

CALJ (2022) VOLUME VI ISSUE II | MAY, 2022



COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW JOURNAL

---

EDITORIAL

HORIZONTAL RESERVATION FOR TRANSGENDER PERSONS: RESOLVING THE NALSA CONUNDRUM.....*Prakhar Raghuvanshi & Sandhya Swaminathan*

ARTICLES

ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS.....*Jayana Bedi & Prashant Narang*

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS.....*Manish*

THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION.....*Meenakshi Ramkumar & Aishwarya Singh*

POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED.....*Anmol Jain*

ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS.....*Mustafa R. & Tejas B. N.*

CENTRE FOR COMPARATIVE CONSTITUTIONAL LAW AND  
ADMINISTRATIVE LAW

NATIONAL LAW UNIVERSITY, JODHPUR (Rajasthan, India)

**PUBLISHED BY:**

**THE REGISTRAR, NATIONAL LAW UNIVERSITY, JODHPUR  
ISSN: 2582-9807**

## **BOARD OF EDITORS**

### **CHIEF PATRON**

*Prof. (Dr.) Poonam Saxena*

*Vice Chancellor, National Law University Jodhpur*

### **DIRECTOR, CENTRE FOR COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW**

*Prof. (Dr.) I.P. Massey*

*Dean, Faculty of Law, National Law University Jodhpur*

### **FACULTY ADVISORS**

*Asst. Prof. Sayantani Bagchi & Asst. Prof. Vini Singh*

### **Editors-in-Chief**

*Prakhar Raghuvanshi & Sandhya Swaminathan*

#### **Managing Editor**

*Ayush Mehta*

#### **Executive Editor**

*Piyush Sharma*

#### **Deputy Managing Editor**

*Falguni Sharma*

#### **Deputy Executive Editor**

*Garima Chauhan*

### **Senior Content Editors**

*Aditya M.*

*Karunakar*

*Kirti Harit*

*Palak Jhalani*

### **Associate Editors**

*Aksbay T*

*Atharva C.*

*Ayush Mangal*

*Himanshi Y.*

*Rachana R.*

*Revati Soboni*

*Siri Harish*

*Visbnu M.*

### **Copy Editors**

*Aksbat*

*Anjali Sunil*

*Krishangee P.*

*Sinchan C.*

*Siddhant R.*

*Sonsie Khatri*

*Sourabh M.*

*Sri Janani S.*

## BOARD OF ADVISORS

JUSTICE (RETD.) M.N. RAO VENKATACHALIAH

*25<sup>th</sup> Chief Justice of India*

JUDGE (DR.) GEORG NOLTE

*Judge, International Court of Justice, The Hague*

*&*

*Professor, Public International Law, Humboldt University*

DR. RAJEEV DHAVAN

*Senior Advocate, Supreme Court of India*

DR. MENAKA GURUSWAMY

*Senior Advocate, Supreme Court of India*

PROF. (DR.) SUSAN ROSE-ACKERMAN

*Henry R. Luce Professor Emeritus of Law & Political Science, Yale University*

PROF. (DR.) TIMOTHY ENDICOTT

*Professor, Legal Philosophy, Faculty of Law, University of Oxford*

**CONTENTS**

---

**Editorial**

HORIZONTAL RESERVATION FOR TRANSGENDER PERSONS:  
RESOLVING THE NALSA CONUNDRUM ..... v

**Articles**

ASSESSING STATE SCHOOL EDUCATION LAWS ON  
ADMINISTRATIVE SAFEGUARDS ..... 1

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS..... 32

THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE  
RIGHTS OF THE OPPOSITION..... 55

POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT:  
STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN  
BE ADDRESSED ..... 87

ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY  
AND INDIA'S TRYST WITH THE REPRESENTATION OF  
MARGINALISED MUSLIMS ..... 124

**EDITORIAL: HORIZONTAL RESERVATION FOR  
TRANSGENDER PERSONS: RESOLVING THE NALSA  
CONUNDRUM**

---

*Prakhar Raghuvanshi<sup>1</sup> & Sandhya Swaminathan<sup>2</sup>*

**INTRODUCTION**

Sustaining any society is a constant struggle. One of the most fundamental pillars to sustain a society is social justice. While political and economic justice affect the population significantly, social justice is the axis around which the other two revolve. It is perhaps due to this cardinal role that social justice plays that Dr. Ambedkar believed that social reform must be given preference over political reform.<sup>3</sup> Among various socio-political issues, including religious chauvinism, linguistic divide, casteism and majoritarian impulses, India faces specific problems in dealing with sexual minorities, particularly transgender persons.<sup>4</sup> It is imperative for India to account for this gross injustice.

---

\* Cite it as: Raghuvanshi & Swaminathan, Editorial, *Horizontal Reservation for Transgender Persons: Resolving the NALSA Conundrum*, 6(2) COMP. CONST. L. & ADMIN. L. J. v (2022).

<sup>1</sup> Prakhar Raghuvanshi is a fourth-year student pursuing B.A. LL.B. (Constitutional Law Hons.) at National Law University Jodhpur and is the Editor-in-Chief of the Comparative Constitutional Law and Administrative Law Journal (ISSN: 2582-9807). The author may be reached at <prakhar.raghuvanshi@nlujodhpur.ac.in>.

<sup>2</sup> Sandhya Swaminathan is a fifth-year student pursuing B.B.A. LL.B. (Business Law Hons.) at National Law University Jodhpur and is the Editor-in-Chief of the Comparative Constitutional Law and Administrative Law Journal (ISSN: 2582-9807). The author may be reached at <sandhya.swaminathan@nlujodhpur.ac.in>.

\*\* We thank the editors of CALJ—Falguni Sharma, Himanshi Yadav, Rachana Rammohan and Revati Sohoni—for their inputs and editorial assistance.

\*\*\* We also acknowledge the rich database hosted by the Centre for Law and Policy Research, Bangalore that helped our research during the course of writing this paper. The database can be accessed at <translaw.clpr.org.in>.

<sup>3</sup> See DR. BR AMBEDKAR, ANNIHILATION OF CASTE (Navayana 2015).

<sup>4</sup> See *Appendix-5: Approach Paper on Education and Employment opportunities & Challenges for Transgender*, in REPORT OF THE EXPERT COMMITTEE ON THE ISSUES RELATING TO TRANSGENDER PERSONS 168 (2013), [https://prsindia.org/files/bills\\_acts/bills\\_parliament/2016/Expert\\_Committee\\_Report\\_\(2014\)\\_1.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2016/Expert_Committee_Report_(2014)_1.pdf). The state government of Tamil Nadu, accepted the recommendation of the Tamil Nadu Backward Classes Commission to include transgender persons under the “*Most Backward Classes*” category observing that members of the transgender community are “*far worse than Scheduled Castes*” in terms of their social and educational backwardness. See Governor of Tamil Nadu, Backward



## EDITORIAL

In 2012, members of the transgender community approached the Supreme Court of India (“**SCI**”), seeking a legal declaration of their gender identity other than the one assigned to them at birth (within the gender binary).<sup>5</sup> The SCI, vide its judgment dated April 15, 2014, upheld the right of transgender persons to decide their *self-identified gender*.<sup>6</sup> The central and state governments were directed to recognise transgender persons as male, female or third gender.<sup>7</sup> While the judgment of the Court broke away from the binary gender theory, it was criticised *inter alia* on the aspect of the “*third gender*” label<sup>8</sup> and for being under-inclusive.<sup>9</sup>

Among other directions made by the Court, a crucial one is in paragraph 135.3 of the judgment directing central and state governments to treat transgender persons as “*socially and educationally backward classes*” and consequently, extend to them the benefit of reservation in educational institutions as well as in public employment.<sup>10</sup>

In furtherance of this direction, the Karnataka state government,<sup>11</sup> as well as the central government,<sup>12</sup> were in the process of including transgender

---

Classes, Most Backward Classes and Minorities Welfare (BCC) Department, GO (Ms) No. 28 (Issued on Apr. 6, 2015), <https://translaw.clpr.org.in/wpcontent/uploads/2019/02/TN-Govt-GO.pdf>; National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (hereinafter *NALSA*) ¶ 1.

<sup>5</sup> *NALSA*, (2014) 5 SCC 438 ¶ 2.

<sup>6</sup> *Id.* ¶ 81-83. The reasoning of the SCI was based on multiple facets of Part III of the Constitution of India, beginning with the interpretation that the use of the gender-neutral term “*person*” in arts. 14 and 19 implies that they extend to transgender persons. Under the scheme of equality, arts. 15 and 16 refer to the term “*sex*”, which according to the Court is inclusive of psychological attributes over biological ones. Furthermore, diversity in self-expression was highlighted through the interpretation of “*dignity*” under art. 21 *i.e.*, leading a dignified life against mere animal existence. The Court also referred to international law (Yogyakarta Principles).

<sup>7</sup> *Id.* ¶ 135.2.

<sup>8</sup> See Agarwal et al., *Report on: Queering the Law: Making Indian Laws LGBT+ Inclusive*, VIDHI CENTRE FOR LEGAL POLICY (July 31, 2019), [https://vidhilegalpolicy.in/wp-content/uploads/2019/07/Queering-the-Law\\_Introduction.pdf](https://vidhilegalpolicy.in/wp-content/uploads/2019/07/Queering-the-Law_Introduction.pdf).

<sup>9</sup> See Dipika Jain, *Shifting Subjects of State Legibility: Gender Minorities and the Law in India*, 32(1) BERKELEY J. GENDER L. & JUST., 39-72 (2017).

<sup>10</sup> *NALSA*, (2014) 5 SCC 438 ¶ 135.3.

<sup>11</sup> Sangama v. State of Karnataka, WP(C) No. 8511/2020.

<sup>12</sup> Nidhi Sharma, *Cabinet Note to Classify Transpeople as OBC to Enable Access to Reservations*, ECONOMIC TIMES (Sept. 25, 2021), <https://economictimes.indiatimes.com/news/india>

persons under the category of Other Backward Classes (“**OBC**”). The Ministry of Social Justice and Empowerment, in consultation with the National Commission on Backward Classes, moved a cabinet note to include transgender persons within the ambit of OBC.<sup>13</sup> While this may be seen as a welcome move in the right direction, this idea has two significant impediments—*first*, seeking the redressal of the issue of transgender persons solely across caste lines; and *second*, the consequent disproportional encroachment upon reserved seats of the OBCs.

Our aim for this editorial is to highlight the problem of treating transgender persons as OBCs, in light of the intersectionality of their caste and gender identities. Through the course of this paper, we discuss the concept of vertical and horizontal reservations (Part I), highlight the need to recognise the separate identities of transgender persons (Part II) and subsequently provide for a broad framework of reservation for transgender persons under which the desired outcome may be achieved (Part III).

## VERTICAL AND HORIZONTAL RESERVATIONS

The Constitution of India envisages and makes room for the conferment of special benefits and reservation for the socio-economic and educational advancement of certain categories of persons by the State—women and children,<sup>14</sup> socially and educationally backward persons,<sup>15</sup> “*backward classes of citizens which in the opinion of the State, is not adequately represented in the services under the State*”,<sup>16</sup> and persons falling under the SC/ST<sup>17</sup> and “*economically weaker section*”<sup>18</sup> lists. However, some of these categories are treated differently from others, in terms of the manner in which reservation is granted, given we each own multiple identities (such as caste, gender, economic status, historical backwardness, physical ability *et cetera*), and these identities co-exist and factor into our resultant socio-economic

---

/cabinet-note-to-classify-transpeople-as-obcs-to-enable-access-to-reservations/articleshow/86500713.cms.

<sup>13</sup> *Id.*

<sup>14</sup> INDIA CONST. art. 15 cl. 3.

<sup>15</sup> INDIA CONST. art. 15 cl. 4-5.

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

<sup>17</sup> INDIA CONST. art. 15 cl. 4-5 & art. 16 cl. 4A.

<sup>18</sup> INDIA CONST. art. 15 cl. 6.



## EDITORIAL

position in society. In this light, reservation schemes are applied vertically or horizontally.

The nature and scope of vertical and horizontal reservations were first clarified by the SCI in *Indira Sawhney v. Union of India*.<sup>19</sup> The Court stated that reservations under Scheduled Castes (“**SC**”), Scheduled Tribes (“**ST**”) and OBC categories fall under vertical reservations. On the other hand, it was held that reservations under special categories such as “*physically handicapped*”, cut across or interlock with vertical reservations. The Court illustrated the same:<sup>20</sup>

*“...suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments.”*

As is clear from the illustration, the Court envisages scope to entitle reservation to a person with a disability under their caste category as well as under the “*person with disability*” category. Horizontal reservations are a means to achieve and recognise the intersectionality of various identities of persons. Some horizontal reservation categories include women, veterans, and sports persons, among others.

However, astray from this understanding of vertical and horizontal reservation and in sheer disregard for the intersectional identities of a transgender person, paragraph 135.3 of the *NALSA* judgment has led to state and central governments clubbing all transgender persons as a single homogenous unit, a “*backward class*”, under the OBC category, in a bid to confer to them the benefit of reservation.<sup>21</sup> This clubbing may be enabled by silences in the directions of the court. For instance, while the Uttarakhand High Court, in a writ petition, directed the state government to provide reservations to transgender persons within six months, it did so

---

<sup>19</sup> *Indira Sawhney v. Union of India*, 1992 Supp 3 SCC 217 (hereinafter *Sawhney*).

<sup>20</sup> *Id.*

<sup>21</sup> *Supra*, Introduction; *infra*, Beyond OBCs: Recognising Intersectionality.

without stating whether the nature of this reservation would be horizontal or vertical.<sup>22</sup>

## BEYOND OBCs: RECOGNISING INTERSECTIONALITY

Shield defines intersectionality as “*mutually constitutive relations among social identities*”.<sup>23</sup> Intersectionality has particularly influenced and contributed to feminist theories.<sup>24</sup> Intersectionality highlights multiple levels of discrimination or oppression due to the interconnection between multiple social identities. Lynn, for example, highlights it from the perspective of black women suffering from triple oppression.<sup>25</sup> This includes discrimination based on colour, gender and class.<sup>26</sup>

In the Indian context, caste and gender become the two primary forms of discrimination.<sup>27</sup> Members belonging to lower castes and sexual minorities suffer discrimination and violence on a routine basis.<sup>28</sup> While the works of Shield and Lynn are based on feminist theory and intersectionality, the essential link of gender with other social identities that form the base for discrimination cannot be disregarded.

Furthermore, Imaan Semmalar has highlighted the intersectionality debate *vis-à-vis* caste and the transgender community in India.<sup>29</sup> The transgender

---

<sup>22</sup> Rano v. State of Uttarakhand, order dated 28.09.2018 ¶ 10. The judgment was progressive on a few aspects as it also directed the state government to frame schemes for their upliftment, provide medical aid and housing, constitute a transgender welfare board and so on.

<sup>23</sup> SA Shield, *Gender: An Intersectionality Perspective*, 59(5) SEX ROLES, 301, 301-311 (2008). The term was originally coined by Kimberle Crenshaw while analysing the limitations of US anti-discrimination law, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43(6) STAN. L. REV., 1241-99 (1991).

<sup>24</sup> L. McCall, *The Complexity of Intersectionality*, 30 SIGNS, 1771–1800 (2005).

<sup>25</sup> D Lynn, *Socialist Feminism and Triple Oppression: Claudia Jones and African American Women in American Communism*, 8(2) J. STUDY OF RADICALISM, 1-20 (2014).

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

<sup>27</sup> M Anne et al., *Gender and Caste Intersectionality in the Indian Context*, 6(95) CEJSH: HUM. RESOURCE DEV., 31-48 (2013).

<sup>28</sup> *Id.* See also Grace Banu, *A Call to End Violence Against the Trans Community in India*, HINDUSTAN TIMES (Apr. 08, 2022), <https://www.hindustantimes.com/opinion/a-call-to-end-violence-against-the-trans-community-in-india-101649429383404.html>.

<sup>29</sup> Gee Imaan Semmalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India*, 42 WOMEN’S STUD. Q., 286 (2014).

## EDITORIAL

community in India faces compound discrimination across social identities.<sup>30</sup> As a corollary to triple oppression, the transgender community faces two-fold oppression (if not more).<sup>31</sup> Semmalar illustrates this through Dalit transgender persons who are subject to discrimination from upper castes (first social identity) due to caste status as well as from Dalits because of their gender (second social identity).<sup>32</sup> Multiple sets of social identities, including economic power structures and social location, add to this discrimination.

It is in this background that the first impediment, *i.e.*, clubbing transgender persons solely with OBCs, is brought to light. The state of Tamil Nadu added “*Transgender or Eunuch*”<sup>33</sup> to the list of Most Backward Classes (“**MBC**”).<sup>34</sup> The order, *inter alia*, iterates the grounds for the grant of reservation to transgender persons as provided by the Tamil Nadu Backward Classes Commission. Of these, two grounds are of great relevance to our discussion—(i) that the situation of transgender persons is far worse than SCs and that the same is likely to improve by their inclusion under the category of MBCs (similar to OBCs); and (ii) that the caste or community from which transgender persons emerge cannot be fixed.<sup>35</sup>

Caste being a social identity determined at birth, it is amply clear that all transgender persons do not belong to one specific caste. The aforementioned order, despite recognising this, adopts a vertical system of reservation that blends transgender persons under MBCs.

---

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

<sup>31</sup> While it could be argued that transgender persons from the upper caste families may not face similar forms of oppression, the possibility of discrimination based on power structure, social location and other forms of marginalisation persist.

<sup>32</sup> *Id.*

<sup>33</sup> It is also important to mention here that the use of the word “*eunuch*” is generally not accepted by the trans community and is regarded as offensive due to historical oppression. See, Gee Semmalar, *Gender Outlawed: The Supreme Court judgment on third gender and its implications*, ROUNDTABLE INDIA (Apr. 18, 2014), <https://www.roundtableindia.co.in/because-we-have-a-voice-too-the-supreme-court-judgment-on-third-gender-and-its-implications/>.

<sup>34</sup> Governor of Tamil Nadu, Backward Classes, Most Backward Classes and Minorities Welfare (BCC) Department, GO (Ms) No. 28 (Issued on Apr. 6, 2015), <https://translaw.clpr.org.in/wp-content/uploads/2019/02/TN-Govt-GO.pdf>.

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

Clubbing the entire transgender community with OBCs has multiple disadvantages. *First*, transgender persons compete with cisgender persons falling under the OBC category, despite the two having different social identities that form the basis for affirmative action. *Second*, transgender persons belonging to different castes (both upper and lower) are placed on the same pedestal. *Third*, transgender persons belonging to SC/STs would have to opt between SC/ST or OBC reservations. While the former might be an obvious choice resulting in better benefits, it would be rooted in caste identity and entirely disregard gender identity. Similarly, a transgender person belonging to a caste that is already classified as OBC would also avail the benefit based on caste identity only. *Lastly*, upper-caste transgender persons would also avail the seats reserved for OBCs, which would go against the entire scheme of reservation in India.

A few judgments from various High Courts support the proposition regarding the horizontal reservation. The Madras High Court in *Swapna v. Government of Tamil Nadu*,<sup>36</sup> while discussing the circular granting reservation to transgender persons under the MBC category (discussed above), directed the government to grant post-based reservation to transgender persons, *i.e.*, at least one seat in each category. The Karnataka government amended its recruitment rules to grant horizontal reservation to the extent of one per cent during the pendency of the case of *Sangama v. State of Karnataka*. Another case from the Madras High Court, *Tharika-Banu v. Health and Family Welfare Department*,<sup>37</sup> is relevant here. Tharika Banu applied for a degree under the SC category. Her application was rejected as she missed the fifty per cent qualifying score. The court considered her SC background and the social stigma faced by her on account of her gender identity to allow the petition. Justice Kirubakaran further stated that the qualifying score of fifty per cent is for cisgender males and females and not for transgender persons.<sup>38</sup>

## **FRAMEWORK FOR HORIZONTAL RESERVATION**

The central question that needs to be tackled at this stage is—how do we ensure that transgender persons get adequate representation at all levels?

---

<sup>36</sup> *Swapna v. Government of Tamil Nadu*, 2016 SCC OnLine Mad 15973.

<sup>37</sup> *Tharika-Banu v. Health and Family Welfare Department*, 2018(2) CTC 683.

<sup>38</sup> *Id.* ¶ 11-12.

## EDITORIAL

The experience from various states portrays a clear disparity. The disparity may range from horizontal/vertical questions to the extent of reservation as well. It is therefore important to draw inspiration from other horizontal categories.

### A. MODEL STRUCTURE

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 accorded persons with disability a reservation of three per cent in seats of public employment<sup>39</sup> and educational institutions.<sup>40</sup> It further accorded them a reservation of at least three per cent of seats in poverty alleviation schemes<sup>41</sup> and provided incentives for public and private sector employers to reserve five per cent of seats in their favour.<sup>42</sup> These seats were subsequently increased to four per cent in public employment<sup>43</sup> and five per cent in educational institutions<sup>44</sup> under The Rights of Persons with Disability Act, 2016.

The 2016 enactment widened the scope of reservation under special schemes to reserve five per cent in allotment of agricultural land, poverty alleviation schemes and allotment of land at a concessional rate.<sup>45</sup> The scheme for statutory reservation provided for persons with disabilities is an example of how horizontal reservation is structured.<sup>46</sup> It is our opinion that a similarly structured system is necessary for transgender persons.

---

<sup>39</sup> Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, § 33, The Gazette of India, Extraordinary, pt. II sec. 1 (Jan. 1, 1996). The section further provided that among the three percent reserved seats, one percent shall account for blindness/low vision, hearing impairment, locomotor disability or cerebral palsy.

<sup>40</sup> *Id.* § 39.

<sup>41</sup> *Id.* § 40.

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

<sup>43</sup> The Rights of Persons with Disability Act, 2016, § 34, The Gazette of India, Extraordinary, pt. II § 3(ii) (Apr. 19, 2017) provides that among the four percent reserved seats, one percent shall account for benchmark disabilities including blindness/low vision, hearing impairment, locomotor disability or cerebral palsy, autism, acid-attack victims, intellectual disability.

<sup>44</sup> *Id.* § 34.

<sup>45</sup> *Id.* § 37.

<sup>46</sup> Justice Sunanda Bhandare Foundation v. Union of India, (2014) 14 SCC 383; Manish Sharma v. Lt. Governor, 2019 SCC OnLine Del 9852.

## B. MODE OF IMPLEMENTATION

As we have noted earlier, reservation schemes in different states vary. While Karnataka has recently recognised a horizontal scheme of reservation for transgender persons after the intervention of the court,<sup>47</sup> few other states, including Kerala and Tamil Nadu, opted for a vertical scheme.<sup>48</sup> A similar stand is visible at the central level.<sup>49</sup> It is also pertinent to note that several states have, to this date, failed to grant any form of reservation (vertical or horizontal) to transgender persons.

The enactment of central legislation, or in this case, an amendment to the existing Transgender Persons (Protection of Rights) Act, 2019 would weed out the scope for differential interpretation of the reservation-related directions laid down in *NALSA* by different states by providing for a single uniform structure of the implementation of strictly horizontal reservations for transgender persons. It would also provide for an appropriate extent of reservation (For instance, one per cent as was in the state of Karnataka) across categories after a careful analysis of relevant empirical data.

It must be noted here that the Report of the Standing Committee on Social Justice and Empowerment (2016-2017) noted that in accordance with *NALSA*, reservations for transgender persons must be granted. However, the Transgender Persons (Protection of Rights) Bill, 2016 was silent on the same.<sup>50</sup> Such an enactment or amendment, as proposed, would also place on all states a more severe mandate to grant reservations to transgender persons, in line with the directions of the SCI.

---

<sup>47</sup> *Sangama v. State of Karnataka*, WP(C) No. 8511/2020, order dated July 20, 2021; Karnataka Civil Services (General Recruitment) (Amendment) Rules, 2020 No. DPAR 179 SRR 2020, <https://dpar.karnataka.gov.in/storage/pdf/KCS%20GR%20Rules/dpar%20179%20srr%202020%20dated%2006%2007%202021.pdf>.

<sup>48</sup> Higher Education Department, Government of Kerala, G.O. (Ms) No. 153/2018/HEDN (issued on July 3, 2018), [https://www.gckoyilandy.org/menus/105\\_4869806200546.pdf](https://www.gckoyilandy.org/menus/105_4869806200546.pdf).

<sup>49</sup> Sharma, *supra* note 12.

<sup>50</sup> MINISTRY OF SOCIAL JUSTICE AND EMP', GOV'T OF IND., 43 REPORT OF THE STANDING COMMITTEE ON SOCIAL JUSTICE AND EMPOWERMENT ON THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 101 (2016), [http://164.100.47.193/lssccommittee/Social%20Justice%20%26%20Empowerment/16\\_Social\\_Justice\\_And\\_Empowerment\\_43.pdf](http://164.100.47.193/lssccommittee/Social%20Justice%20%26%20Empowerment/16_Social_Justice_And_Empowerment_43.pdf).

**C. IDENTIFICATION OF THE BENEFICIARY**

Other appropriate amendments are also required to ensure that the right to self-identification, as recognised by the SCI, is upheld.<sup>51</sup> Under the current framework, a transgender person will be issued a certificate of identity after following the procedure.<sup>52</sup> This provision has been criticised widely.<sup>53</sup>

The relation of this aspect with horizontal quota may be manifested by referring to the Madras High Court judgment in *Nangai v. Superintendent of Police*.<sup>54</sup> The petitioner was terminated on the ground that she was appointed under the quota for women by suppressing her transgender identity. The court held that compelling the petitioner to undergo a medical examination in the absence of any law to that effect is violative of the right to life under Article 21 and freedom of expression under Article 19(1)(a).<sup>55</sup> The petitioner identified herself as a female, was born as a female and perceived by society as a female, and therefore, was eligible for appointment under the women quota.<sup>56</sup>

Similarly, in *Sangeetha Hijra v. State of Bihar*,<sup>57</sup> the court stated that the petitioner had the right to identify herself as a female in accordance with the law laid down in *NALSA* and contest from a female unreserved seat.<sup>58</sup>

---

<sup>51</sup> *NALSA*, (2014) 5 SCC 438 ¶ 135.

<sup>52</sup> The Transgender Persons (Protection of Rights) Act, 2019, § 5 r/w § 6, The Gazette of India, Extraordinary, pt. II § 2(ii) (Jan. 10, 2020).

<sup>53</sup> See Justice MB Lokur, *Transgender Rights and Wrongs*, in *SEX AND THE SUPREME COURT: HOW THE LAW IS UPHOLDING THE DIGNITY OF THE INDIAN CITIZEN* (ed. Saurabh Kirpal, Hachette India 2020).

<sup>54</sup> *Nangai v. Superintendent of Police*, 2014 SCC OnLine Mad 988. In a similar case, *Nangai-II v. Director General of Police*, (2014) 7 MLJ 452, where *Nangai-II* was compelled to resign as the medical check-up during her training declared her as transsexual. The court again upheld the right to self-identity *Nangai-II* as female and reinstated her.

<sup>55</sup> *Nangai v. Superintendent of Police*, 2014 SCC OnLine Mad 988 ¶ 40.

<sup>56</sup> *Id.* ¶ 37.

<sup>57</sup> *Sangeetha Hijra v. State of Bihar*, 2017 SCC OnLine PAT 1040.

<sup>58</sup> *Id.* ¶¶ 3, 6. The petition was eventually withdrawn, therefore a *prima facie* order to this effect cannot be traced. However, the order stated that the court adjudicating the election petition (if filed) shall take into account the law laid down under the *NALSA* judgment.



Giving primacy to the right to self-identify gender, it is essential to amend the requirement regarding the issuance of a certificate to safeguard the benefits that transgender persons are to ultimately receive.<sup>59</sup> Transgender persons identifying as women must be entitled to secure the benefit of reservation under either horizontal gender category—women or transgender. In consultation with persons from the transgender community, necessary amendments must also be made to the existing legislation to ensure wider inclusivity of persons under the umbrella term “*transgender*”—for any reservation accorded to some trans persons to the exclusion of other is a far from desirable outcome to the proposed structure.

#### D. PROPER AND CORRECT COURSE

Post the determination of a broad structure, it becomes imperative to lay down a procedure for filling vacancies. The SCI has delved into this question and provided a detailed answer:<sup>60</sup>

*“The proper and correct course is to first fill up the OC quota (50%) on the basis of merit; then fill up each of the social reservation quotas i.e., SC, ST and BC; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied-in case it is an overall horizontal reservation-no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/ accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment/ accommodation as stated above should be applied separately to each of the vertical reservations. In*

---

<sup>59</sup> It must be noted at this point that the primary reasoning of the Madras High Court was grounded in the fact that the Supreme Court in *NALSA* did not envisage transgender persons undergoing a female to male transition under third gender and consequently, there exists a legal compulsion to bring such female transgender persons under the binary classification of gender (¶ 35). Another aspect in court’s reasoning was the twin test applied for determining sex—(i) physical characteristics found at birth; and (ii) recognition of sex by society at large (¶ 27). Therefore, while the outcome of the judgment was progressive, the underlying reasoning per se cannot be veiled from criticism.

<sup>60</sup> *Anil Kumar Gupta v. State of U.P.*, (1995) 5 SCC 173 ¶ 18.

## EDITORIAL

*such a case, the reservation of fifteen per cent in favour of special categories, overall, may be satisfied or may not be satisfied).”*

*(emphasis added)*

The Gujarat High Court, in the recent case of *Tamannaben Ashokbbai Desai v. Shital Amrutal Nishar*,<sup>61</sup> elaborated on the method for compartmentalised horizontal reservation in a stepwise manner. This was approved by the Supreme Court in *Saurav Yadav v. State of Uttar Pradesh*.<sup>62</sup>

The Court discussed a hypothetical case of one hundred seats with fifty-one for the open category and thirty-three per cent horizontal reservation for women. The first fifty-one seats will be filled up on merit, including candidates from all categories. If there are seventeen women among these fifty-one candidates, no further changes will be required. However, if there are fewer women than seventeen (let’s say there are two fewer), the last two male candidates will be replaced with two women candidates appearing first in the merit list post fifty-one.

At this stage, the open category horizontal reservations are fulfilled. Next, twelve reserved seats for SCs will be filled from the merit list, and it will include male SC candidates who might have been deleted with adjusting shortfall for women. If this list includes four women candidates, the list will be finalised. However, if not, the last two SC male candidates will be deleted, and two SC women candidates will be added from the merit list. In case there are no SC women candidates, SC male candidates will be added. If both are unavailable, the seats will be carried forward to the next admissions/recruitment.

In essence, while calculating the number of candidates selected for applying for horizontal reservation, the candidates already in the list on merit will not be excluded.<sup>63</sup> This principle stands true only for horizontal reservation and not for vertical reservation.

---

<sup>61</sup> *Tamannaben Ashokbbai Desai v. Shital Amrutal Nishar*, 2020 SCC OnLine Guj 2592 ¶ 69.

<sup>62</sup> *Saurav Yadav v. State of Uttar Pradesh*, (2021) 4 SCC 542 ¶ 43.

<sup>63</sup> *Rajesh Kumar Daria v. Rajasthan Public Service Commission*, (2007) 8 SCC 785 ¶¶ 7-9.

## CONCLUSION

*NALSA* was a progressive judgment despite its shortcomings. Though it fails to discuss the issue regarding reservation to be granted to trans persons in an amply clear manner, it is a welcome step in the right direction insofar as it recognises the plight of transgender persons in India and mandates the provision of reservations in their favour. The nature of reservations mandated—whether horizontal or vertical—being unclear has been the cause for a varied interpretation and differential implementation of reservation schemes across states. Analysing state measures in furtherance of the *NALSA* directive, we have critiqued the infirmities that exist with the treatment of transgender persons as OBCs, and argue that any reservation granted to transgender persons should cut across categories which are primarily based on caste lines in recognition of the intersectional socio-economic deprivations they are be faced with.

As highlighted in Part III of this paper, a structure similar to that adopted for granting reservation to persons with disabilities ought to be adopted for transgender persons as well. This will require two broad changes—(i) enacting a central legislation or amendment of the Transgender Persons (Protection of Rights) Act, 2019 to this effect; and (ii) strengthening the self-identification process to weed out existing systemic bottlenecks and increase inclusivity.

Additionally, the extent of reservation must be laid down in the central legislation itself. While we do not propose a number or percentage of reserved seats for transgender persons due to the lack of empirical data, we believe that it is important that an extent of reservation based on empirical evidence (to be reviewed and revised from time to time) be laid down in the central legislation or amendment as proposed, to secure uniformity and adequacy in the implementation of the proposed reservation scheme across states. Furthermore, it is pivotal to ensure that this horizontal reservation is compartmentalised, *i.e.*, restricted in categories and not based on the overall number of transgender persons qualifying in the process. The procedure to prepare the list must be as discussed in *Tamannaben Ashokbbhai Desai*. It is imperative that any such enactment or amendment as proposed must be passed after due deliberation and consultation with persons from the transgender community, for they are the intended beneficiary and their inclusion in this process is essential to achieve a desirable outcome.

## EDITORIAL

### IN THIS ISSUE

The publication of every issue of the Comparative Constitutional and Administrative Law Journal (“**CALJ**”) under the Centre for Comparative Constitutional Law and Administrative Law (“**CCAL**”) is a holistic learning process for the dedicated student editors who work on it. The nature and quality of work that goes into soliciting manuscripts, the painstaking editorial process and finally, the compilation of manuscripts into a single issue is deeply enriching and rewarding. Each successive issue presents us with the opportunity to become more nuanced in the subject matter and to hone our editorial and managerial skills.

The ever-evolving constitutional and administrative law domains put forth hundreds of questions, answers to which demand academic excellence. The authors, who write for us, with the aid of the editorial board, contribute to this unending academic discussion on numerous aspects. As the Editors-in-Chief of CALJ, it gives us immense pleasure to introduce Issue II of Volume VI of our journal.

*Jayana Bedi & Prashant Narang*, in ***Assessing State School Education Laws on Administrative Safeguards***, analyse seventy state education laws and sixty-one subordinate legislations governing kindergarten to 12<sup>th</sup> grade education across sixteen states of India. The authors use four fundamental parameters: (i) procedural safeguards; (ii) legislative guidance on discretion granted to the executive; (iii) proportionality; and (iv) checks on rule-making power to assess these laws. The authors argue that a majority of these laws fail to provide adequate safeguards, which may have the effect of hindering the establishment of new schools, and impinge on the rights of children, school owners and employees. A prime example could be The Madhya Pradesh Ashaskiya School Viniyaman Adhiniyam, 1975, which provides for an imprisonment clause in cases of violation of provisions of the Act. The authors highlight certain features like the inclusion of a provision for reasoned order, laying out a clear objective of the law, avoiding excessive and arbitrary penalties, and limiting rule-making power, among other suggestions, to improve the status quo.

In ***Evaluating India’s New Anti-Conversion Laws***, *Manish* discusses the constitutionality of legislations enacted to prohibit forcible religious conversions in India in light of the newly developed privacy jurisprudence.

The author discusses anti-conversion enactments pre-2000 and critiques the Supreme Court's judgment in *Stainislaus*, which upheld the validity of the anti-conversion legislation in question for its poorly-reasoned application of the public order exception to restrict the right to “propagate” religion, its vagueness and failure to engage with questions of morality or freedom of speech. The author argues that anti-conversion enactments post-2000 place an additional substantive burden on individuals in cases of conversion and puts them under surveillance. Provisions in the newer set of laws regarding prior notice for conversion, initiation of proceedings by persons other than the convert, reconversion exception and rendering marriage voidable in case of forced conversion are criticised for their violation of fundamental rights, primarily on the basis of the right to privacy. Taking note of the Himachal Pradesh High Court decision in *Evangelical Fellowship*, it is argued that the change in privacy jurisprudence would render these newer set of laws unconstitutional.

*Aishwarya Singh & Meenakshi Ramkumar*, in ***The Road Not Taken: India's Failure to Entrench Opposition Rights***, discuss the importance of the opposition in parliamentary democracies by referring to Waldron's conception of the opposition's dual function—to extract accountability from government and to be prepared as “government-in-waiting”. Highlighting the potential abuse of power by political majorities and the silencing of the opposition, the authors argue that the dismal state of opposition in India can be attributed to the absence of opposition rights, partisan functioning of the presiding officer in the Parliament and deferential Supreme Court. Drawing a comparison to opposition rights in South Africa, where the framework is entrenched within the Constitution, the authors argue for the entrenchment of a framework for opposition rights in India. They argue that in the absence of such a framework, judicial review of the legislative process might serve as an imperfect solution. However, the authors caution that if the standards of such review are not clearly laid down within the constitution, it will lead to different judicial interpretations.

Following the same theme of evaluating parliamentary processes in India, *Anmol Jain*, in ***Political Process Failure in the Indian Parliament: Studying Abuse of Power by the Chair and How it can be Addressed***, analyses the inherent flaws in the constitutional design of the chair of the two houses of the Parliament. The author highlights instances of abuse of

## EDITORIAL

power by the Chairperson and display of partisan bias in certain cases, including wrongful certification bills as a money bill to evade the requirement of the majority in the Rajya Sabha (as in the case of the Aadhar Act) and denial of demand for division of votes by the opposition (as in the case of the Farm Bills and the anti-cow slaughter legislation in Karnataka). The author offers three solutions to this problem. *First*, the resignation of the Chairperson from the affiliated political party, and as a convention, the placing of a prohibition on political parties from pitching candidates against the chair in the successive general election. *Second*, referring the decision of the Chairperson to a select committee when a significant number of members of the house demand the same. *Third*, as an external check on the power, Jain suggests an expanded judicial review of legislative processes that are fundamental to lawmaking.

In the final article of this issue, *Analyzing the Invisible: The Constituent Assembly and Independent India's Tryst with the Representation of Marginalized Muslims*, *Mustafa Rajkotwala & Tejas B. Naik* discuss the plight and neglect of lower caste Muslims in India, tracing the same back to the Constituent Assembly's failure to acknowledge the existence of caste hierarchies within Muslims. In an effort to address the resultant socio-economic marginalisation of *Pasmanda* Muslims, the authors draw upon the existing discourse on relevant constitutional and statutory provisions, committee reports and judicial precedents surrounding the community. Highlighting the severe political under-representation and "othering" of Muslim minorities at the hands of the political majority, the authors call for increased and proportional political reservation of Muslims in constituencies with higher Muslim populations. The authors propose a revision of the current scheme of reservation in a manner such that SC, ST and OBC reservations are made religion-neutral to extend benefits to lower caste Muslims, granting recognition to their social and educational backwardness. They alternatively propose the introduction of *Pasmanda* Muslim specific reservation schemes based on, as opposed to umbrella reservations under a blanket Muslim quota, in a bid to secure their educational, political and socio-economic upliftment.

## CCAL ACTIVITIES

CCAL hosted a series of online guest lectures on a wide variety of topics over the last five months, alongside our editorial process for CALJ. At the

outset, CCAL extends its heartiest gratitude to all the speakers for accepting our invitation and taking out valuable time from their busy schedules to deliver enriching lectures to our audience.

We started off with hosting a lecture by Mr. Vikram Raghavan on the topic, “*India’s Transformative Constitution: A Historical Perspective*”. Mr. Raghavan discussed the context behind Granville Austin’s description of the Indian Constitution as a document of social revolution and the resultant popular understanding of the Indian Constitution as bearing a transformative character. Next, we were fortunate to be presented with the opportunity to host Prof. (Dr.) Neera Chandhoke for a lecture on the theme “*Why Secularism?*”. The event was an engaging discussion on the various differences in the concept of secularism as practised in Europe and India. Dr. Chandhoke elaborated upon the various challenges posed to secularism in light of the contemporary political climate in India. Subsequently, we had Dr. Arvind Elangovan speaking on the theme “*The Indian Constitution: A Historical Problem*”. Dr. Elangovan placed emphasis on a critical reading of the constitution-making process. The talk was based on his book “*Norms and Politics: Sir Benegal Narsing Rau in the Making of the Indian Constitution, 1935-50*” (Oxford University Press 2019). Dr. Elangovan’s portrayal of the Constitution making process is in contrast to the idea proposed by Granville Austin in his book “*The Indian Constitution: Cornerstone of A Nation*” (Oxford University Press 1966)—the central theme of Mr. Raghavan’s lecture.

We were honoured to witness a lecture on the topic “*Voices of Dissent*” by Prof. (Dr.) Romila Thapar. Discussing her essay-cum-book, “*Voices of Dissent: An Essay*” (Seagull Books 2020), Dr. Thapar elaborated upon the tradition of dissent that has existed within the cultures and religions of the South Asian subcontinent. She elaborated upon the existence of various sects that vehemently disagree with mainstream religious ideas within India since the premodern era as a sign of dissent. Lastly, we hosted Prof. Cheryl Saunders on the theme “*Towards a Global Constitutional Gene Pool*.” Prof. Saunders discussed the challenges for comparative constitutional law and the impact of contemporary issues on the same. The lecture was based on her paper “*Towards a Global Constitutional Gene Pool*” (National Taiwan University Law Review Volume IV Issue III 2009).



## EDITORIAL

The endeavour of CCAL to encourage discourse on the subject matter of constitutional and administrative law is furthered by the bi-annual publication of CALJ, guest lecture events and the regular publication of articles on topics of contemporary relevance on our blog “*Pith & Substance: The CCAL Blog*”. We ensure the regular updation of our website to ensure a user-friendly interface for our readers. With an aim to further our contribution to existing literature, we endeavour to undertake extensive research projects in 2022-23.

### ACKNOWLEDGMENTS

The onset and rapid decline of the third wave of the COVID-19 pandemic presented the editorial board of CALJ (“**Board**”) with a unique challenge—to shift to offline working mid-editorial process after two years of continued online functioning. The Board adapted to offline working swiftly and turned this challenge into an opportunity to grow together as a strong team.

With the support and guidance of our Patron, Hon’ble Vice-Chancellor of National Law University Jodhpur, Prof. (Dr.) Poonam Saxena, our Director, Prof. (Dr.) IP Massey and Registrar Mrs. Vandhana Singhvi, we have been able to ensure the timely and smooth roll-out of this issue and successfully carry out activities of CCAL. The Board owes its success to our faculty advisors—Asst. Prof. Sayantani Bagchi and Asst. Prof. Vini Singh, who closely mentored and supported us through every initiative. Their inputs have been valuable at every stage of the editorial process and for activities of CCAL.

We thank the members of the Board for their dedication and hard work, without which timely publication of this issue would not have been possible. Each member of our board is equipped with a skill unique to them, and they work to the best of their ability to maintain and improve the standards of our journal. As Editors-in-Chief, we acknowledge and thank them for their meaningful contribution to the editorial process. Their creative mindset and enthusiastic approach towards every initiative helped us in improving the standards of our journal and CCAL. Members of the Board—Ayush Mehta, Falguni Sharma, Piyush Sharma, Garima Chauhan, Kirti Harit, Karunakar, Aditya Maheshwari, Palak Jhalani, Ayush Mangal, Akshay Tiwari, Rachana R. Rammohan, Himanshi Yadav, Revati Sohoni,

Atharva Chandra, Vishnu M., Siri Harish, Akshat, Anjali Sunil, Krishangee Parikh, Siddhant Rathod, Sinchan Chatterjee, Sonsie Khatri, Sourabh Manhar and Sri Janani S.—are all indispensable to our team.

We would like to take this opportunity to extend our gratitude to the IT department of the University and Mr. Gyan Bissa for providing us with adequate resources and maintaining our website. The Board also acknowledges the crucial role played by the Students Section of the University in processing every application and making the procedure seamless.

On behalf of the Board, we would like to thank our authors for having taken out the time to contribute to this issue. While the themes covered in this issue hold extreme contemporary relevance, they also aid in analysing systematic patterns ranging over decades. We appreciate the authors for their patience and cooperation throughout the editorial process, making the publication of this issue timely and seamless.

We sincerely hope that this issue adds to the literature on the themes covered and proves to be an enriching source of information for our readers. Should our readers have any queries, suggestions or feedback for us, write to us at **editorcalq@gmail[dot]com**.

Prakhar Raghuvanshi & Sandhya Swaminathan  
**Editors-in-Chief**

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

---

JAYANA BEDI<sup>1</sup> & PRASHANT NARANG<sup>2</sup>

*This paper reviews the quality of all laws governing K-12 education across sixteen states. The authors assess these laws on four parameters: (i) procedural safeguards (due process and principles of natural justice) encoded in the law; (ii) guidance provided by the law for the quasi-judicial functions of the executive; (iii) the proportionality of the provisions of the law (based on its intended objective); and (iv) checks that the law places on the rule-making powers of the executive. These parameters have been drawn based on a review of international literature on administrative law. Laws that fare poorly on these benchmarks can impinge heavily on the rights and liberties of individuals they govern. In the case of the K-12 sector, the absence of such safeguards in the law may ultimately affect children's access to quality education.*

*We find that most state laws fare poorly on one or more of the parameters listed above. There is no parameter on which all states perform well. While these laws continue to expand the scope of discretionary powers granted to the executive, they fail to provide procedural safeguards which could guide or limit the said discretion. Furthermore, some laws have also introduced provisions that are excessive or arbitrary in nature.*

*Wide discretionary powers often run the risk of abuse in the form of rent-seeking and corruption. Past analyses show the numerous ways in which the departments of school education commit excesses while exercising their discretionary powers. Given that the executive draws its powers from the legislations studied, it is imperative that laws encode the safeguards highlighted in this paper.*

---

\* Cite it as: Bedi & Narang, *Assessing State School Education Laws on Administrative Safeguards*, 6(2) COMP. CONST. L. & ADMIN. L. J. 1 (2022).

<sup>1</sup> Jayana Bedi is a Senior Associate, Research & Training Programs at Centre for Civil Society. The author may be reached at <jayana@ccs.in>.

<sup>2</sup> Prashant Narang is a Senior Fellow, Research & Training Programs at Centre for Civil Society. The author may be reached at <prashant.narang@ccs.in>.

\*\* The authors would like to thank their interns—Aashita Sharma, Abhishek Singh, Anagha Sasidharan, Anshum Agarwal, Bharatt Goel, Disha Mohanty, Harsh Pati Tripathi, Kartikay Agarwal, Mahek Shivani, Md Tasnimul Hassan, Nitish Dubey, Piyush Singh, Pratham Arya, Samridho Sen, Saniya Khanna, Sarthak Chaturvedi, Shailendra Shukla, Shelal Lodhi Rajput, Siddhartha Mishra, Soundarya Rajagopal, Swantika Kumar and Viraj Aditya—for assisting them with the research process for this paper.

# ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

## INTRODUCTION

The National Education Policy, 2020<sup>3</sup> (“**NEP**”) emphasises the need to review and revise the existing regulatory framework for school education in India. The NEP points out that the laws governing education should aim at improving the overall quality of education imparted. While the NEP gives the nudge to reform, states need a clear roadmap on the direction and nature of reform. This requires a systematic review of the gaps in the current regulatory framework. At present, research on the *de jure* regulatory environment for private schools in India is sparse.<sup>4</sup>

This paper attempts to fill the gap by analysing all laws governing K-12 education<sup>5</sup> across sixteen states of India using the Quality of Laws Toolkit (“**QoL Toolkit**”).<sup>6</sup> This includes Andhra Pradesh (six laws), Delhi (two laws), Gujarat (seven laws), Haryana (four laws), Jammu and Kashmir (two laws), Jharkhand (four laws), Karnataka (five laws), Kerala (one law), Madhya Pradesh (three laws), Maharashtra (seven laws), Nagaland (one law), Puducherry (three laws), Rajasthan (three laws), Telangana (six laws), Uttar Pradesh (nine laws), and West Bengal (seven laws). The paper also analyses all the rules under these laws.

