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The Uncertain Régulation of Hate Speech by the Supreme Court

- *Agnidipto Tarafder*

The Existence of the Unamendable Provision of the Unitary State of the Republic of Indonesia: The Role of the Constitutional Court

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Speedy Trial in India: Creation, Chaos and Institutional Choices

- *Sharad Verma*

Aspirational Constitutionalism, Social Rights Proximity and Judicial Activism: Trilogy or Trinity

- *Catarina Botelho*

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FOREWORD

It is with great pleasure that we bring to you Volume 3.4 of the Comparative Constitutional Law and Administrative Law Quarterly. This edition comprises an extremely diverse selection of articles from Indonesia and Portugal, besides India.

In '*The Uncertain Regulation of Hate Speech by the Supreme Court*,' Agnidipto Tarafder analyses the Supreme Court's interpretation of the words "in the interest of...public order" in Article 19(2) of the Constitution, arguing that the Court's stance has fluctuated. After a detailed examination of the Supreme Court's case law, the author suggests that this inconsistency is due to a legislative vacuum, which allows the subjective determination of those on the bench to define the extent of the right to free speech. The solution, it is concluded, is a legislative policy which could guide the judiciary as well as citizens.

The landmark judgment of *Kesavananda Bharati v State of Kerala* laid down the famous 'basic structure' doctrine which limited the ability of the legislature to amend the constitution in India. The next article is about parallels in other countries. In '*The Existence of the Unamendable Provision of the Unitary State of the Republic of Indonesia: The Role of the Constitutional Court*,' Abdurrachman Satrio adopts a comparative approach, discussing the limits on the power of legislatures to amend constitutions in various jurisdictions, such as Turkey, Germany and France. After analyzing case law from each of these jurisdictions, the author considers whether it is possible to apply the doctrine of "unconstitutional constitutional amendment" in Indonesia as well.

In '*Speedy Trial in India: Creation, Chaos and Institutional Choices*,' Sharad Verma analyses how even in the absence of an express constitutional guarantee, the Supreme Court has evolved a right to speedy trial, which however has been undermined by highly discretionary laws. With extensive reference to Canadian and American case law, the author discusses the essential choices that can be referred to by Indian Courts when dealing with institutional delays, arguing for an oversight mechanism which could potentially reduce arbitrary arrests, thereby reducing pendency as well. Reference has also been made to the recent judgment in *K.S Puttaswamy* and what it could mean for the criminal justice system.

In '*Aspirational Constitutionalism, Social Rights Proximity and Judicial Activism: Trilogy or Trinity*' Catarina Botelho discusses aspirational constitutionalism, a process where constitutional decision makers define a country in terms of its future goals. The author examines the debate as to whether social rights belong to the constitutional text, arguing that liberty and social rights cannot be

successfully compartmentalized because they are “deeply interconnected and mutually dependent.” The author then analyses the scheme of the Portuguese constitution, and goes on to discuss judicial activism with reference to the Portuguese Constitutional Court’s rulings in relation to austerity laws and the right-to-health litigation in Brazil.

CALQ, being a quarterly, constantly requires the editorial board to toil in its pursuit of excellence, and the success of the journal is the result of the colossal efforts of the Board. We also express our gratitude for the consistent support and guidance extended by our Chief Patron, Prof. Poonam Pradhan Saxena and our Director, Prof. I.P. Massey. We hope to continue providing a platform for scholars to debate new ideas and concoct differing views and opinions on the various facets of Constitutional Law and Administrative Law. CALQ is a relatively young journal, and we hope to continue to carry rich analysis, reach out to more jurisdictions and foster debate on contemporary constitutional and administrative law issues. To this end, we are keen to receive any comments or criticism and look forward to hearing from anybody who may have something to share with us in this regard.

Ragini Gupta
(Editor in Chief)

THE UNCERTAIN REGULATION OF HATE SPEECH BY THE SUPREME COURT

- Agnidipto Tarafder*

ABSTRACT

This paper attempts to analyze the fluctuating stance of the Indian Supreme Court regarding the regulation of Hate Speech. It focuses on the interpretation of the phrase ‘in the interest of ...public order’ included in Article 19 (2) of the Constitution of India, which has been used by the judiciary to legitimize overbroad restrictions on speech by the State. It argues in favour of adopting a clear legislative policy to aid the judiciary in determining the contours of free speech, over and above the Constitutional framework provided, with a view to establish uniformity in judicial reasoning, in the absence of which the scattered nature or regulations hinder the creation of binding precedents.

INTRODUCTION

“...that the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”¹

- John Stuart Mill, *On Liberty*

The regulation of free speech in a democracy has often given rise to intense debate. This freedom, considered to be the cornerstone of modern democratic state practice, has come to be guaranteed by all major international human rights documents² and national constitutions (or bills of rights) as a fundamental individual liberty, rooted in the idea that freedom of thought and uninhibited exchange of ideas leads to progress and development in society, accountability in governance and facilitates the creation of a just society.

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¹ JOHN STUART MILL, ON LIBERTY 18 (LONDON, LONGMAN ROBERTS AND GREEN et al. eds., 4th ed. 1869).

² G.A. Res, 217A, Universal Declaration on Human Rights (Dec. 10, 1948); G.A. Res, 2200A(XVI) International Covenant on Civil and Political Rights (Dec. 16, 1966). <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Standards.aspx>

The discontent with free speech however emanates from the restrictions placed upon it by the law, involving the characterization of certain kinds of speech as harmful and thus imposing a ban or other sanctions on such speech. While civil libertarians advocate for greater freedom to express ideas, arguing that States have attempted to push forward covert socio-political agendas by censoring free speech, the State contends that it has the primary responsibility of ensuring safety and security for all its citizens.³ In other words, it cannot allow the exercise of an individual freedom by one citizen to harm the essential security of another citizen⁴. The justification behind such regulations lies in the potential of this category of speech in inciting its audience to act violently or in a discriminatory manner towards an identifiable group or community, and the State justifies criminalizing such speech (popularly referred to as ‘hate speech’), in the interest of public order, preservation of national unity or to stop the spread of communal violence.

There exists no universal definition of Hate Speech, though its constituent factors have been identified by several international legal texts. The ICCPR defines it as “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.⁵ Thus, incitement by spoken words or expressions of hatred based on racial, religious, ethnic, or other groups with a view to cause, or threaten to cause harm would qualify as hate speech. Further, incitement to discriminate through use of expressions against a group identity could also be characterized as hate speech.⁶ From the above characterizations, two broad constituent elements may be identified- the incitement to hatred and the targeting of a group identity. The protection of these groups, often vulnerable minorities, isn’t merely restricted to protection from physical violence, but also to ensure the sanctity of their life free from fear of persecution and protection of their essential liberties.

³ Amnesty International, “*Freedom of Expression*”, <http://www.amnestyusa.org/our-work/issues/censorship-and-free-speech>.

⁴ Mill, *supra* note 2.

⁵ The International Covenant on Civil and Political Rights, art. 20(2), Mar. 23, 1976.

⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Art. 4, 6: prohibit ‘dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination...’

Scholarly opinion is equally divided on the issue of regulating hate speech. (Justice) Elena Kagan, in her famous 1993 essay on the subject⁷, argues in favor of framing regulations that would balance the competing interests of free speech and protect the vulnerable from crimes consequent to hate speech being made. She supports the crafting of legislation which could achieve to some extent the regulation of graphic-content in speech, thereby allaying the fears of the vulnerable and the affected, without striking at the heart of the sacrosanct speech rights. Mari Matsuda⁸ argues that the debate between regulation and freedom fails to reflect correct characterization of the conflict. Allowing uninhibited racial hate speech could have the effect of silencing the racial minorities who are the targets of such speech, just as allowing unrestricted pornography could potentially silence women. Feminist legal scholars⁹ have also addressed the question of silencing women through pornography, though the focus has been more on the oppression of marginalized female population. This view is however, contested by others like Kathleen Sullivan¹⁰ who are of the opinion that such an attack on the liberties of a group could in fact serve as an incentive for them to make their voices heard.

Several strategies have been evolved in order to tackle the menace of hate speech. In liberal democracies like the US, where the right to free expression is paid highest reverence to by the Courts and the Constitution¹¹, censorship of speech based on its content has been generally disallowed, and any law attempting the same is subjected to ‘strict scrutiny’ by the Courts in exercise of their review powers.¹² The regulations most often found permissible would be content-neutral ones, which attempt to regulate the manner of expression rather than the ideas expressed therein.¹³ In contrast, a plethora of laws operating in India routinely censure speech based on content, some of which were framed during the colonial rule. Thus, despite deriving the fundamental right to free

⁷ Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873, 902 (1993).

⁸ M J Matsuda, *Public response to racist speech: Considering the victim's story*, 87 MICH. L. REV. 2320-2381, (1989).

⁹ Susan H. Williams, *Feminist Jurisprudence and Free Speech Theory*, 84 IND. L.J. 999 (2009).

¹⁰ Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971.

¹¹ Lawrence H. Tribe, *Toward A Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 246 (1978).

¹² *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994).

¹³ *Id.* A number of cases thereafter have highlighted this distinction in regulating speech. In *Hill v Colorado*, [530 U.S. 703, 735 (2000)], Justice Souter notes: "content-based discriminations are subject to strict scrutiny because of the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others."

speech from the US Bill of Rights, India has chosen to continue with overbroad speech restrictions and not to incorporate the American model for the regulation of the same liberties.¹⁴

In the Indian context, eminent jurists like Soli Sorabjee¹⁵ and AG Noorani¹⁶ point out that certain sections of the criminal legislations, (such as the provision on Sedition in the Indian Penal Code-S.124-A)¹⁷ should be removed as they are not in consonance with our current democratic framework. Moreover, several of these provisions are relics of a colonial past, once used by the British to prosecute Indian freedom fighters, and should therefore be removed from the statute books of independent India. Relying on cases ranging from the persecution of MF Hussain to Tasleema Nasrin¹⁸, they contend that the development of Indian jurisprudence on Hate Speech has been far from satisfactory, since the Apex court has time and again fluctuated in its stance on the issue. Despite the existence of a number of laws, scattered through statutes ranging from the Indian Penal Code, 1860 (“**IPC**”) to the Cinematograph Act, 1952, the lack of a clear legislative policy and overbroad regulatory regime has led to a scenario of uncertain protection against the harm of hate speech.

This paper will try to analyze the fluctuating stance of the Supreme Court regarding the regulation of Hate Speech in India. It focuses on the interpretation of the phrase ‘in the interest of ...public order’ included in Article 19 (2) of the Constitution of India (“**the Constitution**”), used by the judiciary to legitimize overbroad restrictions on speech by the State. It argues in favor of adopting a clear legislative policy to aid the judiciary in determining the contours of free speech, over and above the Constitutional framework provided, with a view to establish uniformity in judicial reasoning, in the absence of which the scattered nature or regulations hinders the creation of binding precedents for the future.

THE FLUCTUATING JURISPRUDENCE OF THE SUPREME COURT ON HATE SPEECH

¹⁴ MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW, 204-06. Eastern Book Company (2006).

¹⁵ Soli Sorabjee, *Hate Speech Dilemma*, FORTNIGHT, No. 318 Jun, 1993, at 27.

¹⁶ AG Noorani, *Hate Speech and Free Speech*, 27 ECONOMIC AND POLITICAL WEEKLY, No. 46 2456 (1992).

¹⁷ The Law Commission in its 267th Report addressed the differences between Hate Speech and Sedition. *Infra* note 35, at pp. 44-45.

¹⁸ Rajeev Dhawan, *Harassing Husain: Uses and Abuses of the Law of Hate Speech*, 35 SOCIAL SCIENTIST, No. ½ (2007).

The issue of regulating offensive or hurtful speech arose before the Supreme Court in *Ramji Lal Modi v State of UP*¹⁹, a case concerning a constitutional challenge to S. 295A of the IPC, which criminalizes the act of insulting religious belief with the deliberate intent to ‘outrage religious feelings of a class of citizens’. The Court, upholding the constitutionality of the provision, said the right to free speech was not absolute and that Article 19(2) of the Constitution envisages reasonable restrictions upon the exercise of free speech. It took the view that the phrase ‘in the interest of...public order’ connotes wider import than ‘maintenance of public order’ which enables the State to impose restrictions on publications to this end, even without the requirement to establish a causal linkage between the impugned speech and resulting violation of public order or safety. This decision was followed in the case of *Virendra v State of Punjab*²⁰ arising in the same year, where the Court applied the same rationale in the interpretation of the phrase ‘in the interest of’, thereby establishing the unquestionable regulatory capacity of the State, pursuant to a strict interpretation of Article 19(2) of the Constitution.

In both these cases, the Constitution Benches were led by Chief Justice SR Das, who in his determination was influenced by the ‘bad tendency’ test- an innovation of the American Courts. In *Patterson v. Colorado*²¹, this test was applied to restrict speech which was deemed to have been made for the express purpose of causing unrest or incitement. Any speech which could be considered to cause a public order violation could be restricted upon the application of this test, as was done in both these cases by the Indian Supreme Court.

The argument before the Court in *Ramji Lal Modi*, relying on previous cases like *Romesh Thapar*²² and *Brij Bhushan*²³, questioned the reasonability of a law which restricted speech without determining whether the speech could reasonably be estimated to have had any causal linkages with a potential violation of public order. However, the Court opined that such a connection need not be established

¹⁹ AIR 1957 SC 620.

²⁰ AIR 1957 SC 896.

²¹ 205 U.S. 454.

²² 1950 AIR 124.

²³ AIR 1950 SC 129.

so long as the law has the effect of preserving public order, basing their reasoning on the aforementioned distinction between ‘in the interest of’ and ‘maintenance of’. It further noted that the import of Section 295A of IPC was restricted to curbing speech which was made with ‘malicious intent’ and not merely offensive speech.

‘[Section] 295A does not penalize any and every... insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalizes only those acts [or] insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetuated with the deliberate and malicious intention of outraging the religious feelings of the class.’²⁴

Although commentators²⁵ note that the Court erred in its application of the ‘bad tendency’ test and excessive reliance on the ‘in the interest of’ phrase, it is useful to remember that the importation of the test from American jurisprudence was not unexpected. Since the Fundamental Rights chapter in the Indian Constitution was largely adopted from the Bill of Rights, it was but natural for the judges to follow the position prevalent in the US, which was at the time in favor of applying this test. Further, the preservation of public order and communal harmony, especially in the nascent years of the republic seems to be a justifiable objective undertaken by the government of the day, which was supported in its efforts by a judiciary marked by its pliant nature.

The deviance from this position, however, came shortly after. In *Superintendent, Central Prison v. Ram Manohar Lohia*²⁶, Justice Subba Rao established the ‘proximate nexus’ test for regulating free speech in the interest of public order. His opinion marked a clear shift from the previously stated position that any law which would have minor linkage with public order would be deemed constitutional. He emphasized:

²⁴ *Id.*

²⁵ Gautam Bhatia, “Free Speech and Public Order”, CIS Blog (2016) <http://cis-india.org/internet-governance/blog/free-speech-and-public-order-1>

²⁶ 1960 AIR 633.

“... The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.”²⁷

Interestingly, Chief Justice Sinha, who was part of the bench in *Ram Manohar Lobia*, speaking for the majority in the subsequent case of *Kedar Nath Singh v State of Bihar*²⁸ reverted to the earlier doctrine of ‘bad tendency’. This case challenged the constitutionality of Section 124A of the IPC, which criminalizes sedition. In delivering the judgment, Chief Justice Sinha quoted with approval the judgment rendered in *Ramji Lal Modi*, without referring to the *Lobia* decision even once in his final decision. This development was quite curious, especially since the majority verdict by J Subba Rao in *Ramji Lal Modi* seemed to indicate a shift in the trend by the Court in regulating speech rights, to which the erstwhile-CJ Sinha was party.

In a much later case of *Bilal Ahmed Kaloo v State of Andhra Pradesh*²⁹, the Court examined the components of hate speech. It concluded that for the application of Sections 153A³⁰ and 505(2)³¹ of the IPC, the arousal of hatred or incitement against a group is a prerequisite. In other words, till the impugned speech or representation fails to create a conflict between two different classes, these sections are not attracted. It relied on the decision in *Kedar Nath Singh* in interpreting Section 124A of the IPC, of which crime it found the accused not guilty.

In *Shreya Singhal v. Union of India*³², which involved a constitutional challenge to Section 66A³³ of the Information Technology Act, 2000 (“**IT Act**”) the contours of free speech were discussed in great

²⁷ *Id.*

²⁸ 1962 AIR 955.

²⁹ AIR 1997 SC 3483.

³⁰ Indian Penal Code, 1860, §153A: Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

³¹ The Indian Penal Code, 1860, §505(2): Statements creating or promoting enmity, hatred or ill- will between classes.

³² AIR 2015 SC 1523.

³³ Information Technology Act, 2000, § 66A: Punishment for sending offensive messages through communication service, etc.

detail by Justice Nariman. He separated with care the different categories of speech, and attempted to understand when ‘offensive speech’ could be criminalized.

“There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc.”³⁴

Relying on the US doctrines of ‘clear and present danger’³⁵ and ‘imminent lawless action’³⁶, he established the position that speech may only be criminalized in case it leads to an act of illegality which has causal linkages with the words spoken, which must be proximate enough to establish such a nexus.

The decision by Nariman J. in *Shreya Singhal* marks a watershed moment in Indian jurisprudence on free speech. Apart from striking down the section 66A of the IT Act due to vagueness, this case makes a number of other significant observations. It discusses the futility of adhering to the previous standard of ‘bad tendency’ and marks a shift towards the modern, rational standard of ‘imminent lawless action’ based on American case law. Most significantly, it denounces the practice of the legislature wielding large regulatory powers in delegitimizing speech.

Despite such clarity of intent however, recent developments are far from encouraging. Dr. Subramaniam Swamy, Rajya Sabha Member for the BJP, filed a PIL before the Supreme Court recently challenging the constitutionality of several sections of the IPC which he believed were in violation of free speech rights. This challenge came in the backdrop of a case filed against him based on his speech at Kaziranga University, Assam, containing inflammatory comments characterized by

³⁴ *Id.*

³⁵ *Schenck v United States*, 249 US 47 (1919).

³⁶ *Brandenburg v Ohio*, 395 US 444 (1969).

the prosecution as Hate Speech. A final decision is yet to be delivered by the Apex Court in this regard. In another recent case of *Pravasi Bhalai Sangathan v Union of India*³⁷, the Court directed the Law Commission to examine the possibility to regulating hate speech especially in relation to electoral offences. Pursuant to this, the Law Commission submitted its 267th Report³⁸ on Hate Speech in March this year. One of the salient features of the report, which carries out an in-depth analysis of hate speech regulation in different jurisdictions across the world, was an attempt to identify the factors to be considered for hate speech regulation. Importance was laid on the extremity of the impugned speech, the incitement it caused, the status of the victim and the perpetrator- both individually and in relation to one another, context and potential impact of the speech.³⁹ Further, it reiterated the position taken by the European Court of Human Rights and UN Special Rapporteur's Report⁴⁰, which suggested that apart from speech perpetuating violent behavior, incitement to discriminate based on group hatred, would also be considered a significant factor in identifying hate speech.⁴¹ The Commission also displayed concern regarding the proliferation of hate speech on the internet, which offers a twin advantage to the author- anonymity and instantaneous mass circulation to a global audience.⁴² While acknowledging that the advent of the internet has had a significant positive impact on the access to and spread of information and opinion, the Commission was justifiably wary of the mischief caused by malicious speech online. In light of these and other observations, the Report made recommendations towards strengthening the restrictions, suggesting the addition of two new crimes within the IPC.⁴³ An expert committee constituted under the Chairmanship of TK Vishwanathan submitted its report to the Home Ministry recently, with similar recommendations. The Committee identified the need to strengthen the penal laws, in particular to

³⁷ AIR 2014 SC 1591.

³⁸ LAW COMMISSION OF INDIA, REP. NO. 267 *Hate Speech*, 2017.

³⁹ *Supra* note 35, at pp. 32-35.

⁴⁰ UN Special Rapporteur's report on Hate Speech and Incitement to Hatred, 2012.

⁴¹ *Id.*, at 37.

⁴² *Id.*, at 24-5.

⁴³ 'Prohibition of Incitement to Hatred'; and 'Causing fear, alarm or provocation to violence in certain cases'.

amend the IPC, the IT Act and the CrPC in order to tackle the proliferation of hate speech in cyberspace.⁴⁴

However, several commentators⁴⁵ have noted that the absence of penal provisions is not what ails the regulation of vitriolic speech in India. In fact, there remain a large number⁴⁶ of laws in force which impact speech that causes incitement, especially on the grounds of religion or race. Despite this, however, the proliferation of hate speech has continued unabated, which indicates that in the absence of more holistic regulation and the executive will to enforce the same, India will continue its stuttering stance in this regard.

IDENTIFYING THE IMPEDIMENTS

As aforementioned, the central problem in regulating or outlawing certain kinds of speech is the effect such regulations have (or likely to have) on other, permissible forms of speech. The idea that hate speech has inherent risks for the security of groups in society is beyond debate, and yet the manner of imposing restrictions continues to attract criticism. The effect of such speech in silencing vulnerable sections of the society has often been used as a justification for outlawing it, as has the issue of preeminence of the right to life and liberty of the targeted communities over free speech rights of individuals. On the other hand, censorship of speech can have a chilling effect on divergence and dialogue essential to democracy.

The pre-censorship regime instituted at the behest of the Supreme Court since the 50s and 60s has had a similar impact upon the exercise of certain classes of speech in India. Without attempting to draw appropriate linkages between speech and action, these early decisions justified curbing free

⁴⁴ The Committee recommended amendments to Sections 153C and 505A, IPC, Sections 25B and 25C, CrPC and Section 78 of the IT Act. The definition of the offences outlined in 153C and 505A were broadened to ‘any means of communication’ purportedly to include cyberspace; whereas the CrPC amendments create the posts of State-level and District -level Cybercrime Coordinators. The amendment to the IT Act specifies that the investigating officer should be of the rank of a Sub-Inspector, indicating that younger officers specially trained should deal with investigation of offences under the Act. Seema Chisti, *Prescription post Section 66A: ‘Change law to punish hate speech online’*, The Indian Express, 6 Oct, 2017 available at <http://indianexpress.com/article/india/hate-speech-online-punishment-supreme-court-section-66a-information-technology-act-narendra-modi-4876648/>

⁴⁵ See generally, Chinmayi Arun and Nakul Nayak, *Preliminary Findings on Online Hate Speech and the Law in India* (2016), Berkman Klein Center Research Publication No. 2016-19; Gautam Bhatia, *Free Speech and Public Order*, CIS Blog (2016).

⁴⁶ See Indian Penal Code, 1860; Representation of The People Act, 1951; The Cable Television Network (Regulation) Act, 1995; The Religious Institutions (Prevention of Misuse) Act, 1988; The Cinematograph Act, 1952; Code of Criminal Procedure, 1973: contain provisions which seek to regulate hate speech.

speech based on the overbroad construction of public order concerns. The shift from this standpoint came much later, through more recent pronouncements of the Court, but has had little effect on the criminalization of speech which is deemed insulting to religious beliefs. While the colonial justification for legitimizing such a regulatory regime was based on the paternalistic and insulting assumption of religious intolerance among Indian subjects and for the purpose of maintaining British dominance over the colonies, to carry on with the vestiges of an inglorious past speaks poorly of the protection of civil liberties in a modern democracy.

