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SILENCES: EXPERIENCES FROM INDIA

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**PREFACE: DECODING CONSTITUTIONAL SILENCES –  
THE INDIAN EXPERIENCE**

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**DR. SAYANTANI BAGCHI<sup>1</sup>**

Constitutional silences are more than mere omissions; they may be deliberate design choices or may emerge organically as the constitution matures through time and circumstances. They may come in the form of definitional ambiguities leaving key phrases open to interpretation, temporal silences that makes room for institutional wisdom, deferrals that leave decision-making to future legislatures or executives or any other form of implied silences inferred from surrounding text.

Silences in the constitution are double edged. On one hand they foster interpretative creativity allowing the Constitution to adapt to unforeseen challenges and infuse life into the bare text of the Constitution. On the other hand, this same flexibility harbours risks. Constitutional silences are often weaponized and exploited through interpretations that undermine core values of constitutionalism. The trajectory of events in the past 76 years of the constitutional history bear testimony both to times when the constitutional silences have been invoked to advance partisan intentions to overthrow constitutional foundations, and to times when the same voids have proved to be redemptive, restoring faith in constitutionalism.

We may think of the prominent instances where the same constitution has allowed authoritarian rules to dismember the Constitution during the infamous emergency through repeated amendments, whereas the same Constitution has preserved the constitutional core through the evolution of the basic structure doctrine in *Kesavananda Bharati v. State of Kerala*.<sup>2</sup> The same constitution that silently watched human rights being systematically eroded in the hands of the brutal emergency was the one that paved way for an expanded reading of the rights and values by preserving the most

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<sup>1</sup> Dr. Sayantani Bagchi is the Chief Editor of Comparative Constitutional Law and Administrative Law Journal (ISSN: 2582-9807), and an Assistant Professor, Faculty of Law, National Law University, Jodhpur. The author may be reached at <sayantani.bagchi@nlujodhpur.ac.in>.

<sup>2</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

## DECODING CONSTITUTIONAL SILENCES – THE INDIAN EXPERIENCE

significant virtues of human existence with the emergence of Public Interest Litigation (PIL) movement.

Thus, constitutional silences may be said to test the true spirit of a nation to see how its citizenry perceives its values, and aspirations. This understanding is articulated by Dr. Ambedkar when he says “...*however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.*”<sup>3</sup>

This special issue of our journal is a sincere effort towards striking a dialogue on constitutional silences urging us all to listen to what the constitution does not say and act wisely on what it implies. In the first edition, we present a distinguished cohort of authors who dissect these silences across several domains and present their views on how to best reconcile them with the constitutional values and purpose.

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<sup>3</sup> Dr. Ambedkar’s last speech in the Constituent Assembly on adoption of the Constitution (November 25, 1949).

**EDITORIAL: COURTS, UNWRITTEN CONVENTIONS AND  
THE CONSTITUTION OF INDIA**

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**DR. SAYANTANI BAGCHI<sup>1</sup>**

*Constitutional conventions significantly shaped the Constituent Assembly's discourse on the parliamentary form of government especially due to India's prolonged familiarity with British parliamentary institutions. While several British conventions were codified into the Codified Constitution of India, the Assembly allowed novel conventions to emerge over time. Though not formal sources of law, Conventions were explicitly recognised as an essential component of the functioning of the constitutional governance framework in India. Judicial practice in India shows that courts often engage with and refer to such conventions when resolving constitutional disputes. This raises a fundamental question i.e. how do courts treat conventions that lack formal legal status yet influence constitutional governance? In particular, it remains unclear whether Courts in India follow a discernible pattern when disputes involving constitutional conventions arise before them. The paper argues that the courts do not treat constitutional conventions as independent claims capable of direct legal enforcement. Instead, courts engage with them as part of a broader constitutional inquiry and consequently enforce them only indirectly. Judicial decisions clarify that while conventions are recognised as evolving institutional practices, courts acknowledge and rely on them only to the extent that they supplement constitutional values and don't run contrary to them. Against this backdrop, the paper examines three cases to understand whether a consistent judicial method guides such engagement. It argues that Courts in India appear to follow a three-pronged analytical approach when addressing conventions, though the depth and rigour of scrutiny varies across each stage of the analysis.*

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<sup>1</sup> Dr. Sayantani Bagchi is the Chief Editor of Comparative Constitutional Law and Administrative Law Journal (ISSN: 2582-9807), and an Assistant Professor, Faculty of Law, National Law University, Jodhpur. The author may be reached at <sayantani.bagchi@nlujodhpur.ac.in>.