The QoL Toolkit assesses laws on three parameters: representation, rights, and resources. *Representation safeguards* ensure that the preferences and interests of stakeholders are reflected in the law.<sup>7</sup> *Rights safeguards* ensure that the principles of natural justice and proportionality are incorporated into the law to protect the rights of individuals. *Resources safeguards* ensure that the impact of the law on stakeholders’ incentives is positive, and the administrative burden imposed by it is limited.<sup>8</sup> The QoL Toolkit is based on a review of literature on administrative law and a study of global indices.

---

<sup>3</sup> MINISTRY OF HUMAN RESOURCE AND DEVELOPMENT, NATIONAL EDUCATION POLICY (2020).

<sup>4</sup> CENTRE FOR CIVIL SOCIETY, ANATOMY OF K-12 GOVERNANCE IN INDIA, 44–72 (2019), <https://ccs.in/sites/default/files/Anatomy-of-K-12-Governance-in-India.pdf>.

<sup>5</sup> K-12 refers to the school education system (including primary and secondary education).

<sup>6</sup> Prashant Narang & Jayana Bedi, *Quality of Laws Toolkit*, CENTRE FOR CIVIL SOCIETY (2021), <https://ccs.in/sites/default/files/Quality-of-Laws-toolkit-CCS.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

For analysing state school education laws, the authors have only focused on the “*rights*” safeguards (explained under the methodology).<sup>9</sup>

This paper studies seventy laws that regulate several aspects of school education, such as the establishment of schools, fees charged, admission process, teacher training and salaries, medium of instruction, the establishment of school boards and tribunals, disbursement of grants, and transfer/takeover of management. These require bureaucrats to take administrative decisions that have a bearing not only on the rights and liberties of individuals but also the ease with which schools can be established and operated. For instance, under state school education laws, the government has the authority to derecognise or shut schools. This has a bearing on children’s right to education and affects the livelihood of school owners, along with their teaching and non-teaching staff. Although there are procedures in place to shift students to nearby schools, such closures impinge on their freedom and choice.

In the following sections, the authors provide an overview of the quality of school education laws in sixteen states and highlight the best and worst practices. Our analysis can be used to draw insights into the regulatory hurdles that make it difficult for school owners to operate and could come in the way of providing quality education. Ultimately, insights from this paper could help guide deliberations on reforming the existing regulatory architecture for school education.

## **METHODOLOGY**

Since the early twentieth century, the role of the administrative state has expanded considerably. The executive now exercises a wide range of adjudicative and legislative powers. In education, the government exercises discretionary powers at several touchpoints. Some of the adjudicative functions performed by the government include making decisions on granting recognition to schools and approving their fee structures. Along with this, state legislatures have also granted the government quasi-legislative powers. These include drafting rules that specify the manner of conducting school inspections, minimum qualifications of teaching and

---

<sup>9</sup> Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1044–1179 (1984).

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

non-teaching staff and conditions for recognition of schools among others. In the following sections, the authors elaborate on how a wide range of these adjudicative and legislative powers are discretionary.

As the field of discretion expands, so does the room for arbitrary conduct.<sup>10</sup> Given that these powers have a bearing on the rights and obligations of people, they must be constrained by the same traditional procedural restrictions that are applicable to judicial decisions.<sup>11</sup> These procedural restrictions include due process and the principles of natural justice.

A law must ensure that it protects the rights of all individuals to fare well on the “*rights*” safeguards of the QoL Toolkit in the following four ways:

- (i) provides clear and sufficient guidance for bureaucratic decision making;<sup>12</sup>
- (ii) encodes due process and principles of natural justice by mandating pre-decisional hearing,<sup>13</sup> reasoned order<sup>14</sup> and recourse to appeal for all decisions that have a bearing on an individual’s life, liberty or property;<sup>15</sup>
- (iii) introduces provisions that are proportional to its objective and the problem it intends to tackle;<sup>16</sup>

---

<sup>10</sup> Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614–621 (1927).

<sup>11</sup> Rubin, *supra* note 9.

<sup>12</sup> Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343 (2009).

<sup>13</sup> Clark Byse, *Opportunity to be Heard in License Issuance*, 101(1) U. PA. L. REV. 57, 57–104 (1952).

<sup>14</sup> V. S. Chauhan, *Reasoned Decision: A Principle of Natural Justice*, 37(1) J. INDIAN L. I. 92, 92–104 (1952).

<sup>15</sup> 1 HALSBURY’S LAWS OF INDIA, ADMINISTRATIVE LAW (2019).

<sup>16</sup> Jud Mathews, *Proportionality Review in Administrative Law*, in COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman et al. eds., 2d ed., Edward Elgar 2017); European Commission, *Better Regulation Toolbox* (2017), <https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox.pdf>.

- (iv) sets clear contours for the executive’s rule-making powers (including subject matter and timelines) and maintains strict control over it.<sup>17</sup>

A law that lacks these basic safeguards leaves room for abuse of powers by the executive and fails to protect individual liberties.<sup>18</sup>

Administrative safeguards act to protect against “*individualised oppression by the government*” and impose absolute limits on the government’s scope of powers.<sup>19</sup> In this paper, the authors review how state school education laws fare on four integral administrative safeguards: due process and principles of natural justice, legislative guidance on discretion, proportionality and nexus, and checks on the executive’s rule-making powers (questions attached in the **Annexure** at the end of this paper). We will briefly discuss these four safeguards in this section.

## **A. DUE PROCESS AND PRINCIPLES OF NATURAL JUSTICE**

Any government action which deprives an individual of their life, liberty, or property must follow due process and the principles of natural justice. At the minimum, this includes: getting an advance (and adequate) notice of such government action, an order detailing the reasons for undertaking the particular action, and a reasonable opportunity to be heard before such a deprivation.<sup>20</sup> These principles are derived from common law and precede the Indian Constitution.<sup>21</sup>

Once the decision is taken, an individual should have recourse to appeal against the decision or get it reviewed by another authority.<sup>22</sup> Central to this

---

<sup>17</sup> Jaivir Singh & Raghav P. Dash, *The Hazards of Erroneous Delegation*, in *THE INDIAN PARLIAMENT AND DEMOCRATIC TRANSFORMATION*, 233–251 (Ajay K. Mehra ed., 1st ed. Routledge India 2017).

<sup>18</sup> Rubin, *supra* note 9.

<sup>19</sup> *Id.*

<sup>20</sup> S.N. Jain, *Judicial Systems and Legal Remedies*, in *THE INDIAN LEGAL SYSTEM*, 151 (Joseph Minattu ed., Indian Law Institute 2006); V.S Chauhan, *Reasoned Decision: A Principle of Natural Justice*, 37 *J. INDIAN L. I.* 92, 92–104 (1995).

<sup>21</sup> V. S. Deshpande, *Administrative Law*, in *THE INDIAN LEGAL SYSTEM* 335–383 (Joseph Minattu ed., Indian Law Institute 2006).

<sup>22</sup> 1 *HALSBURY’S LAWS OF INDIA, ADMINISTRATIVE LAW* (Universal LexisNexis 2d ed. 2019).



## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

appeal process is its independence. One of the key principles of natural justice is “*nemo iudex in causa sua*”, which literally translates as “*no one must be a judge in their own case*”.<sup>23</sup> This ensures that bias and conflict do not creep into the decision-making process.

Another important procedural safeguard is a check against inaction by bureaucrats since delay in decision making may adversely impact individual rights. A study by the Centre for Civil Society reveals that for some schools, the application to obtain a Certificate of Recognition<sup>24</sup> remained under review for over five years.<sup>25</sup> One way in which laws check against such delays is by prescribing an upper time limit or deadline within which the executive must make a decision. For instance, under the Haryana Education Rules, 2003 (Rule 29), the “*appropriate authority*” is required to decide on a school owner’s application seeking permission to establish a school within ninety days.<sup>26</sup> In case the authority fails to do so, the establishment of the school will be “*deemed to have been permitted*”. Without such deadlines, it becomes difficult for the judiciary to hold the government accountable for inaction or slow action.<sup>27</sup>

Another safeguard that enhances procedural efficiency includes clear identification of the decision-making authority.<sup>28</sup> A law must encode all these principles and make it binding for the executive. Without such an express mandate, the executive may bypass, overlook, or compromise on them while undertaking its functions.

### **B. LEGISLATIVE GUIDANCE ON DISCRETION**

Given that performing quasi-judicial functions does not fall within the realm of the executive’s competence, discretion must be guided.<sup>29</sup> The rule

---

<sup>23</sup> Jain, *supra* note 20.

<sup>24</sup> Schools in most states require this certificate to operate legally.

<sup>25</sup> Centre for Civil Society, *supra* note 4.

<sup>26</sup> Haryana School Education Rules, 2003, Gazette of Haryana, § 24 (Apr. 30, 2003).

<sup>27</sup> Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 923–990 (2008).

<sup>28</sup> Bhuvana Anand et al., *What does a Framework of Regulatory Quality and Hygiene entail*, CENTRE FOR CIVIL SOCIETY (2019), <https://ccs.in/sites/default/files/what-does-a-framework-of-regulatory-quality-and-hygiene-entail.pdf>.

<sup>29</sup> Mantel, *supra* note 12 at 343.

of law requires discretionary powers to be guided by certain guidelines. Without guiding norms, “*it may be difficult to assess whether a particular administrative decision is bona fide and based on merits and proper considerations or is mala fide and motivated by some improper and corrupt consideration*”.<sup>30</sup> This implies that clearly defined guidance provides the necessary basis to bring action into question and thereby helps ensure better accountability on the part of the public officials. Unguided discretion opens room for corruption, arbitrariness and misuse of powers.

One way to curb abuse of power is to ensure that the criteria on the basis of which the executive takes decisions are laid down in the law itself.<sup>31</sup> Clear mention of the criteria in a statute helps introduce predictability.<sup>32</sup> For instance, laws must clearly enlist the criteria based on which the executive should grant approvals or impose a penalty. A school owner must know the criteria they have to meet to get recognised. Similarly, a law that elaborates on the criteria for breach increases the school’s awareness of actions that could result in a penalty or sanction. The key challenge lies in developing guidance that is “*sufficient*” to curb abuse of power while also providing flexibility to the executive to administer the law efficiently.<sup>33</sup>

### C. PROPORTIONALITY AND NEXUS

The third way to establish a check on the executive’s exercise of powers and protect the rights, property and freedom of individuals is to use the test of proportionality and nexus. Principles of proportionality help ensure that there is a link between an intervention and the intended outcome. The majority of the school education laws across states aim to better organise and develop school education.<sup>34</sup> The purpose of the proportionality test is to ensure that “*when the government acts, the means it chooses should be well adapted*

---

<sup>30</sup> Jain, *supra* note 20.

<sup>31</sup> Anand et. al., *supra* note 28.

<sup>32</sup> Mantel, *supra* note 12; Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1991–1992 (2015).

<sup>33</sup> Lewis Allen Sigler, *The Problem of Apparently Unguided Administrative Discretion*, 19 ST. LOUIS L. REV. 261, 261–321 (1934).

<sup>34</sup> As stated in the preamble of laws such as The Haryana School Education Act, 1995 and the Delhi School Education Act, 1973.

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

to achieve the ends it is pursuing”.<sup>35</sup> As a result, in order to pass the test of proportionality, these laws must choose a method that aligns with the aforementioned policy objective and is the least restrictive way to achieve it.<sup>36</sup>

The proportionality test has four elements: (i) legitimacy; (ii) suitability; (iii) necessity; and (iv) proportionality *stricto sensu*.<sup>37</sup> It helps in two ways: *first*, to ascertain if the objective aligns with what is needed to tackle the problem identified, and *second*, to check if the measures used by the law (such as penalties sanctioned) align with the stated objective of the law.<sup>38</sup> In the section above, we highlighted the need for laws to mention the criteria on the basis of which the executive must decide. However, to pass the test of proportionality, the criteria set must also be reasonable. In other words, the criteria set must be neither arbitrary nor excessive.<sup>39</sup>

Arbitrary conditions are the ones that have no nexus or connection with the purpose of the legislation or statute. Each law, through its preamble, must make its objective clear and highlight the issue it intends to tackle. This is a necessary precondition to ascertain whether the measures introduced by the law are arbitrary or not. Excessive conditions are the ones that go overboard. Measures are deemed to be excessive if there exists a less restrictive alternative that could achieve the same intended result. The least restrictive method is the one that puts the least restrictions on the freedoms of an individual. For instance, the penalties imposed by law must not be disproportionate to the misconduct or violation.<sup>40</sup>

---

<sup>35</sup> Jud Mathews, *Proportionality Review in Administrative Law*, in COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman et al. eds. 2d ed., Edward Elgar 2017) European Commission, *Better Regulation Toolbox* (2017), <https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox.pdf>.

<sup>36</sup> AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (Cambridge University Press 2012).

<sup>37</sup> *Id.*

<sup>38</sup> European Commission, ‘*Better Regulation*’ *Toolbox: Tool #3. Legal Basis, Subsidiarity and Proportionality*, 21–26 (2015), [https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox-2015\\_0.pdf](https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox-2015_0.pdf).

<sup>39</sup> Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?*, 3(2) U. OXFORD HUM. RTS. HUB J. 57, 62-85 (2020).

<sup>40</sup> Arbitrariness and excessiveness are used to judge whether an administrative action is reasonable; see Paul Craig, *The Nature of Reasonableness Review*, 66(1) CURRENT LEGAL

## D. CHECKS ON EXECUTIVE’S RULE-MAKING POWERS

Apart from taking decisions on a case-by-case basis, the executive is also responsible for putting in place general rules applicable to all. Implementing a law requires technical and localised knowledge. As a result, the parent legislation only outlines the broad principles and often leaves matters of administrative details to be elaborated upon by the executive based on the ground realities. This helps the executive to be more responsive to changes.<sup>41</sup>

However, since rules are not made by elected representatives or subject to close scrutiny, the legislature must ensure that these rules are not in contravention of the interests of the people and the key stakeholders. Safeguards in the parent legislation help ensure that the quasi-legislative powers are not used indiscriminately.<sup>42</sup> The parent legislation can establish this check on the extent and volume of the subordinate legislation in multiple ways.

*First*, the parent legislation must closely guide the subject matter on which the executive can frame rules to limit the scope of their powers.<sup>43</sup> *Second*, the legislation should provide a time frame within which these rules must be framed.<sup>44</sup> This becomes especially salient when most provisions of the law can be realised only once the rules notify the details. *Third*, to ensure that the rules are in line with the statute and that the executive does not overreach its powers, the law must prescribe that the rules made under it be laid before the Parliament for approval.<sup>45</sup>

---

PROBLEMS 131–167 (2013). In this paper, we use the lens of reasonableness to evaluate the provisions introduced under state school education laws.

<sup>41</sup> CECIL THOMAS CARR, *Delegated Legislation*, in CONCERNING ENGLISH ADMINISTRATIVE LAW (Columbia University Press, 1941).

<sup>42</sup> JEFF KING, THE PROVINCE OF DELEGATED LEGISLATION (Oxford Scholarship Online 2020); PAUL BYRNE, PARLIAMENTARY CONTROL OF DELEGATED LEGISLATION (Oxford University Press 1976).

<sup>43</sup> Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd. v. Asstt. Commissioners of Sales Tax, AIR 1974 SC 1660 (India). The Supreme Court held that delegation of rule-making powers would be excessive if: it does not lay down any policy; expresses its policy in “*vague and general terms*”; and lays no guidance for the executive.

<sup>44</sup> Singh & Dash, *supra* note 17.

<sup>45</sup> Elmer A. Driedger, *Subordinate Legislation*, 38 CAN. B. REV. 1 (1960).

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

In some cases, laws also mandate the executive to consult the relevant stakeholders before notifying a rule.<sup>46</sup> If the delegation of quasi-legislative power is not guided by procedural safeguards, it may be deemed as “*excessive delegation*”.<sup>47</sup> Similarly, the executive must exercise its powers within the framework set by the parent statute. For instance, the executive must not sub-delegate its powers unless it has an express authority to do so.

### **HOW DO STATE EDUCATION LAWS FARE ON THE ADMINISTRATIVE SAFEGUARDS?**

State school education laws govern several aspects of a school’s lifecycle, such as entry/establishment, regulation of fees, operation in line with set norms, upgradation and exit. Given that these powers are exercised by the executive (unelected officials), the laws must limit their scope to avoid abuse. The executive ought to operate within a constrained framework and only perform actions for which it has express legal authorisation. Unrestrained powers can impinge on the rights of individuals. In the case of school education, it could create hurdles for new entrants as well as existing school owners. The majority of the seventy laws analysed confer upon the executive either licensing or penal powers.

For the purpose of analysis, the authors further categorise quasi-judicial powers as either related to approval or enforcement. An approval function is defined as one where officials are required to use reason and ascertain facts to determine whether approval is to be granted or not. Our analysis shows that in the majority of the cases, these approval functions pertain to recognition of schools. Other approval functions include grant/funding approvals for aided schools, granting building permits and approval for the upgradation of schools.

Enforcement functions are defined as ones where the executive penalises individuals for non-compliance or violation of the provisions of the law. These include actions such as revocation of licences or any other approval

---

<sup>46</sup> For instance, the National Food Security Act 2013 mandates the draft of all rules to be placed in the public domain before enactment. In compliance with this provision, the Tamil Nadu food security rules, 2017 were placed in the public domain before being enacted.

<sup>47</sup> Jain, *supra* note 20.

granted, derecognition, seizure of property, imposition of a monetary penalty and imprisonment.

## **A. PROCEDURAL SAFEGUARDS**

### **Issuance of Notice or a Pre-Decisional Hearing**

Of the forty laws that give powers to the executive to grant approval, only the Karnataka Education Act, 1983 mandates the issuance of a notice or a pre-decisional hearing before an application is rejected.<sup>48</sup> But even in this case, an opportunity to be heard is not provided for all kinds of approval functions.

In cases where an individual is punished with a penalty or sanction, a pre-decisional hearing and notice become even more pertinent to ensure that no individual is wrongfully penalised. However, thirty-one laws fail to mandate either a notice or a hearing before such enforcement measures are undertaken.<sup>49</sup>

### **Identification of Decision-Making Authority and Time Limit**

In eight laws, there is no clarity on who is the concerned authority for approvals.<sup>50</sup> Of the fifty-three laws that give enforcement powers to the executive, in twenty-nine laws, there is no clarity on the official who is responsible for ensuring enforcement. These laws either do not mention the authority or direct the state government to identify and appoint the

---

<sup>48</sup> See Karnataka Education Act, 1983, § 96, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>49</sup> See Karnataka Prohibition Of Admission Of Students To Unrecognized And Unaffiliated Educational Institutions Act, 1992, No. 7, Acts of Karnataka State Legislature, 1993; Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, No. 5, Acts of Andhra Pradesh State Legislature, 1983 and Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973.

<sup>50</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1983; Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012 No. 1, Acts of Maharashtra State Legislature, 2013; and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987.

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

concerned authority.<sup>51</sup> Once identified, the state government needs to notify the details of the authority either by way of rules or an order. This information is often scattered and can be difficult to collect.

Only six laws set an upper time limit or deadline for all approval functions.<sup>52</sup> In Haryana, the law also puts in place a provision for deemed approval.<sup>53</sup>

### **Reasoned Order**

Once the executive decides to reject an application, the applicant must at least know the ground for rejection.<sup>54</sup> However, most laws either require the executive to communicate the decision in writing (not necessarily with reasons) or communicate the reasons to the concerned school (not necessarily as a written order). The Karnataka Education Act, 1983 mandates the executive to do both in case an application for approval is denied.<sup>55</sup> For enforcement functions, only three laws mandate the executive to provide a reasoned order when imposing a penalty or sanction.<sup>56</sup> Even in the case of these laws, the mandate for a reasoned order is not imposed for all kinds of enforcement functions.

---

<sup>51</sup> See Karnataka Prohibition Of Admission Of Students to Unrecognized And Unaffiliated Educational Institutions Act, 1992, No. 7, Acts of Karnataka State Legislature, 1993; Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984, No. 37, Acts of Karnataka State Legislature, 1984; and Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, No. 5, Acts of Andhra Pradesh State Legislature, 1983.

<sup>52</sup> See Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999; Rajasthan Non-Government Educational Institutions Act, 1989, No. 19, Acts of Rajasthan State Legislature, 1992; Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005; and The Gujarat Educational Institutions (Regulation) Act, 1984, No. 7, Acts of Gujarat State Legislature, 1984.

<sup>53</sup> See Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999.

<sup>54</sup> Chauhan, *supra* note 14 at 92–104.

<sup>55</sup> Karnataka Education Act, 1983, §§ 31 & 36, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>56</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1983; Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995; and Telangana Education Act, 1982 No. 1, Acts of Telangana State Legislature, 1982.



## Recourse to Appeal

Finally, even after the decision has been taken, an individual or entity must have recourse (in the form of appeal) to get the decision reviewed.<sup>57</sup> Only seventeen laws allow for appeal against all approval related decisions of the government,<sup>58</sup> and twelve laws allow an individual to appeal against all kinds of enforcement actions or measures.<sup>59</sup> In fact, under laws such as the Karnataka Education Act, 1983<sup>60</sup> and the Maharashtra Educational Institutions (Management) Act, 1976,<sup>61</sup> appeals against some decisions of the Director of Education and the state government are explicitly denied.

## Independent Appeal Mechanism

For laws that provide an appeal mechanism, the authors have looked into the constitution of the appellate committee to ascertain if the process is independent. Some states like Gujarat, Jharkhand, Karnataka, and Puducherry establish an independent appeal mechanism by setting up independent tribunals.<sup>62</sup> For instance, the Karnataka Education Act, 1983,

---

<sup>57</sup> 1 HALSBURY'S LAWS OF INDIA, ADMINISTRATIVE LAW (Universal LexisNexis 2d ed. 2019).

<sup>58</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1983; Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999; M.P. Ashaskiya School Viniyaman Adhiniyam, 1975, No. 33, Acts of Madhya Pradesh State Legislature, 1975; and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987.

<sup>59</sup> Instances include: Gujarat Higher Secondary Schools Services Tribunal Act, 1983, No. 12, Acts of Gujarat State Legislature, 1983; The Gujarat Educational Institutions (Regulation) Act, 1984, No. 7, Acts of Gujarat State Legislature, 1984; Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987; Rajasthan Non-Government Educational Institutions Act, 1989, No. 19, Acts of Rajasthan State Legislature, 1992; Rajasthan Schools (Regulation of Fee) Act, 2016, No.14, Acts of Rajasthan State Legislature, 2016; and Telangana Education Act, 1982, No. 1, Acts of Telangana State Legislature, 1982.

<sup>60</sup> The Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>61</sup> The Maharashtra Educational Institutions (Management) Act, 1976, No. 13, Acts of Maharashtra State Legislature, 1976.

<sup>62</sup> See Gujarat Higher Secondary Schools Services Tribunal Act, 1983, No. 12, Acts of Gujarat State Legislature, 1983; Gujarat Educational Institutions Services Tribunal Act, 2006, No. 20, Acts of Gujarat State Legislature, 2006; Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005 and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987.

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

requires the state government to constitute Education Appellate Tribunals for adjudicating appeals.<sup>63</sup> These tribunals must have a judicial officer who is not below the rank of a district judge. In other cases, appeals against an officer in the education department are heard by a senior officer in the same department.

### **B. GUIDANCE ON EXECUTIVE DISCRETION**

#### **No Criteria for Approval or Breach**

Of the forty laws that confer upon the executive the authority to grant approvals, only ten laws define the criteria on the basis of which all such approvals may be granted.<sup>64</sup> In twenty laws, the power to define the criteria has been delegated to the executive.<sup>65</sup> Such delegation may give the executive room to introduce conditions that are not consistent with the parent legislation or are *ultra-vires*.

For instance, several state rules under the Right to Education Act require schools to be registered as “*societies*” that are not-for-profit.<sup>66</sup> Such a requirement finds no mention in the parent legislation and has considerable ramifications for school owners. It disallows individuals, a group of individuals, or companies registered under the Companies Act, 2013 from setting up schools.<sup>67</sup>

Of the laws studied, only twenty-three laws lay down the criteria for the imposition of penalties or sanctions. Of these, some laws prescribe very wide criteria for what constitutes a breach. For instance, under the Jammu

---

<sup>63</sup> The Karnataka Education Act, 1983, § 96, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>64</sup> See Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005; Gujarat Self-financed Schools (Regulation of Fees) Act, 2017, No. 12, Acts of Gujarat State Legislature, 2017.

<sup>65</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Bihar High Schools (Control and Regulation Administration) Act, 1960, No. 13, Acts of Bihar State Legislature, 1960 and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry State Legislature, 1987.

<sup>66</sup> Akash Pratap Singh & Tarini Sudhakar, *Restrictions on For-Profit Education in India*, CENTRE FOR CIVIL SOCIETY (May 11, 2020), <https://ccs.in/restrictions-profit-education-india>.

<sup>67</sup> *Id.*

and Kashmir School Education Act, 2002, the executive can derecognise any school if it is of the opinion that the school has violated provisions of the Act.<sup>68</sup> In twenty laws, this power is delegated to the executive. For instance, the Madhya Pradesh Secondary Education Act, 1965 prescribes the board to lay down the criteria for the derecognition of schools.<sup>69</sup>

### **Ambiguous, Vague and Unclear Criteria**

Although twenty-three laws mention the criteria for breach or violation, they are often vague, ambiguous, and unclear. This expands the scope of powers that the executive can exercise. In Andhra Pradesh, recognition can be withdrawn in “*public interest*”.<sup>70</sup> However, it is not clear what constitutes “*public interest*”. Under other laws, such as the Maharashtra Educational Institutions (Transfer of Management) Act, 1971, ambiguous terms are used in the objective itself:<sup>71</sup>

*“An Act to provide for the transfer of management of the undertaking of certain educational institutions, which are being managed in a manner detrimental to the public interest and to provide for matters connected with the purpose aforesaid.”*

The term “*detrimental to public interest*” is broad and all-encompassing. The Act does not define what actions would be considered detrimental to public interest. Similarly, under the Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012, permission for upgradation can be withdrawn if the school is found to be engaging in activities that are “*prejudicial [to] the interests of the students*”.<sup>72</sup> The issue with such overarching phraseology is that almost any action on the part of the school can be misconstrued to be prejudicial to the interests of the students.

---

<sup>68</sup> Jammu & Kashmir School Education Act, 2002, § 16, No. 21, Acts of Jammu & Kashmir State Legislature, 2002.

<sup>69</sup> Madhya Pradesh Secondary Education Act, 1965, No. 3, Acts of Madhya Pradesh State Legislature, 1966.

<sup>70</sup> The Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

<sup>71</sup> The Maharashtra Educational Institutions (Transfer of Management) Act, 1971, No. 49, Acts of Maharashtra State Legislature, 1971.

<sup>72</sup> Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012, No. 1, Acts of Maharashtra State Legislature, 2013.

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

### **Expanding the Executive's Scope of Powers**

Some laws expand the sphere of powers that the executive can exercise. However, they fail to provide sufficient guidance to the executive for exercising these powers. For instance, the Telangana Education Act, 1982 grants power to the executive to exempt any school from the provisions of the law.<sup>73</sup> This could potentially open room for favouritism.

### **C. PRINCIPLES OF PROPORTIONALITY AND NEXUS**

#### **Unclear Objective of the Law**

Twenty-three laws do not mention the issue that they intend to tackle in their objective.<sup>74</sup> Furthermore, eighteen laws use ambiguous and unclear terms in their objectives, such as “*integrated development*” of children, “*better organisation*” and “*national integration*”.<sup>75</sup> In such cases, an assessment of whether the law is meeting its objectives becomes difficult.

#### **Arbitrary and Excessive Conditions/Provisions**

Four laws introduce conditions that are either arbitrary or excessive.<sup>76</sup> The Andhra Pradesh Education Act, 1982 aims to “*reform, organise and develop*” the education system and ensure the “*integrated development*” of children.<sup>77</sup> This objective does not clarify the specific challenge that warrants the

---

<sup>73</sup> Telangana Education Act, 1982, § 100, No. 1, Acts of Telangana State Legislature, 1982.

<sup>74</sup> See, for instance, Gujarat Educational Institutions (Regulation) Act, 1984, No. 7, Acts of Gujarat State Legislature, 1984; Haryana School Teachers Selection Board Act, 2011, No. 21, Acts of Haryana State Legislature, 2011; and Telangana Private Educational Institutions Grant-In-Aid (Regulation) Act, 1988, No. 22, Acts of Telangana State Legislature, 1988.

<sup>75</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973; and the U.P. Educational Institutions (Taking-Over of Management) Act, 1976, No. 18, Acts of Uttar Pradesh State Legislature, 1976.

<sup>76</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Karnataka Education Act, 1983, Acts of Karnataka State Legislature, 1995; Telangana Education Act, 1982, No. 1, Acts of Telangana State Legislature, 1982; and Maharashtra Educational Institutions (Management) Act, 1976, No. 13, Acts of Maharashtra State Legislature, 1976.

<sup>77</sup> The Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

attention of the government. One of the conditions that it introduces for those who wish to establish a school is to prove the “*need*” for such a school in the first place.<sup>78</sup> It is not clear how this condition has any nexus with the objective of the statute.

A criterion that is excessive creates an unnecessary compliance burden for school owners to meet their objectives. For instance, the Karnataka Education Act, 1983 aims to improve the quality of education and ensure “*harmonious development of the mental and physical faculties of students*”.<sup>79</sup> To meet this end, one of its provisions prohibits employees of a recognised school from giving private tuition to *any* individual.<sup>80</sup> While many may argue that private tuition to some students of the school can compromise the performance of other students,<sup>81</sup> it is not clear why private tuition to students outside the school is prohibited. This criterion for breach is excessive and prevents an individual from having an alternative source of livelihood.

In other cases, the penalty sanctioned exceeds what the violation may merit. The Madhya Pradesh Ashaskiya School Viniyaman Adhiniyam, 1975 mentions that the breach of “*any rule*” formulated under this Act could attract an imprisonment of up to six months.<sup>82</sup> Under the Andhra Pradesh Education Act, 1982 the government can take over the management of a school if it is of the opinion that such a takeover is in “*public interest*” and will help ensure “*proper management*” of the school.<sup>83</sup> Furthermore, if the government deems any contract that the erstwhile management engaged in

---

<sup>78</sup> The Andhra Pradesh Education Act, 1982, § 20(3), No. 1, Acts of Andhra Pradesh State Legislature, 1982.

<sup>79</sup> Preamble of the Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>80</sup> Karnataka Education Act, 1983, § 4, No. 1, Acts of State Karnataka Legislature, 1995.

<sup>81</sup> Hai-Anh Dang & F. Halsey Rogers, *The Growing Phenomenon of Private Tutoring: Does It Deepen Human Capital, Widen Inequalities, or Waste Resources?*, 23(2) THE WORLD BANK RESEARCH OBSERVER (2008).

<sup>82</sup> The Madhya Pradesh Ashaskiya School Viniyaman Adhiniyam, 1975, § 21(e), No. 33, Acts of Madhya Pradesh State Legislature, 1975.

<sup>83</sup> The Andhra Pradesh Education Act, 1982, § 60, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

to be “*bad faith*” or “*detrimental to the interests of the educational institution*”, these contracts can be varied or even cancelled.<sup>84</sup>

The Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 prohibits capitation fees, regulates school fees, regulates the admission of students, and lays down norms for the collection of donations.<sup>85</sup> If, according to the government, an educational institution is found to violate *any* provisions of the Act, it can take over the management of the school. Another section of the Act prescribes imprisonment (that can go up to a term of seven years) for contravention of the provisions of the Act.<sup>86</sup> However, the provision to punish those in violation with jail time serves no additional purpose than mere removal of the guilty parties would not do.

Some rules also elaborate on enforcement measures to be taken for students (not just school owners). For instance, under the Delhi School Education Rules, 1973 a student below fourteen years of age can be shifted by an administrator to a “*special school*”, if (among other things) they do not spit in a spittoon.<sup>87</sup> Shifting schools for not meeting these disciplinary requirements is an excessive measure.

### **Archaic and Outdated Provisions**

Many state school education laws were introduced before the year 2000. While, in most cases, the provisions of these laws have been revisited and revised in the form of amendments, some laws continue to have archaic and outdated provisions. For instance, under the Karnataka Education Act 1983, penalties for contravention range from Rs. 2 to Rs. 100.<sup>88</sup>

---

<sup>84</sup> The Andhra Pradesh Education Act, 1982, § 62, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

<sup>85</sup> Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, No. 5, Acts of Andhra Pradesh State Legislature, 1983.

<sup>86</sup> Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, § 9, No. 5, Acts of Andhra Pradesh State Legislature, 1983.

<sup>87</sup> The Delhi School Education Rules 1973, R. 36, Gazette of Delhi, pt. IV (Dec. 12, 1973).

<sup>88</sup> The Karnataka Education Act, 1983, § 113, No. 1, Acts of Karnataka State Legislature, 1995.

## D. CHECKS ON THE EXECUTIVE’S RULE-MAKING POWERS

### Limiting the Breadth and Depth of the Executive’s Rule-Making Powers

Of the seventy laws studied, sixty-two laws delegate rule-making powers to the executive. However, only thirty-one laws enumerate distinct rule heads that the executive can cover in the rules. Other laws leave the subject matter open to the executive.<sup>89</sup>

Of the laws that enumerate rule heads, twenty-six laws also contain a “*residual clause*”.<sup>90</sup> This clause gives the executive the powers to make rules on “*any other matter*” they may deem necessary. Our analysis reveals that eleven rules have introduced provisions that fall under the residual clause. For instance, Rules 34-37 of the Delhi School Education Rules, 1973 mandate an enforceable code of conduct for students in educational institutions.<sup>91</sup> This does not fall under any of the rule-heads of the Delhi School Education Act, 1973 (except the residual clause).<sup>92</sup>

Apart from limits in the range, there must also be limits in the depth of rule-making powers exercised by the executive.<sup>93</sup> Rules must largely cover administrative details rather than questions of substantive rights and duties of individuals. However, we noted in the sections above that the parent legislation often delegates the power to frame criteria for approval or

---

<sup>89</sup> See, for instance, the Gujarat Educational Institutions Services Tribunal Act, 2006, No. 20, Acts of Gujarat State Legislature, 2006; Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, No. 30, Acts of Bihar State Legislature, 1976; Maharashtra Educational Institutions (Regulation of Fee) Act, 2011, No. 7, Acts of Maharashtra State Legislature, 2011; and Puducherry Compulsory Elementary Education Act, 2000, No. 8, Acts of Puducherry Legislature, 2001.

<sup>90</sup> See, for instance, Andhra Pradesh Education Act, 1982, Acts of Andhra Pradesh State Legislature, 1982; Delhi Primary Education Act, 1960, No. 39, Acts of Delhi Legislature, 1960; Gujarat Secondary and Higher Secondary Education Act, 1972, No. 18, Acts of Gujarat State Legislature, 1972; and Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999.

<sup>91</sup> The Delhi School Education Rules, 1973, Gazette of Delhi, pt. IV (Dec. 12, 1973).

<sup>92</sup> The Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973.

<sup>93</sup> JEFF KING, THE PROVINCE OF DELEGATED LEGISLATION (Oxford Scholarship Online 2020); PAUL BYRNE, PARLIAMENTARY CONTROL OF DELEGATED LEGISLATION (Oxford University Press 1976).

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

breach to the executive. For instance, Section 43 of the Rajasthan Non-Government Educational Institutions Act, 1989 requires the state government to prescribe the terms, conditions, and standards on the basis of which educational institutions will be recognised.<sup>94</sup>

### **Laying Before the Parliament and Consulting Relevant Stakeholders**

Of the sixty-two laws that delegate rule-making powers, twenty laws do not put in place any mandate for rules to be laid before the Parliament.<sup>95</sup> Of the sixty-two laws that delegate rule-making powers, no law directs the executive to consult stakeholders while drafting rules.<sup>96</sup>

### **Other Challenges with the Delegation of Rule-Making Powers**

The authors observed three other issues with the delegation of rule-making powers. *First*, laws in Delhi and Gujarat allow the designated authority or official to sub-delegate their rule-making powers.<sup>97</sup> Such sub-delegation could make control over subordinate legislation more difficult. *Second*, five laws (across Andhra Pradesh, Jharkhand, Maharashtra, and Karnataka) allow the executive to give retrospective effect to rules.<sup>98</sup>

---

<sup>94</sup> The Rajasthan Non-Government Educational Institutions Act, 1989, § 43, No. 19, Acts of Rajasthan State Legislature, 1992.

<sup>95</sup> See, for instance, Jharkhand Academic Council Act, 2002, No. 2, Acts of Jharkhand State Legislature, 2003; Gujarat Secondary and Higher Secondary Education Act, 1972, No. 18, Acts of Gujarat State Legislature, 1972 and Puducherry Board of Secondary and Higher Secondary Education Act, 2003, No. 8, Acts of Puducherry Legislature, 2004.

<sup>96</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973; Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999; and Kerala Education Act, 1958, No. 6, Acts of Kerala State Legislature, 1959.

<sup>97</sup> See Delhi Primary Education Act, 1960, No. 39, Acts of Delhi Legislature, 1960; and Gujarat Compulsory Primary Education Act, 1961, No. 41, Acts of Gujarat State Legislature, 1961.

<sup>98</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005; Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995; Karnataka Compulsory Primary Education Act, 1961, No. 9, Acts of Karnataka State Legislature, 1961 and Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, No. 3, Acts of Karnataka State Legislature, 1978.



Allowing retrospective enactment of rules increases uncertainty and unpredictability.<sup>99</sup> In the case of school education, this has a bearing on the decisions that school owners take to improve quality and expand access to education.

*Third*, twenty-six laws give the executive the “*power to remove difficulties*”.<sup>100</sup> This provision, also known as the Henry clause, allows the executive to modify or alter the law itself in case challenges emerge during implementation.<sup>101</sup> Since such changes typically do not go through the legislative process, this power must be subject to certain restrictions. These include limits to the nature of amendments that may be made and limits to the time frame within which such amendments may be made.<sup>102</sup> The former takes the form of guidance that the amendments must not be “*inconsistent with the Act*”. The latter typically involves setting a time frame beyond which the executive ceases to have powers to amend the law.

Of the laws that grant this power to the executive, eleven laws fail to set both limits to the executive’s exercise of this power.<sup>103</sup> The Karnataka Secondary Education Examination Board Act, 1966 and Telangana Private Aided Educational Institutions Employees (Regulation of Pay) Act, 2005 are the only two laws that require such orders to be laid before the Parliament after it is published.<sup>104</sup>

---

<sup>99</sup> CHARLES SAMPFORD, *Arguments against Retrospective Laws*, in RETROSPECTIVITY AND THE RULE OF LAW (Oxford Scholarship Online 2012).

<sup>100</sup> See, for instance, Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Delhi School Education Act, 1973, and Kerala Education Act, 1958.

<sup>101</sup> V.S. Deshpande, *Rights and Duties under the Constitution*, 15 J. INDIAN L. I. 94, 94–108 (1973).

<sup>102</sup> *Id.*

<sup>103</sup> For instance, see Gujarat Secondary and Higher Secondary Education Act, 1972, No. 18, Acts of Gujarat State Legislature, 1972; Madhya Pradesh Secondary Education Act, 1965, No. 3, Acts of Madhya Pradesh State Legislature, 1966; Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, No. 30, Acts of Bihar State Legislature, 1976 and Telangana Education Act, 1982, No. 1, Acts of Telangana State Legislature, 1982.

<sup>104</sup> See Karnataka Secondary Education Examination Board Act, 1966, No. 16, Acts of Karnataka State Legislature, 1966 and Telangana Private Aided Educational Institutions Employees (Regulation of Pay) Act, 2005, No. 37, Acts of Telangana State Legislature, 2005.

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

Along with reviewing the parent legislations, we also studied sixty-one rules governing K-12 education to review how the executive exercises its power under the parent statute.

### **No Clarity on where Rules Derive their Power From**

The government is required to mention the section and subsection of the parent act from which they derive their powers in the preamble of the rules. However, four rules (across Gujarat, Madhya Pradesh, Rajasthan and Uttar Pradesh) do not mention the section or subsection of the parent act from which they derive their power.<sup>105</sup> Without a clear mention of the relevant provisions of the parent act, it becomes difficult to adjudge whether rules are *ultra vires*.

### **Rules Go Beyond the Mandate of the Act**

Even in cases where the relevant sections and subsections have been mentioned, we observed that provisions introduced under three rules (across Andhra Pradesh, Delhi, and Goa) go beyond the rule heads mentioned in the parent act.<sup>106</sup> For instance, the Delhi School Education Rules, 1973 requires schools to ensure that they do not affect enrolment levels in nearby schools if they are to obtain recognition.<sup>107</sup> Such a condition finds no mention in the parent act. One example of best practices is the Haryana School Education Rules, 2003. For each rule, the subordinate legislation has a header that refers to the section of the parent

---

<sup>105</sup> See Assistant Education Inspector and Assistant Teacher, Class III (Departmental Examination) Rules, 2012, Gazette of India (Dec. 21, 2012); The Rajasthan Education Department (Primary and Secondary Teachers) Benevolent Fund Rules, 1975, Gazette of Rajasthan, pt. IV(I) (Feb. 10, 1975); Rules of the U.P. School and College Teachers Gratuity Fund (1964), Gazette of Uttar Pradesh, pt. VIII (Apr. 1, 1964) and The M.P. Date of Birth (Entries in the School Register) Rules, 1973, Gazette of Madhya Pradesh, pt. IV (Nov. 16, 1973).

<sup>106</sup> See Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Institutions of Higher Education) Rules, 1987, Gazette of Andhra Pradesh, pt. I (Jan. 1, 1994); Delhi School Education Rules, 1973, Gazette of Delhi, pt. IV (Dec. 12, 1973); and Goa, Daman and Diu School Education Rules, 1986, Gazette of Goa and Daman and Diu, § 29 (Dec. 22, 1988).

<sup>107</sup> Delhi School Education Rules, 1973, R. 50, Gazette of Delhi, pt. IV (Dec. 12, 1973).

legislation under which it has been drafted (or from which it derives its powers).<sup>108</sup>

### **Rules Introduce Criteria that are Arbitrary**

Three rules introduce criteria for decision-making that are inconsistent with the provisions of the parent act.<sup>109</sup> Rules under the Madhya Pradesh Secondary Education Act, 1965 require schools to have at least one acre of land to be recognised. It also requires schools to deposit a security fund on the basis of the number of students (rather than a standard deposit amount).<sup>110</sup>

The deposit becomes a costly affair for schools that have a high number of students. Furthermore, this amount is over and above the recognition fees that the school needs to pay. Such criteria have not been mentioned in the parent statute. There is no clarity on how these criteria relate to the objective of the Act.

Similarly, Rule 50 of the Delhi School Education Rules, 1973<sup>111</sup> requires a private school to be run by a society registered under the Societies Registration Act, 1860 or a Trust.<sup>112</sup> The parent act does not introduce any such condition. Another example is that of the Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993. The rules create a limitation that finds no mention in the parent legislation. It allows schools to be upgraded to class ten only after three years have passed since the commencement of class eight.

---

<sup>108</sup> Haryana School Education Rules, 2003, R. 24, Gazette of Haryana (Apr. 30, 2003).

<sup>109</sup> See Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993; Delhi School Education Rules, 1973; and Madhya Pradesh Recognition of Secondary and Higher Secondary School Rules, Secondary School Rules, 2017.

<sup>110</sup> Madhya Pradesh Recognition of Secondary and Higher Secondary School Rules, 2017, R. 5, Gazette of Madhya Pradesh (Mar. 09, 2017).

<sup>111</sup> The Delhi School Education Rules, 1973, R. 50, Gazette of Delhi, pt. IV (Dec. 12, 1973).

<sup>112</sup> Societies Registration Act, 1860, No. 21, Acts of Parliament, 1860.

## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

### CONCLUSION

This paper reviewed the quality of the laws and rules governing K-12 education across sixteen states. We found that several school education laws and rules fare poorly on the four integral administrative safeguards: due process and principles of natural justice, legislative guidance on discretion, proportionality and nexus, and checks on the executive's rule-making powers. The absence of these safeguards provides the executive with considerable discretionary powers to derecognise or shut schools, regulate their fees, and take over their management. Such regulatory hurdles may discourage the establishment of new schools, limit innovation, and affect access to quality education. Together, this can impinge on the rights and liberties of children, school owners, and the employees working in schools.

On one hand, laws continue to grant tremendous discretionary powers to the executive in the regulation of schools, on the other hand, they fail to provide procedural safeguards which guide or limit this discretion. Furthermore, some laws have also introduced provisions that are excessive or arbitrary in nature.

Wide discretionary powers often run the risk of abuse in the form of rent-seeking and corruption. Past analyses show the numerous ways in which the departments of school education commit excesses while exercising its discretionary powers.<sup>113</sup> Given that the executive draws its powers from the legislations studied, it is imperative that education laws encode the safeguards highlighted in this paper.

---

<sup>113</sup> CENTRE FOR CIVIL SOCIETY, ANATOMY OF K-12 GOVERNANCE IN INDIA, 44–72 (2019).

**ANNEXURE**

We used the following question-sets to analyse the presence of administrative safeguards in state school education laws and rules. This question-set is taken from the Quality of Laws Toolkit.<sup>114</sup>

**PARENT LEGISLATION**

Questions	Response (Y/N/N.A)
Does the preamble of the legislation capture why the legislation was introduced?	
Is the preamble written clearly and unambiguously? Provide reasons and examples to substantiate.	
Does the legislation delegate rule-making powers to the executive?	
Does the legislation empower the executive to sub-delegate its legislative/rule-making powers?	
Does the legislation grant the executive (rule-making authority) power to give retrospective effect to the subordinate legislation?	

---

<sup>114</sup> Narang & Bedi, *supra* note 6.

ASSESSING STATE SCHOOL EDUCATION LAWS ON  
ADMINISTRATIVE SAFEGUARDS

Does the legislation prescribe consultation with stakeholders while making subordinate legislation?	
If the legislation delegates rule-making powers to the executive are the rule-making heads for the subordinate legislation enumerated in the parent legislation?	
If the parent legislation grants the executive power to remove difficulties, are there any limits to that power?	
Does the parent legislation introduce a residual clause as one of its rule-heads?	
If the legislation delegates rule-making powers to the executive, does it specify when the subordinate legislation must be made?	
Does the parent legislation mandate that the subordinate legislation be placed before the parliament/state legislature before being notified?	
Does the legislation confer upon the executive the authority to grant approval/licence?	
Does the legislation identify the decision-making authority for granting approval/licence?	

CALJ 6(2)

<p>Does the legislation empower the concerned authority to sub-delegate its powers to grant approval?</p>	
<p>Does the legislation define the criteria for grant of approval?</p>	
<p>Does the legislation delegate the power to define the criteria for approval to the executive?</p>	
<p>Are there any arbitrary conditions laid down for the grant of approval?</p>	
<p>Are there any excessive conditions laid down for the grant of approval?</p>	
<p>Does the legislation set a time limit for grant of approval/licence?</p>	
<p>Does the legislation mandate the decision-making authority to provide reasons in writing (for denial or approval)?</p>	
<p>Does the legislation mandate a pre-decisional hearing (or issuance of a show-cause notice) in case of denial of approval?</p>	
<p>Does the legislation allow for an appeal against the decision on denial of approval?</p>	

ASSESSING STATE SCHOOL EDUCATION LAWS ON  
ADMINISTRATIVE SAFEGUARDS

Is there a limitation period within which the aggrieved has to file an appeal?	
If yes, has the appellate authority been empowered to condone the delay in appropriate cases?	
Does the legislation prescribe the time limit within which the appellate authority must dispose of the appeal?	
Can the appellate authority extend the time limit if there is a reasonable cause for delay?	
Does the legislation confer upon the executive the responsibility to ensure enforcement?	
Does the legislation identify the authority for carrying out enforcement actions?	
Does the legislation empower the concerned authority to sub-delegate its powers to ensure enforcement?	
Does the legislation define the criteria for breach?	
Does the legislation delegate the power to define the criteria for breach to the executive?	



