Indian Muslims in modern India is highlighted, along with the neglect of Muslim women's histories of struggle and achievement during the colonial era. The article concludes by suggesting that India's diverse and varied history could potentially serve as the foundation for a new national vision, where constitutional equality coexists with the right to maintain historically inherited differences.

Esha Aggarwal in ***Analysis of India's Internet Censorship Measures in light of American Constitutionalism***, scrutinises the lacunae in the new IT Rules. It highlights the significance of free speech within the American constitutional framework and how foreign judgments and doctrines can fill gaps in Indian judicial thinking. The paper focuses on India's new Intermediary Guidelines and their implications for free speech, emphasising the importance of judicial scrutiny. It underscores the need to protect public debate forums, particularly the internet, which is widely accessible and used daily while addressing issues like fake news, slander, and privacy invasion. The author analyses the IT Rules, advocating for their revision based on democratic principles. The article explores the potential

impact of ambiguous rules and increased self-regulation and censorship by intermediaries on freedom of speech.

In ***Delimiting the Doctrine: An Argument against Basic Structure Review of Ordinary Laws,*** Govind Asawa and Parthiv Joshi address the crisis the basic structure is in due to the challenges it faces against its application to ordinary legislations. This paper provides a thorough analysis of all significant developments related to the scope and extent of the doctrine, aiming to harmonise them systematically. It has been noted that courts have sometimes readily extended the doctrine when assessing the validity of ordinary legislation, interpreting the basic structure as a result of a multi-provisional reading of the Constitution. This approach fails to recognize the 'identity of the doctrine' and 'method of identifying basic features' as separate concepts. Invoking the doctrine is not necessary for testing ordinary legislation based on 'principles' derived from a multi-provisional interpretation of the Constitution. The integrity of the doctrine's identity is rooted in its application to constitutional amendments alone, and this must be maintained.

Harshit Pathak and Vasujit Dubey, in ***Upholding Dignity: A Case for the Right of Civil Union in India***, discuss the parameters laid down by the apex court while giving its verdict on marriage equality. The analysis explores the jurisprudence of dignity as derived from Article 21 of the Indian Constitution, arguing that the right to civil union is a logical extension of this constitutional principle. They examine the transformative ethos of the Indian Constitution, asserting that non-heterosexual couples are entitled to civil rights. Following this, they address the majority's argument regarding the separation of powers. The article thoroughly reviews transnational jurisprudence on civil union rights and highlights its relevance. Additionally, it discusses the potential for establishing a parallel legal framework to support the LGBTQIA+ community. In conclusion, the authors argue that the right to civil union is inherent, stemming from the constitutional principles enshrined in Article 21 of the Indian Constitution.

Finally, Muskan Suhag in ***Revisiting the Basic Structure Doctrine and Constitutional Morality: The Implications of Granting Parliamentary Privilege to Bribery,*** talks about the recent *Sita Soren v. Union of India*, in light of parliamentary privileges and its relationship with the basic structure doctrine and constitutional morality. It examines the relationship of these privileges with the basic structure doctrine and constitutional morality, analysing how the inclusion of bribery affects principles like the rule of law, democracy, free and fair elections, justice, and equality. It proceeds to review how other jurisdictions, including England, Australia, and the USA, have excluded corrupt practices from the scope of parliamentary privileges to consider the feasibility of adopting a similar approach in India. Finally, the paper concludes by asserting that granting immunity to bribery would violate the basic structure doctrine and constitutional morality, and therefore, should not be allowed.

CCAL ACTIVITIES

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

With the help of the *Writ[e] & Talk* podcast, the Centre aims to bring clarity and build discussion when it comes to writing on Constitutional Law and Administrative Law. This initiative is an attempt to increase dialogue, discussion and engagement with legal writing.

In pursuance of the same, this semester, we had the pleasure of hosting Prof. Rowena Robinson, in the podcast, to discuss her article *'Private Acts' and Structural Inequality: Law and Housing Discrimination*. Prof. Robinson talked about an examination of structural housing discrimination against Muslims in urban areas, employing a sociological lens. She argued that housing segregation not only contributed to discrimination, targeted violence, economic inequality, and social exclusion but is also a product of these factors. Furthermore, she delves into the concept of

'Demosprudence' and emphasises the significance of public activism in fostering improved legislation and curtailing social discrimination.

Second, we hosted Mr. Yash Sinha, who provided insight into his research paper, "*Constitutional Ecdysis: How and Why the Indian Constitution May Test Its Original Provisions*" published in *NUJS Law Review*. He is currently a judicial law clerk and research associate at the Supreme Court of India. The paper explores the dynamic nature of constitutional provisions and the evolution of the basic structure doctrine in the Indian Constitution, tracing through prominent judgements. The author makes the case for the extension of the Basic Structure doctrine in checking the validity of Ordinary Laws and further discusses new developments through the NJAC case and separation of powers.

The last guest during this academic semester was Mr. Devansh Shrivastava who, in a conversation with Ms. Sinchan Chatterjee, gave an insight into his research paper, *Socio-spatial Consequences of Disturbed Areas Act 1991 on Urbanizing Spaces in Gujarat*.

In the episode, Mr. Shrivastava guided us to explore the impact of Gujarat's Disturbed Areas Act 1991 on ghettoisation in Ahmedabad city against the background of mass violence and the dynamics of spatial segregation in cities of Gujarat around residential and commercial property disputes. The author discusses the methodology of his research, discusses the case laws used in the research and suggests policy changes for urban governance to tackle religious and ethnic segregation by the community.

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

The centre also had the pleasure of hosting Dr. Prashant Narang who gave a lecture on the "*Rhythms Under the Rule of Law: The Symphony of Regulating Live Performances*". In this lecture, Dr. Narang navigated the legal landscape of Bengaluru, focusing on the intriguing dynamics between musicians, venue regulations, and the broader implications for urban cultural life. He

elucidated how, despite musicians not requiring a licence to perform, the regulatory environment for venues shapes where and how live music can be experienced in the city. The session delved into the complexities of legal regulations that indirectly influence live performances in Bengaluru, shedding light on the challenges bars and restaurants face in offering live music.

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

ACKNOWLEDGMENT

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

The publication of this issue would not have been possible without the guidance of our Patron, Hon'ble Vice-Chancellor of the National Law University, Jodhpur, Prof. (Dr.) Harpreet Kaur and our Internal Advisor Prof. (Dr.) IP Massey. At this juncture, we would also take the opportunity to thank our Chief Editor – Ms. Sayantani Bagchi & Managing Editor – Ms. Rudra Chandran for their constant support, mentorship and engagement with every initiative we undertake. The Registrar of National Law University, Jodhpur has also ensured smooth functioning at every stage, and we are thankful for it.

We would also like to thank every member of the Board for working on the issue and ensuring that the standards of our journal improve constantly. Members of the Board — Sinchan Chatterjee, Sourabh Manhar, Sonsie Khatri, Krishangee Parikh, Anjali Sunil, Bharati Meena, Tasneem Fatma, Aarushi Gupta, Dhruv Singhal, Kovida Bhardwaj, Mohak Dua, Mudit Mangalam Pandey, Palash Singhal, Rishi Dev, Aadisha Dhaliwal, Aashirya Malik, Amita Kaka, Anand Shankar, Gurmehar Singh Bedi, Manishka Baweja, Mayank Sinha, Prabhav Chaturvedi, Suhana Gandhi — have been assets to our team.

EDITORIAL: SECOND CHANCES AND DIGITAL ERASURE: DO FORMER CONVICTS HAVE THE RIGHT TO BE "FORGOTTEN" IN INDIA?

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

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

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

editorcalq[at]gmail[dot]com.

Falguni Sharma and Himanshi Yadav

Editors-in-Chief

ROLE OF CONTEXTUALISM IN CONSTITUTIONAL INTERPRETATION: THE EXPANDING CIRCLES FROM AK GOPALAN TO IN RE ARTICLE 370

P. ISHWARA BHAT[1]

Reading the text with context integrates the Constitution into the social process and people's expectations. Such a reading has several layers or expanding circles. It is a realistic and comprehensive approach. It brings to the process of constitutional interpretation, the arguments based on history, the intention of constitution makers, purpose, philosophy and competence for desirable social transformation. It draws support from the language of the provision under interpretation, the implications of other relevant provisions of the Constitution, and socio-economic, political and cultural factors. Comparative study of the US, Canadian and Australian experiences have established the contribution of contextualism towards expanding the scope of civil liberties, strengthening federalism and making democracy vibrant. Although the Indian Supreme Court had initially hesitated to tap all the dimensions of contextualism, and sometimes acted in response to political context as in Gopalan or ADM Jabalpur cases, the major thrust of the judicial approach has been profitably applying contextualism in constitutional interpretation. Contextualism was a major plank of judicial reasoning in Re Article 370, which helped in constitutionally integrating Jammu and Kashmir to internalise the constitutional values. The great advantage of contextualism is its flexibility and combination of methods of interpretation. However, unless the core constitutional values and objectives are centre staged in its application, the waves of political context would drift away from the constitutional jurisprudence into the wrong path. Anchoring contextualism to the basic philosophy and goal of the Constitution makes it a dependable and useful tool.

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INTRODUCTION

The idea that the interpretation of a text shall match its context is the essence of contextualism. Etymologically, the word "context" is derived from the Latin verb *texere*, "*to weave*", and the related Latin verb *contexere* carries the meaning of "*to weave together*", "*to interweave*", "*to join together*" or "*to compose*."[2] Anthropologically, context connotes an environment that surrounds a phenomenon – statement, act, or event – and attracts factors such as economic, political, religious, rural, urban, trans-national, etc., for interaction.[3] Philosophically, it is crucial for determining the meaning, truth and value of statements or beliefs; it means that the meaning of any text is not fixed or absolute, but is dependent on the context in which it is expressed or interpreted.[4] Juridical discourse on contextualism has trodden the path of enquiring into relevant fields of data from which it is able to draw inferences suitable to the issue. According to Madam Justice Wilson of the Canadian Supreme Court, "*The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it… [It] recognizes that a particular right or freedom may have a different value depending on the context.*"[5] For example, in interpreting the constitutional

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[2] SHORTER OXFORD ENGLISH DICTIONARY (Oxford University Press, 6th ed., 1933).

[3] RM Diley, *The problem of Context in Social and Cultural Anthropology*, 22(4) ELSEVIER 437 (2002), https://www.sciencedirect.com/science/article/abs/pii/S0271530902000198; RAVINDRA JAIN, TEXT AND CONTEXT: THE SOCIAL ANTHROPOLOGY OF TRADITION (Institute for the Study of Human Issues, 1st ed., 1977).

[4] Tim Black, *Contextualism*, OXFORD BIBLIOGRAPHIES, (Jun. 29, 2011), https://www.oxfordbibliographies.com/display/document/obo-9780195396577/obo-9780195396577-0159.xml.

[5] Edmonton Journal v. Alberta (Attorney General), [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, The Court unanimously held that the civil litigation part of the ban, which

guarantee of equality for women, the contemporary state of women's lives shall be a primary topic for judicial consideration. In *Big M Drug Mart*,[6] Dixon C.J. viewed that in examining the validity of a restriction, factors such as the purpose of the right or freedom in question, the larger objects of the Charter itself, the language chosen to articulate the specific right or freedom, the historical origins of the concepts enshrined and where applicable, the meaning and purpose of other specific rights and freedoms with which it is associated within the text of the Charter shall be considered.

Ratnavel Pandian J., in *Judges Appointment case II (SCARA)* has stated, "*when we give a liberal construction to a word used in a statute particularly in the Constitution, we must first of all take note of the relevant and significant context in which that word is used and then interpret that word in that context with meaningful purpose*."[7] According to PN Bhagwati J., "*The words used in a statute [or constitution] cannot be read in isolation; their colour and content are derived from their context and, therefore, every word in a statute must be examined in its context. The context is of great importance in the interpretation of the words used in a statute*."[8]

The Supreme Court in the *Peerless* case viewed that in order for the textual interpretation to match the contextual, the best form of interpretation, the statute shall be read as a whole and then section by section, clause by clause, phrase by phrase, and finally word by word, and that the purpose, history and background of the law shall be duly considered.[9] The aftermath of a constitutional amendment brings a new context, as pointed out in the *MPV*

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prohibited pre-trial publication of all particulars of pleadings save the names of the parties and the general nature of the claims, was overbroad and could not be justified as a reasonable limit under s. 1.

[6] R v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

[7] Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268.

[8] Sankal Chand v. Union of India (AIR 1977 SC 2328); in S R Choudhury v. State of Punjab, (2001) 7 SCC 126, it was observed, *"Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve."*

[9] Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., AIR 1987 SC 1023 ¶ 33.

Sundararamier case.[10] VR Krishna Iyer J. gathers support from Holme's thinking that law's life is experience rather than logic,[11] to insist on construing the constitutional provisions by taking into consideration the historical background, the felt necessities of the time, and the balancing of the conflicting interests.[12]

Context has larger meanings bringing within expanding concentric circles. The specific factual context of the case, the legal context of the statute or the Constitution (linguistic context), the historical background of the statute, the cultural environment,[13] the purpose of the Constitution and the impugned legislation, other schemes and provisions of the Constitution and laws, a comparative study of other jurisdictions in case they are relevant and international perspective – all shall enter into the judicial process by way of providing valuable input and insight in constitutional interpretation. The contextual meaning holistically takes into account the whole surrounding context for a text, rather than focusing exclusively on particular aspects of the interpretive backdrop.[14] Contextualism brings these fields into the cognizance of study on the basis of relevance and disconnects them on the ground of irrelevance. Distinguishing the relevant from the irrelevant is an art of the legal profession that helps in contextualisation.

THEORETICAL ASPECTS

Contextualism relies on law-society interaction in a larger sense. Sociological, economic, realist, critical, feminist, and racial schools of law have argued in diverse ways for bringing inputs of society, economy, and

[10] M. P. V. Sundaramier and Co. v State of Andhra Pradesh, AIR 1958 SC 468.
[11] OLIVER WENDEL HOLMES, THE COMMON LAW 1 (Little Brown and co., 1st ed., 1861).
[12] State of Kerala v. N M Thomas, AIR 1976 SC 490, ¶ 63.
[13] REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 110 (Little Brown & co., 2nd ed., 1975), contextual interpretation can involve "the totality of relevant factors in the general cultural environment external to the specific language being interpreted that are shared by the users of the language in the particular speech community and taken account of by the particular communication."
[14] Jonathan Crowe, *The Role of Contextual Meaning in Judicial Interpretation*, 41 FED. L. REV. 417, 422 (2013).

fields of suppression of the vulnerable in the course of determining any legal issues or formulating legal policies.[15] Shalin Sugunasiri points out the legal sceptic's view that the judiciary is neither constrained by legislation nor by precedent, but acts as a purveyor of those political interests that align with their own.[16] They act with what G Leyh calls a hermeneutic insight which means that all human understanding is historically and temporally conditioned, because of which interpretation of the legal text needs to be done in light of contemporary practices, interests and problems.[17] Sugunasiri states that contextualist judges recognize that meanings of words, including legal words, are but conventions of a community of speakers that are contingent and contestable at all points in time.[18] They consider the language of the text, surrounding linguistic context, history, jurisprudential context as gleaned from case law and commentaries, possible impact upon parties to the case and potential impact upon the society at large.[19] This necessitates a dialogical process of decision-making. Linguistic analysis brings to the surface the cultural underpinnings. Politico-legal discourses enlarge the judicial mind. Self-discipline and exposure to the broad purpose of the Constitution and its values provide parameters for judicial accountability and constraints. Sugunasiri remarks that contextualism can be proceeded with by jurists through humility, honesty, analytical clarity, and corrigibility rather than by obscuring life's (and law's) indeterminacies.[20] Colleen Sheppard notices that contextualism, as exposed by Justice Bertha Wilson, anchors to pragmatism and gathers from factors that render any section of society vulnerable.[21] According to David Kaiser, "*Contextualism reveals the problems of trying to distinguish what meanings are 'inside' or 'outside' the face of the text. What a text means depends on its context, and context necessarily includes information "outside"*

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[15] *See* RWM DIAS, JURISPRUDENCE (Butterworths, 5th Ed., 1985); WAYNE MORRISON, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM (Cavendish Publishing Co, London, Special Indian Edition, 2011).

[16] Shalin Sugunasiri, *Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability*, 22(1) DALHOUSIE L. J. 126, 167 (1999).

[17] *Legal Education and the Public Life* in G. LEYH, ED., LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 283-84 (University of California Press, 1st ed., 1992).

[18] SUGUNASIRI, *supra* note 16, at 17.

[19] *Id.*

[20] *Id.* at 182.

[21] Colleen Sheppard, *Feminist Pragmatism in the Work of Justice Bertha Wilson*, 41 SUP. CT. L. REV.: OSGOODE'S ANNUAL CONSTITUTIONAL CASES CONFERENCE 83, (2008).

the four corners of the text. In fact, even instances of "direct naming" presuppose a context outside the face of the text."[22] Michele Zezza argues that interaction between past context and present context, application of external contextual conditions on interpretation, and semantic holism guides the judicial discretion in dealing with intentional vagueness in constitutional provisions.[23]

Siddharth makes a critical analysis of contextualism as perceived and practised in India.[24] In the background of indeterminacy and fluidity of language structure in which law is couched, he identifies contextualism as a tool for a complete analysis of our life as a phenomenon to improve the means of justice. He states, *"…. our interpretations of our contexts is nothing but superimposition of an imagined structure on them that helps us define our bearings in a better and more functional way. The idea of interpretation then is no more a matter of discernment of the inherent."*[25] The empirical factors of society, culture, language, tradition, etc., facilitate contextual inferences. The truth is not absolute but has relativity that varies with context.

He views the truth as the end result of the dialogical pursuit within the society where a constant exchange exists amongst its members. Hence, the probe is not for absolute universal value but for comprehension of relativity and a fair proposition satisfactorily workable in a context. Still, some of the constant and stable values based on experiences of life have to be built on the basis of contextual strength. Human inclination for family, community life, and enduring association makes it imperative that the permanent social constructs shape the identity of the political society and the system of good governance which shall be safeguarded for future generations. Siddarth asks *'what'* and *'whom'* questions to trace the basic

[22] David Aram Kaiser, *Entering onto the Path of Inference: Textualism and Contextualism in the Bruton Trilogy*, 44 U.S.F. L. REV. 95, 119 (2009).
[23] Micele Zezza, *The Contextual Dependence in the Interpretation of Constitutional Rights: An Analysis from the Point of View of the Post-Neopositivist Epistemology*, 18 AGE OF HUM. RTS. J., 257 (2022).
[24] Siddharth, *Contextual Interpretation and Constitutional Variables*, 1 NUJS L. REV. 517 (2008).
[25] *Id.* at 519.

structure theory in the purposive character of the grand Constitution,[26] and argues for the application of harmonious construction of Part III and Part IV of the Constitution.

Some of the inferences drawn pertaining to the application of contextualism in the domain of statutory interpretation may be referred to here as they are likely to provide some experiential insights. Jeffry Barnes[27] lists such inferences that the Australian High Court evolved: (i) contextualism is essential and not optional, to be applied in all cases comprehensively without leaving any relevant factor from consideration;[28] (ii) context is layered and may be discretely or sequentially considered;[29] (iii) contextualism requires close attention to the text;[30] (iv) contextual material shall be critically analysed before giving any weight.[31] On the other hand, he points out some of the limitations of contextualism: (a) contextualism cannot substitute textualism; (b) purposive interpretation better reflects the context; (c) contextualism may not reflect the intention of law-makers; (d) contextualism does not consider individual judicial philosophies.

Some more theoretical inputs for reinforcing the contextualist approach can also be identified. First, significant historical factors had posed challenges to India's new republic.[32] For a country exploitatively colonised and impoverished for more than 150 years with colonial policies bereft of civil rights and welfare, recouping indigenous strength was required. The British policy of communal electorate resulted in partition, which took place along with communal riots and insecurity. A huge number of killings including the assassination of Gandhiji also took place. In the background of the integration of more than 560 princely states into the Indian Union, territorial reorganisation of states had to be done keeping in mind the

[26] What is to be interpreted? To whom it is to be interpreted? - are the contextual questions that lead us to basic structure theory and public interest litigation according to the author.
[27] Jeffry Barnes, *Contextualism: The Modern Approaches to Statutory Interpretation*, 41(4) UNSW L. J. 1083 (2018).
[28] Independent Commission Against Corruption v Cunneen, (2015) 256 CLR 1, 28 [57]; Minister for Immigration and Border Protection v. WZAPN, (2015) 254 CLR 610.
[29] Victims Compensation Fund Corporation v Brown, (2003) 77 ALJR 1797.
[30] Project Blue Sky v. Australian Broadcasting Corporation, (1998) 194 CLR 355.
[31] Mansfield v. The Queen, (2012) 247 CLR 86.
[32] ARUN K. THIRUVENGADAM, THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS 5 (Oxford and Portland, 1st ed., 2017).

interests of national integrity and recognition of the rights of princes to privy purses. The merger of Kashmir with a temporary special position had to be constitutionally accommodated. All these events had an impact on the making of the Constitution by providing for strong federalism, space for preventive detention law, emergency provisions, power of Parliament to reorganise states, etc., Necessarily, constitutional interpretation cannot afford to ignore the imperatives of these contextual factors.

Second, regarding the social reality of multicultural society, caste discrimination, gender discrimination, poverty, illiteracy, and the exploitative intermediary system of land ownership, the thoughtful policy of amelioration of the vulnerable sections had to be incorporated into the Constitution. Policies of non-imposition of majority language upon linguistic minorities, recognition of regional languages, educational rights of minorities and secularism with social reforms, space for reservation to backward classes and special provision for women were the unique policies in response to the social context. For tribals, security of land, and forest, social customs, immunity from exploitations by non-tribals, social justice and self-governance were provided for their integrated development. Abolition of untouchability, bonded labour, reservation for backward classes in public employment and programmes for the development of weaker sections are specific thrusts towards social justice. Owing to the above, a distinct constitutional identity and the spirit of transformative constitutionalism have placed and shaped the Indian constitutional structure on the foundation of the wide context of social transformation. Hence, contextual interpretation has great importance and role in Indian constitutional jurisprudence.

Third, contextualism is a key factor in allowing or disallowing foreign precedents or comparative studies while drawing analogies in constitutional interpretation. When the Indian position is particularistic and unique and does not pose the potentiality of receiving alien ideas, it is appropriate to disconnect with other alternatives as they are out of context.[33]

[33] Supriyo v. Union of India, 2023 SCC OnLine SC 1348.

Fourth, textual provisions of definitions start with a threshold clause *"unless the context otherwise requires"* and call for analysing contextual relevance. *Fifth*, there is an approach that contextuality is a matter that occurs in the domain of grant of power or guarantee of rights. For example, the non-availability of the commerce power to regulate the possession of guns in the school zones[34] or to enable women who were victims of domestic violence to appeal to federal courts[35] has been decided on the basis of non-contextual application of power.

Sixth, contextualism accommodates the strategies of correlating law and social transformation.[36] The technological developments, economic challenges, political upheavals such as war, and changes in social perceptions call for appropriate legal responses suitable to the context within the constitutional framework. Contextualism strikes a balance between continuity and change. The model of social transformation – consensus, conflict and integration – has also contextual relevance. The judiciary, because of the changed social context or its own changed composition, may be responding to constitutional issues in a different way. The overruling of *Roe* v. *Wade*[37] in *Dobb*'s case[38] after a period of 50 years is to be understood in this light. Changed public opinion about abortion and the recruitment of conservative judges was responsible for such an overruling.

An important feature of contextualism is that it gathers the factors of context from various sources: the language of the provision, other provisions in the same or other Articles, history and social context, structure of the Constitution, purpose and ethos. Hence, it is a primarily pluralistic method of constitutional interpretation.

COMPARATIVE STUDY OF APPLICATION OF CONTEXTUALISM

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[34] United States v. Lopez, 514 US 549 (1995).
[35] United States v. Morrison, 529 US 598 (2000).
[36] P. ISHWARA BHAT, LAW AND SOCIAL TRANSFORMATION (Eastern Book Co, 2nd ed., 2022).
[37] Roe v. Wade, 410 US 113 (1973).
[38] Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health v. Jackson Women's Health Organization, 597 U.S. 215.

A. CONTEXTUALISM IN THE UNITED STATES OF AMERICA

The US experience on contextual interpretation began with attention to the linguistic context of the constitutional provision. In *McCulloch* v. *Maryland*,[39] Marshall C.J. contrasted the word *"necessary"* in the Necessary and Proper Clause with the more restrictive word *"absolutely necessary"* in the Import and Export Clause, and held that the context required a liberal understanding of "*necessary*". Further, the absence of the word *"expressly"* before the word *"delegated"* in the 10th Amendment, unlike the language of the Articles of Confederation, suggested the requirement of fair reading of the Constitution. Accordingly, federal banking was considered a necessary power of the federal government. In the *Dred Scott* case,[40] the decision that persons of African descent, whether slave or free, could not be deemed citizens and that the Congressional law that had prohibited the continuation of slavery when slaves entered into free states deprived property rights of the slave owner abridging due process protection of property under the Fifth Amendment as influenced by mere contextual procedural meaning and not influenced by the substantive principle of propriety of the law which had enlarged rights of the slaves. Laurence Tribe writes, *"The importance of textual context in interpreting constitutional language has grown with the passage of time, as amendments to the Constitution have increased the need to consider the relationships among various parts of the document's text."*[41]

Apart from linguistic context the socio-political context in which a litigation is situated also casts influence. *Hirabayashi*[42] and *Korematsu*[43] cases

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[39] 17 US (4 Wheat.) 316, 414-15 (1819). Article I, Section 8, Clause (18) states, Congress shall have power "To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." Article I Section 10 Clause (2) states, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be *absolutely necessary* for executing its Inspection laws…".

[40] Dred Scott v. Sandford, 60 US (19 Howard) 393 (1857).

[41] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 39 (Foundation Press, 3rd ed., 2000).

[42] Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[43] Korematsu v. United States, 323 U.S. 214, 218–20 (1944).

represent a contextual interpretation of the equal protection clause and due process protection of liberty during the war, which is an aggregation of hardships. The exclusion of US nationals of Japanese origin from the western coast of America was upheld on contextual grounds. In *Korematsu,* the Supreme Court observed, *"Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."*[44] Sean Williamson explains that equal protection scrutiny by the courts is with reference to the context of litigation and not the context of the creation of classification.[45] According to Louis Brandeis J., *"A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."*[46] Such contemporary contextual analyses persuade the judges to reason about the durational limits of affirmative action policy as in *Bollinger.*[47] Williamson refers to *Bowers*[48] and *Lawrence*[49] to point out that when a litigation's context has undergone change due to broader social acceptance of the homosexual community and a more liberal attitude to sexuality, such changed context has an impact on judicial interpretation. He gives similar reasons for the change from *Roe*[50] to *Casey*[51] in relation to pregnant women's right to abortion vis-à-vis the state's power of regulation. He also notices judicial caution in *Allan Bakke* case[52] against the court being swayed by fluctuations of political power.

The difference between a *"contextual"* interpretation of a text and the contextual meaning attributed to the text has been a contentious issue in

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[44] Korematsu v. United States, 323 U.S. 214, 219–20 (1944).
[45] Sean G. Williamson, *Contemporary Contextual Analysis: Accounting for Changed Factual Conditions under the Equal Protection Clause*, 17(2) J. CONST. L. 591-623 (2014).
[46] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935); *see* Abie State Bank v. Weaver, 282 U.S. 765, 772 (1931); *see* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442 (1934); United States v. Carolene Products Co. 304 U.S. 104 (1938).
[47] Grutter v. Bollinger 539 U.S. 306, 326 (2003).
[48] Bowers v. Hardwick 478 U.S. 186 (1986).
[49] Lawrence v. Texas, 539 U.S. 558 (2003).
[50] Roe v. Wade, 410 U.S. 113 (1973).
[51] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 US 833 (1992).
[52] Regents of the Univ. of Cal. v. Allan Bakke, 438 U.S. 265, 298–99 (1978).

recent decades.[53] Antonin Scalia tries to resolve it by stating that the only relevant context is the original context in which the Constitution was made.[54] In a trilogy of cases – *Bruton*,[55] *Richardson*[56] and *Gray*[57] – contextualism was attempted. The Bruton Doctrine states that when a co-defendant makes a confession implicating the guilt of his partner in the murder plot, the influence of such statement upon the minds of the jury in spite of the instruction to the jury to exclude the context of confession in relation to the partner is enough to hold that the right to confrontation requirement of 6th Amendment is violated. A more textualist approach was adopted, the ambit of contextual prejudice was narrowed down and conviction was confirmed in *Richardson*. In *Gray, Bruton's* contextualism was applied.

Initially, the context of civil war reconstruction was kept in mind to limit the scope of the equal protection clause in the *Slaughterhouse* case.[58] The process of incorporation of the Federal Bill of Rights upon the states under the 14th Amendment involved contextual reasoning about whether a particular right is part of the tradition of ordered liberty. After the New Deal Era, two different tests – the rationality test pertaining to economic matters, and the compelling state interest test pertaining to fundamental liberties –called for contextual analysis. Limiting the scope of separate but equal doctrine on the basis of factual context, and recognising unenumerated rights on the basis of contextual importance for freedoms also reflect contextualism. The overruling of *Roe* v. *Wade*[59] in *Dobb's* case[60]

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[53] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); David Aram Kaiser, *Entering onto the Path of Inference: Textualism and Contextualism in the Bruton Trilogy*, 44 U.S.F. L. REV. 95 (2009).

[54] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Princeton Univ. Press, 1st ed., 1997).

[55] Bruton v. United States 391 US 123 (1968).

[56] Richardson v. Marsh 481 US 200 (1987).

[57] Gray v. Maryland 523 U.S. 185 (1998).

[58] Slaughterhouse-Cases, 16 Wall. 83 US 36 (1873).

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

[60] Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health v. Jackson Women's Health Organization, 597 U.S. 215.

after 50 years is due to a change in judicial composition and social perception about pregnant women's right to abortion.

B. CONTEXTUALISM IN CANADA

Contextualism attained a significant place along with the incorporation of rights and freedoms under the Charter of 1982. In *Morgentaler*,[61] applying the contextualist approach, Justice Wilson referred to the complex circumstances, profound social, psychological and ethical factors that influence the decision of pregnant women opting for abortion and the limited space for compelling state interest in the protection of foetuses, and recognised the right to abortion. In the *Prostitution Reference* case,[62] she dissented on criminalising soliciting customers by prostitutes on the ground that morality is a matter of contextual variation and all immoral conducts disapproved by society are not criminalised in this imperfect world. In *Big M Drug Mart*, Dickson J. stated that rights have variable meanings which they derive not from their inherent nature, but from the broader sociopolitical contexts in which they are asserted. The issue in the *Edmonton Journal* case[63] was whether the publication ban on certain aspects of matrimonial and civil litigation mandated by s. 30 of Alberta's Judicature Act, R.S.A. 1980, b c. J-1 violated s. 2(b) of the Charter. The Court ruled that the restriction was overbroad and unreasonable.

Wilson J. reasoned,

> "*It is my view that a right or freedom may have different meanings in different contexts. Security of the person, for example, might mean one thing when addressed to the issue of over-crowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smokestacks. It seems entirely probable that the value to be attached to it in different contexts for the purpose of balancing under s. 1 might also be different. It is for this reason that I believe that the importance of the right or freedom must be assessed in*

[61] R. v. Morgentaler, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).
[62] Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1216 (S.C.C.). *see* Sheppard, Colleen.
[63] Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577.

> *context rather than in the abstract and that its purpose must be ascertained in context.*"[64]

Following this approach, in a subsequent case[65] it was observed,

> *"[i]t is now well established that the Charter is to be interpreted in light of the context in which it is being applied ... [and that] the historical, social and economic context in which a Charter claim arises will often be relevant in determining the meaning which ought to be given to Charter rights and is critical in determining whether limitations on those rights can be justified under s. 1."*

Sugunasiri states that contextualism as a new standard for judicial review has added to the living tree approach, purposive interpretation, postmodernism, and pragmatism.[66]

C. CONTEXTUALISM IN AUSTRALIA

Enacted in 1900 and less prone to constitutional amendments due to rigid procedure, the Australian Constitution has been found amenable for contextual interpretation. Narrowly, it connotes a process of reconstructing from a contemporary point of view the meaning the legal text would have held for its framers. In *King* v. *Jones*,[67] the word 'adult' in section 41 was to be interpreted by the Australian High Court. In 1900, an adult meant a person who attained the age of 21 years. It was argued that the post-1900 developments showed remarkable changes in the capacity of individual persons to make reasonable judgments at the age of 18 years because of their high levels of conceptions of intellectual maturity, social and political participation, contractual capacity, earning and borrowing capacity, criminal accountability, marital and sexual autonomy and so on, and hence citizens within the age group of 18 to 21 years should be entitled to cast their votes in parliamentary and state elections. However, the Commonwealth High Court rejected the contention on the ground that the

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[64] *Id.* at 584.
[65] R v. Laba, [1994] 3 S.C.R. 965.
[66] Shalin Sugunasiri, *Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability*, 22(1) DALHOUSIE L. J. 126, 183 (1999).
[67] King v. Jones, (1972) 128 CLR 221.

relevant context to be considered for the determination of adults in section 41 is the context of the making of the Constitution and not the context and time of its interpretation. Jonathan Crowe argues that this approach often produces interpretations that seem strained from a contemporary viewpoint and holds that wider contextual interpretation that takes care of overall socio-economic developments shall be preferred.[68] Continuing the *King* v. *Jones* approach, in *Re Wakim*,[69] the High Court held that the law which authorised federal courts to exercise state jurisdiction was invalid as the Commonwealth Constitution was silent about such vestment. McHugh J. viewed that the judiciary cannot amend the Constitution through interpretation. In *Grain Pool of Western Australia*,[70] Kirby J. construed the word *"patents"* without tying it to the 1900 understanding. According to him, the dead hand of the past shall not govern the present; the Constitution should be interpreted for Australians and not for its Imperial Makers; the implications of federalism which colonial lawmakers contemplated were irrelevant and even rejected in the *Engineers case*;[71] and the language of the Australian Constitution is not unchanged. Thus, context meant contemporary context, and not the context of 1900. *In CIC Insurance Ltd*., the High Court observed, *"[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy."*[72] Looking into the context is not optional but 'essential' according to the Court.[73] In the *Victim Compensation Fund Corporation* case,[74] the High Court treated contexts in a multi-layered sense, ranging from a focus on words in the statute, the statutory framework, legislative history and the social context of lawmaking. However, in *Al-Kateb,*[75] in the matter

[68] Jonathan Crowe, *The Role of Contextual Meaning in Judicial Interpretation*, 41 FED. L. REV. 417 (2013).
[69] Re Wakim: Ex parte McNally (1999), 198 CLR 511.
[70] Grain Pool of Western Australia v. Commonwealth, (2000) 202 CLR 479.
[71] Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd., (1920) 28 CLR 129.
[72] CIC Insurance Ltd v. Bankstown Football Club Ltd, (1997) 187 CLR 384.
[73] Independent Commission Against Corruption v. Cunneen, (2015) 256 CLR 1.
[74] Victims Compensation Fund Corporation v. Brown, (2003) 77 ALJR 1797, 1799.
[75] Al-Kateb v. Godwin, (2004) 219 CLR 562.

of application of international law, the majority took a narrow view of context and declined the application of human rights.

D. CONTEXTUAL INTERPRETATION IN INDIA

As discussed earlier, there are significant contextual factors – historical, social, cultural, economic and political – that wield great influence upon the judiciary in the course of interpreting the Indian Constitution. Problems of insecurity, inherited disadvantages of colonial rule, the need to resolve complex political situations, and the urge for the overall development of human society have expounded the meaning of the Constitution. The Constitution's role as a purposive enterprise, and potentiality for value-based interpretation by bringing the constitutional ideals to the circumstance of the case at hand and linking the context with the pragmatic planning towards desirable constitutional goals make contextual interpretation a dynamic tool. Courts have used linguistic, factual, societal, historical, political, and international contexts in constitutional interpretation. On a variety of matters, ranging from the dissenting judgement of Fazal Ali and Mahajan JJ., in *AK Gopalan* (1950) to *Re Article 370* (2023), the journey of contextual reading has proceeded to enrich constitutional jurisprudence.

Context I: Reservation

The task of ameliorating the weaker sections of society attracts a context-sensitive approach. In *Indra Sawhney*,[76] B P Jeevan Reddy J., in his leading majority judgement derived from the scheme and context of Article 16 (4), which uses the phrase *"provision for the reservation of appointments or posts"*, all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent with the requirement of maintenance of efficiency of administration as per Art. 335.[77] For objective identification of socially backward class, the court invokes the social context – caste, occupation, poverty, and social

[76] Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217.
[77] *Id.* ¶¶ 58, 400.

backwardness, which are so closely intertwined in our society.[78] In limiting the quantum of reservation, the wise suggestion of Dr Ambedkar that reservation shall be only in a minority of posts is considered relevant to the present context also as it harmonises the claims between backward classes and the society as a whole.[79] The context of possessing features of social and economic advancement pushes the persons in backward class into a pedestal of creamy layer and disentitles them from reservation.[80] P B Sawanth J. expressed the need for responding to the context of social realities, *"To interpret it, ignoring the social, political, economic and cultural realities, is to interpret it not as a vibrant document alive to the social situation but as an immutable cold letter of law unconcerned with the realities."*[81]

In another landmark case, *M Nagaraj*,[82] the Supreme Court considered equity, justice, and efficiency as the context-specific variable factors. The Court said, *"There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State."*[83] The Court examined the linguistic or textual context of Article 16 and highlighted the need to balance between the right to equality, and provisions enabling the State to provide for affirmative action in such a way that the interests of the reserved classes are balanced against the interests of other segments of society. It is on the basis of this contextualism that the Court insisted on three constitutional requirements, namely, the backwardness of a class, the inadequacy of representation in public employment of that class, and the overall efficiency of the administration for affirmative action under Article 16.[84] The Court also observed that the content of merit and extent of reservation are context-specific.[85] In the *Indian Medical Association* case,[86] the Court applied this context-specific approach to reject the claims of the Army

[78] *Id.* ¶ 85.
[79] *Id.* ¶ 94 A.
[80] *Id.* ¶¶ 86, 121; "*If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class*."
[81] *Id.* ¶ 369.
[82] M. Nagaraj v. Union of India, (2010) 12 SCC 526.
[83] *Id.* ¶ 103.
[84] *Id.* ¶¶ 111, 122.
[85] *Id.* ¶ 45.
[86] Indian Medical Assn. v. Union of India, (2011) 7 SCC 179.