An important impediment in this regard is largely procedural. The stand taken by the latter benches of the Supreme Court, especially in *Shreya Singhal*, seems to be unable to negate the ill-effects of the ‘bad tendency’ test. Whereas both *Ramji Lal Modi* and *Kedar Nath Singh* were decisions by a constitutional bench of the Court, the bench in *Shreya Singhal* comprised of two judges. This implies that the adoption of the ‘imminent lawless action’ doctrine by the latter would theoretically fail to dismiss the applicability of these cases, and that the operating law takes from the judgments in *Ramji Lal Modi* and *Kedar Nath Singh*, which proposes a dated doctrine long disregarded in the country of its origin. While the doctrine of ‘imminent lawless action’ provides an evaluation of the cause, effects and dangers of the impugned speech based on justifiable criteria laid down by US Supreme Court decisions⁴⁷, the application of the ‘bad tendency’ test merely exemplifies all that is amiss with the speech regulation regime, providing overbroad powers in the hands of the judiciary in curbing free speech often based on non-objective parameters. Commentators also point out that a modern reevaluation of archaic provisions (such as Section 124A and 295A) the constitutionality of which were once upheld, require a two-judge bench being satisfied of a *prima facie* case, thereby referring it to a Constitutional Bench for their assessment. If convinced, this bench would then need to be reconstituted to a larger seven judge bench for the judgment in *Ramji Lal Modi* to be overturned.⁴⁸

CONCLUSION

The inconsistent positioning of the Supreme Court on regulation of Hate Speech is largely owing to the existence of a legislative vacuum, which allows the subjective assessment of individuals on the bench to determine the contours of a right as crucial as free speech. In the US, where judges of the

⁴⁷ *Supra* note 36. The test has been consistently followed in the US thereafter.

⁴⁸ Gautam Bhatia takes note of this procedural impediment. See *Free Speech and Public Order*, CIS Blog (2016).

Supreme Court have life-tenure, there remains the possibility of creating uniform precedent on issues, owing to the same set of judges serving on the bench for a longer period. In contrast, Indian judges have a lesser possibility of addressing similar issues during their relatively short stay on the bench. Thus, extremely divergent benches address matters of constitutional importance, which allows for deviation from precedent, antithetical to the development of common law jurisprudence. This leads to the anomalous positioning of the Court we witness over the past few decades on issues ranging from privacy to free speech. The remedy seems abundantly clear- the creation of a legislative policy to address these specific concerns, which may guide both the judiciary in their decision making and the citizenry in their actions. Hate Speech regulation has been so scattered through the texts of such a large variety of statutes, it seems but impossible to reconcile the differences in judicial interpretation without bringing these within the umbrella of a single policy, which defines and delimits the exercise of 'speech that wounds'. While the adoption of a single definition may not serve equally to restrict hateful speech in all its varying context, especially considering the diverse demographics in India, the adoption of a uniform policy- one that contextually defines the different standards to be applied in cases of political, commercial or other kinds of speech- is the need of the hour.

**THE EXISTENCE OF THE UNAMENDABLE PROVISION OF THE UNITARY
STATE OF THE REPUBLIC OF INDONESIA: THE ROLE OF THE
CONSTITUTIONAL COURT**

- Abdurrachman Satrio*

ABSTRACT

This paper seeks to answer whether the existence of the unamendable provision in the 1945 Constitution of the Republic of Indonesia, which prohibits amending the form of the Unitary State of the Republic of Indonesia can be a basis for the Indonesian Constitutional Court to use the doctrine of unconstitutional constitutional amendment, which authorizes Constitutional Courts to review the constitutionality of the amendment. In some countries, its existence becomes the basis for constitutional tribunals to use the doctrine to protect the unamendable provision contained in its constitution, though this is not based on the authority stated in its constitution. Therefore, in this paper I try to use a comparative approach, to see how the constitutional tribunals in other countries that is, Germany, Turkey and France, which have unamendable provisions in their constitutions, play a role in protecting their Constitution. Is the unamendable provision legitimizing the constitutional tribunal to review the constitutionality of the amendment?

INTRODUCTION

The existence of the unamendable provision or an explicit limitation on the power of constitutional amendment power in the Constitution¹ is not something uncommon, but its existence can be traced back to the 18th century. However, it seems that the existence of unamendable provisions in the constitution is now becoming a universal trend in the world's constitutions, as its presence is increasingly encountered in these constitutions. According to Roznai's estimates, currently 53 percent (76 of 143) of the world's constitutions (formed from 1989 to 2013) include unamendable

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¹Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, ETHESES (February, 2014), http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf. (Hereinafter "Roznai").

provisions, contrary to the conditions before the Second World War, when only 17 percent (52 of 306) of the constitutions established during that time (1789 to 1944) had unamendable provisions.²

Although it has become a universal trend of the constitutions of the world, the content of the unamendable provision in each constitution varies from one to the other. As an example, in Norway, the country with the second oldest documented constitution in the world,³ Article 112 of the Constitution stipulates that any amendments made to its constitution must never contradict the spirit and principles embodied in it.⁴ Slightly differing from Norway, France in the Constitution of the Third, Fourth, and Fifth Republic prohibits amending of the form of the republican government.⁵ Indonesia itself also has an unamendable provision in its constitution, in Article 37 (5) of the 1945 Constitution of the Republic of Indonesia, wherein it is forbidden to amend the form of the Unitary State of the Republic of Indonesia.⁶

The unamendable provision in respect of the Unitary State of the Republic of Indonesia did not exist when the 1945 Constitution was established,⁷ and only emerged during the amendment of the 1945 Constitution four times between 1999 and 2002, especially in the fourth amendment conducted in 2002.⁸ The unamendable provision in the Indonesian constitution regarding the Unitary State of the Republic of Indonesia has the purpose of ensuring that no changes are made to

² *Id.* at 28.

³ Eivind Smith, *Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway*, 44 *ISR. L. REV.* 365, 365 (2011).

⁴ G.R.L.. CONST, 1814, Art. 112. . "Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution".

⁵ L.A.CONSTI. DU, 1958, Art. 89 (5); Art. 2 (Law partially raising the constitutional laws. August 14, 1884).

⁶ U.U.D. CONSTI., Art. 37 (5), 1945, "Particularly regarding the form of the Unitary State of the Republic of Indonesia no amendment can be made."

⁷ The 1945 Constitution was enacted on August 18th 1945, or one day after Indonesia declaring itself independent on August 17th, 1945. The drafting process of the 1945 Constitution took place during the period of independence struggle, which is why before the amendment in 1999, the 1945 Constitution was relatively a short document having many vague provisions, as it was intended to be a temporary document. However, because of that temporary character and vagueness, many regimes in Indonesia used the 1945 Constitution to establish an authoritarian government. *See* Moh. Mahfud M.D, *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi [CONSTITUTIONAL LAW DEBATE AFTER CONSTITUTIONAL AMENDMENT]* 21-28 (2011).

⁸ Tim Lindsey, *Indonesian Constitutional Reform: Muddling Toward Democracy*, 6 *SING. J. INT'L. & COMP. L.* 244, (2002); *See also* Denny Indrayana, *Indonesian constitutional reform 1999-2002: an evaluation of constitution-making in transition* (2008).

Article 1 (1) of the 1945 Constitution, which states that Indonesia embraces ‘unitary’ as a form of state and ‘republic’ as a form of government.⁹ What are the implications of the inclusion of the unamendable provision of the Unitary State of the Republic of Indonesia? The provision is supposed to act as a limitation on the power of the People’s Consultative Assembly (Majelis Permusyawaratan Rakyat or MPR)¹⁰ to amend the 1945 Constitution.¹¹ However, if the MPR goes on to change the form of the Unitary State of the Republic of Indonesia and violate such limitations, how can the prohibition to amend the form of the Unitary State of the Republic of Indonesia be implemented? This problem is required to be solved, since the 1945 Constitution does not have an answer to it, till date.

Interestingly, today many courts in the world use the doctrine of “unconstitutional constitutional amendment”, which enables constitutional tribunals to review the constitutionality of amendments. The German Federal Constitutional Court, for example uses this doctrine to protect the subject of amendment from breaching the unamendable provision.¹² The Supreme Court of India, on the other hand, even without having an unamendable provision in its Constitution uses this doctrine, the Supreme Court having interpreted that the amendment mechanism is appropriate, only if the amendment does not violate the ‘basic structure’ of the Constitution which includes, *inter alia*, constitutional supremacy, democracy, and separation of powers.¹³

⁹ U.U.D. CONSTI., Art. 1 (1), “The State of Indonesia is a Unitary State in the form of a Republic”.

¹⁰ MPR is a joint session legislative body, which comprises the members of People’s Representative Assembly (*Dewan Perwakilan Rakyat* or DPR) and Regional Representative Assembly (*Dewan Perwakilan Daerah* or DPD).

¹¹ U.U.D. CONSTI., Art. 3 (1), “The People’s Consultative Assembly has the authority to amend and to stipulate the Constitution.”

¹²Gabor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Court as Guardians of the Constitution?*, 19 CONSTELLATIONS 182, 182 (2012).

¹³ The Supreme Court of India first adopted the basic structure doctrine to review the constitutionality of the amendment in the case of *Kesavananda Bharati v. State of Kerala*, [1973] 4 SCC 225 (India). In this case, the Court reviewed the validity of the 24th, 25th and 29th Amendments to the Indian Constitution. With a majority of 7-6, the Court ruled that the power to amend does not include the power to alter the provisions deemed to be the basic structure of the Constitution; Richard Albert has distinguished formal unamendability from informal unamendability, as in the Indian Constitution. Informal unamendability is a condition where some provisions of the constitution are not explicitly prohibited to be changed, but the court with its interpretation declares that it cannot be changed with the amendment mechanism. See Richard Albert, *The Unamendable Core of the United States Constitution*, 9-10 (Boston College Law Sch. Legal Studies Research Paper Series, Research Paper No. 361, 2015).

Therefore, this paper tries to discuss the possibility of using the “unconstitutional constitutional amendment” doctrine by the Indonesian Constitutional Court, especially in relation to protecting the unamendable provision of the Unitary State of the Republic of Indonesia. In my attempt to achieve this, I shall use the comparative approach to examine how the constitutional tribunals in other countries namely, Germany, Turkey, and France, which also have unamendable provisions in their respective constitutions, play a role in their protection, by using this doctrine.

THE USE OF “UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT” DOCTRINE IN OTHER COUNTRIES

A. Germany

The discourse on the unamendable provisions of the constitution is not something new in German constitutional law, having already existed since the time of the Weimar Constitution. Carl Schmitt, a controversial jurist of the time claimed that amending the constitution is very important to preserve the “identity and continuity of the constitutions.”¹⁴ Because there is a difference between “amending the constitution and replacing it”, he argued that amendments cannot be made to fundamental principles in a constitution, such as changing the principle of a republic in the constitution into a monarchy, or changing the federal state to one that is unitary. Changes made to these fundamental principles do not deserve to be called amendments, but “constitutional annihilation”.¹⁵

Although the idea of the unamendable provision was initiated a long time ago by Schmitt, when the Constitution of the Federal Republic of Germany 1949 (Hereinafter “Basic Law”) was formed after the Second World War, none of Schmitt’s ideas were made a reference by the authors of the Basic Law,¹⁶ when formulating Article 79 (3), stating the prohibition to amend some of its provisions such as the principles of federalism, human rights, democracy, and the rule of law.¹⁷ The author of Basic Law actually forbade changing some of these provisions because they were influenced by the idea of

¹⁴ CARL SCHMITT, *CONSTITUTIONAL THEORY* 150 (Jeffrey Seitzer trans., Duke University Press 2008) (1928).

¹⁵ *Id.* at 151-153.

¹⁶ Monika Polzin, *Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law*, 14 *INT’L. J. CONST. L.* 411, 422 (2016).

¹⁷ G.G. CONSTI., Art. 79 (3) “Amendments of this Constitution affecting the division of the Federation into States [*Länder*], the participation on principle of the States [*Länder*] in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible.”

“militant democracy” initiated by Karl Loewenstein, a concept that considers the need for democracy to create certain barriers to those who are anti democratic/fascists from abusing the mechanism of democracy in order to gain power, as it ultimately did when Hitler and his Nazi Party seized power.¹⁸

The Basic Law does not itself state that there is special authority resting with the German Federal Constitutional Court to review the constitutionality of the amendment with the aim of protecting the unamendable provisions therein. Even without the authority to review the constitutionality of the amendment, the German Federal Constitutional Court during its earliest establishment in 1951 actually accepted the doctrine of unconstitutional constitutional amendment through the decision known as *Sudweststaat* (*Southwest Case*). In that case, while the Court was not actually reviewing the constitutionality of the amendment and was reviewing the constitutionality of a statute, however, it interpreted the Basic Law to “represent a logical unity”, therefore affirming:¹⁹

“A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a whole, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate”

Through the decision, the German Federal Constitutional Court ruled that a constitutional amendment could be reviewed and declared unconstitutional if it violates what are referred to as “overarching principles and fundamental decisions”. The Court considers democracy and federalism included in the Basic Law as among the overarching principles.²⁰

The German Court has reviewed the constitutionality of amendments to the Basic Law in multiple cases, specifically in the *Klass case* (1970)²¹, *Land Reform I* (1991)²², *Land Reform II* (1996)²³, *Asylum Case*

¹⁸ Ulrich K. Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44 ISR. L. REV. 429, 441 (2011); See also Svetlana Tyulkina, *Militant Democracy* (2011) (Unpublished Ph.D. Dissertation, Central European University), http://www.etd.ceu.hu/2012/tyulkina_svetlana.pdf.

¹⁹ See Elene Janelidze, *Judicial Review of Constitutional Amendments in Georgia, France, and Germany – The Quest for Eternity* (April 1, 2016) (Unpublished LL.M. Short Thesis, Central European University) (Manuscript at 24), http://www.etd.ceu.hu/2016/janelidze_elene.pdf.

²⁰ *Id.*

²¹ 30 BVERFGGE [German Federal Constitutional Court] 1, (1970).

²² 84 BVERFGGE 90, (1991).

(1996)²⁴, and *Acoustic Surveillance of Homes* (2004)²⁵. In these five cases, the German Federal Constitutional Court considered invalid any amendments that violate the unamendable provisions in the Basic Law.²⁶ In the five cases above, the Court did not use the method of interpretation it did in the *Southwest Case*; which considers that there are certain substances in the constitution, which are implied and positioned higher than other constitutional norms; but directly referred to Article 79 (3) Basic Law which explicitly states that there are certain provisions in the constitution that cannot be amended.²⁷

More recently, in 2009 through its decision in the *Lisbon case* when the German Federal Constitutional Court reviewed the constitutionality of the Act on the ratification of the Lisbon Treaty, it interpreted:²⁸

“From the perspective of the principle of democracy, the violation of constitutional identity codified in article 79.3 of the Basic Law is at the same time an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential, pursuant to article 79.3 of the Basic Law.”

This interpretation shows that unamendable provisions contained in Article 79 (3) Basic Law have an essential position within it, and also reaffirms the approach used by the Court through the doctrine of unconstitutional constitutional amendment, which considers the unamendable provisions unchangeable through any mechanism contained in the Basic Law, including amendment.

B. Turkey

²³ 94 BVERFGGE 12, (1996).

²⁴ 2 BvR 1938/93; 2 BvR 2315/93.

²⁵ 1 BvR 2378/98; 1 BvR 1084/99.

²⁶ See KEMAL GOZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENT: A COMPARATIVE STUDY 56-64 (Bursa, Ekin Press, 2008).

²⁷ *Id.* at 83.

²⁸ BverfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - para. (218), http://www.bverfg.de/e/es20090630_2bve000208en.html.

The Turkish Constitution has long known the existence of unamendable provisions. It is noted that the unamendable provision has existed since the entry into force of the Turkish Constitution of 1961, specifically in Article 9, which prohibits amending the form of government as a republic.²⁹ The prohibition to amend the republican form of government did not necessarily authorize the Turkish Constitutional Court to review the constitutionality of the amendment, until 1971. The Turkish Constitution of 1961 did not contain any provision giving the Turkish Constitutional Court the authority to review the constitutionality of the amendment. However, in 1970 the Court declared itself competent to review the constitutionality of the amendment in question.³⁰ In its decision, though the Turkish Constitutional Court reviewed the constitutionality of the amendment only on the procedural aspect, the Court stated that they were competent to review the constitutionality of the amendment in terms of its substance.³¹

After declaring itself competent to review the constitutionality of amendment in terms of substance, a year later in 1971, the Turkish Constitutional Court once again reviewed the constitutionality of an amendment. This time the Court actually did the review in terms of substance, amendments that postponed the Senate election for a period of one year and four months.³² In this decision the Turkish Constitutional Court reviewed the substance of the amendment with reference to the republican form of government, which was prohibited to be amended. It interpreted “the republican form of government” broadly by incorporating the characteristics of republican government held by Turkey such as secularism, democracy, rule of law, and social state.³³ Ultimately though, it declared that the amendment did not violate Article 9 of the Turkish Constitution of 1961 which prohibited the amendment of the republican government.³⁴

²⁹ T.C. Ana CONSTI., 1961, Art. 9, “The provision of the Constitution establishing the form of the state as a republic shall not be amended nor shall any motion therefore be made.”

³⁰ Turkish Constitutional Court decision of June 16, 1970, No. 1970/31.

³¹ Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision*, 10 INT’L. J. CONST. L. 175, 195-196 (2012).

³² Turkish Constitutional Court decision of April 3, 1971, No. 1971/37.

³³ T.C. Ana CONSTI., Art. 2, “The Turkish Republic is nationalistic, democratic, secular and social State, governed by the rule of law, based on human rights and the fundamental tenets set forth in the preamble.”

³⁴ Roznai, *supra* note 31, at 196.

In 1971 the Turkish Constitution of 1961 was amended, and the amendment to Article 147 of the Turkish Constitution gave the Constitutional Court the authority to review the constitutionality of the amendment, however the authority to review the constitutionality of the amendment was limited to review in terms of the procedure alone and not the substance of the amendment. After this, the Court reviewed five amendments made against the 1961 Turkish Constitution. Interestingly in these five decisions³⁵, the Turkish Constitutional Court interpreted the meaning of the procedure broadly, not only in relation to the mechanism of amending the constitution, but also by reviewing whether or not amendments were against the republican form of government which is prohibited to be amended.³⁶

The Turkish Constitutional Court interpreting the authority to review the constitutionality of amendments in terms of procedures as in the above mentioned five cases, invited some comment such as the criticisms of Kemal Gozler that stated:³⁷

“The question of whether a constitutional amendment affects the immutability of the republican form of state is not a question of form or procedure, but a question of substance because, without looking at the text of the constitutional amendment, it is impossible to determine if it violates this immutability.”

As a result of the interpretation of the Turkish Constitutional Court on its authority to review the constitutionality of the amendment procedurally, when in 1982 Turkey formulated a new constitution, the drafters also asserted in the constitution the limits to reviewing the constitutionality of the amendment procedurally,³⁸ by stating explicitly in Article 148 that the meaning of reviewing constitutionality of amendment procedurally is that the “verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed”.³⁹

³⁵ Turkish Constitutional Court decision of April 15, 1975, No. 1975/87, March 23, 1976, No. 1976/19, October 12, 1976, No. 1976/46, January 28, 1977, No. 1977/4, September 27, 1977, No. 1977/117.

³⁶ See GOZLER, *supra*. note 26, at 42-45.

³⁷ *Id.* at 46.

³⁸ *Id.* at 47-48.

³⁹ T.C. Ana CONSTI., Art. 148, 1982.

Besides asserting limitations in reviewing the constitutionality of the amendment, the Turkish Constitution of 1982 also has unamendable provisions in Article 4 of its Constitution. The unamendable provision is almost the same as those of the 1961 Constitution of Turkey, both of which prohibit the amendment of republican form of government. The difference is Article 4 of the Turkish Constitution of 1982 also asserts that the characteristics of republican forms of government such as democracy, secularism, rule of law, and the assertion that Turkey is a social state are also forbidden to be amended.⁴⁰

In the period of the Turkish Constitution of 1982, until 2008 the Turkish Constitutional Court had been called three times to review the constitutionality of amendments. Of the three decisions, the Court declared they had no jurisdiction to review the substance of the amendment with respect to unamendable provision in the Turkish Constitution of 1982, the Court also stated that they were only authorized to review procedures of the amendment as outlined in Article 148 of the Turkish Constitution of 1982.⁴¹ However, the interpretation of the Turkish Constitutional Court which attempted to limit its authority to review the constitutionality of the amendment only in terms of the procedure, changed in 2008 through a decision known as the *Headscarf decision*,⁴² in which the Turkish Constitutional Court invalidated the amendment which included the following phrase in Article 42 of the Turkish Constitution of 1982:⁴³

“No one can be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise of this right shall be determined by the law”

The purpose of the inclusion of the phrase into the Turkish Constitution of 1982 was to eliminate the prohibition on female students using headscarves when entering higher education institutions, and in the decision the Turkish Constitutional Court, controversially invalidated the amendment on the ground that the substance of the amendment violated the state secular character, which was

⁴⁰ T.C. Ana CONSTI., Art. 4, “The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed.”

⁴¹ See Roznai, *supra* note 31, at 197.

⁴² Turkish Constitutional Court decision of June, 5, 2008, No. 2008/116.

⁴³ See Ali Acar, *Tension in the Turkish Constitutional Democracy: Legal Theory, Constitutional Review and Democracy*, 6 ANKARA LAW REVIEW 141, 147 (2009); See also Roznai, *supra* note 31, at 197.

prohibited from being amended in Article 4 of the Turkish Constitution 1982. Through this decision the Turkish Constitutional Court declared that it was competent to review the substance of the amendment with unamendable provision in the Turkish Constitution of 1982, even though its authority had been strictly limited only to review the constitutionality of the amendment in terms of the procedure alone.⁴⁴ The Court was of the view that the first three articles of the Constitution constitute a basic choice of the political system of the country and hence, any amendment to the first three articles or any amendment to other constitutional provisions causing the same effect would be void and must be invalidated by the Court.⁴⁵

C. France

France is one of the oldest countries to have an unamendable provision in its constitution, where the provision prohibits amendment to the republican form of government. The provision originated in the period of the Constitution of the Third Republic, which marking the end of the French Revolution with the victory of republicanism made the republic a form of government over monarchism and bonapartism, ending the two as well.⁴⁶

Initially, when the Constitution of the Third Republic was formed in 1875, in the form of three special laws called Constitutional Laws, the form of republican government was not directly used as an unamendable provision. It was only declared forbidden to amend in 1884, when the French Parliament adopted the Law of August 14 1884, Partially Revising the Constitutional Law. Law of August 14 1884 was formed to revise Law on The Organization of Public Power on February 25 1875 which is one part of the Constitutional Laws.⁴⁷ Till date, the provision relating to the republican form of government is as an unamendable provision in the French Constitution, even though the current constitution in France has been replaced twice since the stipulation was first

⁴⁴ Acar, *supra* note 47, at 145-148.

⁴⁵ Roznai, *supra* note 31, at 186.

⁴⁶ See David Bates, *Political Unity and the Spirit of Law: Juridical Concepts of the State in the Late Third Republic*, 28 FRENCH HISTORICAL STUDIES. 69, 69 (2005).

⁴⁷ See Charles F. A. Currier, *Constitutional Law And Organic Laws Of France* (American Academy of Political and Social Science, 1893); LA CONST. DU, 1875, Art. 2 (Law Partially Revising The Constitutional Laws. August 14, 1884). “The Republican form of the Government cannot be made of the subject of a proposed revision.”

made, the two Constitutions being the Constitution of the Fourth Republic in 1946 and the Constitution of the Fifth Republic in 1958 (hereinafter “1958 Constitution”).