CALJ 6(2)

Are these conditions/criteria clear and unambiguous?	
Are any of these criteria for breach arbitrary?	
Are all the criteria proportionate?	
Are all the measures proportionate to the breach?	
Does the legislation mandate the enforcement authority to provide reasons for its decision in writing?	
Does the legislation mandate a pre-decisional hearing (or issuance of show cause notice)?	
Does the legislation allow for appeal against the decisions of the enforcement authority?	
Is there a limitation period within which the aggrieved has to file an appeal?	
If yes, has the appellate authority been empowered to condone the delay in appropriate cases?	
Does the legislation prescribe the time limit within which the appellate authority must dispose of the appeal?	

ASSESSING STATE SCHOOL EDUCATION LAWS ON  
ADMINISTRATIVE SAFEGUARDS

Can the appellate authority extend the time limit if there is a reasonable cause for delay?	
Does the Act provide for an independent appeal mechanism?	

**SUBORDINATE LEGISLATION**

Questions	Response (Y/N/N.A)
Does the subordinate legislation mention the section and subsection of the parent legislation under which it has been introduced (in its preamble)?	
Does the subordinate legislation sub-delegate rule-making powers?	
Has the subordinate legislation been given retrospective effect?	
Does the subordinate legislation introduce any provision(s) under the residual powers clause of the parent legislation?	

CALJ 6(2)

<p>Does the subordinate legislation introduce any provision that does not fall under the clause(s)/ rule-head(s) it has invoked?</p>	
<p>If not, does the subordinate legislation introduce any provision that does not fall under the rule-head(s) mentioned in the parent legislation?</p>	
<p>Was the subordinate legislation placed before the Parliament/state legislature before being notified?</p>	
<p>Does the subordinate legislation introduce any criterion for approval that is inconsistent with the objective of the parent legislation?</p>	
<p>Does the subordinate legislation introduce any criterion for breach that is inconsistent with the objective of the parent legislation?</p>	
<p>Does the subordinate legislation introduce any measures of enforcement that are inconsistent with the objective of the parent legislation?</p>	
<p>Was the subordinate legislation made within the time frame mentioned (if any) in the parent legislation?</p>	

## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

---

MANISH<sup>1</sup>

*Religious conversions, especially with allegations of force involved, have continued to be an issue of concern among Indian state administrations since pre-independence. Following the Constitution of India coming into force, a specific right under Article 25 of the Constitution provided all persons with the freedom to profess, practice and propagate religion, the last of which has been the subject of much controversy. Early state legislations prohibiting “forced conversion”, which placed restrictions on religious practitioners seeking to convert others, were upheld by the Supreme Court as reasonable restrictions on Article 25 of the Constitution on the grounds of public order in Rev. Stainislaus v. State of Madhya Pradesh.*

*A newer set of laws since 2000 has, however, sought to place additional substantive burdens on individuals seeking to change their religion and bring them under intensive surveillance by the State. Analysing a cross-section of these laws from different states, this article argues that these newer provisions are unconstitutional for three reasons: they are in excess of the restrictions permitted in Stainislaus, they violate Article 25 of the Constitution, and are not saved by the exception in public order. Additionally, these restrictions deeply infringe the individual’s right to privacy, which had not been well developed in Indian jurisprudence at the time of the decision in Stainislaus, but is now clearly defined by a nine-judge bench in Justice K. S. Puttaswamy v. Union of India.*

### INTRODUCTION

*“Religion is only a means for the attainment of one’s salvation. Supposing I honestly believe that I will attain salvation according to my way of thinking, and*

---

\* Cite it as: Manish, *Evaluating India’s New Anti-Conversion Laws*, 6(2) COMP. CONST. L. & ADMIN. L. J. 32 (2022).

<sup>1</sup> Manish is a Senior Research Associate at Centre for Policy Research, New Delhi and a graduate of the National Law School of India University, Bangalore. The author may be reached at <manish@alumni.nls.ac.in>.

\*\* The arguments presented in this article first appeared in a post on the *Indian Constitutional Law and Philosophy Blog* (<https://indconlawphil.wordpress.com/2021/01/03/guest-post-why-the-new-anti-conversion-laws-are-unconstitutional/>).

\*\*\* The author is grateful to Shylashri Shankar for her insightful comments which added considerable nuance to this article and to Himanshi Yadav, Piyush Sharma and Rashi Jeph, for their valuable research and editorial assistance.

## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

*according to my religion, and you Sir, honestly believe that you will attain salvation according to your way, then why should I ask you to attain salvation according to my way, or way, should you ask me to attain salvation according to your way? If you accept this proposition, then, why propagate religion? As I said, religion is between oneself and his God. Then, honestly profess religion and practise it at home. Do not demonstrate it for the sake of propagating. Do not show to the people that this is your religion for the sake of showing. If you start propagating religion in this country, you will become a nuisance to others. So far it has become a nuisance.”*

–Tajamul Hussain, Member, Constituent Assembly<sup>2</sup>

Anxieties regarding religious conversion manifested themselves as long ago as the debates of the Constituent Assembly. These anxieties, in a broader South Asian context, have been characterised as arising from a situation where a “*dominant religious (and often ethnic) majority feels threatened by an active and growing religious minority*”.<sup>3</sup> These feelings were also closely linked to perceptions of the role of (white) Christian missionaries in perpetuating British and Portuguese colonialism in various parts of the subcontinent.<sup>4</sup>

Prior to Independence, a handful of princely states in India had legislations prohibiting religious conversion, ostensibly targeted at British missionaries.<sup>5</sup> Post-Independence, the drafting of the Constitution was marked by heated debates around the “*propagation*” of religion as an element of the right to freedom of religion, especially in the background of communal violence surrounding the partition. Opponents of this wording raised objections to “*propagation*” as a right primarily benefiting Abrahamic religions, thus serving as a means to convert people from Hinduism to Islam and Christianity, which they argued would exacerbate religious tensions. Eventually, these objections were rejected by the Constituent

---

<sup>2</sup> 7 CONSTITUENT ASSEMB. DEB. (Dec. 3, 1948), [https://www.constitutionofindia.net/c-constitution\\_assembly\\_debates/volume/7/1948-12-03#7.66.254](https://www.constitutionofindia.net/c-constitution_assembly_debates/volume/7/1948-12-03#7.66.254).

<sup>3</sup> Meghan Grizzle Fischer, *Anti-Conversion Laws and the International Response*, 6 PENN ST. J. L. & INT’L AFF. 1, 11 (2018).

<sup>4</sup> James Andrew Huff, *Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws*, 10 RUTGERS J. L. & RELIGION 1, 4 (2009).

<sup>5</sup> One source lists “*Over a dozen princely states, including Kota, Bikaner, Jodhpur, Raigarh, Patna, Surguja, Udaipur, and Kalahandi*”. See Laura Dudley Jenkins, *Legal Limits on Religious Conversion in India*, 71 L. & CONTEMP. PROBS. 109, 113 (2008).

Assembly.<sup>6</sup> The final provision regarding religious freedom under Article 25 of the Constitution, which has remained unamended since, guaranteed equally to all persons the freedom of conscience and the right to freely profess, practice and propagate religion, subject to public order, health and the other provisions of Part III. Following the failure in the Constituent Assembly to remove “*propagation*” as an element of the right under Article 25 of the Constitution, further attempts were made to introduce anti-conversion legislations in Parliament, but these never came to fruition.<sup>7</sup> Today, while there remains no move in Parliament to legislate on the matter, a number of states have sought to enact restrictions on conversion, several of which are under challenge before courts.

The rest of this article is divided into four parts. The first part provides historical background to the issue, the older laws and the build up to the Supreme Court’s 1977 decision in *Stainislaus*. The second part examines the Court’s decision in *Stainislaus* and provides two critiques of the judgment. The third part looks at the newer post-2000 laws and the judicial scrutiny they have received. The fourth part analyses the Court’s decision on privacy as a fundamental right and its implications. The article concludes with a summary of the analysis of the constitutionality of the newer laws and outlines the various legal challenges pending resolution.

## **THE OLDER ANTI-CONVERSION LAWS AND THE DECISION IN *STAINISLAUS***

### **A. THE OLDER ANTI-CONVERSION LAWS AND THE FIRST LEGAL CHALLENGES**

In the late 1960s, the states of Madhya Pradesh and Orissa enacted anti-conversion legislations, again directed at religious preachers, that were dubiously named “*Freedom of Religion*” Acts<sup>8</sup>—nomenclature that continues

---

<sup>6</sup> A detailed discussion took place in the Constituent Assembly on the role of the word “*propagate*” in the draft Article 19 (which became the final Article 25). All amendments proposed by the Members in relation to this were negated by the Assembly. See 7 CONSTITUENT ASSEMB. DEB. (Dec. 6, 1948), [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/7/1948-12-06](https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-06).

<sup>7</sup> Fischer, *supra* note 3, at 14.

<sup>8</sup> The Madhya Pradesh Freedom of Religion Act, 1968 was ostensibly the outcome of an informal committee appointed by the state government in 1956 to “*enquire into the activities*

## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

to the present day. For the purpose of this article, these two laws that formed the basis for our present jurisprudence on religious conversion are referred to in this article as “*the earlier legislations*”.<sup>9</sup> Both these laws sought to ban religious conversions brought about by force, fraud, or inducement/allurement.<sup>10</sup>

Being the first post-constitutional exercises in this direction, the Madhya Pradesh and Orissa laws were challenged by (Christian) preachers, first at their respective High Courts and then in the Supreme Court, as violating their right to propagate their religion under Article 25 of the Constitution. The petitioners in these cases also challenged the legislative competence of the state legislatures to make these laws.<sup>11</sup> The Madhya Pradesh High Court upheld the Madhya Pradesh Freedom of Religion Act, 1968,<sup>12</sup> while the Orissa Freedom of Religion Act, 1968 was struck down by the Orissa High Court.<sup>13</sup> A summary of the key provisions under challenge is given in **Table 1** below.

**Table 1: Provisions of the older laws challenged in *Stainislaus***

Act/Provisions	What is prohibited?	Penalty for violation
<b>Orissa Freedom of Religion Act, 1967</b>	Conversion of another person by the use of force or by inducement or by any fraudulent means	Up to one year's imprisonment and a fine of up to five thousand rupees

---

*of the Christian Missionaries in Madhya Pradesh*”, headed by Justice (Retd.) M.B. Niyogi. See Jenkins, *supra* note 5, at 114–15.

<sup>9</sup> Strictly speaking, there is a third law—the Arunachal Pradesh Freedom of Religion Act, 1978, but it is defunct since rules for its implementation were never framed.

<sup>10</sup> The Madhya Pradesh Freedom of Religion Act, 1968, § 3, No. 27, Acts of Madhya Pradesh State Legislature, 1968; The Orissa Freedom of Religion Act, 1967, § 3, No. 2, Acts of Orissa State Legislature, 1968.

<sup>11</sup> Rev. Stainislaus v. State of M.P., (1977) 1 SCC 677, ¶ 21.

<sup>12</sup> Rev. Stainislaus v. State of M.P., 1974 SCC OnLine MP 16, ¶ 33.

<sup>13</sup> Yulitha Hyde v. State of Orissa, 1972 SCC OnLine Ori 58, ¶ 45.

<p><b>Madhya Pradesh Freedom of Religion Act, 1968</b></p>	<p>Conversion of another person by the use of force or by allurement, or by any fraudulent means</p>	<p>Up to one year's imprisonment and a fine of up to five thousand rupees</p>
------------------------------------------------------------	------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------

**B. THE SUPREME COURT’S DECISION IN *STAINISLAUS***

On appeal, a Constitution Bench of the Supreme Court, in a very brief judgment in 1977,<sup>14</sup> upheld them as being valid exercises of legislative power under the public order exception to Article 25 of the Constitution, holding that the right to propagate one’s religion did not include the right to convert others and that forcible conversions could raise communal passions giving rise to a breach of the public order.<sup>15</sup>

There were two main issues (the same as those raised before the High Courts) before the Constitution Bench. The first was regarding the legislative competence of the state legislatures. The second was in terms of the laws being an encroachment into Article 25 of the Constitution. On both counts, the Supreme Court used “*public order*” as a ground to uphold the validity of the laws.<sup>16</sup>

**C. TWO CRITIQUES OF *STAINISLAUS***

**Public Order**

*Stainislaus* is a very brief judgment—it runs into no more than five pages in the Reporter, and the Court’s findings on the issues are similarly brief and cryptic. The only direct connection that the Court makes between religious conversion and public order is in a single paragraph at the end:<sup>17</sup>

*“Thus if an attempt is made to raise communal passions, e.g. on the ground that someone has been “forcibly” converted to another religion, it would, in all*

<sup>14</sup> Rev. *Stainislaus v. State of M.P.*, (1977) 1 SCC 677, ¶ 25.

<sup>15</sup> *Id.* ¶ 21.

<sup>16</sup> *Id.* ¶ 24.

<sup>17</sup> *Id.* ¶ 25.



## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

*probability, give rise to an apprehension of a breach of the public order, affecting the community at large. The impugned Acts therefore fall within the purview of the Entry I of List II of the Seventh Schedule as they are meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community."*  
(emphasis supplied)

With respect, it is submitted that the reasoning of the Constitution Bench is extremely shallow. The Court did not advert to two prior Constitution Bench decisions on public order that were binding on it: *Ram Manohar Lohia*<sup>18</sup> and *Madhu Limaye*,<sup>19</sup> both of which delineate the “concentric circle” comprising, in decreasing order of severity: security of the state, public order, and law and order. By this jurisprudence, which has remained intact in the decades following, the transition from a disturbance of “law and order” to a disruption of “public order” occurs when an act affects the community or the public at large. In the context of fundamental rights, this has been subsequently interpreted to mean that there has to be a necessary and proximate connection between the (disruption to) public order and the restriction imposed on a right.<sup>20</sup>

The singular connection to public order analysed in *Stainislaus* is only concerned with the “attempt to raise communal passions on the ground that someone has been forcibly converted to another religion.”<sup>21</sup> On this basis alone, the Court upheld the restrictions on persons seeking to carry out religious conversion—and not persons attempting to raise communal passions. In free speech jurisprudence, this is termed the *heckler’s veto*—where the State imposes restrictions on citizens’ speech and expression because of the fear of violence by third parties.<sup>22</sup> In other words, where certain miscreants threaten to violate public order on the ground of objections to someone else’s speech, the State responds by restricting the speech itself rather than

---

<sup>18</sup> Supdt., Central Prison v. Dr. Ram Manohar Lohia, (1960) 2 SCR 821, ¶ 9.

<sup>19</sup> Madhu Limaye v. Sub-Divisional Magistrate, (1970) 3 SCC 746, ¶ 14.

<sup>20</sup> For a recent summary of the position, see *Banka Sheela Sneha v. State of Telangana*, (2021) 9 SCC 415.

<sup>21</sup> Rev. Stainislaus v. State of M.P., (1977) 1 SCC 677, ¶ 24.

<sup>22</sup> For a more detailed explanation of the heckler’s veto and the chilling effect, see GAUTAM BHATIA, *OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION* 32–34 (Oxford University Press 2016).

the miscreants.<sup>23</sup> This then produces a *chilling effect* on speech—because people will be hesitant to speak due to the threats of violence and abdication of the State’s responsibility to protect it.<sup>24</sup>

With ordinary speech, the right under Article 19(1)(a) is violated. With religious speech, such as proselytization, there is an additional violation of Article 25 of the Constitution, for the individual’s right to propagate gets affected. As the eminent jurist HM Seervai pointed out:<sup>25</sup>

*“To propagate religion is not to impart knowledge and to spread it more widely, but to produce intellectual and moral conviction leading to action, namely, the adoption of that religion. Successful propagation of religion would result in conversion.”*

*(emphasis supplied)*

Unfortunately, the nuance of this position was not explored by the Supreme Court in *Stainislaus*. After a survey of biological and dictionary definitions of the word “propagate”, it merely observed that:<sup>26</sup>

*“...what the Article [25] grants is not the right to convert another person to one’s own religion, but to transmit or spread one’s religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees ‘freedom of conscience’ to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is not fundamental right to convert another person as one’s own religion because if a person purposely under-takes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the ‘freedom of conscience’ guaranteed to all the citizens of the country alike.”*

*(emphasis supplied)*

This articulation is not helpful because it ignores the rights of “another person” to willingly undertake such conversion and this question has now arisen in the context of newer anti-conversion laws that also penalise individuals wishing to change their religion. This will be dealt with in more

---

<sup>23</sup> *Id.* at 150–152.

<sup>24</sup> *Id.*

<sup>25</sup> H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 1287 (Universal Law Publishing 4th ed. 1991).

<sup>26</sup> *Rev. Stainislaus v. State of M.P.*, (1977) 1 SCC 677, ¶ 20.

## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

detail in the succeeding section, explaining the actors in religious conversion. The Court's observations above also elide the close connection between "*spreading the tenets of one's religion and conversion of another person to one's religion*" because, as is clear from Seervai's observations, the latter is the ultimate objective of the former and the two are inextricably linked.

### Vagueness

In its overall upholding of the laws based on public order, to satisfy both the requirements of legislative competence and Article 25 of the Constitution, the Court did not go into the specifics of the legislations' clauses. This exercise had, however, been carried out by the Orissa High Court, which analysed the definitions of "*force*", "*fraud*", "*misrepresentation*", and "*inducement*" and found that the first three satisfied the test of morality to be permissible restrictions under Article 25 of the Constitution.<sup>27</sup> However, in relation to inducement, it found:<sup>28</sup>

*"We shall now deal with the argument regarding the definition of 'inducement'. The attack is mainly on the ground that it is too widely stated and even invoking the blessings of the Lord or to say that 'by His grace your soul shall be elevated' may come within the mischief of the term. (...) We are of the view that the definition is capable of covering some of the methods of proselytising and though the concept of inducement can be a matter referable to 'morality', the wide definition is indeed open to reasonable objection on the ground that it surpasses the field of morality."*

*(emphasis supplied)*

Accordingly, it found that the definition of inducement in the statute was liable to be struck down for vagueness. The Supreme Court did not engage with this point at all while setting aside the High Court judgment leaving the question very much open for consideration by future courts, especially given the increasingly wide definitions of "*forcible conversion*" being adopted in newer laws as discussed in the next section.

---

<sup>27</sup> Yulitha Hyde v. State of Orissa, 1972 SCC OnLine Ori 58, ¶ 25.

<sup>28</sup> *Id.* ¶ 25.

## THE NEWER ANTI-CONVERSION LAWS AND THE DEEPER INTRUSIONS INTO INDIVIDUAL LIBERTY

### A. UNDERSTANDING THE ACTORS IN RELIGIOUS CONVERSION

In order to properly understand the difference between the older and newer legislations, it is essential to understand the actors involved in religious conversion. Proselytising religions generally have individuals, such as preachers or clergy, who spread the message of their religion among the public—and, if successful, perform the necessary rituals to admit new people into their faith. These constitute the first set of actors and, like Rev. Stainislaus, were involved in the challenges to the earlier laws. The second set of actors are the individuals who seek to change their religion, with or without the involvement of a preacher, who were not involved in the *Stainislaus* decision at all. Indeed, the Supreme Court did not at all go into the impact of these legislations on the individual, focusing only on the limited question in relation to preachers.<sup>29</sup> That impact, in turn, is closely linked to the development of the jurisprudence on privacy, which is dealt with subsequently.

### B. THE NEW ANTI-CONVERSION LAWS AND THEIR PROBLEMATICS

With this background, we now proceed to analyse the next set of anti-conversion legislations, all enacted after the year 2000 (“**the newer laws**”). These laws go beyond the mere prohibition of forced religious conversion by preachers (which was upheld in *Stainislaus*), now requiring individuals desirous of changing their religion, in addition to people facilitating the conversion, to provide *prior* notice to or take permission from the District Magistrate under fear of penal consequences. In addition, they also expand the definition of “*forced conversion*”, create an exception to this definition for “*reconversion*”, render marriages following “*forced conversion*” voidable, and

---

<sup>29</sup> The third set of actors, in some sense, comprise the bevy of religious extremists who strongly oppose religious conversion to the point of indulging in violence, and in particular view the potential (mass) conversions of socio-economically backward communities, especially the Scheduled Castes and Scheduled Tribes, as a threat to Hindu society. Their argument is similar to the one rejected by the Constituent Assembly (7 CONSTITUENT ASSEMB. DEB. (Dec. 6, 1948), [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/7/1948-12-06](https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-06)), but as subsequently discussed in Section B, has been given increasing credence in newer anti-conversion laws.

## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

permit persons other than the individual converted to initiate criminal proceedings. A summary of these additional provisions introduced by the newer laws is presented in **Table 2**.

**Table 2: Provisions introduced by the newer laws**

<b>Act/ Provisions</b>	<b>Notice/ intimation by the convert</b>	<b>Penalty for not complying</b>	<b>Burden of proof</b>	<b>Who besides the victim can initiate proceedings?</b>
<b>Chhattisgarh Freedom of Religion Act, 1968 (as amended in 2006)</b>	Intimation to the district magistrate within 30 days after the ceremony.	Up to one year's imprisonment and a fine of up to ten thousand rupees		
<b>Gujarat Freedom of Religion Act, 2003 (as amended in 2021)</b>	Intimation to the district magistrate within 10 days after the ceremony.	Up to one year's imprisonment and a fine of up to one thousand rupees	Reverse onus clause on the accused	Victim's parents, brother, sister or any other person related by blood, marriage or adoption
<b>Himachal Pradesh Freedom of Religion Act, 2006 (repealed in 2019)</b>	Notice to the district magistrate 30 days in advance.	Fine of up to one thousand rupees		

<b>Jharkhand Dharm Swatantra Act, 2017</b>	Prior permission is required from the district magistrate.	Up to one year's imprisonment and a fine of up to five thousand rupees	Reverse onus clause on the accused	Victim's parents, brother, sister or any other person aggrieved.
<b>Uttarakhand Freedom of Religion Act, 2018</b>	Prior permission is required from the district magistrate.	Imprisonment of six months to two years and fine		
<b>Himachal Pradesh Freedom of Religion Act, 2019</b>			Reverse onus clause on the accused	Victim's parents or siblings, and with the court's permission, any other person who is related by blood, marriage or adoption, guardianship or custodianship

The most significant change in the newer laws is the additional requirement for individuals to give notice to (or take permission from) the state before changing their religion (see Column 2 of Table 2). This opens up a new constitutional infirmity and ground for a challenge—unlike *Stainislaus*, which was restricted to *propagation*, it strikes at the right to *profess* religion under Article 25 of the Constitution. This, it is submitted, really forms the core of religious freedom under Part III—the “*freedom of conscience*”—for

## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

unless one can profess *any* religion without fear of penalty, there is no scope for exercising any of the other rights under Article 25 of the Constitution.

### C. THE LEGAL CHALLENGE THUS FAR: THE DECISION IN *EVANGELICAL FELLOWSHIP*

The only one of the newer laws that has been subject to the final judicial determination is the Himachal Pradesh Freedom of Religion Act, 2006 (“**2006 Act**”),<sup>30</sup> which was challenged before the Himachal Pradesh High Court in 2011. In its judgment in 2012, the High Court, bound by *Stainislaus*, declined to go into the validity of provisions that were in *pari materia* with the older laws. However, by drawing on privacy jurisprudence from the Supreme Court, it found that the prior notice requirement imposed under Section 4 of the 2006 Act violated both the freedom of conscience and the right to privacy of the individual.<sup>31</sup> In doing so, it rejected the argument of public order advanced by the state, holding that public disclosure of conversion could, in fact, *cause* public order issues and be counterproductive:<sup>32</sup>

*“A person’s belief or religion is something very personal to him. The State has no right to ask a person to disclose what is his personal belief. The only justification given is that public order requires that notice be given. We are of the considered view that in case of a person changing his religion and notice being issued to the so called prejudicially affected parties, chances of the converttee [sic] being subjected to physical and psychological torture cannot be ruled out. The remedy proposed by the State may prove to be more harmful than the problem. (...) In case such a notice is issued, then the unwarranted disclosure of the voluntary change of belief by an adult may lead to communal clashes and may even endanger the life or limb of the converttee.”*

The Court also held that the state’s invocation of public order had to be justified in order to fit within the exception to Article 25 of the Constitution:<sup>33</sup>

---

<sup>30</sup> Himachal Pradesh Freedom of Religion Act, 2006, No. 5, Acts of Himachal Pradesh State Legislature, 2007.

<sup>31</sup> *Evangelical Fellowship of India v. State of H.P.*, 2012 SCC OnLine HP 5554, ¶ 41.

<sup>32</sup> *Id.* ¶¶ 41–42.

<sup>33</sup> *Id.* ¶¶ 37–38.

*“A person not only has a right of conscience, the right of belief, the right to change his belief, but also has the right to keep his beliefs secret. (...) the State must have material before it to show what are the very compelling reasons which will justify its action of invading the right to privacy of an individual. (...) A man’s mind is the impregnable fortress in which he thinks and there can be no invasion of his right of thought unless the person is expressing or propagating his thoughts in such a manner that it will cause public disorder or affect the unity or sovereignty of the country.”*

Relying on the Supreme Court’s 1975 *Gobind* judgment on privacy and state surveillance of the individual,<sup>34</sup> it held that in order to infringe on the individual’s privacy, the state was required to both show a compelling interest and adopt the most restrictive means to achieve it.<sup>35</sup> In this case, it found that even assuming the interest of the state in protecting public order was legitimate, the means adopted did not achieve the interest at all, let alone in the most restrictive manner.<sup>36</sup>

The 2006 Act also contained a proviso (to Section 4) carving out an exception from its penal provisions in case a person “*reverts back to his original religion*”. The Court held that this exception violated Article 14, being both vague (since “*original religion*” was not defined) and arbitrary (since there was no reason for treating these two classes of conversion separately).<sup>37</sup> It thus struck down the entirety of Section 4 and the Rules framed thereunder. In sum, neither of the post-*Stainislaus* additions—a prior notice/permission requirement, and an exception for “*reconversions*” could withstand constitutional scrutiny in this case. The implications of the High Court’s decision in *Evangelical Fellowship* are strengthened by subsequent developments in the Supreme Court’s privacy jurisprudence, which are discussed in the following section.

---

<sup>34</sup> *Gobind v. State of M.P.*, AIR 1975 SC 1378, ¶ 22.

<sup>35</sup> *Evangelical Fellowship of India v. State of H.P.*, 2012 SCC OnLine HP 5554, ¶ 32.

<sup>36</sup> *Id.* ¶¶ 32–34.

<sup>37</sup> *Id.* ¶ 47.



## THE DEVELOPMENT OF THE RIGHT TO PRIVACY AND ITS IMPLICATIONS FOR RELIGIOUS FREEDOM

### A. A BRIEF HISTORY OF PRIVACY JURISPRUDENCE IN INDIA

The right to privacy in Indian jurisprudence had not fully developed at the time of the Supreme Court's decision in *Stainislaus*. Consequently, it did not appear to be raised as a ground at the time, either before the High Courts or the Supreme Court. Moreover, as discussed earlier, the litigation leading up to *Stainislaus* had focused on only one set of actors involved in conversion—*i.e.*, from the perspective of the preacher. The right of an individual to change their religion was not an issue at the time—but, as stated before, it assumes seminal importance in light of the new laws' requirement for an individual to give prior notice or take permission before changing their religion. An argument against these requirements would rely heavily on the right to privacy—similar to what was upheld by the High Court in *Evangelical Fellowship*.

The right to privacy in India had been considered in various judgments right from the Supreme Court's 1954 decision in *MP Sharma*.<sup>38</sup> However, very few of these explicitly engaged with the issue and none in detail. In *Evangelical Fellowship*, as discussed earlier, the High Court accepted the petitioners' arguments on privacy, relying on the Supreme Court's 1976 decision in *Gobind*, which was one of the few judgments to explicitly engage with privacy. Since then, the jurisprudence on privacy has advanced substantially by virtue of the Supreme Court's nine-judge bench *Puttaswamy* judgment in 2017.<sup>39</sup> A brief analysis of this judgment's implications for the freedom of religion is therefore in order, as it is being relied on by a number of petitioners who have challenged the newer laws in different courts.

### B. INDIVIDUAL RELIGIOUS FREEDOM AS AN ELEMENT OF THE RIGHT TO PRIVACY

The decision in *Puttaswamy* was unanimous in its recognition of a right to privacy inherent in the Indian Constitution. Six opinions were delivered,

---

<sup>38</sup> M. P. Sharma v. Satish Chandra, 1954 AIR 300; Kharak Singh v. State of U.P., 1963 AIR 1295; Gobind v. State of Madhya Pradesh, 1975 AIR 1378.

<sup>39</sup> Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

concurring with each other on important aspects. One of these, perhaps the most critical to religious freedom—was the right to individual decisional autonomy, articulated as an integral aspect of privacy in all the opinions.<sup>40</sup> In the judgment, decisional autonomy, or the freedom to make decisions for oneself, was articulated as an integral aspect of individual autonomy, “*perhaps the central concern of any system of limited government*”.<sup>41</sup> This freedom to make choices was held to be vital to the exercise of liberty.<sup>42</sup>

*“To exercise one’s right to privacy is to choose and specify on two levels. It is to choose which of the various activities that are taken in by the general residue of liberty available to her she would like to perform, and to specify whom to include in one’s circle when performing them (...) Exercising privacy is the signalling of one’s intent to these specified others - whether they are one’s co-participants or simply one’s audience - as well as to society at large, to claim and exercise the right.”*

Furthering both of the above articulations, a plurality of judges also recognised privacy as being essential to the dignity of the individual, with decisional autonomy being central to this.<sup>43</sup>

*“Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture.”*

The Court’s grounding of privacy within this “*dignity-liberty-autonomy triangle*” is also central to its exposition of privacy not inhering in any particular Article within Part III of the Constitution but rather permeating all of them.<sup>44</sup> As stated in one of the opinions, privacy is, therefore, a “*basic*,

---

<sup>40</sup> John Sebastian & Aparajito Sen, *Unravelling the Role of Autonomy and Consent in Privacy*, 9 INDIAN J. CONST. L. 1 (2020).

<sup>41</sup> Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 355 (per Nariman, J.).

<sup>42</sup> *Id.* ¶ 279 (per Bobde, J.).

<sup>43</sup> *Id.* ¶ 188 (per Chandrachud, J.).

<sup>44</sup> Sebastian & Sen, *supra* note 40, at 3–5.

## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

*irreducible condition*” and “*the inarticulate major premise*” that is necessary for the exercise of the freedoms guaranteed in Part III of the Constitution.<sup>45</sup>

In this context, privacy becomes a natural element of Article 25 of the Constitution, especially in relation to the freedom of conscience and the right to profess any religion of one’s choice (or none at all). Several of the opinions deal with this aspect, but the essence of the point is most succinctly articulated by the plurality, which states that the “*right to freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world*”.<sup>46</sup>

### C. RESTRICTIONS ON PRIVACY AND PROCEDURAL STANDARDS THEREFORE

While the nine judges in *Puttaswamy* were fairly clear and unanimous in their articulation of privacy as a substantive right, they were neither unanimous nor clear in relation to the procedural aspects of the right—*viz.*, the situations in which it could be restricted and the standard to be satisfied by the State for any such infringement.<sup>47</sup>

The first of these is hardly moot in respect of Article 25 of the Constitution, as the grounds of restriction are provided in the Article itself: public order, morality and health. And since the decision in *Stainislaus* upheld the legislative competence of the states to enact anti-conversion laws on the ground of public order, it is that ground that principally forms the basis of these laws, both old and new. As a critique of this ground has been attempted earlier in this article, we will for now focus on the second aspect: the standard of scrutiny that the State must satisfy.

As noted earlier, the High Court in *Evangelical Fellowship* adopted a strict scrutiny standard, relying upon the decision of the Supreme Court in *Gobind*. However, *Puttaswamy* did not adopt the strict scrutiny standard—it

---

<sup>45</sup> Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 261 (per Bobde, J.).

<sup>46</sup> *Id.* ¶ 188 (per Chandrachud, J.).

<sup>47</sup> See Maryam Kamil, *Puttaswamy: Jury Still Out on Some Privacy Concerns?*, 1(2) INDIAN L. REV. 190 (2017).

is adverted to in only one opinion and that too for limited cases.<sup>48</sup> Other opinions range between the standard prescribed under individual Articles of Part III (Article 25 has none). However, a majority of judges adopted the requirement of “*proportionality*” for testing infringements into the right to privacy.<sup>49</sup> While proportionality as a standard itself has been an evolving act in Indian constitutional law,<sup>50</sup> and the Supreme Court’s application of it has been subject to critique by scholars,<sup>51</sup> the test as it stands is derived from a prior (to *Puttaswamy*) Constitution Bench decision in *Modern Dental College*.<sup>52</sup> As recapitulated in *Puttaswamy*, this comprises four strands:<sup>53</sup>

“(i) *The action must be sanctioned by law;*

*(ii) The proposed action must be necessary in a democratic society for a legitimate aim;*

*(iii) The extent of such interference must be proportionate to the need for such interference;*

*(iv) There must be procedural guarantees against abuse of such interference.”*

Following this discussion, we now proceed to venture into an analysis of the constitutionality of the remaining provisions of the newer laws in the final section of this paper.

---

<sup>48</sup> Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 236 (per Chelameswar, J.).

<sup>49</sup> These are the plurality opinion of Chandrachud, J. (¶ 188) and the opinion of Kaul, J. (¶ 490), together comprising five of the nine judges on the Bench.

<sup>50</sup> See Vikram Aditya Narayan & Jahnvi Sindhu, *A Historical Argument for Proportionality under the Indian Constitution*, 2(1) INDIAN L. REV. 51 (2018); MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* (2d ed. Edward Elgar 2018).

<sup>51</sup> See Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?*, 3(2) U. OXFORD HUM. RTS. HUB J. 55 (2020); Shruti Bedi, *Proportionality and Burden of Proof: Constitutional Review in India*, 10 INDIAN J. CONST. L. (2021).

<sup>52</sup> *Modern Dental College v. State of Madhya Pradesh*, (2016) 7 SCC 353.

<sup>53</sup> Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 490 (per Kaul, J.) The plurality opinion authored by Chandrachud, J. only adverts to the first three, but also adds that in the context of art. 21 “*an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable*”. Notably, none of the judges in *Puttaswamy* cited the decision in *Modern Dental College*.

## ANALYSING THE CONSTITUTIONALITY OF THE NEWER LAWS

To recapitulate, the newer anti-conversion laws have four main features (see Table 2): (i) a requirement for an individual to give prior notice or take permission from the state to change religion; (ii) expanding the definition of “*forced conversion*” while creating an exception for “*reconversion*”; (iii) rendering marriages following “*forced conversion*” voidable; and (iv) permitting persons other than the individual converted to initiate criminal proceedings. These are now dealt with in turn.

### A. THE PRIOR NOTICE/PERMISSION REQUIREMENT

The prior notice/permission requirement was struck down in *Evangelical Fellowship*, following the strict scrutiny standard, for want of compelling state interest and not using the least restrictive means to achieve it.<sup>54</sup> In light of *Puttaswamy*, the standard to be applied is now one of proportionality, but it is submitted that this should not change the outcome. As discussed in the previous section, “*even at its lowest level of scrutiny, proportionality requires the court to determine that the measure was legitimate, suitable, necessary and balanced.*”<sup>55</sup>

Applying this to the provisions of the newer laws, it is clear that the prior notice/permission requirement for changing one’s religion would fail the latter three prongs of the proportionality test: there is no justification as to why prior notice (in addition to the criminal penalty) is necessary to prevent forced conversions; the requirement, as *Evangelical Fellowship* has shown, is disproportionate and in fact, could prove counterproductive to the purpose of maintaining public order; and there is no procedural safeguard—to the contrary, many of the newer laws contain reverse onus clauses. One of the newer laws (Uttar Pradesh) has a requirement to make a public declaration after conversion, which is an even more egregious violation of the right to

---

<sup>54</sup> *Evangelical Fellowship of India v. State of H.P.*, 2012 SCC OnLine HP 5554, ¶ 47.

<sup>55</sup> Chandra, *supra* note 51, at 61.

privacy than prior notice and will fail the proportionality standard for the same reasons.<sup>56</sup>

## **B. THE EXPANSION OF THE DEFINITION OF “FORCED CONVERSION” AND THE “RECONVERSION” EXCEPTION**

As discussed earlier, the definition of “*forced conversion*” is something that was never quite examined by the Supreme Court in *Stainislaus*, even though it was scrutinised by the Orissa High Court in prior proceedings, and parts of it were found suspect for vagueness.<sup>57</sup> The question, it is submitted, is thus still open, especially with respect to the newer laws, which have widened the definition beyond the scope of even the older laws that were challenged in *Stainislaus*. The exceptions to “*reconversion*” are also, for the reasons illustrated in *Evangelical Fellowship*, arbitrary and egregious violations of Article 14 because there is no justifiable reason for treating two sets of converts differently based on the religion they converted to.<sup>58</sup>

## **C. RENDERING MARRIAGES BASED ON “FORCED CONVERSION” VOIDABLE**

A number of the newer laws have similarly (poorly) worded provisions rendering “*marriage done for sole purpose of unlawful conversion*” void.<sup>59</sup> Such restrictions on marriage by inter-religious couples, it is submitted, are in the teeth of two Supreme Court decisions that uphold individual autonomy in matters of marital choice. In *Lata Singh*,<sup>60</sup> the Supreme Court quashed criminal proceedings initiated against an inter-caste couple by their relatives who disapproved of the marriage. It also noted that violence against inter-caste and inter-religious couples was a violation of their fundamental right

---

<sup>56</sup> UP Prohibition of Unlawful Conversion of Religion Ordinance, 2020, § 8 (Nov. 24, 2020).

<sup>57</sup> *Yulitha Hyde v. State of Orissa*, 1972 SCC OnLine Ori 58, ¶ 25.

<sup>58</sup> *Evangelical Fellowship of India v. State of H.P.*, 2012 SCC OnLine HP 5554, ¶ 41.

<sup>59</sup> UP Prohibition of Unlawful Conversion of Religion Ordinance, 2020, § 6 (Nov. 24, 2020); Madhya Pradesh Freedom of Religion Bill, 2021, Bill No. 1 of 2021, § 6 (Feb. 11, 2021); Uttarakhand Freedom of Religion Act, 2018, § 6, No. 28, Acts of Uttarakhand State Legislature, 2018; Haryana Prevention of Unlawful Conversion of Religion Bill, 2022, § 5, Bill No. 1 of 2022 (Feb. 26, 2022).

<sup>60</sup> *Lata Singh v. State of UP*, (2006) 5 SCC 475, ¶ 16.

## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

of marital choice and held that the State was under an obligation to protect the choices of these individuals:<sup>61</sup>

*“This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes (...) We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.”*

In *Shafin Jahan*,<sup>62</sup> another case involving an inter-religious couple, one of whom converted to the other's religion prior to the marriage, the Supreme Court held that the right to choose one's religion was an essential aspect of individual liberty that was constitutionally protected:<sup>63</sup>

*“It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity (...) The said freedom is both a constitutional and a human right (...) Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow.”*

*(emphasis supplied)*

Drawing on *Puttaswamy*, the Court also extended this logic to the individual's right to choose an intimate partner, holding that the Constitution afforded a guarantee that “*each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.*”<sup>64</sup>

Consequently, with both the right to choose one's religion and one's partner constitutionally protected, it follows that restrictions placed on

---

<sup>61</sup> *Id.* ¶ 16.

<sup>62</sup> *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.

<sup>63</sup> *Id.* ¶ 53 (per Misra, J.).

<sup>64</sup> *Id.* ¶ 22 (per Chandrachud, J.).

marriages by the new laws will have to be read narrowly and subject to the exception in *Sarla Mudgal*,<sup>65</sup> where the Supreme Court held that conversion solely for the purpose of subjecting oneself to Muslim personal law and contracting a bigamous marriage would be void.<sup>66</sup>

#### **D. INITIATION OF CRIMINAL PROCEEDINGS BY PERSONS OTHER THAN THE CONVERT**

The most insidiously problematic provisions in the new laws are those which permit the registration of an FIR regarding the alleged offence, not just by the “*victim*” of the alleged forced conversion but also by the parents, siblings or any other relative, *even if the victim is a major* (see Column 5 of Table 2). This, it is submitted, is a body blow to personal autonomy and is being used particularly to strip young women of their autonomy to decide both their religion and choice of partner.<sup>67</sup> As discussed earlier, this decisional autonomy is a core element of the right to privacy, as articulated in *Puttaswamy* and reiterated in *Shafin Jahan*. The test of proportionality articulated in the former judgment would extend to both substantive and procedural provisions that have the effect of infringing upon individual provisions. In this respect, it is submitted that the provisions of the newer laws permitting third parties to initiate criminal proceedings without the consent of the individual convert are wholly disproportionate.

In conventional criminal jurisprudence, all crimes are considered to be committed against the State, which gives any member of the public the right, and sometimes the duty to report an offence. But a forced conversion is more than just a simple criminal offence—it is also a violation of a fundamental right to make an intimate personal decision and can thus only be claimed by the victim. Putting it another way, if the victim, in this case, has decisional autonomy, then an essential aspect of this autonomy is that

---

<sup>65</sup> *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635, ¶ 31.

<sup>66</sup> The judgment in *Sarla Mudgal*, it should be clarified, was in response to a Public Interest Litigation seeking protection for women from unscrupulous Hindu men who converted to Islam to attempt contracting a second marriage without legally dissolving their first marriage (since bigamy, under Indian law, is prohibited in Hinduism but not Islam). It does not lay down a general bar against conversion for marriage in other circumstances.

<sup>67</sup> See Saumya Uma & Niti Saxena, *Juxtaposing ‘Honour’ with Women’s Agency: Rights and Wrongs of Anti-conversion Law(s)*, 56(1) ECON. & POL. WKLY. 15 (2021); Jenkins, *supra* note 5, at 123–24.



## EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

she alone can decide if and when it has been violated. To substitute her decision for anybody else's (whether family or otherwise) would, it is submitted, amount to a further violation of her privacy. The only necessary and proportionate manner of solving this would be to permit the victim to report the violation herself and take assistance from others if she feels the need to (which is anyway allowed under ordinary criminal procedure). Thus, empowering third parties to make this decision on an adult convert's behalf, without her consent, takes away her decisional autonomy—an unnecessary, disproportionate action.

### ONGOING LEGAL CHALLENGES

There has been no High Court decision after *Evangelical Fellowship*, which remains to date the only decision on the validity of the newer anti-conversion laws. However, the Gujarat High Court, in 2020, passed an interim order staying various provisions of the Gujarat Freedom of Religion Act, 2003, citing the decision in *Shafin Jahan* (although it did not refer to the decision in *Evangelical Fellowship*).<sup>68</sup> The decision in *Shafin Jahan* was also invoked by the Allahabad High Court in its interim orders while hearing challenges to the invocation of a similar law in Uttar Pradesh.<sup>69</sup> A legal challenge at the Supreme Court to the law in Uttarakhand, where no interim order has been obtained, remains pending.<sup>70</sup> In Himachal Pradesh, the Legislative Assembly replaced the 2006 Act with a new one in 2019, which reinstated many of the provisions that were struck down by the High Court in *Evangelical Fellowship*. In Rajasthan, which has no anti-conversion law, the High Court issued “*guidelines*” in 2018, the legal validity of which is highly suspect.<sup>71</sup> In recent months, the Legislative Assemblies of Haryana

---

<sup>68</sup> *Mujahid Nafees v. State of Gujarat*, Special Civil Application 10305/2021, order dated 19.08.2021 (Gujarat High Court).

<sup>69</sup> See Sarita Santoshini, *Uttar Pradesh's Beacon Of Hope For India's Interfaith Couples*, ARTICLE-14 (Jan. 18, 2021), <https://www.article-14.com/post/uttar-pradesh-s-beacon-of-hope-for-india-s-interfaith-couples>; LiveLaw News Network, *Upholding Love: In Last One Month, Allahabad High Court Grants Protection To Over 125 Inter-Faith/Caste Couples*, LIVELAW (Dec. 1, 2020), <https://www.livelaw.in/top-stories/allahabad-high-court-grants-protection-to-over-125-inter-faithcaste-couples-166645>.

<sup>70</sup> *Vishal Thakre v. Union of India*, Writ Petition (Criminal) 405/2020.

<sup>71</sup> *Chirag Singhvi v. State of Rajasthan*, 2018 (3) RLW 2270 (Raj.).

and Karnataka have also passed similar laws,<sup>72</sup> which may also be subject to legal challenges in the future.

## THE WAY FORWARD

As the preceding discussion has illustrated, all of the newer anti-conversion laws are constitutionally suspect for a number of reasons. Choosing one's religion is an act of constitutionally protected decision making, and consequently a limited number of restrictions can be placed on it on the specific grounds provided in Article 25 of the Constitution. If conversions present a problem to public order, the remedy must focus on the group creating public disorder rather than the individual doing the conversion. Any allegation of "*force*" must be premised on a violation of individual consent that creates a necessity for intervention. Such interventions must, however, be achieved through a proportionate remedy, which is only possible when legal recourse is made available to the victim without overbroad substantive or procedural provisions that further infringe the rights of the victim or other parties.

Ironically, the concerns expressed by Tajamul Hussain in the Constituent Assembly, quoted at the beginning of this article, are now manifesting in the reverse direction through the new anti-conversion laws. Rather than keeping religion "*a private matter between oneself and his God*", the newer laws seek to bring it out into the open and subject it to the scrutiny of not just the State but one's fellow citizens as well. The provisions of the older laws, upheld in *Stainislaus*, perhaps mark the furthest limit to which an infringement is permitted into the right of propagation under Article 25 of the Constitution. Anything beyond that—as attempted by the newer laws—is an unconstitutional invasion into the private sphere, and the decisions in *Evangelical Fellowship*, *Puttaswamy*, and *Shafin Jahan* have laid out a clear path for subsequent courts to follow. For this reason, the interim orders of the Gujarat and Allahabad High Courts are steps in the right direction and must be taken to their logical conclusion.

---

<sup>72</sup> Haryana Prevention of Unlawful Conversion of Religion Bill, 2022, Bill No. 1 of 2022 (Feb. 26, 2022); The Karnataka Protection of Right to Freedom of Religion Bill, 2021, Bill No. 50 of 2021 (Dec. 20, 2021).

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

---

MEENAKSHI RAMKUMAR<sup>1</sup> & AISHWARYA SINGH<sup>2</sup>

*The interests of various groups in a diverse parliamentary democracy are best represented by a plurality of representatives in Parliament, who can broker compromises, extract justifications and highlight the incompetence or apathy of the majority. Parliamentary procedures must safeguard the rights of the opposition to question and exercise oversight over the majority government in order to sustain genuine and substantial deliberation by representatives. Various constitutions have designed legislative bodies in a distinct manner. For instance, the Indian Constitution does not provide any express provision institutionalising the opposition. In contrast, the South African Constitution not only recognises the leader of the opposition as a constitutional functionary but also cements the rights of minority parties to hold the government accountable through deliberation and debate. This article examines parliamentary structures in India and South Africa, focusing on the role of the opposition envisaged under both constitutions. The difference in constitutional design has resulted in ensuring a more definitive system for enforcing the rights of the opposition by the judiciary in South Africa. While the Indian judiciary has developed tools to navigate the lack of constitutional safeguards for the opposition, these may not serve as an effective solution in the absence of a framework for opposition rights.*

### INTRODUCTION

*“Opposition in a democratic House is a great necessity. It is an indispensable condition of all democratic institutions. We propose to all ourselves, and we propose to make our country, a ‘democratic, sovereign republic’. If we cannot ensure any opposition, we should rather call the constitution that of an*

---

\* Cite it as: Ramkumar & Singh, *The Road Not Taken: India's Failure to Entrench the Rights of Opposition*, 6(2) COMP. CONST. L. & ADMIN. L. J. 55 (2022).

<sup>1</sup> Meenakshi Ramkumar is an LL.M. Candidate at the University of Melbourne and an Alex Chernov Scholar. The author may be reached at <meenakshi@nramkumar.com>.