College of Medical Science to be immune from the State's reservation policy and have its admission preferences.

In *Chebrolu Leela Prasad Rao*,[87] taking support from a precedent in *Prakash Rao*,[88] the Supreme Court held that when the President, by an order passed under Article 371-D,[89] has specified any local area for recruitment to posts of any local cadre (or constituted otherwise) under the State Government, the State Government loses its inherent power to regulate service matters. The words *"or constituted otherwise"* ought to be understood in an analogous sense. The judgement states, *"therefore, the phrase 'constituted otherwise' is to be understood in that context and purpose which Article 371-D and the Presidential Order seek to achieve."* Accordingly, 100 per cent reservation in scheduled areas for tribal people by the State was unconstitutional.

The nature and purpose of reservations in the context of local self-government are considerably different from that of higher education and public employment. According to the Supreme Court's decision in *Krishnamurthy*, *"…. Article 243-D and Article 243-T form a distinct and independent constitutional basis for affirmative action and the principles that have been evolved in relation to the reservation policies enabled by Articles 15(4) and 16(4) cannot be readily applied in the context of local self-government. Even when made, they need not be for a period corresponding to the period of reservation for the purposes of Articles 15(4) and 16(4), but can be much shorter."*[90]

While upholding the 103rd constitutional amendment providing for reservation to EWS by inserting Clause (6) to Articles 15 and 16 in *Janhit Abhiyan*,[91] the majority of the apex court observed, *"On a contextual reading, it could reasonably be culled out that the observations, wherever occurring in the decisions*

[87] Chebrolu Leela Prasad Rao v. State of A.P., (2021) 11 SCC 401.
[88] S. Prakasha Rao and Anr. v. Commissioner of Commercial Taxes and Ors., (1990) 2 SCC 259.
[89] Art. 371-D provides for special provisions with respect to the State of Andhra Pradesh or the State of Telangana, authorising the President to make with respect to these States, having regard to the requirement of each State for equitable opportunities and facilities for the people belonging to different parts of the State in the matter of public employment.
[90] K. Krishna Murthy (Dr.) and Ors. v. Union of India and Anr., (2010) 7 SCC 202.
[91] Janhit Abhiyan v. Union of India, (2021) 11 SCC 78, at ¶ 72.

of this Court, to the effect that reservation cannot be availed only on economic criteria, were to convey the principle that to avail the benefit of this affirmative action under Articles 15(4) and/or 15(5) and/or 16(4), as the case may be, the class concerned ought to be carrying some other disadvantage too and not the economic disadvantage alone. The said decisions cannot be read to mean that if any class or section other than those covered by Articles 15(4) and/or 15(5) and/or 16(4) is suffering from disadvantage only due to economic conditions, the State can never take affirmative action qua that class or section."

That reservation in public employment is context-specific and hence when a State has notified a certain caste or tribe as SC/ST as per the Constitution, such benefits will not be available to migrants from other states is repeatedly pointed out by the Supreme Court in *Marri Chandra Shekhar Rao*,[92] *Veena*,[93] *Milind*[94] and *Subhas Chandra*[95] cases. The argument that migration has contextualised their entitlement was rejected in the *Subhas Chandra* case.

Context II: Reasonableness of restriction

The contextual approach to the identification of the reasonableness of restriction is well-established. In *VG Row*, the Supreme Court stated, *"the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each, individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."*[96] This approach has been followed

[92] Marri Chandra Shekhar Rao v. Dean, Seth G. S. Medical College and Ors., (1990) 3 SCC 130.
[93] M.C.D. v. Veena and Ors., (2001) 6 SCC 571.
[94] State of Maharashtra v. Milind and Ors., (2001) 1 SCC 4.
[95] Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 SCC 458.
[96] State of Madras v. V. G. Row, AIR 1952 SC 196, ¶ 15.

in a number of cases pertaining to freedoms under Article 19.[97] In *Kaushal Kishor*,[98] the content and extent of freedom of speech and expression were found to possess various dimensions in different contexts causing hate, public disorder, defamation, a threat to the security of the state, appeal to criminal actions, obstruction to the free flow of information regarding candidates contesting the election, indignity by appealing to prurient interest, an impediment to Parliament's privilege, lowering of judiciary's image etc., calling for proportionate actions.

Context III: Preventive Detention

In *A K Gopalan*, Patanjali Shastri J., while concurring with the majority observed, *"…. personal liberty in the context of Part III of the Constitution is something distinct from the freedom to move freely throughout the territory of India."*[99] Fazal Ali J., in his dissent interpreted the expression *"throughout the territory of India"* as contextually and juristically connoting personal liberty of movement and held that the juristic conception that personal liberty and freedom of movement connote the same thing is the correct and true conception, and the words used in Art, 19 (1) (d) must be construed according to this universally accepted legal conception.[100] Another dissenting view, by Mahajan J., looked into the context of Article 22 (7) and opted for a narrow interpretation of the Parliament's power to enact laws on preventive detention in view of the right to equality. He observed,

> *"The wide construction of cl. (7) of Art. 22 brings within the ambit of the clause all the subjects in the legislative list and very seriously abridges the personal liberty of a citizen. This could never have been the intention of the framers of the Constitution. The narrow and restricted interpretation is in accord with the scheme of the article and it also operates on the whole field of the legislative list and within that field it operates by demarcating certain portions out of each subject*

[97] Mohd. Faruk v. State of Madhya Pradesh and Ors., AIR 1970 SC 93; Arun Ghosh v. State of West Bengal AIR 1970 SC 1228, Ram Manohar Lohia's case, AIR 1960 SC 633; Shreya Singhal v. Union of India, (2013) 12 SCC 73.
[98] Kaushal Kishor v. State of U.P., (2017) 1 SCC 406.
[99] A K Gopalan v. State of Madras, AIR 1950 SC 27 ¶ 105.
[100] *Id.* ¶ 46.

> *which requires severe treatment. If I may say so in conclusion, S. 12 treats the lamb and the leopard in the same class because they happen to be quadrupeds. Such a classification could not have been in the thoughts of the Constitution makers when cl. (7) was introduced in Art. 22."*[101]

Both the dissenting views were banking upon contextualism as a powerful tool. While the majority did not agree with these contextualist arguments, the entire Bench was unanimous in striking down Section 14 of the Preventive Detention Act, 1950, which had exempted the executive from furnishing information about the grounds of detention to the Advisory Board. This had the consequence of allowing scrutiny of the context of detention and examine its constitutional validity in individual cases. Thus, the Court recognized the role of factual context in testing the validity of detention while the minority was additionally pushing for the application of the text's linguistic context.

Whether the majority view in *A K Gopalan* represents concern for public order and security of the State which a larger political context demanded in a troubled situation soon after the nascent nation's independence which witnessed horrors of communal violence and threats by communists against Jagirdars in the course of implementing welfare legislation is a question examined by political historians like Granville Austin.[102] The facts of the case show that the petitioner, who was a radical leader of the Communist party, was already in prison under a criminal charge and earlier prosecutions against him were not successful. For extending the preventive detention law from time to time the reason attributed was anti-social activities. In *Ram Singh*,[103] the preventive detention of a person to avert speeches causing communal disaffection was upheld (3: 2) by extending the Gopalan reasoning. In *Krishnan*, non-fixation of the maximum period of preventive detention was held as non-objectionable as the legislature had discretion by virtue of the word *"may"*.[104] But when the context was merely

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[101] *Id.* ¶ 149.

[102] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 61 (Oxford University Press, 1st ed., 1999).

[103] Ram Singh v. State of Delhi, AIR 1951 SC 270; 1951 SCR 451; *see* P ISHWARA BHAT, FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP (Eastern Law House,, 1st ed., 2004).

[104] Krishnan v. State of Madras, AIR 1951 SC 301; 1951 SCR 605.

relating to freedom of residence[105] or freedom of speech,[106] The *Gopalan* ruling was not applied. In the *Anwar Ali Sarkar* case, which involved the constitutionality of a special law enacted by the state government providing for executive power to select cases of riots to be tried by the special court without providing for reasonable classification, the Supreme Court nullified the law on grounds of the right to equality. As per *Makhan Singh*[107] and *Sadanandan*[108] decisions, preventive detention could be reviewed by the High Courts under Article 226 even in case of suspension of rights under Article 359 during an emergency if the detention is with malafide intention.

The *Habeas Corpus* case[109] decided during the Emergency represents a sharp conflict between legal contextualism and extra-legal contextualism. The lone voice of dissent by H R Khanna J. reflects legal contextualism. He argued that if the suspension of fundamental rights by the Presidential order under Article 359 and amendments to MISA had the effect of making no fundamental right enforceable, still there was a way available to the detainees: invoke the rule of law through Article 372 and get remedy against unlawful detention. According to him, Article 21 is not the sole repository of right to life and personal liberty; nor are they mere gifts of the Constitution as they are anterior to law and the Constitution. International human rights principles and common law principles developed ever since the Magna Carta provided a rule of context, which Article 226 could not exclude. The argument had textual, structural, historical, moral and consequentialist support. The factor of legal context countered the argument of the absence of *locus standi*. The legal argument of the majority was entirely based on the suspension of rights, amendments to MISA blocking the remedy and absence of *locus standi* on the part of petitioners. But the extra-legal contextualism of political chaos, fear of intervention and inconvenience of confrontation were lurking behind judicial observation which were vindicated in post-emergency revelations, judicial

[105] Shabbir Hussain v. State of UP, AIR 1952 All 257.
[106] Supdt. Central Prison v. Ram Manohar Lohia, AIR 1960 SC 633.
[107] Makhan Singh v. State of Punjab, AIR 1964 SC 381.
[108] Sadanandan v. State of Kerala, AIR 1966 SC 1925.
[109] ADM Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207.

supersessions and transfers and regretful confessions.[110] AN Ray CJI observed:

> *"In period(s) of public danger or apprehension the protective law which gives every man security and confidence in times of tranquillity, has to give way to interests of the State….. While the courts of law are in normal times peculiarly competent to weigh the competing claims of individuals and governments, they are ill equipped to determine whether a given configuration of events threatens the life of the community and thus constitutes an emergency. Neither are they equipped, once an emergency has been recognised particularly a war emergency or emergency on account of security of the country being threatened by internal aggression to measure the degree to which the preservation of the life of the community may require governmental control of the activities of the individual. Jurists do not have the vital sources of information and advice which are available to the executive and the legislature; nor have they the burden of formulating and administering the continuing programme of the government, and the political responsibility of the people, which, although intangibles, are of crucial importance in establishing the context within which such decisions must be made."*[111]

The difference between the legal contextualism of the dissenting judge and the extra-legal contextualism of the majority remained a part of constitutional history.

Whether contextualism could help the commencement of a constitutional amendment, a task which was entrusted to the executive, was a question pondered over in the early 1980s. Specifically, failure to commence and effectuate post-emergency amendment to Article 22 was an issue in *A K Roy* case.[112] The Court ruled that the power to issue a notification for bringing into force the provisions of a constitutional amendment is not a constituent power, because, it does not carry with it the power to amend the Constitution in any manner. According to the Court, the non-exercise of power of notification of commencement by the Union Government was a matter to be dealt with by the Parliament to which the executive is responsible. The plea for the issue of a writ of mandamus was declined by leaving it to the executive to decide the type and extent of preparation

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[110] AUSTIN, *supra* note 102 at 341-343.
[111] ADM Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207 ¶ 36-37.
[112] A. K. Roy v. Union of India, 1982 Cri LJ 340 (SC).

required. The justifications for the same reflect the pragmatism of looking into the context of separation of powers. The Court upheld the major provisions of NSA and expressed hope about the commencement of the amendment within a reasonable time. The hope remained empty even after 55 years of its enactment. Successive governments found no context as opportune for its commencement. Enactment of Terrorism and Disruptive Activities (Prevention) Act, 1985 and 1987 has also received similar treatment in *Kartar Singh* case[113] in the context of growing instances of terrorism. Today, there is a continuation of preventive detention law but its rigour is mellowed down in the changed context and application of *Maneka* principles.[114]

Context IV: Freedom of Religion

Religious freedom has several dimensions and has an intricate and unique relation to respecting other Fundamental Rights. It is subject to public order, morality and health and amenable to social reforms including temple entry measures through law. The coexistence of freedom of conscience with the freedom to profess, practise and propagate religion has the effect of recognising the right to spread one's religion without offending another's freedom of conscience. Group right of religious denominations prevails over individual religious freedom. The state's duty not to promote or maintain any specific religion or religious denomination by using revenue generated through tax from the people and the duty of public educational institutions not to impart religious instructions to students in their institutions aim at keeping the State away from religion. But this is not absolute separation as Indian secularism believes in orientation to social reforms and social justice in the domain of religion by projecting equal religious freedom of all or *sarva dharma samabhava*. It is significant that freedom of religion, both individual and institutional, is contextualised in social relations. While its functioning calls for contexts to have an interface with it, the very identification of essential aspects of religion looks to the philosophy, features, religious text, beliefs and practices of individual religions. In brief, the contexts of each religion have a say in shaping the

[113] Kartar Singh v. State of Punjab, (1994) 3 SCC 569.
[114] Maneka Gandhi v. Union of India, AIR 1978 SC 597.

content of religion of specific religious communities. Religious beliefs are embedded in social customs and community practices purged through constitutional morality. Thus, the social environment surrounding each religion shapes its identity. Hence, judicial interpretation of relevant clauses of religious freedom calls for judicial reasoning to traverse the path enlightened by context. In brief, contextualism has a central role to play in the task of constitutional interpretation in this domain.

In practice, the judiciary has invoked the right to equality and the rule of law for the protection of places of worship and has been resolving issues of religious conflicts by application of the law of the land.[115] Temple entry issues whether triggered by caste prejudice or gender bias are resolved by the application of other Fundamental Rights and individual dignity.[116] The state is asked to gradually phase out from funding religious pilgrimages.[117] In addition to using the religious texts, the social contexts of religious practices are reckoned in conducting the essentiality test.[118] The historical background of the Sabarimala temple and the ongoing social belief formed an important contextual factor thoroughly examined by the Supreme Court although the ultimate decision of the Court turned on feminist perspective of human rights.[119] Mutual balancing between freedom of conscience and freedom of propagation of religion carves out the space for religious tolerance.[120] In building the pillar of secularism in the mindset of people through a comparative understanding of religions, courts have used the wisdom literature enshrined in our multicultural ethos.[121]

Context V: Minority educational rights

The juxtaposition of Article 30 (1) with Article 29 (2), 30 (2) and 28 (3) renders the right of the religious and linguistic minorities to establish and

[115] M. Ismail Faruqui v. Union of India, (1994) 6 SCC 1.
[116] Sri Venkatramana Devaru v. HRE Commissioner, AIR 1958 SC 255; Indian Young Lawyers Association v. State of Kerala (Sabarimala case), (2019) 11 SCC 1.
[117] Praful Goradia v. Union of India, (2011) 2 SCC 568.
[118] Commissioner HRE v. Lakshmindra Thirtha Swamier, AIR 1954 SC 282; Bjoe Emmanuel v. State of Kerala (1986) 3 SCC 615.
[119] Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1.
[120] Rev. Stanislaus v. State of Madhya Pradesh, (1977) 1 SCC 677.
[121] Aruna Roy v. Union of India, (2002) 7 SCC 368.

administer educational institutions of their choice non-absolute.[122] Further, *"establish"* and *"administer"* inherently presuppose a good quality of education and exclude maladministration in order for the right to be effective. Thus, linguistic or textual context becomes crucial for understanding the extent and content of the right. The historical context, as evident from Constituent Assembly Debates, is that while there shall not be the imposition of majority language upon linguistic minority institutions, minority educational institutions shall enable an atmosphere of harmonious learning by the children irrespective of their communities once they receive grants-in-aid from the government.[123] They shall not discriminate in the admission of students on the basis of religion, language etc. Based on these contextual factors, the Supreme Court in the *St. Stephen's College* case,[124] required the minority institutions getting grants in aid to make available 50 percent of seats in their institutions to children of non-minority communities.[125] Partly overruling this principle, in the *TMA Pai Foundation* case,[126] the Court ruled that as long as the minority educational institution permits the admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for whom the institution was meant. What would be a reasonable extent would depend upon variable factors such as the type of institution and the nature of education that is being imparted in the institution. VN Khare J., while concurring observed, *"Looking into the precedents, historical fact and Constituent Assembly debates and also*

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[122] The Ahmedabad St. Xaviers College Society v. State of Gujarat, (1975) 1 SCR 173 at 298, (Dwivedi, J.).

[123] Shri K. Santhanam, 10, CONSTI. ASSEMB. DEB., Oct. 06, 1949, https://www.constitutionofindia.net/constituent-assembly-debate/volume-10/.

[124] St. Stephen's College v. University of Delhi, (1992) 1 SCC 558.

[125] While treating Art. 29(2) as a facet of equality, the Court gave a contextual interpretation to Arts. 29(2) and 30(1) while rejecting the extreme contentions on both sides, i.e., on behalf of the institutions that Art. 29(2) did not prevent a minority institution to preferably admit only members belonging to the minority community, and the contention on behalf of the State that Art. 29(2) prohibited any preference in favour of a minority community for whose benefit the institution was established.

[126] T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, at ¶ 149.

interpreting Articles 29(2) and 30(1) contextually and textually, the irresistible conclusion is that Article 30(1) is subject to Article 29(2) of the Constitution."

Context VI: Constitutional Amendment

Why constitutional amendment is not law for the purpose of Article 13 is explained by contextual interpretation. KK Mathew J. in *Kesavananda* stated, *"When Article 13 (2) said that the State shall not make any 'law', the meaning of the expression 'law' has to be gathered from the context. Though, analytically, it might be possible to say that the word 'law' would include an amendment of the Constitution also, from the context it would be clear that it only meant ordinary law. A word by itself is not crystal clear. It is the context that gives it the colour."*[127] *In order to argue that the scheme of Constitution as a whole shall be construed and that "It is not right to construe words in vacuum and then insert the meaning into an article"*,[128] SM Sikri approvingly cited Greene LJ's view in *Bidie* case, *"Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question: 'In this state, in this context, relating to this subject-matter, what is the true meaning of that word?'"*[129] Similarly, the view of Gwyer C.J. that construction of a grant of power shall be qualified by other provisions of the enactment by understanding the implications of the context was also relied upon.[130] Hence, the word "amendment" was to be understood in the light of the Preamble.

In the *Second Judges* case,[131] the Supreme Court found that *"A constitutional convention existed that the appointment of judges should be made in conformity with the views of the Chief Justice of India"* and that the Constituent Assembly had conceded the co-equal position of President and the Chief Justice of India in the matter of appointment of judges of the Supreme Court and High

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[127] Kesavananda v. State of Kerala, AIR 1973 SC 1461 ¶ 1595; (M.H. Beg J.) ¶ 1845; (Dwivedi J.) ¶ 1914.
[128] *Id.* ¶ 62.
[129] Bidie v. General Accident, Fire and Life Assurance Corporation, (1948) 2 All ER 995 at p. 998; also *see* Powell v. Kempton Park Racecourse Co. Ltd., (1899) A.C. 143, 185.
[130] The Central Provinces and Berar Act, 1939 F.C.R. 18 at p. 42 (AIR 1939 FC 1).
[131] Supreme Court Advocates on Record Association v. Union of India, (1993) 4 SCC 441.

Courts in order that independence of judiciary, which is a facet of basic structure of the Constitution, shall prevail. Hence, the words *"the Chief Justice shall always be consulted"* occurring in the proviso to Article 124 (2) shall be construed in such a way that concurrence of the Chief Justice for appointment of judges of the Supreme Court (other than Chief Justice of India) and High Courts is mandatory. This contextual interpretation became the core reasoning of the majority in *NJAC* case[132] and accordingly, the 99th Constitutional Amendment Act was struck down as violative of the basic structure of the Constitution.

Context VII: Federalism, Reorganisation of states and abrogation of Article 370

In the *NCT Delhi* case, where the issue was pertaining to the extent of the Union Government's power of interference in the matter of control over civil servants in the Delhi Government, D Y Chandrachud J. observed, *"While its (Constitution's) language is of relevance to the content of its words, the text of the Constitution needs to be understood in the context of the history of the movement for political freedom. Constitutional history embodies events which predate the adoption of the Constitution. Constitutional history also incorporates our experiences in the unfolding of the Constitution over the past sixty-eight years while confronting complex social and political problems."*[133] The approach is in continuation of the stance taken in *S R Bommai* that the President's power under Article 356 shall be limited to ensuring parliamentary democracy in the States.

The political position of States at the time of independence was fluid because of their varieties, numbers (562 Princely States) and sizes due to multiple historical experiences. The advice of the State Reorganisation Commission to take into consideration the historical, linguistic,

[132] Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1 ; Madan B Lokur J: "Historically, the Chief Justice of India was always consulted in the matter of appointment of judges, and conventionally his concurrence was always taken regardless of whether a recommendation for appointment originated from the Chief Justice of the High Court or the political executive. It is in this light that the discussion in the Constituent Assembly on the issue of appointment of judges to the Supreme Court and the High Courts deserves to be appreciated." ¶ 591.

[133] State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501.

administrative and geographical factors into consideration speaks much about the contextual approach to be adopted by the Union Government. Article 3 confers powers to the Parliament to make laws for the territorial organisation of States after getting views from the affected States although not bound to adhere to those views. In *Babulal Parate*,[134] where the State Reorganisation Bill providing for State of Maharashtra and State of Gujarat and Union Territory of Bombay was amended subsequent to the reference to the Legislative Assembly of Bombay to provide for a composite State of Bombay, and the matter was not referred to it again, the Supreme Court held that the views expressed by the State Legislature under the proviso to Article 3 are not binding on Parliament and it was not necessary to refer the bill to the State Legislature on each occasion of amendment of the Bill. In *P V Krishnaiah*, the Andhra Pradesh High Court recognised the paramount discretion of the Union Government and Parliament in the matter of territorial reorganisation of the Indian federal structure.[135] The Supreme Court surveyed the evolution of federal units in response to contextual factors in *In re Article 370*. Contextualism becomes important to settle the issues subsequent to the formation of States under Article 3. In *Kapila Hingorani*, non-payment of salary by the State public undertakings after the bifurcation of Bihar into the State of Bihar and the State of Jharkhand was addressed by resorting to contextual interpretation.[136] In *Narendra Kumar Tiwari*,[137] the Supreme Court favoured contextual interpretation of rule regularising daily wage workers who worked for more than ten years in such a way that continuous service prior to the formation of Jharkhand will also be taken into account.

In re Article 370[138] is a landmark case decided by a five-judge Bench of the Supreme Court unanimously. DY Chandrachud CJI delivered the leading judgement on behalf of himself, B R Gavai and Surya Kant JJ. Sanjay Kishan Kaul and Sanjeev Khanna JJ. gave two separate but concurring opinions. The judgments rely on contextualism as a major tool of

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134 Babulal Parate v. State of Bombay, AIR 1960 SC 51.

135 P V Krishnaiah v. State of Andhra Pradesh, AIR 2014 AP 13; Narendra Kumar Tiwari v. State of Jharkhand, (2018) 8 SCC 238.

136 Kapil Hingorani v. State of Bihar, (2003) 6 SCC; 2005 AIR SCW 926; 2009 AIR SCW 545.

137 Narendra Kumar Tiwari v. State of Jharkhand, (2018) 8 SCC 238.

138 Article 370 of the Constitution, In re, 2023 SCC OnLine SC 1647.

interpretation but combine textual, purposive, structural and pragmatic along with it. They take into account several circles of contexts.

First, the factual context which gave rise to challenge the abrogation of the special status of Jammu and Kashmir was as follows. On June 20th, 2018 the Governor of J&K imposed Governor's rule under section 92 of the J&K Constitution in the background of the fall of the coalition government of PDO and BJP and no alternative government was attempted by political parties. In November 2018, the Legislative Assembly was dissolved since there was no attempt to form an alternative coalition. Prior to the expiry of the six-month period, in December 2018, the President's rule was imposed under Article 356. Both the Houses of Parliament passed resolutions approving the President's rule. Two orders, Constitutional Order (**"CO"**) 272 under Article 370 (1) (d) and Constitutional Order (**"CO"**) 273 under Article 370 (3) were issued on August 5th, 2019 and August 6th, 2019 respectively. By CO 272, Article 367(4) was inserted in the Constitution of India, which amended sub-clause (3) Article 370 of the Constitution of India, by replacing the expression 'Constituent Assembly of the State' with 'Legislative Assembly of the State'. It also extended all the provisions of the Constitution of India to J&K supervening the previous piece-meal applications. Subsequently, on August 5th, 2019, Parliament passed a Statutory Resolution regarding the cessation of all clauses of Article 370 except clause (1). It also passed a resolution approving the proposal of reorganising the State of Jammu and Kashmir into two Union Territories: the Union Territory of J&K and the Union Territory of Ladakh.

Thereafter, both the Houses of Parliament passed resolutions recommending to the President under Article 370(3) that all clauses of Article 370 shall cease to operate. On August 6th, 2019, the President of India issued CO 273 under Article 370(3) of the Constitution as amended by CO 272 by which Article 370 ceased to apply with effect from 6 August 2019.[139] This was followed by the passing of the J&K Reorganisation Bill

[139] The modified version of article 370 after CO 273 is: "370. All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary

2019. The factual context was that all the earlier 271 COs were steps in the application of the Constitution of India into J&K and towards the latter's integration with the Indian polity, and the COs 272 and 273 were the culmination of this integrating process. DY Chandrachud CJI narrated in detail in paragraphs 433 to 465 of his judgement about the gradual way of extending various provisions and parts of the Constitution of India into Jammu and Kashmir through a *"slew of Cos"*, and how relating to the division of powers and residuary powers, the relation slowly resembled that of other States vis-à-vis the Union. The learned judge observed, *"The continuous exercise of power under Article 370(1) by the President indicates that the gradual process of constitutional integration was ongoing."*[140] This is corroborated by a research work of Pradeep Kumar Sharma, which made a critical analysis of all the Presidential COs which made selective application of the Indian Constitution.[141] Some of the modifications and exceptions (Article 35-A) were denying some Fundamental Rights and were to be set right. Further, COs 272 and 273 did not reflect mala fide motive nor the exercise of power under Article 356 was deemed mala fide.

Second, there is the linguistic context of Article 370 (3) which is the epicentre of the phenomenal integration of J&K. The said clause states,

> *"(3) Notwithstanding anything in the preceding clauses of this article, the President may, by public notification declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:*
>
> *Provided that the recommendation of the Constituent Assembly of the State shall be necessary before the President issues such a notification."*

Counsels for petitioners argued (a) that compliance with the proviso was a prerequisite for exercising power under the main clause as the proviso

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contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise."

[140] *Id.* ¶ 465.

[141] PRADEEP KUMAR SHARMA, CONSTITUTIONAL IMPLICATIONS IN JAMMU & KASHMIR (Pragati Publications, 1st ed., 2023).

required that the recommendation was necessary before the President issues such notification; (b) that it was not satisfied in the instant case as the Constituent Assembly of the State did not exist and (c) that its substitute (Legislative Assembly) created through CO 272 was amounting to amendment of Article 370 (3) which could have been done only by exercising power of amendment under Article 368. On behalf of the Union Government, it was argued that the power of abrogating Article 370 was vested with the President and the use of the non-obstante clause made it clear that Clause (3) prevailed over Clauses (1) and (2) and that the role of Constituent Assembly of the State was one of recommendation if it existed. The Proviso was not prescribing a condition precedent and became redundant once the Constituent Assembly of the State was not continuing. To hold otherwise is to make the main provision of Clause (3) unworkable, which was not the intention and spirit of Article 370 because Article 370 was a temporary provision as per the Heading and Marginal Note. Although the Marginal Note is not binding, it is relevant because it points out the drift, spirit and direction of the constitutional provision.

DY Chandrachud CJI, on his behalf and on behalf of Gavai and Suryakant JJ. stated in his judgement, *"The power under Article 370(3) did not cease to exist upon the dissolution of the Constituent Assembly of Jammu and Kashmir. When the Constituent Assembly was dissolved, only the transitional power recognised in the proviso to Article 370(3) which empowered the Constituent Assembly to make its recommendations ceased to exist. It did not affect the power held by the President under Article 370(3)."* The learned judge further observed, "*The President had the power to issue a notification declaring that Article 370(3) ceases to operate without the recommendation of the Constituent Assembly. The continuous exercise of power under Article 370(1) by the President indicates that the gradual process of constitutional integration was ongoing. The declaration issued by the President under Article 370(3) is a culmination of the process of integration and as such is a valid exercise of power. Thus, CO 273 is valid."* Sanjay Kishan Kaul J. concurred by stating, *"The power of the President under Article 370(3) was unaffected by the dissolution of the Constituent Assembly of Jammu and Kashmir. The President could exercise their power any time after the dissolution of the Constituent Assembly of Jammu and Kashmir, in line with the aim of full integration of the State*."

Third, the Court considered the situational context in which Article 370 was textually couched. The Heading of Part XXI as it stood originally was *"Temporary and Transitional Provisions"* and after the 13th Constitutional Amendment 1962, remains as *"Temporary, Transitional and Special Provisions."* The leading judgement elaborately refers to various provisions of this Part which became extinct either by the passage of time, the occurrence of the specified event or formal repeal.[142] The temporary nature of Article 370 was also clear from its marginal note, *"Temporary provisions with respect to the State of Jammu and Kashmir."* Given the importance of Headings and Marginal Notes in ascertaining the nature of the provision, as recognised in earlier precedents, the Court looked into the situational context to infer that the arrangement was temporary.

Fourth, the context of Article 370's structure and its relation with other provisions of the Constitution was a matter taken into account by the judiciary. According to the Court, the President had the power to apply all provisions of the Constitution of India to Jammu and Kashmir under Article 370(1)(d), which is similar to the power under Article 370(3). Also, according to the Court, the words "*such of the other provisions of the Constitution*" did not confine to a piecemeal approach as the integrating process was in progress. Article 370 reflects asymmetric federalism as it confines the power of the Union Government to those mentioned in the instrument of Accession (defence, external affairs, and communication), excludes application of the general pattern of the Seventh Schedule, retains indestructible union with India by permanent application of Article 1, allows integration of Jammu and Kashmir with India through progressive extension of constitutional provisions under Article 370 (1) (d). Asymmetric federalism showed peculiar features of the relations between the Union and J&K but did not exhibit sovereignty on the part of J&K. Application of principles of parliamentary democracy, readiness to make FRs fully available to people of J&K, review of power under Article 356 and the objective of keeping national unity speak about the context of Article 370 being related to paramount values of the Constitution. The Court examined the structure of Article 370, its various clauses and their relations with Articles 1, 3 and other provisions of the Constitution.

[142] Article 370 of the Constitution, In re, 2023 SCC OnLine SC 1647 ¶ 302.

Overarching the values of federalism and national integrity was a structuralist approach employed for a comfortable result.

Fifth, the historical context of Article 370 was a matter extensively argued from both sides of the litigation and analysed in-depth by the judiciary. The leading judgement refers to post-1858 political development in Kashmir, King Hari Singh's signature to Instrument of Accession (initial hesitation but subsequent compulsion of circumstances such as intrusion by Pakistan army and tribal invasion), participation of representatives of J&K in Constituent Assembly of India, speeches by N. Gopalswamy Ayyangar and Mohammed Sheik Abdullah in the Constituent Assembly, Yuvaraj Karan Singh's acceptance of the Constitution of India and formation of Constituent Assembly of J&K. The Court inferred that (i) after the IoA, Jammu and Kashmir had become a part of India and would continue to be a part of the territory of the nation and a unit of the future federal republic; and that (ii) the process of integrating State of Jammu and Kashmir was not complete as it was not yet ripe for the kind of integration which was envisaged for the rest of the States due to the circumstances such as ongoing war, entanglement with UN, delay in establishing Legislature or Constituent Assembly of J&K and the clear intention to constitutionally integrate J&K on par with other States.[143] Sanjay Kishan Kaul J. traces the ancient history of J&K, the culture of tolerance distinctly called *"Kashmiriyat"* and people's democratic movement.

Regarding the question of whether after the dissolution of the Constituent Assembly of J&K – because of which there is no scope for making recommendations to the President about the cessation of Article 370 – the opportunity of putting an end to Article 370 ceases to continue, DY Chandrachud CJI observed, "*This Court must take into account the inference drawn on an analysis of the historical context of including Article 370 and the text, placement and marginal note of the provision while deciding this issue*."[144] The learned judge referred to the process of ratification of the Constitution of India by

[143] *Id.* ¶ 270.

[144] *Id.* ¶ 324; Sanjay Kishan Kaul J: "A combination of factors, such as Article 370's historical context, its text, and its subsequent practice, indicate that Article 370 was intended to be a temporary provision." ¶ 112 (b) of his judgement.

the ruler of the princely State or the Constituent Assembly of that State, if it existed, and stated that the role of the Constituent Assembly of the State was only recommendatory and not normative.[145]

Sixth, the interpretation of the text of Article 370 was matched by reference to context. The words *"such exceptions and modifications"* occurring in Article 370 (1) (d) were interpreted in a wider sense than understood in re Delhi Laws case[146] in the light of the competence of the President under Article 370 (3) to abrogate Article 370. Both in *Puranlal Lakhanpal*[147] and *Sampat Prakash*, a wider meaning was given to suit the larger purpose of article 370. The word *"modification"* was considered equivalent to *"change"* in Article 368 (2) and various facets such as change in term, change-in-effect, and greater importance of substance of change in contrast to change in form were considered as relevant to an understanding of *"modification"*.[148]

Seventh, the purpose for which power is conferred under Article 370 (3) is shaped or limited by the context of Article 370 that it is temporary. As Sanjay Kishan Kaul J. stated, *"the power of the President to unilaterally de operationalize Article 370 once the Constituent Assembly of the State ceases to exist accords with the vision of the Constituent Assembly of India and the purpose of Article 370 – to ensure full constitutional integration as and when the circumstances permitted the same."*

Eighth, the Court looked into the larger context of better protection of human rights, removal of discriminatory provisions, harmony and collective development which justify the process of constitutional integration of J&K. Sanjay Kishan Kaul J. spoke of the restoration of *"Kashmiriyat"* tradition and directed the Union Government to constitute a Commission to thoroughly examine the situation, reasons and extent of violation of basic human rights in the Kashmir valley during the last four

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145 *Id.* ¶ 346.

146 In re Delhi Laws (1951) SCR 747.

147 Puranlal Lakhanpal v. President of India I, 1955 (2) SCR 1101; Puranlal Lakhanpal v. President of India II, 1962 (1) SCR 688.

148 Sajjan Singh v. State of Rajasthan, 1964 SCC OnLine SC 25; Kihoto Hollohan v. Zachilhu, 1992 Supp (2) SCC 651; Union of India v. Rajendra N. Shah, 2021 SCC OnLine SC 474.

decades in order to elevate the credibility of democratic governance in Kashmir.

Finally, although the Court did not decide the constitutionality of the Union law converting the State of J&K into two Union Territories, in view of assurance by the Union Government on the floor of the parliament about the restoration of the statehood of J&K, DY Chandrachud CJI for the Court expressed, *'In an appropriate case, this Court must construe the scope of powers under Article 3 in light of the consequences highlighted above, the historical context for the creation of federating units, and its impact on the principles of federalism and representative democracy."*[149]

CONCLUSION

Contextualism envisages multilayered interpretation as it goes on responding to various concentric circles formed by factual, linguistic, textual, historical, structural, political and social circumstances. As an important and old rule of interpretation, it has the merit of linking the judicial process with society. It supplements and gathers support from other rules of interpretation but does not supplant them. It is a realistic and comprehensive approach, addressing the issues in relevant fields. It is not doctrinaire or rigid but is flexible albeit systematic. It is not a stand-alone principle but mixes with textualism, historical analysis and purpose scrutiny. It gathers inputs from social, cultural, economic and political factors. Context changes from case to case, but the enduring constitutional values streamline the course of justice.

Although criticised for its lack of independent theory of its own, it is its competence and function of weaving the socio-legal values together that has added to its strength and credibility. But in times of crisis and emergency, unless shaped by human rights values, contextualism is likely to bow its knees to authoritarianism. Constitutionalism ought to dispel types of extra-constitutional authoritarian contexts that were experienced during the emergency. The common experience of democratic nations, viz., US, Canada, Australia and India, is that long historical contexts inter-

[149] Article 370 of the Constitution, In re, 2023 SCC OnLine SC 1647, ¶ 504.

mingled with text, define the route of judicial reasoning. The expansion of its ambit from *Gopalan* to *In re article 370* has, by and large, served the cause of strengthening the constitutional values, be it federalism, human rights or welfarism.