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## INTRODUCTION

Constitutional conventions are unwritten rules rooted in political practice that allow the constitutional framework to function smoothly. Owing to their diverse character and the unique circumstances from which they emerge, it is neither practical to pinpoint a uniform origin nor attribute a single developmental trajectory or purpose to them. These conventions often evolve organically in response to constitutional ambiguities, periods of political instability, societal transformation, legal reforms or moments of national crisis.<sup>2</sup> They are primarily found in “*precedents: the record of how various problems have in fact been dealt with*” or “*utterances of eminent statesmen and writings of recognised authorities on the Constitution*”.<sup>3</sup> Andrew Heard notes that while conventions emerge from consistent practice, they are distinct from mere customs because of their constitutional significance. As he states, “*the litmus test is whether some principle of the Constitution would be unaffected or impacted by the observance or neglect of a purported rule.*”<sup>4</sup> Colin Munro summarises the field of operation of conventions. He explains that while most important conventions concerned the discretionary powers of the Crown and how they should be exercised, conventions are not limited to how executive governments run or the relationship between legislature and executive. They may be found in other spheres on constitutional activity too – in relations between the Houses of Parliament and in the workings of each House, in the legislative process, in judicial administration and judicial behaviour, in Civil Service, in local governments.<sup>5</sup>

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<sup>2</sup> Nicholas Barry, Narelle Miragliotta & Zim Nwokora, *The Dynamics of Constitutional Conventions in Westminster Democracies* 72 PARL. AFF. 664-683 (2019).

<sup>3</sup> Eugene A. Forsey, *The Courts and the Conventions of the Constitution* 33 UNBLJ 11 (1984).

<sup>4</sup> Andrew Heard, *Constitutional Conventions: The Heart of the Living Constitution* 6 J. PARL. & CONST. L. 320 (2012).

<sup>5</sup> *Id.*

Constitutional conventions occupy a paradoxical position in the normative dynamics of constitutional systems. While their significance in imparting workability to the constitutional framework is unquestionably vast, they have been traditionally understood as “*Rules of political practice*”, making them distinct from legal norms that are enforced by law courts.<sup>6</sup> O. Hood Phillips explains how conventions “*are not laws as they are not enforced by the Courts or by the Houses of Parliament*”.<sup>7</sup> Dicey pinpoints the difference between law and conventions as

*“The one set of rules are in the strictest sense laws, since they are rules . . . whether enacted by statute or derived from the common law which are enforced by the courts. The other set of rules consist of conventions, understandings, habits or practices which, though they may regulate the conduct of . . . officials, are not in reality laws at all since they are not enforced by the courts”.*<sup>8</sup> (emphasis added)

The understanding that conventions are not recognised as enforceable legal norms, a factor that is traditionally believed to insulate them from judicial enforcement, raises a pivotal question about their bindingness. If constitutional conventions are not the subject matter of strict judicial enforcement, what accounts for their binding character as a constitutional practice? Also, considering that conventions lack formal legal status, should the Courts completely detach themselves from conventions irrespective of their normative value they attach to the functioning of the constitutional framework?

## **COURTS AND CONVENTIONS: CONCEPTUAL UNDERPINNINGS**

Conventions are believed to derive authority from consistent patterns of conduct followed in similar situations reinforced by the tacit consensus of constitutional actors to follow those patterns. Such an understanding

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<sup>6</sup> A.V. DICEY, AN INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION 417-438 (10th ed., The Macmillan Press Ltd. London, 1959).

<sup>7</sup> O. HOOD PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 113-116 (7th ed., Sweet & Maxwell Ltd, 1987).

<sup>8</sup> A.V. DICEY, AN INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION 417-438 (10th ed., The Macmillan Press Ltd London, 1959).