<sup>2</sup> Aishwarya Singh is a Law Clerk-cum-Research Assistant at the Supreme Court of India. She holds a B.A., LL.B. (Hons.) degree from Jindal Global Law School. The author may be reached at <singh46aishwarya@gmail.com>.

\*\* We thank the editorial team at CALJ for their inputs and editing this paper.

\*\*\* *Views expressed are personal.*

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

*'undemocratic, sovereign republic'. It is the essence of democracy that there should be effective opposition.'*

- Naziruddin Ahmad, Member, Constituent Assembly<sup>3</sup>

On January 28, 2022, the Supreme Court of India, in *Ashish Shelar v. Maharashtra Legislative Assembly*,<sup>4</sup> revoked the suspension of twelve members of the Legislative Assembly of Maharashtra. In doing so, the Court employed the rights guaranteed under Articles 14 and 21 of the Constitution of India, 1950 (“**Indian Constitution**”) against arbitrary State action to encapsulate parliamentary procedures within judicial review. The Court held that the suspension of the members beyond the duration of the concerned session was beyond the power of the Assembly<sup>5</sup> and, therefore, arbitrary and excessive. Therefore, the actions of the Assembly were held to be violative of Articles 14 and 21 of the Indian Constitution.

Having previously followed a non-interventionist approach with regard to the whimsical use of parliamentary sovereignty by majority parties in legislative bodies, the Court deviated and upheld the core principles of constitutional democracy. It is interesting to note that the opposition's role has not been formally recognised in the Indian Constitution as has been done in other countries.<sup>6</sup> Therefore, the Supreme Court, in the aforementioned case, used the rights framework enshrined in Part III of the Indian Constitution to hold the legislative body accountable.

This article seeks to analyse the constitutional design of parliamentary structures in India and South Africa with particular emphasis on the role of the opposition. In doing so, it will evaluate the impact of constitutional engineering on enforcing the rights of minority parties in the Parliament.

---

<sup>3</sup> 3 CONSTITUENT ASSEMB. DEB. (May 20, 1949), [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/8/1949-05-20](https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-20).

<sup>4</sup> *Ashish Shelar v. Maharashtra Legislative Assembly*, 2021 SCC OnLine SC 3152.

<sup>5</sup> Maharashtra Legislative Assembly Rules, 2015, Director, Government Printing and Stationery and Publications, Rule 53 (Jan. 2015).

<sup>6</sup> Recognition of Leader of Opposition: CONSTITUTION OF THE REPUBLIC OF MAURITIUS, 1968 § 73; *See also*, THE CONSTITUTION OF BARBADOS, 1966 § 74; Consultation of Opposition for Appointments: THE CONSTITUTION OF THE DEMOCRATIC, SOCIALIST REPUBLIC OF SRI LANKA, 1978 art. 41A. *See also*, Elliot Bulmer, *Opposition and Legislative Minorities: Constitutional Roles, Rights and Recognition*, INTERNATIONAL IDEA 22 (2021).

The article argues that the explicit recognition accorded to the opposition and its rights in other jurisdictions has empowered the judiciary to play a proactive role in protecting deliberation and debate in parliament. For this purpose, we refer to South Africa. In contrast, courts in India have often taken a backseat, deferring to parliamentary sovereignty and supremacy. Based on the above analysis, this article concludes that the institutionalisation of rights of the opposition in the Constitution is necessary for providing a well-developed framework to enable minority parties to function as effective opposition in Parliament. Any criteria of review of the legislative process developed by the judiciary in the absence of institutionalisation of such rights would result in arbitrary application of the law by judges based on their personal dispositions and would augment the power of constitutional courts rather than the opposition in the Parliament itself.

## A TALE OF TWO COUNTRIES

There are multiple reasons to compare the Indian and the South African democracies apart from the apparent reason that the former lacks constitutional recognition of the opposition while the latter does not. *First*, the Indian and the South African societies are diverse and have inter-group conflicts. These conflicts often play out in their respective parliaments when interests clash, and therefore, deliberation and representation are equally critical in both the societies.

*Second*, while both constitutions were designed in a post-colonial setting, the context of the 1950 Indian Constitution and the 1996 South African Constitution was starkly different. Consequently, the processes adopted in drafting these constitutions were also different.<sup>7</sup> The South African Constitution was a result of constitutional negotiations and reconciliation between the politically dominant white community and the disenfranchised black community.<sup>8</sup> Therefore, there was scope for deliberation and public participation in the constitution-making process.

---

<sup>7</sup> Vijayshri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT'L & COMP. L. 49 (2007).

<sup>8</sup> *Id.*

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

However, in the Indian context, a single party dominated the constitution-making process.<sup>9</sup> Arguably, these differences had an impact on the constitutional design, which will be explored in the subsequent sections.

### ROLE OF OPPOSITION IN A PARLIAMENTARY DEMOCRACY

The Westminster model of parliamentary democracy envisages a concentration of executive and legislative leadership in the cabinet, which comprises the ministers led by the Prime Minister.<sup>10</sup> The Prime Minister is also the leader of the majority party or the ruling coalition in the Lower House of the Parliament. The cabinet is accountable to the Lower House for its policies and conduct.<sup>11</sup> This model makes “*criticism of administration as much a part of the polity as administration itself*”.<sup>12</sup> However, since the majority party or the bloc in the legislature forms the government, the government is in effect accountable only to the opposition, which would be a minority party or bloc in the Parliament. Legislators hardly act independently of their party position. In fact, anti-defection laws in India penalise legislators who disobey party command with disqualification from Parliament.<sup>13</sup> Thus, it is only the opposition that has the strongest incentive to censure the government.

Jeremy Waldron highlights that the opposition has two functions. *First*, to extract accountability from the government for its policies in parliament, where they are debated and defended in an official adversarial environment; and *second*, to be prepared as a “*government-in-waiting*”.<sup>14</sup> This requires that the opposition is not only able to criticise the government but also present an alternative agenda of governance.<sup>15</sup> While these are the two classical functions of the opposition, the question remains how critical the

---

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

<sup>10</sup> Bulmer, *supra* note 6.

<sup>11</sup> *Id.*

<sup>12</sup> WALTER BAGEHOT, THE ENGLISH CONSTITUTION 53 (2d ed. 1873).

<sup>13</sup> See INDIA CONST. sch. 10, ¶ 2(b); where a member of the House belonging to a political party can be disqualified if they vote or abstain from voting in the House contrary to the direction issued by the political party to which they belong without obtaining prior consent from the party in this regard.

<sup>14</sup> JEREMY WALDRON, POLITICAL THEORY: ESSAYS ON INSTITUTIONS, 101-102 (Harvard University Press 2016).

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

institutionalised setting of parliament is, to conduct these functions. Arthur Rubinoff has noted that with the decline of legislative participation in the Indian Parliament, the media has become the primary site of contestation over administrative policy.<sup>16</sup> Resultantly, scandals, rather than substantive issues have absorbed the focus of opposition.<sup>17</sup> Commentators have also argued that flawed legislative deliberations result in “*poor laws and flawed policies*”.<sup>18</sup> However, with limited numerical strength, the opposition’s impact on the deliberative process remains questionable.

Carl Schmitt, through a historical analysis of the role of the parliament, has argued that the parliament has become an obsolete institution.<sup>19</sup> Earlier, in the absence of mass democracy, the parliament acted as a stand-in for the society before the prince in a constitutional monarchy.<sup>20</sup> It comprised the bourgeoisie, who shared common ideas about the market, state and society and envisaged a limited role of the state in the life of people. However, with the advent of mass democracy, the state itself became representative of the diverse social and economic groups that formed the society through political parties. These diverse groups constitute the state and are also objects of state action through an interventionist state or what he calls the “*total state*”.<sup>21</sup> The political parties which represent diverse interests are stabilised and bureaucratised organisations. Thus, the individual members function according to party discipline and not by the force of deliberations in parliament. Parliament is then nothing but a “*showplace for pluralist interests*”.<sup>22</sup> However, Dominique Leydet, in his critique of Schmitt, identifies the critical role of deliberations that take place in parliament.<sup>23</sup> He states that “*debates do not have to be deliberative in nature to be worthwhile*”.<sup>24</sup>

---

<sup>16</sup> Arthur G. Rubinoff, *The Decline of India’s Parliament*, 4 J. LEGIS. STUD. 13, 13-33 (1998).

<sup>17</sup> *Id.*

<sup>18</sup> THOMAS E MANN & NORMAN J ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK*, 146 (1st ed. Oxford University Press 2008).

<sup>19</sup> CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy Trans., Cambridge MA: MIT Press 1985).

<sup>20</sup> Dominique Leydet, *Pluralism and the Crisis of Parliamentary Democracy*, in *LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM* 111 (Dyzenhaus ed., Duke University Press 1998).

<sup>21</sup> *Id.* at 112.

<sup>22</sup> *Id.* at 111.

<sup>23</sup> *Id.* at 122–123.

<sup>24</sup> *Id.*

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

The debates allow a preliminary screening of the enactments, which enable the public to identify how public monies are being spent and if the government is implementing any unjust measures. The parliamentary debates compel the government to provide justifications for its policies and clarify their purpose.<sup>25</sup>

The public screening can generate substantial opposition, requiring the government to reconsider its policies and laws. While policies and laws can be questioned by media or interest groups, parliament provides what Waldron calls an “*official adversarial environment for democratic dialogue*”. In a polity where suppression of media is constant, and dissent threatens civil liberty, parliament, with its constitutional standing and the accompanying privileges and immunities that accrue to parliamentary speech,<sup>26</sup> can play a central role in oversight and scrutiny of the government.

### THE OPPOSITION IN INDIA

#### A. THE STRUCTURE AND THE ABSENCE OF OPPOSITION RIGHTS

The Indian Parliament is a bicameral legislature, where the Lok Sabha (the Lower House), currently consisting of 542 members,<sup>27</sup> is elected through universal adult suffrage every five years. The Rajya Sabha (the Upper House), also known as the Council of States, is a continuous body currently having 237 members,<sup>28</sup> and is elected through an Electoral College. The purpose of the Rajya Sabha is to represent the interests of states, apart from

---

<sup>25</sup> *Id.*

<sup>26</sup> For example, INDIA CONST. art. 105, cl. 1 specifically provides that there is freedom of speech in Parliament. INDIA CONST. art. 105, cl. 2 provides immunity from court proceedings regarding any speech or vote given by a parliamentarian. Significantly INDIA CONST. art. 361A provides that no person will be subject to civil or criminal proceedings for publication in a newspaper of a substantially true report of any parliamentary proceedings.

<sup>27</sup> Lok Sabha Secretariat, *Seventeenth Lok Sabha*, PARLIAMENT OF INDIA (LOK SABHA), <http://164.100.47.194/Loksabha/Members/AlphabeticalList.aspx> (Last visited on May 21, 2022).

<sup>28</sup> Rajya Sabha Secretariat, *Sitting Members of Rajya Sabha*, PARLIAMENT OF INDIA (RAJYA SABHA), [https://rajyasabha.nic.in/rsnew/member\\_site/memberlist.aspx](https://rajyasabha.nic.in/rsnew/member_site/memberlist.aspx) (Last visited on May 21, 2022).



ensuring further scrutiny of legislation by adopting bicameralism.<sup>29</sup> However, its constitutional standing and legislative powers are less as compared to the Lok Sabha. In a joint sitting of the Parliament, if the Rajya Sabha fails to adopt a bill passed by the Lok Sabha,<sup>30</sup> it would be outnumbered two to one by the numerical majority in the Lok Sabha. Furthermore, the Rajya Sabha can neither introduce money bills nor reject them.<sup>31</sup> If a money bill remains pending for two weeks with the Rajya Sabha, it is considered to have been passed.<sup>32</sup> The classification of bills as money bills has become a contentious issue, which will be discussed later. Suffice to say, often, the dominant party in the Lok Sabha does not have a guaranteed majority in the Rajya Sabha due to different election cycles of the two houses, and the rise of regional parties that have begun to control state governments.<sup>33</sup> Thus, it becomes difficult for the dominant party in the Lok Sabha to push through its agenda in the Rajya Sabha in the absence of the support of the opposition.<sup>34</sup>

---

<sup>29</sup> See 4 CONSTITUENT ASSEMB. DEB. (July 28, 1947), [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/4/1947-07-](https://www.constitutionofindia.net/constitution_assembly_debates/volume/4/1947-07-21)

21. The constituent assembly debated on the motion of whether there should be a second chamber of Parliament. N. Gopalswami Ayyangar in ¶ 4.32.122, who introduced the motion stated that a second chamber is a common feature of “*federations of importance*”. Naziruddin Ahmed in ¶ 4.32.119, while supporting the motion, observed that a second chamber is necessary to give representation to States in the present scheme of things. The motion of having two houses was adopted. See also, INDIA CONST. art. 80, cl. 1(b) which provides that Rajya Sabha would consist of two hundred and thirty eight representatives of states and union territories.

<sup>30</sup> INDIA CONST. art. 108.

<sup>31</sup> INDIA CONST. art. 109, cl. 1—2.

<sup>32</sup> INDIA CONST. art. 109, cl. 5.

<sup>33</sup> The elections to Rajya Sabha take place when the members retire. A third of members of Rajya Sabha retire every two years. The members for Rajya Sabha are elected indirectly by elected members of State Legislative Assemblies of respective states. The ability of the dominant party in Lok Sabha to hold a majority in Rajya Sabha is contingent on its performance in State Assembly Elections since it's only the elected members of State Legislative Assemblies who can elect the members of the Rajya Sabha. See also, INDIA CONST. arts. 80 & 83; INDIA CONST. sch. 4.

<sup>34</sup> Devesh Kapur & Pratap Bhanu Mehta, *The Indian Parliament as an Institution of Accountability*, 23 UNRISD PROGRAMME PAPERS ON DEMOCRACY, GOVERNANCE AND HUMAN RIGHTS (2006). See the example of the land acquisition bill that was introduced by the government on Feb. 24, 2015 to amend the Land Acquisition, Rehabilitation and Resettlement Act, 2013, No. 30, Acts of Parliament, 2013. While the government had the majority in Lok Sabha where the bill was passed on Mar. 10, 2015,

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

The opposition's role in the Indian Constitution has not been formally recognised as has been done in South Africa, which is used as a counter-example to the Indian experience in the article later. However, it is significant to note that the Constituent Assembly debated whether there should be a constitutional recognition of the post of leader of the opposition.<sup>35</sup> Z.H. Lahiri had proposed an amendment to the draft Article 85 of the Indian Constitution (incorporated as Article 106), which provided that a Member of Parliament is entitled to receive salaries and allowances as determined by the Parliament.<sup>36</sup> He suggested that the leader of the opposition be provided with a salary that is equivalent to that of a cabinet minister, similar to the practice in England.<sup>37</sup> He argued that there could not be a whole-time opposition that is active unless there is a leader who can devote his time and energy to the post.<sup>38</sup> In Lahiri's opinion, constitutional recognition of the opposition would prevent the majority party from becoming despotic.<sup>39</sup> An active opposition would keep the majority party in check and make people aware of the actions of the government.<sup>40</sup>

We have also highlighted how deliberations in parliament result in a public screening of the proposed policies and laws. Crucially, Lahiri noted the symbolic effect of having a constitutional recognition of the post of leader of the opposition. He stated that such a recognition ensures that when a leader of opposition criticises the government, it will not be termed as disaffection towards the state, but as a discharge of their constitutional duty.<sup>41</sup> This is significant because it advances the idea that institutionalising dissent in the constitutional scheme can also normalise criticism against the government in society. The proposed amendment was supported by Kazi

---

the bill was stuck in Rajya Sabha, where the government did not have a majority. The government took the route of issuing an executive ordinance to implement the land acquisition reforms, however, the bill was never passed by the Rajya Sabha, and the ordinance eventually expired. The government failed to push its agenda through the Rajya Sabha.

<sup>35</sup> 3 CONSTITUENT ASSEMB. DEB. (May 20, 1949), [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/8/1949-05-20](https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-20).

<sup>36</sup> *Id.* ¶ 8.88.5.

<sup>37</sup> *Id.* ¶ 8.88.10.

<sup>38</sup> *Id.* ¶ 8.88.7.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* ¶ 8.88.10.

Syed Karimuddin.<sup>42</sup> Interestingly, both highlighted that there was no effective opposition in the Dominion Parliament or provincial assemblies established during the colonial regime.<sup>43</sup> In the words of Karimuddin, the opposition was not “*tolerated*”, “*neglected*”, and “*generally punished*”.<sup>44</sup> This showcases that India has had a long-standing problem of having a weak parliamentary opposition, which perhaps explains why institutionalising opposition rights was not a priority for the Constituent Assembly, which itself was dominated by a single party.

Naziruddin Ahmad, supporting the amendment, countered the arguments made by other assembly members that pay does not create opposition, by stating that “*pay gives the opposition a status and it also recognises the opposition*”.<sup>45</sup> The proposal was ultimately rejected, with some arguing that since the Indian Constitution does not prohibit making a provision for payment of salary to the leader of the opposition, it may be done in the future.<sup>46</sup> It was further argued that at that time, there was no “*healthy opposition*”, and an opposition cannot be created “*willy-nilly*” by the creation of a post and payment of salary.<sup>47</sup>

Today, there is only statutory recognition of the post of leader of opposition under the Salary and Allowances of Leaders of Opposition in Parliament Act, 1977. The Act defines a leader of the opposition as the “[l]eader in that House of the party in opposition to the Government having the greatest numerical strength and recognised as such by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.”<sup>48</sup> Crucially, the decision to recognise the leader of the House vests with the Speaker. Although the Act itself does not specify the numerical strength required for the opposition party’s leader to be designated as the leader of the opposition,

---

<sup>42</sup> 3 CONSTITUENT ASSEMB. DEB. (May 20, 1949), ¶ 8.88.40. [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/8/1949-05-20](https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-20).

<sup>43</sup> *Id.* ¶¶ 8.88.9, 8.88.40.

<sup>44</sup> *Id.* ¶ 8.88.40.

<sup>45</sup> *Id.* ¶ 8.88.42.

<sup>46</sup> *Id.* ¶¶ 8.88.23-8.88.25, ¶¶ 8.88.26-8.88.27. The Chairperson of the Drafting Committee, BR Ambedkar did not accept the amendment made by Mr. Lahiri and supported the stance taken by Shri T.T. Krishnamachari and M. Ananthasayanam Ayyangar (¶ 8.88.59).

<sup>47</sup> *Id.* ¶ 8.88.27.

<sup>48</sup> The Salary and Allowances of Leaders of Opposition in Parliament Act, 1977, § 2, No. 33, 1977.

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

the Speaker's decision may be influenced by Direction 121(c), which provides that for a party to be recognised, it should have at least one-tenth of the total members of the House, which is the strength of the *quorum* required to conduct a session of the House.<sup>49</sup> However, this is not a constitutional or statutory requirement. These are merely directions issued by the Speaker under Rule 389 of the Rules of Procedure and Conduct of Business in the House of People.<sup>50</sup> The purpose of these directions was to allot seats, time for debates and rooms in the Parliament. Although the Speaker's directions cannot override the Salary and Allowances of Leaders of Opposition in Parliament Act 1977, perhaps due to the absence of any constitutional sanctity attached to the post, India has not had a leader of the opposition for two consecutive Lok Sabhas elected in 2014 and 2019.<sup>51</sup> This closely echoes the argument put forth by Madhav Khosla that codification of norms in new democracies has significant value because of a lack of a shared historical understanding of the values of constitutional self-rule.<sup>52</sup>

In addition to keeping the post of leader of opposition vacant, the government has pushed many contentious bills through Rajya Sabha by dubious voice votes.<sup>53</sup> For instance, the farm laws were pushed through the Rajya Sabha through voice votes,<sup>54</sup> which led to wide-scale farmer agitation

---

<sup>49</sup> Lok Sabha Secretariat, *Directions by the Speaker of Lok Sabha*, PARLIAMENT OF INDIA (LOK SABHA) (Apr. 2019), <http://loksabhaph.nic.in/direction/direction.pdf>.

<sup>50</sup> Rules of Procedure and Conduct of Business in Lok Sabha, 2019.

<sup>51</sup> Prabhaskar K Dutta, *Narendra Modi Government Will Not have Leader of Opposition in Lok Sabha Again*, INDIA TODAY (May 24, 2019), <https://www.indiatoday.in/elections/lok-sabha-2019/story/17th-lok-sabha-leader-of-opposition-bjp-congress-1533766-2019-05-24>.

<sup>52</sup> MADHAV KHOSLA, *INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY*, 23–24 (Harvard University Press 2020).

<sup>53</sup> In a voice vote, the Speaker puts a question to the house, to which the members have to respond in the form of 'ayes' (yes) or noes. The Speaker decides if the motion was successful based on which side was louder. However, this can produce inaccurate results, especially on contentious issues where the House is divided. If a voice vote is challenged by a member, the Speaker is required to ask for a division, which entails each member's vote to be recorded and is typically done electronically. See Rules of Procedure and Conduct of Business in Rajya Sabha, 2016, R. 252–254 (Aug. 2016).

<sup>54</sup> Sobhana K. Nair, *Parliament Proceedings | Rajya Sabha Passes Two Farm Bills Amid Fierce Protests*, THE HINDU (Sept. 20, 2020), <https://www.thehindu.com/news/national/parliament-proceedings-rajya-sabha-passes-2-farm-bills-amid-ruckus-by-opposition-mps/article61724177.ece>.

in India, forcing the government to repeal the laws, which was again done without any deliberation in Parliament.<sup>55</sup> It is startling to note that during the 2021 monsoon session, on an average, the Lok Sabha passed a bill once every thirty four minutes and the Rajya Sabha every forty six minutes.<sup>56</sup> In the winter session of the Lok Sabha, thirty five percent of the bills were passed in thirty minutes, and only thirteen percent of the bills were referred to parliamentary committees.<sup>57</sup> The committees were intended to enable the Parliament to discuss proposed legislation in small groups, scrutinise budgets, involve experts, collect data and extract information from the government.<sup>58</sup> While political accountability is best ensured by questioning the government on the floor of the House that captures the attention of all members and the society,<sup>59</sup> the declining role of the committees further precipitates the issue of lack of oversight of the executive and the ruling majority in the Parliament.

Not only are parliamentary deliberations side-lined, but opposition members are also suspended arbitrarily without complying with internal rules of the Parliament<sup>60</sup> and through the questionable mechanism of voice votes. In November 2021, twelve Rajya Sabha members from five opposition parties were suspended for the entire winter session for allegedly obstructing the functioning of Rajya Sabha in the previous monsoon session. The motion to suspend the members was moved under Rule 256 of the Rules of Procedure and Conduct of Business in the Council

---

<sup>55</sup> Special Correspondent, *It's Official. Three Farm Laws Scrapped*, THE HINDU (Dec. 2, 2021), <https://www.thehindu.com/news/national/president-gives-assent-to-farm-laws-repeal-bill/article37802828.ece>.

<sup>56</sup> Manish Kanadje & Omir Kumar, *Vital Stats: Parliament Functioning in Monsoon Session 2021*, PRS LEGISLATIVE RESEARCH (Aug. 11, 2021), [https://prsindia.org/files/parliament/session\\_track/2021/vital\\_stats/Vital%20Stats\\_Monsoon%20Session%202021.pdf](https://prsindia.org/files/parliament/session_track/2021/vital_stats/Vital%20Stats_Monsoon%20Session%202021.pdf).

<sup>57</sup> Payoja Ahluwalia & Shashank Srivastava, *Vital Stats: Parliament functioning in Winter Session 2021*, PRS LEGISLATIVE RESEARCH (Dec. 22, 2021), [https://prsindia.org/files/parliament/session\\_track/2021/vital\\_stats/Winter\\_2021\\_Vital\\_Statistics.pdf](https://prsindia.org/files/parliament/session_track/2021/vital_stats/Winter_2021_Vital_Statistics.pdf)

<sup>58</sup> Arthur G. Rubinoff, *The Decline of India's Parliament*, 4(4) J. LEGIS. STUD. 13, 13–33 (1998).

<sup>59</sup> Anirudh Burman, *Legal Framework for the Parliamentary Oversight of the Executive in India*, 6 NUJS L. REV. 387 (2013).

<sup>60</sup> Umang Poddar, *Does the Shock Suspension of 12 Rajya Sabha MPs Violate the Rules of Parliament*, SCROLL (Dec. 4, 2021), <https://scroll.in/article/1012022/does-the-shock-suspension-of-12-rajya-sabha-mps-violate-the-rules-of-parliament>.

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

of States, and was passed by a voice vote.<sup>61</sup> While commentators have highlighted how parliamentary obstructionism through sloganeering, crowding the chair, et cetera, are prohibited by procedural rules and lead to a legislative state of “*gridlock and dysfunction*”,<sup>62</sup> procedural impropriety and suspension of members through voice votes can have a chilling effect on opposition parties.

The opposition in India has its own structural weaknesses where there is a lack of a shadow cabinet and spokespersons with subject-matter expertise to scrutinise policies and legislations, and it often functions to serve its own narrow self-interests.<sup>63</sup> However, as we have highlighted before, it is important to recognise the role of opposition in promoting public dialogue and normalising the role of dissent against the ruling dispensation in society through an official forum like that of the Parliament.

### **B. PARTISAN PRESIDING OFFICERS**

It is important to note that the weakened status of the opposition in the Parliament is not only a result of a lack of constitutional entrenchment of opposition rights, but is also a consequence of the abuse of powers by presiding officers. The Speaker presides over the Lok Sabha,<sup>64</sup> while the Vice President of India presides over the Rajya Sabha.<sup>65</sup> The Deputy Speaker in Lok Sabha and the Deputy Chairman in Rajya Sabha act as presiding officers in the absence of the Speaker and the Vice President, respectively.<sup>66</sup> A brief glance over the powers of the Speaker of Lok Sabha reveals the significance of their role in facilitating discussions and deliberations in Parliament to hold the executive accountable. A Speaker

---

<sup>61</sup> The New Indian Express Team, *12 Opposition Members Suspended from Rajya Sabha for Remaining Part of Winter Session*, THE NEW INDIAN EXPRESS (Nov. 29, 2021), <https://www.newindianexpress.com/nation/2021/nov/29/12-opposition-members-suspended-from-rajya-sabha-for-remaining-part-of-winter-session-2389546.html>.

<sup>62</sup> Tarunabh Khaitan, *The Real Price of Parliamentary Obstruction*, 37 INDIA SEMINAR 642 (2013).

<sup>63</sup> Kapur & Mehta, *supra* note 34.

<sup>64</sup> INDIA CONST. art. 93.

<sup>65</sup> INDIA CONST. arts. 64 & 89.

<sup>66</sup> Lok Sabha Secretariat, *Role of the Speaker*, OFFICE OF THE SPEAKER LOK SABHA, <https://speakerloksabha.nic.in/roleofthespeaker.asp>. Also see Rajya Sabha Secretariat, *Council of States (Rajya Sabha)*, PARLIAMENT OF INDIA (RAJYA SABHA), [https://rajyasabha.nic.in/rajya\\_sabha/council\\_state.aspx](https://rajyasabha.nic.in/rajya_sabha/council_state.aspx) (Last visited on May 21, 2022).

consents to the permissibility of motions.<sup>67</sup> They can suspend members<sup>68</sup> and can adjourn the House in the event of misconduct.<sup>69</sup> They can demand the withdrawal of statements by parliamentarians if they believe they are unparliamentary.<sup>70</sup> They alone can disqualify a member on the ground of defection once a petition has been moved by another member of the House.<sup>71</sup> Considering the importance of the role of the Speaker, they would be expected to be impartial, rising above party lines.

However, it has been repeatedly observed that Speakers behave in a partisan manner, which is attributed to their affiliation to the ruling party.<sup>72</sup> Similarly, the Vice President, who is the Chairperson of Rajya Sabha, is elected through an Electoral College comprising all the members of the Parliament, where typically, the candidate of the majority party wins the election with the support of its allies.<sup>73</sup> While typically, the Deputy Speaker is elected from the opposition party,<sup>74</sup> the current Lok Sabha does not have a Deputy Speaker since the combined opposition lacked the strength to appoint a Deputy Speaker. The task then falls on the ruling party to elect one,<sup>75</sup> which it has failed to do for two and a half years.<sup>76</sup> In fact, recently, a three-judge Bench of the Supreme Court in *Shrimanth Balasabeb Patil v.*

---

<sup>67</sup> Rules of Procedure and Conduct of Business of the Lok Sabha, 2019, R. 56 & 193.

<sup>68</sup> *Id.* R. 374.

<sup>69</sup> *Id.* R. 375.

<sup>70</sup> *Id.* R. 352 & R. 378.

<sup>71</sup> INDIA CONST. sch. 10; *See* Karthik Khanna & Dhvani Shah, *Anti-Defection Law: A Death Knell for Parliamentary Dissent*, 5 NUJS L. REV. 103 (2012) on how anti-defection laws suppress dissent and hamper parliamentary debate by penalising members for going against the mandate of party whip.

<sup>72</sup> Charith Reddy & Shagun Bhargava, *For Laws May Come and Laws May Go, But Defections Go on Forever: A Critical Analysis of the Role of the Speaker in Indian Anti-Defection Laws*, 10(1) NLIU L. REV. 328 (2020).

<sup>73</sup> Howindialives, *A History of Vice-President Elections in India*, MINT (July 12, 2017), <https://www.livemint.com/Politics/akdlnX45Xnu93ACaYs9U4M/A-history-of-vicepresident-appointments-in-India.html>.

<sup>74</sup> *Id.*

<sup>75</sup> Sobhana K. Nair, *Long Wait for a Deputy Speaker For Lok Sabha*, THE HINDU (Sept. 3, 2021), <https://www.thehindu.com/news/national/long-wait-for-a-deputy-speaker-for-lok-sabha/article36252613.ece>. Crucially, INDIA CONST. art. 93 of the Constitution provides that the Lok Sabha must choose a Speaker and Deputy Speaker at the earliest.

<sup>76</sup> Ahluwalia & Srivastava, *supra* note 57.

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

*Hon'ble Speaker, Karnataka Legislative Assembly*,<sup>77</sup> raised the concern that the Speakers have increasingly begun to act in violation of their constitutional duty to be independent and neutral.<sup>78</sup> If they are unable to detach themselves from their political party, they do a disservice to the public trust and confidence that has been reposed in them.<sup>79</sup> A two-judge bench of the Supreme Court in *Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly*,<sup>80</sup> also expressed reservations regarding the grant of quasi-judicial powers to a Speaker to decide on disqualification of elected members of Parliament on the grounds of defection, questioning the neutral credentials of the Speaker. It was observed by the Court that:<sup>81</sup>

*“31. It is time that Parliament have a rethink on whether disqualification petitions ought to be entrusted to a Speaker as a quasi-judicial authority when such Speaker continues to belong to a particular political party either de jure or de facto. Parliament may seriously consider amending the Constitution to substitute the Speaker of the Lok Sabha and Legislative Assemblies as arbiter of disputes concerning disqualification which arise under the Tenth Schedule with a permanent Tribunal headed by a retired Supreme Court Judge or a retired Chief Justice of a High Court, or some other outside independent mechanism to ensure that such disputes are decided both swiftly and impartially, thus giving real teeth to the provisions contained in the Tenth Schedule, which are so vital in the proper functioning of our democracy.”*

It is important to note that the Indian Supreme Court has termed the Speaker's power to disqualify a candidate to penalise defections as a quasi-judicial power, where the Speaker acts as a tribunal. Thus, the order of the Speaker to disqualify a member was held to be amenable to judicial review by the Constitution Bench of the Supreme Court in *Kihoto Hollohan v. Zachillhu*.<sup>82</sup> Interestingly, in that case, apprehensions were raised regarding

---

<sup>77</sup> *Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly*, (2020) 2 SCC 595.

<sup>78</sup> *Id.* ¶ 190.9.

<sup>79</sup> *Id.* ¶ 153.

<sup>80</sup> *Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly*, 2020 SCC OnLine SC 55.

<sup>81</sup> *Id.*

<sup>82</sup> *Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651.



the conferment of significant powers to the Speaker, who may act on a partisan basis. The majority overruling such concerns observed that:<sup>83</sup>

*“[i]t is inappropriate to express distrust in the high office of the Speaker, merely because some of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of that office. The robes of the Speaker do change and elevate the man inside.”*

The majority failed to realise that partisan bias in the actions of the Speaker is not a result of personal failings, but a consequence of the structural weakness of the office of the Speaker. This failure reflects a lack of pragmatism where deference is accorded to the high office of the Speaker, and there is a belief in good faith that the position itself would depoliticise the office of the Speaker, even as the Court admits that Speakers have been found to be politically partial in their actions.

The minority opinion in *Kiboto Holloban* recognised the limitations of the Speaker to act in a neutral manner due to the manner in which a Speaker is elected and serves their tenure.<sup>84</sup> While the observations were made in the context of the Speaker carrying out adjudicatory functions of deciding disqualification positions, the minority opinion is of much relevance in highlighting the shortcomings of the office of the Speaker. The minority opinion stated, “[t]he Speaker being an authority within the House and his tenure being dependent on the will of the majority therein, likelihood of suspicion of bias could not be ruled out.”<sup>85</sup> To remedy such structural weaknesses of the office, jurisdictions like the United Kingdom require the Speaker to sever all ties with their political party.<sup>86</sup> The Speaker can be removed only if they resign or by death during the tenure.<sup>87</sup>

---

<sup>83</sup> *Id.* ¶ 118.

<sup>84</sup> *Id.* ¶ 181.

<sup>85</sup> *Id.*

<sup>86</sup> UK Parliament, *The Speaker, Impartiality and Procedural Reform*, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentwork/offices-and-ceremonies/overview/the-speaker/procedures-and-impartiality/> (Last visited on May 21, 2022).

<sup>87</sup> Erskine May, *Election of Speaker in Course of Session*, in TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT (25th ed., 2019), <https://erskinemay.parliament.uk/section/6515/election-of-speaker-in-course-of-session>.

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

The purpose of the above discussion was to highlight how partisan presiding officers often fail to protect the rights of the opposition in Parliament and contribute to the suppression of democratic dialogue. Commentators have not only highlighted the bias that arises in relation to adjudication of disqualification petitions, but have also noted violations of other constitutional and parliamentary conventions by presiding officers. In such an event, the Speaker's conduct often gives rise to controversies before the courts.

### C. DEFERENTIAL COURTS

Judicial review of the legislative process ("**process review**") in India is governed by Articles 122 and 212 of the Indian Constitution. Article 122 provides the following:

*“(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.*

*(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.”*

*(emphasis added)*

Clause (1) of Article 122 limits the ambit of judicial review. A similar prohibition exists for judicial intervention relating to the conduct of proceedings in legislative assemblies under Article 212. The Supreme Court has interpreted this provision to mean that while the Court cannot interfere with any irregularity of procedure, it can intervene if there is any substantive illegality. In *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*,<sup>88</sup> a Constitution Bench of the Court, observed that Articles 122 and 212 do not provide immunity to those proceedings that suffer from substantive illegality or unconstitutionality. The principle of exclusive cognisance of internal proceedings of Parliament, providing immunity from judicial scrutiny, cannot be applied to India since the Indian Constitution is supreme and not the Parliament.<sup>89</sup> The Supreme Court's power to

---

<sup>88</sup> *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*, (2007) 3 SCC 184.

<sup>89</sup> *Id.* ¶¶ 431 (k)–(m), 360, 366.

intervene in parliamentary proceedings tainted by substantive illegality and unconstitutionality was affirmed by a Constitution Bench of the Supreme Court in *Kalpana Mehta v. Union of India*.<sup>90</sup> Justice Chandrachud, in his concurring opinion, on behalf of Justice Sikri and himself, advanced the idea that while separation of powers is a constitutionally recognised principle, its implementation is less rigorous and nuanced.<sup>91</sup> He observed that the concept of separation of powers has evolved from a strict separation of different organs of the State to an approach that recognises that while there is a division of work, it must be integrated with the constant “*checks and balances*” by one organ of the State on another.<sup>92</sup> Crucially, Justice Chandrachud observed that although one organ of the State cannot usurp the functions of another in principle, in the practical unfolding of events, any conflict in the exercise of powers by different organs can be “*resolved through robust constitutional cultures and mechanisms*”.<sup>93</sup>

While the comments were made in the context of the Court’s power of process review, they are equally applicable to executive aggrandisement of power at the cost of the legislature. The lack of respect for the opposition and parliamentary dialogue and deliberation results from the fusion of the executive and legislative branches of the State, where the latter’s role as watchdog of the executive and majority rule is diminished. The practical problems stemming from the majority’s impulse to push its agenda in Parliament, violating democratic values, can be safeguarded only through what Justice Chandrachud calls a “*robust constitutional design and culture*”, which we have argued is absent under the Indian Constitution. This absence also paves the way for judicial reluctance, even if the Supreme Court has saved its power of process review, albeit on narrow grounds.<sup>94</sup>

Despite rejecting the English practice of exclusive cognisance of internal proceedings of Parliament, the Supreme Court has been deferential to the conduct of the majority (acting through the Speaker) in Parliament. As we have noted before, the Rajya Sabha does not have the power to veto the

---

<sup>90</sup> *Kalpana Mehta v. Union of India*, (2018) 7 SCC 1.

<sup>91</sup> *Id.* ¶ 256.

<sup>92</sup> *Id.* ¶ 33.

<sup>93</sup> *Id.* ¶ 256.

<sup>94</sup> *Mohd. Saeed Siddiqui v. State of U.P.*, (2014) 11 SCC 415; *See also Yogendra Kumar Jaiswal v. State of Bihar*, (2016) 3 SCC 183.

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

money bills<sup>95</sup> passed by the Lok Sabha, it can only issue recommendations within fourteen days. A failure to issue any recommendations within fourteen days leads to deemed approval of the bill by both the Houses of Parliament.<sup>96</sup> The power to classify a bill as a money bill vests with the Speaker.<sup>97</sup> It has been noted that the present government has classified many controversial statutes as money bills to bypass the scrutiny of the Rajya Sabha.<sup>98</sup>

The decision of the Speaker to classify the Aadhar Bill as a money bill was challenged before a Constitution Bench of the Supreme Court in *Justice KS Puttaswamy v. Union of India*.<sup>99</sup> Aadhar is a twelve-digit unique identity number, and requires Indian residents to submit biometric data to a centralised database.<sup>100</sup> The government made Aadhar mandatory for availing welfare schemes.<sup>101</sup> Amongst other things, a dispute arose regarding whether the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (“**Aadhar Act**”) could have been legitimately passed as a money bill.<sup>102</sup> While the majority opinion observed that judicial review of parliamentary proceedings, specifically the decision of the Speaker, may be permissible in certain instances, it did not conclusively address the question of whether “*certification by the Speaker about the Bill being Money Bill is subject to judicial review of not, whether a provision which does not relate to Money Bill is severable or not*”.<sup>103</sup> Justice Bhushan, in his concurring opinion and Justice Chandrachud, in his dissenting opinion, observed that if the bill does not satisfy the conditions stipulated under Article 110(1) to be classified as a money bill, the decision of the Speaker would be subject to judicial review because certification of the bill is not only a matter of procedure but also a breach of constitutional provisions.<sup>104</sup>

---

<sup>95</sup> INDIA CONST. art. 110 cl. 1.

<sup>96</sup> INDIA CONST. art. 109.

<sup>97</sup> INDIA CONST. art. 110 cl. 3.

<sup>98</sup> Datta et al., *supra* note 25 at 76.

<sup>99</sup> K. S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

<sup>100</sup> *Id.* ¶¶ 46–48.

<sup>101</sup> The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, § 7, The Gazette of India, Extraordinary, pt. II sec. 1 (Mar. 26, 2016).

<sup>102</sup> K. S. Puttaswamy v. Union of India, (2019) 1 SCC 1, ¶ 159.6.

<sup>103</sup> *Id.* ¶ 472.

<sup>104</sup> *Id.* ¶¶ 892–895 (per Bhushan, J., concurring opinion) & ¶ 1067 (per Chandrachud, J., dissenting opinion).

Thus, Article 122 of the Indian Constitution would not save the act of the Speaker if it is in violation of the provisions of Article 110. While the Court recognised its power of process review,<sup>105</sup> the majority and the concurring opinion evince that the Court adopts a deferential attitude towards interfering in the business of its co-equal political branch.

The majority judgment delivered by Justice Sikri held that the Aadhar Act essentially enabled the Government to use a twelve-digit unique identity number to provide welfare, benefit or subsidy that is funded through the Consolidated Revenue Fund of India. The disagreement between the majority and minority arose from the use of the twelve-digit number for other purposes. Justice Sikri read down the language of the Aadhar Act to ensure that it remains within the scope of a money bill.<sup>106</sup> Justice Bhushan, in his concurring opinion, upheld the language on the basis that Article 110(1)(g) provides that a bill would be deemed to be a money bill if it contains provisions that are incidental to the essential features of a money bill.<sup>107</sup>

Justice Chandrachud, in his dissenting opinion, reviewed the legislative history of the Aadhar Act, noting that the first original legislation, which was substantially similar to the one that was passed as the Aadhar Act, was first introduced in Rajya Sabha by the previous United Progressive Alliance Government.<sup>108</sup> There was no question of it being a money bill at that time, which can only be tabled before the Lok Sabha. When the National Democratic Alliance Government came to power in 2014, it withdrew the original legislation from Rajya Sabha and introduced it as a money bill in Lok Sabha.<sup>109</sup> This, according to Justice Chandrachud, was a “*fraud on the Constitution*”.<sup>110</sup>

Significantly, Justice Chandrachud stated:<sup>111</sup>

---

<sup>105</sup> *Id.* ¶ 901 per Bhushan, J. & ¶ 464 as per majority.

<sup>106</sup> *K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1 ¶¶ 513.8–513.8.3.

<sup>107</sup> *Id.* ¶ 907.

<sup>108</sup> *Id.* ¶ 1133.

<sup>109</sup> *Id.* ¶ 1136.

<sup>110</sup> *Id.* ¶ 1143.

<sup>111</sup> *Id.*

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

*“1143. The Rajya Sabha has an important role in the making of laws. Superseding the authority of the Rajya Sabha is in conflict with the constitutional scheme and the legitimacy of democratic institutions. It constitutes a fraud on the Constitution. Passing of a Bill as a Money Bill, when it does not qualify for it, damages the delicate balance of bicameralism which is a part of the basic structure of the Constitution. The ruling party in power may not command a majority in the Rajya Sabha. But the legislative role of that legislative body cannot be obviated by legislating a Bill which is not a Money Bill as a Money Bill. That would constitute a subterfuge, something which a constitutional court cannot countenance. Differences in a democratic polity have to be resolved by dialogue and accommodation. Differences with another constitutional institution cannot be resolved by the simple expedient of ignoring it. It may be politically expedient to do so. But it is constitutionally impermissible. This debasement of a democratic institution cannot be allowed to pass. Institutions are crucial to democracy. Debasement can only cause a peril to democratic structures.”*

While Justice Chandrachud expanded the scope of process review to assess the intentions behind the adoption of certain parliamentary procedures to circumvent democratic mandate and deliberations, he saw the injury in the violation of the “*federal structure*” of the bicameral legislature where the Lok Sabha attempted to trample over the interests of the constituent states of India.<sup>112</sup> He stated that the Rajya Sabha’s institutional framework has been designed to represent the nation’s pluralism and diversity in language, culture, perspective and interest. However, it is possible to extend the protection he envisages for the State’s interests to other forms of interests, which an opposition might represent in a democracy. While federalism saves the diverse interests of the states, it comprises only one prong of that plurality. A parliament consists of representatives who put forth varied cross-cutting interests on the lines of caste, gender, labour, capital and religion, amongst others, some posing a challenge to the agenda of the majority. Thus, in order to effectively voice these interests, it is essential to entrench the rights of the opposition. After all, democracy has also been recognised as a part of the basic structure of the Indian Constitution,<sup>113</sup> which cannot be violated by suppressing opposition in the Parliament.

---

<sup>112</sup> *Id.* ¶ 1106.

<sup>113</sup> *Kesavananda Bharati v. State of Kerala and Others*, (1973) 4 SCC 225.

## THE SOUTH AFRICAN EXPERIENCE

Considering the diminishing role of the opposition in India, it may be useful to explore if a different constitutional design can help preserve the value of opposition in the Parliament. Constitutional designs can often provide a conducive environment for political competition to exist by developing institutions that “*preserve such partisanship without being their prey*”.<sup>114</sup>

The parliamentary system of governance was predominant in South Africa for over a century.<sup>115</sup> It is pertinent to discuss the evolution of the current system of government to understand when opposition rights were crystallised in the South African framework. The 1961 Constitution, borrowing from its predecessor, the South Africa Act, 1909, established South Africa as a republic, severing ties with the British monarch. This document provided for a President,<sup>116</sup> an executive council,<sup>117</sup> a bicameral legislature<sup>118</sup> and an independent judiciary.<sup>119</sup> However, it was designed to maintain the status quo of control by the white population over the political affairs by bifurcating the electorate and disenfranchising non-white voters. As the opposition against the dominant white political State grew, political power became increasingly centralised in the office of the Prime Minister.<sup>120</sup>

The 1961 document was soon replaced by the 1983 Constitution that provided a varied system of governance with a President, a Cabinet and a Council of Ministers selected from the parliament. Furthermore, it instituted a tricameral parliament with separate houses for whites, coloureds and Indians. It is argued that apartheid was a result of

---

<sup>114</sup> Maria Paul Saffon and Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41(3) POL. THEORY 441, 461 (2013).

<sup>115</sup> Robert A. Schrire, *Parliamentary Opposition after Apartheid: South Africa*, 14(1-2) J. LEGIS. STUD. 190 (2008).

<sup>116</sup> S. AFR. CONST. § 7.

<sup>117</sup> S. AFR. CONST. §§ 16–17.

<sup>118</sup> S. AFR. CONST. § 24.

<sup>119</sup> S. AFR. CONST. § 94.

<sup>120</sup> Schrire, *supra* note 114 at 191.

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

parliamentary sovereignty and acute centralisation in the office of the President.<sup>121</sup>

In the 1990s, owing to immense political pressure, the apartheid system was considered to be unsustainable and was sought to be dismantled. The constitutional design which followed represented the negotiations between the representatives of both black and white communities—the African National Congress (“**ANC**”) and the National Party (“**NP**”), respectively.<sup>122</sup> The ANC recognised that the increased centralisation could affect the new State envisioned for South Africa. The NP, though a beneficiary of centralisation earlier, was cautious and sought to instil effective institutional mechanisms to challenge concentrated power.<sup>123</sup>

A successor of three post-colonial constitutions, the Constitution of the Republic of South Africa, 1996 (“**South African Constitution**”) was a product of these post-apartheid constitutional negotiations. Section 1 of the South African Constitution explicitly recognises that the South African Republic is founded on the principle of “*a multiparty system of democratic government, to ensure accountability, responsiveness and openness*”.<sup>124</sup> While the South African Constitution encapsulates the vision for a new democracy, it modified the existing institutions to ensure more inclusive political participation.<sup>125</sup> Retaining facets of the parliamentary system of the Republic of South Africa Constitution Act, 1983, the 1996 document is considered to have adopted a mixed model of governance—both parliamentary and presidential.<sup>126</sup>

The South African Parliament is the legislative organ of the State.<sup>127</sup> It is elected for a term of five years, with provisions for dissolving it at an earlier

---

<sup>121</sup> David Bilchitz et al., *Assessing the Performance of the South African Constitution*, INT’L IDEA (2016), [https://constitutionnet.org/sites/default/files/chapter\\_3.\\_fundamental\\_rights.pdf](https://constitutionnet.org/sites/default/files/chapter_3._fundamental_rights.pdf).

<sup>122</sup> Schrire, *supra* note 114 at 191.

<sup>123</sup> *Id.*

<sup>124</sup> S. AFR. CONST. § 1(d).

<sup>125</sup> Schrire, *supra* note 114 at 191.