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

SEEMA KAZI[1]

This article addresses the question of minority differences within modern nation-states with reference to Indian Muslims, especially Muslim women. Using a cross-comparative historical lens the parallels between minority exclusion in Europe and in post-colonial India, and the limits of legal equality as a sufficient protection for minorities, are highlighted. Partition's lasting influence on the Othering of Indian Muslims in modern India is emphasised as is the elision of Muslim women's histories of struggle and achievement during the colonial period. In conclusion, this article suggests that India's history of diversity and difference could possibly form the basis of a new historically anchored national imagination wherein the modern principle of Constitutional equality coexists with the right to historically inherited difference.

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MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

INTRODUCTION

This article focuses on minorities in general and on Muslims, especially Muslim women in post-colonial[2] India. More specifically, it is a critical reflection on the historical production of Muslim minority differences in modern India and its intersection with the question of gender[3] and women's rights in Muslim communities. The contemporary conditions and concerns of Muslim women (and men) in modern India are historically determined. In other words, an appreciation of the particular burdens and challenges imposed by *history* on Muslims in India in general, and on Muslim women in India, in particular, is essential towards developing a deeper and more nuanced understanding of the contemporary challenges confronting both constituencies. In keeping with the emphasis on history, this article discards conventional post-1947 frames of analysis. The discussion encompasses the colonial *and* post-colonial periods.

The discussion is divided into three sections. The *first* section focuses on the majority-minority binary within modern nation-states in the 20th century and the production of the Jewish minority in modern Europe, and of the Muslim minority in post-colonial India. Using critical interdisciplinary literature, the historical parallels between Jewish and Muslim social exclusion in 20th century Europe and in modern India, respectively, are highlighted. The intent here is *not* to equate the mass crime of the Holocaust with minority rights in modern India. Rather, it is to employ a comparative frame of analysis to foreground (a) cross-national historical parallels between the production and exclusion of minority difference within modern nation-states, and (b) the limits of legal/constitutional equality as sufficient protection for minority difference.

[2] The author uses the terms postcolonial and modern India interchangeably; both connote post-1947 India.

[3] In addition to its social meanings, the term gender simultaneously connotes meanings ascribed to Muslim women by virtue of their Muslim identity.

The *second* section focuses on women from Muslim communities in colonial India. Using critical gender scholarship on Muslim women[4] during this period, it offers a brief overview of Muslim women's history of modest *albeit* significant progress in the fields of education, civic participation, literary production, social debate and legal reform within Muslim law in colonial India. Moving on to post-colonial India, the discussion highlights the partition's Hindu-Muslim legacy that in turn reinforced ahistorical public perceptions of Indian Muslims and Indian Muslim women as an undifferentiated 'Other' with lives and choices determined primarily by Islam.

The *third* section focuses on the 2020-2021 Muslim women-led protest movement at Shaheen Bagh. This section contests secular-liberal representations of Shaheen Bagh and demonstrates that the movement (a) dismantles dominant representations and perceptions of Muslim women as culturally inferior, unmodern subjects beyond history, agency or politics; (b) foregrounds the constitutive contradiction between ahistorical abstract secular equality, and postcolonial elision of the historically-determined religion-based power imbalance between Muslim citizens and the Indian state; and (c) epitomises Muslim women (and men) as moral and political subjects, united in struggle and aspiration for social and legal equality as Muslim citizens in modern India.

DIFFERENCE: MAJORITY, MINORITY

In a prescient critique of nationalism in the early 20th century, poet-philosopher Rabindranath Tagore wrote of India's great challenges in the 20th century, among which he forewarned of the challenge of dealing with diversity and difference.[5] Tagore's thoughts on difference in India presaged the erasure of Jewish difference in Europe and the emergence of international law with the protection of 'different' minorities as one of its

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[4] GAIL MINAULT, SECLUDED SCHOLARS WOMEN'S EDUCATION AND MUSLIM SOCIAL REFORM IN COLONIAL INDIA (Oxford University Press, 1st ed., 1998*)*; SHAHIDA LATEEF, MUSLIM WOMEN IN INDIA: POLITICAL AND PRIVATE REALITIES 1890s - 1980s (Kalifor Women, 1st ed., 1990); BARBARA METCALFE, ISLAMIC CONTESTATIONS: ESSAYS ON MUSLIMS IN INDIA AND PAKISTAN (Oxford University Press, 1st ed., 2004); BARBARA METCALFE, MORAL CONDUCT AND AUTHORITY: THE PLACE OF *ADAB* IN SOUTH ASIAN ISLAM (University of California Press, 1st ed., 1992).

[5] RABINDRANATH TAGORE, NATIONALISM 76-77 (Penguin, 1st ed., 2009).

core concerns.[6] States, however, differed on the concept, identification and rights of minorities.[7] Addressing the ambiguity, the United Nations (UN) defined a minority as:

> "*An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these.*"[8]

The UN further clarified that "*numbers or numerical presence is a principal benchmark for the identification of a minority.*"[9] Accordingly, the concept of minority as a demographically smaller social group, 'different' from the majority emerged as part of the normative understanding of the term in international law. Majority (universal) words were the norm; minority (particular) an exception to the norm.

From a historical perspective, however, the concept of minority was not merely an abstraction related to numbers or demography. Rather, as the following discussion demonstrates, minorities were products of history and historical forces. Of particular interest to this discussion is the historical

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[6] Aftab Alam, *Minority Rights under International Law*, 57(3) J. IND. L. INST. 37 (2015).

[7] According to the United Nations, States held "*diverging views…both in terms of who minorities are as right-holders and the nature and extent of their rights*" [U.N. General Assembly, Report of the Special Rapporteur on minority issues, *Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,* U.N. Doc. A/74/160 (15 Jul. 2019).]). As a result "*some minorities are excluded because they are not the 'right kind' of minority according to different parties*" (UN OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, *Concept of a minority: mandate definition*, available at https://www.ohchr.org/en/special-procedures/sr-minority-issues/concept-minority-mandate-definition.

[8] "*One of the objective criteria, if not the main one, for determining whether a group is a minority in a State is a numerical one. A minority in the territory of a State means it is not the majority. Objectively, that means that an ethnic, religious or linguistic group makes up less than half the population of a country.*" (U.N. General Assembly, Report of the Special Rapporteur on minority issues, *Effective Promotion of the Declaration of the Rights of Person Belonging to National, Ethnic, Religious and Linguistic Minorities*, U.N. Doc. A/74/160, ¶ 18, 15 July 2019.).

[9] *Id.*

production of minorities within modern nation-states, Europe being one such case.

The European concept of the modern territorial nation-state was premised on the principle of congruence between state (territory) and nation (people) welded together by the principle of equality; all members within a nation-state were equal citizens. States were protectors of nation and national identity; citizens pledged loyalty to the state. This particular concept of citizenship, however, did not take into account the difference or inequality *between* citizens; it also placed the question of ethnic-religious difference within the legal framework of equal citizenship.[10] The assumption was that "*the state can treat large numbers of people equally by efficient application of the law through the bureaucratic machinery of the state*."[11]

The history and empirical reality of modern nation-states, however, is far more complex. With the exception of Iceland and Japan, all nation-states are historically home to different religious, ethnic or racial social groups.[12] The assumption that legal/constitutional equality is sufficient to deal with historically constituted differences between citizens, or power differentials between majority and minority is, as we shall see, at odds with empirical evidence.

Adding to the challenge were emergent nationalisms that tended to be influenced or shaped by dominant majorities whose perception of smaller, "*different religious-ethnic minorities was as relatively closed and fixed 'different' Others.*"[13] Jewish experience in modern Europe is particularly instructive in this regard.

EUROPE: LEGAL EQUALITY, JEWISH DIFFERENCE

Historically, Jews were a transnational European people scattered across Europe "*with their own religion, their own communities, their own schools and*

[10] Dhirubhai L. Sheth, *The Nation-State and Minority Rights*, in D.L. SHETH AND GURPREET MAHAJAN (eds.) MINORITY RIGHTS AND THE NATION-STATE 23 (Oxford University Press, 1st ed., 2015).
[11] Gordon L. Anderson, *The idea of the Nation-state is an obstacle to Peace,* 33(1) INT. J. WORLD PEACE 75, (2006).
[12] *Id.* at 77.
[13] ANDERSON, *supra* note 11, at 24.

occupations, and they dressed, wrote and spoke differently from the Christian majority."[14] The establishment of modern nation-states across Europe reduced a transcontinental Jewish presence to a minority status within new national borders. With the emergence of nation-states and national constitutions, came the demand for Europe's Jews to relinquish group markers of religious and cultural distinctiveness and become individual (equal) citizens. Large numbers of Jews in Western Europe accepted and embraced the principle of equal citizenship.[15] Yet, even "*those who carved out successful careers in politics and government met with discriminatory treatment: the state considered them as members of a close-knit group, not full-fledged citizens*."[16] Legal equality, in other words, was not necessarily coterminous with social equality. As Jewish scholar Monika Richarz wrote, "*when analysing the situation of a minority, it is not enough to consider their legal status... Emancipation does not work if society does not accept a minority as equal.*"[17]

The relationship between the modern, *albeit* ahistorical, abstract concept of equal citizenship and historically crafted Jewish particularity in Europe was tense and paradoxical.[18] Jewish particularity unsettled European national culture narratives anchored in Christian majorities' self-identification and self-perception of continuity with an authentic national past free of

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[14] Monica Richarz, *The History of the Jews in Europe during the Nineteenth and Early Twentieth Century* in *The Holocaust and the United Nations Outreach Programme*, Discussion Papers Journ., 80 (2008).

[15] France was the first state to affirm citizenship rights for Jews. Acceptance of Jews varied across nation-states even as pogroms in Russia, Romania and Poland deepened anti-Jewish sentiment across the continent.

[16] JOAN SCOTT, THE POLITICS OF THE VEIL 76 (Princeton University Press, 1st ed., 2007). In her history of French Jews, Esther Benbassa notes that "*In 1791, all the Jews of France became citizens on the condition that they will renounce their communal status*"" ESTHER BENBASSA, THE JEWS OF FRANCE - A HISTORY FROM ANTIQUITY TO THE PRESENT 82 (Princeton University Press, 1st ed., 1999).

[17] RICHARZ, *supra* note 14 at 79.

[18] In their critique of the Enlightenment, Adorno and Horkheimer note: "*Liberal theory assumed that unity among men is already in principle established...adherence to their own order of life has brought the Jews into an uncertain relationship with the dominant order. They expected to be protected without themselves being in command.*" THEODOR ADORNO AND MAX HORKHEIMER, DIALECTIC OF ENLIGHTENMENT 169 (Verso, 1st ed., 1997). They further noted that "*Anti-Semitism as a national movement was always based on an urge which its instigators held against the Social Democrats: the urge for equality.*"

different (minority) Jewish presence/Judaism; it contradicted liberal nation-states' own claims to universality. Jewish historical presence in Europe also raised the question as to whether or not Jewish difference and distinctiveness were constitutive of the national (read majority's) self-image as a repository of (Christian) universality.[19]

Europe's unresolved tension between universality and particularity persisted. The idea of cultural nationalism anchored in the concept of homogeneity, with the Jew as an outsider and threat emerged as a response[20] to the dilemma. Its implications for Europe's Jewish citizens were grave. European cultural nationalism drew Jewish communities into a relationship of ambiguity and uncertainty within dominant Christian national orders fearful of particularist Jewish fusion with Christian universality. Jews were viewed as "*an opposing race, the embodiment of the negative principle.*"[21] Even for assimilated Jews, such as those in Germany, the rise of cultural nationalism meant that "*the harmony of society which the liberal Jews believed in turned against them in the form of the harmony of a national community*."[22] In practical terms, this meant that the Jew could no longer be "*a sign of himself in his difference*":[23]

> *"Signs of Jewishness in physical appearance, observance of the Sabbath, dress, cuisine, etc. became signifiers of Jewish cultural...insularity from 'enlightened' Christian culture, an impediment to modernity, and to the creation of modern, national community.*"[24]

Jews were equal citizens in law yet denied legal protection *as Jews* (emphasis added); their negation mirrored dominant/majority perceptions of the Jew

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[19] AAMIR MUFTI, ENLIGHTENMENT IN THE COLONY: THE JEWISH QUESTION AND THE CRISIS OF POSTCOLONIAL CULTURE 55 (Princeton University Press, 1st ed., 2007).

[20] In Berlin, in 1879, Heinrich von Treitschke, an eminent German liberal, set the cultural-intellectual tone for anti-Jewish narrative within the German nation-state: "*What we have to demand from our Jewish fellow-citizens is simple: that they become Germans, regardless of their faith and their old sacred memories....for we do not want thousands of years of Germanic civilisation to be followed by an era of German-Jewish mixed culture*," Marcel Stoetzler, in *The State, the Nation and the Jews: Liberalism and the Anti-semitism Dispute* in BISMARCK'S GERMANY (University of Nebraska Press, 1st ed., 2008).

[21] MUFTI, *supra* note 19 at 169.

[22] *Id.* at 169-170.

[23] STOETZLER, *supra* note 20 at 47.

[24] *Id.*

as 'Other,' undeserving of inclusion within the registers of nation and citizen. Aamir Mufti sums up the paradox of (in)equality undergirding the liberal nation-state:

> "*The 'political emancipation' of the Jews is...caught in a contradiction it cannot overcome. It can only conceive of granting rights to individuals as a solution to the corporate denial of rights to the Jews as Jews, and keeps reverting in its treatment of the Jews to precisely the methods and forms it seeks to eliminate*."[25]

Denied equality, residence or protection by nation-states, Europe's Jews transformed into stateless people, killed in camps. Out of Europe's 9.5 million Jews, only 3.8 million survived.[26] Europe's Jewish tragedy underscored the limits of legal/constitutional equality as a sufficient protection for Jewish difference within modern (liberal) nation-states. As Nathan Sznaider, a Jewish cultural studies scholar, observes: "*Europe is distinguished by its failure to come to terms with difference, which was facilitated by … eliminating the primary 'Other*'."[27]

Ahistorical concepts of the universal equal citizen were, as the above discussion demonstrates, in constant conflict with Jewish difference anchored in particularity, subjectivity and self-identification, shaped through history, religion and ethnicity. Liberal universality "*respects others as equals in principle yet for that very reason it neglects what makes others different*."[28] Europe's universal equality centred on sameness failed to acknowledge or accommodate ethnic-religious differences; hence also its insistence on the dissolution/assimilation of (minority) particularity within (majority) universality.

Can secular-liberal universality coexist with the particularity of difference? There is no easy answer to the dilemma. A possible alternative from a comparative constitutional perspective emerged in the post-revolution

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[25] *Id.* at 60.
[26] Michael Lipka, *The continuing decline of Europe's Jewish population*, PEW RESEARCH CENTRE, (Feb. 9, 2015), https://www.pewresearch.org/fact-tank/2015/02/09/europes-jewish-population/.
[27] Natan Sznaider, *Hannah Arendt: Jew and Cosmopolitan*, 4 SOCIO. 218 (2015).
[28] *Id.* at 203.

United States, whose Constitution blended the historical and empirical fact of ethnic plurality and difference among citizens with the universal value of equality and liberty. For Hannah Arendt, such a framing enabled "*Jews ...[to] be citizens without ceasing to be Jews. Universalism and particularism could exist side by side*"[29] thereby allowing minority 'Others' to survive universality's prescribed route for emancipation through assimilation/erasure of difference. The question of minority difference did not remain restricted to Europe. On the contrary, as Hannah Arendt predicted, the problem of 'Jewish difference' morphed into a modern problem with enormous political consequences in later centuries.[30] There are, as the following discussion demonstrates, disquieting parallels between the exclusion of Jewish difference in Europe, and the Othering of Muslim differences in modern, post-colonial India.

MUSLIM IN MODERN INDIA: HISTORY, DIFFERENCE, MINORITY

Three decades before India's independence in 1947, Rabindranath Tagore observed:

> "*Our real problem in India is not political, it is social…Diversity is a fact from the beginning of India's history. India is too diverse in its races. It is many countries packed into one geographic receptacle. It is just the opposite of what Europe is, namely, one country made into many.*"[31]

Much like the historically shaped presence of Jews across continental Europe, Muslims constituted a historically determined sub-continental presence across British India. There were approximately 95 million Muslims strewn across the Indian sub-continent.[32] Indian nationalists

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[29] *Id.* at 211.

[30] *Id.* at 207.

[31] ALAM, *supra* note 6 at 64, 76. *See also* AINSLEE T EMBREE, UTOPIAS IN CONFLICT RELIGION AND NATIONALISM IN MODERN INDIA 61 (University of California Press, 1st ed., 1990).

[32] In the provinces of Punjab and Bengal, Muslims constituted a majority; in Sindh, Baluchistan and the Northwest Frontier Province Muslims were a smaller majority, while in the United Provinces Muslims were a significant minority. AYESHA JALAL, JINNAH THE SOLE SPOKESMAN: JINNAH, THE MUSLIM LEAGUE AND THE DEMAND FOR PAKISTAN (Sange-e-Meel Publications, 1st ed., 1992).

chose to adopt a European nation-state template at odds with Tagore's empirically accurate characterisation of India as a mosaic of ethnic, religious and linguistic diversity and difference.[33] Thus, a singular, centralised template was ill-suited towards accommodation and representation of the interests of diverse and different social groups including those of the subcontinent's Muslims. Constructs of the postcolonial Indian nation were for this reason imbued with ambiguity.

The ambiguity was mirrored in elite anxiety regarding Muslim particularity perceived as 'external' and by extension insufficiently loyal to the yet-to-emerge independent Indian nation-state-in-the-making.[34] A perception of the Muslim as a negative 'Other' suffused elite imaginations. More particularly, the prospect of Muslim-led provinces in independent India where history had bequeathed a Muslim demographic majority was viewed with unease by anti-colonial elites, for whom "*powerful Muslim-dominated enclaves (where Muslims constituted a numerical majority) would threaten [majority] power at the centre.*"[35] Majority (read national-liberal) universality was disinclined at the prospect of political co-existence with Muslim difference and particularity.[36] As the possibility of a constitutional power-sharing

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[33] Concurring with Tagore, Ainslee Embree wrote: "*Clearly, India possessed none of the prerequisites of nationhood, if the standards were to come from the classic nineteenth-century models of Great Britain and France, for a common language, a proudly shared historical experience, a common religious tradition, and racial homogeneity are all conspicuously lacking in India.*" AINSLEE T. EMBREE, UTOPIAS IN CONFLICT RELIGION AND NATIONALISM IN MODERN INDIA 61 (University of California Press, 1st ed., 1990).

[34] STOETZLER, *supra* note 20 at 135-136.

[35] Victoria Schofield, *Wavell and the 'High Politics' of his Replacement as Viceroy in March 1947* in IAN TALBOT (ED.) THE INDEPENDENCE OF INDIA AND PAKISTAN: NEW APPROACHES AND REFLECTIONS 150 (Oxford University Press, 1st ed., 2013). Endorsing Schofield's observation, historian Joya Chatterji writes: "*There had been a time when the idea of tearing the seamless web of the Indian nation had been anathema to every Congressman. By 1947 however, the Congress was amenable to giving away those parts of the country that they could never hope to control and which in turn threatened their power at the centre...Bengal and Punjab inevitably would have to be partitioned.*" JOYA CHATTERJI, BENGAL DIVIDED: HINDU COMMUNALISM AND PARTITION 1932-1947 225 (Cambridge University Press, 1st ed., 1994).

[36] The British Cabinet Mission Plan proposed a united India with a central government responsible for defence, foreign affairs and communication, and power devolved to Hindu-majority and Muslim-majority groups of provinces.

agreement between the Indian National Congress and the Muslim League[37] receded, partition of the Indian subcontinent became inevitable.

MUSLIMS IN INDIA: CONSTITUTIONAL EQUALITY, MUSLIM INEQUALITY

In the wake of the 1947 partition,[38] out of the 95 million Indian Muslims some 60 million became Pakistani citizens; another 35 million remained in India.[39] Among the multiple challenges confronting Muslims in independent India, was the historical burden of a public perception equating Muslims with India's partition and as disloyal fifth columnists for Pakistan.[40] Sensing the divide, India's post-colonial leadership sought to amalgamate India's diversity and heterogeneity through the modern symbols of a nation-state, a national identity, and equal citizenship. None, however, including the constitutional clause of legal equality, could bridge, much less mend, the partition's Hindu-Muslim majority-minority binary. On the contrary, as Sinha-Kerkhoff notes in her ethnography of minorities in postcolonial India, the physical/territorial partition of India created non-physical "*new narrative regimes*" and symbolic "*mental borders*" anchored on ethnic-religious lines.[41] Such borders, Ranabir Samaddar further maintains, constitute a "*permanent division of the nation into majorities and minorities*."[42]

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[37] The Indian National Congress claimed to represent all Indians. The All-India Muslim League claimed to represent the interests of India's Muslims.

[38] Partition created 10 million refugees, over a million deaths and the rape and abduction of approximately 75,000 women. MUSHIRUL HASAN (ED.) INVENTING BOUNDARIES GENDER, POLITICS AND THE PARTITION OF INDIA 30 (Oxford University Press).

[39] SZNAIDER, *supra* note 27.

[40] Latent pre-partition anxiety at the prospect of a constitutional power-sharing arrangement between the Congress and Muslims morphed into post-partition hostility: soon after independence, powerful public figures in India called for the withdrawal of state protections to Muslim citizens. SUNIL KHILNANI, THE IDEA OF INDIA 31 (Hamish Hamilton, 1st ed., 1987); *See also* BALRAJ PURI, MUSLIMS OF INDIA SINCE PARTITION (Gyan Publishing House, 1st ed., 2009).

[41] KATHINKA SINHA-KERKHOFF, TYRANNY OF PARTITION: HINDUS IN BANGLADESH AND MUSLIMS IN INDIA 24, 31 (Gyan Publishing House, 1st ed., 2006).

[42] Ranabir Samaddar, *'The Last Hurrah that Continues,'* in GHISLAINE G DESCHAUMES AND RADA IVEKOVICH (eds.) DIVIDED COUNTRIES, SEPARATED CITIES: THE MODERN LEGACY OF PARTITION 22 (Oxford University Press, 1st ed., 2003).

The majority-minority divide deepened. So did an unresolved national (read majority) anxiety regarding Muslim minority differences in modern India. In a throwback to early 20th century European narratives of cultural nationalism, the construct of India as a quintessentially Hindu nation and civilisation whose decline coincided with a period of non-indigenous/foreign Muslim rule emerged as an influential strand within Indian nationalist historiography.[43] This particular narrative effaced diverse, overlapping histories; it reduced India's historical complexity and diversity to "*a single source of Indian tradition, viz. ancient Hindu civilisation*." By placing "*Islam...as the history of foreign conquest*" and equating India's Muslim past with "subjection"[44] and "trauma to the nation,"[45] India's Muslim history and identity was recast as disputed and illegitimate.[46]

In addition to history, the question of Muslim differences pervaded cultural and political domains. Tropes of Muslim otherness served to justify stereotypes of the culturally inferior, traditional/obscurantist Muslim.[47] The projection of negativity onto Muslim collectivity exiled the latter into a category and condition of permanent otherness within the nation. Markers of Muslim distinctiveness in food,[48] dress,[49] worship,[50] and

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[43] Two well-known works on this theme are by V.D. Savarkar, *We or Our Nationhood Defined* (1939) and M.S. Golwalker, *Bunch of Thoughts* (1966).

[44] Partha Chatterjee, *'History and the Nationalisation of Hinduism'* Occasional Paper, CENTRE FOR STUD. IN SOC. SCI. 200 (2014).

[45] Aamir Mufti, *Secularity and Minority: Elements of a Critique*, SOC. TEXT 88 (1995).

[46] CHATTERJEE, *supra* note 44, at 217.

[47] For a fuller discussion on the subject see RANA KABBANI, IMPERIAL FICTIONS EUROPE'S MYTHS OF ORIENT (Pandora, 1st ed., 1994).

[48] In July 2017, before being lynched by a mob in a train Mohammed Junaid was termed a 'beef-eater.' Anand Kochukudy, *Blood-stained tickets and bewilderment are what remain of a train ride aborted by hate*, THE WIRE (Jul. 1, 2017) https://thewire.in/communalism/as-fear-grips-junaids-village-family-recalls-horror-of-lynching.

[49] In 2015, the Supreme Court of India barred candidates wearing headscarves from appearing for a medical school examination. For a fuller discussion *see* Ratna Kapur, '*Unveiling the politics of the veil*,' THE WIRE (Jul. 25, 2015) https://thewire.in/education/un-veiling-the-politics-of-the-veil.

[50] According to the Delhi police eight Muslim mosques were damaged or burnt during riots in Delhi during January 2020. The Waqf Board quoted a figure of 19 damaged mosques. Aditya Menon and Shadab Moizee, *Delhi Riots, 11 Muslim, 2 Hindu places of worship damaged say cops,* THE QUINT (Jan. 29, 2020)

historical heritage[51] transformed into targets of violence and erasure mirroring Christian hostility *vis-a-vis* Jewish particularity during interwar Europe.

The logic of social exclusion also made subtle use of reason to serve its ends. Narratives of cultural inferiority merged with public perceptions of Muslim particularity as irretrievably incompatible with a universal, enlightened secular-liberal Indian polity.[52] Both worked to "*implicitly exclude certain categories of people from true citizenship, among them those relegated to the category of traditional or obscurantist*."[53] Indian Muslim citizens were equal in law yet, like Europe's Jewish citizens, legal equality would not erase social perceptions of Muslims as essentially *Muslim*, and therefore undeserving of equality.[54] In a disquieting parallel, historian Joan Scott notes that well after World War II, the French state perceived "*Jewishness as a… religious trait that disqualified [Jews] for the kind of equality espoused by Republicans*."[55]

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https://www.thequint.com/news/india/northeast-delhi-riots-mosques-temples-dargah-damaged-police-rti.

[51] In 2018, the historic Mughalsarai railway station was renamed after a Hindu right-wing ideologue. *See* Rizwan Ahmad, *Renaming India: Saffronisation of public spaces*, AL JAZEERA (Oct. 12, 2018) https://www.aljazeera.com/opinions/2018/10/12/renaming-india-saffronisation-of-public-spaces.

[52] In an article in the *Indian Express*, one of India's best known liberals asserted the *burqa* (veil) was a 'weapon.' He quoted a Dalit leader's advice to Muslims: "*By all means come in large numbers to our rallies. But don't come with your burqas and skull caps*." Ramchandra Guha, '*Liberals, Sadly,'* INDIAN EXPRESS (Mar. 24, 2018). Reminding Guha of the persistent marginalisation of Muslims in modern India and its disconnect with Muslim cultural markers, Shamsur Rahman Faruqi – among India's best known Urdu poets wrote: "*The marginalisation of Muslims began soon after partition and has since been institutionalised by political parties and governments. Doing away with the burqa and the skull-cap with not end it*." Shamsur Rahman Faruqi '*Agony of the Marginalised*,' INDIAN EXPRESS (Apr. 5, 2018) https://indianexpress.com/article/opinion/columns/muslim-personal-law-board-burka-hindu-agony-of-the-marginalised-5123615/.

[53] BARBARA METCALFE, ISLAMIC CONTESTATIONS: ESSAYS ON MUSLIMS IN INDIA AND PAKISTAN 174 (Oxford University Press, 1st ed., 2006).

[54] PURI*, supra* note 40 at 31.

[55] SCOTT, *supra* note 16 at 76.

A 2006 Government of India report[56] on Muslims in India captures the paradox between constitutional/legal equality and the subjective, lived experiences of inequality and social exclusion for India's Muslim citizens:

> *"One of the major issues around the question of identity for Indian Muslims is about being ...'Muslim' in public spaces… Markers of Muslim identity — the burqa [veil]...the beard, and the topi[Muslim skull cap]...have very often been a target for ridiculing the community as well as of looking upon them with suspicion. Muslim men donning a beard and a topi [skull cap] are often picked up for interrogation from public spaces like parks, railway stations and markets... Muslims fear for their safety and security... a feeling of vulnerability, and consequently a visible impact on mobility and education, especially of [Muslim] girls... Increasing ghettoisation...impacts Muslim women the most because they are reluctant to venture beyond the confines of 'safe' neighbourhoods to access these facilities from elsewhere…"*[57]

As demands for cultural homogenisation deepened so did the unresolved interface between national (universal) majority and Muslim (minority) particularity. Within this overarching context, the dilemma for Muslim women in modern India was particularly challenging.

MUSLIM WOMEN IN INDIA: GENDER, CULTURE, DIFFERENCE

Among the damaging outcomes of the singular national culture narratives was the reduction of India's Muslims into a reified, negative 'Other'. Within this frame, the figure of the veiled Muslim woman in particular symbolised multiple postcolonial anxieties: Muslim difference, Islamic misogyny, Muslim women's oppression, Muslim cultural inferiority, and in general, the hindrance posed by Islam and its followers to an emancipated national majority.[58]

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[56] MINISTRY OF MINORITY AFFAIRS, SOCIAL, ECONOMIC AND EDUCATIONAL STATUS OF MUSLIM COMMUNITY IN INDIA: A REPORT (2006) https://www.minorityaffairs.gov.in/WriteReadData/RTF1984/7830578798.pdf.
[57] *Id.* at 11–20.
[58] STOETZLER, *supra* note 20 at 182-187.

Critical gender scholarship however contests reductive representations of women in Muslim communities in India.[59] For instance, Barbara Metcalfe and Gail Minault's scholarship on Muslim women in India during the early 20th century notes that the concept of *adab* – a cultural code of conduct for women in Muslim communities – including the practice of veiling, derived from women's own subjective understanding of appropriate feminine moral and ethical conduct in public spaces; it was not evidence of enforced femininity or subordination.[60] On similar lines, Saba Mahmood's scholarship on Muslim women in Egypt's Islamist movement contests representations of Muslim women as subjects bound inextricably by religious and patriarchal oppression. Mahmood demonstrates that assertions of Muslim women's agency do not necessarily fit liberal/feminist registers of autonomy, self-expression and resistance; her research further demonstrates that women's agential consciousness for change in Muslim societies is context-specific and "*profoundly mediated by cultural and historical conditions*" by "*different bodies, knowledges and subjectivities"* whose trajectories do not necessarily map on to the liberal feminist binary of repression and resistance.[61]

Such scholarship opens up the wider question of women in Muslim cultures. Lila Abu-Lughod's suggestion foregrounding the salience of history and critical self-reflexivity as a method towards engaging with religious/ethnic difference is an important one:

> "*When I talk about accepting differences, I am not implying that we should resign ourselves to being cultural relativists who respect whatever goes on elsewhere as 'just their culture.' Rather, what I am advocating is the hard work involved in recognizing and respecting differences – precisely as products of different histories, as expressions of different circumstances, and as manifestations of differently structured desires*."[62]

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[59] SABA MAHMOOD, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND FEMINIST SUBJECT (Princeton: Princeton University Press, 1st ed., 2005).
[60] METCLAFE, s*upra* note 3. *See also* MINAULT, *supra* note 3, at 66.
[61] MAHMOOD, *supra* note 59, at 14.
[62] Lila Abu-Lughod, *Do Muslim Women Really Need Saving, Anthropological Reflections on Cultural Relativism and its Others,* 787 AMERICAN ANTHROPOLOGIST 104 (2002).

Muslim women's challenges in modern India have likewise been shaped by history and historical forces. India's partition disrupted in great measure a momentum of modest *albeit* significant progress in the emergence of Muslim women as civic, social and political subjects during the colonial period – an often neglected dimension in post-colonial literature. It is useful, therefore, to begin with a brief historical overview of the same.

MUSLIM WOMEN IN COLONIAL INDIA: A BRIEF HISTORY

A. EDUCATION

The subject of education for Muslim girls and women was first raised at the all-male All-India Muslim Educational Congress (MEC). Sayyid Karamat Husain,[63] from the United Provinces, British India, was among the early advocates of education for Muslim women and girls during the late 19th and early 20th centuries. He established[64] the *Zenana Madarsa* (a girls' school) at Aligarh in 1906. The school transformed into a girls boarding school in 1914; by 1925 Aligarh Girls School was known as Aligarh Women's College offering undergraduate and postgraduate degrees.[65] A parallel impetus for Muslim women's primary and secondary education in British India emerged from the *Anjumans* or voluntary Muslim associations for social and educational reform in India - during the late 19th century. For instance, in Punjab[66], *Anjumans*, the *Anjuman-i-Himayat-i-Islam* established several primary schools for girls in Lahore in 1885, followed by middle schools in 1925, and the establishment of Islamiya College for Women in

[63] Sayyid Karamat Husain (1854-1917) – an Islamic scholar, jurist and educationist was an early advocate of Muslim women's education.

[64] In contrast to the MEC annual meeting in Allahabad (1890) where Karamat Husain's proposal for a resolution in favour of women's education was rejected, the Lahore MEC 'agreed in principle that Muslims should open schools for Muslim girls.' In Aligarh, the MEC led by Syed Karamat Husain and concerned students (1891), passed a resolution to the effect that it 'is necessary to make efforts for the education of women as well as for men.' *Supra* note 4, at 191, 220.

[65] *Id.* at 241-248.

[66] Muslims constituted a slender majority in pre-partition Punjab and were part of the provincial landed and professional elite, many of whom initiated or supported Muslim girls and women's education. For this reason, Muslim primary girls' education in Punjab during the 1880s and 1890s was more advanced than in Delhi or Aligarh. MINAULT, *supra* note 4.

Lahore in 1939. In Bombay, civic efforts at the representation of Muslim women's common interests, most notably by the Tyabji[67] family, contributed to the establishment of *Anjuman-e-Islam* (1876) that, in turn, established primary and secondary schools for Muslim girls in the city during the 1920s and 1930s.[68] Similar developments emerged in southern India. In Hyderabad for example, where secular education for Muslim girls was almost non-existent, efforts by Muslim upper-class elites such as Salar Jung,[69] his daughter Nurunissa Begum Syeda and Begum Shujaat Ali facilitated the establishment of the Nampalli Girls School (1890) subsequently known as the Women's College, Osmania University.[70]

Although female education in Hyderabad during the early decades of the 20th century was largely urban and restricted to elite Muslim women, Muslim female students were twice as numerous as their non-Muslim counterparts.[71]

Likewise, in Bengal, efforts by the *Anjuman-e-Khavatin-i-Islam* to promote literacy and education for underprivileged Muslim women were supported by Rokeya Sakhavat Husain[72] – an advocate of women's education and founder of the Sakhavat Memorial Girls School in the Calcutta; Khujista Akhtar Banu Suhrawardy from the Suhrawardy family of Calcutta and Midnapore[73] established primary schools for girls in Bengal.

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[67] Badruddin Tyabji was an eminent Muslim of the Bohra clan. He was the first Indian Muslim barrister in India, a champion of Muslim women's education and a member of the Indian National Congress.

[68] *Supra* note 4, at 176-183.

[69] Salar Jung was the Nizam of Hyderabad's Prime Minister.

[70] Both women were upper-class elites who wanted Muslim women sharing their class to be educated in *purdah* (veil). *See supra* note 4, at 205.

[71] This was because Muslim female students belonged to Hyderabad's administrative and professional elite and therefore more inclined to educate their daughters. *"Muslim backwardness' was a concept that did not apply in their particular milieu." Supra* note 4, at 207-208. In 1932, out of a total of 45,300 girl students across 696 schools in Hyderabad, there were 26,847 Muslim girls and 15,507 Hindu girls. *Id.* at 207.

[72] Rokeya was author of *Sultana's Dream* – a well-known feminist utopian classic.

[73] Khujista Banu Suhrawardy belonged to the politically and culturally eminent Suhrawardy family of Calcutta and Midnapore. Her father Maulana Ubaidullah Suhrawardy was a principal of Dhaka Madarsa.

While the impetus and resources for Muslim women's and girls' education in colonial India emerged primarily from Muslim professional and landed elites, its beneficiaries, as the above discussion indicates, were Muslim women and girls across classes. Despite regional disparities in levels of Muslim female education across the subcontinent, the level of school education for Muslim girls in British India was not conspicuously lower relative to non-Muslim girls.[74] During the 1916-26 decade, the percentage of Muslim male and female pupils registered a rise in all regions.[75]

By 1937, "*the all-India average for Muslim girls had surpassed the national average* (emphasis added) *and Muslim women could be considered within the mainstream of women's education of the time...on an all-India basis.*"[76]

This gradual *albeit* notable trajectory of progress in Muslim women's education in British India was arrested in the wake of the partition's upheaval.[77] The exodus of Muslim urban professionals, leading industrial and trading groups, political personalities, administrators, public figures and intelligentsia, especially members of the community-based *Anjumans,* whose contribution to Muslim women's education in British India was

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[74] In 1902, in the United Provinces for instance, there were 28 Muslim girls attending secondary schools compared to four Hindu girls – a trend attributable to Muslims being part of the landed professional elite. In Bengal and Punjab, where Muslims were largely peasants or cultivators, Muslim girls lagged behind their Hindu counterparts. *Fourth Quinquennial Review of Education*, *India 1897-1902* in SHAHIDA LATEEF, MUSLIM WOMEN IN INDIA: POLITICAL AND PRIVATE REALITIES 1890S – 1980S, 49 & 76 (Kali for Women, 1st ed., 1998). This pattern was confirmed by the Hartog Committee study on Education in British India, 1929 which noted that "*in provinces where Muslims were a minority, they consistently had a higher percentage of in school than their percentage in the population, whereas in Punjab and Bengal, where they were in a slight majority, their percentage in school was proportionately less. This is consistent with an urban, administrative minority (as in Hyderabad) vs. a rural, peasant majority*." HARTOG COMMITTEE REPORT, BRITISH COLONIAL GOVERNMENT, 1929.