Although still used as an unamendable provision, but different from Germany and Turkey which the author has described earlier, the French constitutional interpreting body the *Conseil Constitutionnelle* (Constitutional Council),⁴⁸ does not make a prohibition to amend the republican form of government that existed in the French 1958 Constitution as a basis to review the constitutionality of amendment.

For example, in the *Maastricht Ruling* 1992,⁴⁹ when France wanted to ratify the Maastricht Treaty on the European Union, the Constitutional Council then required amendments to the 1958 Constitution. The amendment was carried out and resulted in Article 88-3 of the French 1958 Constitution. After the amendment the Constitutional Council considers if the ratification of the Maastricht Treaty is no longer in conflict with the 1958 Constitution.⁵⁰ But some members of the French Parliament still considered the ratification of the Maastricht Treaty unconstitutional despite amendment. In response, the Constitutional Council argued:⁵¹

“Subject to the provisions governing the periods in which the Constitution cannot be revised (Article 7 and 16 and the fourth paragraph of Article 89) and to compliance with the fifth paragraph of Article 89 (The Republican form of government shall not be the object of an amendment), the constituent authority is sovereign; it has the power to repeal, amend or amplify constitutional provisions in such manner as it sees fit”

⁴⁸ Unlike the German Federal Constitutional Court and the Turkish Constitutional Court, naturally the Constitutional Council is a political body, built to support the task of parliament in formulating the law. At the beginning of its formation, the Constitutional Council was only given the authority to review the law before it was enacted by the parliament (*ex ante* control). But, since 1970 the Constitutional Council seems to entered slowly into the family of European Constitutional Courts. Now through amendments made in 2008, its authority has increased with the granting of its authority to review the constitutionality of laws that have been enacted, like many other Constitutional Courts. See Pasquale Pasquino, *New Constitutional Adjudication in France: the Reform of the Referral to the French Constitutional Council in Light of the Italian Model*, 3 INDIAN J. CONST. L. 105, (2009).

⁴⁹ Constitutional Council [CC] decision No. 92-312DC, Sept. 2, 1992, Rec. 76.

⁵⁰ LA CONSTITUTION DU, Art. 88-3. “Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither hold the office of Mayor or Deputy Mayor nor participate in the designation of Senate electors or in the election of Senators. An Institutional Act passed in identical terms by the two Houses shall determine the manner of implementation of this article.”

⁵¹ *Supra* note 53, at 35.

After issuing the opinion, the Constitution Council also affirmed that its jurisdiction had been limited by Article 61 of the French Constitution, that it was only entitled to review organic laws as well as ordinary actions of the parliament in respect of the constitution. Thus, it could not extend that authority by reviewing other legislations that are enacted by the parliament or through a referendum.⁵²

This limiting interpretation of authority was further reinforced, in 2003, after the Constitutional Council was asked to review the new bill made by Parliament on the implementation of decentralization amending several constitutional provisions or known as *2003 Ruling*.⁵³ The applicants assume if the Constitutional Council under Article 61 of the 1958 Constitution has jurisdiction to review it.⁵⁴ It turned out that the Constitutional Council had a different view and insisted that Article 61 of the 1958 Constitution gave them no authority to review the constitutionality of the amendment.⁵⁵

What the Constitutional Council has to say in both cases, indicates that it has greatly limited their authority, by narrowly interpreting the text of the Constitution that they have no authority to examine the constitutionality of the amendment, even France's 1958 Constitution has the unamendable provision in it. Although interpreting the text of the constitution narrowly, and declaring that it is not authorized to review the constitutionality of the amendment, it does not mean that the Constitutional Council is not involved the amendment process. In practice, the Constitutional Council is heavily involved, even though it is not through the authority to review its constitutionality.⁵⁶

One of the ways in which the Constitutional Council exercises to protect the unamendable provision of the 1958 Constitution is through its authority to review the constitutionality of the "organic law" (before their promulgation) by issuing interpretations which give guidelines for the future use of

⁵² Denis Baranger, *The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)*, 44 ISR. L. REV. 389, 395-396 (2011).

⁵³ CC decision No. 2003-469DC, Mar. 26, 2003, Rec. 293.

⁵⁴ 1958 CONST. Art. 61, about the jurisdiction of Constitutional Council to review the constitutionality of law.

⁵⁵ Denis Baranger, *supra*. note 56, at 396.

⁵⁶ *Id.* at 410.

amending power.⁵⁷ In both decisions the Constitutional Council argued that “the amending power that, while it was at liberty to amend the constitution, even implicitly, it was also bound by the limitations set by Articles 7, 16 and 89 of the Constitution”.⁵⁸ Such an example would of course prove if the Constitutional Council imposes limitations on the amending powers to protect the unamendable provision in Article 89 of the 1958 Constitution, even if the means of limiting their amendment does not go through judicial activism as shown by the German Federal Constitutional Court.

Of course what is done by the French Constitutional Council is very different from the Constitutional Court of Germany and Turkey, but as stated by Janelidze what is done by the Constitutional Council is a natural thing, because the Constitutional Council is a political organ that runs more administrative functions rather than constitutional. What is an administrative function is that it works more to correct the tasks of Parliament, not as a constitutional court that serves to preserve the constitutional values and principles.⁵⁹

ANALYSIS: COULD IT BE USED IN INDONESIA?

Until now the Indonesian Constitutional Court has never applied the unconstitutional constitutional amendment doctrine. This is reasonable, considering the last amendment made against the 1945 Constitution in 1999-2002, the period before the establishment of the Constitutional Court and the absence of a prohibition to amend the form of the Unitary State of the Republic of Indonesia.⁶⁰ However, if we look at the examples in some of the countries described above, the use of unconstitutional constitutional amendment doctrine to protect the unamendable provision in the constitution becomes possible in Indonesia, because even though the 1945 Constitution does not authorize the Indonesian Constitutional Court to examine the constitutionality of the amendment, in fact based on such instances as in Germany and Turkey it is possible even without such authority of the constitution, based only on the existence of an unamendable provision in its constitution.

⁵⁷ See Decision No. 99-410DC, Mar. 15, 1999, Rec. 51, and Decision No. 2003-478DC, July 30, 2003, Rec. 406.

⁵⁸ *Id.* at 413.

⁵⁹ See Janelidze, *supra* note 19, at 18.

⁶⁰ Constitutional Court was formed during the third amendment of the 1945 Constitution, the third amendment process was held between September 2000 to November 2001. Unamendable provision of the Unitary State of the Republic of Indonesia was formed during the fourth amendment, which held in 2002. See INDRAYANA, *supra* note 8.

There is the different example of France which also has an unamendable provision in the constitution but does not implement the doctrine, but it is understandable because the French constitutional interpreting body that is the Constitutional Council is a political organ that when originally established, was not intended to act as a guardian of the constitution. Unlike in Germany and Turkey, where the Constitutional Court is a judicial organ, and its existence was originally intended to act as a guardian of the constitution. However, it should be remembered, that although the Constitutional Councils do not use the doctrine of unconstitutional constitutional amendment, they still protect the unamendable provision contained in their constitution.

Moreover, according to Aharon Barak currently, in a democratic society, it has become a duty for the courts to play a role in protecting the constitution and democracy. Protecting the Constitution is not only a protection against the contradiction of statutes against it, but also against amendments that are contrary to the basic foundations or fundamental principles of the constitution.⁶¹ By making a provision in the constitution unamendable, it certainly shows that if the provisions prohibited to be amended by the author are deemed to have such an essential position to the constitution,⁶² then it is natural that the position is considered fundamental.⁶³

In Indonesia itself, as in Germany and Turkey, the intention of the establishment of a Constitutional Court is to act as a guardian of the constitution and democracy, and for democracy to be upheld in accordance with the desired constitution.⁶⁴ It can also be said that the form of the Unitary State of the Republic of Indonesia as an unamendable provision has a fundamental position for the 1945 Constitution. This is because, for most Indonesians the 1945 Constitution is a symbol of the struggle for independence from colonialism, while the Unitary State of the Republic of Indonesia is

⁶¹ Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 336 (2011).

⁶² Jose Luis Marti, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 17-36 (Alejandro Saiz Arnaiz & Carina Alcobero eds., 2013).

⁶³ Fundamental has the same meaning as the essential. In the field of law both terminology is often used interchangeably to explain the same thing. For example, the terms “fundamental term” and “essential term” in contract law are used to explain the same thing. See BLACK’S LAW DICTIONARY 1481 (Bryan A. Garner ed., 1999).

⁶⁴ Hamdan Zoelva, *Negara Hukum dan Demokrasi: Peran Mahkamah Konstitusi dalam Menegakkan Hukum dan Demokrasi [Rule of Law and Democracy: The Role of Constitutional Court to Defend the Law and Democracy]*, in NEGARA HUKUM YANG BERKEADILAN [A Just Rule Of Law] (Susi Dwi Harijanti ed., 2011); See also Susi Dwi Harijanti & Tim Lindsey, *Indonesia: General elections test the amended Constitution and the new Constitutional Court*, 4 INT’L. J. CONST. L. 138, (2005).

considered as one of the main elements of the 1945 Constitution⁶⁵. Hence, changing it is considered as not only changing the 1945 Constitution, but also making it something different.⁶⁶ Such a view is reflected in the opinion of former MPR member I Dewa Gde Palguna, while formulating that the form of the Unitary State of the Republic of Indonesia shall be used as an unamendable provision during the amendment period that took place between 1999-2002:⁶⁷

“..that there is one thing in the constitution that if those things change, in fact the constitution has lost its fundamentals idea.. For example, if the principle or the form of a unitary state changed, actually our Constitution has changed from its fundamental principles. If the form of a republic turns into a monarchy for example, it is not only in a constitutional but legally international manner, it is also a state succession... That is why, we have the idea that for matters concerning substances which may be said to be a kind of “equanom” condition for the 1945 Constitution, it should be stated explicitly as mentioned in the German Constitution and the French Constitution that they should not be subject on constitutional change. We must dare to express firmly as objects, not objects of change or in norms that cannot be changed”

What Palguna said, illustrates how fundamental the form of the Unitary State of the Republic of Indonesia is for the 1945 Constitution. This is the reason why it should be protected as an unamendable provision. Its fundamental position can also be observed in the Constitutional Court decision number 100/PUU-XI/2013 or better known as the “*Four Pillar of Nation and State Decision*”, in its decision the Constitutional Court affirmed if the form of the Unitary State of the Republic of

⁶⁵ Andrew Ellis, *The Indonesian Constitutional Transition: Conservatism or Fundamental Change*, 6 SING. J. INT’L. & COMP. L. 116, 117 (2002). According to Andrew Ellis the amendment is intended not only to create more democratic system, but also to protect the major element of the Constitution, which become the symbol of the Indonesian struggle for independence, it’s three major element are Preamble, the Unitary State of the Republic of Indonesia, and the Presidential System.

⁶⁶ *Id.* at 152.

⁶⁷ Sekretariat Jenderal MPR RI [Secretary General of People’s Consultative Assembly of Republic Indonesia], Annual Report Number 38, Committee Ad Hoc I, Working body of MPR about the analysis of Fourth Amendment of the 1945 Constitution, August 6th, 2002, 396-397 (2002).

Indonesia as an unamendable provision is the “*Cita Negara*” (*Staatsidee* or State Ideals),⁶⁸ namely a concept of the state that became the basis when forming and implementing the constitution.⁶⁹

So, because of that fundamental position, it can certainly be a justification for the Constitutional Court as the guardian of the 1945 Constitution, to use unconstitutional constitutional amendment doctrine to protect the form of the Unitary State of the Republic of Indonesia as an unamendable provision, if in the future there are amendments that seek to change the provision. Though the Court has a justification for using the unconstitutional constitutional amendment doctrine, this doctrine cannot be used sparingly, because the doctrine has also been criticized by various academics, the main criticism against the doctrine relating to the problem of democratic legitimacy.⁷⁰ A significant question remains as to how a court not directly elected by the people can overturn the people’s decision to amend the constitution, made by their representatives. Thus, this doctrine, when used, may create a sense of judicial supremacy that will be vulnerable to abuse, because it allows the courts to have the last word, when interpreting the constitution, and that their interpretations determine the application of the constitution for everyone.⁷¹

On the other hand, refusing to use the unconstitutional constitutional amendment doctrine on the basis of the lack of democratic legitimacy of the court, can also lead to other forms of abuse, as it makes the power to amend the constitution unlimited. Whereas the principle of constitutionalism requires that any power under a constitution including amending power be limited⁷² and the existence of an unamendable provision in the constitution is intended to limit it, without the

⁶⁸ See Indonesian Constitutional Court Decision No. 100/PUU-XI/2013 (Indon.). This ruling could be the only decision, where the Constitutional Court gives interpretation to the form of the Unitary State of the Republic of Indonesia.

⁶⁹ The term “*cita negara*” was first used by Soepomo, one of the founding fathers of the Indonesian state, when formulating the 1945 Constitution. See Marsilam Simanjuntak, *Pandangan Negara Integralistik* [An Integralistic State view] 2-4 (1994).

⁷⁰ Roznai, *supra* note 31, at 200.

⁷¹ The use of the unconstitutional constitutional amendment doctrine will abolish the limits of the concept of judicial supremacy, which regards the court have the last word to determine the interpretation of the constitutional provisions, so that its interpretation is binding to everyone. Because according to Robert C. Post, the limits of the concept of judicial supremacy are through the mechanism of constitutional amendment. Through the amendment mechanism, if the people feel that the court has misinterpreted the constitutional provisions, the people can overrule the judicial interpretation by way of amendment. See Robert Post and Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV 1027, 1030 (2004).

⁷² See Dante Gatmaytan, *Can Constitutionalism Constrain Constitutional Change?*, 3 NORTHWESTERN INTERDISCIPLINARY LAW REVIEW 22, (2010).

unconstitutional constitutional amendment doctrine this provision is clearly unenforceable. For these reasons, I am of the belief that the Constitutional Court must use the unconstitutional constitutional amendment doctrine, especially as a tool of last resort,⁷³ if there are amendments that seek to change an unamendable provision of the Unitary State of the Republic of Indonesia because this is the only manner in which the provision can have legal backing (or, “teeth”), in order to be enforced.⁷⁴

To prevent the abuse that can arise while using the unconstitutional constitutional amendment doctrine, YanivRoznai and SerkanYolcu in their criticism of the *Headscarf decision* in Turkey; formulating a special strategy for constitutional courts when using the doctrine; argue that a constitutional court when reviewing the constitutionality of an amendment to an unamendable provision must limit itself by not invalidating the amendment, if the amendment has no major effect or simply limits the principles of the provision, but by leaving the legal principle behind the provision, same as it was before the amendment. An example of this is the case of the *Headscarf decision*. The neutrality of the state in terms of religion according to Roznai and Yolcu remains undisturbed by the use of a headscarf by students in a higher educational institution, since it is done by individuals and not by the state.⁷⁵ Turkish Constitutional Court, according to them can only invalidate amendments in extraordinary and exceptional circumstances, for example if the amendment really changed the essence of the unamendable provision relating to secular character, so as to make it completely different, such as establishing a religion as a state religion.⁷⁶

The explanation given by Roznai and Yolcu explain, is in fact exemplified by the German Federal Constitutional Court in the five cases cited above. When the German Federal Constitutional Court used the doctrine of unconstitutional constitutional amendments, the Court did not invalidate any amendment made to the Basic Law at all. It can be said that the Court took the “middle road” by using the doctrine as a reminder, that the amending power possessed by the German parliament still has a limitation in Basic Law, which is expressed in the form of the unamendable provision. This

⁷³ Rivka Weill, *On the Nexus of Eternity Clauses, Proportional Representation, and Banned Political Parties*, 16 ELECT. LAW J. 237, 243 (2017).

⁷⁴ Barak, *supra* note 64, at 333.

⁷⁵ Roznai, *supra* note 31, at 204.

⁷⁶ *Id.* at 205.

approach can work to prevent the abuse that can arise from the doctrine, while not creating tension between the Courts and elected branches of government which have the power to amend the constitution.⁷⁷

Another argument justifying the use of unconstitutional constitutional amendment doctrine in Indonesia can be found in the opinion of Richard Albert, which states that “The doctrine is most important in countries where the constitution may be easily amended...whose constitution is in most cases amendable by a simple legislative majority”.⁷⁸ This argument by Albert was given as an answer to the criticism of the doctrine with respect to lack of democratic legitimacy of the courts when reviewing the constitutionality of the amendment. He argued that in a country that has a simple legislative majority amendment mechanism, it is not impossible to amend the provisions of the Constitution against the will of the majority of the people.⁷⁹

In the two countries discussed earlier, Germany and Turkey which also have unamendable provision in their constitution, amendments can also be made only by simple legislative majority, the German Basic Law, for example, requires acceptance of an amendment if approved by two thirds of the members of both legislative bodies, the *Bundestag* and the *Bundesrat*.⁸⁰ Similarly, the Turkish Constitution of 1982, though requires a referendum by the people if the amendment proposal is accepted by only three-fifths of the members of the Grand National Assembly of Turkey (GNAT), the referendum cannot take place if the amendment proposal has already been approved by two-thirds of the GNAT members.⁸¹

Reflecting from the experience of the Constitutional Court in both countries which used the doctrine of unconstitutional constitutional amendment to prevent the existence of amendments that change the unamendable provision, it can be concluded that the use of the doctrine by the

⁷⁷ Andrew Friedman, *Dead Hand Constitutionalism: The Danger of Eternity Clauses in New Democracies*, IV MEX. L. REV. 77, 88-89 (2011).

⁷⁸ Richard Albert, *How A Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments*, 77 MD. L. REV. (forthcoming 2017) (Manuscript at 12), <https://ssrn.com/abstract=2975832>.

⁷⁹ *Id* at 13.

⁸⁰ G.G. CONSTI., Art. 79 (2), “Any such statute requires the consent of two thirds of the members of the House of Representatives [*Bundestag*] and two thirds of the votes of the Senate [*Bundesrat*].”

⁸¹ T.C. Ana CONSTI., Art. 175, Constitution of the Republic of Turkey 1982.

Indonesian Constitutional Court is warranted as the amendment mechanism in Article 37 of the 1945 Constitution requires only a simple legislative majority in the MPR to accept an amendment proposal (50 percent + 1 of the members of MPR).⁸² Hence, as discussed this may provide an easier mechanism for the MPR to amend the substance of the unamendable provision of the Unitary State of the Republic of Indonesia, thus making the application of the doctrine necessary.

CONCLUSION

On considering the above jurisprudence, it seems highly likely that the Indonesian Constitutional Court would resort to the unconstitutional constitutional amendment doctrine to remedy a situation where an amendment violates the unamendable provision. As seen from an analysis of the two countries that become the source of comparison in this paper i.e. Germany and Turkey, the existence of unamendable provision in the constitution, is sufficient to provide legitimacy to the use of the unconstitutional constitutional amendment doctrine by the constitutional tribunals in both countries, to protect the unamendable provisions in the constitution.

Another country whose jurisprudence is used for comparative analysis in this paper and which has the unamendable provision in its constitution, but has time and again refused to use this doctrine, is France. However, the reluctance to use the doctrine is more due to the Constitutional Council as the constitutional tribunal in France is a political organ that was not originally established with an intention to act as a guardian of the constitution, unlike the Constitutional Courts in Indonesia, Germany, and Turkey which are judicial organs, and whose existence was originally intended to be as a guardian of the constitution.

The doctrine of unconstitutional amendment, however, has a weakness, with respect to the lack of democratic legitimacy in the decision of the courts while examining the constitutionality of amendments made by the representatives of the people. Nevertheless, I suggest that the Constitutional Court must place reliance on the unconstitutional constitutional amendment doctrine, whenever there is an amendment whose substance violates the unamendable provision of the constitution, as the unamendable provision is intended to limit the amending power of the

⁸²See Art. 37 (1), (2), (3), and (4), 1945 Constitution.

legislature, and only by using the unconstitutional constitutional amendment doctrine, can such limitation be enforced.

SPEEDY-TRIAL IN INDIA: CREATION, CHAOS AND INSTITUTIONAL CHOICES

- Sharad Verma*

ABSTRACT

This paper seeks to analyze the approach taken to ensure the realization of speedy-trial guarantees in the US and Canada, and assess the afflictions of the Indian scenario. Reports of various government and non-government organizations in India show that besides the institutional irregularities that plague the Indian legal system, which have been thoroughly documented - such as the high incidence of corruption; shortage of human and monetary resources, and the lack of institutional coordination - the disarray between the Supreme Court's pursuit of 'speedy justice' and the actual implementation of it may be attributed to the absence of efficient oversight institutions in India to independently monitor those constituent units of the administration of justice which should also be scrutinized for the present conditions, especially the police force.

I will argue that the wrongful violation of 'liberty' in custody is merely an 'effect' of institutional delay that confronts our "top-heavy" judiciary, and may initially be caused by unrestrained instances of wrongful arrest and arbitrariness that have become a manifest feature of the police's functioning. To be kept in check, such tendencies require instruments other than efficient courts. This was also the suggestion of the Supreme Court in Prakash Singh (2006), which led to the establishment of paper-tiger institutions all over India. Employing the 'institutional theory' to analyze why continuous oversight of value-entrusted institutions such as the police force is necessary, which was not done by the Supreme Court in Prakash Singh, I will present a critique of the institutions that stand at present, and by comparison, highlight certain imperatives to ensure the efficiency of such institutions, tailored to India's pendency concerns.

INTRODUCTION

The confluence of criminal law and constitutional values presents a choice between social control and individual liberty. To protect liberty from excessive or arbitrary intrusion by the State, most modern constitutions restrict State-power by placing constitutional limitations on the generally

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subordinate provisions of criminal law.¹ The standard to ensure that the State functions within constitutionally prescribed limits is maintained such that the State must justify every deprivation of liberty before an impartial tribunal, where individuals are guaranteed a “fair trial.”²

A major component of the right to fair-trial caters to the individual expectation of timely and efficient justice. The Canadian Charter fulfils this expectation by guaranteeing the “right to be tried within a reasonable time” in s. 11(b).³ The Sixth Amendment to the US Constitution also guarantees that in “all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”⁴ In comparison, the Constitution of India does the same, albeit in circumspect terms, wherein the ‘right to speedy trial’ has been interpreted by the Supreme Court of India as a part of the ‘fair trial’ guarantee in Art.21 of the Constitution.⁵ In the seminal case of *Hussainara Khatoon (1979)*,⁶ the Supreme Court found ‘speedy trial’ to be essential to criminal justice, and held that “a delay in trial by itself constituted denial of justice.”⁷

The current Indian scenario exhibits troubling realities about the legal system due to which thousands of under-trials, although presumed innocent until proven guilty, await justice for years, sometimes exceeding the possible period of punishment under the law itself.⁸ A paradox presents itself in how since the Supreme Court’s pronouncements favoring speedy trials in late-70s, the number of under-trials has simultaneously risen to the point where most of the incarcerated persons are not convicts, but simply those waiting for their day in court.⁹

¹ Aparna Chandra & Mrinal Satish, *Criminal Law and the Constitution*, in THE OXFORD HANDBOOK OF INDIAN CONSTITUTIONAL LAW 795, 795 (New Delhi: Oxford University Press, 2016).

² *Id.*

³ CANADA CHART. s.11. “Any person charged with an offence has the right (b) to be tried within a reasonable time.”

⁴ US CONST. amend VI.

⁵ Per Bhagwati J., in *Maneka Gandhi v. Union of India* (1978) 1 SCC 248(India).

⁶ *Hussainara Khatoon v. Home Secretary, Bihar*, 1979 AIR 1369(India).