<sup>126</sup> Lindelwa Mhlongo, *A Critical Analysis of South Africa's System of Government: From a Disjunctive System to a Synergistic System of Government*, 41(2) OBITER 257 (2020).

<sup>127</sup> S. AFR. CONST. §§ 42–43.



date.<sup>128</sup> It has two houses—the National Assembly (“**NA**”), comprising 400 members,<sup>129</sup> and the National Council of Provinces (“**NCOP**”), comprising ninety members.<sup>130</sup> Members are elected through proportional representation to ensure a representative parliament.<sup>131</sup>

The President, similar to the 1983 Constitution, continued to remain the executive head.<sup>132</sup> The President is not a member of the legislature and is accompanied by a cabinet selected from the members of the Parliament.<sup>133</sup> The President’s term, however, is at the pleasure of the Parliament and can be removed from office through a no-confidence vote.<sup>134</sup> Additionally, to keep a check on the exercise of power by the executive, the Parliament has been bestowed with the duty to ensure executive accountability and oversight, including implementation of legislation.<sup>135</sup> This addresses Waldron’s conception of the role of opposition by recognising the importance of legislators holding the executive accountable.

Strengthening the same conception, Section 57(2) envisages the leader of the opposition as a constitutional office in the NA. It states:<sup>136</sup>

*“The rules and orders of the National Assembly must provide for...  
d. the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.”*

With space for deliberation and debate, the South African Parliament has still been dominated by the ANC since 1994.<sup>137</sup> The large electoral mandate

---

<sup>128</sup> S. AFR. CONST. §§ 49–50.

<sup>129</sup> S. AFR. CONST. § 46.

<sup>130</sup> S. AFR. CONST. § 60.

<sup>131</sup> Essentially, people vote for a political party and not an individual leader. The party would then be allocated seats in the Parliament in proportion to the votes it secured. This system of election i.e., proportional representation secures a seat in the NA for a party even with a meagre one per cent of the votes. See Karen E. Ferree, *Electoral Systems in Context: South Africa*, in THE OXFORD HANDBOOK OF ELECTORAL SYSTEMS (Erik S. Herron et al. ed. 2018).

<sup>132</sup> S. AFR. CONST. § 83.

<sup>133</sup> S. AFR. CONST. §§ 85–86.

<sup>134</sup> S. AFR. CONST. § 89.

<sup>135</sup> S. AFR. CONST. § 55(2).

<sup>136</sup> S. AFR. CONST. § 57(2).

<sup>137</sup> Ferree, *supra* note 130.

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

empowered the ANC to exercise complete control and authority over the “*legislative behaviour*”.<sup>138</sup> For instance, ANC determines how legislators vote and the proceedings of Parliamentary committees.<sup>139</sup> Consequently, the ANC leadership made institutional decisions with regard to the Speaker, the chairs of committees, the party whip, et cetera. Therefore, only in rare cases, Parliament would oppose the executive, and the opposition would be rendered redundant.<sup>140</sup>

However, the constitutional provisions paved the way for another important institution—“*the judiciary*”, to step in and safeguard the integrity of parliamentary procedures. The Constitutional Court of South Africa has exclusive jurisdiction under Section 167(4)(c) to “*decide that Parliament or the President has failed to fulfil a constitutional obligation*”. Therefore, the Constitutional Court has been conferred the power to defy the non-interventionist approach and step in to ensure that Parliament functions in accordance with the provisions of the South African Constitution. This includes providing minority parties and individuals adequate space and opportunity for debate and deliberation in the NA.

In the case of *Oriani-Ambrosini v. Sisulu*,<sup>141</sup> the Constitutional Court set aside a rule that required a member of the NA to seek permission from the NA before introducing a bill. Section 57(1) permits the NA to “*control its internal arrangements, proceedings and procedures*” and to “*make rules and orders concerning its business*”.

Furthermore, Section 57(2) states:

*“b. the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy; ...”*

Interpreting this, the Court held that the NA’s power to make rules for conducting its business is subject to the condition of ensuring (i) representative and participatory democracy; (ii) accountability; (iii)

---

<sup>138</sup> Schrire, *supra* note 114 at 203.

<sup>139</sup> *Id.* at 203.

<sup>140</sup> *Id.* at 204.

<sup>141</sup> *Oriani-Ambrosini v. Sisulu*, 2012 (6) SA 588 (CC); *See also*, *Mazibuko v. Sisulu*, 2013 (11) BCLR 1297.

transparency; (iv) public involvement; and (v) participation of minority parties in assembly and committee proceedings. The Court further highlighted that the five values stated above are of paramount importance. Therefore, the power guaranteed in Section 57 is limited to procedural matters, and the NA cannot impose substantive restrictions on legislators.

In the case of *Democratic Alliance v. Speaker of National Assembly*,<sup>142</sup> the Court adjudicated the forceful removal of members of the NA while asking the President questions during his address. In this case, the Court held that freedom of speech and immunity granted to members of the NA were absolute, and cannot be made subject to internal rules set forth by the NA in accordance with Section 57(1).

Stephen Gardbaum has identified three stages of South African jurisprudence that have deviated from the conventional non-interventionist approach of courts.<sup>143</sup> *First*, judicial review of legislation for violating constitutional procedures (2006-2007).<sup>144</sup> *Second*, the review of internal parliamentary rules for violating constitutional rights of members of parliament.<sup>145</sup> *Third*, the review of whether parliamentary procedures are holding the executive accountable (2017).<sup>146</sup> While the first two stages have been argued to be constitutionally permissible, the third stage is often considered an overreach on the part of the judiciary in breaching parliamentary autonomy and separation of powers.<sup>147</sup>

The first two stages are characteristic of a balanced judicial intervention based on constitutionally entrenched provisions. For instance, in the first stage, the Court in *Doctors for Life International v. Speaker of the National Assembly*,<sup>148</sup> struck down four laws for not complying with the public participation requirement under Sections 72(1)(a) and 118(1)(a) of the South African Constitution. The Court intervened on the grounds that a

---

<sup>142</sup> *Democratic Alliance v. Speaker of National Assembly*, 2013 (11) BCLR 1297 (CC).

<sup>143</sup> Stephen Gardbaum, *Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa*, 9 CONST. CT. REV. 1, 6 (2019).

<sup>144</sup> *Id.* at 6.

<sup>145</sup> *Oriani-Ambrosini v. Sisulu*, 2012 (6) SA 588 (CC).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 11.

<sup>148</sup> *Doctors for Life International v. Speaker of the National Assembly*, 2006 (12) BCLR 1399 (CC).

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

constitutional obligation was not fulfilled by the NCOP. It was categorically stated that the Court could interfere in parliamentary affairs only when the South African Constitution permits it. Similarly, in the case of *Oriani-Ambrosini*, the Court was able to intervene only because there was a condition under Section 57(2) that was breached by the Parliament.

However, in the case of *United Democratic Movement v. Speaker of the National Assembly*,<sup>149</sup> when the Court intervened in the Speaker's decision to deny secret ballot voting mechanisms for a no-confidence motion, it led to grave uncertainty. The Court intervened based on the silence in the South African Constitution on voting procedures, and held that the Speaker's decision is subject to judicial review on the grounds of legality. This led to arbitrary intervention by the Court, and manifested a lack of clarity on the degree of judicial review in such cases. In this case, as Gardbaum argues, the guiding factor for judicial review, as highlighted in *Doctors for Life, i.e.*, the existence of a constitutional obligation, has been significantly diluted.<sup>150</sup> The Court has extended its powers of review to dictate the processes that the NA must adopt to ensure its compliance with the South African Constitution.<sup>151</sup> This expansive oversight violates the separation of powers and infringes the autonomous functioning of Parliament.

Therefore, it is extremely important to distinguish between judicial review that is obligatory based on constitutionally entrenched provisions and judicial review read into the constitution by judicial interpretation. The latter can often lead to inconsistent intervention and infringe parliamentary autonomy.

### **PAPERING OVER THE CRACKS THROUGH JUDICIAL REVIEW OF LEGISLATIVE PROCESS**

In the absence of constitutionally entrenched opposition rights in the Indian constitution, there has been a growing interest in academic circles about how process review can serve as a solution to keep the parliamentary majority in check. We argue that process review that finds its roots in a

---

<sup>149</sup> *United Democratic Movement v. Speaker of the National Assembly*, 2017 (8) BCLR 1061 (CC).

<sup>150</sup> Gardbaum, *supra* note 142 at 10.

<sup>151</sup> *Id.* at 11.

judicially developed doctrine, rather than in the constitutional text itself, would serve as an inadequate mechanism to protect opposition rights. In this section, we will discuss *first*, how Indian courts have traditionally been reluctant to exercise any process review. *Second*, we will analyse the different theories of process review that have been proposed to be applied in the Indian context and their shortcomings.

The reluctance towards process review primarily arises due to the doctrine of separation of powers between the legislature and the judiciary. Thus, the courts are required to show deference as to how the internal affairs of the parliament are managed. While substantive judicial review or the court's power to strike down a statute on the ground of unconstitutionality has been accepted in many jurisdictions, including in India under Article 13, its powers to review the legislative process, or a process review, remain contested in most domains. The opposition to process review, as opposed to a substantive judicial review, stems from the argument that the former is not aimed at the protection of individual rights. However, commentators have argued that adherence to legislative procedures is a vital practice which is of normative importance, underlining their significance for legislative outcomes, legitimacy, the Rule of Law, and essential procedural democratic values.<sup>152</sup>

John Hart Ely's "*representation-reinforcing*" theory<sup>153</sup> provides a justification for process review, even though the theory itself was aimed at providing the narrow contours of substantive judicial review. Ely worked from the assumption that substantive judicial review stands in opposition to the democratic value of majority rule. However, he argued that courts should intervene only when there is a failure of the political process, which entails that (i) the government has suppressed all channels of political change, thus violating democracy enforcing rights like freedom of speech and right to vote; or (ii) the minority has been almost permanently disadvantaged by the majority in its participation in the political process because of hostility and prejudice.

---

<sup>152</sup> Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B. U. L. REV. 1915, 1936 (2011).

<sup>153</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1st ed. Harvard University Press 1980).

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

However, this theory has been criticised for its distinction between process and substantive review, where the distinction has been categorised as superfluous.<sup>154</sup> Stephen Gardbaum, while developing a framework of “*comparative political process theory*”,<sup>155</sup> has argued that Ely’s theory does not account for other methods through which the political and democratic process is undermined apart from restricting freedom of speech and vote and systemic discrimination against minorities. He presents instances where the ruling government attempts to entrench power by, *inter alia*, undercutting the deliberative process of the legislature, weakening its ability to extract executive accountability, and advancing the interests of powerful special interest groups over the general interests of the diffused minority. He argues that constitutional theory must transcend the traditional procedure-substance division to address different forms of political process failure which require different remedies. He does not term process review as a violation of the separation of powers or judicial overreach. Rather, he believes that such judicial intervention protects the separation of legislative and executive domains. Thus, comparative political process theory is focused on judicial review of any actions that reflect the failure of the political process, which results from the undermining of legislative procedures, beyond electoral processes, in letter or spirit.

It has been argued that the comparative political process theory must be adopted as a standard for process review in India.<sup>156</sup> On the other hand, it has been argued that expanding the scope of judicial review to decisions that can have political ramifications of such magnitude would make the judiciary vulnerable to political capture, and represent a threat to judicial independence.<sup>157</sup> Although the judges in the higher judiciary are appointed

---

<sup>154</sup> Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1222 (1984).

<sup>155</sup> Stephen Gardbaum, *Comparative Political Process Theory*, 18 INT’L J. CONST. L. 1429 (2020).

<sup>156</sup> Anmol Jain, *Judicial Review of Legislative Process: Analyzing Calcutta High Court’s Decision in Ambika Roy*, INDIAN CONST. L. & PHIL. BLOG (Nov. 16, 2021), <https://indconlawphil.wordpress.com/2021/11/16/guest-post-judicial-review-of-legislative-process-analyzing-calcutta-high-courts-decision-in-ambika-roy/>.

<sup>157</sup> Gautam Bhatia, *Judicial Supremacy amid the Breakdown of Constitutional Conventions: What the Karnataka Controversy Tells Us About Our Parliamentary Democracy*, INDIAN CONST. L. & PHIL. BLOG (July 16, 2019), <https://indconlawphil.wordpress.com/2019/07/16/judicial-supremacy-amid-the-breakdown-of-constitutional-conventions-what-the-karnataka-controversy-tells-us-about-our-parliamentary-democracy/>.

by the judiciary itself, concerns of executive interference in the appointment of judges have been raised.<sup>158</sup>

We believe that depending on the judicial resolution of political conflicts makes us forget that the “*Constitution is more than ‘what judges say it is’*”.<sup>159</sup> As Jonathan L. Entin argues, “*excessive reliance upon the Court deceives us into thinking that these disputes are purely constitutional in nature and that only the Justices can resolve them*”.<sup>160</sup> An over-reliance on the judiciary to solve legislative failures diminishes the role of other political branches in interpreting and upholding the constitution. Furthermore, the question of constitutionality framed in either/or terms cannot often address the dubious nature of the action in question.<sup>161</sup> An act may not be unconstitutional, but it may still be violative of accepted norms and conventions of parliamentary conduct, which exist to restrain majoritarian tyranny.

In the absence of governing principles in the Indian Constitution, it is difficult to create a consistent and well-defined judicial standard of process review that would be able to promote democratic dialogue and a plurality of interests in Parliament. *First*, judicially developed criteria of process review in the absence of an explicit constitutional mandate are susceptible to arbitrary application, depending on the predisposition of the judge. While even substantive judicial review is subject to the predilections of the judge, the Indian Constitution provides a list of constitutionally recognised rights against which the constitutionality of a statute is to be assessed. *Second*, process review does not necessarily empower the legislature, it rather expands the power of the judiciary to intervene in the legislative process without any guarantee that it would necessarily stand in opposition to the dominant political opinion. Mark Tushnet, for instance, has called

---

<sup>158</sup> Parmod Kumar, *Government Interference in Judiciary: Senior Lawyers Echo Judge’s Concern*, BUSINESS STANDARD (Mar. 31, 2018), [https://www.business-standard.com/article/news-ians/government-interference-in-judiciary-senior-lawyers-echo-judge-s-concern-118033100201\\_1.html](https://www.business-standard.com/article/news-ians/government-interference-in-judiciary-senior-lawyers-echo-judge-s-concern-118033100201_1.html); Prannv Dhawan & Anmol Jain, *Strong Executive, Weak Courts: Collapsing Edifice of Judicial Independence*, THE LEAFLET (Oct. 10, 2019), <https://www.theleaflet.in/strong-executive-weak-courts-collapsing-edifice-of-judicial-independence-opinion-supreme-court-of-india/>.

<sup>159</sup> Jonathan L. Entin, *Separation of Powers, Political Branches and the Limits of Judicial Review*, 51 OHIO ST. L. J 175, 226 (1990).

<sup>160</sup> *Id.* at 176–177.

<sup>161</sup> *Id.*

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

judicial review a lot of “*noise around zero*” because judicial decisions do not often contradict dominant political positions.<sup>162</sup> In fact, a framework dependent on the enlargement of the judiciary’s powers fails to account for the majoritarian impulses of the judicial institution as well.<sup>163</sup>

The example of South Africa highlights that clearly laid out constitutional mandates protecting the opposition provide a framework against which the judiciary can prevent the majority party from trampling down on the rights of the opposition, as vindicated in *Oriani-Ambrosini*. If the power of the judiciary is to be augmented to enable process review, then safeguards and clarity need to be provided in the Indian Constitution itself to identify when and how the judiciary can exercise this power. Otherwise, process review will only be an unruly horse. For instance, in the Indian context, there is a lack of clarity on how substantive illegality should be interpreted to allow the Court to exercise its powers of process review since Article 122 bars the Court from interfering in matters of mere procedural irregularity. Previously, the Supreme Court<sup>164</sup> has used the violation of constitutional mandate or constitutional provisions as the touchstone of assessing whether the violation can be classified as the one suffering from substantive illegality or unconstitutionality. In fact, the decision of *Ashish Shelar*, which has been hailed for setting a strong precedent for process review, has muddied the doctrinal waters where the Supreme Court, in its bid to arrive at the correct outcome, sidestepped the previous precedents. The Court held that Rule 53, which allowed the period of suspension of Members of Legislative Assembly (“**MLAs**”) to be increased in a graded manner on each successive misconduct, carried a substantive stipulation

---

<sup>162</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 153 (1st ed. Princeton University Press 1999).

<sup>163</sup> Citizens Against Hate, *Courts amid Majoritarian Upsurge: Protector of Citizen’s Rights’ for Criticism of the Recent Decisions of the Courts Where they Failed to Protect Rights of Minorities and Pandered to Majoritarian Agenda*, in, MAJORITARIAN CONSOLIDATION: CHRONICLING THE UNDERMINING OF THE SOCIAL REPUBLIC (Mar. 1, 2020), <https://citizensagainsthate.org/wp-content/uploads/2020/04/CAH-Majoritarian-Consolidation.pdf>.

<sup>164</sup> Justice K. S. Puttaswamy v. Union of India, (2019) 1 SCC 1. In *Raja Ram Pal v. Hon’ble Speaker*, (2007) 3 SCC 184, it was observed in ¶ 398 that, “*in case gross illegality or violation of constitutional provisions is shown, the judicial review will not be inhibited in any manner by art. 122, or for that matter by art. 105.*”



that the power to suspend is not to be used for punishment but for the self-security of the House.

The maximum suspension that could be given was for the remainder of the session, but the MLAs were suspended for one year. The Court held that even if it cannot question the validity of the parliamentary proceeding on procedural irregularity, it can intervene if there is a violation of a substantive stipulation. Any suspension beyond the period contemplated by Rule 53 was arbitrary and violative of Articles 14 and 21 of the Indian Constitution. It also violates democratic values because the constituencies remained unrepresented for the period of suspension. While the Court attempted to make a case that Rule 53 presents a broader substantive stipulation regarding the working of Parliament, in effect, it's merely enforcing the parliamentary procedure. It is uncertain how subsequent cases would use this precedent and whether it will be deemed that the violation of parliamentary rules constitutes a violation of the constitutional mandate itself.

Moreover, in the absence of a shared constitutional understanding of opposition rights, the political branch may disobey or delay the implementation of court orders, making the judicial mechanism an inapt remedy to deal with political dysfunction. For instance, despite the order of the Supreme Court in *Keisham Meghachandra Singh* directing the Speaker to decide disqualification petitions under the Tenth Schedule of the Indian Constitution in three months, the Speaker did not make the decision within the stipulated time.<sup>165</sup> This happened despite the Supreme Court's rap on the knuckles of the office of Speaker for functioning in a partisan manner.

## CONCLUSION

The interests of various marginalised sections of society are politically represented in the Parliament. These representatives negotiate compromises, demand justifications and help hold the majority accountable. Strengthening of the opposition requires its institutionalisation through measures like recognising the office of the leader of the opposition, improving oversight mechanisms and preventing repeated violations of constitutional and parliamentary conventions by

---

<sup>165</sup> Jain, *supra* note 155.

## THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION

reforming the office of presiding officers. It may be argued that in the face of a powerful majority in the Parliament, the opposition may not be able to block the agendas of the ruling party, then whether there is any benefit in institutionalising the rights of the opposition. However, even with a limited democratic mandate, the opposition, as noted by the authors before, can enable public screening of the government's policies and laws. It is important to remember that in a democracy, the opposition can stand as a wall between the majority rule and the tyranny of the majority.

While providing a comprehensive list of opposition rights that must be incorporated in the Indian Constitution is outside the scope of this article; the thrust of the argument is that empowerment of the legislative process would result from empowering individual legislators and minorities in the Parliament, who would have the most incentive and ability to protect their rights as opposed to judicial intervention. However, in the absence of such a framework of opposition rights, various approaches to judicial review as discussed above may serve as an imperfect solution.

To clarify, a process review by the judiciary is acceptable if the standards for such review are laid down in the Indian Constitution. However, one must be wary of the judiciary developing its own criteria. We have witnessed how the current process review standard developed by the Supreme Court, *i.e.*, the substantive illegality or unconstitutionality of the parliamentary process, has failed to keep the majority party in check and has further resulted in different judicial interpretations, as is evident from the disagreements between the majority and minority opinions in *Justice KS Puttaswamy*.

One must remember that the Constitution is interpreted by different branches of the State that negotiate power allocation based on a set of governing principles derived from the Constitution. Thus, it is important to strengthen the opposition by constitutionally recognising its role and rights and improving oversight mechanisms.

**POLITICAL PROCESS FAILURE IN THE INDIAN  
PARLIAMENT: STUDYING ABUSE OF POWER BY THE  
CHAIR AND HOW IT CAN BE ADDRESSED**

---

**ANMOL JAIN<sup>1</sup>**

*Parliamentary deliberation is constantly declining in India, with several laws being passed in violation of due process. There are numerous reasons for this decline. This paper argues that one of the contributing factors is the abuse of power by the Chair of the two Houses of Parliament. The Constitution of India and the respective Conduct of Business Rules of the two Houses confer certain consequential powers upon the Chair, including the power to certify a bill as a money bill and to order a division of votes. This paper documents how the Chairpersons have functioned in a partisan manner, denying legislative due process to the opposition parties. It identifies two factors that enable such abuse: one, the constitutional design of the Chair that keeps the Chairpersons subservient to their political party; and two, the constitutional and parliamentary rules that confer finality upon the decisions of the Chair. Based on this study, this paper proposes certain changes in the constitutional design and internal checking mechanisms to secure the independence of the Chair. It also develops a theoretical framework for creating an external check in the form of judicial review, which could also be extended and employed as a general theory of judicial review of the legislative processes.*

*“In the whole set-up of parliamentary democracy, the Speaker is the only autocrat meaning thereby that his exercise of authority requires no previous consultation or concurrence of anybody and the authority is unchallengeable.”*

*-G.V. Mavalankar<sup>2</sup>*

---

\* Cite it as: Jain, *Political Process Failure in the Indian Parliament: Studying Abuse of Power by the Chair and How it can be Addressed*, 6(2) COMP. CONST. L. & ADMIN. L. J. 87 (2022).

<sup>1</sup> Anmol Jain is an advocate holding a B.A. LL.B. degree from the National Law University, Jodhpur. The author may be reached at <jainanmol23@gmail.com>.

\*\* I thank Dr. MR Madhavan, peer reviewers, editors and the participants of the National Seminar on Constitutional Law organised by the National Law University, Jodhpur for reading and sharing their valuable feedback on the earlier versions of this paper.

<sup>2</sup> G.V. Mavalankar, *The Office of the Speaker*, in SUBHASH C. KASHYAP (ED.), DADA SAHEB MAVALANKAR: FATHER OF LOK SABHA 153 (The Lok Sabha Secretariat 1989).

# POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

## INTRODUCTION

Indian democracy is under attack. Tarunabh Khaitan, in a celebrated but distressing paper, “*Killing a Constitution with a Thousand Cuts: Executive Aggrandisement and Party-state Fusion in India*”, has comprehensively documented how the current National Democratic Alliance (“**NDA**”) government has been incrementally laying the groundwork for an authoritarian rule in India.<sup>3</sup> Scholars such as Christophe Jaffrelot and Arvind Narrain have extensively explored how the Bharatiya Janata Party (“**BJP**”) and the larger Sangh Parivar have deployed the tool of institutional capture in this regard.<sup>4</sup> Internationally, several indices that measure the performance of democracy have identified this trend. The V-Dem Institute has classified India as an electoral autocracy in its Democracy Report 2021,<sup>5</sup> and The Economist’s Democracy Index 2020 dropped India’s ranking from the 27<sup>th</sup> position in 2014 to the 53<sup>rd</sup> position, citing “*democratic backsliding under the leadership of Narendra Modi*”.<sup>6</sup>

However, one aspect that has not been given adequate attention in these studies is how the government has, by taking advantage of its electoral majority, fast-paced the due process of lawmaking and effectively neutralised the Indian Parliament by curbing the extent and quality of parliamentary deliberation.<sup>7</sup> Debate and deliberation perform certain consequential functions in a democracy. These processes not only respect

---

<sup>3</sup> Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandisement and Party-state Fusion in India*, 14(1) L. & ETHICS HUM. RTS. 49 (2020); See also, Manoj Mate, *Constitutional Erosion and Challenges to Secular Democracy in India*, in MARK A. GRABER, SANFORD LEVINSON AND MARK TUSHNET (EDS.), CONSTITUTIONAL DEMOCRACY IN CRISIS (Oxford University Press 2018); M. RAJSHEKHAR, DESPITE THE STATE 1-11, 216-229 (Context 2021).

<sup>4</sup> CHRISTOPHE JAFFRELOT, MODI’S INDIA: HINDU NATIONALISM AND THE RISE OF ETHNIC DEMOCRACY (Context 2021); ARVIND NARRAIN, INDIA’S UNDECLARED EMERGENCY: CONSTITUTIONALISM AND THE POLITICS OF RESISTANCE (Context 2022).

<sup>5</sup> *Autocratization Turns Viral: Democracy Report 2021*, V-DEM INSTITUTE (Mar. 2021), [https://www.google.com/url?q=https://www.v-dem.net/static/website/files/dr/dr\\_2021.pdf&sa=D&source=docs&ust=1652016388131782&usg=AOvVaw0h75AVa5Swl9Mu2Fy5CG-w](https://www.google.com/url?q=https://www.v-dem.net/static/website/files/dr/dr_2021.pdf&sa=D&source=docs&ust=1652016388131782&usg=AOvVaw0h75AVa5Swl9Mu2Fy5CG-w).

<sup>6</sup> *Democracy Index 2020: In Sickness and In Health?*, THE ECONOMIST (2021), <https://pages.eiu.com/rs/753-RIQ-438/images/democracy-index-2020.pdf>.

<sup>7</sup> See Vikram Narayan & Jahnvi Sindhu, *A Case for Judicial Review of Legislative Process in India?*, 53(4) WORLD COMP. L. 358, 363-376 (2020).

the many-minds principle<sup>8</sup> but also require the legislators to articulate their reasons for taking a particular stand, thereby helping the legislature to constantly oversee the executive and demand accountability for its actions.<sup>9</sup> As Udit Bhatia notes, “*it is only through such justification that power can be considered legitimate, based on collective authority rather than brute force.*”<sup>10</sup> Therefore, if a procedural limitation on the lawmaking process in the form of parliamentary deliberation is curbed, it gives the executive a free pass to frame anti-democratic sub-constitutional laws without any effective legislative oversight.

This has been achieved in India by employing several tools, such as the abuse of the ordinance-making power, over-use of the anti-defection law, and virtual non-use of the power to refer bills to parliamentary committees.<sup>11</sup> This paper studies one such tool: partisan functioning by the Chairpersons of the two Houses of Parliament.

The Chairpersons of the two Houses of Parliament are constitutionally obligated to function independently and impartially to guarantee legislative due process.<sup>12</sup> This necessarily mandates that after being chosen to function as the Chair, the selected candidate must maintain sufficient distance from their political party, at least while performing the duties assigned to the Chair, and must not treat the ruling party in any manner different from the opposition parties. As G.V. Mavalankar, the first

---

<sup>8</sup> See Udit Bhatia, *What's the Party Like? The Status of the Political Party in Anti-Defection Jurisdictions*, 40 L. & PHIL. 8-11 (2021); See also, Bernard Grofman & Scott L. Feld, *Rousseau's General Will: A Condorcetian Perspective*, 82(2) AM. POL. SCI. REV. 567 (1988).

<sup>9</sup> See WILLIAM SELINGER, *PARLIAMENTARISM: FROM BURKE TO WEBER* 3-4 (Cambridge University Press 2019); JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 107-132 (The Floating Press 2009).

<sup>10</sup> Udit Bhatia, *Cracking the Whip: The Deliberative Costs of Strict Party Discipline*, 23(2) CRITICAL REV. INT'L SOC. & POL. PHIL. 254, 262 (2020).

<sup>11</sup> Anmol Jain, *Democratic Decay in India: Weaponizing the Constitution to Curb Parliamentary Deliberation*, (May 31, 2021) (unpublished manuscript) (on file with the author); *Functioning of 16<sup>th</sup> Lok Sabha* (2014-2019), PRS LEGISLATIVE RESEARCH, <https://www.prsindia.org/parliamenttrack/vital-stats/functioning-16th-lok-sabha-2014-2019> (on the declining role of the parliamentary committees in the law-making process in India).

<sup>12</sup> See PHILIP LAUNDY, *THE OFFICE OF SPEAKER* 7 (Cassell 1964); Philip Laundy, *The Speaker of the House of Commons*, 14 PARL. AFF. 72 (1960); See D.R. ELDER (ED.), *HOUSE OF REPRESENTATIVES PRACTICE* 167-169 (7th ed, Department of the House of Representatives 2018).

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

Speaker of Lok Sabha, observed, “*the success of parliamentary democracy depends not only on the impartiality of the presiding officer—the Speaker—but also on his courage and indifference to the favours or the frowns of the executive government.*”<sup>13</sup>

However, the actual performance of the Chair during the present regime seems to be quite far from this ideal. There have been several instances when the debate on the union budget was guillotined by the Lok Sabha Speaker,<sup>14</sup> a practice that allows the Speaker to put a bill to vote without any debate and discussion. Similarly, on several occasions, the Speaker has wrongfully certified a bill as a money bill<sup>15</sup> and has shown collusion with the ruling party to disallow discussions on controversial matters that can result in political setbacks.

In this backdrop, the next part of the paper discusses a few instances of abuse of power by the Chair of the two Houses of Parliament and shows how they have impacted parliamentary deliberation and the lawmaking process in India. Based on this, the paper explores the reasons that enable the Chair to function in an undemocratic and partisan manner, denying legislative due process to the opposition parties. The part titled ‘*Possible Solutions to Check Partisan Functioning by the Chair*’ forms the central thesis of this paper. After proposing certain constitutional design changes to secure the independence of the Chair, it develops a theoretical framework for creating external checks in the form of judicial review to check the powers of the Chair. The last part concludes the paper.

---

<sup>13</sup> G.V. Mavalankar, *On the Position of Speaker, No-Confidence Motions and Parliamentary Committees*, in SUBHASH C. KASHYAP (ED.), DADA SAHEB MAVALANKAR: FATHER OF LOK SABHA 147 (The Lok Sabha Secretariat 1989).

<sup>14</sup> *Guillotine on Budget Debate*, THE TELEGRAPH (Mar. 15, 2018), <https://www.telegraphindia.com/india/guillotine-on-budget-debate/cid/1338698>; *Union Budget 2021-22: Demands for Grants Guillotined, Appropriation Bill Passed*, BUSINESS LINE (Mar. 17, 2021): <https://www.thehindubusinessline.com/news/national/union-budget-2021-22-demands-for-grants-guillotined-appropriation-bill-passed/article34092142.ece>; Sana Ali & Ambar Sharma, *Budgets Routinely Passed Without Discussion and Scrutiny: Data Show*, BLOOMBERG QUINT (Feb. 28, 2020), <https://www.bloombergquint.com/politics/budgets-routinely-passed-without-discussion-and-scrutiny-data-show>.

<sup>15</sup> See *infra*, Part II.

## ABUSE OF POWER BY CHAIR

### A. WRONGFUL CERTIFICATION OF BILLS AS MONEY BILLS

The Constitution of India (“**Constitution**”) envisages a restricted role for the Rajya Sabha in matters related to money bills.<sup>16</sup> It provides that money bills can be introduced only in the Lok Sabha, and once transmitted to the Rajya Sabha, the Rajya Sabha is obligated to return the money bill to the Lok Sabha with its non-binding recommendation(s) “*within a period of fourteen days from the date of its receipt*”.<sup>17</sup> Therefore, the Speaker’s certification of a bill as a money bill has a definitive and destabilising impact on the principle of bicameralism and it nullifies the epistemic functions performed by the Rajya Sabha in the lawmaking process. It allows the ruling executive to bypass the requirement of seeking majority support for its legislative agenda in the Rajya Sabha and thus, save itself from deliberating, defending, and convincing the parliamentarians about the merits and needs of its proposed legislation.<sup>18</sup>

The ruling political party typically invokes such tactics when it lacks a majority in the Rajya Sabha, a situation that the present NDA government has recurrently exploited. The most common way adopted in this endeavour is by tacking unrelated matters with a bill concerning the subjects enlisted under Article 110 of the Constitution—taxation, financial obligations undertaken by the Government of India and Consolidated Fund of India—and passing the whole as a money bill in clear violation of the word “*only*” mentioned in Article 110.<sup>19</sup> One of the most prominent and highly debated examples of the same is the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (“**the Aadhaar Act**”).<sup>20</sup>

---

<sup>16</sup> INDIA CONST. art. 109.

<sup>17</sup> INDIA CONST. art. 109 cl. 2.

<sup>18</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1, ¶¶ 1094-1111 (per Chandrachud, J., dissenting opinion).

<sup>19</sup> INDIA CONST. art. 110 cl. 1 reads: “*For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely: - ...*”.

<sup>20</sup> Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, Act No. 18 of 2016.

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

The Aadhaar Act was enacted to create a biometric identity for Indian citizens. It entitles every citizen to obtain an Aadhaar number by submitting demographic and biometric information which could also be used as a proof of identity. The Preamble to the Aadhaar Act mentions that the law was introduced to ensure “*targeted delivery of subsidies, benefits and service, the expenditure for which is incurred from the Consolidated Fund of India ...*”.<sup>21</sup> *Prima facie*, it might seem that the Act falls under the domain of Article 110 as it pertains to extending benefits charged on the Consolidated Fund of India. However, a detailed study of the Act reveals that the government tacked several additional provisions along with, which virtually brings the Act out of the definition of a money bill.<sup>22</sup>

For instance, Section 57 of the Aadhaar Act authorises any individual (private included) to require the possession of the Aadhaar number as a means to establish identity “*for any purpose*”. The Aadhaar Act also empowers the Unique Identification Authority of India, the nodal authority established to perform the core functions outlined in the Act, to specify the manner of use of the Aadhaar number for “*any other purposes*” than those outlined in the Preamble.<sup>23</sup> It also includes provisions regarding security and confidentiality of the personal data so obtained and creates substantive offences and penalties regarding the same.<sup>24</sup> Therefore, read cumulatively, the Act creates an ecosystem wherein the possession of a biometric-based Aadhaar number could be made compulsory for availing any service, which might even have no connection with the Consolidated Fund of India.

The Aadhaar Act is not the only example of rampant misuse. Since 2014, the Speaker has certified, and in an unconstitutional fashion, many

---

<sup>21</sup> Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, Preamble.

<sup>22</sup> See Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14(1) L. & ETHICS OF HUM. RTS. 49, 65-66 (2020); M.R. Madhavan, *Name of The Bill*, THE INDIAN EXPRESS (Apr. 15, 2016), <https://indianexpress.com/article/opinion/columns/aadhaar-bill-money-bill-name-of-the-bill-2754080/>; Pratap Bhanu Mehta, *Privacy After Aadhaar*, THE INDIAN EXPRESS (Mar. 26, 2016), <https://indianexpress.com/article/opinion/columns/privacy-after-aadhaar-money-bill-rajya-sabha-upa/>.

<sup>23</sup> Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, § 23(h).

<sup>24</sup> *Id.* §§ 37-39.



contentious and politically heavyweight bills as money bills.<sup>25</sup> This could especially be seen during the NDA government's first term when the opposition parties enjoyed the majority in the Rajya Sabha.

For instance, the NDA government introduced the dubious electoral bond scheme, which allows a donor to anonymously donate an unlimited amount of funds to political parties by amending various laws through the Finance Act, 2017.<sup>26</sup> Under Part XIV, the Finance Act also amended several statutes that established tribunals in India,<sup>27</sup> majorly to *one*, abolish and merge some of the existing tribunals; and *two*, empower the central government to make rules regarding the conditions of service, qualification, appointment, term of office, salaries and allowances, resignation, and removal of the presiding officers and other members of such tribunals.<sup>28</sup>

When compared to the Aadhaar Act, non-money related matters that fall beyond the scope of Article 110 are explicitly tacked with this legislation.<sup>29</sup> The Speaker also certified bills that sought parliamentary approval of the demonetisation scheme as money bills<sup>30</sup> and made it easier for political parties to receive foreign funds.<sup>31</sup>

---

<sup>25</sup> For a list of the same, see Pratik Datta et al., *Judicial Review and Money Bills*, 10(2) NUJS L. REV. 75, 76-77 (2017); Devyani Chhetri, *As Justice Chandrachud Calls Aadhaar Law 'Unconstitutional', Government Increases Use of Controversial Short Cut*, BLOOMBERG QUINT (Oct. 3, 2018), <https://www.bloomberquint.com/law-and-policy/as-justice-chandrachud-calls-aadhaar-law-unconstitutional-government-increases-use-of-controversial-short-cut>.

<sup>26</sup> The Finance Act, 2017, Act No. 7 of 2017; Anjali Bhardwaj & Amrita Johri, *Ensuring Trust in the Electoral Process*, THE HINDU (Mar. 8, 2021), <https://www.thehindu.com/opinion/op-ed/ensuring-trust-in-the-electoral-process/article34022063.ece>.

<sup>27</sup> Finance Act, 2017, No. 7 of 2017, see Part IV.

<sup>28</sup> *Id.* § 184.

<sup>29</sup> See Suhrith Parthasarathy, *Trickeries of the Money Bill*, THE HINDU (Apr. 10, 2019), <https://www.thehindu.com/opinion/lead/trickeries-of-the-money-bill/article26799226.ece>.

<sup>30</sup> The Specified Bank Notes (Cessation of Liabilities) Act, 2017, Act No. 2 of 2017; *To Bypass RS, Demonetization to Come as A Money Bill*, DNA (Jan. 28, 2017), <https://www.dnaindia.com/india/report-to-bypass-rs-demonetization-to-come-as-money-bill-2296844>.

<sup>31</sup> PTI, *Lok Sabha Passes Bill to Exempt Political Parties from Scrutiny on Foreign Funds, Without Debate*, THE HINDU (Mar. 18, 2018), <https://www.thehindu.com/news/national/lok->

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

Despite its uses—or, to use a more appropriate term, “*abuses*”—the money bill route cannot be adopted for every legislation. For certain of them, it becomes beyond the bounds of possibility to establish that the “*core*” of the legislation concerns money matters, and other provisions are just incidental, which has been the line of argument of the government when these statutes were judicially challenged.<sup>32</sup> Such matters have to be deliberated and passed through the Rajya Sabha, and the NDA government has resorted to yet another mechanism to abuse the power of the Chairperson in its favour.

### **B. DENYING THE DEMAND FOR DIVISION OF VOTES**

On September 20, 2020, the Rajya Sabha was debating the contentious Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill, 2020<sup>33</sup> and the Farmers’ Produce Trade and Commerce (Promotion and Facilitation) Bill 2020 (“**Farm Bills**”).<sup>34</sup> When the Deputy Chairman proceeded to conduct voting on the said bills, members from the opposition parties moved several statutory resolutions, amendment motions and a resolution to refer the two bills for consideration to a select committee and demanded a division of votes for each of them before final voting on the bills.<sup>35</sup> The Rules of Procedure and Conduct of Business in the Council of States state that if the decision of the Chairman about the sense of the house on any matter is challenged, he is obligated to hold a division of votes.<sup>36</sup> Ignoring all such demands by claiming that the members demanding division were not present in their

---

sabha-passes-bill-to-exempt-political-parties-from-scrutiny-on-foreign-funds-without-debate/article23285764.ece.

<sup>32</sup> See Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1, ¶ 461.

<sup>33</sup> The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill, 2020, Bill No. 112 of 2020.

<sup>34</sup> The Farmers’ Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020, Bill No. 113 of 2020.

<sup>35</sup> Meenakshi Ray, *2 Farm Bills Clear Rajya Sabha Hurdle Amid Protests*, HINDUSTAN TIMES (Sept. 20, 2020), <https://www.hindustantimes.com/india-news/rajya-sabha-adjourned-after-chaos-opposition-members-demand-voting-on-farm-bills/story-jjHKGfpmSzq8E148zTD90I.html>.

<sup>36</sup> Rules of Procedure and Conduct of Business in the Council of States, Rules 252-254.

seats,<sup>37</sup> the Deputy Chairman rejected all the motions tabled by the opposition parties by way of voice votes. He proceeded with the final voting on the Farm Bills, which were deemed as passed by way of a voice vote amid chaos and in clear derogation of the Rules.<sup>38</sup> As the editor of a national daily, *The Hindu*, has noted:

“*[t]he explanation that members were not demanding a division from their seats and the house was not in order is disingenuous. To begin with, the disorder was triggered by the Chair’s refusal to order a division*”.<sup>39</sup>

The importance of the division of votes lies in the fact that it brings on record the standing of different political parties on an issue, and it comes with a possibility of embarrassment for the government in case any of its coalition partners votes against it.<sup>40</sup> There remains a possibility that the government lacked the support of enough members of the Rajya Sabha to clear the two bills. The government’s claim that it had enough numbers to face the division of votes<sup>41</sup> seems dubious as the Farm Bills were always

---

<sup>37</sup> Manoj CG, *Deputy Chairman Said Opposition Wasn’t in Seat When Asking for Division, RS TV Shows Otherwise*, THE INDIAN EXPRESS (Sept. 28, 2020), <https://indianexpress.com/article/india/dy-chairman-said-opp-wasnt-in-seat-when-asking-for-division-rs-tv-shows-otherwise-6617404/>; Ajoy Ashirwad Mahaprashasta, *RSTV Footage, MPs’ Accounts for Farm Bills Debate Paint Picture of RS Rules Violation*, THE WIRE (Sept. 27, 2020), <https://thewire.in/government/rajya-sabha-farm-bills-rules-violation-speaker>.

<sup>38</sup> Scroll Staff, *Parliament: Rajya Sabha Passes 2 Farm Bills, Opposition Alleges Demand for Division of Votes Denied*, SCROLL.IN (Sept. 20, 2020), <https://scroll.in/latest/973587/parliament-rajya-sabha-passes-2-farm-bills-opposition-alleges-demand-for-division-of-votes-denied>; Such practices are not a new phenomenon. Even in the past, Chairpersons have employed this controversial route to avoid actual counting of the numbers. *See also*, Varghese K George, *Voice Vote Valid Only When Nobody Questions It*, THE HINDU (Nov. 13, 2014), <https://www.thehindu.com/news/national/other-states/voice-vote-valid-only-when-nobody-questions-it/article6596275.ece>.

<sup>39</sup> Editorial, *A Point of Order: On Farm Bills*, THE HINDU (Sept. 22, 2020), <https://www.thehindu.com/opinion/editorial/a-point-of-order/article32663531.ece>.

<sup>40</sup> *See* Chakshu Roy, *Explained: Why Division of Votes Is Key To Healthy Parliamentary System*, FINANCIAL EXPRESS (June 28, 2019), <https://www.financialexpress.com/india-news/explained-why-division-of-votes-is-key-to-healthy-parliamentary-system/1621857/>.

<sup>41</sup> Ravi Singh, *Govt Ready to Discuss Farm Bills, Face Division of Votes if Suspended Members Express Regret: Naidu*, THE TRIBUNE (Sept. 22, 2020), <https://www.tribuneindia.com/news/nation/govt-ready-to-discuss-farm-bills-face-division-of-votes-if-suspended-members-express-regret-naidu-144942>.

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

contentious since the beginning, as evident from the fact that one of the union ministers had also resigned in protest.<sup>42</sup> It seems that the government had perhaps considered it better to utilise the Deputy Chairman's powers to avoid any division of votes and clear the bills by a voice vote.<sup>43</sup>

Such abuse of power is not only limited to Parliament. In February 2021, a similar incident occurred in the state of Karnataka. The ruling BJP government enjoys the majority in the Karnataka State Legislative Assembly but lacks it in the Legislative Council. When the Karnataka Prevention of Slaughter and Preservation of Cattle Bill, 2020, was brought up in the Legislative Council, the Chairperson did not allow a division of votes despite repetitive demands from the opposition parties and proceeded with conducting a voice vote. The Chairperson declared the bill as passed by taking a sense of the house by a voice vote amid uproar and chaos.<sup>44</sup> Interestingly, both—the Farm Bills and this Karnataka Act—were first introduced as ordinances. These instances evince how the impartiality and independence of the Chair have been compromised and enervated in the Indian legislative setting as the Chairpersons seem to be prioritising party patronage over ensuring legislative due process and independent functioning.<sup>45</sup>

---

<sup>42</sup> Special Correspondent, *Harsimrat Kaur Badal Quits Union Cabinet in Protest Against Two Agri Bills*, THE HINDU (Sept. 18, 2020), <https://www.thehindu.com/news/national/other-states/harsimrat-kaur-badal-quits-union-cabinet-in-protest-against-two-agri-bills/article61705356.ece>.

<sup>43</sup> See Anuj Bhuwania, *Voice Vote as Constitutional Subterfuge*, THE HINDU (Feb. 22, 2021), <https://www.thehindu.com/todays-paper/tp-opinion/voice-vote-as-constitutional-subterfuge/article33898899.ece>.

<sup>44</sup> Staff Reporter, *Anti-cow Slaughter Bill Passed in Karnataka*, THE HINDU (Feb. 8, 2021), <https://www.thehindu.com/news/national/karnataka/anti-cow-slaughter-bill-passed-in-karnataka/article33785877.ece>.

<sup>45</sup> Apart from the aforementioned abuse of power, India recently witnessed suspension of MPs/MLAs that greatly affects the culture of debate and deliberation in the House. However, in the author's opinion, this power has not been misused rampantly. Suspension can take place through two routes: by a motion passed in the House or by the Speaker/Chairman. Most of the incidents of suspensions have arisen by account of motions passed in the House, wherein the presiding officer does not have any power but to ask the suspended members to leave. Moreover, all these incidents have some connection to the unruly behaviour of the members of the opposition parties (the aspect of proportionality is definitely a debate that must take place). As this paper restricts itself

## FACTORS ENABLING THE ABUSE OF POWER BY THE CHAIR

In this part, I discuss two factors that have enabled the Chair to function in a partisan manner. *First*, the constitutional design of the Chair does not include mechanisms for ensuring its independence from the political party on whose ticket the Chairperson won the election to Parliament. *Second*, the decisions of the Chair have been accorded finality, with no internal as well as external checks on their power, a situation which changed only very recently.

### A. FLAWED CONSTITUTIONAL DESIGN

The Constitution and the respective parliamentary rules of the two Houses of Parliament provide the procedure for selecting the Chairpersons. Article 89 states that the Vice President of India shall function as the *ex-officio* Chairperson of the Rajya Sabha,<sup>46</sup> and the house shall choose a member of the Rajya Sabha to function as the Deputy Chairperson.<sup>47</sup> The method for the selection of the Deputy Chairperson has been detailed under Rule 7 of the Rajya Sabha Rules.<sup>48</sup> It provides that after seeking prior consent from a prospective candidate, any member of the Rajya Sabha could give a notice in writing to the Secretary-General of a motion that such other member be chosen as the Deputy Chairperson. After the notice is seconded by a third member of the Rajya Sabha, the member who issued the notice is allowed an opportunity to move the motion, and if the motion receives the support of the majority, it is deemed to be carried, and the candidate in whose favour the motion was raised is elected as the Deputy Chairperson. A

---

to instances wherein speakers have deliberately abused their power to fulfil the political agenda of the ruling party and the connection between the abuse of power and such fulfilment of political agenda is direct, the author has refrained from discussing suspension of members.

<sup>46</sup> INDIA CONST. art. 89 cl. 1.

<sup>47</sup> INDIA CONST. art. 89 cl. 2.

<sup>48</sup> Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha), R.7 (9th ed., 2016).