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resonates with the three-pronged test proposed by Sir Ivor Jennings that forms the basis of understanding how practices crystallise into conventions. *First*, one must assess whether there is a consistent pattern of precedent, i.e., whether the practice has been followed in previous instances. *Second*, it must be established whether the political actors involved regarded themselves bound by that practice, reflecting a sense of obligation rather than mere convenience. *Third*, there must be a clear reason or justification for the practice, indicating its functional role within the broader framework of governance.<sup>9</sup> Dicey's explanation reinforces the dilemma that laws and conventions do impact one another, despite his initial emphasis on their distinctive identities. He argues that besides the fear of disapprobation for deviating from long standing practice, the fear of "*conflict with the courts and law of the land*" may be regarded as another factor that compels stakeholders to obey conventions.<sup>10</sup> While several scholars highlighted the non-legal character of conventions,<sup>11</sup> the fact that conventions are closely intertwined with laws remains uncontested. Dicey terms conventions as "*constitutional understandings*" that emerge out of the need to supplement "*the laws that are enforced by the Courts*".<sup>12</sup> Though such an explanation admits conventions as authoritative blocks in the Constitutional province, it rigidly claims that conventions are not laws in as much as cannot be legally enforced by law courts. Dicey clarifies how sanctions for violating conventions are not legal but may lead to public disapprobation reflected "*through an adverse vote at the polls*" or political censorship in the form of "*estrangement of supporters at the House of Commons*" or maybe a '*dread of impeachment*'. He maintains that conventions can neither be recognised nor enforced by the courts, although breaking them can put the violator in legal jeopardy.<sup>13</sup> He explains

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<sup>9</sup> SIR IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* (5th ed., University of London Press, 1959).

<sup>10</sup> A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION* 417-438 (10th ed., The Macmillan Press Ltd London, 1959).

<sup>11</sup> O. HOOD PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 113-116 (7th ed., Sweet & Maxwell Ltd, 1987); Léonid Sirota, *The Case of the Prorogations and the Political Constitution* 3 JCL 103 (2021).

<sup>12</sup> Farrah Ahmed, Richard Albert & Adam Perry, *Enforcing Constitutional conventions* 17(4) ICON 1146-1165 (2019); Léonid Sirota, *The Supreme Court and the Conventions of the Constitution* SCLR 78 (2d) (2017).

<sup>13</sup> K.J. Keith, *The Courts and the Conventions of the Constitution* 16(2) INT'L COMPAR. L.Q. 542-549 (1967).

that, “*boldest political adventurer*” obeys “*the fundamental principles of the Constitution and the conventions in which these principles are expressed*” because the “*breach of these principles and conventions will almost immediately bring the offender into conflict with the courts and law of the land*”.<sup>14</sup> Sir Ivor Jennings’ explanation resonates with the notion of mutual reinforcement of laws and conventions when he writes, “*the shortest 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 ideas*”.<sup>15</sup> Closely aligned with Sir Jennings’ view is John Elster’s understanding of conventions as “*sanction-based practices that regulate the relation between the main branches of government, their prerogatives, and limitations on their powers*”.<sup>16</sup> Therefore, since a constitutional convention is essentially an agreement or understanding among parties to impart the viability to legal provisions, breaking it will inevitably put the legal framework at peril, and failing to do so will result in legal repercussions.<sup>17</sup>

The foregoing discussion allows for a fair assessment of the position of constitutional conventions on two principal points: (1) conventions are inherently political and flexible and (2) they function to supplement the formal legal structure, with their breach potentially producing tension within that structure. Nevertheless, the question of whether conventions possess a distinct legal standing remains unresolved. The second point which highlights the nexus between conventions and laws turns our attention to the second question identified at the outset. Since conventions lack formal legal status and are essentially political in nature, should the Courts completely detach themselves from conventions irrespective of the normative value they attach to the functioning of the constitutional framework?

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<sup>14</sup> A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1st ed., Macmillan Press Ltd. 1885).

<sup>15</sup> SIR IVOR JENNINGS, THE LAW AND THE CONSTITUTION 81-82 (5th ed., University of London Press, 1959).

<sup>16</sup> Jon Elster, *Unwritten Constitutional Norms* 21, 43. (undated) cited in Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361 (2022) <<https://repository.law.umich.edu/mlr/vol120/iss7/2>> <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=8681&context=mlr>>.

<sup>17</sup> A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 417–438 (10<sup>th</sup> edn. Macmillan Press Ltd. 1959).