[75] GEORGE ANDERSON, PROGRESS OF EDUCATION IN INDIA, 1937-32, Tenth Quinquennial Review 76 (The Government Central Press, 1st ed., 1932).

[76] *Id.* "*The prejudice which has hindered its [Muslim women's] educational progress in the past appears to be dying away*".

[77] The bulk of Muslim migrants from India to Pakistan were urban, young and educated intelligentsia. Their departure stripped the traditional Muslim urban centres. In Delhi for instance, by 1951, 329,000 Muslims left for Pakistan, reducing the Muslim population of the metropolis from 33.22 percent to 5.71 percent in 1961. MUSHIRUL HASAN, LEGACY OF A DIVIDED NATION 173-175 (Oxford University Press, 1st ed., 1997).

considerable - left behind a socially fragmented, economically depressed, and politically marginalised community lacking the resources, social capital or intellectual momentum to advance women's education as was the case prior to partition.[78]

Eliding Muslim women's pre-partition history of progress and achievement in the field of education in post-colonial narrative frames strengthened statist, post-colonial public perceptions regarding Muslim women's educational backwardness. A somewhat similar elision shaped post-colonial public perceptions regarding the question of women's rights in Muslim communities. It is useful therefore to briefly consider histories of social change and reform among Muslims in British India, especially those relating to women's rights.

B. MUSLIM WOMEN AND SOCIAL REFORM

Early 20th century modernist impulses influenced the emergence of a nascent Muslim women's movement towards social change. Progress in Muslim women's education in late colonial India – in which Aligarh Women's College played a stellar role – led to a growth in the number of educated women even as gender segregation was still observed. Education facilitated women's entry towards publication of women's journals in English and the vernacular that addressed, among others, social issues as well as literary production.[79] Among others, Rokeya Sakhawat Hossain from Bengal wrote against female seclusion. Rashid Jahan Begum became part of the Urdu Progressive Writers Movement; she was an advocate of women's rights. So was Ismat Chughtai, educated at Karamat Husain's school in Lucknow and subsequently at Aligarh Women's College;

[78] A Muslim survivor in Delhi observed: "*Partition was a total catastrophe. Those who are left behind are in misery. Those who are uprooted are in misery*." Muslim urban centres such as Delhi, United Provinces, Bihar and Hyderabad were racked by riots and witnessed large-scale exodus of Muslim members from professional classes, defence services, the police, universities, the law courts, and the central secretariat. Muslim presence and influence in government, business, trade and professions declined. Less than five Muslim Indian Civil Services officers remained in India; less than 300 Muslim army officers opted to stay in India. OMAR KHALIDI, INDIAN MUSLIMS SINCE INDEPENDENCE 341 (Vikas Publishing House, 1st ed., 1995).

[79] *Supra* note 4, at 248-249.

Chughtai's short stories centred on women's oppression and female sexuality established her as a literary icon in her own right.[80]

Using the newly available print medium, Muslim men like Khwaja Altaf Husain Hali (Chup ki Dad) and Maulana Ashraf Thanavi (Beheshti Zevar) blended a modernist spirit of gender equality with conventional gender mores; both affirmed female education *albeit* within domestic confines and within an Islamic religious reformist perspective. Historian Barbara Metcalfe notes that both texts *"implicitly posit a single notion of the person and of personal capacity for both women and men with no separate standard for women, but rather a common model of humanity for both."*[81]..."*In terms of essential nature and potential, women and men were regarded as one...Girls, like boys, had to study...Girls should ...read the same texts as boys."*[82]

In addition to education, writing, publication and literary production, there was an increased awareness regarding gender issues and women's rights, best symbolised by Attiya Begum – a participant at the Muhammedan Educational Conference (MEC) held at Aligarh in 1926 where she "*came up openly and got up on the dais unveiled and delivered a strong speech demanding equal rights with men to go about God's earth freely and openly. Another lady also delivered a strong speech and the poor ....Secretary of the Conference did his best to send those suffragettes back into their place screened up for them. Failing in his efforts he left the hall himself.*"[83] Muslim women's writing and civic activism, paralleled discussion regarding reform in Muslim law.

C. LEGAL REFORM

Historically, Muslim family law has been a contested marker of Muslim identity and Muslim difference; it is widely regarded as incompatible with women's rights. Conventional understanding of an immutably misogynist Muslim law however overlooks the diversity and complexity within the Islamic legal canon characterised by the existence of four major schools of

[80] *Id.* at 274–279.
[81] METCALFE, *supra* note 4, at 106.
[82] *Id.* at 105, 107.
[83] Gail Minault, *Coming Out: Decisions to Leave Purdah*, 23(3) IND. INT. CENT. QUART. 93 (1996).

jurisprudence.[84] As we shall see, this point bears great significance with regard to the provisions of the Dissolution of Muslim Marriages Act, (1939).

In 1937, the Shariat Act legislation overrode customary practice and sought uniform application of Muslim *Hanafi*[85] law to Muslim women in British India[86] including the Islamic rights to inheritance, divorce and property.

> "*The legislation evoked considerable public interest and the Muslim community by urging support of the bill was perceived to have furthered the interests of women.*"[87]

A subsequent legislation, the Dissolution of Muslim Marriages Act, 1939 ("**DMMA**") utilised Islamic jurisprudential diversity to advance Muslim women's divorce rights. Acknowledging the restricted grounds for divorce available to Muslim women in colonial India under *Hanafi* law,[88] the DMMA[89] extended the grounds for divorce available to Muslim women in

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[84] The four *Sunni* schools of law are viz., *Hanafi*, *Shafi*, *Maliki* and *Hanbali.* While all schools agree on core religious doctrine, there is jurisprudential divergence in legal interpretations and positions including matters related to women and gender relation).

[85] A majority of Muslims in India follow the *Hanafi* school of Islamic jurisprudence.

[86] The 1937 Shariat Act aimed at uniformity of law among Muslims throughout British India in all their social and personal relations. Among others, it clarified questions regarding marriage, divorce, maintenance, succession and guardianship. METCALFE, *supra* note 4 at 68.

[87] The passage of the Bill prompted Dr. G.V. Deshmukh, a member of the Central Legislative Assembly from Bombay to opine that the provisions of the Shariat Act set a positive precedent for Hindu women. Hindu members who met with little success while proposing Hindu women's right to property felt that the Shariat Act could facilitate similar measures within their own community (Legislative Assembly Debates 1939, *Id.* at 68–69, 45–46 and 73.

[88] *Hanafi* law offered limited grounds for divorce to Muslim women. Minault notes that "*the Hanafi school of jurisprudence, followed by a majority of Muslims in the subcontinent, is the strictest in matters of divorce and gives a wife almost no grounds for initiating the dissolution of her marriage. In the early twentieth century, the number of Muslim women who resorted to the device of renouncing Islam in order to secure judicial divorces increased alarmingly.*" MINAULT, *supra* note 4, at 303.

[89] "*The Statement of Objects of the Bill justified the application of Maliki law by noting that 'Hanafi jurists have laid down that in cases in which the application of Hanafi law causes hardship it is permissible to apply the provisions of Maliki, Shafi or Hanbali law.*" Rohit De, *Mumtaz Bibi's Broken Heart: Personal Law, Identity Politics and Civil Society in Colonial South Asia*, 46(1) IND. ECON. & SOC. HIST. REV. 117 (2009).

British India under *Hanafi* law, by incorporating and extending the provisions of the more liberal *Maliki*[90] school of jurisprudence into *Hanafi* law.[91] The outcome of this legislation for Muslim women's divorce rights was noteworthy. As Rohit De observes:

> "*The Act was a radical piece of social legislation that gave South Asian Muslim women greater rights for divorce than those enjoyed by other women in India and Britain. Instead of placing women's rights and Islamic law as opposed to each other, the legislation …guaranteed women's rights by applying Islamic law.*"[92]

The DMMA challenged stereotypes of an immutably, misogynist Muslim law beyond human agency or intervention; it mirrored Muslim modernity wherein Muslim identity is in consonance with gender equality.[93] Postcolonial elision of histories of difference and contestation around Muslim law or the fact of Muslim consent for legislation affirming women's rights in Muslim law bolstered post-colonial assumptions of a static, misogynist Muslim law beyond history or human agency.

Adding to the historical burden, was the partition's continuing majority-minority legacy that had the effect of politicising Muslim difference and identity in modern India. The Muslim came to symbolise a negative distinction defined by Islam[94]– a difference undergirding national borders, territory, politics and culture.[95] The pre-partition Muslim question acquired

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[90] The Maliki school of Islamic jurisprudence is widely followed in North Africa.

[91] A Muslim woman could ask her marriage to be dissolved on grounds of cruelty, including mental and physical cruelty, denial of property or prevention of the wife's legal rights, immorality, obstruction of religious practices and failure on the part of the husband to treat all his wives equally. *Id.* at 115.

[92] *Id.*

[93] *Id.* at 105.

[94] The Muslim as outsider/foreigner construct is epitomised by 'Babar, a foreigner and invader, and with him all Indian Muslims as progeny of that invader (*Babar ki aulad*)' was further buttressed further by a narrative of 1200 years of slavery of India encompassing the Mughal and British colonial period, and postcolonial rule by India's westernised elites. *See* Gyanendra Pandey, *Modes of History Writing: New Hindu History of Ayodhya* 29 (25) EPW (Jun. 18, 1995).

[95] Markha Valenta, *'The Muslim as Victim, the Muslim as Agent: On Islam as a Category of Analysis'* in ABDUL SHABAN (ED.) LIVES OF MUSLIMS IN INDIA: POLITICS, EXCLUSION AND VIOLENCE 36-42 (Routledge, 1st ed., 2018).

a newer insistence in postcolonial India where, as Abdul Shaban writes: "*the Muslim question still remains as alive as it was during the partition of the country in 1947 and there are those who still ask 'Can a Muslim be an Indian*?""[96] *'It is, as Barbara Metcalfe wrote, as if 'Islam' puts [Muslim women] not only outside the national community but also outside intelligible human behaviour, choices, responses, and life experiences.'*"[97] Critical gender perspectives in modern India were not always an exception to this trend.

D. (POST)COLONIAL CONTINUITY

Among the first comprehensive reports on women in modern India to emerge in the public domain was the landmark Government of India '*Towards Equality'* Report authored by the Committee on the Status of Women in India (1974). The findings of the Report laid the basis for gender-inclusive development and policymaking, academic scholarship, and women's activism. The Report replicates partition's (post)colonial binary to characterise Muslim women in modern India as a homogenous, undifferentiated constituency with lives and choices shaped primarily by Islam.[98] There is little acknowledgement of Muslim women's socio-economic complexity across class, sect or region; or of the differential influence of social, economic and political conditions on Muslim women across these rubrics. In her book on Muslim women in India, Shahida Lateef notes that the Report's *"analytic separation between the status of Muslim women and other women is a continuation of the distinction made between the rise of ethnic politicization between the Muslim and other communities. By this separation, it has been possible to attribute the blame for the social, political and economic problems of Muslim women on Islam."*[99]

[96] *Id.* at xxvii.

[97] METCALFE, *supra* note 4, at 20.

[98] According to the Report on the Survey of the Status of Women in India: '81.11% of the respondents belonged to the Hindu religion followed by the Muslims' (sic) 393-394. *Towards Equality: Report of the Committee on the Status of Women in India*, Government of India, Ministry of Education and Social Welfare, Department of Social Welfare, (New Delhi, December 1974).

[99] LATEEF, *supra* note 4, at 104–105.

A more contemporary variation of the same is reflected in a chapter titled 'Muslim Women Organise' by scholar-activist Sadhna Arya in her book[100] on the post-1990s women's movements in India. Without an introduction to the historically constituted challenges confronting Muslim women in contemporary India, or Muslim women's differentiation across region, class, ethnicity etc. The chapter focuses on Muslim women's mobilisations around Muslim law – a contested domain and as we have seen, a source of Muslim exclusion and Othering in modern India. Arya's chapter opens with a discussion on the Uniform Civil Code (UCC), moves on to Muslim women's mobilisation around Muslim Personal Law and the UCC, followed by a discussion on triple *talaq* (verbal divorce, each of which reinforces the trope of Muslimness (read 'Muslim law') as an impediment to Muslim women's emancipation. Muslim men's recourse to unilateral verbal divorce (triple *talaq*)[101] in modern India has been inferred as irrefutable evidence of Muslim legal and, by extension, cultural incompatibility with secular modernity. The practice of triple *talaq* dovetails into a wider perception, which as Saba Mahmood writes, is widely "*regarded as indexical of …a lesser unenlightened form of religiosity [and] also of social and political backwardness of the community, rendering it incapable of inhabiting the norms of a modern polity*."[102] The practice of triple *talaq* does indeed exist to the great detriment of Muslim women's rights and welfare. However, court judgements by Indian jurists affirm that triple *talaq* is a practice, not constitutive of Islamic legal canon.[103] In a case judgement on divorce in Muslim law, Justice V.R. Krishna Iyer noted that:

> *"The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions...Indeed a deeper*

[100] SADHNA ARYA, GAINING GROUND: THE CHANGING CONTOURS OF FEMINIST ORGANISING IN POST-1990S INDIA (Women Unlimited, 1st ed., 2020).

[101] Presently, triple *talaq* is a criminal offence. Muslim men convicted for the same are subject to a jail term. 'It is a popular fallacy that the Muslim male enjoys, under the Quranic Law, unbridled authority to liquidate the marriage.' Judgement by Justice Baharul Islam Rukia Khatun v. Abdul Khalique Laskar, 1979 SCC OnLineGau 41.

[102] DE, s*upra* note 60.

[103] A.G. Noorani, *'A Monstrous Wrong,'* FRONTLINE, (Dec. 21, 2016).

> *study of the subject discloses a surprisingly rational, realistic and modern law of divorce."*[104]

Also overlooked by Arya in her discussion on Muslim law is the colonial-era 1939 DMMA legislation, that as Rohit De notes, was used as a foil by post-colonial elites to thwart changes in the Hindu Code Bill:

> "*the construction of Muslim Personal Law as backward is ironic, given that Hindu conservatives in the 1950s had attacked the 'progressive' Hindu Code Bill on the grounds that the draft code was '90 per cent Muhammedan law.*"'[105]

Whether intended or not, Arya's framing of Muslim law as a major, if not principal challenge confronting Muslim women serves to resurrect old colonial tropes of unmodern, inferior Islamic law and culture – a difference that renders Muslim inclusion in modern India impossible. Arya's prescribed remedy for Muslim women's legal emancipation by way of a UCC mirrors national (read majority) anxiety *vis-a-vis* a 'different' Muslim law undergirded by an implicit message of assimilation within a project of national emancipation, defined and determined by an 'enlightened' majority.[106] Viewed this way, the UCC is not as much about legal justice for Muslim women as it is about crafting a universal Indian identity opposed to, and assimilative of Muslim particularity defined by "*the culture and subject position of the majority coded as the standpoint of [secular modernity].*"[107]

This is not to deny the fact of gender discrimination in Muslim law but rather, to foreground how triple *talaq* becomes an inflection point that works to accentuate Muslim difference, resurrect the majority-minority divide, and reinforce Muslim exclusion. Such a frame reflects what gender

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[104] Justice V.R. Krishna Iyer, A. Yousuf Rather vs Sowramma, AIR 1971 ker 261. In their judgement Must. Rukia Khatun vs Abdul Khalique Laskar, Justice Baharul Islam and Justice D. Pathak held that "*In our opinion the correct law of 'talaq' as ordained by the Quran is: (i) talaq must be for a reasonable cause and (ii) that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be affected. It is a popular fallacy that the Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage*." Judgement by Justice Baharul Islam Rukia Khatun v. Abdul Khalique Laskar, 1979 SCC OnLineGau 41.
[105] DE, *supra* note 60, at 127.
[106] MUFTI, *supra* note 19, at 55.
[107] *Id.*

historian Joan Scott terms as "*the mutually constitutive nature of gender and politics*,"[108] that in this case, forecloses the possibility of historically-grounded, empirically anchored, nuanced understandings of Muslim women's multiple including legal challenges in modern India.

While the UCC centres on Muslim legal differences, there emerged another inflection point positioning Muslim differences as a basis for legislatively-sanctioned exclusion of Muslims from the registers of Indian citizenship. An extraordinary public mobilisation by Muslim women at Shaheen Bagh against the legislation illuminated the hitherto unacknowledged, unexamined and unaddressed dilemma between ahistorical constitutional-secular equality, and historically determined Muslim social inequality in modern India.

SHAHEEN BAGH: A STRUGGLE FOR EQUALITY OF DIFFERENCE

In December 2019, women from Shaheen Bagh, an underprivileged, working-class largely Muslim suburb in New Delhi embarked on a sit-in against two government bills using religion as a benchmark to deny citizenship to Muslims.[109] Large numbers of underprivileged Muslim

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[108] *"To put it another way,"* Scott maintains, *"gender and politics were co-constitutive, the one establishing the meaning of the other."* JOAN SCOTT, SEX AND SECULARISM 22-25 (Princeton University Press, 2018).

[109] The 2019 National Register for Citizens (NRC) declares a passport or voter identity insufficient proof of nationality. Instead, NRC mandates the possession of unavailable or hard to access legal documents in order to claim Indian citizenship. Those unable to furnish the same may be stripped of citizenship and/or deported. In the state of Assam, the only state so far where NRC was implemented over two million people were denied citizenship. Anna Payton, *Legalised Discrimination: India's NRC and CAA*, BERKELEY POLITICAL REVIEW, (Feb. 6, 2020) https://bpr.studentorg.berkeley.edu/2020/02/06/legalized-discrimination-indias-nrc-and-caa/. The Citizenship Amendment Act (CAA) allows non-Muslim refugees from Pakistan, Bangladesh and Afghanistan to claim Indian citizenship. The key provision excluding Muslims violates the Constitutional principle of religious equity, in particular Articles 14 and 15. *See* '*CAA, NRC may affect status of India's Muslim minority: Congressional Research Service'* The Hindu (Dec. 27, 2019), https://www.thehindu.com/news/international/caa-nrc-may-affect-status-of-indias-muslim-minority-congressional-research-service/article30409109.ece.

women, many wearing the *burqa*[110](veil) and *hijab* (headscarf) held peaceful protests at Shaheen Bagh from December 2019 – March 2020. The protests transformed into a civic resistance movement led by subaltern Muslim women – one of India's most disenfranchised groups.[111] In their book on Muslim women in the Shaheen Bagh movement, Salam and Ausaf write:

> "*The protests in the capital's Shaheen Bagh neighbourhood became an enduring symbol of the demonstrations that have swept India over the new law...Most of the women are homemakers, many in hijabs...the Shaheen Bagh women came out; first only a handful, then hundreds, at times even thousands.*"

Shaheen Bagh received much support from civil society whose members emphasised the constitutional value of equality. For several writers, Shaheen Bagh's protesting Muslim women symbolised a reclaim of threatened constitutional rights embodied in the right to equal citizenship.[112] For instance, for an academic, the protests were "*affirmation of Indian secularism, constitutionalism and democracy*."[113] Likewise, for a journalist, Shaheen Bagh symbolised the return of "a targeted and pilloried community" back into "India's secular and democratic mainstream."[114] In a somewhat similar *albeit* more laudatory vein, liberal social media applauded a hitherto much-stereotyped and relatively invisible constituency for its spirited, feisty protest. The social media news outlet, The Wire, exulted: "*Shaheen Bagh's women are now seen as the torchbearers of the protest to save the Indian constitution from neo-fascist forces.*"[115]

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[110] A *burqa* is an outer garment covering the body and at times, the face.

[111] Gem Fletcher, *A Multilayered Document of the Shaheen Bagh Protest Site,* BRIT. J. PHOTOGRAPHY (2022).

[112] Nayantara Sahgal, *The Message*, in SEEMA MUSTAFA (ED.), SHAHEEN BAGH AND THE IDEA OF INDIA: WRITINGS ON A MOVEMENT FOR JUSTICE, LIBERTY AND EQUALITY (Speaking Tiger, 1st ed., 2020); Nandita Haksar, *Who is Afraid of the Indian Citizen* in SEEMA MUSTAFA (ED.), SHAHEEN BAGH AND THE IDEA OF INDIA: WRITINGS ON A MOVEMENT FOR JUSTICE, LIBERTY AND EQUALITY (Speaking Tiger, 1st ed., 2020).

[113] *Id.* at 171–172.

[114] *Id.* at 19–20.

[115] Rafia Kazim, *At Shaheen Bagh Muslim women take their place as heroes of the movement*, THE WIRE (Jan. 30, 2020), https://thewire.in/women/shaheen-bagh-muslim-women.

The seamless transformation of Shaheen Bagh's *burqa* and headscarf-wearing Muslim women – signs of inherently misogynistic, unmodern Islam and symbol[s] of a difference that could never be integrated – into doughty defenders of modern constitutional values was not without paradox. Uniting diverse civic constituencies in solidarity with Shaheen Bagh's Muslim women was the government's violation of the constitutional principle of legal equality. Yet, civil society's valorisation of Shaheen Bagh's Muslim women as "*icons of secular resistance against the violation of the constitutional value of legal equality*" deflected attention away from the constitutive contradiction undergirding an equal rights constitutionalism whose persistent elision of the religion-based power imbalance between Muslims and the Indian state has served to mask the real basis of Muslim minority exclusion in post-colonial India.[116] This relationship of power and dominance - exemplified in this instance by the CAA and NRC - placed Muslim minority particularity beyond the life of the state and postcolonial nation.[117]

Precisely this equation of power, dominance and inequality was the subject of ninety-year-old *dadi* (grandmother) Asma Khatoon's – an underprivileged Shaheen Bagh protestor – anguish. Asma Khatoon was not knowledgeable about the Indian Constitution. She was however keenly aware of the *historical* register of inequality, discrimination and exclusion of Muslim citizens *as Muslims* in modern India that she accurately pinpointed as the basis for collective Muslim exclusion from the CAA and NRC

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[116] Albert Memmi, a Tunisian Jew, writes of the excessive loyalty and fealty of French intellectuals to the ideals of republicanism, secularism, political and civic freedom blinding liberals to the nationalist and culturally exclusivist character of the Tunisian nationalism. *See* SUSIE LINFIELD, THE LION'S DEN: ZIONISM AND THE LEFT FROM HANNAH ARENDT TO NOAM CHOMSKY 170 (Yale University Press, 2019). Memmi's critique may apply into India where secular celebration of Asma Khatoon as a civic icon is rooted in secular blindness to the majoritarian, culturally exclusive dimensions of Indian nationalism. In her analysis on Muslims in India, Markha Valenta suggests an alternative approach that would *"read ...the majority as 'deficient' and 'backward,' lacking in this case a democratic commitment to equality and confidence in its own security...In approaching the Muslim (minority) through the lens of deficiency without addressing the deficiency of majority... the dynamic persistence of Muslims – as Muslims [emphasis added] in post-colonial India after ...years of public discrimination, caricature and erasure, constitutes not a sign of backwardness but of resourceful social, cultural and religious 'development' under...the twin pressures of religious nationalism and global fast-capitalism"* Valenta, *supra* note 109, at 55.

[117] MUFTI, *supra* note 19, at 68.

legislation. Asma Khatoon said, *"the Act was to deny citizenship only [emphasis added] to the Muslim [emphasis added] community in the country*."[118] Her words encapsulate Muslim women's (and men's) struggle for equality in their ethnic difference as *Muslims* – a struggle shaped by history, memory and collective subjective awareness of a historically-determined context of domination that as Saba Mahmood insightfully notes, can "*be understood only from within the discourses and structures of subordination that create the condition of [their] enactment*."[119]

The persistent shadow of partition, the 'Pakistanisation of Indian Muslim identity, religiosity, institutions and neighbourhoods,'[120] the perception of the Muslim as a disloyal citizen, and the norms of India's post-colonial secular, democratic politics are among the structures of subordination that make it difficult for Muslims to legitimately organise *as Muslims* to counter discrimination.[121] The Muslim women of Shaheen Bagh however did precisely this. In so doing, they drew attention to how the axis of Muslim difference mediates rights and claims to (equal) citizenship. In effect, Asma Khatoon's words at Shaheen Bagh epitomise what cultural studies scholar Aamir Mufti aptly sums up as "*the real classic dilemma of [Muslim] minority existence in India: how to remain distinct and at the same time enter into the fullness of political experience as citizens.*"[122]

CONCLUSION

A comparative historical frame illuminates the troubled interface between minority differences and universal/majoritarian constructs of nation and national modernity in the contemporary world. The social experience of religious/ethnic difference with regard to Europe's Jews, and Muslims in post-colonial India is historically conditioned and divided across time and space. Yet, as we have seen, both are not entirely dissimilar. Through war, genocide, expulsion and partition, modern (liberal) nation-states reduced

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[118] *Dadi of Shaheen Bagh in Kerala says CAA singles out Muslim community*, NEW INDIAN EXPRESS (Feb. 25, 2020).
[119] MAHMOOD, *supra* note 59, at 15.
[120] For a greater explication of this point *see* VALENTA, *supra* note 95, at 38-39.
[121] TAYLOR SHERMAN, MUSLIM BELONGING IN SECULAR INDIA: NEGOTIATING CITIZENSHIP IN POSTCOLONIAL HYDERABAD 17 (Cambridge University Press, 1st ed., 2015).
[122] MUFTI, *supra* note 19, at 68.

the Jews of Europe and the Muslims of India into minorities. Both groups were subsequently subject to social exclusion, discrimination and the targeting of markers of religious/cultural difference and distinctiveness.

Further, the experiences of both groups foreground the limits of legal/constitutional equality wherein the putative distinction between the universal rights-bearing citizen and his/her (private, historically determined) ethnic/religious particularity lies perennially blurred, if not entirely non-existent.[123] In the case of India, the principle of constitutional equality – an abiding marker of modern Indian nationhood – could neither bridge the majority-minority divide nor preempt Muslim minority exclusion and discrimination in postcolonial India.[124] Shaheen Bagh underscored this limitation; the protest also foregrounded the unstable, unsettled and contingent character of postcolonial constructs of nation and citizen – among the core markers of Indian modernity – and the struggle of Muslim women (and men) for inclusion and belonging within both.

Furthermore, the above discussion draws attention to the importance of history, in particular the histories of Indian Muslims contesting their post-colonial characterisation as subjects with lives and choices circumscribed by religion. Shaheen Bagh reaffirmed *burqa* and *hijab*-clad Muslim women

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[123] Marcel Stoetzler captured liberalism's perennial contradiction: "*if you declare you are not different from your fellow citizens, someone will show you are different… if you declare yourself different, someone will tell you that you ought to grow up and become an equal member of society*." Marcel Stoetzler, *The State, the Nation and the Jews: Liberalism and the Antisemitism Dispute in* BISMARCK'S GERMANY307 (University of Nebraska Press, 1st ed., 2008).

[124] Recent scholarship foregrounds parallels between the 1938 Kristallnacht anti-Jewish pogrom in Nazi Germany and the 2002 anti-Muslim pogrom in the state of Gujarat. *See* Baijayanti Roy, *The Long Shadow of Kristallnacht on the 'Gujarat Pogrom' in India? A Comparative Analysis* in WOLF GRUNER, STEVEN J. ROSS (EDS.), NEW PERSPECTIVES ON KRISTALLNACHT: AFTER 80 YEARS THE NAZI POGROM IN GLOBAL COMPARISON (Purdue University Press, 1st ed., 2019). *See also* PARVIS GHASSEM-FACHANDI, 2012, PROGROM IN GUJARAT: HINDU NATIONALISM AND ANTI-MUSLIM VIOLENCE IN INDIA, (Princeton University Press, 1st ed., 2019); In 2022, Gregory Stanton, President, Genocide Watch warned that genocide against Muslims in India could occur. India Genocide Warning, GENOCIDE WATCH (Mar. 1, 2022), https://www.genocidewatch.com/single-post/india-genocide-emergency; *See also* Debashish Roy Chowdhury, *Is India Headed for an Anti-Muslim Genocide*? TIME (Oct. 4, 2021), https://time.com/6103284/india-hindu-supremacy-extremism-genocide-bjp-modi.

and indeed all Muslim women as self-aware moral and political subjects possessing voice, agency and critical political understanding. In effect, Shaheen Bagh was an emphatic riposte to what Aamir Mufti appropriately terms as "*the 'torments'*[125] *of a postcolonial Indian modernity with the Muslim as the default negative Other*."

Finally, Shaheen Bagh's Muslim women demonstrated the limits of a reified secular imagination anchored in homogeneity (sameness, abstract equality) and a refusal to engage with, much less accept (Muslim) difference. It suggests a need for re-imagining national, civic and constitutional imaginaries in ways where (minority) difference is *not* synonymous with exclusion, discrimination or domination; where, as Marcel Stoetzler, a Jewish scholar writes, "*people can be different without fear*."[126]

Can there be a new image of India where Muslim, citizen, and modernity are not mutually irreconcilable categories? In order to answer this question, it may be useful to recall Tagore's words regarding India's fateful replication of European history: "*We in India must make up our minds that we cannot borrow other people's history and that if we stifle our own we are committing suicide...Europe...simplified her problem [of difference] by almost exterminating the original population...But India tolerated difference...and that spirit of toleration has acted all through her history*."[127] Modern India's attempt to superimpose homogeneity on diversity and difference was, as Parasher-Sen maintains, at odds with India's historical experience of *"multi-lingual, multi-ethnic, multi-religious dialoguing...in the performances of everyday life."*[128]

Indeed, India's history of diversity and plurality can arguably constitute the basis of a new non-national Indian civic and constitutional imaginary – one that blends the modern principle of constitutional equality with historically inherited and empirically lived 'different' identities – in this case a Muslim minority identity - where a Muslim is not shunned for being Muslim but is accepted as a Muslim and as a citizen. This would necessarily mean

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125 MUFTI, *supra* note 19, at 78.
126 STOETZLER, *supra* note 20, at 308.
127 TAGORE, *supra* note 5, at 71 & 144.
128 Aloka Parasher-Sen, *The Whole and the Particular; Negotiating Difference in Indian Civilization*, *in* MOJTABA MAHDAVI AND W. ANDY KNIGHT (EDS.) IN TOWARDS THE DIGNITY OF DIFFERENCE? NEITHER 'END OF HISTORY' NOR 'CLASH OF CIVILISATIONS' (Routledge, 1st ed., 2016).

discarding Eurocentric liberal-feminist emancipation-through-sameness narratives and affirmation of an *Indian* imaginary of India as a plural mosaic that *"does not need an underlying unity...to hold people together. It needs mechanisms to make integration possible without denying those characteristics that define the essential life of its [diverse] component groups."*[129]

[129] EMBREE, *supra* note 31, at 64-65.

ANALYSIS OF INDIA'S INTERNET CENSORSHIP MEASURES IN LIGHT OF AMERICAN CONSTITUTIONALISM

ESHA AGGARWAL[1]

The article focuses on the freedom of speech on the internet in India and its comparison with the principles of the American Constitution. It explains the importance of free speech in the American constitutional context and also how foreign judgments and doctrines can help fill gaps in the Indian judicial thought process. This paper specifically concentrates on the new Intermediary Guidelines in India and their implications on free speech and the importance of judicial scrutiny. The article focuses on the need to safeguard the forums for public debate, especially the internet which is very accessible to the general public and utilised on a daily basis for this purpose, while addressing some of the concerns that arise from its misuse such as fake news, slander, and invasion of privacy. In this article, the author analyses the IT Rules and then calls for their revision based on the principles of democracy. It also gives an insight into the possible impact on freedom of speech because of ambiguous rules and increased self-regulation and censorship by the intermediaries. Finally, the article calls for moderation in the freedom of speech and the need to regulate it, with lessons from American constitutionalism to improve India's constitutional objectives.

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ANALYSIS OF INDIA'S INTERNET CENSORSHIP MEASURES IN LIGHT OF AMERICAN CONSTITUTIONALISM

INTRODUCTION

The internet, like any medium of communication, can be abused by people to spread misinformation, defraud, scam, spread propaganda, and terrorism, and it is the duty of the State to regulate this domain just like ordinary speech, in order to preserve and promote its democratic and constitutional goals. Theoretically, however, this proposition is inimical to the classical liberalist, John Stuart Mill's ideas espoused in "On Liberty", wherein he grants an exclusive status to speech, propositioning that it is "a basic right for human flourishing"[2] and is immune even from the tenants of the "Harm Principle".[3] Whether this postulation can be attributed to his assumption about the inherent "harmlessness" of speech or an anti-paternalistic approach is a matter of legal and philosophical debate.

Thinkers like Dworkin, Nagel and Rawls too have advocated for similar legal protection to be accorded to public expression of "dangerous" ideas.[4] American free speech constitutionalism derives its validity from the First Amendment of the United States. A number of essential liberties are guaranteed by the First Amendment of the US Constitution, including the freedom of assembly, expression, religion, and the press, as well as the ability to petition the government. It guarantees people's freedom to express themselves, follow their religion, congregate in peace, and criticise the government without fear of retaliation or censorship. This pillar of American democracy symbolises the country's dedication to upholding individual liberty and encouraging a varied and lively public conversation.

While the tenets of classical liberalism have historically aligned with and helped build the American constitutional tradition, there are numerous philosophical, socio-legal, and most importantly, practical considerations that run contrary to free-speech absolutism, and even the United States couldn't practically sustain the literal "purity of interpretation"[5] that came with the First Amendment and post 1919, courts had to develop certain

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[2] JOHN S. MILL, ON LIBERTY (Batoche Books, 1859).
[3] *Id.*
[4] W. Jeffrey Howard, *Dangerous Speech*, 47 PHIL. & PUB. AFFS. 208 (2019).
[5] Christopher M. Schultz, *Content-Based Restrictions on Free Expression: Reevaluating the High Versus Low Value Speech Distinction*, 41 ARIZ. L. REV. 573 (1999).

legal standards and doctrines to discern "low value" speech from "high value" vis-à-vis the potential of the impugned speech to further the "First Amendment values".[6] These values consist of expressions that further society's interests in transmitting ideas, discerning the truth and creative expression.[7]

Through judicial and jurisprudential developments, certain classes of speech have been termed "low value"– obscenity, child pornography, incitement, commercial speech and fighting words.[8] Such speech is subject to greater judicial scrutiny and censorship compared to "high value" speech, which is broad-based and arguably consists of all speech excluding the above-mentioned categories, and it, on the contrary, receives almost absolute protection against legal coercion.[9]

The Indian constitutional tradition differs significantly in the sense that certain categories of restrictions are embodied within Article 19 i.e. the provision that grants us the "fundamental" right to free speech. Through decades of judicial interpretation and lawmaking, three criteria for "constitutional censorship" were established – first, the restriction can only be imposed through legislative action (not administrative or executive), second, it should fall under one of the grounds specified under Art 19(2), and such restriction must be reasonable, proportionate and strike a proper balance between freedom guaranteed under Art. 19(1) and the restrictions made permissible under Art. 19(2).

While the "no-go zones" mentioned under subsection 2 are broad-based, including categories like "public order" and "morality and decency", it is qualified with the prerequisite of "reasonableness" and the reasonableness of the same is subject to the scrutiny of the court, which is armed with the potent principles of natural justice. In terms of real-life speech, courts are a viable refuge to contest one's case, however, as we will explore hereunder, the validity of every piece of media or communication censored by a social media intermediary cannot be challenged in the court, owing to the private and contractual nature of "Terms and Conditions" and "User Agreements"

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[6] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).
[7] SCHULTZ, *supra* note 5.
[8] *Id.*
[9] STONE, *supra* note 6.

governing the same. Moreover, with the new fact-check units that essentially let states monitor and indirectly censor content, censorship by the state shall take place behind the veil of a private company, leading to potential violations of our Fundamental Rights under Articles 19(1) and 21, which cannot even be subject to judicial scrutiny. In this paper, the author will explore the constitutionality of the new IT Rules and its recent amendments in light of American free speech constitutionalism.

METHODOLOGY

The author has employed and relied upon comparative materials to highlight lacuna in our judicial reasoning when it comes to the regulation of speech on the internet and to propel our unique "living originalism" in modern times by using these doctrines to stimulate an internally significant constitutional conversation. In this paper, the author has referred to primary sources from American jurisprudence for the purpose of comparative analysis. These range from the Amendments in the US Constitution to tests and theories developed by American courts for the purpose of interpreting their scope. The model used is dialogical, and the goal of the paper is to highlight foreign doctrines that can aid in achieving our constitutional goals when it comes to free speech, with the advent of new technologies and forums.[10]

CYBER-SPEECH REGULATION IN INDIA

India is a signatory to the Universal Declaration on Human Rights (UDHR) law, and the International Covenant of Civil and Political Rights (ICCPR), many provisions of which correspond to and are symbiotic with the judicially protected Fundamental Rights guaranteed to Indian citizens under Part III of the Constitution.[11] Arts. 19[12] and 20[13] of the ICCPR

[10] Sujit Choudhry, *Living Originalism in India: Our Law and Comparative Constitutional Law*, 25 YALE J. L. & HUMAN. 1 (2013).

[11] A. Raza, *'Freedom of Speech and Expression' as a Fundamental Right in India and the Test of Constitutional Regulations: The Constitutional Perspective*, 43(2) INDIAN BAR REV. 87 (2016).

[12] International Covenant on Civil and Political Rights art. 19, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[13] International Covenant on Civil and Political Rights art. 20, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

acknowledges the varying substantive values that can exist with respect to acceptable speech and allow "necessary" limitations on the right to free speech, manifestly calling for the application of Due Process while assessing speech, and not for a mechanical procedure established by law. Similarly, Art. 29[14] of the UDHR reiterates that only such restrictions on rights and freedoms are permissible which are "determined by law".