⁷ *Id.*

⁸ Jayanth Krishnan & C. Raj Kumar, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, GEOR. J. OF INTL. LAW 755, 747-784 (2011).

⁹ *Id.* at 750.

Institutional theorists Bernard and Engel¹⁰ recommend that analysis of criminal law functionalities from an institutional perspective should be conceptualized according to the “individual behavior of criminal justice agents, the behavior of criminal justice organizations, and characteristics of the overall justice system and its components.”¹¹ Following this framework, in Part I, I will begin with an analysis of ‘fair trial’ as understood by the Indian Courts and the related laws. I will attempt to exhibit how despite no express constitutional guarantee, the Supreme Court’s resolve has led to the creation of a right to speedy-trial, but there exists dissonance between the constitutional ideals and highly discretionary laws that allow such ideals to be undermined, plausibly leading to the present situation.

In Part II, I will undertake a comparative analysis of the speedy-trial guarantee beginning with the US, analyzing the legal remedy created in *Barker* (1972). I will then trace the evolution of Canadian law on this subject, and highlight the essential choices that the Canadian judicial discourse exhibits, which can be referred to by Indian Courts when dealing with institutional delays in Part II. In Part III, I will present an institutional analysis of the recent Indian setup, and attempt to posit why an oversight mechanism is necessary, especially for value-laden functionalities such as the police force, and how the presence of a time-bound oversight authority may reduce unnecessary arrests, thereby stemming the problem of pendency.

PART I: INDIAN LAW AND EMPIRICS IN REVIEW

The National Crimes Records Bureau of India has reported that as of 2015, 67.2 per cent of prisoners in Indian prisons were ‘under-trials’ - people who were awaiting trial or whose trials were still ongoing, and who have not been convicted.¹² Meaning thereby, there are more than twice as many under-trials in Indian prisons as there are convicts. The under-trial population in India is estimated to be the 18th highest in the world, and the third highest in Asia.¹³ In the US, which is

¹⁰ Thomas J Bernard & Robin Shepard, *Conceptualizing Criminal Justice Theory*, 18:1 JUS. QUAR., 18:1, 165, 163-181 (2001).

¹¹ *Id.*

¹² NATIONAL CRIME RECORDS BUREAU, *Prison Statistics India 2015*, at i, (2016); Abhinay Laha, *Two-thirds of prisoners in India are Under-trials*, THE HINDU, October 24, 2016.

¹³ R. Walmsley, *World Pre-trial / Remand Imprisonment List: Pre-trial detainees and other remand prisoners in all five continents*, London: International Centre for Prison Studies (2008). <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf> (Last accessed: June 17, 2017).

estimated to have the highest incarceration rate in the world, only 20 per cent of prisoners are under-trials.¹⁴ The incarceration rate in US is 707 per 100,000 of the national population, while in India it is 33 per 100,000.¹⁵ However, the average occupancy rate in Indian prisons is 114 per cent, and is as high as 233.9 per cent in states such as Chhattisgarh.¹⁶ The conviction rate in India is also dismal, at 37 per cent, which pales in comparison to countries such as Australia and USA, at 85 per cent each.¹⁷

Empirical research about the Indian judiciary highlights a routine failure on part of the courts to provide timely remedies to the aggrieved.¹⁸ The knee-jerk judicial response to manage this problem has been fast-tracking of criminal cases, and the release of pre-trial detainees who have completed at least half their maximum prison term under s.436A of the Code of Criminal Procedure, 1973.¹⁹ Through this, 12,92,357 under-trials were released during 2015 out of which 11,57,581 were released on bail.²⁰ However, a total of 2,31,340 under-trial prisoners from various States and Union Territories are still lodged in jails for committing crimes under Indian Penal Code, and 50,457 were under-trials under special laws, *e.g.* Customs Act, 1962; Narcotic Drugs and Psychotropic Substances Act, 1985; Excise Act, 1944, *etc.*²¹

In the following analysis, the Indian legal system may appear to be ‘liberal’ on a preliminary glance. However, certain tendencies have manifested the criminal law discourse which aggravate the problem of pre-trial detention and will further be discussed in Part III of this paper.

¹⁴ W. Dobbie, *The effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, NBER Working Paper (2016) 1.

¹⁵ Institute for Criminal Policy Research, *World Prison Brief* (2013), <http://www.prisonstudies.org/country/india> (Last accessed: June 17, 2017).

¹⁶ Amnesty International India, *Justice Under Trial: A Study of Pre-Trial Detention in India* (2017) at 5. https://www.amnesty.org.in/images/uploads/articles/UT_Final.pdf (Last accessed: August 17, 2017).

¹⁷ Muhammad Waheed, *Victims of Crime in Pakistan*, The 144th International Senior Seminar Participants’ Papers, United Nations Asia and Institute for the Prevention of Crime and the Treatment of Offenders (2014) at 23.

¹⁸ Galanter & Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in India*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Stanford University Press, 2003) at 96.

¹⁹ Bhim Singh v. Union of India, WP (Crl.) No. 310/2005, Supreme Court order dated 5th September 2014 (India).

²⁰ *Id.*

²¹ NCRB, *supra* note 12.

A. **Constitutional Provisions and ‘Fair Trial’**

The two perspectives towards criminal procedure, one being the ‘liberty perspective’ and the other being the ‘public-order perspective’ may not necessarily be considered mutually-exclusive.²² Approaching constitutional law and criminal procedure from one perspective does not imply that the values of the other are negated, but does influence their *inter se* prioritisation.²³ Indian courts have been proactive in availing constitutional guarantees to the citizen, as well as progressively ‘reading-in’ newer aspects in constitutional provisions relating to ‘liberty’.²⁴ The oft-cited constitutional provision enshrining the liberty perspective is Art.21 of the Constitution, which guarantees the right to “life and personal liberty”, and can only be limited according to the “procedure established by law.”²⁵ Through the expansive interpretation of Art.21, a ‘fair-trial’ guarantee was read into the Constitution by the Supreme Court.²⁶ The concept has come to be understood as a condition, that the State must justify every instance of deprivation of life or liberty before an impartial tribunal.²⁷

Despite no express constitutional guarantee, speedy trial has been “read-in” as a part of fair trial, guaranteed under Art.21.²⁸ However, delay by itself is not considered to be a violation of the right. The accused must establish that ‘prejudice’ was caused because of the delay.²⁹ An important precedent in the context of Art.21 and its component phrase - “the procedure established by law” is

²² Aparna Chandra & Mrinal Satish, *supra* note 1, at 795.

²³ Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PENN. L. R. 506, 575-77 (1972).

²⁴ Aparna Chandra & Mrinal Satish, *supra* note 1 at 795.

²⁵ INDIA CONST. art. 21 “Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.”

²⁶ Maneka Gandhi, *supra* note 4.

²⁷ J. Jayalalitha v. State of Karnataka (2014) 2 SCC 401 (India).

²⁸ Hussainara Khatoon, *supra* note 5.

²⁹ Dharmendra Kirthal v. State of UP (2013) 8 SCC 368 (India).

Maneka Gandhi,³⁰ wherein the Supreme Court held that any law authorising the deprivation of liberty should be “reasonable, even-handed and geared to the goals of community good and State necessity.”³¹ In *Antulay*,³² the right to speedy trial was clarified to encompass “all the stages: namely, the investigation, inquiry, trial, appeal, revision and re-trial.”³³

Further, Art.22 of the Constitution guarantees to an accused person the right to be informed of the grounds for arrest; not to be denied the right to consult and be represented by a counsel of choice; and to be produced before the nearest magistrate within twenty-four hours of being arrested.³⁴ In pursuit of these provisions, the Supreme Court of India in the important case of *DK Basu*,³⁵ furnished guidelines for the exercise of the power to arrest, which require the preparation of a memo of arrest— to state the time and date of arrest, be signed by at least one witness, and countersigned by the arrested person. During the arrest, an officer must also bear accurate, visible, and clear identification tags with the name and designation.³⁶

Professors Aparna Chandra and Mrinal Satish in their analysis of Indian criminal procedure from a constitutional perspective hold that “India has demonstrated a shift from a liberty perspective to a public order perspective.”³⁷ The judiciary has regularly understood the law of arrest as requiring a balance between the rights of the arrestee and protecting societal interests in reducing crime rates.³⁸ However, the Supreme Court’s various perspectives have resulted in distinct practices and doctrinal construction, which helps explain the trajectory of the criminal process in India. To further understand this assertion, the constitutional ideals need to be compared to the legislative grants of power that cater to public order concerns and the functioning of criminal law in India.

³⁰ *Maneka Gandhi*, *supra* note 4.

³¹ *Id.*

³² *Abdul Rehman Antulay & Ors. v. R.S. Nayak & Anr.*, AIR 1992 SC 1701 (India).

³³ *Id.*

³⁴ INDIA CONST. art. 22.

³⁵ *DK Basu v. State of West Bengal*, AIR 1997 SC 610, 623 at ¶36 (India).

³⁶ *Id.*

³⁷ *Aparna Chandra & Mrinal Satish*, *supra* note 1, at 796.

³⁸ *Joginder Kumar v. State of Uttar Pradesh* (1994) 4 SCC 260 (India).

B. Arrest and Investigatory Provisions

In India, it has become an entrenched practice in criminal law to cloak pre-trial detention as criminal justice, bypassing the legal restrictions on such procedures.³⁹ Chapter V of the Code deals with the arrest of persons, in which S.41⁴⁰ is the main provision for situations when police may arrest without warrant.⁴¹ The Supreme Court has clarified that the power to arrest without a warrant is only confined to such persons who are accused or concerned with the offences or are suspects thereof.⁴² Caution has been mandated for the Magistrates when an arrest is made under mere suspicion by the police, “as the power of arrest without warrant under suspicion is liable to be misused.”⁴³

Till now, the Indian Constitution was understood not to guarantee privacy against the state⁴⁴. However, with the recent judgment of the Supreme Court in *K.S. Puttaswamy* (2017)⁴⁵, which unanimously held privacy to be a fundamental right guaranteed by Art.21, it is expected that standards such as the “reasonable expectation of privacy”⁴⁶ of the accused, and “reasonable and probable grounds”⁴⁷ of the law enforcement agent, which have not found relevance in India, may counter arbitrariness in arrest and investigatory procedures greatly, when and if they are read into the

³⁹ Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, (2001) 114 HARV L.R. 1433.

⁴⁰ §41, CODE CRIM. PROC.(‘CrPC’): When police may arrest without warrant.

⁴¹ §42, CODE CRIM. PROC. specifies yet another situation where a police officer can arrest a person - when a person commits an offence in the presence of a police officer, or where he has been accused of committing a “non-cognizable offence” and refuses, on demand being made by a police officer to give his name and residence or gives false name or residence, such person may be arrested for the purpose of ascertaining his name and residence.

⁴² *Sham Lal v. Ajit Singh*, 1981 CriLJ NOC 150 (India).

⁴³ *Re: Shahadat Khan*, AIR 1965 Tripura 27 (India).

⁴⁴ *M.P. Sharma & Ors. v. Satish Chandra &Ors.*, AIR 1954 SC 300 (India); *Kharak Singh v. State of U.P. &Ors.*, AIR 1963 SC 1295 (India).

⁴⁵ *Justice K.S. Puttaswamy and Anr. v. Union of India and Ors.*, Writ Petition (Civil) No. 494 of 2012 (India).

⁴⁶ *Katz v. United States*, 389 U.S. 347 (1967) (USA); *Hunter v. Southam*, (1984) 2 SCR 145 (Canada) “An assessment must be made as to whether in a situation, the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy to advance its goals, notably those of law enforcement.”

⁴⁷ *R. v. Biron*, (1976) 2 SCR 56 “The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibility-based probability replaces suspicion.” (Canada)

law. Currently, Chapter V of the Code further endows police officers with discretionary powers to arrest through various provisions.⁴⁸ S.47 (1) enables the police officer to enter a place if he has “reason to believe” that the person to be arrested is at that place.⁴⁹ What runs as a general theme in terms of ‘arrest provisions’ in the Code is the width of the powers granted to police officers.

To compare, British law enables arrest only in serious cases on a ‘reasonable suspicion’ that the arrested person has committed an offence. Woolf LJ.’s decision in *Castorina* (1988)⁵⁰ makes this test objective, requiring all relevant, and not irrelevant, circumstances to be considered. If the ‘reasonable suspicion’ test is not satisfied, the police are liable to pay damages. Dr. Rajeev Dhavan, Senior Advocate of the Supreme Court notes that the difference between the British and the Indian law has been expounded by the Law Commission in various reports, but is left hanging in the air.⁵¹ The generality of the Code’s provisions and consequent wide discretion have been the very source of misuse, with the qualifying words ‘reasonable’ and ‘credible’ reported to “mean nothing in practice.”⁵²

The preventive and public order provisions in the Code add another branch which empowers the police to arrest persons with wide discretion. S.151 allows a police officer to arrest any person, without orders from a Magistrate, and without warrant.⁵³ Additionally, S.167(2) of the Code authorises a Judicial Magistrate to send an accused to police-custody for 15 days if the police investigation cannot be completed within 24 hours, and if the magistrate is satisfied with the legality of the arrest.⁵⁴ Beyond this, if the magistrate “is satisfied that adequate grounds exist”, he or she may

⁴⁸ §43, CODE CRIM. PROC. provides for a situation where an arrest can be made by a private person and the procedure to be followed on such arrest.

⁴⁹ §47, CODE CRIM. PROC. - Search of place entered by person sought to be arrested.

⁵⁰ *Castorina v. Chief Constable of Surrey*, [1988] NLJR 180 (UK).

⁵¹ *Id.*

⁵² LAW COMMISSION OF INDIA (Herein after “LCI”), Report No. 177, Report on the Law Relating to Arrest, 4 (2001).

⁵³ §151, CODE CRIM. PROC. - “...if it appears to such officer that such person is designing to commit a cognizable offence and that the commission of offence cannot be prevented otherwise.”

⁵⁴ Vrinda Bhandari, *Pretrial Detention in India: An Examination of the Causes and Possible Solutions*, 11:2 ASIAN J. OF CRIM. 83, 80 (2016).

authorise further judicial custody up to 60 or 90 days.⁵⁵ It can be seen that, even though judicial magistrate is generally considered a sufficient check on the misuse of police powers, the legislation sets a very low standard of ‘legality’ for any incident of arrest to qualify. In 2014, the Supreme Court criticised the “cavalier manner” in which detention was authorised by magistrates and directed them to independently peruse the police report and record their satisfaction.⁵⁶

C. **Bailable and Non-bailable Offences**

Prof. Jayanth Krishnan notes that by more than a two-to-one margin, there are more pre-trial detainees facing non-bailable murder charges (54,245 defendants) than any other crime.⁵⁷ In ‘bailable’ offences, where bail is a matter of right, s.436 of the Code requires the release of the accused, provided that the accused “is prepared” to give bail or execute a personal bond.⁵⁸ Any accused person arrested for a bailable offence willing to provide bail must be released.⁵⁹ A 2005 amendment inserted S.436A⁶⁰, which requires an accused who had been detained for “one-half of the maximum period of stipulated imprisonment” to be considered for release, and to be granted release on the completion of the maximum period of imprisonment.⁶¹

The judicial view regarding grant of bail has been that pre-trial detention is not opposed to the basic presumptions of innocence.⁶² It has been observed that, “[E]nsuring security and order is a permissible non-punitive objective, which can be achieved by pre-trial detention. Where overwhelming considerations require of the denial bail, it must be denied in societal interest.”⁶³ In practice too, the present system of bail is heavily influenced by economic status and discriminates

⁵⁵ Based on whether the alleged offence is punishable with a sentence of less than, or more than, 10 years.

⁵⁶ Armesh Kumar v State of Bihar, (2014) 8 SCC 273 (India).

⁵⁷ Krishnan and Kumar, *supra* note 7, at 763.

⁵⁸ Bhandari, *supra* note 54, at 85.

⁵⁹ Santh Prakash v. Bhagwandas Sahni, 1969 MLW (Cri) 88 (India).

⁶⁰ §436A, CODE CRIM. PROC.

⁶¹ Bhandari, *supra* note 54, at 85.

⁶² LCI, Report No. 268, Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail, Law Commission of India (May 2017), at 11.

⁶³ State v. P. Sugathan 1988 Cr. LJ 1036 (Kerala, India).

against the impoverished and the illiterate.⁶⁴

Importantly, the Law Commission remarks that the “judicial system seems to have evolved two approaches to bail - bail as a right for the financially able; and for rest, bail is dependent on the judicial discretion, exercised through manipulation of the ‘reasonable’ amount that will be required for bail.”⁶⁵ However, as per one of the Supreme Court’s various views, ‘reasonableness’ entailed not using pre-trial detention through the denial of bail as a punitive measure.⁶⁶ In relation to the legal-aid guarantees⁶⁷ of the Constitution and its Preamble⁶⁸ for bail, in *Raghunathji*,⁶⁹ the Supreme Court has held that “social justice would include ‘legal justice’, which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realization of justice by all section of the people irrespective of their social or economic position or their financial resources.”⁷⁰

The Indian legal scenario exhibits contending values of the courts and the police force. Whereas the judiciary can be credited with humanization of law administration even in the face of pre-constitutional laws on a case-by-case basis, statistically, these ideals do not seem to have percolated the justice system as a ‘value’. Subsequently, when faced with institutional delay, the Supreme Court will be seen to make choices potentially contrary to its ‘fair-trial’ pursuit.

PART II: SPEEDY-TRIAL IN A COMPARATIVE PERSPECTIVE

The American notion of dismissing charges, *carte blanche*, against a defendant whose speedy trial right has been violated raises interesting issues, especially when comparing it to other legal systems.⁷¹ The framework, termed as the ‘exclusionary rule’, has been referenced by the Canadian judiciary, and will also be useful for considering the essential choices before India’s common law system which

⁶⁴ LCI, *supra* note 62, at 12.

⁶⁵ *Id.*

⁶⁶ *Gudikanti Naraisimhulu v. Public Prosecutor* (1978) SCC 240 (India).

⁶⁷ INDIA CONST. art.39 and art.39A.

⁶⁸ INDIA CONST. Preamble - “...to secure to all its citizens: JUSTICE, social, economic and political...”

⁶⁹ *L. Babu Ram v. Raghunathji Maharaj and Ors.*, AIR 1976 SC 1734 (India).

⁷⁰ *Id.*

⁷¹ *Krishnan and Kumar*, *supra* note 7, at 749.

regularly takes inspiration from the US.⁷²

A. **The American Conception - *Barker v. Wingo***

In the United States, the Sixth Amendment guarantees “the right to a speedy and public trial”, in all criminal prosecutions.⁷³ The right has been recognized as “one of the most basic rights preserved by our Constitution.”⁷⁴ To give effect to the guarantee, in *Barker* (1972),⁷⁵ the “dismissal with prejudice” remedy was formulated by the US Supreme Court as “the only possible remedy”⁷⁶ for speedy-trial violations. The Court enunciated a four-part balancing test meant to clarify when the right would be violated.⁷⁷

Following *Barker*, the US Speedy Trial Act of 1974 was signed into law by President Gerald Ford on January 3, 1975.⁷⁸ Upon signing the bill, President Ford expressed that the dismissal of the indictment with potential preclusion of subsequent indictment (in the trial judge’s discretion) would result in unnecessary exoneration of criminal defendants for serious offenses.⁷⁹ Essentially the same argument has been adopted by various commentators regarding the ‘exclusionary’ rule, holding that by making complete dismissal the only remedy for a speedy trial violation, lower court judges would not be in favour of defendants when such claims were brought, because of the inevitable, drastic

⁷² *Id.*

⁷³ US CONST., *supra* note 4.

⁷⁴ Anne Conway, *Speedy Trial: The Path to Protecting the Rights of Citizens and Defendants*, 7th Annual Conference on Legal & Policy Issues in the Americas (2006) 1.

⁷⁵ *Barker v. Wingo*, 407 U.S. 514 (1972).

⁷⁶ Akhil Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 645 (1996) (“The only possible remedy” for speedy trial violations, the Court has unanimously proclaimed, is dismissal of the case with prejudice-in effect, excluding all evidence of guilt forever.”)

⁷⁷ *Wingo*, *supra* note 75, 514, 529–32, which include:

1. the length of delay;
2. the reason for the delay;
3. the time and manner in which the defendant has asserted his right; and
4. the degree of prejudice to the defendant which the delay has caused.

⁷⁸ Statement on Signing the Speedy Trial Act of 1974, 1 PUB. PAPERS 7-8 (January 4, 1975).

⁷⁹ *Id.*

outcome - unconditional release.⁸⁰ However, the US Supreme Court has adhered to *Barker*, and the consequent legislation has ingrained unconditional release upon inordinate delay in the American system.

B. The Canadian Approach – From *Askov* to *Jordan*:

There exist various parallels between an accused person’s rights in Canada and the US, both of which evolved out of the British Common Law system.⁸¹ S. 11(b) of the Canadian Charter provides any person charged with an offence, “the right to be tried within a reasonable time.”⁸² According to the Supreme Court of Canada, like the US conception, the minimum remedy for a violation of s. 11(b) is a permanent stay of the proceedings.⁸³ As to whether the protection of the provision extends to appellate proceedings, in *Potvin*,⁸⁴ Supreme Court held that the right does not extend to appeals from conviction or acquittal.

The matter of systemic or institutional delay was for the first time considered by the Canadian Supreme Court in *Askov* (1990).⁸⁵ To check whether institutional delay was unreasonably long, the Court designed a test for comparing jurisdictions across Canada, by comparing the questioned jurisdiction to the standard maintained by the best comparable jurisdiction.⁸⁶ The test created, known as the ‘Comparative-Jurisdictions Test’, required all the factors to be considered as to whether the length of the delay of a trial has been ‘unreasonable’, grouped under the headings of length of the delay, explanation for the delay, waiver, and prejudice to the accused. No mechanical time-limit was set in *Askov*, and the determination of ‘reasonableness’ had to be made by the

⁸⁰ Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1515 (2009).

⁸¹ Marc W. Patry et al, *Recent Supreme Court of Canada rulings on Criminal Defendants’ Right to Counsel*, PSYCH, CRI& L. J., 741, 749 (2013).

⁸²CANADA CHART., *supra* note 3.

⁸³ Rahey (1987) 57 CR (3d) 289 (SCC) (Canada).

⁸⁴(1993), 23 CR (4th) 10 (SCC) (Canada).

⁸⁵ (1990) 79 CR (3d) 273 (SCC) (Canada).

⁸⁶DON STUART, CHARTER JUSTICE IN CANADIAN CRIMINAL LAW, 303 (5th ed., Toronto: Carswell, 2010).

‘comparative jurisdiction test’, upon balancing of the four factors.⁸⁷

Later, in *Morin* (1992),⁸⁸ the Court’s approach revised the emphasis on discretion and ‘actual prejudice’ to the accused, curtailing the right substantially.⁸⁹ In the balancing process, the Court sought to introduce subtle changes from the *Askov* approach which were restrictive of the accused’s rights, such as the ‘seriousness’ of the offence. Unlike the US Supreme Court’s approach in *Barker* - that once the accused had satisfied that the delay was “*prima facie* unreasonable”, the onus shifted to the Prosecution to justify the delay - the Court in *Morin* found it “preferable to evaluate the reasonableness of the lapse of time having regard to the factors referred.”⁹⁰ The comparative jurisdiction test was also abandoned in *Morin*.⁹¹

The “proof of prejudice” caused to the accused became the key factor leading to the decision in *Morin*, and its departure from *Barker*. According to Sopinka J., prejudice may be inferred from the delay, but when it is not inferred and otherwise proven, “the basis for the enforcement of the individual right is seriously undermined.”⁹² This approach led the Court in *Morin* to hold that despite a delay of 14 and a half months between the arrest and the trial, the accused had led no evidence of prejudice and did not respond to the Crown as to whether the defence counsel wished to have any of his cases expedited on account of prejudice.⁹³

In 2016, the Supreme Court of Canada overruled *Morin* in the 5:4 decision of *R v. Jordan*,⁹⁴ in which new presumptive ceilings for unreasonable delay were set at 18 months for cases being heard before provincial courts, or 30 months for cases that are either before the superior court or before the provincial court following a preliminary inquiry. Upon incurring delay exceeding the ceilings, the

⁸⁷*Barker*, *supra* note 75.