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Courts function as the principal forum for the interpretation and enforcement of legal rules. In jurisdictions governed by codified constitutions, however, complete judicial disengagement from constitutional conventions becomes difficult, as such conventions operate in close proximity with written constitutional text. Therefore, this rigid wall separating courts from conventions is untenable in light of the growing body of Constitutional standards that courts have discovered to provide normative foundations for engaging with conventions. The intricate weaving of Constitutional conventions into the Constitutional framework in modern times has made it impracticable to sustain the Diceyan premise that conventions do not constitute the subject matter of judicial inquiry. Scholars in recent years refuse to accede to the Diceyan approach<sup>18</sup> towards the understanding of conventions which, according to them, relegates a convention to a status inferior to that of law. Rather than viewing conventions as *‘not laws properly so called’*, they view constitutional conventions *“as integral parts of the Constitutional system that has broad political and social, rather than legal foundations”*.<sup>19</sup> Therefore, as Adrian Vermeule maintains that *“Courts interpreting written Constitutional provisions, statutes or regulations have no choice but to navigate through and around conventions, and in order to do so, courts must recognise conventions”*.<sup>20</sup>

It is therefore evident that judges do engage with constitutional conventions. However, the precise manner in which courts interact with these conventions requires a nuanced understanding. The question arises whether courts refer to conventions merely as interpretative aids in understanding existing constitutional provisions, or whether they may treat them as “free-standing” claims<sup>21</sup> capable of grounding judicial remedies when conventions are breached? Determining what constitutes reasonable

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<sup>18</sup> Ashraf Ahmed, *A Theory of Constitutional Norms* 12 MICH. L. REV. 11 (2022).

<sup>19</sup> DENIS GALLIGAN & MILA VERSTEEG, *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* (Cambridge University Press, 2013); *K Lakshminarayanan v. Union Of India* 2018 SC 635; Professor Dicey’s statement that the convention is not a binding rule was departed with by Sir Kenneth Wheare in *Modern Constitutions*, who wrote – *‘By convention is meant a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the Constitution’*.

<sup>20</sup> Adrian Vermeule, *Conventions in Court* 38 DUBLIN U.L.J. 283 (2015).

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

and appropriate judicial approach to engaging with convention becomes important.

The “*commonwealth approach*,”<sup>22</sup> popular in Britain and other commonwealth nations<sup>23</sup> is built around the narrative that courts do nothing more than recognize conventions. They do not enforce them. Judges in this case will only recognize established conventions; although, in the case of more recent conventions, they may conduct a fact-finding investigation, declare their existence, and thereby grant recognition. However, the judiciary only goes so far as to acknowledge and reorient parties back to the system, which allows them to apply the recognised convention at will. The adaptable and unique political nature of conventions is thought to be preserved using this approach. However, scholarly research underscores that courts do not limit themselves to merely recognising conventions, they in fact interact with and occasionally enforce conventions.<sup>24</sup>

The present paper has a focused analytical objective. It proceeds on the understanding that though constitutional conventions are not formal sources of law yet they remain indispensable to the effective functioning of a constitutional system. Moreover, judicial practice validates that courts, at times, engage with and refer to conventions while resolving constitutional questions. Against this backdrop, the paper seeks to understand whether a discernible judicial method, framework or interpretative strategy exists that guides Courts, particularly the higher judiciary in India when disputes involving constitutional conventions arise before them. The paper argues that the Courts adopt a three-pronged method of engaging with conventions and thereby enforce conventions not as free standing or independent legal claims but as a part of a broader legal inquiry involved in a dispute. However, the depth and rigour of

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<sup>22</sup> Farrah Ahmed, Richard Albert & Adam Perry, *Judging Constitutional conventions* 17(3) ICON 787-806 (2019).

<sup>23</sup> O. HOOD PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 119 (7th ed., Sweet & Maxwell Ltd, 1987); SIR IVOR JENNINGS, THE LAW AND THE CONSTITUTION 81-82 (5th ed., University of London Press, 1959).

<sup>24</sup> Farrah Ahmed, Richard Albert & Adam Perry, *Judging Constitutional conventions* 17(3) ICON 787–806 (2019); SIR IVOR JENNINGS, THE LAW AND THE CONSTITUTION, chapter III (5th ed, University of London Press, 1959); Adrian Vermeule, *Conventions in Court* 38 Dublin U.L.J. 283 (2015).

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judicial scrutiny differ considerably across each step. An important incidental question concerns the effect of judicial enforcement, even if indirect, on the inherent flexible and political character of constitutional conventions. The paper does not pursue that question further and instead limits its inquiry to examining whether Indian courts engage with issues involving constitutional conventions through a consistent methodological approach.