However, an important distinction needs to be made on constitutional reservations with free speech (Art 19(2)) and the separate grounds introduced in the Information Technology Rules, 2021 (**"IT Rules"**). One particularly debated regulation is Rule 3,[15] which makes it obligatory for social media intermediaries (**"SMI"**) to monitor and promptly remove content on receiving knowledge of the same, whether from a platform user or the government. However, the grounds of such censorship have vague connotations and are highly susceptible to subjective interpretation. Usage of phrases like "harmful to children", "ethically and racially objectionable", and "insulting to other nations" stretch the scope of prohibition beyond the permitted grounds in Art. 19(2). *Shreya Singhal v. Union of India* primarily struck down S. 66A for laying down amorphous and broad standards for censorship and reiterated that orders to censor content must be backed by reasons.[16]

There is no requirement under the Act for the intermediary to apply its own mind on the basis of broad-based categories, and such a provision would be unconstitutional, as per this judgement, especially if it's accompanied by penalisation. Additionally, with regards to S. 79(3)(b) of the Act which mandates that the intermediary must expeditiously remove certain content on receiving actual knowledge by a court order, it was noted in *Shreya Singhal* that it must be read down to include only the subject matter listed in Art 19(2). Any "unlawful" speech beyond the categories listed in Art 19(2) cannot be part of Section 79[17] or the guidelines formulated under it because the Constitution of a country forms the basis for assessing the

[14] Universal Declaration of Human Rights art. 29, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).
[15] Rule 3, The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.
[16] Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 106.
[17] *Id.* ¶ 117.

legality of any statute, and there is no fundamental distinction between speech on the internet and in real life. If speech, including mass media through any other medium is not subject to restrictions extraneous of Art 19(2), neither should online speech. Further, SMI would be held liable lest they knowingly host, publish or transmit such content, which would lead to sweeping, impetuous and extensive censorship on their part to evade liability.[18]

Needless to say, the want for online speech regulation in the Indian scenario is urgent, as more than half a dozen people have died in violence caused due to misinformation spread on social media platforms like WhatsApp and Facebook, the most recent being a mob-killing instigated by online rumours in a village.[19] Another wave of fake news spread after the Pulwama attack, fuelling conspiracy theories involving local Kashmiris and the opposition party, with morphed pictures of Rahul Gandhi with suicide bombers spreading on WhatsApp.[20] and in the last 7 years, India saw a 500% increase of cases filed under 153A (Promotion of enmity between different groups on grounds of religion) of the Indian Penal Code.[21] In light of these events, it is no surprise that India is one of the first countries to legislate, *albeit* loosely, on the question of intermediary liability.[22]

However, it is also imperative to mention that these private intermediaries play a crucial role in providing a virtual infrastructure for a free exchange

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[18] Pritika Advani, *Intermediary Liability in India*, 48(50) EPW (2013).

[19] Elyse Samuels, *How misinformation on WhatsApp led to a mob killing in India - ...* WASHINGTON POST (2020) https://www.washingtonpost.com/politics/2020/02/21/how-misinformation-whatsapp-led-deathly-mob-lynching-india/.

[20] Kunal Purohit, *WhatsApp rumours have led to 30 deaths in India. Who's next?*, SOUTH CHINA MORNING POST, (2019) https://www.scmp.com/week-asia/society/article/2187612/whatsapp-rumours-have-led-30-deaths-india-social-media.

[21] N. Jacob, *Data check: In Seven Years, India has seen a 500% rise in cases filed under its hate-speech law*, SCROLL.IN (2022) https://scroll.in/article/1026701/data-check-in-seven-years-india-saw-a-500-rise-in-cases-filed-under-its-hate-speech-related-law/.

[22] R. Chhaya and A. Afaq, *Information technology (guidelines for intermediaries and digital media ethics code), 2021: Critical Study*, J. PATENT & TRADEMARK OFFICE SOCIETY, 623–635 (2022).

of ideas, and it is pertinent to note that the internet penetration rate in India stands at around 50% of the population or 692 million people and is growing at the rate of 8% per year.[23] We can reasonably deduce from these facts that the debate and discussion regarding current issues, government policies and other important facets of public life as well as the volume of social and digital news and opinion pieces being communicated to the public is immense. It is as important to protect this engaged space for public dialogue, as it is to curb social evils like defamation, and criminal activity including identity phishing, credit card fraud, bank impersonation scams, copyright infringement, content piracy and so on. Considering our constitutional mandate, certain forms of speech which are violative of other's moral and legal rights, as well as averse to public order should be regulated, however, as mentioned above, it is equally necessary to protect forums that act as primary conduits to communicate and exchange ideas for more than 500 million people. Rendering these forums susceptible to liability by way of rules that are unpredictable and vague, as the researcher will elaborate upon in the following sections, can lead to intermediaries themselves erring on the side of caution[24], and being less discerning while censoring content, and being driven by self-preservation. In fact, such liability can threaten the very existence of social media and e-commerce platforms itself.

It is due to the above-mentioned reasons that immunity to such liability was given to intermediaries under S.79 of the Information Technology Act, 2000.[25] The genesis of S. 79, in the essence that it exists contemporarily, can be attributed to the decision in *Avnish Bajaj v. State*[26], wherein the court refused to exempt the Managing Director of a certain website from liability, citing lack of filters and Due Diligence on their part for hosting an objectionable advertisement for a mobile phone. The addition of S. 79 (safe harbour clause) to the IT Act vide an amendment was made after this decision. Since many computer resources act as conduits for the exchange of information between parties unrelated to it, the imposition of liability on them is considered antithetical to the development of technology.

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[23] S. Kemp, *Digital 2023: India - DataReportal – global digital insights*, DATAREPORTAL, https://datareportal.com/reports/digital-2023-india.
[24] ADVANI, *supra* note 18.
[25] Information Technology Act, 2000, No. 21, Acts of Parliament, § 79.
[26] Avnish Bajaj v. State, 2008 SCC OnLine Del 688.

Additionally, regulating intermediary platforms in the past was considered difficult, as algorithmic censorship was not commonplace. Self-monitoring a computer resource two decades ago would require considerable manpower and resources. S. 79 of the Act limits the liability of ISPs and other intermediaries that host or transmit third-party content as long as they comply with certain stipulations. These include not initiating the transmission of the information, not modifying the content, observing due diligence and any guidelines as may be prescribed by the Central Government in this regard and expeditiously removing or disabling access to any unlawful material being hosted on it, on being notified by the appropriate Government or its agency. Further, the definition of intermediary under S. 2(w)[27] of the Act, formulated after this case, brought India closer to international standards. With the new IT Rules, this safe harbour protection has been qualified and certain external checks have been placed upon the free flow of information and content across social media, digital media, and OTT platforms.

We will examine the constitutionality of the checks hereunder, through the lens of American free speech constitutionalism. Since after the First World War, the First Amendment, and the right to freedom of speech have assumed a special status, both culturally and constitutionally, within the "American constitutional enterprise".[28] This significance accredited to free speech inevitably led to the development of a jurisprudential and judicial landscape that ensured maximum protection to speech, and it would be socially and legally relevant to explore doctrines, processes and theories that developed under this ideological framework and assess the desirability of their application on India, to further our original constitutional goals[29]. At the outset, the researcher reiterates that every country has their own set of substantive values, and the following analysis doesn't argue for an all-

[27] § 2(w): "Intermediary" means any person who on behalf of another person receives, stores or transmits electronic record or provides any service with respect to that record and …network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online marketplaces and cyber cafes.

[28] G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996).

[29] Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC OnLine Del 1762.

encompassing 'free marketplace of ideas'[30], or even exaltation of free speech over other values like public order or state security, which was the case in the infamous *per curiam* decision of *Brandenburg v. Ohio*.[31] It is rooted in our Constitution that speech, threatening state security, foreign relations, public order and state sovereignty does warrant some form of regulation and even prohibition.

CONSTITUTIONALITY OF IT RULES, 2021 IN LIGHT OF AMERICAN CONSTITUTIONALISM

Under the Information Technology Act, 2000, intermediaries including social media and marketplace intermediaries were exempt from liability accruing to any content, information, or data they provided a forum for.[32] They were construed as mere conduits for two parties to exchange ideas or conduct business. E-commerce Rules, 2020 are beyond the scope of this research, so the focus of this research will be social, digital media intermediaries and marginally, OTT platforms.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (**"IT Rules, 2021"**), were formulated under the mandate of Section 87(2)(z)[33] and (zg)[34] of the Act, to prescribe guidelines for the due diligence to be conducted by the intermediaries to retain the protection of S. 79. It also prescribes the procedures to be followed by the government to block access to any content under S.69A and B of the Act. The Supreme Court urged the Central Government to legislate on guidelines under the IT Act, 2000, after videos involving gang rape and child pornography circulated on the internet. A committee was formed which made various recommendations, one of them reiterating the necessity of imposing strict intermediary liability on hosting platforms in light of this case.[35]

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[30] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
[31] *Brandenburg v. Ohio*, 395 U.S. 444 (1969)
[32] Information Technology Act, 2000, No. 21, Acts of Parliament, § 79.
[33] Information Technology Act, 2000, No. 21, Acts of Parliament, § 87(2).
[34] Information Technology Act, 2000, No. 21, Acts of Parliament, § 87(2)(zg).
[35] Prajwala Letter (Videos of Sexual Violence & Recommendations), In Re, (2018) 17 SCC 79.

Following this, IT Rules, 2021 were formulated, suppressing the 2011 Rules made on similar lines. The main difference between IT Rules and the Act is that earlier, the intermediary was to be held liable if it omitted to remove information in contravention of a court order or some instruction by a government agency, but now liability can accrue from failure to self-monitor and remove the 'offensive' content on complaint by an interested party within 36 hours as per Rule 3 of the IT Rules[36] These Rules mandate SMIs to perform greater due diligence with respect to the content hosted on or transmitting through their platforms. The intermediaries are also obligated to remove information that a government body called a "Fact check unit" will determine as false. The government will also be able to direct the SMI to break encryption to determine the first originator of a particular piece of content as per the 2023 Amendment to the Rules. While the new Rules would lead to some beneficial outcomes by mandating the issuance of user policies and notices, as it would promote user standards and lead to greater transparency, security and trust between the users and the platform, they are ultra vires the original delegating intent of the Act.[37]

A. RULE 3(2)

However, the grounds mentioned in Rule 3(1)(b)[38] of the Rules for the removal of content through such self-appraisal or complaint are vague, with a broad interpretative scope. The terms mentioned have not been defined anywhere, neither in the Constitution nor in the General Clauses Act. Imposition of liability on failure to delete information on this basis would lead to broad-based censorship, through various technical and manual methods like keyword filtering, something used widely in countries that want to suppress information like China.[39] In *Shreya Singhal v. Union of India* (2015)[40], S. 66A of the IT Act was declared unconstitutional owing to

[36] Information Technology (Intermediate Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3.
[37] CHHAYA & AFAQ, *supra* note 22.
[38] Information Technology (Intermediate Guidelines) Rules, 2011, Rule 3(1)(b), India.
[39] WeiMing Ye & Luming Zhao, *"I know it's sensitive": Internet censorship, recoding, and the sensitive word culture in China*, 51 DISCOURSE CONTEXT & MEDIA 100666, (2023), https://doi.org/10.1016/j.dcm.2022.100666.
[40] Shreya Singhal v. Union of India, (2015) 5 SCC 1.

its vagueness and disproportional censorship potential. It was held to have a 'chilling effect on the freedom of speech and expression' as the grounds mentioned – speech meant to cause annoyance, inconvenience or gross offence- were subjective and didn't have a close enough nexus with disruption of public order under Art 19(2).[41] To establish this, reliance was placed on an American case[42], which held that speech on the Internet is entitled to the same level of protection as that given to print media. The impugned legislation in this case was the Communications Decency Act which contained a provision to protect minors from "patently offensive" speech on the internet. The court declared the Act unconstitutional, citing the three-part obscenity test established in the *Miller*[43] case and concluding that the terms "indecent" and "patently offensive" failed to establish any reasonably narrow or precise criteria to censor speech. In the *Shreya Singhal*[44] judgement, a similarity was drawn between "patently offensive" and "grossly offensive" and the broad censorship potential, owing to the lack of precision and definition of such terms, was deemed unacceptable. In Shreya, further reference was made to the American case *Federal Communications Commission v. Fox Television Stations*[45]and due process considerations of a 'precise notice' of law – a fair notice to inform persons or entities of conduct that was forbidden- was given weight even though due process isn't applicable in India, in the form it takes in the US, as 'personal liberty' under Art. 21 must be interpreted in a narrower sense than 'liberty' more generally under the Fourteenth Amendment.[46] In this case, the Supreme Court's recourse to American judgements to define the scope of Art. 19 and reinterpret the provisions of the IT Act helped safeguard our fundamental right to free speech and nullify an excessively restrictive provision.

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[41] Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 83.

[42] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[43] Miller v. California, 413 U.S. 15 (1973); the three part obscenity test- whether on application of community standards, the work would appeal to prurient interests, whether it has any political, scientific or artistic value and lastly, whether it depicts sexual conduct in a patently offensive way specifically defined by state law.

[44] Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 106.

[45] FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

[46] Sujit Choudhry, *Living Originalism in India? 'Our Law' and Comparative Constitutional Law*, 25(1) YALE J. L. & HUMAN. (2013).

However, the main difference between the two provisions – Rule 3(2) of the Rules and Section 66A of the Act is that the latter involves a criminal liability by an appropriate governmental authority and the former is an obligation/duty on the owner of the computer resource or intermediary with unprescribed liability, if any, to take down certain categories of content under their Terms of Service or Community Guidelines. Rule 3(2) would hence be constitutional due to the following reasons: first, since the categories of content mentioned are censored through the discretion of the private entities, and by way of the User Agreement or Terms of Service Contract, it will fall under the contractual realm and be shielded from Art 19(1) scrutiny.[47] Second, no direct government intrusion is taking place, rather certain categories, albeit vague and extraneous to the grounds in Art. 19(2), have been laid down as guidelines for the private entity to self-govern, which are congruent with the grounds of censorship already present in most community guidelines.

The question of whether SMIs would be liable for failure to remove offensive content, or whether these guidelines are only faciliatory in nature, was addressed in the recent *Tandav*[48] judgement, wherein the court ruled that the Rules lack teeth and do not impose liability that takes away the safe harbour protection under S. 79, therefore they are merely guidelines. However, this is only one precedent, and the ruling can be reversed in the future. With the recent *Tandav* fiasco, it can be concluded that Rule 3(2) does set a dangerous legislative precedent and can have a chilling effect on speech when it comes to the censorship and access removal policies undertaken by private intermediaries. Since a humongous quantum of data passes through their servers, companies can undertake mass censorship through censorship algorithms, which would redact speech irrespective of the context or discursive meaning of the speech.[49] This will lead to the consideration of commercial and political concerns interfering with the daily communications of billions of people as well as lead to a frivolous suppression of critical or satirical content. However, the rules as they stand

[47] J.E. Fradette, *Online Terms of Service: Shield for First Amendment Scrutiny of Government Action*, 89(2) NOTRE DAME L. REV., 947 (2013).
[48] Aparna Purohit v. State of UP, (2021) 3 All LJ 634.
[49] Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, 34 PHIL. TECH., 739–766 (2021).

currently, cannot be deemed to be unconstitutional due to the veil of private law and the directory nature of the provisions.

B. FACT-CHECK UNIT BY MEITY

Through an amendment to the Information Technology Rules in 2023, the Union government notified an additional check on information dissemination on social media.[50] A fact-check unit ("**FCU**") run by MeitY by way of Rule 3(1)(b)(v) of the IT Rules can now direct the concerned SMI to remove 'fake, false or misleading' information related to the business of the Central Government, and the SMIs are supposed to take reasonable efforts to comply with the same.

In the recent Bombay High Court case *Kunal Kamra v. UOI*[51], the division bench gave a split judgement on the constitutionality of this amendment. Gokhale J. found the provision innocuous, stating that merely taking away safe harbour would not lead to a cent per cent probability of content removal and that the intermediary can still choose to retain the user-generated content and defend itself in court. [52] Patel J. on the other hand, described the choice between losing a trifling piece of content and that of losing safe harbour as a "Hobson's choice"– they would rather sacrifice the user content than risk litigation in a country like India that criminalises a broad swathe of speech.[53] Therefore, the most rational course of action for an intermediary would be to remove the piece of content flagged by the FCU. Very recently, the Supreme Court stayed the petition and it is awaiting a final verdict in the Bombay High Court.[54]

The grounds mentioned for censorship by the FCU – "fake, misleading information" relating to the "business" of the government, are overly broad and not directly connected to the grounds under Art 19(2). S.

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[50] Ministry of Electronics and Information Technology. Information Technology (Intermediary Guidelines) Amendment Rules, Apr. 6, 2023.
[51] Kunal Kumra v. UOI, 2024 SCC OnLine Bom 360.
[52] *Id.* ¶ 17.
[53] *Id.* ¶ 81.
[54] AK Bawa, *'Supreme Court stays Fact-Check Unit notification under IT Amendment Rules 2023 | Awaits Bombay HC judgment,'* LIVE LAW, (Mar. 21, 2024) https://www.livelaw.in/top-stories/supreme-court-kunal-kamra-editors-guild-notifying-fact-check-unit-it-rules-2023-252998.

79(3)(b) of the IT Act also directs intermediaries to remove "unlawful" content on the direction of the government. In *Shreya Singhal*, S.79(3)(b) was declared constitutional on the condition that the orders made under it conform to the grounds laid down in Art 19(2) and liability accrues only on failure to comply with a court or government order and not on general complaints. However, in the *Shreya* case, no link was established between the word "unlawful" in the Act and the grounds under Art 19(2) specifically and in fact the possibility of such linkage was disturbed by purporting that the speech on the internet is intelligibly different from speech in real life and through other modes owing to its high dissemination potential and anonymity. Such distinction is not made in First Amendment jurisprudence owing to the "public forum" doctrine which categorically declares cyberspace to be a public forum, the same as any other real-life venue.

C. PUBLIC FORUM DOCTRINE

One of the tests developed under First Amendment jurisprudence to determine the scope of its application is the forum analysis or designation test. For different forums — public, non-public, and limited, a different level of protection is designated, the constitutional protection of absolute freedom of speech being afforded only to a public forum.[55] In case a physical space is deemed to be a public forum, like a public park or street, the government regulation has to be content-neutral and can only regulate the manner, avenue or time of the speech (irrespective of the message it seeks to convey). Any restrictions on the content of free speech here must be carefully scrutinised.[56] In non-public fora like an airport or a private store, there is greater scope for public power to play its role and balance speech rights against public interests. Finally, limited or designated fora would be spaces assigned for a particular purpose and for a specific group of people. Herein, free speech rights would be significantly limited. However, for this purpose, it is important to remember that judicial scrutiny would be the most stringent when it comes to any regulation of speech in the public fora and a two-pronged test would have to be fulfilled

[55] Enrico Andreoli, *Continuities and Discontinuities. First Amendment and Digital Free Speech in U.S. Constitutionalism*, 56(1) DPCE ONLINE (2023).
[56] Police Dep't v. Mosley, 408 U.S. 92 (1972).

by the state – that the regulation is narrowly tailored and accomplishes some compelling government interest.[57]

In *Packingham v. North Carolina*[58], the court deemed the internet to be a 'modern public forum' and decreed that an act to restrict free speech on social media was violative of the First Amendment. In *Cornelius v. NAACP Legal Def. & Educ. Fund*[59], it was argued that a public forum is wherever the primary purpose of a physical space is the free exchange of ideas i.e., it is not a limited or private forum designated for any particular purpose or accepting a limited membership. Lastly in *Brown v. Ent. Merchs. Ass'n*[60], it was established that the First Amendment will apply irrespective of the change in the mediums of communication. Since the internet was equated to a public forum, strict judicial tests scrutinising any form of regulation on cyberspace would apply as well. Such a regulation would have to be content-neutral, precise and to fulfil a "compelling government interest".

Since it hasn't been established under the Indian context that speech on the internet would be deemed to be the same as speech in real life as speech on the internet can reach a wider audience at a faster rate, the standards for speech restrictions can be different in such a case. In the *Shreya Singhal* judgement, the court declared a provision similar to Rule 3(1)(b)(v) to be constitutional by decreeing that the interpretation of the word "unlawful" under S. 76(3)(b) has to be in conformity with the grounds in the Constitution. However, for such an interpretation, some commonality between speech on the internet and real-life speech needs to be established. The cases cited above essentially equate the internet to physical spaces by deeming it a 'modern public forum' and a similar approach in India would guarantee greater protection for speech on the internet.[61]

D. STATE ACTION DOCTRINE

[57] ANDREOLI, *supra* note 55.
[58] Packingham v. North Carolina 582 U.S. 98 (2017).
[59] Cornelius v. NAACP Legal Def. & Educ. Fund 473 U.S. 788 (1985).
[60] Brown, et al. v. Entertainment Merchants Assn. et al., 564 U.S. 786 (2011).
[61] Information Technology (Intermediate Guidelines) Rules, 2011, Rule 3(1)(b)(v), India.

In the petition filed by Kunal Kamra, the Government made its submissions,[62] primarily contending that the word 'information' under Rule 3(1)(b)(v) of the IT Rules is narrowly tailored and pertains only to the information that has the capacity of being true and false and that humour, satire, or opinion pieces for or against the Government will remain unaffected. Further, the Hon'ble Solicitor General on behalf of the Government contended that the social media intermediary was only required to make 'reasonable efforts' and decide whether to restrict the content or not on receipt of a complaint from the Government. However, if the Government remained adamant, the issue could be later examined by an appropriate judicial authority under Rule 7 of the IT Rules. However, this claim by the Government that the social media entity has any discretion is meaningless. The possibility of prosecution or incurring some form of liability after going through the judicial process may be too tiresome to take on, again and again. The intermediary might just err on the side of caution here too, just delete the impugned information, making the apparent discretion they have virtually meaningless.

However, if the literal argument of the government is considered, they could have a case. The regulation of speech, though generally a constitutional function exercised by the Government, has been transferred to the private entities, to exercise by way of this apparent discretion. Since the censorship is being imposed through self-regulation by the private intermediary, the government merely giving notice of fake or misleading information they may choose to remove, the public character of the impugned measure would be difficult to discern. The self-regulatory actions of the intermediary will be shielded from the scrutiny of Art 19 as they would fall within the realm of contractual law (User Agreement & Community Standards would govern the censorship).[63]

This is another lacuna in our Constitutional jurisprudence that can be filled by taking recourse to foreign judgments and doctrines. In many cases, the

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[62] T. Singh, *"Intermediaries can decide if they want to take down 'fake' information" - the union government concludes its submissions in petition challenging the IT amendment rules, 2023*, INTERNET FREEDOM FOUNDATION (Sept. 23, 2019) https://internetfreedom.in/it-rules-2023-bombay-hc-meity-submissions/.

[63] FRADETTE, *supra* note 47.

American Courts have looked past the 'nominally private' form through which speech on the internet was restricted[64] and isolated the government actions from the private ones, subjecting them to the dictates of the First Amendment. The first of this sort was *Marsh v. Alabama*[65]. In this case, a private entity that owned an entire town was restricting free speech and was indirectly facilitated and supported by the government in doing so. The Court applied the state action doctrine and deemed such censorship to be subject to the First Amendment despite it being implemented through private channels. Such censorship would be scrutinised as if it was engaged in by the government itself.

In *Lebron v. National Railroad Passenger Corp*[66], it was reiterated that the government cannot escape its constitutional responsibility of operating within constitutional limits by delegating its public functions to private entities. It is imperative that our fundamental rights be protected and the censorship conducted under the guise of private self-regulation be subject to appropriate scrutiny. Since our constitutional and judicial conventions do not eschew engagement with comparative materials, the constitutionality of Meity's fact-checking unit can be examined by taking recourse to the state action doctrine and through this analysis, it might be rendered unconstitutional.

E. RULE 4(3)- 'FIRST ORIGINATOR CLAUSE'

The 'First Originator Clause' is a controversial addition to the IT Rules, considering it requires an alteration of the technical aspects of a computer resource to access the private information of users. While the term itself is not defined, the provision mandates the intermediary to break its end-to-end encryption feature and identify the first originator of a disputed message, on intimation from a government agency or a court order.[67] Neither IT Rules nor the Act defines what such first originator or would mean. In S. 2(1)(za)[68] of the Act, an 'Originator' is defined as a person who

[64] D.C. Nunziato, *How (not) to censor: procedural first amendment values and internet censorship worldwide*, 42(4) GEORGET. J. INT. L., 1123 (2011).
[65] Marsh v. Alabama, 326 U.S. 501 (1946).
[66] Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995).
[67] Rule 4(3), The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2023.
[68] Information Technology Act, 2000, No. 21, Acts of Parliament, § 2(1)(za).

sends, stores, transmits or generates information to any other person. The first originator in that context would mean the first person to store, generate or transmit a particular message or media file to any other person over a specific computer resource or intermediary. The issue would arise when one piece of information is being transferred from one computer resource to another, for instance, from WhatsApp to the Telegram messaging app.[69] This would impose an unreasonable duty on the first sender of information to a different computer resource to verify the veracity of the information before forwarding, otherwise, they could be implicated for disrupting public order or endangering the security of the state grounds under Art 19(2), which are vague conceptions in the first place.

Since there is no way of knowing if one is the first originator of certain information on a computer resource, the possibility of being falsely accused of intentionally curating such a message is liable to create fear and anxiety among the public. This apprehension would curb the desire of people to communicate openly and therefore ultimately restrict their freedom of speech and expression within cyberspace. The possibility of surveillance and the precarity of having one's identity revealed would have a 'chilling effect' on free speech. Privacy and autonomy form the very fabric of democratic engagement, for example, our polling booths are within walled enclosures or behind a curtain or some sort of veil to obstruct the view of the onlookers.[70] This "Right to Privacy of Speech" is protected in both Indian and American Constitutionalism. The US Supreme Court has interpreted the First Amendment to cover a variety of privacy-related topics, including the freedom of speech and expression, even though the document doesn't specifically mention a right to privacy.

In *Griswold v. Connecticut (1965)*, the right to privacy was discerned under the Fourteenth Amendment's due process clause. The due process clause forbids state intrusion upon the life, liberty and property of citizens without due process. In this case, William O. Douglas J., speaking for the majority,

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[69] Abhishek Gupta, *A Constitutional Scrutiny of the 'First Originator Clause' of Information Technology Rules 2021*, 4(2) JUS CORPUS L. J. 900, (2023).

[70] *Free speech is under fire with the rise in global surveillance,* TUTANOTA, (Oct. 17, 2023) https://tutanota.com/blog/free-speech-under-fire-surveillance.

held that even though there is no explicit mention of the right to privacy, it can be discerned from the penumbras of the Due Process clause and the Bill of Rights,[71] and therefore, the right to privacy extends to married couples and their personal decisions regarding the use of contraceptives.

Similarly, in *Roe v. Wade*[72], the court interpreted the right to privacy within "liberty" protected by the Due clause of the First Amendment to include a woman's right to terminate her pregnancy. More particularly in relation to speech, in *Citizens United v. Federal Election Commission (2010)*[73], the Supreme Court addressed the constitutionality of a legislation prohibiting certain forms of political speech and held that there's a broad protection offered to political speech under the First Amendment. While in India, privacy jurisprudence is mostly centred around Art. 19 of the Indian Constitution.

In *PUCL v. Union of India (1997)*[74], the Supreme Court held that unregulated and unauthorised phone tapping violated Art. 19 (Right to freedom of speech and expression) and 21 (Right to life and personal liberty) of the Constitution. The Court in *State of Uttar Pradesh v. Raj Narain*[75], indirectly protected the right to freedom and privacy of speech of the press, when it came to transparency and accountability in governance and the electoral process. Therefore, there is sufficient jurisprudential basis for protecting privacy both in India and in the US.

F. REASONABLE EXPECTATION OF PRIVACY DOCTRINE

The Reasonable expectation of privacy doctrine was developed in the United States primarily in the context of the Fourth Amendment, in search and seizure cases. It pertains to both a physical expectation of privacy, like in homes and a subjective expectation of privacy, that society deems reasonable like protection of privacy during phone calls. It was first expounded in *Katz v. United States*[76], wherein the court expanded the scope of the Fourth Amendment from "unreasonable searches and seizures" of physical property or intrusion in a physical space to a "reasonable

[71] Griswold v. Connecticut, 381 U.S. 479 (1965).
[72] Roe v. Wade, 410 U.S. 113 (1973).
[73] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[74] People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568.
[75] State of Uttar Pradesh v. Raj Narain, (1975) 4 SCC 428.
[76] Katz v. United States, 389 U.S. 347 (1967).

expectation of privacy" of a person. Since a person would expect their informational privacy to be protected, especially in non-public spaces of communication like the telephone or over the internet, tapping telephone lines or breaking end-to-end encryption would be violative of this doctrine.

Therefore, as per this case, a person must have a subjective reasonable expectation of privacy in a particular circumstance, that must be backed by societal norms and expectations. This concept was further clarified in *Riley v. California*[77], warrantless search and seizure of mobile phones was considered unconstitutional as it is not merely an object that is being seized, but a data repository containing all the sensitive personal information of an individual including their location history, financial information and personal messages. The reasonable expectation of privacy doctrine affords speech a higher degree of protection than the compelling state interest test which is usually employed in the Indian scenario.[78] The compelling state interest test is centred around the state's interests in public security and the other grounds in Art. 19(2) and not the expectation of privacy individuals have when expressing their opinions or views in a particular setting. While the doctrine has evolved with the digital age, the judicial evolution of this doctrine has not kept pace with the development of new technologies.[79] Even then, borrowing American jurisprudence, especially the tests developed under the Fourth Amendment, would protect the right to freedom of speech encapsulated under Art. 19(1) to a greater degree and curb the menace that could be caused by bringing the first originator clause into practice.

CONCLUSION

Through a comparative analysis, we determined that the new Intermediary Guidelines do not stand constitutional scrutiny as they have a disproportionate impact on free speech, as opposed to the public interests it seeks to protect. Such an impact would threaten the very fabric of our

[77] Riley v. California, 573 U.S. 373 (2014).
[78] Sejalsri Mukkavilli, *Surveillance induced chilling effect on speech: Constitutional safeguards in India and USA*, 24 SUPREMO AMICUS, (2021).
[79] Haley Plourde-Cole, *Back to Katz: Reasonable Expectation of Privacy in the Facebook Age*, 38 FORDHAM URB. L. REV. (2010).

democracy since popular participation and engagement are essential components of popular sovereignty. State sovereignty derives its validity from people's sovereignty hence to compromise it would be to topple the very premise of a democratic state. The grounds mentioned in Rule 3(2) like "harmful to children" being extremely vague, the breach of "privacy of speech" and the resulting deterrent effect on our freedom of speech and expression due to the first originator clause under Rule 4(2) and the intrusive, unchecked, and therefore unconstitutional interference by MeitY through a fact-check unit breach the principles of proportionality. Considering the doctrines developed under the First Amendment jurisprudence, we are able to deduce the chilling effect such mechanisms would have on our freedom of speech, especially in the absence of judicial review as such actions, orders and interventions will be shielded from public scrutiny owing to the private or contractual legal veil of User Terms of Agreement, Community Guidelines or other similar agreements with an intermediary. Therefore, IT Rules, 2021, especially the provisions specified and analysed above should be declared unconstitutional and reformulated in light of democratic best practices.

DELIMITING THE DOCTRINE: AN ARGUMENT AGAINST BASIC STRUCTURE REVIEW OF ORDINARY LAWS

GOVINDA ASAWA[1] & PARTHIV JOSHI[2]

The Basic Structure Doctrine, which was crafted to preserve the enduring identity of the Constitution, finds itself in an identity crisis in the fifty years of its existence. One prominent debate regarding the doctrine concerns its applicability to challenges against ordinary legislation. The judicial history in this regard is marred by conflicting opinions that add more to the debate than they resolve. This essay undertakes a comprehensive analysis of all the significant developments on the key issue of the scope and extent of the doctrine and attempts to harmonise them piece by piece. It has been observed that courts have, at times, readily extended the doctrine in testing the validity of ordinary legislation by construing the basic structure as nothing more than an interpretation emergent from a multi-provisional reading of the Constitution. Such an approach fails to appreciate the 'identity of the doctrine' and the 'method of identification of basic features' as two independent concepts. The invocation of the doctrine is not sine qua non for testing ordinary legislation based on 'principles' emerging from a multi-provisional interpretation of the Constitution. The sanctitude of the doctrine's identity lies in its operation in the sphere of constitutional amendments only, and the same must be preserved.

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DELIMITING THE DOCTRINE: AN ARGUMENT AGAINST BASIC STRUCTURE REVIEW OF ORDINARY LAWS

INTRODUCTION TO THE ENDURING DEBATE

The Basic Structure Doctrine ("**the Doctrine**"), a crown jewel of Indian constitutional law, continues to invite extensive contemporary scholarship. Even though it was crystallised in the sixties and seventies, it remains a topic of debate in twenty-first-century scholarship as well. The Judiciary, championing constitutionalism, and the Parliament, with its political aspirations, have found one another at a crossroads since antiquity. These tensions between the two organs of the state eternalise the need for a harmonising thread – that holds both of them together in times of prosperity as well as turmoil. The mammoth exercise of crafting such a thread was taken up by thirteen judges of the Apex Court, assisted by many legal stalwarts with the likes of Shri N.A. Palkhiwala and Shri H.M. Seervai, when they convened to decide the fate of Edneer Mutt, where His Holiness Kesavananda Bharati had brought the State of Kerala to court over its attempt to acquire Mutt land. While the contours of the story of what followed have been narrated time and again, this version attempts to contextualise the Doctrine's identity to better appreciate its scope and extent, particularly its extension to testing the validity of ordinary legislation as opposed to its traditional application to test constitutional amendments.

The *first* section of this essay delineates the 'identity' of the Doctrine as a limitation on the constituent power of the Parliament. It is essential to appreciate the issues that led to the genesis of such a doctrine. It is observed that the non-obstante clause inserted in Art. 368 of the Constitution *vide* 24th Amendment,[3] effectively ousting the then prevailing types of judicial review based on provisions of the Constitution, prompted the Court to devise this new form of judicial review. The *second* section of this essay is devoted to the key issue of the Doctrine's scope and extent, that is, the applicability of the basic structure review in challenges to ordinary legislation enacted by the Parliament or the Legislatures of the States in the exercise of the legislative powers conferred by Art. 245 of the Constitution. Various decisions of the Apex Court that offer insights regarding the said issue are critically examined in this section. The *third* section of this essay

[3] INDIA CONST. art. 368, *amended by* The Constitution (Twenty-fourth Amendment) Act, 1976.

turns to a series of judgements pertaining to the independence of judiciary and tribunalisation, which have been rendered one after the other like a string of pearls, leading to a new 'identity' of the Doctrine. The *fourth* section of this essay argues that the recent judicial trend of moulding a secondary identity of the Doctrine is not based on convincing grounds and should be avoided, for it takes away the essence of the Doctrine's 'identity' as it was construed in *Kesavananda.*[4] It is concluded that an alternative approach to harmonise the recent judicial understanding and the concerns over dilution of the Doctrine's identity lies in appreciating the 'identity' of the Doctrine and the 'process of identification' of the basic features as two independent concepts, whereby invocation of the former is not *sine qua non* for application of the latter, which may be construed as principles emergent from multi-provisional interpretations of the Constitution.

THE IDENTITY OF THE DOCTRINE

> *"Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity"*[5]

This section sets the tone of the essay by investigating the background and the reasons that compelled the 13-judge bench in *Kesavananda* to devise the Doctrine. The origins and purpose of the Doctrine's emergence play a significant role in identifying the 'identity' of the Doctrine.

To begin on a simple note, the majority in *Kesavananda* ruled that although there are no implied limitations flowing from normative constitutional theory that restrict the powers of the Parliament to amend the Constitution, they cannot be exercised so as to destroy or damage the 'basic features' or the 'basic structure' of the Constitution.[6] Such a ruling is the culmination of a series of tussles between the Parliament and the Judiciary over the interpretation of Art. 368 of the Constitution. The debate centres on the scope of judicial review of constitutional amendments and essentially asks whether constitutional amendments fall under the

[4] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[5] Minerva Mills Ltd. and Ors. v. Union of India and Ors., (1980) 3 SCC 625, ¶ 16.
[6] SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE, at 26 (Oxford University Press, 2nd ed., 2011).

definition of 'law' as defined in Art. 13(3)(a)[7] of the Constitution. The story ostensibly begins with *Shankari Prasad,*[8] when the Supreme Court held that a constitutional amendment is not a 'law' under Art. 13 and thus, not amenable to judicial review for abridging Part III rights. Although this view was affirmed in *Sajjan Singh,*[9] J.R. Mudholkar J. in his concurring opinion, first introduced the idea of 'basic features' by referring to the *Fazlul Quader Chowdhry*[10] judgement of the Supreme Court of Pakistan.[11] He indicated that there may be certain features of the Constitution that can limit the amending power of the Parliament. However, he left the discussion open and drew no conclusions. Subsequently, the Supreme Court in *Golakhnath*[12] observed that the marginal heading of the Art. 368, as it then stood, merely prescribed the 'procedure' for amendment and the substantive powers flowed only from Articles 245, 246, and 248 of the Constitution.[13] Consequently, previous decisions were overruled, establishing that an amendment is 'law' within the meaning of Art. 13 of the Constitution and thus amenable to judicial review.