⁸⁸ *R. v. Morin* (1992) 12 CR (4th) 1 (SCC) (Canada).

⁸⁹Don Stuart, *supra* note 86, at 402.

⁹⁰ *Morin*, *supra* note 88, at 11-12.

⁹¹*Id.* at 19-21.

⁹² *Id.* at 23.

⁹³Don Stuart, *supra* note 86, at 406.

⁹⁴ 2016 SCC 27 (Canada).

prosecution (the Crown) would have to demonstrate that it is attributable to exceptional circumstances outside its control. The burden to show reasonableness was effectively put back on the Crown, and ‘exceptional circumstances’ were defined as being “circumstances which are reasonably unforeseeable or reasonably unavoidable, and which Crown counsel cannot reasonably remedy once they have arisen.”⁹⁵ The Court further allowed the accused persons wishing to challenge delays that fall below the ceiling, with the burden of demonstrating that the delay is unreasonable, requiring them to demonstrate both that the defence made a meaningful and sustained effort to expedite proceedings and that the case took ‘markedly’ longer than it should have.⁹⁶

What is interesting about the revised Canadian framework is its continued emphasis on ‘prejudice’ caused to the claimant, as well as the due weight given to arbitrariness of any kind on part of the state-functionaries. Subsequently, the contrary will be seen in the Indian Supreme Court’s approach towards the accused in a controversial case involving 37 years of delay.

C. **The Indian Approach towards ‘Unreasonable Delay’**

Like the choices made by the Canadian Supreme Court from time to time when faced with institutional constraints and delay, in *Ranjan Dwivedi* (2012),⁹⁷ a 37-year-old criminal case pending trial brought certain similar issues before the Supreme Court of India. Besides the complex history of the case, it was the polyvocality of the Court that stood exposed after its judgment.

The petitioners were accused and tried for the assassination of L.N. Mishra, the Union Railway Minister in 1975, who was injured in a bomb-blast at a railway station in 1975, and later succumbed to his injuries. The CBI filed charges in 1975. The trial proceeded for twelve years, and was subject to political interference, as was reported before the Court.⁹⁸ In 1987, the trial having remained pending for over 12 years, the accused petitioned for quashing of the charges and proceedings. The Supreme Court rejected these petitions in 1991, with a direction to the trial court to expeditiously

⁹⁵*Id.* at 73-74.

⁹⁶*Id.* at 82.

⁹⁷ *Ranjan Dwivedi v. The CBI*, (2012) 8 SCC 495 (India).

⁹⁸*Id.* at ¶3.

complete the trial on a day-to-day basis. However, these directions were not followed by the trial court.⁹⁹

The judgment in this case in 2012 was rendered pursuant to a second request by the accused petitioners to quash the trial, this time after 37 years of delay. The counsel for the petitioners laid the issue before the Supreme Court unequivocally: “Whether any judicial system would tolerate such an inordinate delay” and “whether the fact that the judicial system works in a particular way can be a justification for its failure to complete the trial.”¹⁰⁰ Engaging in a “balancing process”, the Court held that it must weigh several relevant factors, and that the nature of the offence and other circumstances in a case may be such that quashing of proceedings may not be in the interest of justice.¹⁰¹

Unlike the Canadian Supreme Court in *Jordan*, the Indian Supreme Court rejected the idea of an upper-limit, holding that “it is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one.” In fact, referring to an earlier decision of seven judges in *P.Ramachandra*,¹⁰² in the face of a trial pending for 37 years, the Court nullified the time-limits prescribed in earlier decisions. It was held that “criminal courts are not obligated to terminate trial or criminal proceedings merely for the lapse of time”, which was wrongly directed in *Common Cause (I)*.¹⁰³

The Court went on to lament that “...our legal system has made life too easy for criminals and too difficult for law abiding citizens. Our Constitution does not expressly declare that right to speedy trial is a fundamental right.”¹⁰⁴ These observations are curious not only because the Court based its views on the absence of ‘speedy trial’ in the Constitution, as if it was never read in earlier cases,¹⁰⁵

⁹⁹*Id.* at ¶4.

¹⁰⁰*Id.* at ¶5.

¹⁰¹*Id.*

¹⁰² P. Ramachandra v. State of Karnataka, (2002) 4 SCC 578 (India).

¹⁰³ Common Cause v. Union of India, 1996 (4) SCC 33. The Court further nullified the time-limits prescribed in Raj Deo Sharma (I), 1998 (7) SCC 507 and Raj Deo Sharma (II), 1999 (7) SCC 604 (India).

¹⁰⁴ Ranjan Dwivedi, *supra* note 97, at ¶16.

¹⁰⁵ Hussainara Khatoon, *supra* note 6.

but also because the Court essentially denied relief to the petitioners without finding any evidence of wrong-doing against them which may have stalled the process in any manner.

Surprisingly in consonance, Prof. Lon Fuller remarkably predicted that when faced with a ‘polycentric’¹⁰⁶ issue, an adjudicator, “instead of accommodating procedures to the nature of the problem he confronts, may reformulate the problem to make it amenable to solution through adjudicative procedures.”¹⁰⁷ Unlike the prudent Canadian approach to avoid viewing unintentional delay as causing ‘prejudice’ to the accused, and yet taking into account institutional factors in determining ‘unreasonableness’, the Indian Supreme Court held that “unintentional and unavoidable delays or administrative factors over which prosecution has no control”¹⁰⁸ cannot be held to violate the “accused’s right to a speedy trial, and need to be excluded while deciding whether there is unreasonable and unexplained delay.”¹⁰⁹ This approach indubitably dampens the cause of speedy trial in the country, especially considering the reality that it is only judicial efforts till now that have led to positive changes in terms of ‘fair trial’ in India, and exhibits the polyvocality that judicial decisions are capable of.

INSTITUTIONAL REQUIREMENTS OF CONSTITUTIONAL IDEALS

On the face of it, the Indian Constitution organizes the country’s judicial system with striking unity. Appeals progress upstream in a set of hierarchically organized courts, whose judges interpret law under a single national Constitution.¹¹⁰ However, there exists a clear distinction between the higher judiciary and subordinate levels. Since 2014, there are twenty-four High Courts in India, which range

¹⁰⁶ JEFF KING, *JUDGING SOCIAL RIGHTS*, 209 (Cambridge University Press 2012) (“According to Lon Fuller, a polycentric problem is one that comprises a large and complicated web of interdependent relationships, such that a change to one factor produces an incalculable series of changes to other factors. Fuller never gave a succinct one-line definition of what a polycentric task was.”).

¹⁰⁷ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. R. 353, 401 (1979) (“*First*, the adjudicative solution may fail. Unexpected repercussions make the decision unworkable; it is ignored, withdrawn, or modified, sometimes repeatedly. *Second*, the purported arbiter ignores judicial proprieties – he ‘tries out’ various solutions in post-hearing conferences, consults parties not represented at the hearings, guesses at facts not proved and not properly matters for anything like judicial notice. *Third*, instead of accommodating his procedures to the nature of the problem he confronts, he may reformulate the problem to make it amenable to solution through adjudicative procedures”).

¹⁰⁸ Ranjan Dwivedi, *supra* note 97, at ¶19.

¹⁰⁹ *Id.*

¹¹⁰ Nick Robinson, *Judicial Architecture and Capacity*, in THE OXFORD HANDBOOK OF INDIAN CONSTITUTIONAL LAW 331 (New Delhi: Oxford University Press, 2016).

in size from 160 sanctioned judges in Allahabad, to 3 in Sikkim.¹¹¹ There are 640 districts, each with its own district court, with a clear distinction between judges on the criminal side and the civil side.¹¹²

A. **The ‘Top-Heavy’ Indian judiciary:**

Each State in India provides funds for the operation of the state-judiciary, which has implications on the performance of such units, since the states in India are socio-economically diverse, leading to varying budgetary allocations.¹¹³ For example, in Maharashtra, over 2 per cent of the budget was allocated for judicial administration in 2011, while in Chattisgarh it was 0.25 per cent.¹¹⁴ This also indicates a variation in the litigant profile, the legal cultures, and the governance capability of different states.¹¹⁵ According to estimates, at the current rate, if the Supreme Court takes no fresh cases and there is no increase in judicial office-holders strength, a dedicated period of 9 months of fulltime attention would be needed to clear the backlog.¹¹⁶ On average, High Courts would need about 31 months, and lower courts about 21 months. Due to the inter-state disparities mentioned earlier, this figure would vary among various high courts and lower courts. Allahabad High Court, for example, would need about 72 months to clear its backlog while Sikkim High Court would need 14 months.¹¹⁷

One solution suggested for pendency is to take these calculations and hire enough judges to clear the backlog even as efficiency is increased through other means.¹¹⁸ General explanations for the pendency rates in Indian courts include poor management of cases; procedural complexity; the rare

¹¹¹ *Id.*, at 333.

¹¹² *Id.* (“A ‘district’ is the chief unit of administrative coordination below the state level.”)

¹¹³ THE SUPREME COURT OF INDIA, *National Court Management System Policy and Action Plan*, 1.1 (2012).

¹¹⁴ *Id.*

¹¹⁵ Robinson, *supra* note 110, at 335.

¹¹⁶ O.P. Jindal Global University, *Justice Without Delay: Recommendations for Legal and Institutional Reforms in Indian Courts*, 9 Research Paper No. 4/2011, Center on Public Law and Jurisprudence (2011).

¹¹⁷ Rohit Kumar, *Pendency of Cases in India Courts*, 2 PRS Legislative Research (2009).

¹¹⁸ LCI, Report No. 120, *Manpower Planning in the Judiciary* (1987) (suggested a formula for the fixation of judge strength, adopting a demographic approach).

use of plea bargaining.¹¹⁹ In a comprehensive analysis of institutional delay in the Indian judiciary on all levels, the researchers suggest “litigiousness” as being one of the obvious factors for pendency.¹²⁰ However, despite the evident clogging of cases, India has a relatively low per capita litigation rate.¹²¹ Prof. Robinson argues that the current low per capita litigation rate in India indicates that as the country develops economically, it can expect to have even more cases filed in its courts.¹²²

As has been illustrated in the analysis in Part I of this paper, since the values relating to the liberty and public order perspectives are sourced largely from constitutional law, cases in relation to arrest have a tendency of reaching directly before the higher judiciary in petitions, which is a statutory as well as constitutional right.¹²³ What this spells in terms of pendency figures is alarming. Prof. Krishnan holds that “the problem is not with too many cases coming in; it’s with too few coming out.”¹²⁴ Between 2005 and 2011, the number of cases that were appealed to the Supreme Court increased by 44.8 per cent, and the number of cases that were accepted by the Court for regular hearing increased by 74.5 per cent.¹²⁵ Prof. Robinson argues that this pattern seems to indicate that litigants are bypassing the subordinate judiciary where possible, appealing as a matter of right¹²⁶ to the Supreme Court or High Courts in greater numbers, and increasingly adding to the appeals pending.¹²⁷ By these accounts, it appears that the rate of pendency is only bound to rise, and the focus must shift to other institutions involved in the administration of law, regulation of which may reduce the incidence of wrongful arrests and investigation, and the consequent need for “due process” which consumes judicial resources, causing pendency.

¹¹⁹ LCI, Report No. 142, Concessional Treatment for Offenders (1991) at 24.

¹²⁰ Justice Without Delay, *supra* note 116, at 12.

¹²¹ Theodore Eisenberg & Nick Robinson, *Litigation as a Measure of Well-Being*, 62 DEP. L.R. 241, 247 (2013).

¹²² Robinson, *supra* note 110, at 336.

¹²³ INDIA CONST. art. 32 and art. 226.

¹²⁴ Justice Without Delay, *supra* note 116, at 12.

¹²⁵ Robinson, *supra* note 110, at 337.

¹²⁶ Madhav Hoskot v. State of Maharashtra, AIR 1978 SC 1548 (India); P.C. Garg v. Excise Commissioner, AIR 1963 SC 996, at 999 (India).

¹²⁷ Bhim Singh v. Union of India & Ors., Writ Petition (Crl.) Nos. 310/2005 (India).

B. The ‘High-Handed’ Indian Police

The institutional issues plaguing criminal law administration in India must be analyzed in tandem with the police force and its tendencies. Besides codification of the substantive aspects of criminal law in 1860, the Indian Police Act of 1861 was passed by the British administration of the time to structure a police-force in India. According to Art.246 of the Constitution¹²⁸ and S.3 of the IPA,¹²⁹ the police force is a “state subject” and is not dealt with at the central level. Each state government has the responsibility to draw guidelines, rules and regulations for its police force. These regulations are found in the state police manuals.¹³⁰

Police misconduct and the failure to effectively respond to situations have been found to undermine public confidence in the system.¹³¹ The widespread belief that the police functions with impunity, and officers are rarely held to account for their omissions and commissions is breaking the faith of the public in the police.¹³² Wrongful arrests add to the aspect of pendency because all instances of misuse of police authority under the various legislations covered in Part I of this paper are amenable to a challenge before the courts only, on a case-by-case basis. Since the only option to check police actions flouting the various judicial guidelines, is to file a case, the cause of ‘speedy justice’ and ‘fair trial’ suffers, adding to ever-mounting pendency.

The Malimath Committee¹³³ observed that the standard of policing in India remains poor and there is considerable room for improvement.¹³⁴ Besides inefficiency, members of the public complain of rudeness, intimidation, suppression of evidence, concoction of evidence and malicious padding of

¹²⁸ INDIA CONST. Art.246 specifies the subject matter of laws made by Parliament and by the Legislatures of States, to be read with E. 2 of List II of the Seventh Schedule.

¹²⁹ §2, IND. POL. ACT.

¹³⁰ Maja Daruwala, G.P Joshi & Mandeep Tiwana, *The Police Act, 1861: Why we need to replace it*, 16 Commonwealth Human Right Initiative Report (2005).

¹³¹ Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs, March 2003 (Known as the ‘Malimath Committee’) at 55.

¹³² CHRI report, *supra* note 129, at 16.

¹³³ Malimath Committee, *supra* note 131, at 91.

¹³⁴ *Id.*

cases.¹³⁵ Further, there exists no code of practice disciplining the police other than the broad due-process guidelines laid down in *D.K. Basu's* case,¹³⁶ and certain subsequent decisions.¹³⁷ Additionally, registering a criminal case against a police officer is a long and cumbersome process. Sanction requirements of S.132¹³⁸ of the Code prevent courts from taking cases of alleged offences in the discharge of official duty, for various categories of public servants including police officers. Thus, the legal quagmire ensures less responsibility, unrestrained discretion and unsustainable backlogs before courts at all levels.

The impunity with which the Indian police has been observed to function, due to the discretionary power to arrest under Indian law is also factor which contributes to pendency figures in India.¹³⁹ The present institutional requirement, besides those that are routinely suggested,¹⁴⁰ including the prospect of a legislative overhaul,¹⁴¹ is to create a continuous institutional check on the police force in India which ensures that illegitimate arrests as a matter of routine are not made in the first place, thereby checking the systemic harassment that has been reported to persist.

C. Institutional Theory of Police

There are well-founded reasons besides emulation of more successful models as to why an oversight and complaint mechanism to monitor police functioning may help in reducing unnecessary arrests, and the consequent need for litigation. 'Institutionalized organizations' such as the police force operate in environments that are complex, and function with certain values.¹⁴² Distinguishing 'institutionalized' organizations from 'technical' or 'business' organizations, Prof. John Crank explains that "the technical capacity of such organizations to produce this service is not well-known

¹³⁵*Id.*

¹³⁶ Basu, *supra* note 35.

¹³⁷ *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260. (The Supreme Court laid extensive guidelines governing arrest powers and procedures to be followed by the police.)

¹³⁸ §132, CODE CRIM. PROC. provides sanction-protection against prosecution for acts of enlisted functionaries.

¹³⁹ SANKAR SEN, *ENFORCING POLICE ACCOUNTABILITY THROUGH CIVILIAN OVERSIGHT*, 25 (Sage Publications, July 2010).

¹⁴⁰ Justice Without Delay, *supra* note 116, at 53.

¹⁴¹ LCI, *supra* note 118.

¹⁴² John P. Crank, *Institutional Theory of Police: A Review of the State of the Art*, 26 INTL. POL. J., 186, 187 (2003).

or well-established. However, these organizations succeed in their institutional environment to the extent that they conform to structures (procedures, programs, or policies) that are widely accepted as being correct, even though the relationship of these structures to actual performance is not well established.”¹⁴³ According to this conception of institutionalism, institutions should function within procedurally defined ‘means’ that provide for appropriate or customary ways of acting.¹⁴⁴ Skolnick and Fyfe suggest that “a redesign of police performance standards and rigorous overview of officer-behaviour is necessary to bring the police into conformity with propriety-conceptions.”¹⁴⁵ They describe this need as “coercive isomorphism”, *i.e.*, an obligated expectation that the department must conform with.¹⁴⁶

The need for providing statutory safeguards to prevent abuse of power of arrest has been emphasized time and again in various reports.¹⁴⁷ However, for procedural obligations to be routinely practiced, the more practical option appears to be a sufficiently empowered and time-bound external oversight body, rather than a judge expounding case-by-case, individually. Internationally, it is considered good practice for an independent, external body to have oversight over the entire complaints system and share responsibility with the police for the visibility and accessibility of the system.¹⁴⁸

D. The Need for Oversight

In *Prakash Singh* (2006),¹⁴⁹ the Supreme Court of India passed certain directives for structural reform of the police, one of which was that all state governments and union territories must devise Police

¹⁴³ Stephen Mastrofski et al, *Compliance on Demand: The Public's Responses to Specific Police Requests*, 33:269, J.OF CRIAND DELINQ. 305 (1996).

¹⁴⁴ Crank, *supra* note 142.

¹⁴⁵ JEROMEH. SKOLNICK, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE*, 97 (Free Press, New York: 1993).

¹⁴⁶ *Id.* at 98.

¹⁴⁷ LCI, *supra* note 118, at 16.

¹⁴⁸ *Id.* at 36.

¹⁴⁹ *Prakash Singh and Others v Union of India and Others*, (2006) 8 SCC 1 (India).

Complaints Authorities (PCAs) at the state and district levels, with immediate effect.¹⁵⁰Till now, 14 out of the 29 Indian states and 7 Union Territories have passed Police Acts in response to the Court's judgment,¹⁵¹ with variations that blunt the effectiveness of the directive.¹⁵²The Police Act of 1861 does not put in place any mechanism to ensure external accountability, unlike police legislation in the UK, South Africa, Canada and Northern Ireland.¹⁵³Presently, as civilian-oversight mechanisms, India has the National Human Rights Commission and the Central Vigilance Commission, but no specialized police complaints handling body.¹⁵⁴However, neither of these bodies are arms-length institutions, because they hold a wide portfolio of responsibilities, remaining ineffective in ensuring oversight of police actions.

To formulate the modalities for an oversight institution for India and its constituents is beyond the scope of this paper. However, general concerns that have been recognized by Indian researchers in their reviews of the working of these nascent institutions can be addressed. Specifically, in relation to expediency, there is no time-frame set for the conduct of inquiries by Police Complaints Authorities in any state or union territory in India.¹⁵⁵ Further, because the PCAs have not been given binding powers, they function as advisory bodies whose recommendations can be ignored by the government when they are inconvenient.¹⁵⁶Since most of the police complaint authorities in India came into being after government notifications were issued, the accountability of such institutions

¹⁵⁰ Devika Prasad, *Police Complaints Authorities in India - A Rapid Study*, Commonwealth Human Rights Initiative, 3 (2012). ("However, this being a judicial measure, there was no legislative mandate for the same to be complied with uniformly throughout the country.")

¹⁵¹ *Id.* ("Assam, Bihar, Chhattisgarh, Gujarat, Haryana, Himachal Pradesh, Karnataka, Kerala, Meghalaya, Punjab, Rajasthan, Sikkim, Tripura and Uttarakhand. While 26 states have established SSCs on paper, only 14 states have seen Commissions move from paper to actually functioning.")

¹⁵² Anuradha Nagar & Devika Prasad, *State Security Commissions: Bringing Little to the Table*, Commonwealth Human Rights Initiative, 66 (2014).

¹⁵³ CHRI, *supra* note 130 at 23.

¹⁵⁴ Dr. Changwon Pyo, *Examining Existing Police Oversight Mechanisms in Asia*, Asia-Europe Democratisation and Justice Series - Improving the Role of the Police in Asia and Europe, 13(2008).

¹⁵⁵ Devika Prasad, *supra* note 150, at 18.

¹⁵⁶ Anuradha Nagar, *supra* note 152, at 11.

itself is not provided for.¹⁵⁷

The current requirement is for a central legislation to furnish structural framework for oversight institutions, as well as the scope of their powers.¹⁵⁸ A separate legislation offers two key benefits: makes it easier for people to understand oversight bodies, and confirms their independence.¹⁵⁹ A comprehensive model for an arms-length oversight institution should provide for departments which investigate police-civilian interactions that result in serious injury or death; a public complaints authority; and an independent office to adjudicate police disciplinary hearings, and appeals.¹⁶⁰ Needless to mention, completion times for specific stages of the oversight process should be mandated to ensure timely review of police actions.¹⁶¹

Besides maintaining a continuous check on the police, delegating limited adjudicatory functions to the oversight institution would enhance the speed at which claims relating to procedural impropriety would be assessed,¹⁶² and the routine requirement of every claim reaching the regular judicial machinery would reduce, thereby positively affecting pendency.¹⁶³ In practice, continuous oversight and the ‘exclusion’ remedy empirically aid the trial process, with a primary benefit being the determination of whether a trial is needed, at all, in the first place.¹⁶⁴

¹⁵⁷ *Id.* at 15.

¹⁵⁸ This was also done in the case of Lokpal, through the Lokpal and Lokayuktas Act of 2013, in which the setting up Lokayuktas in the states was made mandatory within a period of one year from the date of commencement of the Act, but the consent of state governments was requisite for the adoption of the central legislation’s model (S.63 of Act No.1 of 2014).

¹⁵⁹ Justice Michael Tulloch, *Report of the Independent Police Oversight Review*, recommendation 4.1 at 65, (2017). (Report written in context of police oversight agencies of the province of Ontario, Canada.)

¹⁶⁰ See ANDREW GOLDSMITH & COLLEEN LEWIS, *CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY AND HUMAN RIGHTS*, 331 (Portland: Hart, 2000).

¹⁶¹ See N. MELVILLE, *THE TAMING OF THE BLUE: REGULATING POLICE MISCONDUCT IN SOUTH AFRICA*, 209 (Pretoria: HSRC, 1999).

¹⁶² Joel Miller, *Civilian Oversight of Policing, Lessons from the Literature*, 31 *Global Meeting on Civilian Oversight of Police*, 2002.

¹⁶³ David Bull & Erica Stratta, *Police Community Consultation: An Examination of its Practice in Selected Constabularies in England and New South Wales, Australia*, 27 *AUS. AND NZ. JOUR. OF CRIM.*, 237, 249 (1994).