### FOUNDING DEBATES ON THE SCOPE OF JUDICIAL INQUIRY INTO CONSTITUTIONAL CONVENTIONS

India's ongoing experiment with British methods of Parliamentary procedure is clearly what led to its initial tryst with conventions.<sup>25</sup> Though the Constituent Assembly preferred a Westminster-style Parliamentary model, the precise import of conventions remained obscure. The practicality of importing the Parliamentary system or "*blind imitation*" of British Conventions received criticism from members. Some feared that we lacked the necessary experience to manage such institutions<sup>26</sup> while others feared leaving important matters to conventions.<sup>27</sup> They were inclined towards an adequate codification of each convention in the Constitution to evade any future ambiguity. The Assembly finally ended up introducing several of the long-standing and fundamental British conventions explicitly into the Constitution to lay down the foundation of the Parliamentary system of governance. These include the obligation of the Council of Ministers to *aid and advise* the President/Governor and the binding character of such advice (Article 74),<sup>28</sup> the *collective responsibility* of Ministers to the lower chambers of the Parliament/Legislatures (Article 75)<sup>29</sup> and the Prime Minister or Chief Minister's responsibility to inform the President about the working of the Parliament (Article 78).<sup>30</sup> Besides

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<sup>25</sup> SCARA 1993 ¶ 435.

<sup>26</sup> Kazi Syed Karimuddin: "*It is as clear as daylight that the political opponents are practically crushed, neglected and ignored; we have no conventions and we have no discipline and it is very difficult for our people who are not trained in the Parliamentary system of Government to put up with opposition in the country.*" CA DEB. DEC. 10 1948.

<sup>27</sup> CA DEB. Nov. 18 1949.

<sup>28</sup> INDIA CONST. art. 74.

<sup>29</sup> INDIA CONST. art. 75

<sup>30</sup> INDIA CONST. art. 78.

codification, the Assembly left several spaces of constitutional functioning indeterminate to ensure both existing and novel conventions evolve over time. According to many, the idea of permitting conventions to develop in the near future would secure a perfect harmony between the letter and spirit of the Constitution.<sup>31</sup> They believed that it is not only unrealistic for a written Constitution to accurately enumerate every detail, but also making a written Constitution with plenty of nuances would amount to creating “*a strait jacket in which the nation must grow*” something that is likely to be an “*impediment to the growth of the people*”.<sup>32</sup>

The inclusion of the Instrument of Instructions<sup>33</sup> in the Draft Constitution and the subsequent revocation of the same provides a useful illustration of how the framers preferred conventions over documentation in certain cases. The Instrument was added to the Draft Constitution<sup>34</sup> to codify the conventions of a responsible government regulating the powers of the Governor and was later proposed to be extended to the President.<sup>35</sup> However, the Instrument was purely a “*code of behaviour and procedure*” that commanded a moral force. It was devoid of an enforceable character. Ambedkar backed the inclusion of the Instrument when the Draft Constitution was presented to the Assembly, arguing that it would have a moral force rather than a legal one. He claimed that anything done in violation of the conventions embodied in the Instrument would result in the Governor’s impeachment. Ten months later, however, the plan was abandoned, with Ambedkar first entrusting T.T. Krishnamachari the task of justifying the same. The rationale for this withdrawal, according to Krishnamachari, was that it was desirable to let conventions that evolve through time define the relationships of the President and the Governors in relation to their respective Ministries.<sup>36</sup>

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<sup>31</sup> 11 CA DEB. Nov. 21, 1949, 11.161 34-11.161 44.

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

<sup>33</sup> An Instrument of Instructions is a body of directives issued to the Governor. *See*, D.N. Banerjee, *The Nature of The Governor’s Instrument of Instructions: Is It A Law?* 1(4) INDIAN J. POL. SCI. 393-410 (1940).

<sup>34</sup> Drafting Committee, Report on Draft Constitution of India (1948), <https://www.constitutionofindia.net/committee-report/draft-constitution-of-india1948/>.

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

<sup>36</sup> 8 CA DEB. May 23, 1949, 8.89 141-8.891 142.