This prompted the Parliament to pass the 24th Amendment,[14] which significantly altered Art. 368 of the Constitution. The marginal heading was changed to denote the 'power' of amendment.[15] A non-obstante clause was inserted[16] *vide* clause (1) and Part III judicial review was expressly ousted vide clause (3) of Article 368[17] with a corresponding amendment in Article 13 as well.[18] Effectively, the amendment gave unfettered powers to the Parliament to amend any part of the Constitution including Part III, while immunising such actions from the traditional forms of judicial review. This

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[7] INDIA CONST. art. 13, cl. 3 (a).
[8] Shankari Prasad Singh Deo v. Union of India, (1951) SCC 966.
[9] Sajjan Singh v. State of Rajasthan, AIR (1965) SC 845.
[10] Mr. Fazlul Quader Chowdhry v. Mr. Mohd. Abdul Haque, (1963) PLD SC 486.
[11] *Id.* ¶ 57.
[12] Golak Nath v. State of Punjab, AIR (1967) SC 1643.
[13] *Id.* ¶ 53.
[14] INDIA CONST. art. 368, *amended by* The Constitution (Twenty-fourth Amendment) Act, 1976.
[15] *Id.* at art. 3(a).
[16] *Id.* at art. 3(b).
[17] *Id.* at art. 3(d).
[18] *Id.* at art. 2.

amendment fell for consideration in *Kesavananda*, where the Court construed the scope and extent of the newly recognised constituent power. While the majority upheld the 24th Amendment, they devised the Doctrine, intended to ensure that the powers conferred upon the Parliament are not exercised to alter the Constitution's fundamental foundation.[19] S.M. Sikri J. observed that the basic foundation cannot be destroyed by any form of amendment.[20] In effect, the constituent power of the Parliament was subjected to a novel form of judicial review. Such a 'basic structure' review ensured that the most fundamental or basic features of the Constitution were not damaged or destroyed in the exercise of the untrammelled constituent powers. The scope of this operation defines the 'identity' of the Doctrine. The peculiar historical context in which the Doctrine emerged also sets apart this newly evolved form of judicial review from other traditional forms. Therefore, the 'identity' of the Doctrine is distinctly characterised by its application to the constituent powers of the Parliament exclusively.

EXTENDING THE DOCTRINE TO TEST ORDINARY LEGISLATION: THE INITIAL POSITION

Although the Doctrine was originally constructed to test the validity of constitutional amendments in *Kesavananda*, numerous attempts have since been made to extend its applicability to test ordinary legislation enacted by the Parliament or State Legislatures, in the exercise of the legislative powers conferred by Article 245[21] read with Art. 246[22] of the Constitution. At the outset, it is pertinent to frame two points of consideration – the 'Why' and the 'How'. The 'Why' examines the purpose of such an extension and its consequential advantages (or drawbacks). The 'How' explores the manner of articulation of the Doctrine so as to make it suitable for limiting a kind of power (legislative, as opposed to the constituent) — for which it was not originally designed. Before engaging with the relevant judgements of the Supreme Court, it would be useful to consider other recognised forms of judicial review concerning the exercise of legislative powers.

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[19] N.A. Palkhivala, *Fundamental Rights Case: Comment*, 4 SCC JOURNAL 57, (1973).
[20] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 293.
[21] INDIA CONST. art. 245.
[22] INDIA CONST. art. 246.

A. JUDICIAL REVIEW OF LEGISLATIVE POWERS

The legislative powers of the Parliament and the State Legislatures i.e., the ordinary law-making powers, are delineated in Articles 245[23] and 246[24] of the Constitution. Whereas Art. 245 of the Constitution, in first impression, provides for territoriality of ordinary laws and Art. 246 of the Constitution provides for subject-matter division; three aspects of judicial review may be culled out, termed as 'Legislative Competence' Review. *First*, review of compliance with other provisions of the Constitution in as much Art. 245[25] begins with a subjection clause; *second*, a review of territorial operation; and *third*, a review of the subject matter of enactment being in accordance with the heads of legislation in Schedule VII[26] of the Constitution. Another kind of judicial review is provided under Art. 13 of the Constitution,[27] which may be termed a 'Part III compliance' review. It provides that no law (including any ordinary legislation) can be made in violation of Part III of the Constitution.[28] As such, the Indian Constitution places only two restrictions on the ordinary law-making power of the Parliament, namely lack of legislative competence and violation of fundamental rights. There is no third ground.[29]

Therefore, there exists a well-established distinction between the judicial review of ordinary legislative power, which is expressly provided in the Constitution itself, and the judicial review of an otherwise unfettered constituent power, which was developed as a necessary measure in *Kesavananda*. In the backdrop of this understanding, the following section analyses the approach of the judiciary to the key issue of expansion of the Doctrine in the twentieth century. Whereas the decisions directly addressing the key issue are analysed in the first part; the decisions indirectly involving the key issue, such as instances where the Doctrine was

[23] INDIA CONST. art. 245.
[24] INDIA CONST. art. 246.
[25] INDIA CONST. art. 245.
[26] INDIA CONST. sch. VII.
[27] INDIA CONST. art. 13.
[28] INDIA CONST. art. 13, cl. 2.
[29] State of A.P. v. McDowell & Co., (1996) 3 SCC 709.

directly applied to ordinary laws without considering the question of extension in the first place, are critically examined in the second part.

B. PART 1: EARLY DEBATES

The early phase of development comprises two decisions of the Supreme Court, rendered proximate in time to one another. The period immediately succeeding *Kesavananda*, precisely the seventies and eighties, witnessed rigorous investigation into various facets of the newly evolved doctrine. The myriad socio-political circumstances, such as the electoral malpractices issue of Indira Gandhi, corruption allegations against the Karnataka Chief Minister, etc., that emerged in the said period transformed into politico-legal issues involving fundamental questions of constitutional law upon reaching the gates of the Apex Court. However, the scope of this part is limited to examining the decisions where the key issue was specifically considered at length, enabling us to assert the initial position distinctively.

The *Election* case

> *"The concept of a basic structure as brooding omnipresence in the sky apart from the specific provisions of the Constitution is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law."*[30]

The Doctrine was revisited for the first time post-*Kesavananda* in the matter of *Indira Nehru Gandhi v. Raj Narain,*[31] popularly known as the *Election* case of 1975. For this reason, it deserves a detailed examination. Along with the challenge to clause (4) of Art. 329A of the Constitution, inserted vide the 39th Amendment,[32] the validity of the Representation of the People (Amendment) Act, 1974 and the Election Laws (Amendment) Act, 1975 was also assailed on the grounds that they destroyed the basic structure. The 5-Judge Bench, while considering *Kesavananda* to be a binding precedent, proceeded to consider the key issue of extension of the Doctrine in the following terms.

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[30] Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, ¶ 357.

[31] *Id.*

[32] INDIA CONST. art. 329A, cl. 4, *amended by* The Constitution (Twenty-fourth Amendment) Act, 1976.

AN Ray, CJ. expressly rejected such an extension, arguing that it would equate constituent powers with legislative powers.[33] This is better understood along the lines of Kelsen's Hierarchy of Norms,[34] which theorises a hierarchical legal order where one legal norm draws its validity from a higher legal norm and this regression continues till a basic self-validating basic norm is reached.[35] In a similar vein, Ray C.J. appears to suggest that while the Doctrine, controls amendments to the *Grundnorm*, it does not extend direct control over the enactment of general legal norms, which are governed by the *Grundnorm* itself as this would break the sequential chain of regression. He further observes, that in view of the specific restrictions on the plenary legislative powers set forth in Articles 245 and 246 of the Constitution, accepting the extension would amount to "*re-writing of the Constitution and robbing the legislature of acting within the framework of the Constitution*".[36] He also expressed concerns about the ensuing practical difficulties, noting that allowing the extension would subject every piece of ordinary legislation, which are far more common than constitutional amendments, to challenges based on violations of the Doctrine, even though such legislation was enacted within the scope of the plenary powers of the legislature.

While H.R. Khanna J. opted to not address this issue,[37] K.K. Mathew J., in his concurring opinion, first articulated his view that ordinary laws could not be tested for basic structure violations.[38] His analysis deepened in response to the respondent's contention that even if Art. 14 of the Constitution was not recognised as part of the basic structure in *Kesavananda*, the concept of 'equality' was an essential feature of democracy and the rule of law. He examined the interplay between concepts like equality, rule of law, etc. and the specific provisions of the Constitution to conclude that such concepts, by themselves, are inherently ambiguous, and

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[33] Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, ¶ 132.
[34] RICHARD TUR & WILLIAM TWINING, ESSAYS ON KELSEN, at 111 (Oxford University Press, 1986).
[35] HANS KELSEN, PURE THEORY OF LAW, at 226 (University of California Press, 1st ed. 1967).
[36] Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, ¶ 134.
[37] *Id.* ¶ 239.
[38] *Id.* ¶ 317, 329.

their 'genuine' forms, as sought to be guaranteed by the 'Indian Democratic Republic', are subsumed within specific provisions of the Constitution.[39]

The discussion that follows offers key insights into the 'identification' of basic features, in contradistinction to the 'idea' of the Doctrine. Mathew J. emphatically remarks that *"[t]o be a basic structure, [the feature concerned] … must be a terrestrial concept having its habitat within the four corners of the Constitution*".[40] In this sense, applying the Doctrine to an otherwise constitution compliant ordinary legislation would amount to testing the said ordinary legislation on the strength of some imported concept, foreign to the enacted provisions of the Constitution. Mathew, J. strictly disapproves of such adventurism.[41] This understanding has a significant bearing on the 'Why' question insofar as the purpose of fancying such an extension is itself questioned. If the basic features are to be located in specific provisions of the Constitution, then the inquiry should directly proceed with examining the ordinary legislation's compliance with the provisions of the Constitution rather than treading the tricky and convoluted path of the basic structure review. Mathew J. expressed similar concerns by noting that what is put forth as a 'basic feature' is oftentimes a political term, prone to contradictory meanings by its very nature.[42] As such, in light of express limitations, he refused to read in any limitations of basic structure in Articles 245 and 246 of the Constitution.

However, M.H. Beg J. observed that the Doctrine can be invoked to test the validity of both – constitutional amendment and ordinary law because "*ordinary law making itself cannot go beyond the range of [the] constituent power*".[43] This is again another strand of interpretation of Kelsen's theory. Although there is no doubt that lower legal norms cannot go beyond higher legal norms, the nuance lies in the approach of testing the same. The nuance lies in appreciating that Kelsen's legal order is not a higher legal order directly controlling all other dissimilarly placed lower orders, rather, it is a hierarchical mechanism where one controls the other and the other, in turn,

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[39] *Id.* ¶ 343.
[40] *Id.*
[41] *Id.* ¶¶ 347-359.
[42] *See* SAMUEL EDWARD FINER, COMPARATIVE GOVERNMENT, at 62-63 (The Penguin Press, 2nd ed., 1970).
[43] Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, ¶ 622.

controls yet another. Nevertheless, the observations by Beg J. form an obiter dictum as he fairly notes that at the said stage, he was only concerned with the question qua constitutional amendment.[44]

YV Chandrachud J. adopts an approach similar to Ray CJ. as he expressly rejected the extension of the Doctrine primarily because the same does not flow from *Kesavananda*. Although this proposition appears alluringly simple, it highlights the 'identity' argument for non-extension. That is to say, the 'identity' of the Doctrine as a restriction on the constituent power of the Parliament, and none other, should be preserved unless compelling reasons for extension are found. Interestingly, Chandrachud J. also gives his own interpretation of the argument based on Kelsen's Theory by noting that "*certain limitations operate upon the higher power for the reason that it is a higher power … the two powers, though species of the same genus, operate in different fields and therefore [are] subject to different limitations*"[45]. In a way, this observation directly addresses Beg J.'s concerns in a manner similar to the reasoning given above.

Therefore, what emerges is that the majority had a consensus on the position that the Doctrine cannot be extended to test ordinary legislation, with multiple lines of reasoning offered to substantiate the same.

The *Inquiry Commission* case

Shortly after the express rejection to extend the Doctrine in the *Election* case, a backdoor entry to the same was sought to be made in State of Karnataka v. Union of India[46] (**"Inquiry Commission case"**). Invoking the original jurisdiction of the Supreme Court under Art. 131 of the Constitution, the State of Karnataka challenged the Constitution of an inquiry commission looking into corruption allegations against the Chief Minister and other ministers of the State.[47] Although the State failed in establishing a violation of an express provision of the Constitution; it took

[44] *Id.*
[45] *Id.* ¶ 692.
[46] State of Karnataka v. Union of India, (1977) 4 SCC 608.
[47] The Commissions of Inquiry Act, 1952, § 3, No. 60, Acts of Parliament, 1952.

recourse to the Doctrine to sustain its "gallant attacks".[48] It assailed the law on the basis of concepts such as 'basic scheme' and 'fundamental backbone of the Centre-State relationship', which was essentially a plea of basic structure violation, albeit not argued candidly in view of the *Election* case being decided just two years earlier. Such a 'strategy' invited a divided opinion by the 7-Judge bench.

N.L. Untwalia J., speaking for P.N. Singhal, Raja Jaswant Singh JJ., and himself, delivered the majority opinion on this limited issue of extension. The majority expressly rejected the State's submission by affirming the view in the *Election* case (specifically endorsing the view of YV Chandrachud J. thereof).[49] It was pointed out that the theory of implied prohibition or limitation has been rejected time and again in India and elsewhere; thus, no such limitations of the 'basic scheme' can be read in Articles 245 and 246 of the Constitution.

Although the separate view of M.H. Beg C.J. forms a minority on this limited issue of extension, it deserves careful consideration as he attempts to improve upon his reasoning in the *Election* case. At the outset of his opinion, he offers sound advice that one must not apply the Doctrine merely because of the binding nature of *Kesavananda*, rather, one must judiciously identify the specific "*type of cases to which [the Doctrine] could and other to which it could not apply*".[50] Further, he observes that the basic structure emerges from nothing but a multi-provisional interpretation of the Constitution. To him, the basic structure is not "*floating, like a cloud in the skies, above the surface of the Constitution and outside it or one that lies buried beneath the surface*", rather, it is "*nothing more than a set of obvious inferences … arrived at by applying the established canons of construction*".[51] This understanding most closely resembles Mathew J.'s line of reasoning in the *Election* case qua 'identification' of basic features.

However, in what marks a shift in the approach, he revisits his opinion in the *Election* case to suggest that although the Doctrine, in the sense it evolved in *Kesavananda*, does not extend to the legislative sphere and is

[48] *Id.* ¶ 128.
[49] *Id.* ¶ 269.
[50] *Id.* ¶ 129.
[51] *Id.* ¶ 141.

limited to the sphere of constituent powers only; but there are certain imperatives necessarily flowing from the basic structure of the Constitution, i.e., from multi-provisional interpretation, that deserve to be treated similarly to its express provisions.[52] These imperatives may nonetheless be applied to test the validity of ordinary laws, in the same manner that the express provisions are applied.[53] This line of reasoning perhaps conflates the 'identity' of the Doctrine with the method of 'identifying' the basic features.

It must be noted that the 'identity' of the Doctrine still lies in its operation on the constituent powers, which ensures that the most fundamental features of the Constitution are not damaged in its exercise. The mere fact that the specific basic features are 'identified' using a multi-provisional interpretative technique does not alter the heart and soul of the Doctrine as a limitation on the constituent power. Hence, merely because the identification technique is relatable to the phrase "*subject to provisions of the Constitution*" of Art. 245, the Doctrine should not be readily extended to the sphere of legislative powers as well. In our view, this does more harm than good. Attributing such elasticity to the Doctrine may potentially reduce it to a tool of convenience, thereby diluting its identity. Such a sea change in the Doctrine's identity, i.e., its disassociation from its very origins in the sphere of constituent powers, would perhaps render it bereft of any identity at all.

Even Beg, C.J. appears to be conscious of such consequences as he takes cognizance of the fact that the Doctrine cannot be extended to the legislative sphere "*in that sense*"[54]. The perils of construing the technique of identification of the Doctrine as its independent identity are highlighted when he asserts that "*the basic scheme of the Constitution could certainly be invoked*"[55] to invalidate an ordinary central law when it operates on a subject matter that pertains either exclusively to the domain of constitutional powers or to State's legislative powers. Indeed, there is no debate that Parliament cannot amend the Constitution or encroach on State List

[52] *Id.* ¶146.
[53] *Id.*
[54] *Id.*
[55] *Id.* ¶ 148.

entries in the exercise of its legislative power, but this is properly assailed as a violation of Art. 246 and not of some 'basic scheme' or 'basic feature' of the Constitution. Challenges to such actions of the Parliament must be sharp and clearly defined, eliminating the exercise involved in finding the contours of the said 'basic scheme' or 'feature'.

It appears that Beg C.J., in an attempt at crystallising the basic structure as a "*mode of interpreting the Constitution only*"[56], seemingly revived the theory of 'implied limitations', which was expressly rejected by the majority in *Kesavananda*. Krishnaswamy rightly remarks that Beg C.J. attempted to justify what was expressly rejected by turning to provisions of the Constitution and re-characterising it as a theory of 'necessary implications'. [57] However, neither does Beg C.J. go on to overrule the *Election* case nor does he expressly distinguish it despite discussing the same at length.

Be that as it may, Beg C.J.'s postulation and acceptance of extending the Doctrine to test ordinary legislation form a minority view on this limited issue. The majority view, as authored by Untwalia J., for Singhal, Singh J., and himself, that no implied limitations of basic scheme can be read in Articles 245 and 246 remains the view of the 7-Judge bench. Therefore, there was a consistent judicial opinion against the extension of the Doctrine in the initial stage of development.

C. PART 2: PHASE OF DISORDERLY DEVELOPMENTS

Having examined the decisions where the Apex Court, specifically addressed the key issue, this part now turns to other decisions that shaped the contours of the debate, albeit not considering the scope of the Doctrine as a core issue for determination. This part highlights the judgments that muddled the debate by dealing with the Doctrine in a roundabout manner, without actually investigating its 'identity' and applicability in the first place. Our attempt in this part is to not only highlight the tangents of the central debate, which have arisen due to the haphazard manner of dealing with the Doctrine but also to critically examine the said decisions in particular and harmonise them in general.

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[56] *Id.* ¶ 150.

[57] KRISHNASWAMY, *supra* note 6, at 62.

The *Ayodhya Acquisition* case

One of the rare instances where the Doctrine was extensively discussed to test the vires of an ordinary legislation is that of *M. Ismail Faruqui v. Union of India*[58] (**"Ayodhya Acquisition case"**). Surprisingly, the binding ratios of the *Election* and *Inquiry Commission* cases as regards the extension of the Doctrine were not even referred to, much less considered, in this decision. This raises serious concerns about the propriety of the Court's approach. As such, this decision requires detailed independent consideration. The petitioners herein mounted a composite challenge against an ordinary law[59] on the twin grounds, namely violation of secularism and rule of law, being basic features, and of Articles 25, 26, along with Art. 14 of the Constitution. JS Verma J., speaking for Venkatachaliah C.J., A.N. Ray J., and himself, addressed the arguments on secularism and basic structure at length rather than delving into the contours of the challenge based on specific constitutional provisions. S.P. Bharucha J., speaking for A.M. Ahmadi, J. and himself, delivered the minority opinion, observing that the provisions of the Act effaced the principle of secularism from the Constitution.[60]

Despite the division of the bench on certain matters of merits, there was a consensus on the invalidity of sub-section (3) of section 4, which provided for abatement of all pending suits and legal proceedings in respect of rights, title and interest in the disputed property. However, even in this agreement, the majority and the minority opinions resorted to contrasting approaches. The majority held that since the issues framed in the simultaneous reference under Art. 143(1) of the Constitution did not adequately cover the issues framed and defences advanced in the pending suits, it was not an effective alternative dispute resolution mechanism.[61] Therefore, the majority struck down the impugned provision as violative of the Rule of Law, for it extinguished the judicial remedy for the resolution of the dispute.[62]

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[58] M. Ismail Faruqui (Dr) v. Union of India, (1994) 6 SCC 360.
[59] The Acquisition of Certain Area at Ayodhya Act, 1993, No. 33, Acts of Parliament, 1993.
[60] M. Ismail Faruqui (Dr) v. Union of India, (1994) 6 SCC 360, ¶ 140.
[61] *Id.* ¶ 61, 62.
[62] *Id.* ¶ 96(1).

The minority, on the other hand, adopted a more rigorous inquiry by resorting to the canons of statutory interpretation, such as reading the statute as a whole. The minority noted that whereas Section 4(3) of the impugned Act abated the disputes pertaining to title and interest in the acquired property, they were essentially revived by the operation of Section 8 of the impugned Act,[63] which provided for the award of compensation to the owners of the acquired property. Section 8(3) provided for the appointment of a Claims Commissioner who was required to decide the claim of the owner or any person having a claim against the owner as per the procedure devised by himself.[64] Essentially, the issues in the pending proceedings relating to the title and interest in disputed property were to be adjudicated by a quasi-judicial delegate, i.e., the Claims Commissioner with no right of appeal, review, or reference being provided. The minority considered such an arrangement to be arbitrary and unreasonable and struck down the impugned provision.[65]

The approach of the minority, in this limited regard, offers a more convincing basis whereby the offending part of Section 4 was struck down as violative of Art. 14 of the Constitution inasmuch as it was arbitrary and unreasonable. The minority did not invoke the Doctrine yet arrived at the same result and in a more convincing manner. This judgement is an apt example of how extending the basic structure review to ordinary legislation robs the review of any critical enquiry into the subject matter. It is rather prone to being used as a convenient tool that may be contended and applied in an omnibus fashion.

The *Kanungo, APSC, and Indra Sawhney* Trinity

The woes highlighted above are further aggravated by the approach adopted in *GC Kanungo*[66], APSC[67], and *Indra Sawhney-II,*[68] where the Court invoked the basic features despite none being warranted. The impugned legislations in these cases were challenged for violation of specific

[63] *Id.* ¶ 127, 133.
[64] *Id.* ¶ 133.
[65] *Id.*
[66] G.C. Kanungo v. State of Orissa, (1995) 5 SCC 96.
[67] A.P. State Council of Higher Education v. Union of India, (2016) 6 SCC 635.
[68] Indra Sawhney v. Union of India, (2000) 1 SCC 168.

provisions of the Constitution, calling upon the Court to undertake a 'Part III compliance' review. However, the Court seemed to entirely sideline these arguments in favour of directly applying the Doctrine in vacuo. At this juncture, it would be fair to note that such an approach is not solely attributable to the zealousness of the Courts in invoking the Doctrine, but also to the confusion created by the inconsistent approach of the courts. *Krishnaswamy* also argues that the approach in these decisions blur the distinction between the basic structure review based on general constitutional rules and the 'Part III compliance' review based on specific constitutional provisions.[69]

In any case, these decisions, where the courts have not satisfactorily appreciated the composite challenges i.e. those based on constitutional provisions as well as the Doctrine, go against the settled position laid down in the *Inquiry Commission Case* and the *Election Case*. This approach of the Court makes the Doctrine a tool of easy challenge and adjudication, thereby depriving the opportunity for independent evolution of the provisions of the Constitution.

The *Rajya Sabha* case

A 5-judge bench was again invited to harmonise this disorderly development in the Doctrine's application in *Kuldip Nayar v. Union of India*, popularly known as the *Rajya Sabha* case.[70] Herein, the petitioner assailed the removal of the domicile requirement for being elected to the Council of States[71] on grounds of violation of the principle of federalism, a basic feature. In its attack, the Petitioner relied upon *DC Wadhwa* to illustrate an earlier occasion where an ordinance was struck down for being "*repugnant to the constitutcional scheme*". Further reliance was placed on *Indra Sawhney – II* to prevent the striking down of ordinary legislation for violation of the basic structure.

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[69] KRISHNASWAMY, *supra* note 6, at 126.
[70] Kuldip Nayar v. Union of India, (2006) 7 SCC 1.
[71] The Representation of the People (Second Amendment) Act, 2003, No. 2, Acts of Parliament, 2004.

Y.K. Sabharwal C.J., speaking for the bench unanimously, observed that the view taken in *DC Wadhwa* was in "*face of clear violation of the express constitutional provisions*"[72] and not the basic structure in vacuo. As regards *Indra Sawhney – II*, he noted that the Court was essentially dealing with a question of violation of equality and not the basic structure *per se*. It was further observed that in the cases relied upon by the Petitioner, namely *DC Wadhwa*, *Indra Sawhney – II*, and *L. Chandra Kumar*, the question regarding the scope of the Doctrine was neither raised nor considered and the observations were merely obiter dicta.

The Court reiterated the *Election* case and the *Inquiry Commission* case as the settled law of the land.[73] However, it must be appreciated that the matter before the Court presented it with an opportune moment to harmonise the approach adopted in the *Ayodhya Acquisition* case as well; but neither the parties nor the judges averted, much less applied, themselves to the same. Therefore, the fact that both the decisions - the *Ayodhya Acquisition* and the *Rajya Sabha*, were rendered by coordinate benches of 5-Judges does not allow us to assert that the position was 'settled' in this case.

BROADENING THE SCOPE: THE TRIBUNALISATION SAGA

The previous section of this essay was an attempt to examine and harmonise the decisions of the Supreme Court rendered in contexts of various ordinary legislations and distinct themes. Although a common string was identified in the said decisions because the Doctrine came to be discussed directly or indirectly, there was no uniformity as regards their individual merits. This section goes a step further and identifies a series of judgements that concern uniform issues of judicial independence and separation of powers, where the key issue of extending the Doctrine's application has also been considered. The saga pertains to the decisions tracing the emergence and development of tribunals in India, with a hint of higher judiciary independence as well.

S.P. Sampath Kumar v. Union of India[74]

[72] Kuldip Nayar v. Union of India, (2006) 7 SCC 1.
[73] *Id.* ¶¶ 96, 105.
[74] S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124.

DELIMITING THE DOCTRINE: AN ARGUMENT AGAINST BASIC STRUCTURE REVIEW OF ORDINARY LAWS

The earliest case pertaining to tribunalisation in India saw two novel approaches to the issue of extension being adopted by the 5-Judge bench of the Supreme Court to a challenge to the exclusion of High Courts' writ jurisdiction by an ordinary law[75] enacted consequent to Art. 323A of the Constitution.[76] The ouster of jurisdiction was primarily assailed as violative of the basic feature of judicial review. This was essentially a challenge to sub-clause (d) of clause (2) of Art. 323A of the Constitution as it empowered an ordinary law to provide for such an ouster.

Ranganath Misra J. speaking for V. Khalid, G.L. Oza, M.M. Dutt JJ. and himself, in his lead opinion, endorsed Y.V. Chandrachud's view in *Minerva Mills*[77] whereby it was suggested that ouster of the High Court's jurisdiction was permissible if the Parliament establishes an "*effective alternative institution for judicial review*". In this context, he examines whether the Administrative Tribunal proposed to be established as an effective substitute for High Courts. Although he does not invalidate any provision on the basis of the Doctrine or any other express provisions of the Constitution, he indicates certain amendments required to be brought in to make the impugned Act constitution-compliant. His conclusions in this regard are largely based on principles of acceptable justice and incentives for judges.

P.N. Bhagwati C.J. in his concurring opinion, adopted an innovative approach whereby instead of testing the impugned Act on grounds of basic structure violation directly; he first interpreted Art. 323A of the Constitution in a basic structure compliant manner and then proceeded to test the impugned Act for compliance with the so construed Art. 323A of the Constitution.[78] Such an approach is not found in any earlier decisions and merits a closer examination. He observed that if the 42nd Amendment is construed to have inserted Art. 323A of the Constitution in such a manner that allows exclusion of Articles 226 and 227 jurisdictions without the establishment of an "*effective alternative institutional mechanism or arrangement for judicial review*", it would fall foul of the Doctrine.[79] Therefore, the

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[75] The Administrative Tribunals Act, 1985, No. 13, Acts of Parliament, 1985.
[76] INDIA CONST. art. 323A.
[77] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.
[78] S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124, ¶¶ 4-5.
[79] *Id.* ¶ 4.

requirement of the effective substitute must be "*read as implicit in this constitutional amendment*".[80] This approach enabled him to then test the validity of the impugned Act based on the parent constitutional provision itself.

Notably, the constitutional validity of Articles 323A(2)(d) and 323B(2)(d) of the Constitution was challenged as being violative of the Doctrine in *L. Chandra Kumar v. Union of India*.[81] The seven-judge bench invalidated the impugned provisions of the Constitution because they excluded the jurisdiction of the Supreme Court under Art. 32 and of High Courts under Articles 226 and 227. Consequently, Section 28 of the Administrative Tribunals Act, 1985, which was enacted "*under the aegis of the said provisions of the Constitution*"[82] was also struck down. Whereas this decision has been understood by scholars[83] and courts in subsequent judgements[84] as an instance of the application of the Doctrine on ordinary legislation — specifically noting that Section 28 of the said Act was held unconstitutional, it is important to appreciate that Section 28 of the said Act was not tested on the Doctrine itself but merely invalidated as a consequence of its parent constitutional provision being invalidated to that extent.

Union of India v. R. Gandhi[85] (MBA-I)

The second case in the series revisited Beg C.J.'s minority view from the *Inquiry Commission* case permitting the Doctrine's extension, perhaps because he authored the majority view as regards other issues therein. The appellants mounted a challenge to the transfer of the High Courts' entire company law jurisdiction to the National Company Law Tribunal[86] as being violative of the Rule of Law, separation of powers, and independence of the Judiciary. To this, the Union of India specifically contended that ordinary legislation cannot be challenged for violation of the Doctrine.

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[80] *Id.*
[81] L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.
[82] *Id.* ¶ 99.
[83] *See* Pathik Gandhi, *Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case),* 4 INDIAN J. OF CONST. L. 47 (2010).
[84] *See* Madras Bar Association v. Union of India, (2022) 12 SCC 455, ¶ 77.
[85] Union of India v. R. Gandhi, (2010) 11 SCC 1.
[86] The Companies (Second Amendment) Act, 2002, No. 11, Acts of Parliament, 2002.

This set the stage for the five-judge bench to revisit the age-old debate in the modern context.

RV Raveendran J. delivered the unanimous opinion of the bench. The Court, after briefly considering various judicial pronouncements and Memorandum by framers of the Constitution[87] on the independence of the judiciary, noted that the independence of the judiciary has always been recognised as a part of the basic structure of the Constitution. A similar exercise was undertaken with respect to the separation of powers, concluding that it too forms a part of the basic structure.

The Court then considered the *Election* case and the *Inquiry Commission* case to hold that although ordinary legislation cannot be assailed on grounds of violation of the Doctrine, it can certainly be "*challenged as violative of constitutional provisions which enshrine the principles of Rule of Law, separation of power and independence of Judiciary*".[88] Consequently, the offending parts of the impugned Act were struck down as unconstitutional by tracing the principles contented to specific provisions of the Constitution.

A significant takeaway from this decision is however that by this approach of implying provisions as 'enshrined' in the provisions, the five-judge Bench essentially adopted the reasoning of Beg C.J. in the Inquiry *Commission* case. The Court failed to note that although Beg C.J. authored the lead opinion in the *Inquiry Commission case*, his line of reasoning as regards the applicability of the Doctrine formed a minority in the face of the other three judges' contrary views. This marked the beginning of the broadening of the Doctrine in the modern context which later culminated into the Doctrine having acquired a secondary meaning, as illustrated in the forthcoming portion of this section of the essay.

MBA-II (2014)

[87] B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION 196 (Law and Justice Publishing Company, 1st ed., 1967).
[88] Union of India v. R. Gandhi, (2010) 11 SCC 1, ¶ 41.

Unlike the flawed approach of Beg C.J.'s minority in *MBA-I*, the five-judge Bench in *Madras Bar Association v. Union of India*[89] attempted to articulate a constitutional basis for the extension of the Doctrine for the first time. This was a welcome approach given the dearth of judicial application of mind in this regard. Here, the petitioner had challenged the National Tax Tribunal Act, 2005 and Art. 323B, inserted vide Constitution (forty-second Amendment) Act, 1976, as being violative of separation of powers, rule of law, and judicial review.

J.S. Khehar J., speaking for R.M. Lodha, the C.J.I. J.S. Khehar, Jasti Chelameswar, A.K. Sikri JJ. and himself, addressed the key issue of the extension of the Doctrine and approached it in a unique manner. He attempted to provide a constitutional basis for such an extension in the following manner. He first presumed that the Parliament was competent to enact ordinary legislation in terms of Articles 245 and 246 read with the relevant entries of the Seventh Schedule of the Constitution. He then referred to the procedure outlined in Part XI of the Constitution only to conclude that the legislative power conferred by Part XI has one overall exception, which "*undoubtedly is, that the basic structure of the Constitutional cannot be infringed, no matter what*"[90]. He then notes that various judicial pronouncements have consistently held that an amendment to the provisions of the Constitution would not be sustainable if it violates the basic structure even though the amendment would have been carried out by following the procedure contemplated in Part XI of the Constitution. Therefore, in the view of the majority, "*even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the basic structure would be unacceptable*"[91].

It is imperative to note that Khehar J. never actually examined the text of either Articles 245 and 246 or Article 368. Whereas the earlier judicial pronouncements adopted the aforementioned view in the context of Art. 368 precisely because it contained a non-obstante clause excluding any scrutiny on the basis of other constitutional provisions, whereas Art. 245 expressly subjects the legislative power of the Parliament to other provisions of the Constitution. The non-appreciation of this distinction by

[89] Madras Bar Association. v. Union of India, (2014) 10 SCC 1.
[90] *Id.* ¶ 65.
[91] *Id.*

Khehar J. led him to a flawed conclusion. This illustrates an instance where the 'how' question was articulated yet the 'why' question remained unanswered. This approach is in teeth of the *Election* case and the *Inquiry Commission* case as an application of the Doctrine to an otherwise constitution compliant ordinary legislation, as presumed, would amount to construing the basic structure as something beyond or in addition to the provisions of the Constitution, which is an impermissible construction in view of the settled law.

The NJAC case

The tussle between the Parliament and the Judiciary witnessed yet another milestone when the Parliament enacted the Constitution (Ninety-ninth Amendment) Act, 2014[92] and consequently, the National Judicial Appointments Commission Act, 2014[93] (**"NJAC Act"**). This also marks a sharp disagreement between two separate opinions regarding the debate of extension in a well-articulated manner and thus deserves careful examination.

The ordinary legislation, along with the constitutional amendment, essentially replacing the then prevailing system of 'Collegium', was assailed in *SCAORA v. Union of India,*[94] as being violative of primacy and independence of the judiciary in matters of appointment and transfers, which are basic features of the Constitution. The respondents promptly countered this by contending that the vires of an ordinary legislation could only be assailed on limited grounds of legislative competence and violation of Art. 13. The respondents correctly identified that the competence review under Article 245 required compliance with all the provisions of the Constitution and not merely Part III provisions. These contentions again saw the bench divided with Lokur J. and Khehar J. rendering diametrically opposite opinions; the rest expressing no opinion.

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[92] INDIA CONST., art. 342A. cl. 1 & 2, *amended by* The Constitution (One Hundred and Second Amendment) Act, 2018.

[93] The National Judicial Appointments Commission Act, 2014, No. 40, Acts of Parliament, 2014.

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

Lokur J. began his inquiry by discussing the nature of the Doctrine, as it evolved in *Kesavananda*. His analysis of *Kesavananda* essentially described the 'identity' of the Doctrine, as we have put it, as being a limitation on the amending power of the Parliament under Art. 368 of the Constitution. He then traced the series of judgements, as if they were a string of pearls, that rejected the extension of the Doctrine to ordinary legislation viz. the *Election case*, the *Inquiries case*, *Kuldip Nayar*, and *Ashoka Kumar Thakur*. He does take note of the divergent opinion expressed by Khehar J. in *MBA-II*, but proceeds to adopt the view of the seven-judge bench in the *Inquiries case* as a binding precedent. He then adverted to the submission of the respondent that the challenge to the 99th Constitution Amendment Act and the NJAC Act shall be bifurcated for the grounds of challenge and principles applicable to both are quite distinct and independent.[95] Lokur J. endorsed this view by consolidating the available grounds of challenge for both types of laws; whereas a constitutional amendment can be assailed only on violation of the basic structure, an ordinary legislation can only be assailed on *(i)* lack of competence of the Legislature, *(ii)* violation of Art. 13 of the Constitution, *(iii)* enactment contrary of express prohibitions in the Constitution,[96] and *(iv)* procedural irregularity.[97]

Per contra, Khehar J. found this to be an opportune moment to develop his line of reasoning expressed in *MBA-II*. He devoted an entire chapter, so to speak, in his lead opinion to substantiate the same. His inquiry, however, appears to suffer from the same vice of 'identity' and 'identification' conflation. Since the 'basic features' are essentially 'determined' by deducing concepts from a collective reading of the provisions of the Constitution, he observed that a challenge to an ordinary legislation on the grounds of basic structure violation is to be understood as a challenge on the basis of such provisions read collectively and harmoniously.[98] It thus logically flows that finding a breach of basic features is equivalent to finding a breach of a bunch of provisions read together. In postulating so, he

[95] *Id.* ¶¶ 993-994.
[96] *See* Chhotabhai Jethabhai Patel v. Union of India, 1962 Supp (2) SCR 1.
[97] *See* Kihoto Hollohan v. Zachillhu, 1992 Supp (2) SCC 651, ¶ 61-62.
[98] Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 1, ¶ 339.

attempted to provide a novel reason in favour of extending the scope of the Doctrine.

Whereas the previous debates were largely concerned with the contours and ways of extending the scope, not much was said about the supposed advantages that such an extension would bring. Simply put, Khehar J. offered the advantage of convenience. According to him, 'basic structure' was to be construed as a bundle or a basket of provisions of the Constitution so that all of the constituent provisions need not be reiterated time and again. It would "*obviate the necessity of recording the same conclusion, which has already been scripted while interpreting the Article(s) under reference, harmoniously*". As such, he unequivocally concluded that an ordinary legislation can be assailed for violation of any 'basic features' of the Constitution. However, in doing so, it would be technically sound to refer to the provisions that are supposedly violated when a challenge to an ordinary legislation is mounted.