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

similar procedure is envisaged for choosing Chairpersons of the Lok Sabha.<sup>49</sup>

A few observations can be made about the selection of Chairpersons from studying this process. *One*, a legislator who is elected to Parliament on the ticket of a political party could be selected to function as the Chairperson without any pre-condition, such as resignation from the political party, to reflect their independence from such political party;<sup>50</sup> *two*, the only condition to be fulfilled is that such prospective candidate must give their consent to be chosen as the Chairperson which must be backed by one-third of the members; and *three*, as the selection is made through a process of election, it is generally certain that the candidate who is backed by the ruling party will be chosen to act as the Chairperson.<sup>51</sup>

Therefore, it would not be wrong to conclude that the procedure for the selection of the Speaker and the Deputy Speaker of the Lok Sabha and the Deputy Chairman of the Rajya Sabha is skewed in favour of the ruling party and the Constitution as well as the respective parliamentary rules do not envisage any checks to ensure that the Chairpersons do not function in a partisan manner.<sup>52</sup> Commenting on this structural imbalance, Mavalankar, in a speech delivered at the time of his election as the Speaker of the Lok Sabha in 1952, stated that:<sup>53</sup>

*“It is obviously not possible, in the present conditions of our political and parliamentary life, to remain as insular as the English Speaker, so far as political life goes ... He does not cease to be a politician merely by the fact of his being*

---

<sup>49</sup> INDIA CONST. art. 93; Rules of Procedure and Conduct of Business in Lok Sabha, R.7 & R.8 (16th ed., 2019).

<sup>50</sup> See Hari Chand, *Powers of the Speaker*, 16(1) J. INDIAN L. INST. 128, 132 (1974); Deepak Raju & Karthy Nair, *Quit or Be Disqualified: Does Continuing As Speaker Inviting Expulsion From One's Party Warrant Disqualification Under The Tenth Schedule?*, 2 NUJS L. REV. 127, 128 (2009).

<sup>51</sup> For an internal account of why the election of a party-member to the Offices of the Chairpersons is important, see SHAKTI SINHA, VAJPAYEE: THE YEARS THAT CHANGED INDIA 78-81 (Penguin Random House India 2020).

<sup>52</sup> See *Role of the Speaker*, OFFICE OF THE SPEAKER OF THE LOK SABHA, <https://speakerloksabha.nic.in/roleofthespeaker.asp>.

<sup>53</sup> M.N. KAUL & S.L. SHAKDHER (ANOOP MISHRA ED.), PRACTICE AND PROCEDURE OF PARLIAMENT 102-108 (7th ed., Lok Sabha Secretariat 2016).

*Speaker. We have yet to evolve political parties and healthy conventions about Speakership, the principle of which is that once a Speaker, he is not opposed by any party in the matter of his election, whether in the constituency or in the house, so long as he wishes to continue as a Speaker. To expect the Speaker to be out of politics altogether without the corresponding convention is perhaps entertaining contradictory expectations.*

*(emphasis added)*

The situation remains the same even today, which allows the government to use the Chair's powers either in its favour<sup>54</sup> or to subvert the opposition parties.<sup>55</sup>

## **B. CONFERMENT OF FINALITY UPON THE DECISIONS OF THE CHAIR**

The second factor which has enabled the abuse of power by the Chairpersons is the conferment of finality on their decisions. When it comes to money bills, Article 110(3) of the Constitution states that “*if any question arises whether a bill is a money bill or not, the decision of the Speaker of the House of the People thereon shall be final.*”<sup>56</sup>

It is interesting to note the developments in this provision in the Constituent Assembly. On October 27, 1947, the constitutional adviser to the Constituent Assembly of India, Sir Benegal Narsing Rau, placed a Draft Constitution before the Drafting Committee, which was prepared based on the preliminary discussions undertaken in the Constituent Assembly.<sup>57</sup> Article 75 of this draft pertained to money bills, and it provided under

---

<sup>54</sup> Chakshu Roy, *The Anti-Defection Law Has Failed. It Is Time to Scrap It*, HINDUSTAN TIMES (July 26, 2020), <https://www.hindustantimes.com/analysis/the-anti-defection-law-has-failed-it-is-time-to-scrap-it/story-BCTMzgsgLiqHrOxqSucCM.html>; Arvind Kurian Abraham, *Parliament in Decline? The Ball is in the Speaker's Court*, THE WIRE (Apr. 15, 2018), <https://thewire.in/government/parliament-in-decline-the-ball-in-the-speakers-court>; Pradip Phanjoubam, *The Gross Abuse of the Manipur Mandate*, THE HINDU (June 20, 2020), <https://www.thehindu.com/opinion/lead/the-gross-abuse-of-the-manipur-mandate/article31873142.ece>.

<sup>55</sup> Sujit Choudhry, *Opposition Rights in Parliamentary Democracies* (Unpublished manuscript), [https://www.law.nyu.edu/sites/default/files/Opposition%20Rights%20in%20Parliamentary%20Democracies%20Sept%202020%20draft\\_0.pdf](https://www.law.nyu.edu/sites/default/files/Opposition%20Rights%20in%20Parliamentary%20Democracies%20Sept%202020%20draft_0.pdf).

<sup>56</sup> INDIA CONST. art. 110 cl. 3.

<sup>57</sup> B. SHIVA RAO (ED.), THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS 3 (The Indian Institute of Public Administration 1967).

POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT:  
STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT  
CAN BE ADDRESSED

Clause (3) that “*if any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.*”<sup>58</sup>

Rau had also included marginal notes with almost all the provisions, mentioning the corresponding provisions from the Government of India Act, 1935 and certain foreign constitutions. With Article 75, Rau had mentioned Section 37 of the Government of India Act, 1935; Section 53, Chapter 1 of the Commonwealth of Australia Constitution Act, 1900; and Article 22 of the Constitution of Ireland, 1937.<sup>59</sup> Interestingly, of the three, only the Irish Constitution confers finality and conclusiveness upon the decision taken by the Speaker. However, this decision is still subject to internal review, which I will discuss later in this paper. This scheme of finality was followed without any changes in the Draft Constitution prepared by the Drafting Committee<sup>60</sup> and then adopted as a part of the Constitution as well. Therefore, the design chosen for India was completely different from that of other constitutional documents as referred to by the constitutional adviser. The finality conferred on the decision of the Speaker under the Constitution was made subject to no other authority internal to the Parliament, and this position remains the same even today.

Not only is there an absence of internal checks on the power of the Speaker to certify a bill as a money bill, but there was also an absence of external checks in the form of judicial review until very recently. Pratik Datta, Shefali Malhotra, and Shivangi Tyagi writing before the Supreme Court changed its opinion about judicial review of the Speaker’s certification have extensively discussed the jurisprudence of the Supreme Court on whether it has the power to review the certification of the Speaker of a bill as a money bill.<sup>61</sup> Based on their study of the Court’s decisions in *Mangalore Ganesh Beedi Works v. State of Mysore*,<sup>62</sup> *Mohd. Saeed Siddiqui v. State of Uttar*

---

<sup>58</sup> *Id.* at 32.

<sup>59</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1, ¶ 1062 (per Chandrachud, J.).

<sup>60</sup> DRAFT INDIA CONST. (1948) art. 90 cl. 3.

<sup>61</sup> Datta et al., *supra* note 25.

<sup>62</sup> *Mangalore Ganesh Beedi Works v. State of Mysore*, 1963 Supp (1) SCR 275. A constitution bench of the Supreme Court observed, though in obiter, that in light of Article 212, which prohibits the validity of any proceedings in a state legislature from being



*Pradesh*,<sup>63</sup> and *Yogendra Kumar Jaiswal v. State of Bihar*,<sup>64</sup> the authors concluded that “*the current legal position in India is that the certification of a bill as ‘money bill’ by the Speaker is beyond the judicial review powers of the Supreme Court*”.<sup>65</sup>

The authors trace the reason for this approach of the Court to its “*erroneous understanding of several provisions of the Constitution of India but also owing to a refusal to acknowledge the difference between ‘procedural irregularity’ and ‘substantive illegality’ that it has itself developed to check the abuse of legislative immunity*”.<sup>66</sup> In the opinion of the authors, judicial review of a wrongful certification of a bill as a money bill must be permitted as such wrongful certification constitutes substantive illegality and a “*breach of a cardinal constitutional provision*”,<sup>67</sup> and not just procedural irregularity, which is how the Court construed it.<sup>68</sup>

Therefore, the power of the Speaker to certify a bill as a money bill was absolute in the absence of any internal as well as external checks, which makes this office a hotbed for partisan decision-making. Similarly, when it

---

called in questions in courts, a law cannot be challenged on the grounds it offends Articles 197 to 199 and the procedure laid down in Article 202 of the Constitution.

<sup>63</sup> Mohd. Saeed Siddiqui v. State of Uttar Pradesh, (2014) 11 SCC 415. The Speaker of the Uttar Pradesh State Legislative Assembly certified a bill increasing the term of the Lokayuktas and Up-Lokayuktas as a Money Bill. Dismissing the challenge to such wrongful certification, the three-judge bench of the Supreme Court followed its decision in Mangalore Ganesh Beedi Works and held that the question of whether a bill is a Money Bill or not can be raised only in the State Legislative Assembly and not in courts.

<sup>64</sup> Yogendra Kumar Jaiswal v. State of Bihar, (2016) 3 SCC 183. The Speaker of the Orissa State Legislative Assembly certified a bill constituting special courts for speedy trial of cases involving allegations of accumulation of disproportionate amounts of assets and properties by persons holding high political and public offices as Money Bill. A two-judges bench of the Supreme Court, rejecting the challenge to the bill, held that wrongful certification of a bill as a Money Bill is mere irregularity of procedure and does not constitute substantive illegality.

<sup>65</sup> Datta et al., *supra* note 25.

<sup>66</sup> *Id.* at 102-103.

<sup>67</sup> For the Supreme Court’s jurisprudence on judicial review in case of procedural illegality, see *M.S.M. Sharma v. Sri Krishna Sinha*, AIR 1959 SC 395; *Powers, Privileges and Immunities of State Legislatures*, In re (Special Reference No. 1 of 1964), AIR 1965 SC 745, ¶ 62; *Ramdas Athawale (5) v. Union of India*, (2010) 4 SCC 1, ¶ 36; In the case of *Raja Ram Pal v. Lok Sabha*, (2007) 3 SCC 184, ¶ 386, it was observed: “*Applying the principle of ‘expressio unius est exclusio alterius’ (whatever has not been included has by implication been excluded), it is plain and clear that prohibition against examination on the touchstone of ‘irregularity of procedure’ does not make taboo judicial review on finding of illegality or unconstitutionality*”.

<sup>68</sup> See Mohd. Saeed Siddiqui v. State of Uttar Pradesh, (2014) 11 SCC 415, ¶ 37.

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

comes to deciding whether a division of votes must be allowed, even though the respective Lok Sabha<sup>69</sup> and Rajya Sabha Rules<sup>70</sup> provide that the Chairpersons must proceed for division of votes by different methods whenever the opinion of the Chairperson in relation to a voice vote is challenged, they create no redressal mechanism to challenge the decision of the Chairperson as to whether demand for the division was made or to challenge the legality of the outcome of such a process merely on the grounds this procedural lapse. This creates a possibility for abuse of the process by the Chairpersons, as we have seen above. In this background, the next part explores certain possible solutions that could be adopted to correct the situation and ensure independence in the functioning of the Chairpersons.

### **POSSIBLE SOLUTIONS TO CHECK PARTISAN FUNCTIONING BY THE CHAIR**

As the above discussion has shown, changes are required in three respects in an attempt to check the partisan functioning of the Chair. *One*, changes that isolate the Chairpersons from the clutches of the political party on whose ticket they were elected to the Parliament; *two*, changes which create internal checking mechanisms on the powers of the Chairpersons; *three*, changes which create external checking mechanisms in the form of judicial review on the powers of the Chairpersons. I discuss these *in seriatim* below.

#### **A. CONSTITUTIONAL AND INSTITUTIONAL DESIGN CHANGES**

Before any constitutional and institutional design changes could be mulled upon, certain fundamental facts about the position of Chairpersons need to be recollected. *First*, at the time of their election to the Parliament, the Chairpersons usually belong to a political party. *Second*, in most cases, legislators belonging to the ruling party or the ruling coalition are elected as the Chairpersons as they can function favourably.<sup>71</sup> *Third*, under the

---

<sup>69</sup> Rules of Procedure and Conduct of Business in Lok Sabha, R.367-367B (16th ed., 2019).

<sup>70</sup> Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha), R.252-254 (9th ed., 2016).

<sup>71</sup> M.R. Madhavan, *Parliament* in DEVESH KAPUR, PRATAP BHANU MEHTA AND MILAN VAISHNAV (ED.), RETHINKING PUBLIC INSTITUTIONS IN INDIA 79 (Oxford University Press 2017).

present constitutional framework, the Chairpersons continue their membership in their parent political party despite being elected as Chairpersons. *Fourth*, the Chairpersons need the support of their political party to seek tickets for the next election to Parliament. Read cumulatively, the present framework binds the Chairpersons tightly to their political party. As Sardar Hukum Singh, who has been a Speaker of the Lok Sabha, commented:<sup>72</sup>

*“The Speaker has to seek election every five years. To get himself elected, he must have the support of his party ... the ruling party on certain occasions expects some favours. If the Speaker agrees, then he must be charged with partiality. If he refuses, then next time there will be pressure in his party that he must be replaced. The Speaker cannot sever his connection absolutely from the party, as he has to seek its patronage again. As long as he maintains his association, or even simple membership of the party, there always remains a suspicion in the minds of the opposition that the presiding officer is partisan.”*

Therefore, the first step towards securing a relatively more independent and impartial Chair would be to undertake certain constitutional and institutional design changes. The first change in this regard could be in terms of the British parliamentary traditions, wherein the Speaker of the House of Commons, upon being elected as the Speaker, resigns from their political party.<sup>73</sup> Furthermore, to secure the future political ambitions of the Speaker, a political convention may be developed by way of agreement among the existing political parties providing that no candidate from any political party is fielded against the Speaker in the next elections.<sup>74</sup>

Previously, similar changes were also mooted by the Committee of Presiding Officers appointed at the 1967 conference of Presiding Officers, better known as the Page Conference after the name of its Chairperson V.S. Page, to explore possible conventions that could be adopted for better

---

<sup>72</sup> Sarkar Hukum Singh, *The Speaker in India*, 48 THE PARLIAMENTARIAN 9, 10 (1967), cited in Hari Chand, *Powers of the Speaker*, 16(1) J. INDIAN L. INST. 128, 132 (1974).

<sup>73</sup> *The Speaker of the House of Commons*, UK PARLIAMENT, <https://www.parliament.uk/globalassets/documents/commons-information-office/Speaker.pdf>.

<sup>74</sup> PHILIP LAUNDY, *PARLIAMENTS IN THE MODERN WORLD* 49-50 (Dartmouth Publishing Company 1989).

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

functioning of the legislature.<sup>75</sup> The Committee considered the position of the Chair and noted that the independence and impartiality of the Chairperson are indispensable conditions for the proper functioning of parliamentary democracy. It is important, the Committee observed, that upon being elected to the Chair, the Chairpersons would sever ties with their political party, and other political parties would ensure that the Chairpersons could seek re-election from their constituency without any contestation.<sup>76</sup> Similarly, writing in 1974, Prof. Hari Chand had also argued for similar design changes. After studying the British tradition and the suggestion regarding the creation of a special constituency of Parliamentary Hill, he concluded that it would be appropriate to follow the dual British traditions in India.<sup>77</sup> This would ensure that, on the one hand, the Chairpersons are not formally bound by the party directives and can independently render their functions, while on the other, they would not be reliant on any political party for continued membership of the Parliament.

This scheme is not entirely foreign to the current Indian constitutional framework. Paragraph 5 of the Tenth Schedule to the Constitution, which deals with the anti-defection law, saves the Chairpersons from immediate disqualification from the house if they resign from their respective political parties but do not join any other.<sup>78</sup>

However, it must be remembered that merely isolating the Chairpersons from their political party may not lead to an ideal situation. It is possible that given the majoritarian selection of the Chairpersons, the ruling party will field such a candidate who would be ideologically as well as politically committed to the ruling party. It is also possible that the ruling party might

---

<sup>75</sup> M.N. KAUL & S.L. SHAKDHER (ANOOP MISHRA ED.), PRACTICE AND PROCEDURE OF PARLIAMENT 106-17 (7th ed., Lok Sabha Secretariat 2016).

<sup>76</sup> *Id.*

<sup>77</sup> Hari Chand, *Powers of the Speaker*, 16(1) J. INDIAN L. INST. 128, 132-135 (1974). *But see* S.M. Sayeed, *Role of the Speaker of the U.P. Assembly – A Case Study of the Relationship Between the Speaker and the Assembly Since 1952*, 33(2) INDIAN J. POL. SCI. 218 (1972), where the author concluded that confidence of the legislators in the impartiality of the Speaker cannot be ensured merely by adopting the British traditions of leaving the Speaker's constituency uncontested and his resignation on being elected as the Speaker.

<sup>78</sup> INDIA CONST. sch. 10, ¶ 5.

not re-elect the same candidate again as the Chairperson if they had proven hostile in the last term. Therefore, unless most of the political parties agree to develop political conventions based on these norms, something which seems an unrealistic thought, given the present political climate, the only way to bring about these changes seems to be by constitutionally entrenching them. Moreover, unless such entrenchment is secured by the Constitution, there remains a possibility that a new government might exercise a simple majority to undo these changes. But why would a ruling party volunteer to bring such changes when in power? It might perhaps be the case that, considering an expected loss in the next election, the incumbent government might push for such changes to secure legislative due process while it sits in the opposition. This is only a speculative answer. There do not seem to be enough political incentives for the government to change the existing framework.

Therefore, constitutional and institutional design changes to secure an independent and non-partisan Chair seem to be a vulnerable proposition, at least when introduced as a sole-standing measure. Their successful introduction and continued implementation are based on multiple political considerations of the time in which they were first introduced and the future.<sup>79</sup> As Wojciech Sadurski has observed in the context of Poland, institutional design by itself, how so ever good it might be, is not sufficient “*to arrest the erosion of democracy and rule of law by strongly determined and socially popular autocrats*”.<sup>80</sup> Instead, for a constitutional democracy to function properly:<sup>81</sup>

*“Institutions must be underwritten by norms which are by-and-large shared, and by common understandings about what counts as a norm violation, even if formal legal rules are silent about it.... norms that supply the rules of behaviour cannot be captured by written rules constitutive of these institutions.”*

---

<sup>79</sup> See Vikram Narayan & Jahnvi Sindhu, *A Case for Judicial Review of Legislative Process in India?*, 53(4) WORLD COMP. L. 358, 379 (2020).

<sup>80</sup> Wojciech Sadurski, *On the Relative Irrelevance of Constitutional Design: Lessons from Poland*, Sydney Law School Legal Studies Research Paper Series, No. 19/34 (2019).

<sup>81</sup> *Id.*

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

These suggested changes must, therefore, be coupled with changes that additionally ensure internal as well as external checks on the exercise of power by the Chairpersons.

### **B. CREATING A NEW POWER SOURCE FOR CHECKING THE POWERS OF THE SPEAKER**

As discussed above, the Constitution and the respective parliamentary rules attach finality to the decisions of the Chairpersons. When it comes to the certification of a bill as a money bill, the constituent assembly debates highlight that the purpose of conferring such finality upon the certification of the speaker was not to make it a final determinative authority on money bills but only “*to prevent any controversy ‘about the matter outside the Lower House’.* Therefore, the finality conferred upon the decision of the Speaker as to whether a Bill is a Money Bill or not is aimed at avoiding any controversy on the issue in the Rajya Sabha and before the President”.<sup>82</sup> However, given the way this power has been abused in multiple instances, it is important to create sufficient internal checks. Otherwise, by claiming to avoid any controversy, the Speaker could sanction any bill as a money bill in direct violation of the constitutional text.

Let us consider the position in the United Kingdom (“UK”) and Ireland in this regard, as their legal framework for money bills is somewhat similar to India’s.

In the UK, Section 1 of the Parliament Act, 1911 states that whenever a money bill is sent to the House of Lords or presented to the Queen for assent, it must be endorsed with a certificate by the Speaker of the House of Commons to the effect that the said bill is a money bill.<sup>83</sup> Such a certificate is deemed to be conclusive for all purposes and cannot be questioned in any court of law.<sup>84</sup> However, to internally balance this absolute power of the Speaker, the 1911 Act further states that “*before giving his certificate the Speaker shall consult, if practicable, two members to be appointed from*

---

<sup>82</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1, ¶ 1069 (per Chandrachud, J.); Datta et al., *supra* note 25.

<sup>83</sup> Parliament Act 1911, 1 & 2 Geo. 5 c. 13, § 1(3).

<sup>84</sup>*Id.* § 3.

*the Chairmen's Panel at the beginning of each Session by the Committee of Selection*".<sup>85</sup> As this Committee and the Chairmen's Panel are generally bi-partisan, the British constitutional framework creates some form of internal checks on the power of the Speaker to certify a bill as a money bill.

The practice of certifying a bill as a money bill has largely remained uncontroversial in the UK. It has been observed that nearly half of the finance bills sent to the House of Lords since 1911 were not even certified as a money bill.<sup>86</sup> This is equally true for the practice of taking unrelated matters with finance bills. While the British parliamentary texts do not comment on the actions that the House of Lords might take to address its breach of privilege by way of tacking unrelated matters with money bills, the Standing Order No. 51 of the House of Lords do forbid such actions in regard to bills of aids and supplies.<sup>87</sup> Therefore, when the Finance Bill, 1976, which vested police powers with the tax inspectors in the form of powers to demand information and search premises, was certified as a money bill, a complaint was filed in the House of Lords challenging such tacking as unparliamentary and untenable in law. However, the Practice and Procedure Committee of the House of Lords rejected this allegation. In fact, the House of Lords has not invoked this Standing Order to reject any bill since 1807.<sup>88</sup>

The Irish Constitution creates a more comprehensive framework in this regard. Under Article 22, it provides that "*the Chairman of Dáil Éireann (the Lower House of the Irish Parliament) shall certify any Bill which, in his opinion, is a Money Bill to be a Money Bill, and his certificate shall, subject to the subsequent provisions of this section, be final and conclusive.*"<sup>89</sup> As such a certification impacts the deliberative function of the Upper House, Article 22 empowers the Seanad Éireann (the Upper House of the Irish Parliament) to pass a resolution at a sitting when not less than thirty members are present,

---

<sup>85</sup>*Id.* § 1(3).

<sup>86</sup> THOMAS ERSKINE MAY, ERSKINE MAY: PARLIAMENTARY PRACTICE, ¶ 37.31, (David Natzler et. al. eds., LexisNexis Butterworths 25th ed. 2019).

<sup>87</sup> The Standing Orders of the House of Lords Relating to Public Business, Standing Order No. 51 (*"the annexing of any clause or clauses to a bill of aid or supply, the matter of which is foreign to and different from the matter of the said bill of aid or supply, is unparliamentary and tends to the destruction of constitutional government."*).

<sup>88</sup> MAY, *supra* note 86.

<sup>89</sup> CONSTITUTION OF IRELAND 1937 art. 22 cl. 2(1°).

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

requesting the President to refer the question about whether the bill in question is a money bill to a Committee of Privilege.<sup>90</sup> Upon consultation with the Council of States, which is a special body constituted to aid and counsel the President,<sup>91</sup> if the President decides to accede to the said request, he appoints a Committee of Privilege consisting of an equal number of members from both the Houses of Parliament and a judge of the Supreme Court to act as the Chairman. Such appointments must be made after consultation with the Council of States.<sup>92</sup> The Committee so constituted must report its decision to the President within twenty-one days, and such a decision would be considered final and conclusive.<sup>93</sup> However, in case the President rejects the request of the Seanad Éireann or the Committee fails to submit its report within the given time frame of twenty-one days, the decision of the “*Chairman of Dáil Éireann shall stand confirmed*”.<sup>94</sup>

It is argued that India also needs to adopt a framework along the lines of the Irish Constitution. As the Indian President, unlike the Irish President,<sup>95</sup> is indirectly elected and is mandated to function with the aid and advice of the Council of Ministers,<sup>96</sup> perhaps the requirement of seeking presidential consent before a question about a money bill is referred to a select committee could be avoided. Instead, it could be envisaged that if the Rajya Sabha passes a resolution with the support of a majority of its members, or the Lok Sabha passes a resolution with the support of, say, twenty per cent of its members, then the question regarding the correctness of the Speaker’s certificate must be referred to a select committee constituted of the members of the Lok Sabha. This would institute a form of sub-majority rule, which enables the opposition parties to set the parliamentary agenda and “*force public accountability and transparency upon majorities.*”<sup>97</sup>

---

<sup>90</sup> CONSTITUTION OF IRELAND 1937 art. 22 cl. 2(2°).

<sup>91</sup> CONSTITUTION OF IRELAND 1937 art. 21.

<sup>92</sup> CONSTITUTION OF IRELAND 1937 art. 22 cl. 2(3°).

<sup>93</sup> CONSTITUTION OF IRELAND 1937 art. 22. cl. 2(4°)-(5°).

<sup>94</sup> CONSTITUTION OF IRELAND 1937 art. 22 cl. 2(6°).

<sup>95</sup> CONSTITUTION OF IRELAND 1937 art. 12 cl. 2.

<sup>96</sup> INDIA CONST. art. 74.

<sup>97</sup> Adrian Vermeule, *Submajority Rules: Forcing Accountability Upon Majorities*, 13(1) J. POL. PHIL. 74 (2005).



As Adrian Vermeule has argued, “*an institution that is committed to making final substantive decisions by majority or supermajority vote, for the standard reasons, might work better if minorities have the power to force accountability upon the majority*”.<sup>98</sup> The reason for the differential majority requirement in the two Houses of Parliament is based on the core functions of the two Houses and how they are elected. As a majority of members of the Lok Sabha would belong to the ruling/coalition, it would be ineffective to fix a fifty per cent majority requirement for passing such a resolution. A low threshold then not only ensures that opposition parties have an effective say in ensuring the proper functioning of the house, but it also ensures that the power of the Lok Sabha to decide on money matters, including whether a particular bill qualifies as a money bill, is not manipulated by the majoritarian executive.

As against Lok Sabha, the Rajya Sabha is a permanent body whose members are elected by the elected members of the state legislative assemblies. Therefore, it is only when a particular political party wins both the national election and a majority of state elections simultaneously for at least two terms that it can capture the Indian Parliament. Moreover, as the Rajya Sabha has been conferred a secondary role in matters mentioned under Article 110 of the Constitution, therefore, a higher threshold of fifty per cent majority must be met to seek a reference of the Speaker’s certification to the select committee of Lok Sabha.

The membership of this Committee could be based on equal representation of all political parties that have won, say, at least ten seats or a vote share of a minimum of three per cent. The maximum cap on membership could be seven members because it must be remembered that this committee is constituted only to deliberate upon the correctness of the Speaker’s certification and not to finally decide on something which must take into consideration the opinion of the entire house, for instance, passing any law.

Therefore, capping the membership to the seven biggest political parties would ensure that while all the power blocks of the sitting Lok Sabha are represented in the committee, its proceedings are not unnecessarily disrupted by members representing different and diverse interests. Moreover, the membership of the committee must be restricted to only the

---

<sup>98</sup> *Id.* at 79.

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

Lok Sabha members, and it should not be a joint parliamentary committee to respect the principle that the control over the money must be restricted to the directly elected house.<sup>99</sup> However, as Rajya Sabha's constitutional right to deliberate on each bill also gets impacted owing to the certification of a bill as a money bill, therefore, it would still be permitted to refer a question about the correctness of the Speaker's certification to the select committee of the Lok Sabha. This design change would ensure that both Rajya Sabha and the opposition parties are sufficiently empowered to check the abuse of power by a partisan Speaker.

However, despite such checks, the ruling party and its alliance partners might be the biggest gainers in a particular election by virtue of which they have the requisite number in the select committee to uphold the wrongful certification of a bill as a money bill by the Speaker. In such circumstances, the requirement of having an external check in the form of judicial review becomes imminent. The next section first discusses the changing jurisprudence of the Indian courts regarding judicial review of the decisions of the Speaker. It then develops a normative argument that could be employed by the courts to exercise jurisdiction over any matter arising out of the abuse of power by the Chairpersons.

### C. JUDICIAL REVIEW OF THE CHAIR'S DECISIONS

In Part 3 of the paper, we discussed how the Supreme Court had, in *Mangalore Ganesh Beedi Works v. State of Mysore*,<sup>100</sup> *Mohd. Saeed Siddiqui v. State of Uttar Pradesh*,<sup>101</sup> and *Yogendra Kumar Jaiswal v. State of Bihar*,<sup>102</sup> denied exercising jurisdiction over the Speaker's certification of a bill as a money bill by stating that any issues in this process would only constitute a procedural irregularity and not substantive illegality. A change in this approach of the Court started to happen in September 2018.

---

<sup>99</sup> B. SHIVA RAO, *THE FRAMING OF INDIA'S CONSTITUTION: A STUDY* 427 (The Indian Institute of Public Administration 1968) (“the general principle approved by the Constituent Assembly was that financial control over the executive would be exercised by the House of the People”).

<sup>100</sup> *Mangalore Ganesh Beedi Works v. State of Mysore*, 1963 Supp (1) SCR 275.

<sup>101</sup> *Mohd. Saeed Siddiqui v. State of Uttar Pradesh*, (2014) 11 SCC 415.

<sup>102</sup> *Yogendra Kumar Jaiswal v. State of Bihar*, (2016) 3 SCC 183.

The first sub-part of this section traces the development of this renewed approach towards judicial review of the Speaker's certification of bills as money bills. The second sub-part discusses how this renewed approach remains short of addressing all concerns arising from partisan functioning by the Chair and proposes changes to fill this gap.

### **Travelling from “Procedural Irregularity” to “Substantive Illegality”**

In *Justice K.S. Puttaswamy (Retd.) v. Union of India*,<sup>103</sup> while deciding on the constitutionality of the Aadhaar Act, two of the five judges of the Supreme Court dissented against these three decisions by stating that a wrongful certification by the Speaker constitutes illegality and a constitutional violation.<sup>104</sup>

Despite these opinions, as the majority did not comment on the question of whether a wrongful certification by the Speaker constitutes substantive illegality, the law remained unchanged.<sup>105</sup> However, Suhrith Parthasarathy has suggested that there were subtle and indirect indications in the majority opinion about the possibility of judicial review of the Speaker's certification.<sup>106</sup> In November 2019, this view was also endorsed by Justice Chandrachud in his separate opinion in *Rojer Mathew v. South Indian Bank Limited*,<sup>107</sup> wherein he noted that “[o]n an overall reading of the judgment of Sikri, J. it is not possible to accede to the submission of the learned Attorney that the issue of reviewability of the certificate of the Speaker is left at large by the decision of the majority”.<sup>108</sup>

---

<sup>103</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1.

<sup>104</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1, ¶ 901 (per Bhushan, J.) & ¶ 1092 (per Chandrachud, J.).

<sup>105</sup> For a detailed discussion, see Suhrith Parthasarathy, *The Aadhaar Judgment and the Constitution – III: On the Money Bill (Guest Post)*, INDIAN CONST. L. PHIL. BLOG (Oct. 1, 2018), <https://indconlawphil.wordpress.com/2018/10/01/the-aadhaar-judgment-and-the-constitution-iii-on-the-money-bill-guest-post/>.

<sup>106</sup> See Suhrith Parthasarathy, Guest Post: On Money Bills, INDIAN CONST. L. PHIL. BLOG (Apr. 1, 2019), [https://indconlawphil.wordpress.com/2019/04/01/guest-post-on-money-bills/?fbclid=IwAR0T7-8pZbme-sZaUCaMm-HgQA8ER\\_lwSZxIWU1GaMFGYw2Ve7mXCXeOV7g](https://indconlawphil.wordpress.com/2019/04/01/guest-post-on-money-bills/?fbclid=IwAR0T7-8pZbme-sZaUCaMm-HgQA8ER_lwSZxIWU1GaMFGYw2Ve7mXCXeOV7g).

<sup>107</sup> *Rojer Mathew v. South Indian Bank Limited*, (2020) 6 SCC 1.

<sup>108</sup> *Id.* ¶ 292 (per Chandrachud, J.).

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

In the same decision, the majority of the bench also settled the judicial opinion on this aspect. It held that “*it would hence be gainsaid that gross violations of the constitutional scheme would not be mere procedural irregularities and hence would be outside the limited ambit of immunity from judicial scrutiny under Article 122(1). In the case at hand, the jurisdiction of this Court is, hence, not barred*”.<sup>109</sup> With this opinion, the majority also overruled the Court’s previous decisions in *Mangalore Ganesh Beedi Works, Mohd. Saeed Siddiqui* and *Yogendra Kumar Jaiswal*.<sup>110</sup>

This decision of the Court had another significant impact. Until this decision, the majority of cases in which the Court had exercised jurisdiction, though limited, despite the fact that the decision of the constitutional authorities was deemed as final and conclusive, concerned either the exercise of judicial power or involved the aspect of the formation of an opinion based on legally sound evidence and reasons. For instance, in *Union of India v. Jyoti Prakash Mitter*, the Court held that it can examine the decision of the President on the determination of the age of a High Court Judge because “*the President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution*”.<sup>111</sup>

In *Union of India v. Tulsiram Patel*, the question before the Court was about the finality of the decision of the disciplinary authority holding that it was not reasonably practicable to hold an inquiry in the matters of dismissal, removal or reduction in rank of a civil servant employed under the Union or the State Government. It was held that the finality conferred upon such a decision under Article 311(3) of the Constitution is not binding upon the Court.<sup>112</sup>

In *State of Rajasthan v. Union of India*,<sup>113</sup> the question before the Court was related to the validity of a proclamation of state emergency under Article 356 of the Constitution. In this case, the Court upheld the judicial review of the Presidential order despite it being accorded finality. The Court held that though it might not enter the question of whether the satisfaction was

---

<sup>109</sup> *Id.* ¶ 99.

<sup>110</sup> *Id.* ¶ 103.

<sup>111</sup> *Union of India v. Jyoti Prakash Mitter*, (1985) 3 SCC 398, ¶ 32.

<sup>112</sup> *Union of India v. Tulsiram Patel*, (1985) 3 SCC 398.

<sup>113</sup> *State of Rajasthan v. Union of India*, (1977) 3 SCC 592.

improper or unjustified, it could still review the existence of satisfaction based on whether the reasons cited by the President are extraneous, irrelevant, based on illegal consideration and *mala fide* intentions.<sup>114</sup>

Similarly, in *Kiboto Holloban v. Zachillu*,<sup>115</sup> the question before the Court was about the constitutional validity of the anti-defection law and the finality of the decision of the Speaker in that respect. The Court noted that “*in the Indian constitutional dispensation the power to decide a disputed disqualification of an elected member of the House is not treated as a matter of privilege and the power to resolve such electoral disputes is judicial and not legislative in nature.*”<sup>116</sup> This allowed the Court to conclude that the decision of the Speaker regarding disqualification of a legislator on account of defection would be a decision in the exercise of judicial power and thus, subject to judicial review.<sup>117</sup> Therefore, by upholding its power of judicial review of the Speaker’s certification on the ground of substantive illegality in *Aadhaar* and *Roger Mathew*, the Court also held that finality attached to even a purely legislative decision could be made subject to judicial review if such legislative decision violates the Constitution. As Justice Chandrachud noted in his dissenting opinion in the *Aadhaar* judgment:<sup>118</sup>

*“A constitutional function is entrusted to the Speaker to certify a Bill as a Money Bill under Article 110(3), to which the attributes of a judicial power do not apply. Indeed, the power which is entrusted to the Speaker under Article 110(3) is integral to the legislative process. But, the fact that the authority which a constitutional functionary exercise is not of a judicial character is not sufficient to lead to the conclusion that a finality clause governing the exercise of that power makes it immune from judicial review. Where the entrustment of the power is subject to the due fulfilment of constitutional norms, the exercise of jurisdiction is amenable to judicial review, to the extent necessary to determine whether there has been a violation of a constitutional mandate.”*

*(emphasis added)*

---

<sup>114</sup> *Id.*

<sup>115</sup> *Kihoto Hollohan v. Zachillu*, 1992 Supp (2) SCC 651.

<sup>116</sup> *Id.* ¶ 88.

<sup>117</sup> *Id.* ¶ 111.

<sup>118</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1, ¶ 1075 (per Chandrachud, J., dissenting opinion).

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

Recently, the Calcutta High Court further expanded the scope of judicial review of legislative processes by including the violation of a constitutional convention<sup>119</sup> as a valid ground for review.<sup>120</sup> In *Ambika Roy v. The Hon'ble Speaker, West Bengal Legislative Assembly and Ors.*,<sup>121</sup> one of the questions before the High Court was whether it has the jurisdiction to hear a challenge to the appointment of Mukul Roy, a legislator who had de-facto defected from the BJP to the ruling All India Trinamool Congress, as the Chairperson of the Public Accounts Committee (“PAC”). While holding that the convention to appoint a legislator from the opposition party as the Chairperson of PAC has been ascribed the status of a constitutional convention, the Court observed that any violation of this convention would not be a “*case of procedural irregularities, which could debar this Court from entertaining the petition in terms of Article 212(1) of the Constitution of India. It is a case of blatant illegality*”.<sup>122</sup>

### Limits of Existing Jurisprudence on Judicial Review of Speaker's Decisions

Despite such expansion of jurisdiction by the Supreme Court and the Calcutta High Court, I argue that the courts have still kept the scope of enquiry vague and narrow. This expansion of jurisdiction has been limited

---

<sup>119</sup> The idea of constitutional convention as forwarded by Ivor Jennings has been adopted by the Indian judiciary. While discussing his works, the Supreme Court noted in *K. Lakshminarayanan v. Union of India*, (2020) 14 SCC 664, ¶¶ 62-64, “*Sir Ivor Jennings in his treatise has elaborately dealt with the conventions of the Constitution. While explaining the purpose of the convention, he states: ‘the short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal Constitution work; they keep it in touch with the growth of idea. ... As in the creation of law, the creation of a convention must be due to the reason of the thing because it accords with the prevailing political philosophy. It helps to make the democratic system operate; it enables the machinery of State to run more smoothly; and if it were not there, friction would result.’*”

<sup>120</sup> See Anmol Jain, *Guest Post: Judicial Review of Legislative Process – Analyzing Calcutta High Court's Decision in Ambika Roy*, INDIAN CONST. L. PHIL. BLOG (Nov. 16, 2021), <https://indconlawphil.wordpress.com/2021/11/16/guest-post-judicial-review-of-legislative-process-analyzing-calcutta-high-courts-decision-in-ambika-roy/>

<sup>121</sup> *Ambika Roy v. The Hon'ble Speaker, West Bengal Legislative Assembly and Ors.*, WPA (P) 213 of 2021 (Calcutta H.C.).

<sup>122</sup> *Ambika Roy v. The Hon'ble Speaker, West Bengal Legislative Assembly and Ors.*, WPA (P) 213 of 2021, ¶ 67 (Calcutta H.C.).

to the enquiry of “*violation of a constitutional mandate*” or a “*constitutional convention*”. There is not enough clarity about whether the courts would also include the “*violation of parliamentary rules*”, such as not ordering for division of votes despite express demands, within the purview of judicial review. As Article 122(1) of the Constitution states, “*the validity of any proceedings in Parliament shall not be called into question on the ground of any alleged irregularity of procedure*”.<sup>123</sup> The answer to this question, therefore, would be based on how the courts construe the violation of the parliamentary rule involved—whether it is construed as a procedural irregularity or substantive illegality, the determination of which is subject to judicial discretion as the evolving jurisprudence on judicial review of money bills shows.

Vikram Narayan and Jahnvi Sindhu have discussed a different approach to avoid the deployment of such discretionary methodology while deciding on the possibility of judicial review of legislative processes in India.<sup>124</sup> In this approach, they classify judicial review of legislative processes into direct and indirect forms of judicial review.<sup>125</sup> The direct form of judicial review takes place when the validity of a law is challenged solely on the ground that it was enacted without following the legislative due process.<sup>126</sup> In indirect judicial review, the court considers how the lawmaking process took place while enacting the law as one of the grounds while hearing a challenge on the substance of the law.<sup>127</sup> After tracing the international scholarship and jurisprudence on the judicial review of legislative processes, the authors argue:<sup>128</sup>

*“the manner in which the provisions [of the Indian Constitution] are structured suggests that the limits on judicial power provided for in Article 122 apply in respect of rules devised by the Houses themselves and not in respect of procedural rules entrenched in the Constitution or with respect to constitutional values.”*

---

<sup>123</sup> INDIA CONST. art. 122 cl. 1.

<sup>124</sup> Vikram Narayan & Jahnvi Sindhu, *A Case for Judicial Review of Legislative Process in India?*, 53(4) WORLD COMP. L. 358 (2020).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 383-384.

<sup>127</sup> *Id.* at 384-388.

<sup>128</sup> *Id.* at 391.

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

By highlighting the judicial differentiation between procedural irregularity and substantive illegality, the authors note:<sup>129</sup>

*“the Supreme Court has repeatedly relied on this distinction to hold that Article 122 precludes the judiciary from enforcing the rules made by the Houses of Parliament under Article 118, but does not affect the power of the Court to check violations of norms relating to the legislative process that may be traced back directly to the Constitution.”*

In this manner, the authors argue for the institutionalisation of a direct form of judicial review of the legislative process in India limited to the violation of those procedural aspects which are entrenched in the Constitution. They specifically note that in this approach, the court would not be examining the compliance of the parliamentary rules while enacting the impugned law.<sup>130</sup> Therefore, this approach is similar to the Supreme Court’s decision in *Aadhaar and Roger Mathew*.

The authors then discuss the applicability of the indirect form of judicial review of the legislative process in India by highlighting how it could “*add depth to two aspects of the Court’s rights jurisprudence: (1) how it chooses among the standards of review; and (2) how it applies the proportionality test.*”<sup>131</sup> Importantly, the authors suggest an expansion in the variety of due process violations that the Court could consider under this approach.<sup>132</sup>

*“By applying this version of indirect [judicial review of legislative process], the judiciary could take into consideration whether a law was actually debated, whether opposition voices were heard, whether the legislature relied on expert evidence and whether it scrutinised the impact of the law on fundamental rights. This sensitivity to the actual legislative process could help the Court distinguish between a law that has been enacted through a highly participative, open and deliberative process involving experts and one that has been rushed through by the political executive by flouting (non-constitutional) procedural rules that facilitate minimal deliberation.”*

*(Emphasis added)*

---

<sup>129</sup> *Id.* at 392.

<sup>130</sup> *Id.* at 394.

<sup>131</sup> *Id.* at 394-401.

<sup>132</sup> *Id.* at 396.



However, despite its expansiveness, this approach lacks what the direct approach allowed for—the nullification of law *only* on the ground of violation of due process in lawmaking.<sup>133</sup> Violation of a parliamentary rule becomes just one of the considerations before the court. Therefore, I argue that there is a need to adopt a broader theory for the determination of the existence and scope of judicial review of legislative processes. Such a theory must have at its foundation a normative argument that combines the expansiveness of the indirect approach with the assertiveness of the direct approach.

A recent work by Stephen Gardbaum titled *Comparative Political Process Theory*, which also inspired the title of this paper, provides some important insights for the development of such a broader theory.<sup>134</sup> Gardbaum’s comparative political process theory refines and further expands on the earlier work done by John Hart Ely on judicial review as a tool for the protection of representative democracy.<sup>135</sup> The theory broadens the types of political process malfunctions that a representative constitutional democracy might face on account of autocratic governance. As against Ely’s two-pronged understanding of political process failures—*one*, where the incumbent government attempts to entrench itself to avoid political change in power; and *two*, where the majority suppresses and “*systematically disadvantages*” the minority, Gardbaum includes “*all the processes by and through which public power is allocated, exercised, and held to account*” as part of his comparative political process theory.<sup>136</sup> Based on this understanding, he then develops a normative theory of judicial review and the specific manner in which the courts could secure the structures and processes of representative democracy, which gives central importance to the deliberative model of lawmaking.

One of the political process failures that Gardbaum discusses in this regard is the “*non-deliberativeness of the legislature*”, referring to situations wherein the executive-controlled legislature pushes through laws with “*insufficient notice*

---

<sup>133</sup> See *id.* at 396-397.

<sup>134</sup> Stephen Gardbaum, *Comparative Political Process Theory*, 18(4) INT’L J CONST. L. 1429 (2020).

<sup>135</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>136</sup> Gardbaum, *supra* note 134.

POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT:  
STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT  
CAN BE ADDRESSED

*or opportunity for deliberation*".<sup>137</sup> He specifically refers to certain developments in Poland,<sup>138</sup> the United States,<sup>139</sup> and Israel,<sup>140</sup> where governments fast-tracked the lawmaking process. This was done by outrightly reducing or restricting debate on the legislative proposals, excluding opposition parties from the process, refusing to publish expert opinions on the parliament's website, holding sessions beyond usual parliamentary timings, and providing insufficient time to the legislators to read legislative proposals et cetera. The actions of the Chairpersons of the two Houses of Indian Parliament, as we discussed above, squarely fall under this category. Wrongfully certifying a bill as a money bill, not at one but in multiple instances, was an attempt to curb the deliberative role of the Rajya Sabha and not allowing division of votes was another attempt towards fast-tracking the lawmaking process.

This also falls under another political process failure—the failure of the legislature to hold the executive accountable. After discussing the developments in South Africa, where the then President Jacob Zuma attempted to dominate and weaponize the National Assembly to absolve himself of the corruption charges, and the United Kingdom, where Prime Minister Boris Johnson advised the Queen to prorogue the Parliament at a crucial time immediately before Brexit, Gardbaum notes that “*either (likely partisan) unwillingness to undertake this task or inability to do so due to executive obstruction can rise to the level of a malfunction that may justify judicial, and other forms of, intervention*”.<sup>141</sup> The effect of denying division of votes is similar to an illegal prorogation of the house. In both situations, the legislature becomes

---

<sup>137</sup> *Id.*

<sup>138</sup> Wojciech Sadurski, *How Democracy Dies (In Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Legal Studies Research Paper 18/01 (2018); Wojciech Sadurski, *Constitutional Crisis in Poland*, in MARK A. GRABER, SANFORD LEVINSON AND MARK TUSHNET (EDS), *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 267-8 (Oxford University Press 2018); WOJCIECH SADURSKI, *POLAND'S CONSTITUTIONAL BREAKDOWN* 141 (Oxford University Press 2019).

<sup>139</sup> Gardbaum, *supra* note 134.

<sup>140</sup> Ittai Bar-Siman-Tov, *In Wake of Controversial Enactment Process of Trump's Tax Bill, Israeli SC Offers a Novel Approach to Regulating Omnibus Legislation*, I-CONNECT BLOG (Dec. 13, 2017), <http://www.iconnectblog.com/2017/12/in-wake-of-controversial-enactment-process-of-trumps-tax-bill-israeli-sc-offers-a-novel-approach-to-regulating-omnibus-legislation/>.

<sup>141</sup> Gardbaum, *supra* note 134.

unable to seek justifications from the executive for their actions, and legislative scrutiny is avoided. The executive is then empowered to proceed with its legislative proposals despite its failure to fulfil the due process of lawmaking and satisfy the legislature of the merits of such proposals. It strikes at the root of the values and norms of representative lawmaking.

To address such political process failures, Gardbaum suggests a ‘*pure procedural review*’, wherein “*the role of the courts is to protect the legislative-executive separation of powers and the distinct role of the legislature from executive overreach*”.<sup>142</sup> In this weak-form judicial review, the role of the courts would be limited to “*remediating and identifying political failures*”, leaving the exact outcomes for the other political branches to pursue.<sup>143</sup> The courts would not be indulging in judicial overreach but attempting to secure the fundamental principles of parliamentary democracy. Their decisions would be such that, without entering the domain of the other branches, they would aim toward “*protecting the integrity*” of the political processes.<sup>144</sup> Through this approach, the courts could ensure due process in the lawmaking process and extend external support to the executive-dominated Parliament in performing its fundamental functions, which might be unable to do so owing to its “*erosion, corruption or capture*”.<sup>145</sup> The adoption of this approach in India would justify judicial review of legislative functions without relying on the distinction between a substantive illegality and procedural irregularity. Any procedural lapse that impacts the participatory, deliberative and representative model of lawmaking would be subject to judicial review. Therefore, if the Deputy Chairman of Rajya Sabha wrongfully denies the division of votes on any motion put forth by the opposition despite demands for the same, it could be considered a political process failure and subject to judicial review. Any decision taken pursuant to such a defective process could be nullified.