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Therefore, despite being unwritten, conventions hold immense constitutional significance as the above discussions suggest, but what is puzzling is comprehending if the Assembly decided to keep them beyond the range of judicial recognition. The exchanges on the *Instruments of Instructions* provide some guidance on this point.<sup>37</sup> It may be noted that even before the plan to annex the Instruments to the final Constitution was officially withdrawn, they were essentially envisioned to operate as conventions or political guidelines and not as enforceable legal norms as the discussions below suggest. A common feature in the Instruments found in the constitutional documents<sup>38</sup> preceding the draft constitution, as well as the Instrument proposed to be added to the Draft Constitution,<sup>39</sup> was a provision that the Governor or the President would be guided by the conventions of responsible government set out in that Instrument. However, the validity of any gubernatorial or Presidential decision *shall not be called into question on the ground that it was done "otherwise" than in accordance with those Instructions.*<sup>40</sup>

The principle that conventions and political instructions should guide behaviour but should not be enforceable in courts lay at the core of the debate surrounding the above clause. The Instrument was intended to set out certain conventions of responsible government that would guide the conduct of the President/Governor in the exercise of constitutional functions. However, the clause above also stated that the validity of any act done by the President could not be challenged on the ground that it had been performed otherwise than in accordance with those Instructions. The

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<sup>37</sup> 7 CA DEB. Dec. 31, 1948, 7.77 148.

<sup>38</sup> Government of India Act, 1935, §50 (Eng.); Provincial Constitution Committee, Report of the Provincial Constitution Committee (27 June 1947); Constitutional Advisor, Report on Draft Constitution prepared by the Constitutional Advisor (1947), <https://www.constitutionofindia.net/committee-report/draft-constitution-prepared-by-the-constitutional-adviser/>.

<sup>39</sup> Honourable Dr. B. R. Ambedkar (Bombay: General): Sir, I move: "*That after clause (5) of article 62, the following new clause be inserted:--` (5) (a) In the choice of his Ministers and the exercise of his other functions under this Constitution, the President shall be generally guided by the instructions set out in Schedule III-A, but the validity of anything done by the President shall not be called in question on the ground that it was done otherwise than in accordance with such instructions.*" 7 CA DEB. Dec. 31, 1948, 7.77 4.

<sup>40</sup> 7 CA DEB. Dec. 31, 1948, 7.77.

effect therefore was that the Instruments were meant to operate as political guidelines rather than legally enforceable rules.

Naziruddin Ahmad objected to this formulation as he believed that the clause granted excessive immunity to presidential acts. He claimed that if the President's actions could not be called into question for failing to comply with the Instrument, this might prevent courts or the legislature from scrutinizing those actions even when they were unconstitutional. Since the President/Governor would ordinarily act on the aid and advice of Ministers, Ahmad feared that ministers might misuse this protection by 'coaxing' and 'persuading' the President to take actions that violated the Constitution while shielding themselves from accountability.

Ambedkar responded by acknowledging that the clause did indeed prevent judicial enforcement of Instrument of Instructions. However, he contended that such a move was intentional. In his view, there were two possible ways of ensuring compliance with such instructions – either courts were given the authority to examine if they had been followed or their enforcement could be left to the political process. Ambedkar favoured the latter approach. Allowing courts to adjudicate on compliance with such instructions could in his view lead to excessive judicial interference in the functioning of the legislature and the executive. In Ambedkar's estimation, the proper mechanism for enforcing conventions was *political* rather than *judicial*.<sup>41</sup> If Ministers failed to advise the President properly, or if the President acted contrary to constitutional expectations, Parliament could hold the government accountable through mechanisms such as censure motions, votes of no-confidence or in extreme cases impeachment of the President. The debate reflects a conscious attempt to preserve the distinctions between legally enforceable constitutional rules and political conventions.

The spirit of judicial minimalism in matters traditionally governed by constitutional conventions was ultimately carried into the final constitution. Several codified provisions that were primarily inherited from the Westminster conventions were accompanied by explicit limitations on judicial review. Two provisions illustrate this design. Article 74(2) expressly

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<sup>41</sup> 10 CA DEB. Oct. 11, 1949, 10.148.

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bars courts from inquiring into the nature of the “*aid and advice*” tendered by the Council of Ministers to the President. Similarly, Article 122 prohibits courts from questioning the validity of parliamentary proceedings on the ground of *procedural irregularity*. These provisions operate as structural safeguards that preserve the institutional autonomy of the executive and legislative branches by creating space for conventions to evolve and regulate the functioning of these institutions. What emerges from the above discussions are (1) the constitution makers did allow unwritten constitutional conventions to operate alongside the written provisions of the Constitution of India. (2) the design therefore preserved institutional autonomy as it allowed constitutional conventions to operate with a degree of flexibility. Judicial intervention was therefore expected to remain largely applicable to the written provisions of the Constitution.