¹⁶⁴ United States Department of Justice, *The Impact of the Speedy Trial Act on Investigation and Prosecution of Federal Criminal Cases*, 36 (1985).

CONCLUSION

There are simply too many offenses, too many offenders and few resources to deal with them all. A burgeoning population and socio-economic conditions exert unexpected pressures on institutions designed in an earlier time. Even though the law relating to arrest and investigation has till now been humanized by judicial pronouncements, a case-by-case adjudication of every instance of non-conformity is impracticable, since there is no option but to retain the accused in custody till contending claims regarding the arrest are settled. It is incumbent upon academia to recognize the challenge, and present real solutions to the pendency issue.

“It is becoming increasingly apparent to criminal justice scholars that models of criminal procedure are being stretched beyond their capacity by the phenomena they are designed to control.”¹⁶⁵ Whether institutional delay is a reason to sympathize with the accused’s plight, or it should not be an excuse to release the accused back in society presents is a choice contingent upon the perception of institutional propriety, having serious individual and societal consequences. Cases such as *Ranjan Dwivedi*, which go on to question whether a right to speedy-trial even exists must not be considered one-off incidents. The urgent need is for legislative and institutional reform to ensure that arrests are only made when necessary, and fail with consequences, when found to be unreasonable or unjustified.

“There has been a steady movement towards a convergence of legal systems – towards borrowing from others, institutions and practices that offer some home of relief.”¹⁶⁶ A comparative analysis of the Indian position with the Canadian and US conceptions exhibits the choices that are before the Indian policy-makers and the judiciary to adopt, especially the “dismissal with prejudice”¹⁶⁷ remedy. Further, the recent recognition of privacy as a fundamental right opens new avenues to object to unscrupulous police tactics, in which efficient oversight institutions will prove to be instrumental. To fulfill grand constitutional ideals, the requirement is to create accountable institutions that rein in the existing functionaries, and induce confidence towards a responsible police-force.

¹⁶⁵ Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 31 ISR. L. R. 169, 169 (1997).

¹⁶⁶ *Id.*

¹⁶⁷ Akhil Amar, *supra* note 76.

**ASPIRATIONAL CONSTITUTIONALISM, SOCIAL RIGHTS PROLIXITY AND
JUDICIAL ACTIVISM: TRILOGY OR TRINITY?**

- Catarina Botelho*

ABSTRACT

The epistemic community of constitutionalists and experts in public law is called to critically examine the main assumptions of fundamental social rights theory and its evident impact on the distribution of power among political actors. This article argues that the challenge of social rights' enforceability is clearly exacerbated in austerity contexts and within the framework of strong judicial review models.

One can question not only the legitimacy of downsizing legislation on social rights protection during economic setbacks, but also the constitutional courts' authority to dispute this kind of reformatio in pejus. From this perspective, the author would analyze the interesting evolution of the Portuguese Constitutional Court's jurisprudence of crisis.

Given their extensive commitment to social rights, aspirational constitutions leave more room for institutional tensions between democratic deliberation/popular sovereignty and an over-extended judicial power. Therefore, a too ambitious or unrealistic constitutional text may seduce judges to colonize political and economic issues. Precisely for that reason, this paper focuses on Brazilian right-to-health litigation, hoping to contribute to a puzzling and highly controversial constitutional debate: whether the so-called "judicial activism" is an illegitimate juristocracy or just compliance with the constitutional text?

ASPIRATIONAL CONSTITUTIONALISM

The ideational pattern of "aspirational constitutionalism", as the name suggests, is full of hope and aspirations. The text requires being an active instrument of political and social change. In order to fulfill this ambition, boldness should insinuate itself into the constitutional design. The constitutional reality is often idealized and the text focuses not on what the constitution is but on what it can be.¹ As examples we can point out many constitutional texts that emerged from authoritarian or totalitarian regimes such as the Portuguese, the Spanish, the Colombian or the

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¹ Kim Lane Scheppelle, *Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models*, 1 (2) IJCL 299, 296-324 (2003); PETER HÄBERLE, *DAS MENSCHENBILDIM VERFASSUNGSSTAAT* 29,30 (Duncker & Humblot, 2008).

Brazilian Constitution. These examples share a very heavy political history and the ambition of getting over the struggles of the past and building a fairer future.

A. What is the relevant time: the past, the present or the future?

Constitution makers answer the question “what is the relevant time: the past, the present or the future?” differently, that is why there are diverse conceptions of constitutionalism. From an external or sociological perspective on Constitutional Law, the doctrine tends to distinguish two main conceptions of constitutionalism: (i) functional or protective constitutionalism; and (ii) aspirational constitutionalism.² Still, there can be a myriad of possibilities in between, more or less equidistant.

Thus, it is clear that most of the constitutional texts do not fall solely into one category.³ For this reason, the distinction should not be exacerbated and it is suitable for a propaedeutic perspective of constitutionalism⁴. Both constitutional conceptions share a sense of common purpose and complex balance intent between the normal inconstancy of law and the need for stability and consistency endogenous to the constitutional norms.⁵

The functionalist approach goes back to the constitutional movement at the end of the 18th century. The liberal constitutions which resulted from the French and American Revolutions consecrated the rule of law, separation of powers and a catalog of essentially negative rights.⁶ Nowadays we can trace this kind of constitutional perspective in the United States, Canada, Austria, Germany, Belgium,

²Mauricio García Villegas, *Constitucionalismo aspiracional: derecho, democracia y cambio social en la América Latina*, 75 AP 92, 89-110 (2012).

³INGO WOLFGANG SARLET, CURSO DE DIREITO CONSTITUCIONAL 88 (Saraiva, 2017).

⁴ Catarina Santos Botelho, *Aspirações constitucionais e força normativa da Constituição – Requiem pelo conceito ocidental de Constituição?*, JORNADAS NOS 40 ANOS DA CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA – IMPACTO E EVOLUÇÃO 26, 19-52, Universidade Católica Editora, 2017.

⁵ Dieter Wyduckel, *Verfassung und Konstitutionalisierung – Zur Reichweite des Verfassungsbegriffs im Konstitutionalisierungsprozess*, FESTSCHRIFT FÜR FRIEDRICH E. SCHNAPP ZUM 70. GEBURTSTAG 895, 893-924 (Duncker & Humblot, Berlin, 2008), Niklas Luhmann, *Positivität des Rechts als Voraussetzung einer modernen Gesellschaft*, AUSDIFFERENZIERUNG DES RECHTS - BEITRÄGE ZUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 145, 113-153 (Suhrkamp, Frankfurt am Main, 1999), and Peter Häberle, *Zeit und Verfassungsstaat – kulturwissenschaftlich betrachtet*, 1, JURA, 4, 1-10 (2000).

⁶ As Mattias Kumm, *Taking the dark side seriously: Constitutionalism and the question of constitutional progress. Or: Why is it fitting to have the 2016 ICON-S conference in Berlin*, 13 (4) I.CON 777, 777-785 (2015) puts it “the Trinitarian grammar of the constitutionalist project”, which involved a commitment to human rights, democracy and rule of law.

Denmark or Ireland. The constitutional catalogues are frugal and minimalistic as the constitutional text only prescribes what can be achieved. Therefore, the text concentrates itself on the present moment, on what it wants to preserve in the present time and hopefully sustain in the future. In order to do so, constitutional norms tend to be politically neutral or aseptic.

On the other hand, in an aspirational constitutionalism scenario, the constitutional text is prolix, long and exhaustive, contemplating a wide range of rights and usually a generous catalog of social constitutional rights, even beyond the budgetary possibilities of the State.⁷ We can identify a certain dose of constitutional pretentiousness in the way the text is worded, with too ambitious or unrealistic superlatives. This constitutional arsenal is sometimes difficult to interpret and to implement. Therefore, questions arise with regard to the dilution of borders between judicial and legislative power.

After gathering the basic traits of each constitutional conception, what we question is whether intermediate alternatives are more balanced or not? The dangers of an extremely aspirational constitution are plain to see. First, there is a distressing lack of connection between the constitutional text and constitutional reality. This disconnection is potentially disturbing for the constitutional project of a State, as it threatens its probity and suitability.⁸ Instead of a normative constitution, in which the constitutional text accompanies the constitutional reality, aspirational constitutionalism is often based on semantic constitutions.⁹

In a semantic constitution, the constituent power tries to portray the historical and political moment of its elaboration.¹⁰ As a metaphor, we can think of the constituent power taking a picture of a concrete reality and trying very hard to perpetuate this reality through the times that will come. That, however, is not very likely to succeed. The problem is that, at first, it may seem that people are

⁷CATARINA SANTOS BOTELHO, OS DIREITOS SOCIAIS EM TEMPOS DE CRISE – OU REVISITAR AS NORMAS PROGRAMÁTICAS 167-164 (Almedina, 2015).

⁸Catarina Santos Botelho, *Aspirações constitucionais e força normativa da Constituição – Requem pelo «conceito ocidental de Constituição»?*, JORNADAS NOS 40 ANOS DA CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA – IMPACTO E EVOLUÇÃO 35, 19-52 (Universidade Católica Editora, 2017) (forthcoming).

⁹KARL LÖWENSTEIN, VERFASSUNGSLEHRE 151-154 (Mohr Siebeck, 2000).

¹⁰MANUEL AFONSO VAZ, TEORIA DA CONSTITUIÇÃO – O QUE É A CONSTITUIÇÃO, HOJE? 62-64 (Universidade Católica Editora, 2015).

happy and involved with the constitutional design. However, in both, intra-generational and intergenerational perspective, the political and sociological sensibilities of one time are not necessarily bequeathed to the following decades. As time goes by, it becomes increasingly difficult not to see this one-sided constitutionalism as a helpless political cover-up that downplays the fact that a Constitution is not a governmental programme. When a constitution is not politically neutral and functionalizes its fundamental rights ideologically, it risks of being overcome by the democratic volatility.

B. Semantic constitutions or the need to perpetuate a constitutional moment

The Portuguese example is pertinent to provide an illustration of this kind of phenomena. After almost five decades of the right-wing authoritarian regime of Salazar (“Estado Novo”), there was a military coup called “*Revolução dos Cravos*” led by the Movement of Armed Forces (MFA). However, the overthrow of Salazar’s dictatorship did not mean the immediate advent of democracy.¹¹

In fact, there was a significant intellectual confrontation between the “revolutionary path”, which defended a dominant and authoritarian constitution, and the “electoral path”, which opted for a liberal and democratic constitution.¹² The difficulty of forcing a consensus around these contradictory values was quite clear. The first version of the Portuguese Constitution, approved in 1976, had a heavy ideological weight of Marxist-Leninist content through an overly programmatic wording.¹³ This impressive ideological twist could have commuted into left-wing authoritarianism.

¹¹ António de Araújo & J. A. Teles Pereira, *A justiça constitucional nos 30 anos da Constituição Portuguesa: notas para uma aproximação ibérica*, 10, REVISTA BRASILEIRA DE DIREITO CONSTITUCIONAL 21-22, 21-38 (2007), Gonçalo Almeida Ribeiro, *O paradoxo democrático na constituição portuguesa de 1976*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 138, 121-148, (Almedina, 2016), and PAULO CASTRO RANGEL, O ESTADO DO ESTADO – ENSAIOS DE POLÍTICA CONSTITUCIONAL SOBRE JUSTIÇA E DEMOCRACIA 136 (Dom Quixote, 2009).

¹² Andre Thomashausen, *Die revidierte Verfassung der Republik Portugal von 1976*, JÖR 443-444, 443-506 (1983); Maria Inácia Rezola, *O Movimento das Forças Armadas e a Assembleia Constituinte na Revolução Portuguesa*, 13 HISTÓRIA CONSTITUCIONAL 635-659 (2012); and Maria Lúcia Amaral & Ravi Afonso Pereira, *Um tribunal como os outros. Justiça constitucional e interpretação da constituição*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 415-416, 381-446 (2016).

¹³ CATARINA SANTOS BOTELHO, OS DIREITOS SOCIAIS EM TEMPOS DE CRISE – OU REVISITAR AS NORMAS PROGRAMÁTICAS 256-258 (Almedina, 2015); Joaquim Cardoso da Costa, *Tribunal Constitucional e debate público*, 40 ANOS DE POLÍTICAS DE JUSTIÇA EM PORTUGAL 120, 113-141 (Almedina, 2016); and JORGE MIRANDA, DA REVOLUÇÃO À CONSTITUIÇÃO – MEMÓRIAS DA ASSEMBLEIA CONSTITUINTE 181-272 (Principia, 2015).

To begin with, the Portuguese Preamble states that “the Constituent Assembly affirms the Portuguese people’s decision to ‘*open up a path towards a socialist society*’”.¹⁴ This kind of poetic and idealized Preamble is typical of what Liav Orgad calls a “ceremonial-symbolic Preamble”.¹⁵ According to the author, the Portuguese Preamble, due to its ineluctable politic character, should not be legally enforceable and is just a nonbinding historical and symbolic statement.

Next, the first Article of the Portuguese Constitution (first version of 1976) stated that “Portugal is a sovereign republic committed to transformation into a society without classes”. The constitutional text had norms such as: “the Portuguese Republic is a democratic State with the goal of assuring the transition to socialism through the creation of conditions for the exercise of power by the working classes” (Article 2); “the law can regulate that the expropriation of landowners, owners and entrepreneurs or shareholders do not give rise to any compensation” (Article 82); “all nationalizations are irreversible conquests of the working classes” (Article 83).

There is no requirement of presenting more examples. This small sample of articles is enough to understand why some doctrines warned of a dangerous mismatch between text and constitutional reality, which would culminate in the loss of the normative force of the Portuguese Constitution.¹⁶ This a perfect example of what Richard Albert describes as “constitutional dismemberment”, which is a “deliberate effort to transform the *identity*, the *fundamental values* or the *architecture* of the constitution without breaking legal continuity”.¹⁷ Fortunately, the constitutional amendments of 1982 and 1989 reshaped the Portuguese Constitution and made it consonant with the substantive requirements of a truly democratic Rule of Law.

Aspirational constitutionalism can become a sort of a “cult of constitutionalism”¹⁸, or, as a Portuguese author had once described, a “constitutional psychosis” that asks from the constitution

¹⁴ The “socialist society” refers to the Marxist-Leninist front that was very influential in the political Portuguese life at the time of the end of Salazar’s dictatorship.

¹⁵ *The preamble in constitutional interpretation*, 8 I.CON 722-723, 714-738 (2010).

¹⁶ Heinrich Ewald Hörster, *O imposto complementar e o Estado de Direito*, III RDES 93, 37-136 (1977), and Jörg Polakiewicz, *Soziale Grundrechte and Staatszielbestimmungen in der Verfassungsordnung Italiens, Portugals und Spaniens*, ZAÖRV349,340-391 (1994).

¹⁷ 43 YJIL, 2018 (forthcoming).

¹⁸ Richard Albert, *The Cult of Constitutionalism*, 39 FSULR, 373-416 (2012).

way more than what it can ever give. In this scenery, in each political turn all the attention will “anxiously turn to the magical idea of the constitution, as if the solution to every problem depended exclusively on it”.¹⁹ If a constitutional text is an exercise of erudition, intellect and poetry, then its rules and principles will probably not have immediate applicability and will be “sleeping rules.”²⁰

SOCIAL RIGHTS PROLIXITY

C. Social rights design

A macro-comparative approach shows us that constitutions come in various lengths. For a long time, social rights were disregarded as a less important fundamental rights category. In the last decades, we can identify a growing trend toward their consecration in constitutional texts.

A global survey of social rights’ positivation shows a growing number of states with constitutional positivation – for example, Portugal, Brazil, Italy, France, Greece, South Africa, Argentina, and Chile, just to name a few. Other states, such as Germany, Canada, Australia or the United States, prefer to leave social rights to the *infra* constitutional legislation.²¹ Nevertheless, while in some countries social rights are not a part of constitutional adjudication, this does not translate to social rights being constitutionally irrelevant.

After years of ongoing debates, the main question is still univocally unanswered: do social rights belong to the constitutional text? Some answer it affirmatively and base their response in several arguments such as social rights are “trumps” against the majority; social rights share the same dignity of liberty rights, given the fact that liberty rights are often incomplete without social rights; social rights promote a genuine equality (and not just a formal equality) between citizens.²²

¹⁹ Rogério Ehrhardt Soares, *O conceito Ocidental de Constituição*, 119 REVISTA DE LEGISLAÇÃO E JURISPRUDÊNCIA, 36, 36-73 (1986).

²⁰As Gargella and Curtis interestingly called them, EL NUEVO CONSTITUCIONALISMO LATINOAMERICANO: PROMESAS E INTERROGANTES, 31-34 (Cepal, 2009).

²¹ Ingo Wolfgang Sarlet, *Los derechos sociales en el constitucionalismo contemporáneo: algunos problemas y desafíos*, LOS DERECHOS SOCIALES COMO INSTRUMENTO DE EMANCIPACIÓN 39, 35-61, (2010).

²²Absjorn Eide & Allas Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 15-21 (Springer, 1994); Amartya Sen, *Human rights and the limits of law*, 27 CALR 2915, 2913-2927 (2006); Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 AHRLJ 467-474 (1992); HELMUT WILLKE, STAND UND KRITIK DER NEUERENGRUNDRECHTSTHEORIE – SCHRITTE Z. E.

On the other side of this debate, it is argued that the social rights belong to the democratic discussion; they are neither fundamental rights nor constitutionally binding; they are incredibly costly and an “affordable luxury” only accessible to very rich states.²³ Consequently, social rights could never be designed as rights, but are instead moral duties that arise from a social idea.

D. Unbreakable walls require demolition techniques

The language of indivisibility – liberty rights *versus* social rights – is not uncommon and, according to Jeff Kenner, “[it] cloaks the reality of a 50-year long schism”.²⁴ This systematic option is the reality of most international legislations approved after the Second World War. In 1966, the International Covenant on Civil and Political Rights (“**ICCPR**”) and the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”) were approved. Yet, there are remarkable peculiarities regarding the ICESCR when compared with the ICCPR. Firstly, the ICCPR addresses states whereas the ICESCR addresses individuals. Secondly, there is a progressive clause in the ICESCR that does not exist in the ICCPR. Thirdly, contrary to the ICCPR, the ICESCR recognizes that the rights’ implementation depends on available resources.

In an international regional dimension, there is also a clear division between the European Convention on Human Rights, 1950 (“**ECHR**”) and the European Social Charter, 1961 (“**ESC**”). The latter has a very inferior enforceability level when compared to the ECHR. If the ECHR is enforced by the European Court of Human Rights, ESC is monitored by the European Committee of Social Rights, which, until recently, was not considered as a jurisdictional organ.²⁵ In confirmation

NORMATIVENSYSTEMTHEORIE 219 (Duncker&Humblot ,1975); Norbert Bernsdorff, *Soziale Grundrechte in der Charta der Grundrechte der Europäischen Union – Diskussionsstand und Konzept*, 1 VSSR 2, 1-23 (2001); and Pierre de Vos, *Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa’s 1996 Constitution*, 13 AHLRJ 71, 67-101, (1997).

²³ Albie Sachs, *Social and Economic Rights: Can they be made Justiciable?*, 53 SMULR1381-1391 (2000), JOEL FEINBERG (1973) at 67-95, JÖRG PAUL MÜLLER; *SOZIALERGRUNDRECHTE IN DER VERFASSUNG?* 69 (Helbing Lichtenhahn Verlag, 1981); Lawrence G. Sager, *Thin constitutions and the good society*, 69 FLR 1989-1990 1989-1998 (2001); Manfred Nowak, *Die Justitiabilität wirtschaftlicher, sozialer und kultureller Grundrechte, DIE DURCHSETZUNGSWIRTSCHAFTLICHER UND SOZIALER GRUNDRECHTE*387-405 (Norbert P. Engel, 1991); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOYALREV 1207-1219 (1991); Richard Albert, *The Cult of Constitutionalism*, 39 FSULR, 400 373-416 (2012); and Wolfgang Graf Vitzthum, *Auf der Suche nach einer sozio-ökonomischen Identität? – Staatszielbestimmungen und soziale Grundrechte in Verfassungsentwürfen der neuen Bundesländer*, VBLBW 413 404-414 (1991).

²⁴ *Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility*, ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 1, 1-25 (Hart Publishing, 2003).

²⁵ Régis Brillat, *La Charte Sociale et son acceptation progressive par les États*, 13 REDF 230, 227-243(2009).

of this idea, an analysis of the constitutional jurisprudence – in states members of the Council of Europe – reveals beyond doubt that the ECHR is widely cited and used as a ground for jurisdictional decisions, while references to ESC are infinitesimal.²⁶ Furthermore, rights protected by the ECHR are susceptible to an individual complaint under article 34, a situation that is not echoed by the mechanisms provided for the protection of the rights provided by the ESC.²⁷

After the Second World War, the profound ideological division between liberal and socialist worldviews translated itself to the normative context. However, this division should not be exacerbated. In author's opinion and in a dogmatic perspective, we should not divide fundamental rights according to different values, as if liberty rights were first class rights and social rights were second class rights.²⁸ These days, we can see a global effort to change the perspective of a constitutional or international “apartheid” between liberty and social rights.²⁹ There is not a “clear-cut division” between these rights, which is why eventual differences should not be related to alleged diverse levels of dignity/relevance/ontological worthiness, but should be associated with different formal traits of the norms that consecrate fundamental rights instead.³⁰

During several decades, a common perspective regarding fundamental rights divided them into two sealed and impenetrable categories: (i) *liberty* rights, which are negative rights, rest on state abstention and, therefore, are cost-free; and (ii) *social* rights, which are sheer positive rights and demand costly

²⁶ Catarina Santos Botelho, *A proteção multinível dos direitos sociais : verticalidade gótica ou horizontalidade renascentista – Do nãoimpacto da Carta Social Europeia (Revista) na jurisprudência constitucional portuguesa*, 7 LEX SOCIAL 88-123 (2017) ; Gráinne de Búrca, *The future of social rights protection in Europe*, SOCIAL RIGHTS IN EUROPE 11, 3-15 (Oxford University Press, 2005) ; J.-M. Belorgey, *Quelles garanties des droits sociaux en temps de crise?*, 2 LEX SOCIAL 7, 1-11 (2016) ; and Jean-François Akandji-Kombé, *The Material Impact of the Jurisprudence of the European Committee of Social Rights*, SOCIAL RIGHTS IN EUROPE 89, 89-108 (Oxford University Press, 2005).

²⁷ Still, it's relevant to mention the collective complaint mechanism, created by the Additional Protocol (1995).

²⁸ CATARINA SANTOS BOTELHO, OS DIREITOS SOCIAIS EM TEMPOS DE CRISE – OU REVISITAR AS NORMAS PROGRAMÁTICAS 286-287 (Almedina, 2015); Frédéric Sudre, *La protection des droits sociaux par la Cour européenne des droits de l'homme : un exercice de «jurisprudence fiction»?*, 54 RTDH 757, 755-779 (2003); Ngo Wolfgang Sarlet, *Los derechos sociales en el constitucionalismo contemporáneo: algunos problemas y desafíos*, LOS DERECHOS SOCIALES COMO INSTRUMENTO DE EMANCIPACIÓN 40, 35-61, (2010); and Mariella Saettone, *El estado de derecho y los derechos económicos sociales y culturales de la persona humana*, RIIDH 142-143, (2004), at 142-143, 133-154.

²⁹ Jorge Pereira da Silva, *Os direitos sociais e a Carta dos Direitos Fundamentais da União Europeia*, XV (2) DIREITO E JUSTIÇA 154-155, 147-230 (2001).