A few decisions by foreign courts could provide important guidance in this regard. In 2017, the Israeli Supreme Court struck down a tax law stating that the law was passed in haste and the Knesset members were not provided with a real opportunity to understand, debate, discuss, formulate

---

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

and present their opinions on the bill.<sup>146</sup> The Court observed that this was a substantive defect, which went to the heart of the proceedings.<sup>147</sup> Therefore, in striking down the law, the aim of the Court was not to substantively comment on the specifics of the law but to uphold the principles and procedures of lawmaking which respect proper participation and deliberation on all legislative proposals.

Similarly, the United Kingdom Supreme Court, in *Cherry/Miller (No. 2)*, while holding the advice rendered by Prime Minister Johnson to the Queen to prorogue the house for five crucial weeks when “*the Parliament would have the opportunity to debate the Government’s overall approach to Brexit in the run-up to the EU Council*”<sup>148</sup> as “*unlawful*” and “*null and of no effect*”,<sup>149</sup> it noted that:<sup>150</sup>

“*a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justifications, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.*”

One can also witness the Indian judiciary exploring the possibilities of this approach. *Ashish Shelar v. The Maharashtra Legislative Assembly*<sup>151</sup> involved a challenge to a resolution of the Maharashtra Legislative Assembly suspending twelve Members of the Legislative Assembly for one year, citing their unruly behaviour. The Supreme Court quashed the resolution noting, *inter alia*, that long suspensions, particularly those extending beyond the ongoing session of the house, would:<sup>152</sup>

---

<sup>146</sup> *Quantinsky v. The Israeli Knesset*, HCJ 10042/16 (2017); See Yaniv Roznai, *Constitutional Paternalism: The Israeli Supreme Court as the Guardian of the Knesset*, 51(4) WORLD COMP. L. 417 (2018).

<sup>147</sup> See *Quantinsky v. Knesset* (Summary), Versa, <https://versa.cardozo.yu.edu/opinions/quintinsky-v-knesset-summary>.

<sup>148</sup> *R (on the application Miller) (Appellant) v. The Prime Minister (Respondent) and Cherry and others (Respondents) v. Advocate General for Scotland (Appellant)*, [2019] UKSC 41, ¶ 17 (on appeals from [2019] EWHC 2381 (QB) and [2019] CSIH 49).

<sup>149</sup> *Id.* ¶ 69.

<sup>150</sup> *Id.* ¶ 50.

<sup>151</sup> *Ashish Shelar v. The Maharashtra Legislative Assembly*, WP (Civil) No. 797 of 2021.

<sup>152</sup> *Id.* ¶ 48.

*“impact the democratic setup as a whole by permitting the thin majority government (coalition government) of the day to manipulate the numbers of the Opposition Party in the house in an undemocratic manner. Not only that, the Opposition will not be able to effectively participate in the discussion/debate in the house owing to the constant fear of its members being suspended for longer period. There would be no purposeful or meaningful debates but one in terrorem and as per the whims of the majority. That would not be healthy for the democracy as a whole.”*

As I have argued elsewhere, this approach of the Supreme Court has great potential. It emphasises that any legislative action that results in undemocratic processes impacts the due procedure of functioning of the legislature and creates impediments in the parliamentary form of governance could be subjected to judicial challenge and liable to be held unconstitutional.

It requires necessary compliance with parliamentary procedures if their non-observance leads to undemocratic results. If extended to its logical conclusion, this approach could justify courts in even questioning the validity of any substantive legislative action undertaken without observing due adherence to parliamentary procedures.<sup>153</sup>

These decisions and the political process theory argue that the parliamentary lawmaking procedure is equally important as the substantive content of the law. If the executive is allowed a free pass to manipulate the independent Chair of the two Houses of Indian Parliament, the only casualty would be the deliberative function that the legislature performs and the ability to check and seek justifications from the executive. It would be tantamount to the capture of the legislature by the executive. The independence of the Parliament is equally important as the independence of other institutions, such as the judiciary and the electoral commissions.

If the legislative process is compromised, it will provide a frictionless opportunity for the executive to push any law without respecting the

---

<sup>153</sup> See for a detailed analysis of the Supreme Court’s decision, Anmol Jain, *Judicial Review of the Suspension of MLAs by the House: Another Step Towards the Political Process Doctrine*, INDIAN CONST. L. & PHIL. BLOG (Feb. 5, 2022), <https://indconlawphil.wordpress.com/2022/02/05/guest-post-judicial-review-of-the-suspension-of-mlas-by-the-house-another-step-towards-the-political-process-doctrine/>.

## POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED

representative model of lawmaking. Therefore, any legislative action which inhibits the due process of lawmaking must be subjected to judicial review. The fact that the violation involved is that of a parliamentary provision must not deter the courts from holding such a violation illegal. This kind of judicial review would be weak in the sense that it would not be authoritatively commenting on the substantive interpretation of the law or the question of what the law *ought to be*. However, this would necessarily strengthen the institutions to perform their fundamental duties without any executive interference.<sup>154</sup>

### CONCLUSION

Democratic backsliding in India is happening across multiple institutions.<sup>155</sup> The way the current NDA government is functioning in India has exposed multiple vulnerabilities of the existing Indian constitutional framework and depicted how the absence of a proper constitutional design could act as an enabler of authoritarianism. Design gaps allow would-be autocrats to pursue their authoritarian projects and entrench themselves in the state apparatus by institutional capture without engaging in any overt constitutional change or replacement. This also makes their identification as autocrats difficult.

The Chair of the two Houses of Parliament is one such instance of institutional capture. The functioning of the Chairpersons has been controversial for some time now, and as the paper has shown, the executive has successfully compromised their independence with the support of a defective institutional design. It has contributed to the decline in the quality and extent of parliamentary deliberation and has denied legislative due process to the opposition parties. It manifests the concerns of G.V.

---

<sup>154</sup> See also, *Democratic Alliance v. Speaker of the National Assembly and Others*, (CCT 143/15; CCT 171/15) [2016] ZACC 11 (Mar. 31, 2016); *Economic Freedom Fighters and Others v. Speaker of the National Assembly and Another*, (CCT 76/17) [2017] ZACC 47 (Dec. 29, 2017); *Doctors for Life International v. Speaker of the National Assembly and Ors.*, (CCT 12/05) [2006] ZACC 11 (Aug. 17, 2006).

<sup>155</sup> Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14(1) L. & ETHICS OF HUM. RTS. 49 (2020).

Mavalankar and reinforces his urgency to isolate the Chairperson from their parent political parties.

Against this backdrop, the paper suggests a comprehensive overhauling of the extant design and power framework of the Chair of the two Houses of Parliament. The amendments, if implemented and respected across political parties as part of political conventions, would set in motion a transition of the Chair from a partisan office to an independent one. The idea of calling a select multi-partisan parliamentary committee to rule on the correctness of the Speaker's decisions would not act as a check against misuse of power by the Speaker but also create a first-level balancing authority within the institution of Parliament. An expanded idea of judicial review that recognises the jurisdiction of the courts to entertain matters involving a violation of legislative processes that are fundamental to lawmaking would establish a second-level and external check on the powers of the Chair.

Indeed, the ultimate functioning of the Chair and its respect for the due process of lawmaking depends on the people who adorn the Chair, but as the partisan functioning has its roots in the flawed design, it is hoped that amendments in the existing constitutional framework would nudge the Chair to transcend self-interested party politics. The adoption of the comprehensive package of suggestions as discussed above is, therefore, imminent.

**ANALYSING THE INVISIBLE: THE CONSTITUENT  
ASSEMBLY AND INDIA'S TRYST WITH THE  
REPRESENTATION OF MARGINALISED MUSLIMS**

---

**MUSTAFA RAJKOTWALA<sup>1</sup> & TEJAS B. NAIK<sup>2</sup>**

*In the Indian subcontinent, caste-based discrimination has been observed as a corporeal experience, irrespective of religious affiliations. Although the Indian Muslim community is perceived to be homogenous in nature, there exist caste-based segregations on horizontal and vertical lines. Referred to as Pasmada Muslims—the 'lower' caste Muslims not only face oppression from the power holding groups within the religion's structure but have been systemically denied social, political and economic opportunities across decades—even though they make up for nearly eighty-five per cent of the Muslim population. The lack of representation in State institutions and their lack of political power make them a more vulnerable section in the communal atmosphere of the country that faces social and economic discrimination. This paper aims at addressing the oppression and deprivations faced by marginalized sections of the Indian Muslim community, tracing the discourse from the Constituent Assembly debates to political movements in independent India across decades. Furthermore, judicial and policy developments have been discussed, with suggestions for revisiting the current reservation schemes in India in order to make them more inclusive and effective for the marginalized Muslims in India.*

**INTRODUCTION**

The Indian population consists of different religious groups, the most prominent being Hindus and Muslims, in terms of population.<sup>3</sup> While the Muslim community, being a minority, faces oppression and deprivation at

---

\* Cite it as: Rajkotwala & Naik, *Analysing the Invisible: The Constituent Assembly and Independent India's Tryst with the Representation of Marginalized Muslims*, 6(2) COMP. CONST. L. & ADMIN. L. J. 124 (2022).

<sup>1</sup> Mustafa Rajkotwala is a fourth year student at NALSAR University of Law, Hyderabad. The author may be reached at <mustafa.rajkotwala21@gmail.com>.

<sup>2</sup> Tejas B. Naik is a fourth year student at NALSAR University of Law, Hyderabad. The author may be reached at <tejasbnaik1999@gmail.com>.

<sup>3</sup> Press release, RGI releases Census 2011 data on Population by Religious Communities, PRESS INFORMATION BUREAU (Aug. 25, 2015), <https://pib.gov.in/newsite/printrelease.aspx?relid=126326>.



## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

the hands of the majority,<sup>4</sup> the crisis of democracy in India, by most, is rooted in a communal issue between the Hindus and Muslims.<sup>5</sup> However, there is a deeper, internal division within the Muslim community, as there is in the Hindu community, on the basis of caste hierarchies, which are invisibilised from mainstream discourse.<sup>6</sup> Although Islam mentions the notion of equality amongst its followers and prohibits any segregation on the basis of any societal constructs—there exists a social stratification and discrimination amongst the members of the community which emanates from caste and racial divisions.<sup>7</sup> Several scholars and researchers have opined that caste-based segregations in the Indian subcontinent are a corporeal experience, including socio-economic segregation, deep-rooted within the notions of purity and racial superiority.<sup>8</sup>

In the course of drafting the Indian Constitution (“**Constitution**”), the Constituent Assembly (“**Assembly**”) conceptualised a society wherein differences based on identity markers such as caste, creed and religion, among others, do not exist.<sup>9</sup> This hinged on the creation of a homogeneous community. In this light, they did not permit mechanisms of representation, such as separate electorates and religious reservations, to prevent the country from “*disintegrating*”.<sup>10</sup> Contrary to those aspirations, it can be argued that our country has today paved the way for the “*othering*” of minorities, including *Pasmanda* Muslims, in almost all spheres of growth and development. These marred aspirations have not only excluded representation-based discourse of socio-political minorities but have also significantly crushed their human dignity, leaving little to no scope for any

---

<sup>4</sup> Zoya Hasan, *Muslims and the Politics of Discrimination in India*, in *THE EMPIRE OF DISGUST: PREJUDICE, DISCRIMINATION, AND POLICY IN INDIA AND THE US* 304 (Zoya Hasan et al eds., Oxford University Press 2018).

<sup>5</sup> Sumit Ganguly, *The Crisis of Indian Secularism*, 14 *J. DEMOCRACY* 11 (2003).

<sup>6</sup> ALAM FALAHI, *HINDUSTAN MEIN JAAT PAT AUR MUSALMAN* (CASTE SYSTEM IN INDIA AND THE MUSLIMS) 392 (Al Qazi 2007).

<sup>7</sup> A. R. Momin, *Review of Muslim Caste: Theory and Practice*, 10 *ECON. & POL. WKLY.* 580 (1975).

<sup>8</sup> Hasan, *supra* note 4.

<sup>9</sup> Simona Vittorini, *Representing the Nation: Competing Symbolic Repertoires in India* (Oct. 2006) (published PHD dissertation, School of Oriental and African Studies, University of London), <https://core.ac.uk/download/pdf/161528898.pdf>.

<sup>10</sup> Shefali Jha, *Secularism in the Constituent Assembly Debates, 1946-1950*, 37 *ECON. & POL. WKLY.* 3175, 3175–80 (2002).

social revolution.<sup>11</sup> While caste has been acknowledged as a reality in Hindu society, its existence among Muslims has not been meaningfully engaged with, in civil and political discourses.<sup>12</sup> The inequalities that exist in the Indian subcontinent primarily hinge on social structures of caste and patriarchy, and one of the most powerful tools to negotiate for these inequalities is adequate representation, for and among all communities.<sup>13</sup> This representation must account for socio-political and economic power that communities enjoy and try to balance inequities within the structure of the State, which bears all the responsibility to uphold the promises made in the Constitution.

This paper attempts to deconstruct the idea of a homogenous Muslim community in the Indian subcontinent and shed light on the socio-political factors that have deprived *Pasmanda* Muslims of their representation and rights in the contemporary political space. To understand the context of this disadvantage in the various political and constitutional discourses, we will look at the Constitution makers' outlook on the caste system within the Muslim community and deliberations within the Assembly to ensure adequate representation. We place our focus on identifying prejudices in the Assembly debates and discussing them in the context of representation of these communities, especially the *Pasmandas*.

*First*, we shall analyse the Momin Conference<sup>14</sup> and its effects on the Assembly to better understand aspects of oppression faced within the Muslim community left unaddressed by the State. *Second*, we shall examine relevant statutes, legislative developments, judicial precedents and political movements surrounding the representation and rights of the Muslim community in India. Subsequently, we shall conclude the paper by exploring solutions within the framework of the Constitution to realise both—dignity to the people of India and a voice for Muslims that are marginalised in public tranquillity and political spaces.

---

<sup>11</sup> Santosh Rai, *Muslim Weavers' Politics in Early 20th Century Northern India*, 47 ECON. & POL. WKLY. 63, 61-70 (2012).

<sup>12</sup> *Id.*

<sup>13</sup> Kanchan Chandra, *Caste, Representation, and Enduring Inequality*, 115 CURRENT HISTORY 150 (2016).

<sup>14</sup> Santosh Rai, *Formation of a Colonial Identity: The Momin Ansars in Early Twentieth Century Northern India*, 67 PROCEEDINGS OF THE INDIAN HISTORY CONGRESS 563 (2006).

ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY  
AND INDIA'S TRYST WITH THE REPRESENTATION OF  
MARGINALISED MUSLIMS

**PASMANDAS WITHIN THE MUSLIM COMMUNITY**

Socio-economic positions of communities within the Muslim community must be engaged with when we are to analyse the extent of oppression faced by them. These segregations amongst Indian Muslims affect interactions such as marriages, access to education and economic opportunity.<sup>15</sup>

**A. CASTE HIERARCHIES WITHIN THE INDIAN MUSLIM COMMUNITY**

In terms of categories, “*Pasmanda*” is an overarching term that includes Dalit-Muslims, Backward-Muslims, and Adivasi-Muslims.<sup>16</sup> *Pasmanda* has a family resemblance to *Bahujan*, which includes Scheduled Castes (“**SCs**”), Scheduled Tribes (“**STs**”) and Other Backward Classes (“**OBCs**”) belonging to the Hindu tradition.<sup>17</sup> The principle of graded inequality, of course, works across *Bahujan/Pasmanda* communities. The caste system in Islam can be manifested through a division of three main categories, coupled with hundreds of sub-categories referred to as *Biradaris* (literally, neighbourhoods).<sup>18</sup>

At the top of this hierarchical chain are the *Ashraf* Muslims, whose origins trace to western or central Asia (this would include *Syed, Sheikh, Mughal, Pathan*, et cetera or native Hindu upper-caste converts like *Rangad* or Muslim *Rajput, Taga* or *Tyagi* Muslims, *Garhe* or *Gaur* Muslims, et cetera). At the lower rung of the hierarchy lie *Ajlaf* (backward Muslims) and *Arzal* (Dalit Muslims). As a whole, the *Syed Biradari* are placed on a high pedestal, with their status identical to that of Brahmins in Hinduism.<sup>19</sup> Similar to Brahminism, the ideology of social discrimination and inequality within the Muslim community has been labelled as “*Syedism*”.<sup>20</sup> The upper-caste

---

<sup>15</sup> Sachar Committee, *Social, Economic and Educational Status of the Muslim Community of India: A Report*, MINISTRY OF MINORITY AFFAIRS 192 (2006), [https://www.minorityaffairs.gov.in/sites/default/files/sachar\\_comm.pdf](https://www.minorityaffairs.gov.in/sites/default/files/sachar_comm.pdf).

<sup>16</sup> Rai, *supra* note 11.

<sup>17</sup> Irfan Habib, *Indo-Islamic Thought and Issues of Religious Co-existence*, in HANDBOOK OF MUSLIMS IN INDIA: EMPIRICAL AND POLICY PERSPECTIVE 28 (Rakesh Basan, Abusaleh Shariff eds. Oxford University Press 2010).

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

<sup>19</sup> Rai, *supra* note 11.

<sup>20</sup> Khalid Anis Ansari, *Rethinking the Pasmanda Movement*, 44 ECON. & POL. WKLY. 8 (2009).

Muslims make up only fifteen per cent of the entire Muslim community—the *Pasmanda* Muslims encompass a whopping eighty five per cent of the total Indian Muslim population.<sup>21</sup>

## B. DISCOURSE ON RIGHTS OF PASMANDA MUSLIMS

The voices for reform could be found in how *julahas*, a community of weavers, who are generally lower caste Hindus, had converted to Islam.<sup>22</sup> The name *julaha* carries with it caste connotations, which demarcate the social position of these lower castes *vis-à-vis* the upper castes.<sup>23</sup> The “higher” caste positions, which include Sheikhs, Pathans, *et cetera*, control most resources and have structurally deprived *Pasmanda* Muslims access to the same.<sup>24</sup> To counter the caste construct associated with the name *julaha*, the community took up the name *Momin Ansar* or *Shiekh Ansar* (*Ansar*: helper of the prophet; *Momin*: faithful).

The organisation of the community formally started from Calcutta in 1914 with *Falah-ul-Momineen*.<sup>25</sup> In 1926, the All India *Jamait-ul-Momineen*, also known as the All India Momin Conference, was formed for the social, economic and cultural upliftment of communities like the *Momin Ansars*.<sup>26</sup> The conference in no way questioned or opposed Islam itself, but it was an assertion in response to the organisations of the elite and *upper* castes.<sup>27</sup> Demands, such as the representation of the depressed castes in the Haj committee and with a population of around four crore out of the total seven crore Muslims, representation proportional to the population of these communities, were taken up by the conference.<sup>28</sup> The Muslim League was popularly seen as an upper caste organisation and the population from the depressed classes often tilted towards the Indian National Congress<sup>29</sup>—

---

<sup>21</sup> *Id.*

<sup>22</sup> Rai, *supra* note 11.

<sup>23</sup> Sanobar Umar, *The Identity of Language and the Language of Erasure: Urdu and the Racialized-Decastification of the “Backward Musalmaan in India”*, 1 CASTE GLOBAL J. ON SOC. EXCLUSION 175 (2020).

<sup>24</sup> Rai, *supra* note 11.

<sup>25</sup> *Id.*

<sup>26</sup> Rai, *supra* note 14.

<sup>27</sup> *Id.* at 565.

<sup>28</sup> *Id.* at 569.

<sup>29</sup> *Id.*

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

with communal rhetoric taking centre stage in the discourse of representation in the country and the absence of political discourse of depressed classes, especially among Muslims in the subcontinent.<sup>30</sup> The All India Momin Conference failed to back their claims of a large population because the Census Reports<sup>31</sup> rendered the community a minority. It is believed that many did not reveal their caste identities, as they wanted to evade the status it conferred.<sup>32</sup>

The prominent voices of the Assembly included the likes of Jawaharlal Nehru, Maulana Abul Kalam Azad, Sardar Vallabhbhai Patel, Rajendra Prasad, and K.M. Munshi, among others, who stood to form a nation that did not allow for violence, especially like the kind that erupted post-partition.<sup>33</sup> However, they did not engage with questions on the livelihood of marginalized communities, which had been on the receiving end of the communal violence.<sup>34</sup> There is no record<sup>35</sup> of any mechanisms framed to spot systemic inequities that *Pasmanda* Muslims faced due to displacement and violence. The discussion on the representation of Muslims cannot be limited to Hindu-Muslim prejudices.<sup>36</sup> The actual situation on the ground cannot be articulated, unless we look at the effect of the control exercised by these dominant voices, both, within and outside the Assembly.

### REVISITING THE CONSTITUENT ASSEMBLY DEBATES

The Constitution bats on an expansive conceptualisation of “*disadvantage*” (historical and otherwise), and the Assembly debates ground this understanding in the existence of various communities in our country.<sup>37</sup>

---

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

<sup>31</sup> *Id.* at 567.

<sup>32</sup> Vittorini, *supra* note 9.

<sup>33</sup> Aditya Nigam, *A Text Without Author: Locating Constituent Assembly as Event*, 39 *ECON. & POL. WKLY.* 2107 (2004).

<sup>34</sup> Khalid Anis Ansari, *Contesting Communalism(s): Preliminary Reflections on Pasmanda Muslim Narratives from North India*, 1 *PRABUDDHA: J. SOC. EQUALITY* 78 (2018).

<sup>35</sup> Seik Rahim Mondal, *Social Structure, OBCs and Muslims*, 38 *ECON. & POL. WKLY.* 4892 (2003).

<sup>36</sup> Prashant Waikar, *Reading Islamophobia in Hindutva: An Analysis of Narendra Modi's Political Discourse*, 4 *ISLAMOPHOBIA STUD.* J. 161 (2018).

<sup>37</sup> S. Waseem Ahmed & M. Ashraf Ali, *Social Justice and the Constitution of India*, 67 *INDIAN J. POL. SCI.* 767 (2006).

The initial draft of the Constitution in 1948,<sup>38</sup> in Article 296,<sup>39</sup> provided for welfare schemes (separate electorates and reservations, among others) for religious minorities, backward classes, SCs and STs with the aim of providing adequate representation<sup>40</sup> in opportunities and governance. Nonetheless, reservations on the status of religious minorities did not make it to the final draft. A sizable majority in the Assembly believed that welfare schemes for any religious minority group would promote disunity and violate equality, if provided on a permanent basis.<sup>41</sup> The intention of the reservation policy under the final draft of the Constitution was to undo past injustices,<sup>42</sup> by functionally ensuring the representation of marginalised communities. Finally, only caste hierarchies within a Hindu identity<sup>43</sup> made it to the reservation policy, wherein some communities, which were conferred SC or ST status, could now be beneficiaries.

Before the final draft of the Constitution was tabled, an Advisory Committee on Fundamental Rights, Minorities, and Tribal and Excluded and Partially Excluded Areas headed by Sardar Vallabhbhai Patel was formed.<sup>44</sup> Under the Advisory Committee, a sub-committee for minority rights was led by Harendra Coomar Mukherjee.<sup>45</sup> In its extensive discussion, the committee looked at the definition of untouchability, wherein there was a broad agreement that untouchability of all kinds: caste, religion, sex, *et cetera*, is prohibited. The members of the committee acknowledged the existence of caste among Muslims and Christians while

---

<sup>38</sup> DRAFT INDIA CONST. (1948).

<sup>39</sup> DRAFT INDIA CONST. (1948) art. 296 read as “*Subject to the provisions of the next succeeding article the claims of all minority communities shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State for the time being specified in Part I of the First Schedule*”.

<sup>40</sup> 3 CONSTITUENT ASSEMB. DEB. (Apr. 29, 1947), [https://eparlib.nic.in/bitstream/123456789/762962/1/cad\\_29-04-1947.pdf](https://eparlib.nic.in/bitstream/123456789/762962/1/cad_29-04-1947.pdf).

<sup>41</sup> Ashok Guha, *Reservations in Myth and Reality*, 25 ECON. & POL. WKLY. 2716 (1990).

<sup>42</sup> National Commission to Review the Working of the Constitution, *Issues of Social Justice: Scheduled Castes, Scheduled Tribes and Other Backward Classes: An Unfinished National Agenda*, [https://www.humanrightsinitiative.org/publications/const/issues\\_of\\_social\\_justice\\_scs\\_t\\_abc.pdf](https://www.humanrightsinitiative.org/publications/const/issues_of_social_justice_scs_t_abc.pdf).

<sup>43</sup> Rai, *supra* note 14.

<sup>44</sup> Ansari, *supra* note 20.

<sup>45</sup> 3 CONSTITUENT ASSEMB. DEB. (Jan. 24, 1947), <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C24011947.html>.

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

discussing untouchability,<sup>46</sup> and the current form of Article 16(4) of the Constitution is a result of these discussions.<sup>47</sup> However, the committee did not make any specific recommendations to address the caste-based stratifications in minority religions. This may be attributed to the fact that there were no *Pasmanda* Muslims in the Assembly to articulate any such demand. The Assembly was fixated on homogenising<sup>48</sup> the nation under an umbrella of “*national unity*”,<sup>49</sup> while the Muslim leaders<sup>50</sup> came about to impel<sup>51</sup> a single Muslim identity.

There was an inherent discomfort among the dominant nationalists when arguments were presented by members claiming to represent Muslims, concerning their status and representation. Members like Krishnaswamy Bharati and Mahabir Tyagi, were against minority-based reservations for government employment or separate electorates for political representation. They argued that these demands were an attempt to create separatism in the country.<sup>52</sup> According to them, in due course, this would ruin the fabric of national harmony, antithetical to one of the primary goals the Assembly sought to achieve. The premise is that any form of identification based on religion would pose a threat to this “*unity*”.<sup>53</sup> This builds as one of the strongest reasons for why reservations for religious minorities never formally became a part of the Constitution. In its quest to

---

<sup>46</sup> B. SHIVA RAO, *THE FRAMING OF INDIA'S CONSTITUTION*, 227 (Universal Law Publishing Co. 2005).

<sup>47</sup> V. P. Bharatiya, *Minorities Commission: Constitutional Metamorphosis?*, 21 J. INDIAN L. INST. 268 (1979).

<sup>48</sup> 5 CONSTITUENT ASSEMB. DEB. (Aug. 30, 1947), [https://www.constitutionofindia.net/blogs/the\\_legitimacy\\_of\\_the\\_constituent\\_assembly\\_\\_3\\_\\_what\\_did\\_the\\_constituent\\_a\\_ssembly\\_think\\_of\\_its\\_representative\\_credentials\\_](https://www.constitutionofindia.net/blogs/the_legitimacy_of_the_constituent_assembly__3__what_did_the_constituent_a_ssembly_think_of_its_representative_credentials_).

<sup>49</sup> Shabnum Tejani, *The Necessary Conditions for Democracy: B R Ambedkar on Nationalism, Minorities and Pakistan*, 48 ECON. & POL. WKLY. 111 (2014).

<sup>50</sup> Hilal Ahmed, *Muslim Representation in the Rajya Sabha: Forms and Trajectories*, RAJYA SABHA (2015), [https://rajyasabha.nic.in/rsnew/fellowship/Hilal\\_Ahmed.pdf](https://rajyasabha.nic.in/rsnew/fellowship/Hilal_Ahmed.pdf).

<sup>51</sup> Rochana Bajpai, *Constituent Assembly Debates and Minority Rights*, 35 ECON. & POL. WKLY. 1837 (2000).

<sup>52</sup> Vittorini, *supra* note 9.

<sup>53</sup> 3 CONSTITUENT ASSEMB. DEB. (May 25, 1949), [https://www.constitutionofindia.net/blogs/the\\_legitimacy\\_of\\_the\\_constituent\\_assembly\\_\\_3\\_\\_what\\_did\\_the\\_constituent\\_assembly\\_think\\_of\\_its\\_representative\\_credentials\\_](https://www.constitutionofindia.net/blogs/the_legitimacy_of_the_constituent_assembly__3__what_did_the_constituent_assembly_think_of_its_representative_credentials_).

form a nation with a fundamental homogeneous identity,<sup>54</sup> the Assembly did not make any attempt to engage with the differences within the Muslim identity. This non-engagement not only left the most vulnerable Muslim population unrepresented, but it also legitimised the hegemony<sup>55</sup> of a small minority of upper-caste Muslims with unchecked access to most community resources.<sup>56</sup>

Muslim representation in the Assembly hinged on a premise that was two-fold—*first*, the Muslim community in India is a homogenous unit,<sup>57</sup> therefore they shall be looked as only a religious minority group in cumulation; *second*, the Muslim representatives in the Assembly represented the interests of Muslims of different social, political and economic backgrounds within the community.<sup>58</sup> Therefore, the issue of caste-based segregation and marginalisation of *Pasmanda* Muslims were never engaged with. The demands of separate electorates and minority reservations (which were rejected by the Assembly) were the only points of engagement with the backwardness of Muslims in India as a religious minority group.

The conjecture of the Hindu-Muslim binary needs to be reconstructed in light of the communal post-partition rhetoric,<sup>59</sup> and the non-participation of communities such as *Pasmanda* Muslims. The manner in which concerns of Muslim representatives were responded to depicts the stereotypes<sup>60</sup> under which a rhetoric against them functioned. The result of this rhetoric effectively upheld the power of the upper castes, furthering the systemic deprivation of *Pasmandas*.

---

<sup>54</sup> Mashirul Hasan, *In Search of Integration and Identity: Indian Muslims since Independence*, 23 ECON. & POL. WKLY. 2467 (1998).

<sup>55</sup> Irfan Ahmed, *A Different Jihad: Dalit Muslims' Challenge to Ashraf Hegemony*, 38 ECON. & POL. WKLY. 4886 (2003).

<sup>56</sup> *Id.*

<sup>57</sup> Shabnum Tejani, *Between Inequality and Identity: The Indian Constituent Assembly and Religious Difference, 1946–50*, SOUTH ASIA RESEARCH (2013); Shefali Jha, *Rights Versus Representation: Defending Minority Interests in the Constituent Assembly*, 38 ECON. & POL. WKLY. 1579 (2003).

<sup>58</sup> 3 CONSTITUENT ASSEMB. DEB. (Apr. 29, 1947), [https://eparlib.nic.in/bitstream/123456789/762962/1/cad\\_29-04-1947.pdf](https://eparlib.nic.in/bitstream/123456789/762962/1/cad_29-04-1947.pdf).

<sup>59</sup> Tejani, *supra* note 49.

<sup>60</sup> JOHN ESPOSITO & IBRAHIM KALIN, *ISLAMOPHOBIA: THE CHALLENGE OF PLURALISM IN THE 21ST CENTURY* 65 (Oxford University Press 2011).



## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

Widely, there was a persistent fear that any special privileges given to the Muslim community could act as a roadblock towards the Assembly's nation-building project.<sup>61</sup> A direct follow-up<sup>62</sup> from the Morley-Minto Reforms of 1909<sup>63</sup> that introduced separate electorates for the members of the community, led to the fear of "*Muslim separatism*".<sup>64</sup> Amidst communal tensions<sup>65</sup> within the representative<sup>66</sup> Assembly (whose authority was being questioned<sup>67</sup> at various fronts), the question of caste segregation among Muslims was virtually erased.<sup>68</sup> There was clear hostility in the way the Assembly dealt with the demands for separate electorates or reservation policies for Muslim communities<sup>69</sup> with a communal partition afresh in their memory. Naturally, the demands for separate electorates transgressed into demands for proportional representation and reservations. The vocal members in support<sup>70</sup> of proportional representation and reservations such as Zahir-ul-Husain Lari, Syed Muhammad Saadullah, Mahboob Ali Baig Sahib Bahadur and Kazi Syed Karimuddin argued that such benefits would not mean that the secular fabric of the nation would be harmed,<sup>71</sup> but would rather provide assurance that the voices of the minorities are heard and the Parliament shall have increased diversity. Further, the spirit of

---

<sup>61</sup> *Id.*

<sup>62</sup> Francesca Jensenuis, *Mired in Reservations: The Path-Dependent History of Electoral Quotas in India*, 74 J. ASIAN STUD. 85 (2015).

<sup>63</sup> The Indian Councils Act, 1909, No. 4, Acts of British Parliament, 1909 (British India).

<sup>64</sup> Stephen Koss, *John Morley and the Communal Question*, 26 J. ASIAN STUD. 381 (1967).

<sup>65</sup> Bharatiya, *supra* note 47.

<sup>66</sup> Vineeth Krishna, *The Legitimacy of the Constituent Assembly #3: What Did the Constituent Assembly Think of its Representative Credentials?*, CONSTITUTIONOFINDIA.NET (Apr. 23, 2019), [https://www.constitutionofindia.net/blogs/the\\_legitimacy\\_of\\_the\\_constituent\\_assembly\\_3\\_what\\_did\\_the\\_constituent\\_assembly\\_think\\_of\\_its\\_representative\\_credentials\\_](https://www.constitutionofindia.net/blogs/the_legitimacy_of_the_constituent_assembly_3_what_did_the_constituent_assembly_think_of_its_representative_credentials_).

<sup>67</sup> DRAFT INDIA CONST. (1948). *See also*, Raja Dandamudi & Prarthana Bhatija, *How Partition Can be An Invaluable Lens to Approach Minority Rights Guaranteed by the Constitution of India*, THE LEAFLET (Jan. 30, 2019), <https://theleaflet.in/how-partition-can-be-an-invaluable-lens-to-approach-minority-rights-guaranteed-by-the-constitution-of-india/>.

<sup>68</sup> ZOYA HASAN, POLITICS OF INCLUSION: CASTES, MINORITIES AND AFFIRMATIVE ACTION 32 (Oxford University Press 2009).

<sup>69</sup> Mattison Mines, *Muslim Social Stratification in India: The Basis for Variation*, 28 SOUTHWESTERN J. ANTHROPOLOGY 333 (1972).

<sup>70</sup> Shefali Jha, *Representation and Its Epiphanies: A Reading of Constituent Assembly Debates*, 39 ECON. & POL. WKLY. 4357, 4357-4360 (2004).

<sup>71</sup> Ahmed, *supra* note 50.

democracy would then be meaningfully engaged with the minority opinions, *i.e.*, primarily, the voices of the groups traditionally rendered powerless in the hegemony of social relationships, evading the risk of fascism.<sup>72</sup> In light of this, it can be argued that the dominant pre-partition narrative, ultimately stalled any State action to ensure representation of Muslims, and that this “*transgression*” can be termed as a negotiation between the upper castes of both Muslims and Hindus, ousting the representation and demands of *Pasmanda* Muslims from the entire process.

Consequently, during the course of the Assembly debates, the nationalist idea towards the adoption of a secular image prevailed over the idea of providing additional benefits for minority rights. Some Muslim members accepted the idea of forfeiting reservations for legislative seats, in the debate against educational and employment reservations.<sup>73</sup> Naziruddin argued that reservations for Muslims would deteriorate improved Hindu-Muslim relations in the long run, and “*the safety of the Muslims lies in intelligently playing their part and mixing themselves with the Hindus in public affairs*”.<sup>74</sup>

Begum Aizaz Rasul stated that having separate electorates and reservations for Muslims would fuel separatism between the majority and minority communities, and having joint electorates would be a viable measure in countering any animosity between the two communities.<sup>75</sup> She argued:<sup>76</sup>

*“If reservation of seats for Muslims remains, it would be tantamount to an act of charity on the majority community. For those Muslims who think that this is going to be harmful to them, I say that it is not going to be harmful because it will create better relationship between the two communities. Even if a few seats are lost to the Muslims, I feel that sacrifice is worthwhile if we can gain the goodwill of the majority in that way.”*

---

<sup>72</sup> Hasan, *supra* note 4.

<sup>73</sup> Rochana Bajpai, *Multiculturalism in India: An Exception?*, B. U. INST. ON CULTURE, RELIGION & WORLD AFF. 10-11 (2015).

<sup>74</sup> 3 CONSTITUENT ASSEMB. DEB. (May 26, 1949), <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C26051949.html>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

Eventually, the Assembly, while dealing with the benefits for the “minority” status, created a binary; with religious minorities and backward classes.<sup>77</sup> Reservations for the latter, due to efforts of members such as Dr. B.R. Ambedkar, were agreed upon in order to make good towards the past injustices meted towards individuals that constituted as members of such marginalised communities.<sup>78</sup> This clubbing of all classes under a single Muslim identity, disallowing any assessment of backwardness, is attributable to the hegemony of the upper caste Muslims, who represented the Muslim community in the Assembly.

The effect of homogenising “Muslim” as an identity of a single minority community derailed<sup>79</sup> the focus from the socio-economic deprivations that many Muslim communities, particularly *Pasmanda* Muslims face within the established social order, to mere negotiations of how the religious group would posit and organise itself.<sup>80</sup> This is far from the idea behind reservations in social and political spheres—to ensure adequate representation and allow the voices of such members to be heard as a constitutional safeguard against their constant socio-economic deprivations.<sup>81</sup> Voices like Jaipal Singh Munda (who especially advocated for Adivasi rights in the Assembly debates) did not settle with this binary and asserted that backwardness can be found in different faiths/identities and that they must be recognised and safeguarded.<sup>82</sup>

In India, power is conferred upon communities based on their caste positions, notwithstanding religious beliefs. It is in this context that the essence of representation of people belonging to the communities which are left out of this social order, in the state apparatus holds a lot of significance. When communities are left unrepresented in the State and the

---

<sup>77</sup> Hasan, *supra* note 4.

<sup>78</sup> See MARC GALANTER, *COMPETING EQUALITIES, LAW AND BACKWARD CLASSES IN INDIA* (University of California Press 1984).

<sup>79</sup> Kumkum Sangari, *Politics of Diversity: Religious Communities and Multiple Patriarchies*, 30 *ECON. & POL. WKLY.* 381 (1995).

<sup>80</sup> Habib, *supra* note 17.

<sup>81</sup> *Indra Sawhney v. Union of India*, AIR 1993 SC 477 (India); Kailash Jeenger, *Reservation Is About Adequate Representation, Not Poverty Eradication*, THE WIRE (May 18, 2020), <https://thewire.in/law/supreme-court-bench-reservation>.

<sup>82</sup> Pooja Parmar, *Undoing Historical Wrongs: Law and Indigeneity in India*, 49 *OSGOODE HALL L.J.* 491 (2012).

politics of its functioning, the effects transgress squarely on the communities that are marginalized and left unrepresented. This can be seen in the case of *Pasmanda* Muslims. There is negligible representation of *Pasmandas* and their interests. These communities have been systematically ghettoised<sup>83</sup> in the corporeality of cities and the aspirations of development that the State institutions boast of never make it to these pockets. The primary reason cited by State institutions with regard to this lack of representation is that the communities themselves do not want to participate in the vision the State has for development. On the contrary, these communities never receive the bandwagons of developmental policies due to the State suffering from the lack of their representation. As a result of the same, the living conditions of *Pasmandas* have worsened over the years and there seems to be no recourse to the ‘normal’ set in the State’s administration.<sup>84</sup>

The inability of the Assembly to establish an inclusive concept of backwardness amidst the rhetoric that special privileges to Muslims would lead to separatist tendencies was actively given a centre stage, and unsurprisingly, all this was done by the ones placed higher in the hegemony. In the process of preserving the secular fabric and achieving effective administration and good governance, the Assembly failed the under-represented *Pasmanda* Muslims. The inability of the Assembly to dwell into the socio-economic positions of Muslim communities is a mitigating factor in the larger scheme of things behind the denigration of the socio-economic and political status of *Pasmanda* Muslims in the country. In the following portions of the paper, we aim to present links between the structural positions of the *Pasmanda subaltern* groups against the on-going rhetoric over separatist tendencies of Muslims, which prevail in today’s times.

## RECONCILIATION OF “*DIGNITY*” THROUGH THE LENS OF THE CONSTITUTION

At the core of Indian Constitutionalism lies the concept of “*human personality*”, which articulates “*dignity*” through equality, liberty and

---

<sup>83</sup> Raphael Susewind, *Muslims in Indian Cities: Degrees of Segregation and the Elusive Ghetto*, 49 ENVIRONMENT AND PLANNING A: ECONOMY AND SPACE 1286 (2017).

<sup>84</sup> Habib, *supra* note 17.

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

fraternity.<sup>85</sup> This idea of human personality articulated by Dr. B. R. Ambedkar does not concern mere individuals, but has a lot to do with the morality and burden of the community (Nation) towards its individuals and communities.<sup>86</sup> The insistence is primarily on “*empathy*” within this community towards its own. Moving away from this insistence on “*dignity*” is a disservice to the Constitution, which has its foundations laid on this very idea of “*Human Personality*”.<sup>87</sup> This also acted as the cornerstone behind the formulation of provisions against anti-discriminatory practices (here, the caste system) at the hands of the Assembly.<sup>88</sup> Dr. B. R. Ambedkar, in his last speech before the Assembly, referred to how the monopoly of political power in the hands of few *vis-à-vis* the oppressed individuals has “*sapped them away from the significance of life*”.<sup>89</sup>

The aspect of human dignity for the Pasmada Muslims needs to be looked at in light of the opinions and narratives laid down in the Assembly. The lack of discourse on systemic deprivations of these communities may be attributed to the communal atmosphere owing to the post-independence communal partition.

In terms of a glaring example—the Permit System<sup>90</sup> existed under Article 7 of the Constitution, which treated Hindu and Muslim migrants differently. Among the several kinds of permits that were available, the “*permanent resettlement*” permit, meant for Indian Muslims who had migrated to West Pakistan and who now wanted to permanently resettle in India, was incredibly difficult to obtain. As a response to the growing migration

---

<sup>85</sup> Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L. L. 655 (2008); Aharon Barak, *The Role of Human Dignity as a Constitutional Value*, CUP 103 (2015); Doron Shulztiner & Guy Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AJCL 461 (2014).

<sup>86</sup> B. R. Ambedkar, *Annihilation of Caste: The Annotated Critical Edition*, VERSO (2016).

<sup>87</sup> B.R. AMBEDKAR & V. MOON, DR. BABASAHEB AMBEDKAR (Dr. Ambedkar Foundation 2014),

<sup>88</sup> Kanta Kataria, *Dr. B.R. Ambedkar as a Nation-BUILDER*, 73 IN. J. POL. SCI. 4, 601 (2012).

<sup>89</sup> 11 CONSTITUENT ASSEMB. DEB. (Nov. 25, 1949), [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/11/1949-11-25](https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25).

<sup>90</sup> *Rights of Citizenship of Certain Migrants to Pakistan*, CONSTITUTIONOFINDIA.NET, [https://www.constitutionofindia.net/constitution\\_of\\_india/citizenship/articles/Article%207](https://www.constitutionofindia.net/constitution_of_india/citizenship/articles/Article%207). (Last visited on May 21, 2022).

after the India-Pakistan partition,<sup>91</sup> the Permit System schema categorized “refugees” as: a) “*evacuees*” and b) “*displaced persons*”, wherein, the former were Muslims who owned property in India, while the latter were Hindus and other non-Muslims that wished to return to India.<sup>92</sup>

Nevertheless, due to the Assembly’s scepticism towards Muslims, they were discriminated against while implementing the said system.<sup>93</sup> On multiple occasions, the communications between ministers of the Indian government were hostile towards Muslims who were returning to Indian territory from newly-formed Pakistan.<sup>94</sup> *Prima facie*, this arrangement is fielded against the “*evacuees*” (Muslims), who are socially and economically marginalized as the standard of documentation required to be maintained by them was much higher than the “*displaced persons*”, which is also reflected in the benefits conferred. The refugee colonies then settled in cities like Delhi, articulate the kinds of differences that existed between these two categories.<sup>95</sup> However, due to the communal atmosphere present at that time, issues such as backwardness and deprivation for individuals that fell under the “*evacuee*” category (*i.e.*, Muslims) did not receive attention. Furthermore, if backwardness had to be considered for such marginalized Muslims in order to provide welfare benefits, the communal nature of the State’s analysis stacked presumptions against them that resulted in an additional burden of proof onto the individuals to prove their nationality. It can be said that although the Assembly was not communal in nature, the circumstances were unique, and the atmosphere was communal due to the pre-partition scepticism and post-partition violence.

---

<sup>91</sup> Sajal Nag, *Nationhood and Displacement in Indian Subcontinent*, 36 ECON. & POL. WKLY. 4753 (2001).

<sup>92</sup> *Id.*

<sup>93</sup> Abhinav Chandrachud, *The Origins of Indian Citizenship*, BLOOMBERG QUINT (Dec. 26, 2019), <https://www.bqprime.com/opinion/citizenship-amendment-act-the-unsecular-origins-of-indian-citizenship-by-abhinav-chandrachud>.

<sup>94</sup> Anirban Bhattacharya & Azram Rehman Khan, *Contested Citizenship: What Constituent Assembly Debates from 70 years ago Reveal about India Today*, THE SCROLL (Feb. 26, 2020), <https://scroll.in/article/953877/contested-citizenship-what-constituent-assembly-debates-from-70-years-ago-reveal-about-india-today>.

<sup>95</sup> Dhooleka Sarhadi Raj, *Ignorance, Forgetting, and Family Nostalgia: Partition, the Nation State, and Refugees in Delhi*, 44 SOC. ANALYSIS: INT’L J. ANTHROPOLOGY 30 (2000).

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

One can also argue that communal biases existed in pre-Assembly times as well. However, in post-independence India (built on a promise of secularism and a welfare state), these prejudices have increasingly crept into the day-to-day social interactions of communities and individuals, and have manifested themselves into communal undertones in our governance. Furthermore, as the State had not investigated into the question of providing welfare benefits, the effect of this amplified when it came to socially and economically marginalized *Pasmanda* Muslims.<sup>96</sup> As the Assembly failed *Pasmanda* Muslim communities who were left politically vulnerable post-partition,<sup>97</sup> the lack of any conversation and representation of these communities is a result of this political ignorance since the dusk of India's modern nation-building project.

Although we cannot reduce the experiences of Muslim communities to a direct link with only the Assembly's omission of any discussion and conceptualization of the social structures within, we can look at this as a starting point of the governmentality that guided the administrations in many issues of post-partition India. Simply equating the fact that the Assembly did not provide reservations to religious minorities, and that is the reason behind their deprivation, would be an unfair proposition to present. It is one facet (albeit, a pertinent one) with regard to the unaddressed and unchecked backwardness of many Muslim communities. In light of this, we study other important factors involved, to determine a holistic picture that calls for a case of worry for the socially, economically, and culturally vulnerable lower-caste Muslim population in India.

In recent years, the psyche of the entire Indian Muslim community (as a single unit, across castes) has been threatened, due to the increased politically motivated actions of the right-wing majority.<sup>98</sup> This has culminated over the years, starting from the Hindu Rashtra Project to the

---

<sup>96</sup> Hilal Ahmed, *Pasmanda Muslim Politics and Caste-based Reservation*, ECON. & POL. WKLY. BLOG (Feb. 10, 2014), <https://www.epw.in/blog/hilal-ahmed/pasmanda-muslim-politics-and-caste-based-reservation.html>.

<sup>97</sup> Rowena Robinson, *Religion, Socio-economic Backwardness & Discrimination: The Case of Indian Muslims*, 44 IN. J. INDUS. REL. 194, (2008).

<sup>98</sup> Sanjeev Kumar, *Constructing the Nation's Enemy: 'Hindutva', Popular Culture and the Muslim 'other' in Bollywood Cinema*, 34 THIRD WORLD Q. 458, (2013).