However, this reasoning suffered on two counts. First, it closely resembles the approach of Beg C.J. in the *Inquiries* case and Raveendran J. in *R. Gandhi* and suggests that ordinary legislation may be tested on first derivative concepts of constitutional provisions. While it may be a simple proposition at the first instance, it opened a window for looking into 'necessary implications' of the said concepts itself, in essence, a second derivative of the constitutional provisions. Once allowed, no precise boundaries can be placed on degrees of derivative meanings or interpretations, however remote, that may be devised, argued, and applied in the courts of law.

Per contra, testing the ordinary legislation on the basis of the provisions in the first instance provides a better sense of boundaries in which the derivatives or 'necessary implications' may be devised. Second, it reduces the 'identity' of the Doctrine to a mere placeholder for convenience. Repetition of recording the same conclusions is not a factor, much less a determinative one, in the debate of extending the scope and applicability of the Doctrine. Rather, it is the sanctitude and context in which the Doctrine emerged that is desired to be preserved. However, since the opinions of Lokur J. and Khehar J. were in direct disagreement with one

another and no other opinion was expressed by the rest, no conclusion can be attributed to the view of the bench and the issue was left unanswered.

MBA-III: Evolution of a secondary meaning

Next in the series, *Rojer Mathew v. South Indian Bank Ltd.*,[99] highlights a curious case where neither the parties nor the bench advertised the issue of extension. The petitioners herein had principally challenged a law providing for tribunal reforms[100] as being a colourable exercise of legislative power and a violation of the basic structure.

Gogoi J. speaking for the bench, unanimously acceded to the petitioner's contention that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain.[101] Further, the Court held that the rules providing for the designation of the Secretary to the Government of India in the Ministry or Department under which the Tribunal is constituted as the convener of the Search-cum-Selection Committee were in direct violation of the separation of powers doctrine, thus contravening the basic structure of the Constitution.[102]

Surprisingly, neither the Union of India contended the non-applicability of Doctrine to ordinary legislation nor the court concerned itself with the debate surrounding this issue in the entire judgement. It is perhaps in this background of 'tribunalisation cases' that the Doctrine has acquired a new sense, a new identity, which better resonates with Khehar J.'s understanding of the Doctrine in *NJAC*.

MBA-IV: Distinguishing the Doctrine from the Principles

In what is described by L. Nageswara Rao J. as a sequel to *Rojer Mathew*, a 3-judge bench presided over the challenge to yet another law providing for

[99] Rojer Mathew v. South Indian Bank Ltd., (2020) 6 SCC 1.
[100] The Finance Act, 2017, No. 7, Acts of Parliament, 2017.
[101] Rojer Mathew v. South Indian Bank Ltd., (2020) 6 SCC 1, ¶ 153.
[102] Rojer Mathew v. South Indian Bank Ltd., (2020) 6 SCC 1, ¶ 179.

similar tribunal reforms[103] in *MBA-IV*.[104] The petitioners again mounted a composite challenge of violation of Articles 14, 21, and 50 of the Constitution and of principles of separation of powers and independence of the judiciary.

While *Rojer Mathew* had unequivocally struck down the 2017 Rules as violative of the basic structure of the Constitution, the Court interestingly observed that the 2017 Rules were invalidated as being "*contrary to the principles of the Constitution as interpreted by various decisions of this Court*" in reading *Rojer Mathew*. The issues framed also adopted a similar approach whereby various facets of the 2020 Rules, viz. Seach-cum-Selection Committees, eligibility, appointment, and term of office, were to be tested on the anvil of conformity with 'principles' of judicial dominance or separation of powers or independence of judiciary. It thus emerged that the Court was consciously avoiding any reference to the Doctrine; even in the discussion that ensued. The Court directed various amendments to the 2020 Rules to ensure that they comply with the aforesaid 'principles of the Constitution' and earlier judicial pronouncements; it did not express why any references to the Doctrine were avoided.

However, an understanding that is perhaps forthcoming is that the Court realised that the Doctrine exclusively operates as a limitation on the constituent power of the Parliament only, and it would not be proper to extend it to the ordinary legislative power. This approach of the Court better frames the essence of Khehar J.'s opinion in *NJAC*. Whereas it is certainly in the interest of expediency that the same conclusions regarding constitutional principles such as independence of the judiciary are not reiterated and re-recorded time and again, and a reference to the principle should be construed as a reference to Articles 14, 21, 36, 50, etc. read harmoniously; it does not logically follow that invocation of the Doctrine is *sine qua non* for assailment on violation of principles emergent from multi-provisional interpretation of the Constitution.

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[103] Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and Other Conditions of Service of Members) Rules, 2020.
[104] Madras Bar Association v. Union of India, (2021) 7 SCC 369.

While some challenges to ordinary legislations may be directly relatable to certain specific provisions of the Constitution, as in *Indra Sawhney (II)*, others may be relatable to multi-provisional interpretations. There is no doubt that interpretations emerging from harmonious reading of numerous provisions of the Constitution can be referred to as principles of the Constitution for the sake of convenience; a challenge based on such emergent interpretation need not invoke the unrelated doctrine of basic structure, which operates in a totally different field, merely because the said principle also finds mention as a 'basic feature' in that doctrine. The Court appears to have recognised this very approach, thereby reconciling the substance of Khehar J.'s approach in *NJAC* and the identity of the Doctrine.

MBA-V: Crystallising the difference

The final case in the series,[105] at least for the time being, offers key insights into the modern understanding of the Doctrine. It bolsters the argument for the preservation of the Doctrine's identity as against its extension to ordinary legislation. This case saw a challenge to the Tribunal Reforms Ordinance, 2021 for violation of the trinity of Articles 14, 21, and 50 of the Constitution. It was asserted that the Ordinance was violative of the 'principles' of separation of powers and independence of the judiciary. The respondent naturally contended that ordinary legislation or an instrument of like nature (such as in Ordinance) cannot be challenged on any 'concept or notion', rather, the challenge must be rooted in some express provisions of the Constitution.

L. Nageswara Rao J., in his lead opinion, preliminarily observed that the scope of judicial review is the same for ordinances and ordinary legislations as the promulgation of ordinances is an exercise of legislative power by the President only.[106] He then reiterated the trite law that there are only two types of judicial review of ordinary legislation; 'competence review' i.e. violation of Articles 245 or 246 of the Constitution and Art. 13 review i.e., violation of provisions of Part III of the Constitution. While noting that judicial interpretation has read in 'manifest arbitrariness' as another ground under Art. 14 of the Constitution, there exists no other ground on which

[105] Madras Bar Association v. Union of India, (2022) 12 SCC 455.
[106] *Id.* ¶ 43.

ordinary legislation can be struck down.[107] While striking down the impugned provisions as improper attempts at legislative overruling, he construed 'separation of powers' as emergent from Art. 14.

S. Ravindra Bhat J. in his concurring opinion, resonated Rao J.'s understanding and read the 'principles' as "evident in the Constitution, but not clearly spelt out".[108] He observed that in view of *DC Wadhwa*, *L. Chandra Kumar*, and *Ayodhya Acquisition* cases, among others, the contention of the respondent no longer deserves consideration.[109] The decisions cited by Bhat J. suffer from serious infirmities as regards their precedential value and interpretation, for reasons elaborated previously in this essay. It emanates from his opinion that his insistence lies in the propriety of testing ordinary legislation for violation of 'separation of powers' and not in undertaking a basic structure judicial review. Whereas his approach is limited to testing the efficacy of tribunals as 'substitutes' of the courts they seek to replace in the interests of the independence of the judiciary; his approach is least concerned about the 2021 Ordinance damaging or destroying the basic structure of the Constitution. Thus, Bhat J. in essence followed the multi-provisional approach of Rao J. *albeit* making references to the Doctrine where perhaps none were required.

This marks the end of the third section of the essay but not the saga, as the subsequently passed Tribunal Reforms Act, 2021, stands assailed by the Madras Bar before the Supreme Court.[110]

CONCLUSION

The Basic Structure Doctrine has come a long way since its inception in *Kesavananda*, with its myriad interpretations and understandings. Debates revolving around its meaning, legitimacy, method of determination, standard of review, level of scrutiny, scope of application, and many other facets have attracted considerable judicial scrutiny and academic scholarship. This essay has attempted to highlight two distinctions to argue

[107] *Id.* ¶ 44.
[108] *Id.* ¶ 73.
[109] *Id.* ¶ 81.
[110] Madras Bar Association v. Union of India, WP (C) No. 1018 of 2021 (S.C.) (Pending).

against the application of the basic structure review of ordinary legislation. The first distinction is between the 'identity' and the method of 'identification' of the Doctrine. Whereas the 'identity', *inter alia*, lends constitutional, sociological, and moral legitimacy to the Doctrine; the multi-provisional method of 'identification' better equips the courts and the scholar to determine what all can be included within the meaning of 'basic features'.

The method of identification is an interpretative aid and not the identity itself. The judicial misconception of the 'identity' and conflation of the same with 'identification' has led to the present position where the Doctrine is essentially understood as a bunch of provisions of the Constitution, clubbed for convenience. As analysed in the 'tribunalisation cases' in the third section, the judge-made law has given a second identity to the Doctrine. There appears to be little or no articulation of the purpose and the basis on which the Doctrine has been extended to test the validity of ordinary legislation. Although it was possible to reconcile the earlier judgments of the twentieth century, as done in the second section, the task of reconciling the later judgments of the twenty-first century poses a newer set of challenges.

This lack of clarity necessitated the development of the second distinction: between the Doctrine and the 'principles' of the Constitution. The 'tribunalisation' judgements drew a false equivalence between the Doctrine and the principles of the Constitution emerging from interpretations of the Constitution. Although the Doctrine was initially developed as a limitation on the constituent powers, which excluded the traditional forms of judicial review, it is now being extensively invoked as a limitation on the ordinary legislative powers, which anyway expressly subjects itself to the constitutional compliance review. The perils of such an extension are apparent. It robs judicial review of its critical investigation in favour of the basic structure review, reducing it to a generic review devoid of rigorous scrutiny.

Apart from the practical difficulties, such extension inflicts a serious dent in the 'identity' of the Doctrine at a normative level. The sanctity of this judicially evolved doctrine that limited the unbridled constituent powers must be preserved by invoking it in the sphere of constitutional

amendments only. While the extant debates often ask "Why not?" extend the Doctrine, this essay counters with a "Why even?".

UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

HARSHIT PATHAK[1] & VASUJIT DUBEY[2]

This article endeavours to analyse the Supreme Court of India's verdict on same-sex marriage, specifically scrutinising the parameters of the right to a civil union for non-heterosexual couples. The initial segment dissects the Court's decision, which expressly negated both the entitlements to marry and engage in civil unions for same-sex couples. Subsequently, the analysis extends to the jurisprudence of dignity as derived from Article 21 of the Indian Constitution, positing that the right to civil union is a logical extension of this constitutional foundation. The subsequent section delves into the transformative ethos of the Indian Constitution, asserting the entitlement of non-heterosexual couples to civil rights. Following this, the fourth part counters the majority's argument pertaining to the separation of powers. The article meticulously scrutinises transnational jurisprudence on civil union rights and elucidates its pertinence. Furthermore, the article delves into the prospect of establishing a parallel legal framework to accommodate the LGBTQIA+ community. In conclusion, the author contends that the right to civil union is inherent, emanating from the constitutional tenets enshrined under Article 21 of the Indian Constitution. The Supreme Court is fervently urged to adjudicate on this matter through a review petition, leveraging transformative and transnational legal principles.

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UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

INTRODUCTION

The Constitutional Bench of the Supreme Court of India in October 2023 delivered one of the most awaited judgments in the case of *Supriya Chakraborty v. Union of India*[3] also known as the Marriage Equality Case. The petitioners prayed for the right to marry for same-sex couples, along with other entitlements such as adoption and maintenance and declaration of entitlements under the Special Marriage Act 1954, accordingly as per the constitutional rights bequeathed to non-heterosexual couples.

The majority consisting of Justices S. Ravindra Bhat, Hima Kohli, and P.S. Narasimha and the minority consisting of Chief Justice D.Y. Chandrachud and Justice S.K. Kaul, with a ratio of 3:2, held that there is no unqualified fundamental right to marry under the Indian Constitution. It further declared that the Special Marriage Act, 1954 is not violative of any fundamental right and cannot be construed in a gender-neutral manner. The right to adoption was also deemed unavailable to non-heterosexual couples. The Court also categorically denied the existence of a right to have a civil union for unmarried same-sex couples, rejecting its recognition under the fundamental rights in the Constitution. However, recently, a review petition was admitted which sought to challenge the judgement in the said case.

The article focuses on emphasising the right of a civil union for same-sex couples and examines its peripheries to include the same within the existing jurisprudence of fundamental rights. *First*, the author explores the feasibility of incorporating the right to a civil union under Article 21 of the Constitution of India. *Second*, relying on the dignity aspect of jurisprudence under Article 21 and keeping the transformative spirit of the Constitution in mind, the author argues for the existence of the right to a civil union under Article 21. *Last*, the author argues that the principle of separation of powers is misconstrued by the Supreme Court in the present case by denying the right to a civil union on the sole ground of violating the same

[3] Supriya Chakraborty v. Union of India (2023) SCC OnLine SC 1348.

separation. By drawing emphasis on transnational jurisprudence, the authors advocate for granting same-sex couples the right to civil union.

UPHOLDING DIGNITY: A CASE FOR CIVIL UNION

One of the essential facets of Justice Chandrachud's minority judgement was the aspect of 'dignity' as an expression of oneself. Prof. Upendra Baxi in Justice Sikri's book aptly remarks on the idea of dignity by elucidating the difference between the Eurocentric *vis-a-vis* non-Eurocentric approach to dignity.[4] The Eurocentric view of human dignity comprises two elements: personhood (moral agency) and the freedom of choice manifested as autonomy.[5] Conversely, the non-Eurocentric approach to dignity perceives dignity as empowerment, grounded on three essential edifices. These include respect for one's capacity as an agent to make one's own free choices, respect for the choices made, and enabling an individual to foster an environment conducive to helping them operate as a source of free will.

The non-Eurocentric view entails seeing dignity as an essential pillar for upholding the core values of the human rights framework. The concept of 'choice' emanates from the foundational principles of personal autonomy, encompassing the right to choose and cohabit with a partner, regardless of gender. The second facet of the non-Eurocentric view of dignity lies in respect for the choices made. The fundamental distinction between the Eurocentric and non-Eurocentric perspectives lies in the element of recognition. The non-Eurocentric viewpoint not only grants freedom but also affords respect for choices and an environment to exercise such choices. This attains significance due to societal acknowledgement, making the right to choose or the right to be in a civil union an integral aspect of dignity.

Justice A.K. Sikri in his book, '*Constitutionalism and Rule of Law*',[6] enlists dignity to have normative as well as a constitutional role. According to him, the normative role of dignity is enacted through three primary mechanisms.

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[4] A.K. SIKRI, CONSTITUTIONALISM AND THE RULE OF LAW: IN A THEATRE OF DEMOCRACY, at 282 (Eastern Book Company, 1st ed., 2023).
[5] *Id.* at 282.
[6] SIKRI, *supra* note 4, at 292.

Firstly, it establishes the foundation for constitutional rights. Secondly, it functions as an interpretative principle guiding the delineation of the scope of constitutional rights. Lastly, it assesses the proportionality of a statute restricting a constitutional right.[7] He goes to the extent of invalidating a statute if it imposes restrictions on a constitutional right, applying the doctrine of proportionality. As elucidated earlier, civil union is inherent to the aspect of human dignity. In light of the proposition made above, the right to live together and obtain legal recognition deserves constitutional recognition.

The United States Supreme Court in the case of *Obergefell v. Hodges*[8] while upholding the sanctity of same-sex marriages described the right to choose or personal choice as fundamental to the idea of personal autonomy which is protected by the American Constitution.

One of the primary arguments on which the Court relied on, was that of a 'positive obligation' instilled upon the State, by the virtue of the rights inherent to individuals, obligated to be fulfilled by the Constitution. The Court interpreted that, the fundamental nature of the institution of marriage instils upon an individual a right to marry which becomes inherently attached to their autonomy, thereby imposing a positive obligation upon the State not only to protect but also enable and enhance this right. A court can enforce such constitutional rights only through writ jurisdiction for which the marginalised community may face significant challenges in assessing this remedy. So, the State under its positive duty can enact a statute which proliferates the remedies thereby securing social welfare and promotion of justice.[9] By drawing on the 'Equal Protection Clause' and the 'Due Process Clause' enshrined in the 14th Amendment[10] of the United States Constitution, the Court interpreted the rights of same-sex couples to marry as being equivalent to those of heterosexual couples. Upholding the idea of equality among individuals, irrespective of their

[7] *Id.* at 292.
[8] Obergefell v. Hodges, 576 US 644 (2015).
[9] Jana Kalyan Das, *'The Judgment of Obergefell v. Hodges and the Philosophical Foundations of Same-Sex Marriage,'* LIVELAW (Dec. 24, 2023), https://www.livelaw.in/articles/same-sex-marriage-american-supreme-court-judgment-obergefell-v-hodges-philosophical-foundations-228469.
[10] U.S. CONST. amend. XIV.

sexual orientation, the Court determined that same-sex couples are entitled to protection by the state, which can be obtained by granting them an equal right to marry.[11]

A similar claim was raised by Justice Chandrachud, which sought to instil a positive obligation on the State. However, Justice Bhat and Justice Kohli dissented stating that the right of civil union imposes a positive obligation on the state to accord recognition to such union or relationship, which according to them would be improper.[12] Also, there were disagreements on the characteristics of the entitlement or corresponding state obligation to create a status through a statute.

The majority affirmed that an unqualified right to marriage is recognised solely within the parameters of the law. He stressed that marriage, as a social institution existing prior to the establishment of the State, does not derive its status from governmental sanction. Thus, the genesis of marriage lies outside the realm of governmental jurisdiction. As a social institution, marriage grants rights endorsed by society rather than bestowed by the State. The law serves merely to acknowledge and legitimise this institution. Therefore, in their view, marriage transcends being merely a collection of rights; instead, it represents a collection of duties and responsibilities. Hence, the minority's claim could not be fructified.

However, taking the essence of *Hodges'* case, it would not be incorrect to state that the association of two consenting adults, irrespective of their sexual orientation, to live together is derived from Article 21 of the Indian Constitution[13] and given its inception from the perspective of human dignity, it would not be incorrect to assert that the right to be in a civil union also stems from Article 21 of the Indian Constitution. The Chief Justice of India maintained that the right to autonomy, which extends to choosing sexual orientation and gender identity, would be violated if the LGBTQI+ community is prevented from entering into a civil union. Thus, denying the validity of their sexuality is a violation of their fundamental right under Article 21 of the Constitution.[14] Consequently, the Court held

[11] DAS, *supra* note 9.
[12] Supriya Chakraborty v. Union of India, (2023) SCC OnLline SC 1348.
[13] INDIA CONST. art. 21.
[14] Supriya Chakraborty v. Union of India, (2023) SCC OnLline SC 1348.

that the state has a positive obligation to protect and enhance the right to a civil union.

The Supreme Court sought to comprehend and extend the concept of dignity, applying it to the government within the framework of liberty under Article 21 of the Constitution in the case of *K.S. Puttaswamy v. Union of India.*[15] The Court interpreted 'dignity' as bestowed with both intrinsic as well as instrumental value, where intrinsically it commands constitutional protection and instrumentally, it indicates dignity and freedom as insertable with each being a facilitative tool to the other.[16] Furthermore, the Court held,

> "*The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty...The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognizes an inviolable right to determine how freedom shall be exercised.*"[17]

By providing a fresh outlook on the issue, the Court introduced a novel perspective by tethering the notion of 'dignity' to aspects such as privacy, marriage, and personal life. This lens rejuvenates a right which empowers individuals to exercise their freedom in this regard. This understanding of dignity can be said to be a corollary to the above-mentioned idea of 'choice' emanating as the free will of the individual. This can be said to form the core of the conception of the dignity jurisprudence under Article 21 of the Constitution of India.

By granting the status of civil union, the State would empower non-heterosexual couples to live together and further the cause of the rights revolution while also enhancing their liberty. It would also create a positive impact, fostering an environment wherein society would have a more amenable attitude towards non-heterosexual couples.

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[15] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[16] *Id.*
[17] *Id.* ¶ 298.

Justice Chandrachud and Justice Kaul demonstrated a nuanced understanding of the liberal spirit of the Constitution. By acknowledging the role of the State as not merely a 'regulator' but as a 'catalyst' of growth, the minority aligned with the essence of positive constitutionalism. Unlike the majority, the minority recognised the importance of acknowledging and accommodating diverse forms of unions by advocating for the grant of the status of civil unions, highlighting the inclusive nature of constitutional morality.

INVIGORATING THE TRANSFORMATIVE SPIRIT

One of the essential aspects of the majority judgement is its strict adherence to the written law emanating from the established framework of personal laws, employed to dismantle the plea of civil union. However, the majority misses incorporating the essential transformative spirit of the Constitution in its assessment.

For any Constitution to remain relevant, it is pertinent to have an interpretation that ideally and intrinsically conforms to the values and spirit of the Constitution as well as the changing needs of society. American scholar Prof. Karl Klare encapsulated this idea in his work titled "*Legal Culture and Transformative Constitutionalism.*"[18] He articulated the idea as, "*a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.*"[19] Termed as the 'transformative constitution', the Supreme Court of India, in various judgments,[20] has held this as a guiding principle in constitutional interpretation. The idea was elaborately dealt with in the case of *Navtej Singh Johar v. Union of India,*[21] where it was termed as the ability of the Constitution to adapt and transform with the changing needs of the times.[22] Therefore, to assess the objectives of transformative constitutionalism, it is essential

[18] Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AF. J. ON HUM. RTS. 146, 150 (1998).
[19] *Id.* at 150.
[20] Joseph Shine v. Union of India, (2019) 3 SCC 39; State of Punjab v. Davinder Singh, (2020) 8 SCC 1.
[21] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[22] *Id.* ¶ 96.

to permit the Court to transcend the existing legal or jurisdictional boundaries and explore areas not covered by established precedents or statutes by adhering to the tenets of positive constitutionalism.

The majority concurred on the proposition that there remains an existence of apathy towards the queer community, however, they differ from the minority on the fundamental basis of their claim, asserting that the absence of a pre-existing legal framework prevents them from granting the right to a civil union. It is pertinent to note that, allowing such reasoning to prevail implies perpetuating discrimination towards a community catalysed by the absence of a pre-existing legal framework required for its elimination. Such an interpretation strikes at the heart of established tenets of transformative constitutionalism thereby, rendering justice ineffective.

Notwithstanding this, the transformative spirit was highlighted in the minority assessment wherein Chief Justice Chandrachud and Justice Kaul acknowledged the existence of an inherent right to a civil union available to non-heterosexual couples which the State must respect. They surpass the unipolar understanding of Article 19(1)(c)[23] of the Constitution by broadening the scope of freedom to form intimate associations within its ambit. In doing so, Justice Chandrachud extends the reach of the provision beyond its traditional application, which typically pertains to associations formed by workers or employees, to hold associations emanating from human relations as also protected under Article 19 of the Constitution.[24] By granting the transgender community the capacity to realise all forms of expression protected under Article 19(1)(a), the clarification of the right to civil union within the ambit of Article 19(1)(c) represents a manifestation of transformative constitutionalism by the Supreme Court.

Justice Kaul employs an innovative interpretive approach, drawing inspiration from the South African Constitution,[25] which explicitly mandates the interpretation of all statutes with '*due regard to the spirit, purport, and objects*'; of the fundamental rights chapter. Justice Kaul contends that India should adopt a similar method of statutory interpretation. Such an

[23] INDIA CONST. art. 19.
[24] Supriya Chakraborty v. Union of India, (2023) SCC OnLline SC 1348.
[25] S. AFR. CONST., 1996 § 39(2).

understanding would provide a much-needed impetus to the transformative role of the Constitution while at the same time also passing the muster of a forward-looking interpretation of the Constitution. The majority appears to have erred in applying this principle. A proper application of the same would lead to the recognition of this right and, consequently, the recognition of a civil union.

THE GLASS CEILING: SEPARATION OF POWERS

One of the overarching arguments on which the majority builds its case is based on a rigid understanding of the principle of separation of powers. The majority asserts that the Court making the law, or as in this case, a grant of the status of civil union would amount to the Court overstepping in the arena specifically set for the legislature by the Constitution. Therefore, such an act would lead to violating the principle of separation of powers.

It is also true, that the application of this principle is not as rigid, and the Court can perforate it to further the cause of justice. The Supreme Court of the United States also has exhibited a fluctuating stance on this issue over time.[26] This is so because the idea of separation of power is to a

[26] In Aziz Huq & Jon Michaels, *The Cycles of Separation-of-Powers Jurisprudence,* 126 YALE L. J. 346 (2016), the author explains with examples the oscillating stance of the Supreme Court between the 'open-textured law' and 'strict interpretation style'. The author writes, "*Presidential removal power: In Morrison v. Olson, the Court employed an open-textured standard to uphold a congressional limitation on the President's Article II authority to fire an executive official. But in the next major challenge to such congressional limits on the President's removal power, Free Enterprise Fund v. Public Co. Accounting Oversight Board, the Court refused to apply Morrison and instead imposed a hard-edged rule. Limits on Article I tribunals: In Stern v. Marshall, the Court adopted a rule to reject the authority of a non-Article III bankruptcy court to issue a final judgement on a particular state-law counterclaim. Only four years later, though, the Court in Wellness International Network, Ltd. v. Sharif rejected "formalistic and unbending rules" of the kind applied in Stern in favour of a "practical effect" standard. Congressional regulation of presidential foreign relations powers: When analysing the constitutionality of legislative constraints on the President's wartime actions, courts have relied heavily on Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer. Yet such almost reflexive reliance obscures considerable oscillation in the application. Specifically, in applying Justice Jackson's framework, the Court alternatively reads statutes as narrow rules (thereby authorising only limited presidential engagements) or as open-textured standards (effectuating delegations of broad authority to the President). The result is a jurisprudence that cycles between pro-presidential and pro-congressional positions*" (p. 349).

considerable extent extrapolated by metaphysical principles. This does not suggest a relinquishment of the same but rather a careful and methodological approach towards it, wherein a higher aspect of justice and constitutionalism is reserved. Recently, the Court in the case of *Anoop Baranwal v. Union of India,*[27] while adopting a liberal interpretation of the principle held,

> "*...when the court decides a lis, is the function of the court merely to apply the law to the facts as found or do courts also make law? The theory that the courts cannot or do not make laws is a myth which has been exploded a long while ago.*"[28]

The Court consequently recomposed the selection committee of the Election Commission of India. For this, it further relied on *State of U.P. v. Jeet S. Bisht*[29] where the court elaborately stated the need to have a flexible application of the said creation held,

> "*Constitutional mandate sets the dynamics of this communication between the organs of the polity. Therefore, it is suggested to not understand the separation of powers as operating in a vacuum. Separation of powers doctrine has been reinvented in modern times.*"[30]

Therefore, the real question that arises is when the Court itself recognises systematic structural discrimination towards a class of individuals, whether an argument edified on a rigid understanding of the separation of powers deters the Court from exercising its principal function as the dispenser of justice, especially so when the Court itself has had varied interpretation on the same issue?

Abhinav Chandrachud[31] in his book, '*Soli Sorabjee: Life and Times (Biography)*',[32] makes an interesting observation. While analysing the win and loss percentage of Senior Advocate Soli Sorabjee he mathematically derives

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[27] Anoop Baranwal v. UOI, (2023) SCC OnLine SC 216.
[28] *Id.*
[29] State of U.P. v. Jeet S. Bisht, (2007) 6 SCC 586.
[30] *Id.*
[31] ABHINAV CHANDRACHUD, SOLI SORABJEE: LIFE AND TIMES (Penguin Viking, 1st ed., 2022).
[32] *Id.*

the conclusion, that while Mr. Sorabjee remained a government advocate his winning percentage was significantly higher than when he was practising as an independent counsel, also this being the case when the win probability was significantly lower as compared to the higher win probability at the time of him being an independent counsel. He writes,

> "*Unsurprisingly, after becoming the Attorney General, Sorabjee's win-loss record once again went up. As a private lawyer in the 1980s, Sorabjee won around 54 per cent of his cases that were published in the law reports in which there was a clear winner and loser. As the Attorney General, on the other hand, he won 68 percent of those cases, a proportion very similar to the 70 percent of cases that he won as a law officer with the Janata government. There appeared to be an unmistakable trend in Sorabjee's career - Sorabjee was more successful, he won more cases when he was a law officer, rather than when he was a private lawyer. Once again, it is highly unlikely that Sorabjee's advocacy skills substantially improved each time he was appointed a law officer.*"[33]

By this, Chandrachud suggests a general tendency of the Judiciary to lean favourably towards the State in one-on-one comparisons. There can be various reasons for this example, namely, the inherent biases prevailing towards the government, the possibility of post-retirement avenues for judges, and the institutional support garnered. But the final idea remains that this approach is prevalent throughout. Certainly, such a hypothesis cannot be dismissed entirely, and it continues to be a matter of concern.

However, the justification for employing disparate approaches in the application of similar standards during the adjudication of a common principle should not be predicated on distinctions in subject matter or the parties involved in such differentiation. There is a need for the adoption of a unanimous stance on the application of the principle to provide uniformity. This would eliminate instances wherein allegations of breach of subjective application of the doctrine are raised to allege an existence of malafide intention on the part of the Judiciary. In *Supreme Court Advocates on Record and Anr. v. Union of India*[34] the Supreme Court held that the doctrine of separation of powers is central to the core of judicial

[33] CHANDRACHUD, *supra* note 31, at 125, 168.
[34] Supreme Court Advocates on Record and Anr. v. Union of India, (2016) 5 SCC 1.

independence. However, in the *Anoop Baranwal case,*[35] the same doctrine's veracity was questioned to transgress into the legislative domain of lawmaking. Consistency in the application would reduce the instances where the application of the same is challenged in the judgments that appear to favour one side over another due to the influence of power.

RIGHT TO CIVIL UNION OR ABIDING RELATIONSHIP IN OTHER JURISDICTIONS: A TRANSNATIONAL APPROACH

Currently, there are around thirty-four countries including the United States, the United Kingdom, and France[36] which recognise same-sex marriages. Interestingly, many of these have recognised non-heterosexual relationships only after granting legal recognition to civil unions or same-sex partnerships. The concept of a civil union was initially pioneered by Denmark when it first granted the 'right to register' as domestic partners to same-sex couples,[37] extending property and inheritance rights to them.[38] Other countries were encouraged to provide LGBTQ+ couples the same rights as a result of this move. As a result, countries like Iceland, Norway, Sweden, and other European nations gave queer couples the same civil union rights.

However, due to the changing socio-economic and political factors, countries have started to recognise same-sex marriages with many having already passed legislation incorporating the same. Same-sex marriages were first legalised in the Netherlands, and since then, about thirty-four other countries have complied with the trend. These include Andorra, Argentina,

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[35] Anoop Baranwal v. UOI, (2023) SCC OnLine SC 216, Justice K.M. Joseph writing for Aniruddha Bose J. Hrishikesh Roy J. and C. T. Ravikumar J. writes, "*The theory that the courts cannot or do not make laws is a myth which has been exploded a long while ago.*" (p. 84). This suggests a diversion from the old thesis of strict application of the principle of separation of powers.

[36] Anna Fernandes, *Which countries in the world allow same-sex marriage?,* DECCAN HERALD (Dec. 23, 2023) https://www.deccanherald.com/india/which-countries-in-the-world-allow-same-sex-marriage-1199817.html.

[37] *Id.*

[38] Tom Rosentiel, Same-Sex Marriage: Redefining Legal Unions Around the World, PEW RESEARCH CENTER (Dec. 25, 2023), https://www.pewresearch.org/2007/07/11/samesex-marriage-redefining-legal-unions-around-the-world/.

Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, the United States of America, and Uruguay.[39] The mode of enactment however remains different with some recognising it through legislation, some through the Court's interpretation, and others by a decision of the courts.[40]

The pivotal point in the American journey was in 2015, when the Supreme Court in the *Hodges*[41] *case* held that the right to marry for non-heterosexual couples is to be the same as heterosexual couples.[42] This conclusion was found based on the following principles.[43]

Firstly, the 'right to personal choice' within the ambit of the right to marry is a fundamental aspect of individual autonomy which includes within itself the choices concerning childbearing, procreation, etc. which are protected by the Constitution. Secondly, the right to marry is fundamental because it holds a unique importance to the committed individuals in supporting a two-person union, unlike any other right. Lastly, the right to marry, being a keystone of social order and quintessential for the national community, draws meaning from related rights of childbearing, procreation, and education. It safeguards children and families, a principle elucidated by national traditions and court cases. Therefore, it shall be extended to non-heterosexual couples. The Court upheld individual liberty by legalising same-sex marriages, reconciling individual freedom and rights within the societal order of a civil society.

The United Kingdom, unlike the United States, took the legislative route. On July 17th, 2013, the Parliament enacted the Marriage (Same-Sex Couples) Act, 2013 recognising same-sex marriage. Earlier, the non-heterosexual couples were granted the status of civil partnerships under the

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[39] HRC Foundation, Marriage Equality Around the World, HUMAN RIGHTS CAMPAIGN (Dec. 23, 2023), https://www.hrc.org/resources/marriage-equality-around-the-world.
[40] *Id.*
[41] Obergefell v. Hodges, 576 US 644 (2015).
[42] *Id.*
[43] *Id.*

Civil Partnership Act, of 2004. The Act bestowed the rights and responsibilities equivalent to civil marriage. The United Kingdom Parliament enacted this legislation as a demonstration of society's respect for all individuals, irrespective of their sexual orientation, to foster inclusivity.[44] The Government maintained the sanctity of the freedom of expression and equality clause by legalising same-sex marriages.[45]

In most nations, where same-sex marriage is legalised, there is a prevalence of instances where a purposive interpretation of statutes is undertaken to extend the rights of the community either by the courts or by Parliament. For instance, in *Minister of Home Affairs v. Fourie*,[46] the Supreme Court of Appeal found Section 30(1) of the Marriage Act[47] unconstitutional and arbitrary for excluding same-sex couples from the definition of marriage.[48] In its approach, the Court adopted a purposive interpretation, engaging in a transformative reading of the text of the Constitution, thereby transcending and not confining it within the existing societal notions.

The Indian Courts have frequently delved into transnational jurisprudence, often relying significantly on decisions from the US Supreme Court, the South African Constitutional Court, and the United Kingdom Courts. For instance, in the *Joseph Shine case,*[49] Justice Chandrachud, while giving a concurring opinion, talked about transnational jurisprudence by emphasising the measures taken by the United Nations and other international human rights organisations on the abolishment of the criminalisation of adultery.[50] Similarly, the Court in the case of *K.S.*

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[44] UK Government Equalities Office, Marriage (Same Sex Couples) Act: A factsheet, UK Govt. Assets Publishing Service (Apr. 2014), https://assets.publishing.service.gov.uk/media/5a750cd2e5274a59fa717007/140423_M_SSC_Act_factsheet__web_version_.pdf.

[45] *Id.*

[46] Minister of Home Affairs and Another v. Fourie and Another (CCT 60/04) [2005] ZACC 19 (S. Afr.).

[47] South African Marriage Act, 1961, § 30(1), No. 25, Acts of Parliament, 1961 (S. Afr.).

[48] Dr. Prema E & Ragul OV, *Legal Odyssey on Non-Heterosexual Marital Rights in Indian Tapestry - A Comment On Supriyo Vs. Union of India*, LIVELAW (Dec. 23, 2023), https://www.livelaw.in/articles/legal-odyssey-on-non-heterosexual-marital-rights-in-indian-tapestry-a-comment-on-supriyo-vs-union-of-india-241266.

[49] Joseph Shine v. Union of India, (2019) 3 SCC 39.

[50] Joseph Shine v. Union of India, (2019) 3 SCC 39.

Puttaswamy v. Union of India[51] has relied on the decisions of the Canadian Supreme Court for proportionality. However, the Court appears to have overlooked transnational jurisprudence in the present case. Approximately ninety countries have enacted either same-sex marriage Acts or specific provisions enabling civil unions to recognise same-sex relationships. The Court's stance on transnational jurisprudence in the context of preventing sexual harassment in *Vishaka v. State of Rajasthan,*[52] in which, the Supreme Court issued guidelines following the CEDAW Convention. A similar approach can be applied in the present case as well. By promoting a purposive interpretation of the Constitution, the Supreme Court can grant the right of civil union to individuals. Hence, there is a need for the Supreme Court to reconsider the judgment from the perspective of transnational jurisprudence.

A POSSIBILITY OF A PARALLEL STRUCTURE

Despite the Court's empathetic words and, most importantly, their recognition of the discrimination faced by the LGBTQIA+ community, the Court restrained itself from providing any relief to the Petitioners. In such a scenario, it is not completely incorrect to state that this amounts to an abdication of the Court's duty to protect the fundamental rights of a class of individuals. The window of opportunity remains open for rectifying the injustices and addressing the gaps through the means of review petitions.

Non-heterosexual marriages can be effectuated by adopting a parallel structure of civil union, operating for all legal purposes alongside the existing structure of marriage in India. Kaul J., while recognizing the right of civil union, emphasised that statutes or regulations of marriage are not explicitly extended to a civil union, however, since the right has been recognised, statutes should now be interpreted in a manner to give effect to this right, in conjunction with the principles of equality and non-discrimination under Articles 14 and 15 of the Indian Constitution.[53]

[51] K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.
[52] Vishaka v. State of Rajasthan, AIR 1977 SC 3011.
[53] Supriya Chakraborty v. Union of India, (2023) SCC OnLline SC 1348.