³⁰ Simon Deakin and Jude Browne, *Social Rights and Market Order: Adapting the Capability Approach*, ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 38, 27-43 (2003).

and extensive intervention from the state in order to correct inequalities. In other words, the main logic we are used to, even if just for propaedeutic intentions, is the following: (a) liberty rights → *non facere* obligations → non costly; (b) social rights → *facere* obligations → costly.

In the last decade, there have been many doctrinal and jurisprudential enlightenments which show us that this dichotomy can be misleading. On the one hand, both liberty and social rights have negative and positive dimensions. Although their positive dimension represents a considerable length in social rights design, it is certainly not an exclusive liberty rights' trait.³¹ Social rights do have negative dimensions, even if in some rights' design this negative dimension is just distinguishable in the rights' minimum content. Liberty rights also have positive dimensions, as electoral rights can easily demonstrate.

Regarding rights' costs, there is a tendency to consider social rights as overly pricey when compared to cost-free liberty rights.³² The truth is that all fundamental rights have significant budgetary implications and the idea of cost-free rights is a myth.³³

In conclusion, liberty and social rights cannot be successfully compartmentalized because they are deeply interconnected and mutually dependent. They always require the reciprocal enlightenment of engagement.

E. Social rights in the Portuguese Constitution

C.1 Identifying social rights' regimes

The wishful thinking of the Portuguese constitutional framers is well documented. Many foreign authors considered this baroque text an inconsistent compromise between liberalism and socialism.³⁴

³¹FRIEDERIKE VALERIE LANGE, GRUNDRECHTSBINDUNG DES GESETZGEBERS – EINE RECHTSVERGLEICHENDE STUDIE ZU DEUTSCHLAND,FRANKREICH UND DEN USA 444, (Mohr Siebeck, 2010); and Hans-Jürgen Whipfelder, *Die verfassungsrechtliche Kodifizierung sozialer Grundrechte*, ZRP 147, 140-149 (1986).

³² EVA M. K. HÄUBLING, SOZIALE GRUNDRECHTE IN DER PORTUGIESISCHEN VERFASSUNG VON 1976, 67 (Nomos Verlagsgesellschaft, 1997); and Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, TLR 1896, 1895-1919 (2004).

³³ José Casalta Nabais, *Reflexões sobre quem paga a conta do estado social*, 7 RFDUP 51-52, 51-83 (2010); Luigi Ferrajoli, *Derechos sociales y esfera pública mundial*, LOS DERECHOS SOCIALES EN EL ESTADO CONSTITUCIONAL 54, 47-59 (Tirant to Blanch, 2013); Raymond Plant, *Social Rights and the Reconstruction of Welfare*, CITIZENSHIP 56, (Lawrence & Wishart, 1991); STEPHEN HOLMES and CASS R. SUNSTEIN, THE COST OF RIGHTS – WHY LIBERTY DEPENDS ON TAXES (W. W. Norton & Company, 1999), at 43-48; and Volker Neumann, *Sozialstaatsprinzip und Grundrechtsdogmatik*, DVBL 92-100 (1997).

The illusion of continuous progress translated in one of the widest social rights' catalogue in the world and probably the widest in Europe.³⁵

In the Portuguese Constitution fundamental rights are divided in two categories: (i) rights, liberties and freedoms (Title II – articles 24 to 57); (ii) social, economic and cultural rights (Title II – articles 58 to 79). To highlight this distinction, the Constitution *warrants* liberty rights (b) article 9) and *promotes* social rights (d) article 9). As we can see, these verbs are not synonyms and reflect a particular constitutional idiosyncrasy.

This division is relevant since the constitutional framer consecrated a special regime for rights, liberties and freedoms (herein liberty rights). Indeed, the Portuguese Constitution reserves a special regime to liberty rights: they have immediate applicability, bind public and private entities and benefit from rigorous limitations to their restriction (article 18);³⁶ the right to “resist any order that infringes their rights, freedoms or guarantees and, when it is not possible to resort to the public authorities, to use force to repel any aggression” (article 21); furthermore, unless it also authorizes the Government to do so, the Assembly of the Republic (Parliament) has exclusive competence to legislate on liberty rights (b) no. 1 article 165);³⁷ finally, amongst several material limitations on constitutional amendment, “constitutional revision laws must respect citizens’ rights, freedoms and guarantees” (d) article 288).

C.2 Social rights’ specificities in the Portuguese Constitution

Given social rights’ specificities in the Portuguese legal system, it is necessary to establish whether the relationship between liberty rights and social rights should be *dichotomous*, *unitary* or of *interaction*.

³⁴ GEOFFREY PRIDHAM, THE DYNAMICS OF DEMOCRATIZATION – A COMPARATIVE APPROACH 208 (2000).

³⁵ See Avi Ben-Bassat & Momi Dahan, *Social rights in the constitution and in practice*, 36 (1) JOURNAL OF COMPARATIVE ECONOMICS 103-119 (2008); José Martínez Soria, *Das Recht auf Sicherung des Existenzminimums*, 13 JURISTENZEITUNG 647-655 (2005); and Mónica Brito Vieira & Filipe Carreira da Silva, *Getting Rights Right: Explaining social rights constitutionalization in revolutionary Portugal*, 11 (4) IJCL, 898-899, 898-922 (2013).

³⁶ The immediate applicability clause was clearly inspired by article 1/3 from the German *Grundgesetz*.

³⁷ Although some social rights also benefit from this partially exclusive legislative competence from the Assembly of the Republic, given f), g) and h) no 1 article 165 (bases of social security, national health service, nature/ecologic balance/cultural heritage and the e general regime governing rural and urban rentals).

We stand for a renewed understanding of social rights, based on logic of material indivisibility and structural interaction between liberty rights and social rights.³⁸

Given the impressive array of social rights, the question that follows can be stated thus: which is the social rights' regime? Is it same as liberty rights? The Portuguese doctrine is highly divided on this matter. We will present the three main narratives that were built around this inquiry:

- A. Some authors defend a rigid bifurcation between liberty and social rights and even argue for *an ontological superiority* of liberty rights when compared with social rights.³⁹ Far from conferring independent constitutional rights, social rights would be principles orientating state's action.
- B. At the other extreme of this discussion, others defend regime *parity* between both the rights and refuse any distinction.⁴⁰ Even if social rights' content are not constitutionally determined, the reality is that the Portuguese legislator has already legislated on all social rights. Then, this *infra* constitutional legislation on social rights has reached the status of fundamental worth as a constitutional *continuum*.⁴¹ Yet the assumption underpinning this thesis – that fundamental rights' regime is unitary – is not what the constitutional text consecrates *de jure condito*, albeit interesting *de jure condendo*.
- C. Nevertheless, the majority of the doctrines (as included by the author) supports an intermediate thesis – more or less equidistant – which states that there is no substantial hierarchy between rights, just a *formal* distinction, based either on different regimes, on

³⁸ CATARINA SANTOS BOTELHO, OS DIREITOS SOCIAIS EM TEMPOS DE CRISE – OU REVISITAR AS NORMAS PROGRAMÁTICAS 313-321 (Almedina, 2015).

³⁹ CARLOS BLANCO DE MORAIS, CURSO DE DIREITO CONSTITUCIONAL – TEORIA DA CONSTITUIÇÃO EM TEMPO DE CRISE DO ESTADO SOCIAL II 531-545 (Coimbra Editora, 2014); JÓNATAS MACHADO, LIBERDADE DE EXPRESSÃO – DIMENSÕES CONSTITUCIONAIS DA ESFERA PÚBLICA NO SISTEMA SOCIAL 87 (Coimbra Editora, 2002); and PAULO OTERO, ILIÇÕES DE INTRODUÇÃO AO ESTUDO DO DIREITO 224 (Pedro Ferreira, 1998).

⁴⁰ JORGE REIS NOVAIS, AS RESTRIÇÕES AOS DIREITOS FUNDAMENTAIS NÃO EXPRESSAMENTE AUTORIZADAS PELA CONSTITUIÇÃO 76-80 (Coimbra Editora, 2003). This unitary approach is followed by ISABEL MOREIRA, A SOLUÇÃO DOS DIREITOS, LIBERDADES E GARANTIAS E DOS DIREITOS ECONÓMICOS, SOCIAIS E CULTURAIS NA CONSTITUIÇÃO PORTUGUESA 89 (Almedina, 2007); JORGE SILVA SAMPAIO, O CONTROLO JURISDICCIONAL DAS POLÍTICAS PÚBLICAS DE DIREITOS SOCIAIS 181-183 (Coimbra Editora, 2015); VASCO PEREIRA DA SILVA, A CULTURA A QUE TENHO DIREITO – DIREITOS FUNDAMENTAIS E CULTURA 113-145 (Almedina, 2007), amongst others.

⁴¹ However, it must be stressed that intermediate theses believe this discussion shouldn't be placed with regard of *infra* constitutional legislation, but instead should be placed at a constitutional level, comparing social rights' norms with liberty rights' norms.

State's duties or even on the determinability of the right's content.⁴² According to this perspective and in a dogmatic point of view, fundamental rights (either liberty rights or social rights) are indivisible, unitary and non-hierarchical. However, the constitutional design of fundamental rights has significant differences, whether the norm is a liberty right or a social one.

There is dissimilarity between immediate applicability and binding effect. A norm can have a binding effect without being immediately applicable.⁴³ In the Portuguese context, immediate applicability means that the courts can apply the Constitution directly, even against an infra-constitutional law. In other words, immediate applicability is the possibility of direct application, regardless of *interpositiolegislatoris*.⁴⁴ That being said, we can conclude that immediate applicability is a plus, an upgrade of the principle of constitutionality. All fundamental rights are binding, but not all of them are *normanormata* and benefit from having immediate applicability.

Therefore, the author proposes a distinction of immediate applicability intensity. Up to a certain point, all fundamental rights are immediately applicable – they benefit from what we call a “*latosensu* immediate applicability”, which means that they can derogate norms that violate them or serve as an interpretative tool. *Prima facie*, social rights norms are only *latosensu* immediately applicable. If they prove to be clear, precise and unconditional, then they will be upgraded to benefit from the liberty rights regime, which has *strictosensu* applicability⁴⁵.

⁴² João Carlos Loureiro, *Constitutionalism, welfare and crises*, 1 (3) REDP 46-47, 41-58 (2014); JOÃO CAUPERS, OS DIREITOS FUNDAMENTAIS DOS TRABALHADORES E A CONSTITUIÇÃO 24 (Almedina, 1985); JORGE MIRANDA, CONTRIBUTO PARA UMA TEORIA DA INCONSTITUCIONALIDADE 74-76 (Coimbra Editora, 1996); JOSÉ CARLOS VIEIRA DE ANDRADE, OS DIREITOS FUNDAMENTAIS NA CONSTITUIÇÃO PORTUGUESA DE 1976 96 (Almedina, 2012); J. J. GOMES CANOTILHO, DIREITO CONSTITUCIONAL E TEORIA DA CONSTITUIÇÃO 802-804 (Almedina, 2003); JOSÉ MELO ALEXANDRINO, I A ESTRUTURAÇÃO DO SISTEMA DE DIREITOS, LIBERDADES E GARANTIAS NA CONSTITUIÇÃO PORTUGUESA 153-157 (2006); MANUEL AFONSO VAZ, LEI E RESERVA DA LEI – A CAUSA DA LEI NA CONSTITUIÇÃO PORTUGUESA DE 1976 293 (Coimbra Editora, 2013); and Rui Medeiros, *O Estado de Direitos Fundamentais português: alcance, limites e desafios*, II ANUÁRIO PORTUGUÊS DE DIREITO CONSTITUCIONAL 42 (Coimbra Editora, 2002).

⁴³ FRANCISCO BALAGUER CALLEJON, II FUENTES DEL DERECHO 21 (1991), and Jean-François Akandji-Kombé, *De l'invocabilité des sources européennes et internationales du droit social devant le juge interne*, DROIT SOCIAL 1015-1019, 1014-1026 (2012).

⁴⁴ JOÃO CAUPERS, OS DIREITOS FUNDAMENTAIS DOS TRABALHADORES E A CONSTITUIÇÃO 127 (Almedina, 1985).

⁴⁵ Catarina Santos Botelho, *40 Anos de Direitos Sociais – Uma reflexão sobre o papel dos direitos fundamentais sociais no século XXI*, 29 Julgar, 206-207, 197-216 (2016).

C.3 Requiem for the non-retrocession principle?

The spirit of generosity of the Portuguese constitutional frames regarding social rights' design raises many pertinent questions and exacerbates some problems. One interesting debate is with regard to the question, whether social rights granted in infra-constitutional legislation can be restricted or even limited. Is there a principle of irreversibility of social conquests?

The principle of the prohibition of social retrogression is not stated in the Portuguese Constitution, but some argue that it springs from rule of law derivations, such as the principles of equality, proportionality and trust protection (doctrine of legitimate expectations).⁴⁶ Consequently, once a social right receives concretization in infra-constitutional legislation, it becomes a substantive constitutional fundamental right – acquired or vested social right – and cannot be eliminated or restricted.⁴⁷

The author strongly disagrees with this thesis. Firstly, the democratic principle rests upon the principles of majority rule, periodicity, pluralism and the fact that elected legislatures are the principal forum for passing laws in a representative democracy.⁴⁸ Inasmuch as legislative process is not a one-way street, the legislator is free to change the relevance he gives to each fundamental right, considering that he respects other fundamental principles and constitutional limitations to restrictions.

Secondly, this theoretical construction is wrongly premised on fundamental social rights being self-executing norms on the grounds of their constitutional consecration. If we accept the assertion that the legislator cannot go back in any social right's policy, then the lofty goals of our glorious social rights' catalogue would translate in a potential constitutionalization of the entire infra-constitutional

⁴⁶ Articles 2, 13 and 18, 2 of the Constitution.

⁴⁷ J. J. GOMES CANOTILHO e VITAL MOREIRA, FUNDAMENTOS DA CONSTITUIÇÃO 131 (Coimbra Editora, 1991). Nevertheless, J. J. GOMES CANOTILHO, *Metodologia «fuzzy» e «camaleões normativos» na problemática actual dos direitos económicos, sociais e culturais*, ESTUDOS SOBRE DIREITOS FUNDAMENTAIS 97-114 (Coimbra Editora, 2008) seems to be defending this thesis less and less enthusiastically.

⁴⁸ RAINER GEESMANN, SOZIALE GRUNDRECHTE IM DEUTSCHEN UND FRANZÖSISCHEN VERFASSUNGSGRECHT UND DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION (2005) at 244, and VOLKER NEUMANN 401 (Europäischer Verlag der Wissenschaften, 1998).

legislations on social rights.⁴⁹ It seems that the seductiveness of pan-constitutionalism – transformation of infra constitutional law in constitutional law – is still alive.⁵⁰

Thirdly and quite ironically, social rights would be more immune to the legislative activity than liberty rights, on account of liberty rights’ restriction being admissible in the Portuguese Constitution.^{51/52}

According to the author, the non-retrocession principle is not a constitutional principle but motto for political programmes. Nonetheless, we must stress out some constitutional safeguards that the Portuguese constitution allows on social rights: (i) retrocession must always be sufficiently grounded for protecting another *in casu* stronger constitutional right;⁵³ (ii) social rights’ core must be protected. For example, the Portuguese legislator cannot eliminate the national health system, but he can change it into a more or less socialized system or a more or less decentralized one.⁵⁴

What we object is that there is no justification for claiming social rights as immutable. Successive cycles of fiscal loosening and retrenchment are a reality of economic recoveries and setbacks. Despite many social empathic yet circular defenses of the non-retrogression principle, we are not convinced of their validity. Additionally, the non-retrogression principle receives scant attention from the Portuguese jurisprudence.

In 1984, the instantly created Portuguese Constitutional Court applied the principle of non-retrogression, in a famous judgment concerning a legislation that revoked a significant part of the

⁴⁹MATTHIAS CORNILS, DIE AUSGESTALTUNG DER GRUNDRECHTE – UNTERSUCHUNG ZUR NORMATIVEN AUSGESTALTUNG DER FREIHEITSRECHTE 541 (Mohr Siebeck, 2005).

⁵⁰ João Carlos Loureiro, *Constitutionalism, welfare and crises*, 1 (3) REDP 48, 41-58 (2014).

⁵¹ Articles 18(2) and 18(3).

⁵² JOÃO CAUPERS, OS DIREITOS FUNDAMENTAIS DOS TRABALHADORES E A CONSTITUIÇÃO 133 (Almedina, 1985), JORGE REIS NOVAIS, DIREITOS SOCIAIS – TEORIA JURÍDICA DOS DIREITOS SOCIAIS ENQUANTO DIREITOS FUNDAMENTAIS 244 (2017); and MANUEL AFONSO VAZ, LEI E RESERVA DA LEI – A CAUSA DA LEI NA CONSTITUIÇÃO PORTUGUESA DE 1976 384 (Coimbra Editora, 2013).

⁵³ José Carlos Vieira De Andrade, *O Papel do Estado na Sociedade e na Socialidade*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 251, 239-255 (Almedina, 2016); And Maria Benedita Urbano, *Ainda algumas notas breves sobre a criação de direito pelos juízes constitucionais*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 372, 363-379 (Almedina, 2016).

⁵⁴ JORGE MIRANDA, IV MANUAL DE DIREITO CONSTITUCIONAL 494 (Coimbra Editora, 2012).

law that created a national health system.⁵⁵ From this judgment onwards, the Constitutional Court adopted terse, decaffeinated and rhetorical references to non-retrogression, essentially referring to the judgment of 1984, but deciding on the grounds of violation of other (constitutional) principles. Its lingering presence in the Portuguese jurisprudence through several decades indicates poor dogmatic grounding for non-retrogression as a constitutional principle.⁵⁶

JUDICIAL ACTIVISM

A. Constitutional courts trapped in a legitimacy crisis

Almost 40 years ago, Ernst Forsthoff prognosticated a “transition from a parliamentary legislative state to a judicial-constitutional judicial state”.⁵⁷ Once surpassed the idea of judicial activity as mere legal syllogistic reasoning or “*buche qui prononce les paroles de la loi*”, it was recognized that this activity included moments of creation and influenced the political process of a dynamic society.⁵⁸ The danger of the judicial usurpation of politics is very well-known.⁵⁹ Michel Rosenfeld argues constitutional states tend to constitutionalize the political and to politicize the constitution.⁶⁰

The economic and financial crises that have affected Europe reopened the debate about judicial self-restraint as a tool for interpreting more abstract norms, such as fundamental rights norms. When legislative power acts contrary to the constitution, jurisdictional power (constitutional courts and/or the ordinary courts, depending on the constitutional justice model) can invalidate this

⁵⁵ Available, in a Portuguese version at <http://www.tribunalconstitucional.pt/tc/acordaos/19840039.html>

⁵⁶ CATARINA SANTOS BOTELHO, *Os direitos sociais num contexto de austeridade: um elogio fúnebre ao princípio da proibição do retrocesso social?*, I/II REVISTA DA ORDEM DOS ADVOGADOS, 259-294 (2015).

⁵⁷ *Die Umbildung des Verfassungsgesetzes*, VERFASSUNG: BEITRÄGE ZUR VERFASSUNGSTHEORIE 148 (Wissenschaftliche Buchgesellschaft, 1978).

⁵⁸ RALPH CHRISTENSEN & ANDREAS FISCHER-LESCANO, *DAS GANZE DES RECHTS – VOM HIERARCHISCHEN ZUM REFLEXIVEN VERSTÄNDNIS DEUTSCHER UND EUROPÄISCHER GRUNDRECHTE* 263 (Duncker & Humblot, 2007).

⁵⁹ Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen. Zur gegenwärtig Lage der Grundrechtsdogmatik*, 29, DER STAAT 25, 1-31 (1990).

⁶⁰ *Constitutional adjudication in Europe and the United States: paradoxes and contrasts*, EUROPEAN AND US CONSTITUTIONALISM 205, 197-238 (Cambridge University Press, 2005). For the origin of “judicial activism”, see Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CLR, 1441 -1478 (2004).

unconstitutional action – jurisdictional restraint. Contrastingly, the only control available for jurisdictional activity is self-restraint.

Constitutional courts are not co legislators but controllers. Legislative power does have that positive function of creating legislation.⁶¹ Constitutional courts are asked to intervene as a “negative legislator”, in order to invalidate unconstitutional positive inputs given by the legislative power.⁶² Should constitutional judges upgrade from mere “negative legislators” or watchdogs to policymakers?⁶³

Even so, the constitutional court’s activity is quite difficult. We cannot lose insight of what constitutional courts are asked: to decide whether or not public policies respect the Constitution. On one hand, if the constitution is political, then a constitutional judgment cannot be politically aseptic. On the other hand, courts should not dethrone legislators.⁶⁴ Therefore, what divides politics from constitutional jurisdictions is not the *quisjudicabit* (object) of their decisions – constitutional text – but the grounding for their decisions.⁶⁵ If legislators are responsible for the lawmaking, constitutional courts are adjudicators.

Nevertheless, there is a qualitative difference about legislation and jurisprudence.⁶⁶ As the legislator is the first constitutional interpreter, its function is to determine *prima facie* that whether the legislation is in accordance with the constitution. Besides, the legislator benefits from a *constitutional*

⁶¹ Ingo von Münch, *El Tribunal Constitucional Federal como actor político?*, 6 AIJC 581, 567-582 (2002); and Uwe Wagschal, *Verfassungsgerichte als Vetospieler in der Steuerpolitik*, POLITIK UND RECHT, 581, 559-584 (Verlag für Sozialwissenschaften, 2006).

⁶² HANS KELSEN, JURISDIÇÃO CONSTITUCIONAL 153 (Martins Fontes, 2003).

⁶³ MARIA BENEDITA URBANO, *Ainda algumas notas breves sobre a criação de direito pelos juízes constitucionais*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 377, 363-379 (Almedina, 2016).

⁶⁴ Manuel Aragón Reyes, *La interpretación de la Constitución y el carácter objetivado del control jurisdiccional*, 6 (17) REDC 128, 85-136 (1986).

⁶⁵ DOROTHEE AX, PROZEBSTANDSCHAFT IM VERFASSUNGSBESCHWERDE-VERFAHREN – ZUGLEICH EIN EXKURS BETREFFS METHODENRICHTERLICHER RECHTSFORTBILDUNG IM VERFASSUNGSBESCHWERDE-VERFAHREN 25 (Nomos Verlagsgesellschaft, 1994).

⁶⁶ HORST DREIER, DIMENSIONEN DER GRUNDRECHTE – VON DER WERTORDNUNGSJUDIKATUR ZU DEN OBJEKTIV-RECHTLICHENGRUNDRECHTSGEHALTEN 52 (Schriftenreihe der Juristischen Studiengesellschaft, 1993); Paul Kirchhof, *Verfassungsgerichtsbarkeit und Gesetzgebung*, VERFASSUNGSGERICHTSBARKEIT UNDGESETZGEBUNG 16, 5-22 (C.H.Beck, 1998).

preference, on the grounds of being the state power responsible for creating legislation. On the other hand, *constitutional primacy* is given to constitutional courts for interpreting and applying the constitutional text.⁶⁷

Nowadays, judicial activism is a label often used to inadvertently shadow constitutional enlightenment. Very sharply, Nuno Garoupa discusses whether the pejorative term “activism” really is “a bad thing”.⁶⁸ In a context like the Portuguese one, where the Constitutional Court has significant powers of constitutional review, judicial activism cannot simply mean strong constitutional adjudication.⁶⁹ Therefore, given the fact that the label “judicial activist” is used quite superficially, we agree with the author’s conclusion of “judicial activism” being somehow “an empty concept”, hence a vicious circular concept.⁷⁰

According to the author, a properly understood notion of “judicial activism” would then be one that describes controversial judicial behavior, “judicial misuse of authority”, such as “sticking down constitutional legislation” or acting from a partisan point of view.⁷¹ As Mattias Kumm points out “once judicial power becomes so strong that overall legislative effective control is lost, the step from contestatory democracy to *juristocracy* has been taken”.⁷²

B. Do aspirational constitutions promote judicial activism?

B.1 Portuguese Constitutional Court and austerity

⁶⁷ See Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen. Zur gegenwärtig Lage der Grundrechtsdogmatik*, 29, DER STAAT 18, 1-31 (1990).