Babri Masjid-Ram Mandir dispute in the 1980s<sup>99</sup>—which has only worsened in the post-2014 era. These political developments have actively stunted any development possible among the minority population that was already politically voiceless and had been reduced to “*second-class citizenship*.” It has happened primarily based on how the community was in essence forced to ghettoise in the name of religion and has not been able to focus on its socio-political aspirations.<sup>100</sup> The constant hate, trolling and conspiracy theories peddled by influential news media organisations, social media influencers, and right-wing spokespersons fuel the alienation of the community.

In the current political atmosphere, this has also culminated into politics at the hands of fringe elements, which includes the application and enforcement of controversial laws, such as the amendments to various anti-terror laws that allow the State alarmingly extra power,<sup>101</sup> the victims of the same being Muslims on multiple fronts.<sup>102</sup> The passing of legislation, such as the Citizenship Amendment Act 2019<sup>103</sup> (“CAA”) or the “*Love-Jihad*” bills in various states,<sup>104</sup> act as a catalyst in reinforcing existing prejudices and stereotypes. Further, there are regular reports of mob-lynching,<sup>105</sup>

---

<sup>99</sup> Anwar Alam, *Democratisation of Indian Muslims: Some Reflections*, 38 ECON. & POL. WKLY. 4881 (2003).

<sup>100</sup> *Id.*

<sup>101</sup> Ramanand Garge, *Jurisprudence of Anti-Terrorism Laws—An Indian Perspective*, VIVEKANANDA INTERNATIONAL FOUNDATION (July 09, 2019), <https://www.vifindia.org/monograph/2019/july/09/jurisprudence-of-anti-terrorism-laws-an-indian-perspective>.

<sup>102</sup> Bilal Kuchay, *With 2% convictions, India’s terror law more a ‘political weapon’*, AL JAZEERA (July 02, 2021), <https://www.aljazeera.com/news/2021/7/2/india-terror-law-uapa-muslims-activists>.

<sup>103</sup> Madhav Godbole, *A Law that Offers Citizenship Only to Non-Muslims Sidesteps the Real Issues for Political Mileage*, THE INDIAN EXPRESS (Dec. 30, 2019), <https://indianexpress.com/article/opinion/columns/caa-protests-nrc-citizenship-amendment-act-right-question-wrong-answer-6190568/>.

<sup>104</sup> Apoorv Anand, *India’s ‘Love Jihad’ Laws: Another Attempt to Subjugate Muslims*, AL JAZEERA (Jan. 15, 2021), <https://www.aljazeera.com/opinions/2021/1/15/indias-love-jihad-laws-another-attempt-to-subjugate-muslims>.

<sup>105</sup> Harsh Mander, *Lynching, the Scourge of New India*, THE HINDU (Oct. 16, 2019), <https://www.thehindu.com/opinion/lead/lynching-the-scourge-of-new-india/article29693818.ece>.



## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

increased instances of violence and communalism,<sup>106</sup> and recurring narratives around terrorism<sup>107</sup> (which run as recent as the COVID-19 pandemic).<sup>108</sup> Evidently, however, the experiences of lower caste Muslims do not receive regular acknowledgement in media spaces. The normalised scepticism against Muslims furthers the marginalisation of lower caste Muslims, making them more susceptible to oppression and deprivation—at the hands of the majority and their community, respectively.<sup>109</sup>

Across decades, upper caste Muslims have acted as representatives for issues that relate to the community in spaces such as Madrasas, Personal Law Boards, Representative Political Institutions (central, state and municipal assemblies), Ministries and educational institutions that claim to work for the betterment against deprivations faced by the Muslim community (Minority affairs organizations, non-governmental organizations, Waqf boards, Urdu academies, AMU, Jamia Millia Islamia, *et cetera*).<sup>110</sup> Furthermore, the invisibility of caste segregation in Islam has made it difficult for representations to be made in the course of seeking affirmative action and welfare benefits for the downtrodden sections of the community. With an increasingly hostile tendency of the powerful classes and spaces of our society to become blind towards socio-economically marginalised communities, there is an imminent need to bring forward policy solutions that shall elevate the status of such *lower caste* Muslims for the long run.<sup>111</sup>

---

<sup>106</sup> Ajay Gudavarthy, *There Is Communalism—Not Islamophobia in India*, THE WIRE (May 01, 2019), <https://thewire.in/communalism/muslim-prejudice-islamophobia-india>.

<sup>107</sup> Issac Chotiner, *The Real Objective of Mob Violence Against Muslims in India*, THE NEW YORKER (Feb. 20, 2020), <https://www.newyorker.com/news/q-and-a/the-real-objective-of-mob-violence-against-muslims-in-india>.

<sup>108</sup> Shakuntala Banaji & Ram Bhat, *Disinformation against Indian Muslims during the COVID-19 Pandemic*, MEDIA@LSE BLOG (Sept. 24, 2020), <https://blogs.lse.ac.uk/medialse/2020/09/24/disinformation-against-indian-muslims-during-the-covid-19-pandemic/>.

<sup>109</sup> Azhar ul Hassan Sumra, *Muslims and Islam in Indian English Press: Exploring the Islamophobic Discourse*, 5 ISLAMOPHOBIA STUD. J. 226 (2020).

<sup>110</sup> Arjumand Ara, *Madrasas and Making of Muslim Identity in India*, 39 ECON. & POL. WKLY. 34 (2004).

<sup>111</sup> *Id.*

## THE DISCOURSE AROUND “*DISADVANTAGE*” AMONG MUSLIMS

As we examine this tangled identity of the Indian Muslim in today’s time, we need to delve into how the State has perceived issues associated with the deprivation of the Muslim community, especially *Pasmanda* Muslims. Today, the Indian Muslim faces a fascist threat by the majority in two overarching formats: a) socio-economic and political deprivations; and b) cultural subjugation, where to exercise any cultural right there is fierce opposition against it by the political majority. However, the *Pasmanda* Muslims face the aforementioned external deprivations and troubles in the form of a systemic deprivation in the distribution and control of knowledge and social capital, power and influence, property and associated ownership rights, resources, sexuality, gender discrimination, and human dignity.

### A. POLITICAL DEPRIVATIONS

As of now, through the demographics associated with parliamentary elections in India, we see a pattern among the representatives, vertically in selected areas and horizontally as per religion. For example, there has been a steady decline in the percentage of representatives from Muslim Communities. 1980 recorded the largest number of Muslim representatives,<sup>112</sup> which is now down to twenty seven in 2019 after a marginal increase from twenty one in 2014. Today, only five per cent of the Members of Parliament (“**MPs**”) come from Muslim communities.<sup>113</sup> The majority of these Muslim representatives are elected from the same constituency in order to serve in Parliament. During the timeline of 1951 to 2019, the Murshidabad constituency (West Bengal) has had a Muslim representative elected for all seventeen terms of the Lok Sabha.<sup>114</sup> Similarly,

---

<sup>112</sup> Daniel Wolfe et al., *Why is Muslim Political Representation Declining in India?*, QUARTZ INDIA (May 22, 2019), <https://qz.com/india/1617067/indian-election-2019-why-few-muslims-make-it-to-the-lok-sabha/>.

<sup>113</sup> Christophe Jaffrelot & Gilles Verniers, *The Dwindling Minority*, THE INDIAN EXPRESS (July 30, 2018), <https://indianexpress.com/article/opinion/columns/muslims-politicians-in-india-bjp-narendra-modi-government-5282128/>.

<sup>114</sup> ELECTION COMMISSION OF INDIA, ELECTION RESULTS - FULL STATISTICAL REPORTS (2022), <https://eci.gov.in/past-elections-statistics/>.

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

Dhubri (Bihar) has had a Muslim representation for sixteen terms,<sup>115</sup> Baramulla (J&K) and Srinagar (J&K) has had one for fifteen terms.<sup>116</sup>

Similarly, Uluberia (West Bengal) has had one for thirteen terms, Rampur (Uttar Pradesh) has had one for twelve terms, while Moradabad (Uttar Pradesh) and Hyderabad (Telangana) have had one for eleven terms.<sup>117</sup> Representation in the Rajya Sabha and state legislatures does not show us any different observations either. In terms of the socio-economic aspect of this argument, the “*othering*” of Muslims and widespread poverty across the communities hints at the idea of how constituencies are ghettoised and furthered away from the society, while they act as a token source of Muslim representation in the country. It is pertinent to note that Muslims constitute nearly fourteen per cent<sup>118</sup> of the Indian population, but are still political minorities in almost every sphere of governance, due to the lack of any proportionate representation as per their population and social status.<sup>119</sup> This, in a way, presents a mirror towards the current state of affairs in our country, as opposed to the vision of the Assembly towards the socio-economic and political status of Muslims in India.

In a recent study on political representation of Indian Muslims in post-colonial India, Iqbal Ansari has argued that Muslims are not adequately represented in legislative bodies.<sup>120</sup> This study, for instance, reveals that Muslim representation has not been satisfactory in Parliament (*see Table 1* attached below). Except for the 1980 and 1984 Lok Sabha(s), Muslim under-representation, or what Ansari calls *Muslim political deprivation*, remains around fifty per cent.

---

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Stephanie Kramer, *The Religious Composition of India*, PEW RESEARCH CENTER (Sept. 21, 2021), <https://www.pewforum.org/2021/09/21/religious-composition-of-india/>.

<sup>119</sup> Lindsay Maizland, *India's Muslims: An Increasingly Marginalized Population*, COUNCIL ON FOREIGN RELATIONS (Aug. 20, 2020), <https://www.cfr.org/backgrounder/india-muslims-marginalized-population-bjp-modi>.

<sup>120</sup> IQBAL A. ANSARI, *POLITICAL REPRESENTATION OF MUSLIMS OF INDIA: 1952-2004* 25 (Manak Publications 2006).

Ansari points out that political parties are mainly responsible for Muslim political deprivation. He shows that almost all major political parties failed to nominate Muslims for Lok Sabha elections (**Table 2**). Analysing these trends, Ansari concludes that the present electoral mechanism system is inadequate, because it does not provide proportional representation to Muslims. Therefore, some kind of alternative should be worked out.

Ansari suggests three main avenues for increasing Muslim representation:<sup>121</sup>

*“(a) All political parties nominate a fair share of minority candidates under the People’s Representation Act... at least making parties accountable for any persistent under-representation of minorities; (b) De-reserving those constituencies reserved for SC, which have a good percentage of Muslim voters. Alternatively, the category of SC should be defined in terms of social origin, irrespective of faith, allowing Muslims and Christian Dalits to seek election from seats reserved for SC; and (c) Redrawing constituencies with a view to enabling under-represented groups like Muslims.”*

No.	Year	Total elected members	Muslims elected	Expected representation on population basis	Deprivation %
I	1952	489	21	49	57.14
II	1957	494	24	49	51.02
III	1962	494	23	53	56.60
IV	1967	520	29	56	48.21

<sup>121</sup> *Id.*

ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY  
AND INDIA'S TRYST WITH THE REPRESENTATION OF  
MARGINALISED MUSLIMS

V	1971	518	30	58	48.28
VI	1977	542	34**	61	44.26
VII	1980	529* <sup>1</sup>	49**	59	16.95
VIII	1984	542	46**	62	25.81
IX	1989	529* <sup>2</sup>	33	60	45.00
X	1991	534* <sup>3</sup>	28	65	56.92
XI	1996	543	28	66	57.56
XII	1998	543	29	66	56.06
XIII	1999	543	32	66	51.52
XIV	2004	543	36	66	45.45
Total			442	836	47.12

*Notes:* \*1: Elections were not held in Assam (12) and Meghalaya (1); 2: Elections were not held in Assam (14); 3: Elections were not held in J&K (6) and countermanded in two seats in Bihar and one in UP.

\*\* Including Muslims elected in bye-elections.

*Source:* Ansari 2006, p. 64.

<b>TABLE 2</b>		
<b>Nomination of Muslims for the Lok Sabha Elections by Major Political Parties</b>		
<i>Name of the political party</i>	<i>Average nomination</i>	<i>Ratio: elected to nominated</i>
INC	6.72%	1:2
BJS/BJP	0.82%	1:10
CPI	4.24%	1:9
CPI(M)	9.34%	1:2
Janata Party/Lok Dal	6.8%	1:5
Janata Dal	9.04%	1:4
RJD	14.79%	1:4
SP	18.02%	1:7
BSP	10.53%	1:17
<i>Source: Based on Ansari 2006, 99-102.</i>		

## **B. THE DISCOURSE WITHIN STATE MACHINERY**

While communal bias did exist in pre-independence India, there was some mobilisation in order to ensure representation and parity in political spaces as there has been a history of affirmative action in favour of Muslims in public employment, educational institutions, alongside a temporary wave

ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY  
AND INDIA'S TRYST WITH THE REPRESENTATION OF  
MARGINALISED MUSLIMS

of separate electorates.<sup>122</sup> However, this ceased to exist post-independence after 1947.

Article 15(4) of the Constitution, enables the State to make special provisions for the socially and educationally backward classes of citizens. In *M. R. Balaji v. State of Mysore*,<sup>123</sup> the Supreme Court of India clarified that “*backwardness*” needs to be both “*social and educational*”. The Court’s belief that the test of caste does not apply to other religions other than Hinduism is negligent and ill-reasoned. The existence of a caste-based hierarchy is not negated because “*certain sections of Indian society..... do not believe in the caste system.*”<sup>124</sup>

In *Soosai v. Union of India*,<sup>125</sup> the Supreme Court categorically held that it was not sufficient to show that the same caste continues post-conversion of individuals from marginalised communities in the Hindu order to another religion. The Court further held that “*disabilities and handicaps suffered from such caste membership*” need to be established, after such conversion owing to the “*new environment*” afforded due to the religious conversion.<sup>126</sup> This essentially means that Dalits, who still face oppression, even when under the banner of a different religion, are now saddled with the burden to prove that they were in fact oppressed. This approach of the Supreme Court does not engage with the nuance of social hierarchies that continue and invariably trace caste oppression limited to the “*Hindu*” order.

Over the years, the State has been made aware of the lived realities of Muslims who are socio-economically and politically marginalised. While most reports do not even acknowledge the presence of *Pasmanda* demands, which has been rallied for since before independence, they do attempt at summarising the disadvantages faced by these Muslims, in and especially against the State.<sup>127</sup>

---

<sup>122</sup> Jensenuis, *supra* note 62.

<sup>123</sup> *M. R. Balaji v. State of Mysore*, 1963 AIR 649.

<sup>124</sup> *Id.*

<sup>125</sup> *Soosai v. Union of India*, AIR 1986 SC 733.

<sup>126</sup> *Id.*

<sup>127</sup> *Ansari, supra* note 34.

In the landmark case of *Indra Sawhney v. Union of India*,<sup>128</sup> the Supreme Court placed a cap of fifty per cent on reservations in State institutions of any kind. The Court in this case in a very detailed manner refers to the Second Backward Classes Commission Report (Mandal Commission Report),<sup>129</sup> to balance an idea that followed suit from *Balaji* when it came to the status of Muslims and Christians. It would be noteworthy to look at the various developments around welfare schemes for the Muslim community as a whole—this is because Muslims were not excluded from the *Mandal List*, and various Muslim castes are included in the list of OBCs.

The Supreme Court in the case of *R. Krishnaiah v. Union of India*<sup>130</sup> held that the State can accommodate minorities that come under backward classes amongst the Other Backward Classes (OBC; twenty seven per cent reservation in total) by making a sub-quota within the OBC category. Empirical data would make up for the most important basis for such categorisation in the process of determination and execution of such a quota policy.<sup>131</sup> Regardless of these aforementioned developments providing reservations to the Muslim community on the basis of socio-economic lines, the fundamental issue of caste has not been addressed.

The First Backward Classes Commission Report (“**Kaka Kalelkar Report**”),<sup>132</sup> the Mandal Commission Report, the Sachar Committee Report<sup>133</sup> and the Justice Ranganathan Misra Report<sup>134</sup> (“**Misra Report**”) respectively, have noted that Muslim communities have under-performed when it comes to metrics of development on socio-economic parameters,

---

<sup>128</sup> *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

<sup>129</sup> National Commission for Backward Classes, Report of the Backward Classes Commission, 14 (1980), <http://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf>.

<sup>130</sup> *R. Krishnaiah v. Union of India*, 1996 (4) ALT 175.

<sup>131</sup> *Id.*

<sup>132</sup> First National Commission for Backward Classes, *Report of the Backward Classes Commission* (1955), <https://dspace.gipe.ac.in/xmlui/handle/10973/33678>.

<sup>133</sup> Sachar Committee, *Social, Economic and Educational Status of the Muslim Community of India: A Report*, MINISTRY OF MINORITY AFFAIRS 192 (2006), [https://www.minorityaffairs.gov.in/sites/default/files/sachar\\_comm.pdf](https://www.minorityaffairs.gov.in/sites/default/files/sachar_comm.pdf) (hereinafter *Sachar Committee Report*).

<sup>134</sup> National Commission for Religious and Linguistic Minorities, *Report of the National Commission for Religious and Linguistic Minorities*, MINISTRY OF MINORITY AFFAIRS (2007), <https://www.minorityaffairs.gov.in/sites/default/files/volume-1.pdf> (hereinafter *Misra Report*).



## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

educational and employment opportunities among other factors. The Misra Report identifies Muslim minorities as eligible for socio-economic reservations with respect to their pre-conversion caste status as well. The Mandal Commission Report went on to recognize eighty two different groups of Muslims to fall under the OBC category, nonetheless, that constituted less than half of the entire Muslim population in the country.<sup>135</sup>

The text of the Constitution (Scheduled Castes) Order, 1950 (“**Presidential Order, 1950**”),<sup>136</sup> which is one of the most important instruments that has enabled representation of some of the most downtrodden and marginalised communities of the country to be represented in various sectors of the state functioning, explicitly excludes Muslim and Christian SCs from any kind of reservations. In such a case, the need for reservations for backward Muslims<sup>137</sup> has become an issue of elevation against deprivation and oppression, alongside the over-arching idea of holistic representation in various sections of the society.

The Sachar Committee Report dominates discussions which attempt to assess “*political backwardness*” among Muslims. This has been one of the rare fact-finding bodies, which have recognised that a caste hierarchy exists among Muslims, and also attempted to collect data for it. But when one looks at the recommendations of this committee and its probable implications, there is no remedy proposed for the structural oppression caste perpetuates. The Sachar Committee, *first* suggests reform in the nomination procedure to the various institutions and boards that run the affairs of the community as a whole.<sup>138</sup> These reforms, it says, have to be more “*equitable*” for all the members. *Second*, it is clear that the committee has identified the existence of a large number of people who are more backward than everyone else.<sup>139</sup> These people are found to have similar traditional occupations like the SCs, and the committee proposes to

---

<sup>135</sup> Habib, *supra* note 17.

<sup>136</sup> The Constitution (Scheduled Castes) Order, 1950.

<sup>137</sup> Zoya Hassan, *Reservation for Muslims*, INDIA SEMINAR (May 2005), <https://www.india-seminar.com/2005/549/549%20zoya%20hassan.htm>.

<sup>138</sup> Sachar Committee Report, *supra* note 133 at 241.

<sup>139</sup> *Id.* at 196.

identify them as “*Most Backward Classes*” (“**MBCs**”), and make multifarious arrangements, including reservations, for their betterment.<sup>140</sup>

Finally, the commission looks at the problems in the delimitation of constituencies, which seem to be designed against Muslim representation. A number of constituencies that have a higher share of the Muslim population than others have been reserved for SCs/STs. This reservation disallows any Muslim from representing these constituencies. The commission recommends that reservations be provided to SCs and STs in areas that do not have high Muslim populations so that there is a better chance of representation among Muslims.<sup>141</sup> However, this recommendation completely disregards the existence of caste divisions among Muslims.

On the other hand, the Misra Report suggested that caste reservations should be made religion neutral.<sup>142</sup> The Misra Report recommended ten per cent reservation for Muslims and five per cent for other minorities in government jobs and favoured SC status for Dalits in all religions.<sup>143</sup> The Misra Report recommends delinking of SC status from religion and the abrogation of the 1950 Scheduled Caste Order which “*still excludes Muslims, Christians, Jains and Parsis from the SC net.*”<sup>144</sup> The Order originally restricted the SC status to Hindus only but later opened it to Buddhists and Sikhs.

In 2008, Dr. Mahmoodur Rahman Committee Report<sup>145</sup> submitted its findings on the socio-economic conditions of Muslims in Maharashtra. The Committee revealed:<sup>146</sup>

---

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 25.

<sup>142</sup> Misra Report, *supra* note 134.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Chief Ministers Study Group Government of Maharashtra, *Report on the Socio-Economic and Educational- Backwardness of the Muslims in Maharashtra*, MINORITIES DEVELOPMENT DEPARTMENT (May 2013), [https://mdd.maharashtra.gov.in/Site/Upload/Pdf/Mahmmoodur\\_Rahman\\_Committee\\_Report\\_with\\_Cover\\_page.pdf](https://mdd.maharashtra.gov.in/Site/Upload/Pdf/Mahmmoodur_Rahman_Committee_Report_with_Cover_page.pdf).

<sup>146</sup> *Id.*

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

*“59.4% of the urban population and 59.8% of the rural population of Muslims is below the poverty line (BPL). The Committee has also found that about 25% of the Muslim population is marginally above the poverty line.”*

It outlined the absence of representation of Muslims in Government Services, especially the Indian Administrative Service, where it was at that time found to be nil, and among the police forces, where only four point four per cent of the police force in Maharashtra were Muslims.<sup>147</sup> The representation of Muslims is not better in these sectors even today, and the disadvantage that *Pasmanda* Muslims are facing is not even engaged with, at this point. With high shares of Muslims in jail occupancy and very low education levels, majority of the Muslims in Maharashtra are severely underrepresented. The Amitabh Kundu Report,<sup>148</sup> which assessed the efficacy of policy implementations after the Sachar Committee's recommendations. Even in this report, it is noted that Muslims have been “left out of both Government jobs and the urbanization wave”.<sup>149</sup>

While we look at what various state governments have done on this front, it is found that most of them have sub-classified backward class Muslims under the OBC list, and accorded them reservations accordingly. In terms of examples at the state government levels, Kerala has included all Muslims under the “backward” category and has fixed a quantum of twelve per cent (which was earlier ten per cent) under the OBC category.<sup>150</sup> In Karnataka, reservations are afforded to Muslims whose annual income falls under Two Lakh Indian Rupees.<sup>151</sup> Tamil Nadu includes almost ninety five per cent of its Muslim population to be eligible for reservation schemes.<sup>152</sup> The High

---

<sup>147</sup> *Id.*

<sup>148</sup> Expert Group on Diversity Index, *Report of the Expert Group to Propose a Diversity Index and workout the Modalities of Implementation*, MINISTRY OF MINORITY AFFAIRS 3 (2008), [https://www.minorityaffairs.gov.in/sites/default/files/di\\_expgrp\\_1.pdf](https://www.minorityaffairs.gov.in/sites/default/files/di_expgrp_1.pdf).

<sup>149</sup> *Id.*

<sup>150</sup> B. Krishnakumar, *A History of Reservation*, THE HINDU (Apr. 27, 2004), <https://frontline.thehindu.com/social-issues/article30224191.ece>.

<sup>151</sup> Bageshree S., *The saga of OBC reservation for Muslims in Karnataka*, THE HINDU (July 23, 2012), <https://www.thehindu.com/news/national/karnataka/the-saga-of-obc-reservation-for-muslims-in-karnataka/article3670268.ece>.

<sup>152</sup> PS Krishnan, *Muslim Quota: The States Eye View*, The Financial Express (Apr. 06, 2010), <https://www.financialexpress.com/archive/muslim-quota-the-states-eye-view/599873/>.

Court of Andhra Pradesh (whose order has been stayed by the Supreme Court when there was a challenge against it) has held that, when backwardness of a particular community has to be assessed, it shall be done on the basis of empirical data *vis-à-vis* other backward communities.<sup>153</sup>

The Andhra Pradesh High Court ended up allowing a four per cent reservation quota for Muslims. Further, Telangana has allowed a four per cent reservation status to Muslims in education and employment opportunities, under the OBC category. Further, the TRS government in Telangana had also proposed a twelve per cent quota for Muslims within the state-level OBC lists, but the Bill passed by the State Legislature has not been notified as of yet.<sup>154</sup> The primary objection that emerged against this Bill was that it would violate the fifty per cent cap on reservations (emphasized in the *Indra Sawhney* decision) and that reservations for religious minorities were not contemplated in the original constitutional scheme.<sup>155</sup> Satish Deshpande and Geetika Bapna from Delhi University prepared a report titled “*Dalits in the Muslim and Christian Communities: A Status Report on Current Social Scientific Knowledge*”<sup>156</sup> for the National Minorities Commission in 2008. In this report, they rely on data from NSSOs’ 61st Round, where markers of income, kinds of occupation, education across different kinds of households have been recorded. The report concluded that there is ample socio-scientific evidence on the discrimination faced by Dalit Muslims and Dalit Christians. Through the data available, the Report observed that economically, Dalit Muslims are worse off compared to non-Dalits. Among Dalits of different religions, nearly forty seven per cent of Dalit Muslims in urban India are in the below

---

<sup>153</sup> T. Muralidhar Rao v. State of Andhra Pradesh, 2010 SCC OnLine AP 69.

<sup>154</sup> M. Rajeev, *Telangana Assembly passes bill to hike Muslim quota to 12%*, THE HINDU (Apr. 16, 2017), <https://www.thehindu.com/news/national/telangana/telangana-assembly-passes-bill-to-hike-muslim-quota-to-12/article18071406.ece>.

<sup>155</sup> TNM Staff, *BJP continues protest against Telangana’s Muslim quota hike, several arrested*, THE NEWS MINUTE (Apr. 17, 2017), <https://www.thenewsminute.com/article/bjp-continues-protest-against-telanganas-muslim-quota-hike-several-arrested-60492>; Scroll Staff, *Telangana BJP describes Muslim reservation Bill as ‘trash’, says the Centre will never approve it*, THE SCROLL (Apr. 17, 2017), <https://scroll.in/latest/834865/telangana-bjp-describes-muslim-reservation-bill-as-trash-says-the-centre-will-never-approve-it>.

<sup>156</sup> Satish Deshpande & Geetika Bapna, *Dalits in the Muslim and Christian Community- A Status Report on Current Social Scientific Knowledge*, NATIONAL COMMISSION FOR MINORITIES 19 (2008), [http://kscminorities.org/pdf/Status%20Report%20on%20Dalits\\_in\\_Christian\\_and\\_Muslim\\_Communities.pdf](http://kscminorities.org/pdf/Status%20Report%20on%20Dalits_in_Christian_and_Muslim_Communities.pdf).

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

poverty line category. This is a significantly higher percentage than Hindu Dalits and Dalit Christians. In rural India, forty per cent of Dalit Muslims and thirty per cent Dalit Christians are in the Below Poverty Line category.<sup>157</sup>

Furthermore, in terms of education, the gap between Dalits and non-Dalits among Muslims is worse. The economic data showed that Dalits Muslims are worse off than the other segments of their communities—they are over-represented among the poor or disadvantaged (as seen in the data above) and under-represented among the privileged by all conventional measures of poverty or disadvantage. The Report does not summarise discrimination of Dalit Muslims in terms of untouchability, rather the methodology involves studying the inequalities that exist. Dalits are worse off across all religions practised in the Indian subcontinent. The report states:<sup>158</sup>

*“If no community had already been given SC status, and if the decision to accord SC status to some communities were to be taken today through some evidence-based approach, then it is hard to imagine how Dalit Muslims and Dalit Christians could be excluded.”*

There have been minimal developments in the direction of substantially elevating the position of Muslims in the country, besides proposing on-paper solutions for affirmative action. There has been no serious enquiry by the State to recognise systemic caste based oppression faced by members of the Muslim community, and the demand for effective representation for Muslims in the country remains a distant dream.<sup>159</sup> Considering the prejudices at play, the kinds of social conflict and hierarchies which exist in India, an inclusive representation of Muslims in political, educational and employment sectors while acknowledging and factoring in the existence of a caste system in the community would be the most ideal step forward.

---

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Prateek Patnaik, *Caste Among Indian Muslims Is a Real Issue. So Why Deny Them Reservation?*, THE WIRE (Dec. 02, 2020), <https://thewire.in/caste/caste-among-indian-muslims-real-why-deny-reservation>.

In *Mohammad Sadique v. Darbara Singh Guru*,<sup>160</sup> the Supreme Court upheld the SC status of Sadique, a person from the Doom community who converted to Sikhism from Islam. The Court essentially agreed that religion and caste are both independent of each other—although a person would convert out of a religion, the caste status would be carried forward with that individual. However, Dalits who profess Hinduism, Sikhism and Buddhism are the only ones who can avail reservations instrumental to enhance their socio-economic status as a community. Similar positions were also held in the cases of *Principal, Guntur Medical College, Guntur v. Y Mohan Rao*,<sup>161</sup> *S Anbalagan v. B Devarajan*,<sup>162</sup> *Kailash Sonkar v. Smt. Maya Devi*<sup>163</sup> and *K P Manu v. Chairman, Scrutiny Committee*.<sup>164</sup>

However, it can be argued that the implications of these judgments are conflicting to the fundamental tenets of our Constitution *vis-à-vis* the intent behind providing reservations (essentially, Part III—which extends to the principle of equality to all religions).<sup>165</sup> A bare reading of the judgment shows that the SC status provided to Mohammed Sadique came from the fact that he had converted to Sikhism, which would not be possible to exercise if he were a Muslim—however, both of his religious affiliations had no relation to the deprivations and backwardness he faced as a member of the Doom community. In a way, it can be said that Hinduism, Sikhism and Buddhism (as per the mandate of the Presidential Order, 1950) have an upper hand over minority religions such as Islam, when the case of providing welfare benefits due to caste-based deficiencies are involved.

In such a case, only two scenarios can pan out: i) the current stance of SC, ST and OBC reservations are revised—and they are made religion neutral; and ii) reservation schemes for *Pasmanda* Muslims are introduced on the basis of their deprivations. As recently as 2020, the Supreme Court agreed to examine a plea by the National Council of Dalit Christians, a private organisation, to make reservations “*religion neutral*”, for Dalit Muslims and Christians to benefit from the status provided under the 1950 Presidential

---

<sup>160</sup> *Mohammad Sadique v. Darbara Singh Guru*, 2015 SCC OnLine P&H 7273.

<sup>161</sup> *Principal, Guntur Medical College, Guntur v. Y Mohan Rao*, 1976 AIR 1904.

<sup>162</sup> *S Anbalagan v. B Devarajan*, 1984 AIR 411.

<sup>163</sup> *Kailash Sonkar v. Smt. Maya Devi*, 1984 AIR 600.

<sup>164</sup> *K P Manu v. Chairman, Scrutiny Committee*, (2015) 4 SCC 1.

<sup>165</sup> Vinay Sitapati, *Reservations*, in *THE OXFORD HANDBOOK FOR THE INDIAN CONSTITUTION* (Oxford University Press 2015).

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

Order.<sup>166</sup> On the other hand, the Supreme Court has accepted to hear a petition that reviews *EV Chinnaiah*, towards further sub-categorisation of SCs and STs and making a non-creamy layer for them. Arguing from the Muslim reservation perspective, this push by the government comes without making any credible assessment of castes among Muslims, before they can be included in this list.

In regards to (ii) as stated above, as we explore this unique case for reservations for Muslims in India, there are various socio-political factors that need to be taken into account due to the prevalent conditions and the shortcomings that could derive from the same. An all-pervasive/blanket Muslim quota would fail to provide the benefits that are needed to elevate the community, as they face discrimination on the basis of caste-identities. A lower caste-Hindu who would convert to Islam would still face the perils of being discriminated on the basis of their social standing in the prevailing hierarchies.<sup>167</sup> If blanket reservations are provided to Muslims, then it would fail to address the roots of specific evils of socio-economic deprivations, political under-representation, and geographical disadvantages, without addressing the actual underlying issues of elevation, equal access, and opportunities for deprived Muslims.

In such a case, it would be a wise step to revise the current SC/ST list, in order to provide quotas and reservations to backward Muslims on the basis of empirical data that determines the unique issues faced by them, due to the virtue of their identity. It can be argued that providing blanket quotas would cause greater harm towards the growth of Muslims and larger attention should be paid towards promoting education and economic growth to the community in order to allow them progress.

Due to the existence of discrimination in the public and private spheres at large, the only plausible way to promote an equal level-playing field for the Muslims would be to increase representation by targeted reservations and proportional representation constitutional schemes which are religion

---

<sup>166</sup> Priscila Jebaraj, *70-year wait for Dalit Christians, Muslims on SC verdict over caste status*, THE HINDU (Aug. 10, 2020), <https://www.thehindu.com/news/national/70-year-wait-for-dalit-christians-muslims-on-sc-verdict-over-caste-status/article32312331.ece>.

<sup>167</sup> Shamim Ahmad & A.K. Chakravarti, *Some Regional Characteristics of Muslim Caste Systems in India*, 5(1) GEOJOURNAL 55 (1981).

autonomous in nature. This shall not fuel debate about religious rights as mentioned in the Constitution, and shall prevent backward Muslims from facing any political mileage at the hands of the majority. However, due to invisibility in mainstream discourse, the limited data about different caste groups can impede informed policy and welfare measures. SCs and STs (Muslims or otherwise) should be sub-classified so that the more marginalised groups within these can avail more benefits.

Another deep-rooted issue that needs to be addressed is the intra-community disparity in terms of mobilisation and unity in the cause for demanding reservations. Due to the existing class and caste hierarchies, coupled with inter-sect prejudices, in order to overcome the political turmoil in the country that is presented by the Hindu right-wing majority at the Centre, there needs to be a strong united voice that comes from within. Although there is minimal data with respect to the capturing of such attitudes, an interesting survey conducted by Lokniti, Centre for the Study of Developing Societies (“**CSDS**”) and Konrad Adenauer Stiftung (“**KAS**”) on attitudes of youths towards politics showed that Muslim youth were unique in the sense that they were the only ones to support reservations for backward individuals of their community, even if they themselves would never access such reservation.<sup>168</sup> While one cannot deny the fact that there are inter-sect and class conflicts amongst the Muslim community, the tolerant attitudes towards reservations for the backward individuals does evade a roadblock in terms of obtaining such benefits. It hints at a possibility where the community would be able to overcome their deprivations much faster in light of its coherence against the political turmoil it perceives. However, the attitude of the current Union Government does not seem favourable in this direction.

For example, in February 2016, the Union Minister of Social Justice and Empowerment, Thawar Chand Gehlot said that granting SC status to

---

<sup>168</sup> *Key highlights from the CSDS-KAS Report ‘Attitudes, Anxieties and Aspirations of India’s Youth: Changing Patterns’*, KONRAD ADENAUER STIFTUNG (Apr. 3, 2017), [https://www.kas.de/c/document\\_library/get\\_file?uuid=2fdad3d0-1a8c-fd74-919b-cf8d9f1761b6&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=2fdad3d0-1a8c-fd74-919b-cf8d9f1761b6&groupId=252038).



## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

members from other religious groups could incentivise many to convert to other religions from Hinduism, which cannot be allowed.<sup>169</sup>

However, the recent 127<sup>th</sup> Constitutional Amendment Act, 2021<sup>170</sup> (popularly termed as the “**OBC Reservation Act**”), which has a subtext of being a response to the Supreme Court’s approach towards reservations in *Jaishri Laxmanrao Patil v. Union of India*,<sup>171</sup> in many ways brought community demands for inclusiveness in state mechanisms to the fore. The Parliament was flooded with Members of Parliament appealing to break the fifty per cent cap on reservations and in a very long time clocked the demand for the Presidential Order, 1950 which granted SC and ST status to various communities, to be religion neutral—bringing this issue into the mainstream discourse.<sup>172</sup> Following the OBC Reservation Act, the discussion for performing a nation-wide caste-based census (which has never taken place in independent India) has taken up prominence, with further action being awaited from the Central Government on the same.<sup>173</sup>

### WAY FORWARD

There has never been a recognition of religion-based reservations for Muslims as a mechanism for combatting injustices faced by Muslims in the form of regular cases of social discrimination<sup>174</sup> and denial of opportunities<sup>175</sup> on the basis of their minority status (as discussed in the previous portion of the paper). As substantiated above, the Indian Muslim

---

<sup>169</sup> Press Trust of India, *SC status to Dalit Muslims, Christians will encourage conversion*, DECCAN HERALD (Feb. 15, 2016), <https://www.deccanherald.com/content/529072/sc-status-dalit-muslims-christians.html>.

<sup>170</sup> INDIA CONST. art. 342A cl. 1 & 2, 366 cl. 26 & 338B cl. 9 *amended by* The Constitution (One Hundred and Twenty Seventh Amendment) Act, 2021.

<sup>171</sup> *Jaishri Laxmanrao Patil v. Union of India*, 2020 SCC OnLine 727.

<sup>172</sup> Special Correspondent, *Lok Sabha clears Bill restoring States’ rights to specify OBC groups*, THE HINDU (Aug. 11, 2021), <https://www.thehindu.com/news/national/lok-sabha-clears-bill-restoring-right-of-states-to-specify-obc-groups/article35841765.ece>.

<sup>173</sup> Aparna Alluri & Zoya Mateen, *Caste Census: Clamour to Count India Social Groups Grows*, BBC (Aug. 28, 2021), <https://www.bbc.com/news/world-asia-india-58141993>.

<sup>174</sup> Hasan, *supra* note 4.

<sup>175</sup> ABDUR RAHMAN, DENIAL AND DEPRIVATION: INDIAN MUSLIMS AFTER THE SACHAR COMMITTEE AND RANGNATH MISHRA COMMISSION REPORTS (Manohar Publishers & Distributors 2019).

has always been a victim of an “*othering*” at the hands of the political majority, which has reflected towards reinforcing deep-rooted prejudices in policies and legislations, alongside social ongoings of everyday life. In order to understand an ideal policy around welfare benefits for Muslims, one needs to understand the following underlying issues:

**A. WHAT ARE QUOTAS FOR MUSLIMS SUPPOSED TO ACHIEVE OR REMEDY?**

Here, we are looking at the socio-economic deprivations, political under-representation and cultural prejudices against and among Muslims. The Indian Muslim faces threat from the political majority in this country and within the community has to negotiate with resources based on identity markers of caste and sect. Measures taken by the State to elevate the status of Muslims do not seem to be enough. In an attempt to address Muslim backwardness, the Kundu Report suggested a “*Diversity Index*” (p.31) in order to ensure benefits towards the community.

The Report does not touch upon caste (*Pasmanda* Muslims) within the Muslim Community, which can be recognised as a primary unit in the structuring of access to resources. If the State takes measures to elevate the status of the Muslims, the ripple effect shall be visible automatically in the longer run. In such a case, including backward Muslims under the ambit of the Presidential Order, 1950 is the first step in this direction.

**B. WHAT IS THE NATURE OF MUSLIM BACKWARDNESS?**

Muslim backwardness, like the backwardness of any other community in India, needs to be understood in a historical context, alongside the contemporary developments in place. Like their poor Hindu counterparts, a larger section of Muslims has lived in concentrated pockets across the country, the question of access to resources has been structured in terms of social phenomena the State has refused to engage with.<sup>176</sup> Locational differences, regional disparities and the nature of the state cannot be side-tracked, while attempting to assess the economic conditions of a community. In such a case, the case of Muslims in today’s India is unique

---

<sup>176</sup> Rowena Robinson, *Indian Muslims: The Varied Dimensions of Marginality*, 42 ECON. & POL. WKLY. 839 (2007).

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

in its own as they are being discriminated against and deprived, but their systemic oppression has not been adequately enquired into, to be visible.<sup>177</sup>

*Pasmanda* Muslims, apart from being victims of structural socio-economic deprivations, have been discriminated against based on their identity as Muslims by the majority.<sup>178</sup> The effect of this can be seen on the population front, wherein poverty, economic and social is one of the major reasons for the vast population, especially in these communities.<sup>179</sup> Very recently, the Uttar Pradesh Government brought in a policy<sup>180</sup> aimed at controlling population, but the kind of politics that it has been exposed to and the heal-hearted conceptualisations of demographic realities<sup>181</sup> this policy is marred with would not help in achieving the aim it expresses on paper aims. The two-child policy that was drafted in Uttar Pradesh places burden on the people to control fertility indices, but it does not negotiate with the existing structures of power such as patriarchy and caste that such a policy in its transition on ground will have to negotiate with. The effect of such a policy on ground would not effectively be a reduced fertility rate, but it would fuel sex-recognition leading many to abort female foetuses.<sup>182</sup> The incentives of the policy are not nuanced enough to negotiate with the patriarchal setup, especially in the marginalised sections of the society. On one hand, it would result in many citizens losing out on benefits that other government schemes provided and on the other, it has a possibility of creating a sex-ratio imbalance.

### **C. WHAT IS THE CONNECTION BETWEEN LACK OF REPRESENTATION, MUSLIM BACKWARDNESS, MUSLIM MARGINALISATION AND MAJORITARIAN PREJUDICE?**

---

<sup>177</sup> Momin, *supra* note 7.

<sup>178</sup> *Id.*

<sup>179</sup> T. N. Krishnan, *Population, Poverty and Employment in India*, 27 ECON. & POL. WKLY. 2479 (1992).

<sup>180</sup> Uttar Pradesh Population (Control, Stabilization and Welfare) Bill, 2021.

<sup>181</sup> Mohan Rao, *Two-child Norm and Panchayats: Many Steps Back*, 38 ECON. & POL. WKLY. 3452 (2003).

<sup>182</sup> P. N. Mari Bhat, *Two-Child Norm: In Defence of Supreme Court Judgment*, 38 ECON. & POL. WKLY. 4714 (2003).

The “*othering*” of Muslims is primarily a political phenomenon that has social and economic implications. Increased representation of Muslims in State machinery would be the most appropriate response to this stimulus. But the unheard voices, since the Assembly and the successive formation of the Indian State should be given more space in our discourse of Muslim representation today. To address inequality and deprivations faced by Muslims in India, the questions of resource allocation in the socio-political economy need to be meaningfully engaged with. It is this inequality and structural deprivation that keeps a large chunk of the Muslim impoverished. And the majoritarian prejudice is a huge hurdle to have a conducive atmosphere for any betterment, especially for *Pasmanda* Muslims, who are the most marginalised.<sup>183</sup>

#### **D. WHAT ARE THE BENEFITS THAT WOULD CORRECT MUSLIM BACKWARDNESS?**

While making active attempts to curb the majoritarian attitudes that are breeding in Indian politics, the demands of the various sections of the Muslim society need to be meaningfully engaged with, to understand the kinds of disadvantage which are prevalent. In course of this, targeted attempts must be made, to address the socio-economic deprivations faced by the most marginalised sections among Muslims. The demands made by *Pasmanda* Muslims could be the starting point to identify the socio-economic placement of different castes and sections among Muslims where economic, social and political benefits need to be targeted.

Alongside this, increased quotas and reservation benefits in accordance to geographical, socio-economic and political deprivation for Muslims is necessary. This would ensure that the level playing field for the community gets restored, and an effort towards preventing further discrimination and marginalization can be made by the State.

#### **E. HOW DOES SUCH AN ACTION FALL IN LINE WITH THE BASIC STRUCTURE OF THE CONSTITUTION?**

The idea of a “*religious*” quota does not even surface in the policy discussion to alleviate all forms of poverty among Muslims. The primacy of these

---

<sup>183</sup> Momin, *supra* note 7.

## ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS

plans is not *only* to enhance the status of Muslims, as a whole but to address the socio-economic deprivations of a large number of populations, that remains impoverished and is subjected to political marginalization on the outside and a structured inaccessibility to resources “*inside*”. The action is to correct the State’s stunted analysis of backwardness, especially among Muslims. The scheme of the Constitution allows the State to make quotas only when backwardness has been identified. This has not reached out to benefit large sections of Indian Muslims because of a crystallized homogenous identity structured to benefit the upper sections of Muslims and/or the political majority of the country. This homogenous identity comes as a major source for the suffering and statelessness of large sections of the Muslim society in India. Breaking this homogeneity and enquiring into the social and educational backwardness of Muslims, especially *Pasmanda* Muslims shall fall under Article 15(4) and 16(4) of the Constitution.<sup>184</sup>

Furthermore, as Part III of the Constitution highlights prevention of discrimination on the basis of religion, introducing a religion-neutral quota that focuses on the “*caste*” status of individual shall stand true to the secular spirit of the Constitution’s text—Article 340, 341 and 342,<sup>185</sup> alongside the Presidential Order, 1950 lays down the framework. The inclusion of Muslims under this ambit shall act as the first step towards the elevation of *Pasmanda* Muslims in India.

### CONCLUSION

The insensitivity that has crept into the various pillars of Indian democracy in its course of fuelling and being complicit to communal divisions among governance is criminal and culpable. The social fabric of the country with its normalised sense of fear, especially in the case of religious identities, remains strained. While on one hand, Indian constitutionalism has grown to discuss concepts like the *anti-stereotype* principle,<sup>186</sup> which requires

---

<sup>184</sup> INDIA CONST. art. 15 cl. 4, art. 16 cl. 4.

<sup>185</sup> INDIA CONST. arts. 340, 341, 342.

<sup>186</sup> Gautam Bhatia, *Sex Discrimination and the Constitution – XI: The Justification of the Anti-Stereotyping Principle*, INDIAN CONST. L. PHIL. BLOG (Nov. 04, 2020), <https://indconlawphil.wordpress.com/2015/08/31/sex-discrimination-and-the-constitution-xi-the-justification-of-the-anti-stereotyping-principle/>.

credible identification and naming of the stereotype by the judiciary<sup>187</sup> to battle systemic oppression; on the other, the politics of the republic breeds on fear and catalyses the ghettoisation of marginalised communities and identities. Ghastly politics makes even the identification of the former very difficult.

As opposed to the rhetoric in the Assembly, when questions of separate electorates and minority rights were being rested, a case can be made in today's time for the reservation for *Pasmanda* Muslims (in political, educational and employment spheres), and such socio-economically marginalised religious minorities shifting away from the evidently flawed reasoning that it would be detrimental to the making of a homogeneous community. The consequent shooting down of these needs must be looked at, from how national unity has panned out now, in terms of their dignity rights being shredded and made redundant.

An immediate example towards the under-representation of Muslims is the fact that only around twenty seven Members of Parliament identify as Muslims in a nation with more than two hundred million Muslims<sup>188</sup> as discussed in detail above. This pattern<sup>189</sup> continues in most avenues of state machinery, with the Muslim identity as a whole being grossly underrepresented. The contradictions of representation in our democracy become much clearer as we look at basic divisions of caste. A disadvantaged community, which lags in almost all indices, would make its integration with the remaining populace meaningful only if there is better representation provided to them in all spheres. To do so, questions of caste need to be discussed and addressed in an expeditious manner. In this manner, the integration of *Pasmandas* with the remaining populace would be meaningful only by ensuring adequate educational and political representation. In this regard, there is an imminent need to revive and

---

<sup>187</sup> Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1.

<sup>188</sup> Prakash Singh, *2019 Lok Sabha election results: Only 27 Muslim MPs elected to Parliament, from the BJP*, THE SCROLL (Nov. 04, 2020), <https://scroll.in/latest/924627/2019-lok-sabha-election-results-only-24-muslim-mps-elected-to-parliament-none-from-the-bjp>.

<sup>189</sup> Abantika Ghosh, *Muslim working proportion lowest among communities*, Indian Express (Nov. 04, 2020), <https://indianexpress.com/article/india/india-news-india/muslim-working-proportion-lowest-among-communities/>.

ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY  
AND INDIA'S TRYST WITH THE REPRESENTATION OF  
MARGINALISED MUSLIMS

resurrect a public culture with democratic insistence amidst these dominant voices paving way for a more stable public sphere.<sup>190</sup>

---

<sup>190</sup> Peter Hohendahl & Patricia Russian, *Jürgen Habermas: "The Public Sphere" (1964)*, 3 NEW GERMAN CRITIQUE 45–48 (1974).