For this purpose, inspiration can be drawn from states, such as Vermont (USA), wherein certain specifications are mandated for being eligible to marry such as a licence to the civil union by a town clerk same as a marriage licence, the right to divorce same as heterosexual couples and benefits available to married couples such as estate rights, taxation rights.[54] India can provide specific criteria on similar lines which can be related to the minimum registration age, prohibiting close blood relations between couples, the requirement of sound mind with consent, and the mandatory granting of a civil union licence by a judge after due verification. This would ensure proper redressal of the issue regarding the eligibility of individuals to marry or stay together.

Notwithstanding this, the above-mentioned guidelines are not exhaustive, and the courts can formulate state-specific guidelines. The government or any organisation authorised by it can through a 'certificate of registration', grant basic rights such as inheritance, pension rights, etc to the registered couple. There are specific dispute resolution mechanisms such as arbitration, conciliation, meditation, etc.[55] the statutes for which are already in existence in India, which can be utilised for the resolution of disputes.

The Court may, if it thinks fit, direct Parliament to make amendments to the Transgender Persons (Protection of Rights) Act, 2019[56] to include provisions enabling the right to a civil union for non-heterosexual couples as well.

CONCLUSION

The same-sex marriage case serves as a crucial judgment signalling an opportune time for India to confer the status of civil union upon non-heterosexual couples. The analysis herein contained regarding dignity standards endeavours to provide a clear understanding of the potential recognition of civil unions through Article 21 of the Constitution of India.

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[54] Samuel C. Pang, *How to Get Married in Vermont*, GLAD LEGAL ADVOCATES & DEFENDERS (Jul., 2015), https://glad-org-wpom.nyc3.cdn.digitaloceanspaces.com/wp-content/uploads/2017/01/how-to-get-married-vt.pdf.

[55] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996; Mediation Act, 2023, No. 32, Acts of Parliament, 2023.

[56] Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019.

Simultaneously, the transnational jurisprudence and the transformative nature of our Constitution empower the Judiciary to spearhead the rights revolution in the country. The prospect of the Court applying discrete standards to acknowledge the dignity of individuals remains a matter of anticipation. The impending opportunity lies before the Court in the form of the review petition, holding the promise of further shaping the legal landscape and advancing the cause of fundamental rights.

REVISITING THE BASIC STRUCTURE DOCTRINE AND CONSTITUTIONAL MORALITY: THE IMPLICATIONS OF GRANTING PARLIAMENTARY PRIVILEGE TO BRIBERY

MUSKAN SUHAG[1]

The Sita Soren v. Union of India case has once again brought the question of corrupt practices vis-à-vis parliamentary privileges to the fore. This paper delves into the relationship between bribery and parliamentary privileges from the perspective of the basic structure doctrine and the concept of constitutional morality. The purpose of this piece is not to delve into the technicalities of each case, but to explore the implications of the inclusion of bribery on overarching constitutional values. First, it provides a brief context of the concept of parliamentary privileges in India. Then it examines the relationship of such privileges with the basic structure doctrine and constitutional morality to analyse the impact of the inclusion of bribery on the features of these principles such as the rule of law, democracy, free and fair elections, justice, equality, etc. Second, other areas of jurisdictions including England, Australia, the USA, etc. which have excluded such corrupt practices from the ambit of parliamentary privileges have been presented to verify the possibility of choosing a similar approach for the Indian context. Third and finally, the paper concludes by highlighting that a grant of immunity to bribery would violate the basic structure doctrine and transcend constitutional morality, and thus be disallowed from immunity.

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REVISITING THE BASIC STRUCTURE DOCTRINE AND CONSTITUTIONAL MORALITY: THE IMPLICATIONS OF GRANTING PARLIAMENTARY PRIVILEGE TO BRIBERY

INTRODUCTION

It is well-known that the Constitution of India endows the members of the Parliament with various privileges within its four walls. Such privileges bestow immunity upon the legislatures from ordinary law and judicial scrutiny, thus, the term "parliamentary privilege." The provisions mainly highlighted are articles 194(2)[2] and 105(2)[3] which deal with parliamentary privileges and state legislatures, respectively. The provisions include immunity from being subjected to judicial proceedings for both – speech within the parliament and the act of voting, etc. for parliamentary processes.[4] Since the latter is *mutatis mutandis* with the former, discussing them separately for this study might not be very significant. The question is – should such immunity include immunity from criminal and corrupt acts like bribery as well? Way back in 1998, the Hon'ble Supreme Court had included bribery for voting in the parliamentary process to be within the ambit of parliamentary privileges.[5] In the landmark ruling of *P.V. Narasimha Rao*, the Hon'ble Supreme Court upheld the immunity of members of the Parliament even in cases of bribery. However, such acts of corruption by public representatives and officials have been rampant and such immunity might not bode well for the spirit of the Constitution and democratic values.

Thus, the question of whether bribery should be included within the ambit of parliamentary privileges or not was only reconsidered recently and has been reserved for judgement by the Court in the case of *Sita Soren v Union of India*[6]. While speculations are rife over what the answer of the court might be, this paper aims to delve into this question within the context of the validity of such an inclusion vis-à-vis the Constitution's basic structure and the concept of constitutional morality i.e., deliberating on the potential *ultra vires* nature of such inclusion.

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[2] INDIA CONST. art. 194. cl. 2.
[3] INDIA CONST. art. 105. cl. 2.
[4] P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 SCC 626.
[5] *Id.*
[6] Sita Soren v. Union of India, 2024 SCC OnLine SC 229.

The basic structure doctrine was laid down in the renowned case of *Keshavananda Bharati*[7] wherein, to put simply, the Court ruled that even though the provisions related to fundamental rights as stated in the Constitution may be amended, the Constitution's basic framework cannot be modified to change its identity.[8] Therefore, it can be implied that the basic structure lies above the provisions related to fundamental rights and is unalterable. It was argued in the case of *Narasimha Rao*[9] that the provisions of 105(2) and 194(2) are privileges which cannot be limited, even by fundamental rights like the freedom of speech,[10] leading to the subsequent conclusion by the Hon'ble Court that even bribery for parliamentary proceedings is immunised.

Next, as was opined by the Hon'ble Chief Justice of India in his speech recently, constitutional morality includes constitutional values that the courts are supposed to uphold such as fraternity, human dignity, personal liberty, equality and other core constitutional values.[11] Constitutional morality is thus, quite different from popular morality.[12] It is tethered to the ideals and principles enshrined in the Constitution and serves as an anchor to rely upon. However, the concept is not static and evolves as society progresses, striving to achieve transformation and development of society.[13]

The judiciary does and is supposed to go by constitutional morality. One of the aspects of constitutional morality is maintaining public trust in democratic institutions. However, corrupt practices by public representatives themselves go against this very aspect of constitutional morality.

The purpose herein is not to delve into the technicalities of the cases dealing with the issue of the inclusion of bribery in parliamentary privileges.

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[7] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[8] *Id.*
[9] P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 SCC 626.
[10] INDIA CONST. art. 19.
[11] Sheryl Sebastian, *Unlike Elected Government, Judges Don't Go By Popular Morality, But By Constitutional Morality: CJI DY Chandrachud*, LIVELAW (Nov. 4, 2023), https://www.livelaw.in/top-stories/unlike-elected-government-judges-dont-go-by-popular-morality-but-by-constitutional-morality-cji-chandrachud-241614.
[12] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[13] *Id.*

Rather, the aim is to look at the issue from the lens of the overarching principles and doctrines. The primary objectives of this paper will be fulfilled in a three-pronged approach. *First*, whether the features of the basic structure are violated by such an immunity (which includes bribery within parliamentary privileges). *Second*, since the concepts of basic structure and constitutional morality are intertwined, next would be the discussion regarding the possible violation of constitutional morality. The nature of constitutional morality will be studied to see if it is contravened in granting the immunity in question. *Third*, the jurisprudence of other countries (including England) which have exempted bribery from the scope of parliamentary privileges over time will be analysed to see if the same can be applied to the Indian context.

IN RELATION TO THE BASIC STRUCTURE

In the case of *Kesavananda Bharati*,[14] the Hon'ble Apex Court held that even though amendments can be made in provisions relating to fundamental rights of the constitution, the constitution's basic structure is not to be meddled with. Therefore, it can be inferred that the basic structure lies above the law as interpreted from Article 13.[15] This is because Article 13 includes the fundamental rights and ordinary rights laid down in the constitution and all other rules, regulations, orders, by-laws, etc. having the force of law within the territory of India[16] that *can be amended* by the Parliament.[17] However, the basic structure has been repeatedly held to be unalterable and is not to be meddled with by any amendment.

Therefore, though it was held in the *P.V Narasimha* case that parliamentary privileges are absolute and unfettered,[18] this view has been overruled in the recent *Sita Soren* judgement, wherein the Hon'ble Court has rightly opined that *Narasimha* had wide ramifications on parliamentary democracy, probity and public interest.[19] Thus, applauding and supporting the *Sita Soren*

[14] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[15] INDIA CONST. art 13.
[16] INDIA CONST. art 13, cl. 3 (a).
[17] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[18] Markandey Katju v. Lok Sabha, (2017) 2 SCC 384.
[19] N. Ravi and Ors. v. Speaker, Legislative Assembly and Ors, (2005) 1 SCC 603.

judgement, the foremost point of contention in this paper, simply, is that bribery must not be included within the parliamentary privileges since it is violative of the features of the basic structure which are not to be altered. Such immunity, if given to bribery, in voting in furtherance of the activities of the Parliament, would violate the principles of the rule of law, constitutionalism, and free and fair elections, among others which are essential facets of the basic structure doctrine.

A. RULE OF LAW[20]

It is one of the most significant facets of the basic structure.[21] It affirms the Parliament's supremacy while denying its sovereignty over the Constitution,[22] functioning as an implied limitation on the Parliament's powers. No one is above the rule of law. It does not discriminate or differentiate between individuals or institutions. One of the features of the rule of law is accountability, and an act which is found in breach of the law by any individual may be punishable.[23] An expanding and dynamic concept,[24] it stands for social justice and ensuring proper social life.[25]

An immunity to bribery as part of parliamentary privileges would impede the deliverance of social justice and create an arbitrary classification between the representatives and the common people who indulge in such corruptive acts. Furthermore, the parliamentary privileges apply to individual members only to the extent necessary for the free performance of functions by the house. They are not meant to absolve the individuals from societal obligations which equally apply to them and rather more firmly owing to their representative character than commoners.[26]

Moreover, precedents have laid down those acts done, or even a repetition of slanderous words that were made inside the Parliament during the proceedings of the house, if done outside the Parliament will not be given

[20] Indra Sawhney v Union of India, (1992) Supp (3) SCC 217.
[21] K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1.
[22] *Id.* ¶ 211.
[23] State of Maharashtra v. Saeed Sohail Sheikh, (2012) 13 SCC 192.
[24] K.S. Puttaswamy (Aadhaar-5J.) v. Union of India, (2019) 1 SCC 1, ¶ 94.
[25] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.
[26] The Committee of Privileges, *Report of Committee of Privileges in Lewis case* (HC 164 1939-40) pt. vi, ¶ 19.

parliamentary privileges.[27] The exchange of the promise of a bribe and the fulfilment of that promise wouldn't have been executed within the four walls of the Parliament. Therefore, such an act shouldn't be bestowed with any parliamentary privilege in accordance with the doctrine of *stare decisis*.[28] In other words, existing case law on the immunity of speech does not immunise any reiteration of the speech outside the Parliament, showcasing that it is only words spoken within the Parliament and not outside it which are protected. Thus, following this logic, any act of bribery executed outside the four walls of Parliament must also not be immunised. This is not to support any act of bribery done within the four walls of Parliament but rather only support the idea of de-immunisation in corollary with existing cases pertaining to the privilege of speech.

B. CONSTITUTIONALISM

It is the Constitution of India which horizontally separates power between the three primary organs of Indian democracy i.e., the executive, the judiciary and the legislature. The legislature has complete authority to exercise its powers as per the allocation of the Seventh Schedule in the Constitution.[29] It is the Constitution and the values enshrined therein that reign supreme in India. The plenary powers of legislatures are to be in accordance with the Constitution's basic concepts and limits stated therein.[30]

All the functionaries, including members of legislatures, the executive or the judiciary, take their oath of allegiance to the Constitution and derive their authority and jurisdiction from its provisions.[31] Every action taken by public functionaries must align with constitutionalism where their every action accords with the basic tenets of the Constitution.[32] In *Navtej Singh*

[27] Jatish Chandra Ghosh v. Hari Sadhan Mukherjee, AIR 1961 SC 613.
[28] State of Andhra Pradesh v. A.P. Jaiswal, (2001) 1 SCC 748.
[29] INDIA CONST. sch. VII.
[30] Gajendragadkar, C.J., Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[31] K.S. CHAUHAN, PARLIAMENT: POWERS, FUNCTIONS AND PRIVILEGES, (LexisNexis, 1st ed., 2013).
[32] State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501.

Johar[33], it was stated that the values of constitutionalism are not limited to what has been written in the Constitution and must percolate down to the grassroots for the betterment of every citizen. Corrupt practices hinder such welfare of the people and are thus, violative of the principles of constitutionalism.

A prominent argument put forth by H.M. Seervai[34] in his book states that the fundamental right of speech of citizens (though not absolute) must be balanced with the parliamentary privileges of debate and discussion. He further states that when people draw the analogy of the Indian privileges in Parliament with that of the British, they miss out on important distinctions.[35] It must be noted that the British Parliament, reigns supreme, owing to its unitary structure of governance. They do not have a written constitution and the legislative supremacy of the Parliament has been recognised for hundreds of years by the courts.

However, in India, the situation is quite different. In a federal structure, the concept of supremacy is defined. It is not the Parliament that is supreme in our country, but rather the Constitution.[36] Since it is the Constitution that is supreme in our country, the Parliament must abide by the fundamental values enshrined in it. The powers of the legislatures are fettered by Fundamental Rights and other constitutional limitations.

Acts of corruption by elected representatives, in furtherance of parliamentary processes like electing individuals or saving the elected ones from impeachment[37] are an antithesis to the spirit of constitutionalism that upholds social justice, public welfare and interest, accountability, good governance and so on. Thus, drawing from the above argument, such acts are to be fettered by these principles and should not be immunised.

C. DEMOCRACY

[33] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[34] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, (Law and Justice Publication, 4th ed., 1975).
[35] *Id.*
[36] *Id.*
[37] P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 SCC 626.

Democracy is not solely limited to electing governments but rather must give undivided attention to the goals of social, political and economic justice enshrined in the preamble to the Constitution to be meaningful. If only lip reverence is paid to the rule of law, democracy would be left fragile.[38] The democratic institutions generate aspirations of good governance and inspire passion among the people.[39]

The Parliament, one of the most prominent democratic institutions, has the power to legislate upon the privileges under the Constitution. The parliament formulates itself and its rules to ensure that it can function independently and discharge its functions freely. The elected chairman/speaker of the house has a pivotal role in the scheme of parliamentary democracy and is the guardian of the privileges and rights of the House.[40] Parliamentary privileges are, therefore, nothing but a special arrangement based on the principles of democracy. This is because the whole concept of privileges came about to empower the representatives of the people to fearlessly put forth their concerns and viewpoints. However, such acts of corruption erode the trust of the people in democratic institutions and undermine their faith – a quite undesirable effect which is harmful to the stable sustenance of the system, maintaining fraternity among citizens and the growth of the individuals within the society.

Another point that can be made is that the moment a legislator acts according to his promise undertaken in exchange for a bribe, his view expressed is no longer free and not in furtherance of the interest of the house but rather out of his selfish interest. The intent of working in the interest of the people represented is not fulfilled in a case of bribery for casting a vote or speaking or doing anything in furtherance of parliamentary processes. Since the privileges endowed in the Constitution are with the object of allowing legislators to function freely in the exercise of their Parliamentary functions to achieve the best possible outcomes for the people, the objective of the privilege is defeated by such an exchange.

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[38] Anoop Baranwal v. Union of India (Election Commission Appointments), (2023) 6 SCC 161, ¶ 124.
[39] *Id.* ¶¶ 291- 292.
[40] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651.

The immunity is not provided with individual legislators in mind but rather for the effective functioning of the Parliament as a whole.[41] The Constitution only immunises acts and speech which are in the furtherance of the parliamentary functions.

Therefore, such acts for self-gratification and corruption amount to an abuse of privilege (incorruptibility and honesty being the most elementary traits for elected representatives)[42] and should not be immune from criminal proceedings against the individual. This is in view of the fact that it has not been done in the interest of his public duty as a legislator and elected representative. On the contrary, the representative has acted in keeping with his own selfish gains, defeating his mandate as a representative. Furthermore, since the life of the government is dependent upon majority support, governments may be destabilised by bribing members of the house, threatening and undermining the authority and stability of the legislature itself.

Free and Fair Elections

Democracy is a part of the basic structure, and free and fair elections are a basic feature of democracy.[43] The very fact that the voting process was rigged due to bribery of the elected members of the house in the case of *Narasimha Rao* defeats the principle of free and fair elections, embedded within the concept of democracy itself. Thus, providing immunity to such a deplorable act would undermine the institution of democracy itself.

Public Welfare

The object of the legislative system as a whole is to advance public welfare. The ideals of justice and reason make up the larger legislative intent of every legislation.[44] Bribery goes against the very objective of public welfare and is an undeniable part of corruption. Such an act, by an elected

[41] Markandey Katju v. Lok Sabha, (2017) 2 SCC 384.
[42] Common Cause, A Registered Society v. Union of India, (1999) 6 SCC 667.
[43] Anoop Baranwal v. Union of India (Election Commission Appointments), (2023) 6 SCC 161 .
[44] Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation,* 3(1) KANSAS L. REV. (1954).

representative, is punishable under the Prevention of Corruption Act[45] to prevent the abuse of power by such individuals.

Since there are not many cases relating to bribery in the exercise of parliamentary privileges and the act of voting and freedom of speech have been given equal immunity under the Constitution, it would not be wrong to draw an analogy from cases relating to immunity of free speech. It was established in the case of *Horrocks v. Lowe*[46] that the parliamentary privilege of speech is lost if abused. The individual making a defamatory statement has to establish that the statement made is justified. There is a special reason why the law accords immunity from a suit – there should exist a public or private, legal or moral duty on the one who makes the defamatory statement. If the individual uses the occasion for some other purpose, he loses the privilege.

Drawing an analogy in this instance, the person is not discharging his moral and public duty of voting/acting fairly and independently but rather votes/acts in a corrupt manner. Thus, the individual is essentially liable for abuse of privilege and must not be granted immunity.

IN RELATION TO CONSTITUTIONAL MORALITY

Constitutional interpretation must flow from constitutional morality. Values of Constitutional Morality are a *"non-derogable entitlement"*.[47] It should have a value of permanence. Yet, it is not a static concept but rather a concept to be cultivated.[48]

Constitutional morality is tethered to the values enshrined in the Constitution along with the basic structure doctrine. Both concepts are not limited to the provisions laid down in the Constitution but go much further. They uphold the underlying values of the written provisions such as the principles of natural justice, liberty, dignity and other core principles

[45] The Prevention of Corruption Act 1988, § 7, No. 49, Acts of Parliament, 1988.
[46] Horrocks v. Lowe, (1975) AC 137 (U.K.).
[47] Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1 ¶¶ 289, 357.
[48] *Id.*

which form the foundational values of the Constitution. While the basic structure protects equality, constitutional morality strikes down anything that prevents the realisation of the same, as was witnessed in the judgement of *Joseph Shine*.[49] Thus, the two seem to be quite intertwined in practical application. The principles which are upheld by the basic structure doctrine are more or less done at the touchstone of constitutional morality. The content of constitutional morality is in turn founded upon the precepts of the Preamble to the Constitution.[50]

Consequently, democratic ideals are to be protected, sustained and guided by the presence of constitutional morality. Constitutional morality protects citizens' rights and safeguards democratic principles, without which it would be difficult for democratic institutions to thrive. If constitutional morality is replaced with public morality, there would be no stability of the underlying values since public morality may change with time. The anchor provided by constitutional morality will be lost and institutions will go astray. For instance, it makes the government accountable to the represented people and makes them function in accordance with the rule of law, without which, public trust in democratic ideals will be lost.

It plays a prominent role in a democratic set-up and basically means obeisance to the norms of the constitution, making sure to not act arbitrarily.[51] The democratic values survive and turn out to be successful when the common masses and concerned officials of institutions do not go astray but rather strictly adhere to the constitutional parameters. Their act should reflect their regard for institutional integrity and requisite constitutional restraints.[52] By placing responsibility and duties on occupiers of constitutional institutions and offices,[53] it acts as a check on the functionaries and citizens alike. It highlights the need to preserve the public trust in democratic institutions[54] and provide the means to ensure the deliverance of justice in all its dimensions. Thus, practices like bribery that hinder a fair democratic functioning and erode public trust must not be provided immunity in parliament as they serve no public or social benefit

[49] Joseph Shine v. Union of India, (2019) 3 SCC 39.
[50] *Id.* ¶ 215.
[51] Manoj Narula v. Union of India, (2014) 9 SCC 1.
[52] *Id.*
[53] State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501, ¶ 295.
[54] *Id.*

but rather undermine democracy and are detrimental to the basic structure itself.

Adding on, the courts have to ensure that what is protected conforms with the fundamental values, guarantees and morality of the Constitution.[55] Corruption, especially by elected representatives who are supposed to discharge public function with all sincerity keeping the welfare of the people in mind goes against the tenets of the preamble. Bribery impinges upon the welfare and development of the state, integrity of democratic institutions, fraternity amongst the citizens, fairness and equality, the rule of law and so on. It thus seriously violates Constitutional morality and should not be given immunity by the courts since no privilege should be so absolute as to violate the basic constitutional principles.

In the famous *Sabarimala* case,[56] the Court stated that the Constitution didn't intend to grant immunity to practices that speak against the vision of dignity and equality of individuals. The provision of immunity to members of parliament even in cases of bribery would create an arbitrary classification between representatives and the commoners who indulge in such practices. This is because the objective of granting parliamentary privileges is already lost when the legislator acts in furtherance of his own gains and not that of the people he represents. Thus, when the objective is itself negated, there remains no difference between a common man or public official who takes bribes for his own gains, and an elected representative sitting in the legislature. Such acts go against the basic Right to Equality of all citizens and are a blow to their dignity. Thus, such arbitrary classification is liable to be struck down.

JURISPRUDENCE IN OTHER COUNTRIES

The attorney general in *PV Narasimha Rao*[57] had also argued that the immunity provided by Article 105(2)[58] ought to be interpreted in context

[55] SEBASTIAN, *supra* note 11.
[56] Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1.
[57] P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 SCC 626.
[58] INDIA CONST. art. 105 cl. 2.

of the contemporary times and thus, must exclude corrupt legislators from its ambit. In several countries across the globe, including England, the USA, Canada, and Commonwealth countries like Australia and New Zealand, the courts have held that a legislator could be proceeded against for corruption. An analysis of their rationale can prove helpful in understanding the implications of such an exclusion if applied to Indian Parliamentary privileges.

A. ENGLAND

Under the chairmanship of Lord Salmon, *the Royal Commission on Standards of Conduct in Public Life*, presented its report in July 1976. It recommended bringing corruption, bribery and even attempted bribery by elected representatives acting in a parliamentary capacity within criminal law's ambit.[59] This is because being a Member of the Parliament brings with it great honour and a strict adherence to the special "*duty to maintain the highest standards of probity*."

To provide clarity and better certainty to the question of applicability of the criminal law, and of parliamentary privilege, in cases of alleged corruption by a member of Parliament, the government of the United Kingdom, in 1996, released a discussion paper titled '*Clarification of the law relating to the Bribery of Members of Parliament*.' It clarified that an offer of a bribe to (and acceptance of the same) members of the Parliament to influence their conduct in the house is a *breach of privilege*.[60] However, the debate over whether such acts should be excluded or not and what way of prosecution of such offences is to be implemented if such acts are included, etc. is being deliberated upon.[61]

B. EUROPE

[59] U.K. Parliament, *The Royal Commission on Standards of Conduct in Public Life* (1974-1976) HO 241, ¶ 311.

[60] Government of the United Kingdom, *Clarification of the law relating to the Bribery of Members of Parliament* (Dec. 1966), https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/8012002.htm.

[61] The Leader of the House of Commons and Lord Privy Seal by Command of Her Majesty, *Parliamentary Privilege* (Apr. 2012), https://assets.publishing.service.gov.uk/media/5a78e3fd40f0b6324769af87/consultation.pdf.

The Venice Commission Report on *the Scope and Lifting of Parliamentary Immunities*, adopted in 2014 recognises that "*in such cases it is not the vote but the taking of the bribe which is the criminal offence, for which there is certainly no reason to protect the member concerned.*" Amongst its criteria and guidelines for non-liability, it holds that the freedom to vote must be absolute, provided it "*does not put any limitation on the power and the duty to hold Members of the Parliament liable for corrupt acts,*"[62] thus recognising the requirement of regulating the corrupt practices of legislative members.

C. NEW ZEALAND AND CANADA

In the ruling of *Pebbles v Television New Zealand Ltd.,* The Privy Council considered Article 9 of the Bill of Rights 1688 which applies by way of incorporation in New Zealand. The Privy Council refused to allow any challenges to anything said or done within the parliament in the course of its legislative functioning and the protection of its privileges.[63]

However, in a subsequent case, the trial judge relied upon the case of *R. v. White,*[64] a case concerning the attempted bribery of a Member of Parliament in New South Wales, wherein it was stated that:

> *"it would be a reproach to the common law if the offer to, or acceptance of, a bribe by a legislator were not an offence. A legislator who suffers his votes to be influenced by a bribe does that which is calculated to sap the utility of representative institutions at their foundations."*

A similar view was opted for in Canada in the case of *R. v. Bunting*[65] and *R. v. Boston.*[66] In the latter case, Buckley J., quoted Lord Salmon and reiterated,

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62 European Commission for Democracy through Law (Venice Commission), *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts*, CDL-AD(2014)011 (Oct. 10-11, 2014), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e.

63 Pebbles v Television New Zealand Ltd., [1995] 1 AC 321.

64 R. v. White, (1875) 13 SCR (NSW) (L) 322 (Austrl.).

65 R. v. Bunting, (1885) Ontario Reports 524 (Can.).

66 R. v. Boston, (1923) HCA 59 (Austrl.).

> "…*Equality before the law is one of the pillars of freedom. To say that immunity from criminal proceedings against anyone who tries to bribe a member of the parliament and any member of the parliament who accepts the bribe stems from the bill of rights is a serious mistake*…"

He further stated that a bribe was taken and/or given by a member of the Parliament to use his position favouring the one giving the bribe in place of acting on his conscience and the merits, the crime of bribery is done and is not dependent on anything said or done during parliamentary proceedings or on whether the bribe worked or not. The proof of the existence of corruption in such an exchange is a separate consideration altogether. These rulings and Section 9 of the Parliamentary Privilege Act, 2014 of New Zealand provide for the prosecution of offences related to Parliamentary proceedings, and lists offences under the Crimes Act of 1961, including Section 102[67] and Section 103[68] therein.[69]

The law in Canada is similar to that of Australia. The acts of offer or acceptance of a bribe by a provincial or a federal member of Parliament are recognised as an offence under Section 108 of the Criminal Code, Canada.

D. AUSTRALIA

As is visible from the ruling of *R. v. White,*[70] Australia excludes acts like bribery from the ambit of parliamentary privileges. In Australia, legislative members can be proceeded against for criminal offences and acts falling outside their protected area, no matter whether the act in question is done in the capacity of a member or is linked to the acts of a member during Parliamentary proceedings.

For instance, asking for or obtaining a bribe in return for exercising the functions of a member in a particular way is recognised as an offence under section 73A of the Crimes Act 1914. If a member is proceeded against for

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[67] The Crimes Act, 1961, §. 102 (N. Z.).
[68] The Crimes Act, 1961, §. 103 (N. Z.).
[69] New Zealand Parliament, *Parliamentary Practice in New Zealand 2023* (Sep. 29, 2023), https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand-2023-by-chapter/chapter-57-parliamentary-privilege/#_ftnref49.
[70] R. v. White, (1875) 13 SCR (NSW) (L) 322 (Austrl.).

offences like receiving a bribe in return for asking certain questions in Parliament, the offence would be the receiving of the bribe and the prosecution would not have to present any evidence of what the member subsequently said or did in the Parliament.[71]

E. UNITED STATES OF AMERICA

The law in the USA is similar to the Commonwealth countries. In *Daniel v. Brewster,*[72] the majority view in the Supreme Court held that the immunities of the speech or debate clause are meant to protect the legislative integrity and independence of Congress by ensuring the members' independence. It is neither aimed for their personal or private benefit nor for establishing the supremacy of the body. Even though the clause is rooted in English History, yet, it had to be interpreted in the light of the American experience and the context of the American constitutional scheme of government. The court thus had to apply the clause to maintain the historic balance of the government's three branches vis-à-vis the independence of the legislature.

Along the same lines, the interpretation of such privileges must be done keeping in mind India's constitutional scheme of governance and experiences. As is evident from parliamentary debates on the matter, the intent of the legislators was to provide a platform for elected representatives to put forth their concerns fearlessly. Their intent was clearly not to enable these representatives to forget their primary duties and probity and act for their personal gains. Our scheme of parliamentary privileges is thus rooted in the ideal of providing the best possible representation of the voters and not to immunise the individuals for any personal act whatsoever.

Moreover, the constitutional scheme of the Indian government is that of horizontal classification between the three organs of the government.

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[71] Parliament of Australia, *Odger's Australian Senate Practice,* ch. 2, https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_02.

[72] United States of America v. Daniel B. Brewster, (1972) 33 Law Ed 2d 507 (U.S.).

While the English Parliament exercises supremacy, the Indian Parliament is not supreme to the other two organs, thus, members of Parliament cannot be given such privileges that unnecessarily rule out our system of checks and balances, rendering them superior.

Thus, there is a need for the application of Transformative Constitutionalism, given the jurisprudence of other contemporary countries where similar privileges exist. Transformative constitutionalism is the Constitution's ability to adapt and mould according to the changing times.[73] Its objective is to improve society and embrace the ideals of justice, liberty and equality as set out in the Preamble of the Constitution.[74] Given the changing jurisprudence across the globe where, like India, absolute immunity was bestowed upon members of legislatures but has subsequently evolved to not giving immunity to criminal acts like bribery, the Constitution must be interpreted by the need and requirements of the changing times following the principle of transformative constitutionalism.

Also, to understand the substance of a provision and make out what the makers of the Constitution have truly intended to do, the court needs to look beyond what is written to grasp the legislation's true character.[75] As was the argument of the learned counsels in the *Sita Soren* case,[76] *prima facie*, the object of Article 105(2) or Article 194(2) doesn't seem to be the rendition of immunity from criminal proceedings, which may arise independently of the exercise of the rights and duties as a member of the legislature.[77] The object is not to give protection from criminal laws to the members. The object instead is, to protect the integrity of the legislative process, by securing the legislature's independence.[78] Thus, the true intent behind such privileges can be made from an application of the doctrine of pith and substance.

Corruption is a punishable offence and must not be let go of, without a trial. If bribery is included in parliamentary privileges, it would come under the scrutiny of the Parliament and not the courts of law. The majority view

[73] SEBASTIAN, *supra* note 11, at ¶¶ 108, 109.
[74] *Id.* ¶ 107.
[75] Dwarkadas Shrinivas v. Sholapur Spg. and Wvg. Co. (1954) SCR 674.
[76] Sita Soren v. Union of India, 2024 SCC OnLine SC 229.
[77] *Id.*
[78] *Id.*

in the *P.V. Narasimha Rao* ruling[79] held that a member can be prosecuted without such sanction for offences of these types, but not without the permission of the Chairman/Speaker of the concerned House.[80] However, since bribery is a crime and the House doesn't have the power to try a crime, there exists no competent authority capable of trying a legislator or removing a member of the Parliament/ State Legislature.[81]

RISK OF POLITICISATION

In the context of rife politicisation these days, any action against a guilty member will not be without politicisation, which runs the risk of dividing the house into political lines. The speaker/chairperson of the house is empowered to decide such cases of corruption and it cannot be ignored that the speaker is a politician himself and would be prone to partiality, rather than objectivity or impartiality.[82] Even the Lok Sabha Ethics Committee which recommended expelling a member of the Parliament, Mahua Moitra, from the house was not based on any clear principle and seemed like a result of political bias in contrast to the lukewarm response of the Privileges Committee to the passing of a defamatory casteist slur by the ruling party's member of the Parliament, Ramesh Bidhuri.[83] This clearly showcases the defects in the current mechanism.

Such politicisation also risks targeting opposition MPse while the ones within the fold of the ruling party are assured of not being acted against and remain unafraid of any action against them.

Thus, instead of enforcing democratic principles and probity amongst the elected representatives, this system might as well serve as another way for the ruling party to suppress the views of the opposition, thus defeating the

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[79] P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 SCC 626.
[80] *Id.* ¶¶ 98, 99.
[81] Election Commission v. Subramaniam Swamy, (1996) AIR 1996 SC 1810.
[82] M. P. JAIN, INDIAN CONSTITUTIONAL LAW, (LexisNexis, 8th ed., 2018).
[83] *Over the Top: The decision to expel Mahua Moitra smacks of political vendetta*, THE HINDU, (Nov. 11, 2023) https://www.thehindu.com/opinion/editorial/over-the-top-the-hindu-editorial-on-mahua-moitra-and-the-lok-sabha-ethics-panels-disqualification-recommendation/article67521709.ece.

very purpose of granting such parliamentary privileges. Hence, augmenting the parliamentary mechanism for the resolution of such cases to make it unbiased is the need of the hour, or else, the substance behind such immunities is negated.

IMPORTANCE OF JUDICIAL SCRUTINY

Bribery shouldn't be exempted from judicial scrutiny as it would create arbitrary discrimination between the elected representatives and other public officials regarding the liability of the bribery, as the latter might as well be absolved of an otherwise serious liability or wrongfully indicted owing to political biases. This lacuna of law must be rectified as bribery is an act that goes against our constitutional norms, even more so when done by an elected representative. A corrupt official shouldn't be allowed to wash their hands off such a grave abuse of power with such ease. It is ironic to note that the individual who truly exercised his conscience, acted in the interest of the Parliament and discharged his public duty as an elected representative in not voting per the promise of bribery was deprived of the privilege; while others whose conscience and act was marred by selfish intent were absolved of their liabilities. Such a decision may not set an ideal precedent for the legislators in future who might consider the parliament as the blind spot for the commission of unethical and corrupt practices like bribery.

By and large, the idea herein is not to deprive the legislators of their privileges of speaking their will or acting free of any fear of judicial proceedings for the furtherance of the interests of the people they represent. However, criminal acts like bribery are consciously driven acts which do not serve any public benefit but rather prove to be contrary to constitutional values. Hence, the *principle of harmonious construction* must be implemented to balance the privileges of the legislatures in the context of the constitutional principles, so that effect may be given to all provisions and values as much as possible while avoiding any interpretation which might leave any of them ineffective.[84] The principle is to be applied in keeping with the concepts which give life to the Constitution, such as that of the basic structure and constitutional morality.

[84] State of Rajasthan v. Gopi Kishan Sen, (1993) Supp (1) SCC 522.

CONCLUSION

Therefore, in view of the above, and the persuasive rulings of other countries which also provide similar parliamentary privileges, including England itself, it can be concluded that extending the parliamentary privileges to acts of bribery in voting in furtherance of the proceedings of the Parliament is indeed violative of the basic structure and constitutional morality of the constitution. This is because it is a clear antithesis to some of the essential features of our Constitution including the principles of the rule of law, constitutionalism, democratic values, free and fair elections, justice and fairness, integrity and fraternity etc. Therefore, it might not be in the interest of the people to bestow parliamentary privilege on unethical and corrupt practices such as bribery.

The questions being deliberated upon in the UK are more related to how the way ahead would be rather than disputing this argument. Indeed, the ways to go about the prosecution of such unethical practices would depend upon the circumstances of each country in the context of its structure and experiences and thus, would require in-depth deliberation. In Australia, for instance, recognising that unless absolute parliamentary privilege is curtailed, the way to resolve issues of abuse of privileges would have to be through the *existing* procedures of proceedings in the House (as new internal regulations might be aimed at suppression of embarrassment or inconvenient debates by the ruling majority). Therefore, the Senate accepted giving the aggrieved individuals a right of reply.[85] Similar way-outs can be looked at for the prevention of abuse of parliamentary privileges while making sure that the purpose of the immunity is fulfilled.

As Mr. Seervai opined, by limiting the absolute parliamentary privileges by Fundamental Rights, the abuse of privileges would be greatly minimised if not prevented altogether.[86] The very fact that the same question has arisen, that the unethical act of bribery in voting in Parliament by elected

[85] Parliament of Australia, *Odger's Australian Senate Practice,* ch. 2, https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_02.
[86] SEERVAI, *supra* note 34, at 2204.

representatives has surfaced again, is proof enough that such acts would not stop but rather continue to happen.

An inclusion of bribery would not be in the interests of our democracy and would undermine our constitutional values. Rather, an exclusion of the same might serve as a needed deterrent for such acts in times to come. The main concern and task of the three fundamental democratic institutions is to ensure proportionality, such that these limitations don't create a chilling effect upon the legislators to impede the freedom and independence of the body. An application of well-established doctrines of harmonious construction, pith and substance and transformative constitutionalism can be of significance in making such a decision.

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