⁶⁸ *Comparing Judicial Activism – Can we say that the US Supreme Court is more Activist than the German Constitutional Court?*, RPF 1090, 1089–1106 (2016).

⁶⁹ If we compare it to the countries with strong-forms of constitutional review, we will conclude that the Portuguese constitutional justice is quite strong, albeit not having a constitutional complaint mechanism that could allow (as the German “*Verfassungsbeschwerde*” or the Spanish “*recurso de amparoconstitucional*”) citizens to address the Constitutional Court directly.

⁷⁰ *Comparing Judicial Activism – Can we say that the US Supreme Court is more Activist than the German Constitutional Court?*, RPF 1090-1091, 1089–1106 (2016).

⁷¹ IDEM, at 1092-1093.

⁷² *Constitutional Courts and Legislatures – Institutional Terms of Engagement*, 1 CLR, 56, 55-66 (2017).

A prolix positivation of social rights could lead to an uncontrolled judicial activism, especially in a crisis context and when all eyes are on the state's budget.⁷³ When critiques regarding the activity of the constitutional court are polarized, then also their legitimacy is being questioned. In the European context, constitutional courts were widely criticized for acting with substantial judicial self-restraint when faced with decisions that carried out severe economic implications.⁷⁴ This attitude was seen as an unacceptable deference to the legislator and an inversion of the constitutionality principle.⁷⁵

Likewise, the Portuguese Constitutional Court (PCC) was often criticized by its *favor legislatoris* (deference towards the legislator) jurisprudence in the beginning of the application of the Memorandum of Understanding.⁷⁶ This problem was very pertinent during “Troika” intervention in Portugal, which started in 2011.⁷⁷ The Memorandum of Understanding signed between the International Monetary Fund, the European Commission and the European Central Bank compelled the Portuguese legislators to a very strict austerity programme, which predictably led to significant budgetary cuts and other measures: public sector wage cuts, tax increases, flexibilization of dismissal rules, pensions cuts and other welfare benefits, privatization of public utilities, increased working hours (for civil servants and equivalent), convergence of pension systems (public and private sectors), amongst other measures.

During 2010-2011, PCC judgments seemed to adhere to the crisis's rhetoric and to refrain from interfering with budgetary impositions and international commitments.^{78/79} These endogenous and

⁷³ JOSÉ MELO ALEXANDRINO, I A ESTRUTURAÇÃO DO SISTEMA DE DIREITOS, LIBERDADES E GARANTIAS NA CONSTITUIÇÃO PORTUGUESA 44 (Almedina, 2006).

⁷⁴ Volker Neumann, *Sozialstaatsprinzip und Grundrechtsdogmatik*, DVBL 04, 92-100 (1997); and Wouter Vandenhoe, *Conflicting Economic and Social Rights: the Proportionality Plus Test*, CONFLICTS BETWEEN FUNDAMENTAL RIGHTS, 559-590 (2008).

⁷⁵ Rainer Wahl, *Der Vorrang der Verfassung*, 20 DER STAAT 487, 485-516 (1981).

⁷⁶ JORGE REIS NOVAIS, DIREITOS SOCIAIS – TEORIA JURÍDICA DOS DIREITOS SOCIAIS ENQUANTO DIREITOS FUNDAMENTAIS 374 (2017).

⁷⁷ More generally, see Mattias Kumm, *Taking the dark side seriously: Constitutionalism and the question of constitutional progress. Or: Why is it fitting to have the 2016 ICON-S conference in Berlin*, 13 (4) ICON 779, 777-785 (2015).

⁷⁸ Rui Medeiros, *Jurisprudência Constitucional Portuguesa sobre a Crise: Entre a Ilusão de um Problema Conjuntural e a Tentação de um Novo Dirigismo Constitucional*, O TRIBUNAL CONSTITUCIONAL E A CRISE – ENSAIOS CRÍTICOS 263-288 (Almedina, 2014).

⁷⁹ PCC ruling number 399/2010 from October 27th, available in an English version at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20100399s.html> (retroactive personal income tax pensions); and

exogenous constraints justified the permissiveness of the PCC, which allowed many austerity laws to remain in force or to get into force.

However, soon after, the PCC showed a decreasing deference towards the legislator, arguing that the “exceptional argument” could not be sustained for a long period of time and stating that its tolerance to the crisis argument would be inversely proportional to the duration of the crisis.⁸⁰

More recently, the PCC undertook a formulation of the constitutionality judgment according to the reasoning of normality, giving as surpassed the argument of exceptional economic-financial conjuncture.⁸¹ These reasoning coincided with the Portuguese withdrawal from the assistance program by June 2014.

These cases thus emphasize the power given to constitutional jurisdictions. Even if the PCC did not invalidate unconstitutional governmental measures on the grounds of fundamental social rights violations – but the violation of the principles of equality, proportionality, and protection of trust instead – its activity was considered highly activist.⁸² The PCC received unprecedented attention and

number 396/2011 from September 21th, available only in Portuguese at <http://www.tribunalconstitucional.pt/tc/acordaos/20110396.html> (public sector wage cuts).

⁸⁰PCC ruling number 353/2012 from July 5th, available in an English version at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html> (suspension of the Christmas-month (13th month) and holiday-month (14th month) payments of annual salaries, both for persons who receive salaries from public entities and for persons who receive retirement pensions from the public social security system). This judgment was highly controversial as the PCC limited the retroactive effects of the declaration of unconstitutionality on the grounds of “exceptionally important public interest” (article 282/4). In fact, the PCC suspended its decision’s effects in order to permit the full execution of the state budget (which had already been executed for half a year); PCC ruling number 187/2013 from April 5th, available in an English version at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html> (review of the constitutionality of norms contained in the State Budget Law for 2013).

⁸¹PCC ruling number 862/2013 from December 19th, available in an English version at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20130862s.html> (Civil Service Law – Statute governing the Retirement of Public Sector Staff); PCC ruling number 413/2014 from May 30th, available in an English version at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20140413s.html> (review of the constitutionality of norms contained in the State Budget Law for 2014 – the PCC declared the unconstitutionality of the majority of the measures syndicated); PCC ruling number 575/2014 from August 14th, available in an English version at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20140575s.html> (proposed creation of an additional tax-“Sustainability Contribution” - updating pensions in the public social protection system); PCC ruling number 3/2016 from January 13th, available in an English version at <http://w3b.tribunalconstitucional.pt/tc/en/acordaos/20160003s.html> (elimination of lifetime annuity for former political officials, declared unconstitutional on the grounds of the violation of the principle of the protection of trust).

⁸²We have to stress out, as Claire Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry*, EUROPEAN UNIVERSITY INSTITUTE 11 (2015), rightly did, that in other judgments in which the

international coverage, which combined endorsement and disapproval insights.⁸³ How did the PCC’s reputation change from almost 30 years of a relatively unknown existence (not to say a diminished existence) to a kind of super-hero constitutional guardian (to some) or to a *constitutional juristocracy* (to others)?

If some praised the Court’s unwillingness to convey with social state downsizing,⁸⁴ others consign it to a corner of shame for supporting an unaffordable welfare state and obstructing a free-market economy.⁸⁵ In an empirical point of view, a Portuguese study revealed that the judicial behavior of the PCC “exhibits much less exceptional patterns than often argued”.⁸⁶

Regardless of where one stands in the above controversy, it is important to stress out that a constitutional court is not just “another court”. Although constitutional courts share the main aspects of other jurisdictions – so, regarding this subject, the logic should not be one of “constitutional courts” *versus* “the others”⁸⁷ – at the same time they display very distinctive traits: the designation of their judges, the object of their decisions and, more importantly, their parameter – the Constitution. A constitutional text is not just the *norma normarum* of a state (only through an internal

Court reasoned changes driven by the bailout programme, specific labour and social rights provisions were applied. See PCC ruling number 602/2013 from September 20th, <http://www.tribunalconstitucional.pt/tc/en/acordaos/20130602s.html>.

⁸³ Claire Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry*, EUROPEAN UNIVERSITY INSTITUTE 13-14 (2015); and Joaquim Cardoso da Costa, *Tribunal Constitucional e debate público*, 40 ANOS DE POLÍTICAS DE JUSTIÇA EM PORTUGAL 113, 113-141 (Almedina, 2016).

⁸⁴ Andreas Dimopoulos, *PIGS and Pearls: State of Economic Emergency, Right to Resistance and Constitutional Review in the Context of the Eurozone Crisis* 7 (4) VJICL501 -520 (2013), Luis Gordillo Pérez, *Derechos Sociales y Austeridad*, LEX SOCIAL, 55, 34-56 (2014), and Nelliana Rodean, *Social rights in our backyard: ‘Social Europe’ between standardization and economic crisis across the continent*, EUROPEAN SOCIAL CHARTER AND THE CHALLENGES OF THE XXI CENTURY – LA CHARTE SOCIALE EUROPÉENNE ET LES DÉFIS DU XXI^E SIÈCLE, 41-42, 23-49 (Edizioni Scientifiche Italiane, 2014).

⁸⁵ Susan Corado, Nuno Garoupa & Pedro Magalhães, *Judicial Behaviour Under Austerity – An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2016*, JLC 26 (2017), at 10, even gather significant elements that showed how far PCC critics went: “sanctions against judicial party misalignment” were suggested along with proposals for the “dissolution of the Constitutional Court as an independent court and for the consequent transfer of its powers to the Supreme Court”.

⁸⁶ Susana Corado, Nuno Garoupa & Pedro Magalhães, *Judicial Behaviour Under Austerity – An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2016*, JLC 26 (2017), at 26, interestingly found out that the “pattern of political (...) polarization [of the PCC] seems to have been less prevalent during the financial crisis than before”.

⁸⁷ Maria Lúcia Amaral & Ravi Afonso Pereira, *Um tribunal como os outros. Justiça constitucional e interpretação da constituição*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 435-437, 381-446 (Almedina, 2016).

perspective, by all means) but a very complex and compromised political tissue.⁸⁸ There is a world of difference between interpreting the constitution text or an infra constitutional norm.⁸⁹

B.2 Right-to-health litigation in Brazil: helicopter judging?

On the other side of the Atlantic, the Brazilian Constitution competes with the Portuguese in terms of the magnitude of the catalogue of fundamental rights, in particular the one referring to social rights. The 1988 Brazilian Constitution establishes economic, social and cultural rights, spread over several articles – 6, 8, 11, 205 and 214. Unlike the Portuguese Constitution, in this constitutional text liberty and social rights are not divided into different categories and the immediate applicability clause (article 5 § 1) can be interpreted in a way that applies to all fundamental rights.⁹⁰

In this scenario, it is not surprising that an uncontrolled judicial activism has emerged, especially with regard to fundamental social rights to health, education, housing, environment and social assistance.⁹¹ Many scholars even refer to an “epidemic of litigation.”⁹²

Perhaps, the main critic to judicial activism is the one acknowledging its casuistic approach.⁹³ Situations of social exclusion and social rights implantation should be primarily addressed through legislation. Detractors of judicial activism argue that it impacts the separation of powers principle,

⁸⁸ Joaquim Cardoso Da Costa, *Tribunal Constitucional e debate público*, 40 ANOS DE POLÍTICAS DE JUSTIÇA EM PORTUGAL, 126, 113-141 (Almedina, 2016) states that “constitutional justice, as justice that interprets and applies the constitution, is as politicized and «impure» as are the constitutional norms which it must interpret and apply” (our translation).

⁸⁹ CHRISTIAN PESTALOZZA (2008), at 31; MANUEL ARAGÓN REYES (1986), at 109; PAVEL HOLLÄNDER (2011); RAINER WAHL (2010), at 30; and RAVI AFONSO PEREIRA (2012), at 65-66.

⁹⁰ MANOEL GONÇALVES FERREIRA FILHO, DIREITOS HUMANOS FUNDAMENTAIS 38 (Editora Saraiva, 2000). It should be mentioned that in an intermediate position, INGO WOLFGANG SARLET, A EFICÁCIA DOS DIREITOS FUNDAMENTAIS – UMA TEORIA GERAL DOS DIREITOS FUNDAMENTAIS NA PERSPECTIVA CONSTITUCIONAL 261-273 (Livraria do Advogado Editora, 2009), has defended a mitigate approach to dogmatic unitary thesis, arguing that Article 5 § 1, of the Brazilian Constitution does not have the character of norm-rule, but of norm-principle and therefore of a mandate of optimization.

⁹¹ ALBERT NOGUERA FERNÁNDEZ, LOS DERECHOS SOCIALES EN LAS NUEVAS CONSTITUCIONES LATINOAMERICANAS, 70-95 (2010).

⁹² Octavio Luiz Motta Ferraz, *The right to health in the Courts of Brazil: worsening health inequities?*, 11 (2) HEALTH AND HUMAN RIGHTS 35, 33-45 (2009).

⁹³ Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen. Zur gegenwärtig Lage der Grundrechtsdogmatik*, 29, DER STAAT 25, 1-31 (1990).

namely by involving courts in traditional legislative and executive functions. We have to keep in mind that the separation of powers is the bulwark of democratic and balanced societies.

Unlike normative acts (e.g., constitution, laws), which are general and abstract, non-normative acts (e.g., administrative acts, court decisions) are individual and concrete. Judicial acts apply general and abstract norms to the circumstances of the concrete legal dispute between adverse parties. Hypothetically, given a situation where right X is on stake, litigant A can obtain a positive result, whereas litigant B might have his request rejected. It is up to the judiciary to clarify the meaning of legislation and to apply it to concrete disputes. In other words, legislators are responsible for macro-justice, whereas judges have a micro-justice role, as they decide in a one-case-at-a-time perspective.⁹⁴ Judicial empowerment is not compatible with judicial definition/concretization of what a fundamental right is, but how this right applies itself in a concrete case. For example, health litigation in Brazil attracted wide media coverage. New alleged fundamental rights to “therapeutic innovation” and to “healthcare tourism” are emerging. These rights gather many corollaries, such as: access to unorthodox treatments, experimental therapies and other non-validated medical practices, innovative surgery, and access to not yet approved drugs or not even included on governmental drug formularies/protocols.

There will always be a certain amount of dissatisfaction in the fulfilling of the right to health, as it combines a myriad of more or less convincing drugs/treatments with limited state resources. That being said, we have to analyze if the judiciary ought to protect social rights as a reaction to the inaction or insufficient commitment of the legislator. If health is one of the budgetary items responsible for draining the majority of public funds, should judges decide to attribute huge amounts of the state’s budget to very expensive treatments/drugs, even if they lack convincing data on their efficacy?

When courts act as social rights’ enablers, allowing every single demand, they will inevitably compromise state’s budget. Then, their legal reasoning will be (knowingly or unknowingly) metamorphosed in political reasoning, jeopardizing the constitutional division of powers.

⁹⁴ Ana Paula de Barcellos, *Constitucionalização das políticas públicas em matéria de direitos fundamentais: o controle político-social e o controle jurídico no espaço democrático*, 3, RDE111-147 (2006).

Just as psychologists identifies “helicopter parenting” phenomenon in our parenting generation, we recognize in this judicial behavior a pathology that we call *helicopter judging*. This metaphor allows us to understand how judges, facing cases involving health, housing (and other life) struggles, can easily be tempted to hover over citizens like a helicopter. This could be perceived as a somehow imprudent or at least impulsive behavior. Some scholars even warned about the dangers of judiciary “messianic” approaches or jurisdictional “emotionality”, relying on populist and demagogic analysis.⁹⁵

This syndrome of over judging could also lead to other pathologies described above. If judges constantly shadow citizens in a way that is overprotecting, they discourage them to search democratic ways to change the laws. Even if they start off with good intentions, judges will inadvertently contribute to an “infantilized” society.⁹⁶

*In medio stat virtus?*⁹⁷ Not always, but generally this seems to be true. To us, the key would be a balance between a too libertarian or a too paternalistic approach. On the one hand, judges have a role to play, which is why they simply cannot be passive and accept a continuous legislative silence on rights that demand legislator intervention. On the other hand, instead of being so enmeshed, judges need to take a step back and allow legislative and executive powers to honor their constitutional tasks.

FINAL REMARKS – TRILOGY OR TRINITY?

From our perspective, there is sometimes a bias inherent to social rights, as if the word “social” was a hint for social rights being part of a socialist discourse. There is a rooted fallacy from the last decades that scholars ought to unmask. For this reason, it is important to emphasize that the

⁹⁵ Ana Paula de Barcellos, *O Direito a prestações de saúde: complexidades, mínimo existencial e o valor das abordagens coletiva e abstrata*, DIREITOS SOCIAIS: FUNDAMENTOS, JUDICIALIZAÇÃO E DIREITOS SOCIAIS EM ESPÉCIE 824-825, 803-826 (Lumen Juris, 2010); ANGÉLICA CARLINI, JUDICIALIZAÇÃO DA SAÚDE PÚBLICA E PRIVADA (Livraria do Advogado, 2014); Luís Roberto Barroso, *Da falta de efetividade à judicialização excessiva: direito à saúde, fornecimento gratuito de medicamentos e parâmetros para a atuação judicial*, IX (46) REVISTA INTERESSE PÚBLICO 31-62 (2007); and Zélia Luiza Pierdoná, *A proteção social na constituição de 1988*, 7 (28) RDS 11-29 (2007).

⁹⁶ Daniel Sarmiento, *O neoconstitucionalismo no Brasil: riscos e possibilidades*, 3 (9) REVISTA BRASILEIRA DE ESTUDOS CONSTITUCIONAIS 95-133 (2009).

⁹⁷ Meaning that virtue stays in the middle and not in an extreme position.

concept of social state should not be held hostage by any political or ideological conception.⁹⁸ Constitutional history demonstrates that the label “social state” is imbued in the narratives of several political views, whether social Christian, socialist, capitalist, nationalist, utilitarian, conservative or progressive liberal.

Despite of social rights’ language streaming more or less naturally in a given ideology, it is not directly linked to any political view. Instead, it flows from its umbilical source: human dignity. Irrespective of whether all parties share the same views on reduction/increasing of state size or state intervention on macro-economic matters, social protection is a common denominator. In the realm of politics, comparisons are often misleading. Thus, social rights should not be a sort of ideological-cultural inheritance of a predetermined political party, elite (or, more broadly, political ideology), since all democratic political parties promote social justice.

As the author tried to demonstrate, aspirational constitutions may be trapped in their own generosity due to their likely utopian characteristics. Just the belief that a state can convey to the fullest extent all constitutional rights is faced with the harsh reality of scarce goods, resource limitations and fluctuating macro-economic circumstances.⁹⁹ If on the one side of the coin we have entitlements, on the flip side we do not have (due to *de facto* limitations) unlimited resources and full right’s application.

This previous consideration should not be followed by the unilluminating conclusion that constitutionalizing social rights was a poor idea. Although social rights consecration in a constitution is not a sufficient predictor of social rights effective implementation,¹⁰⁰ we have good reasons to believe that upgrading these rights in a constitutional text was a very important step in post-authoritarian/totalitarian states. If anything, social rights discourse has a rhetoric significance that should not be taken for granted – we believe this to be true, without any kind of surreptitious condescendence.

⁹⁸ Ernst Benda, *Der soziale Rechtsstaat*, HANDBUCH DES VERFASSUNGSRECHTS 477-544 (1984); and JORGE BACELAR GOUVEIA, II *Manual de Direito Constitucional* 847 (Almedina, 2013).

⁹⁹ Luís Heleno Terrinha, *The under-complexity of social rights*, 201 (5) LLR 50-51, 27-53 (2015).

¹⁰⁰ There are many examples of developed social policies, which coexist with limited recognition of social constitutional rights (Germany, Scandinavian countries, amongst others).

The focal point remains unanswered: (i) are aspirational constitutionalism, social rights prolixity and judicial activism three related subjects – a trilogy? Or (ii) are aspirational constitutionalism, social rights prolixity and judicial activism mutually interdependent - a trinity?

This new seam of constitutional challenges are quite enriching and yet difficult to answer univocally. In our point of view, the flimsiest connection is the latter (i.e., social rights prolixity → judicial activism). We can say that aspirational constitutions will have social rights' catalogues and, most likely, their catalogues will be generous. However, does aspirational constitutionalism and social rights prolixity necessarily mean judicial activism?

The answer to this question will depend on the adopted definition of “judicial activism”. As I stated before, if we label “judicial activism” as engaging in strong forms of judicial review, then we can portrait both Brazilian courts and PCC decision-making as activists.¹⁰¹ However, if by “judicial activism” we interpret an illegitimate usurpation of legislative or executive powers, there is not an umbilical link between them. Usurpation of powers could never be a constitutional trait of a democratic state, but only a pathology requiring treatment.

Consequently, we don't have a trinity – that rests upon a premise of the three factors being ineluctably interrelated – but a trilogy. In a trilogy there is a series of three related subjects that usually come together, but they are not necessarily codependent of each other.

As stated before, public policies involve significant compromise and arduous choices that benefit some rights (or rights dimensions) to the detriment of full implementation of other rights. It is true that undue conquest of political decisions encourages judicial activism. After all, jurisdictional function does not entail rewriting the constitution, but applying it in accordance with the constitutional reality.¹⁰²

However, this does not justify the disregard of social rights as a normative constitutional concept nor that constitutional courts should acquiesce to the political majorities. What it requires is stronger vigilance and the break of the misconception that public policies cannot be criticized. Here, the main

¹⁰¹ As Nuno Garoupa, *Comparing Judicial Activism – Can we say that the US Supreme Court is more Activist than the German Constitutional Court?*, RPF 1098-1099, 1089–1106 (2016), stated judicial activism “is shaped by the frequency and extension of constitutional adjudication”.

¹⁰² David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, CLREV 1172, 1163-1254 (2011).

problem is how to satisfy the double objective of limiting both legislator's and judge's activities. If the judge's activity is limited, then the legislator will have a wider margin of legislative design. If the legislator has a narrower margin of legislative discretion, then the judge will be able to contribute to the (living) constitutional design of his state.

In sum, two lessons can be drawn. First, conventional self-restraint is not compatible with the paramount expression, social rights have in aspirational constitutions. That is why, in our point of view, a disregard of constitutional social rights conflicts with the wide consecration, which they have in the Portuguese and Brazilian constitutions. We need to realize that the judicial role can be played with accuracy, endeavor, creativity and even activism (not pejorative one), without overstepping separation of powers. Second, the confine of judicial activism is precisely the constitutional separation of powers. For this reason, there should be no judicial activism at the sake of democracy. To us, it is quite an illusion or a fallacy to separate, with a perfect dividing line, law from politics. We can perform conceptual divisions and undertake complex line-drawing maneuvers, but in the end, there will always be some kind of intersection.¹⁰³ Notwithstanding areas of imbrications and significant blurriness, the reign of politics should refrain from overpowering the reign of law. Macroeconomic decision-making pertains to democratic deliberation and popular sovereignty, albeit fertile exchanges of ideas amongst state powers are always welcome.

¹⁰³ Jutta Limbach, *The Law-Making Power of the Legislature and Judicial Review*, LAW MAKING, LAW FINDING AND LAW SHAPING: THE DIVERSE INFLUENCES 174 (Oxford University Press, 1997).