### JUDGES, CONVENTIONS AND THE CONSTITUTION – A GROUND LEVEL VIEW

The Courts in India have consistently defined the scope of conventions against the framework of the Constitution of India. Through its evolving jurisprudence, the Court has emphasised the derivative positioning of constitutional conventions within a framework otherwise shaped by the codified Constitution. The purpose of conventions is therefore “*to ensure is that the legal framework of the Constitution is operated in accordance with Constitutional values and Constitutional morality*”<sup>42</sup>. At the same time, the Court firmly delineates their limits, observing that, “*No constitutional conventions can be recognised or implemented which runs contrary to the underlying constitutional objectives and aims which the Constitution sought to achieve*”.<sup>43</sup> It has been clearly laid out that, once it is established to the satisfaction of the court that a particular convention exists and is operating, then the convention becomes a part of the constitutional law of the land and can be enforced in the like manner.<sup>44</sup>

Drawing from the above observations of Indian Courts, what remains settled is that courts routinely engage with conventions to the extent of

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<sup>42</sup> K. Lakshminarayanan v. The Union of India, 2018 SCC Online Mad. 2730.

<sup>43</sup> K. Lakshminarayanan v. The Union of India, 2018 SCC Online Mad. 2730.

<sup>44</sup> Supreme Court Advocates-On-Record v. Union of India, AIR 1994 SC 268, 451.

enforcing them provided conventions supplement the constitutional values and do not run contrary to them. Therefore, while the Court acknowledges that though conventions are evolving norms, their transformation must still be evaluated against shifting constitutional values and interpretations.

The task now is to identify how they enforce conventions and whether they follow a systematic strategy to do so. The paper argues that the courts in India do not treat conventions as free-standing claims capable of direct legal enforcement, meaning the grant of a legal remedy for their breach. Instead they address questions of conventions as a part of a broader legal inquiry and thereby enforce them indirectly. In doing so, they follow a three step analytical formula to engage with conventions: Courts shall (1) identify the constitutional and legal framework within which the convention is located (determine the legal framework) (2) verify through strong and convincing evidence whether the said convention exists as a matter of institutional practice (determines factual existence) and (3) consider whether acknowledging it would legitimately inform exercise of constitutional power (determines compatibility with constitutional and legal framework). The constitutional and legal framework here includes both the textual framework identified in step one or constitutional principles underlying it. Following the successful application of the test, the court proceeds to apply its findings to adjudicate the cases before it.

The discussion now brings into view three specific cases to illustrate how the courts have operationalized the three-pronged strategy outlined above together with its application to determine the core issues raised in these cases. The three cases have been selected considering that they grapple with the interpretation of constitutional provisions whose meaning and application are significantly established by conventions. Also, these three cases do not rely on British conventions but on conventions developed within our own constitutional system making them ideal for examining how courts apply the three-pronged strategy in practice. The first phase of inquiry examines if the framework has been consistently applied across all three cases and then the analysis moves to a comparative dimension probing whether the rigor and depth of judicial scrutiny are uniform across them.

### **APPLYING THE THREEFOLD TEST: AN ANALYSIS OF THREE CASES**

Taking a lead among the most well-known cases involving detailed engagement with and reliance upon constitutional conventions is the *Second Judges case*.<sup>45</sup> One of the core issues before the Court was whether the President in appointing judges to the Supreme Court and High Courts under Articles 124 and 217 of the Constitution was bound by the opinion of the Chief Justice of India. This question arose from the formulation of the two provisions that mandate “consultation” with the Chief Justice of India by the President. The Court was called upon to determine the precise nature and scope of such consultation. In the earlier decision of *SP Gupta*,<sup>46</sup> the Court had emphasized the need for “full and effective consultation” while preserving the primacy of the executive in judicial appointments. In the present case, however, the Court clarified that in the four decades since *SP Gupta*, the expanding horizons of judicial review and the evolving understanding of judicial independence made it necessary for the Court to revisit this issue and examine whether the practice of consultation with the Chief Justice had over time crystallised into a binding convention.<sup>47</sup> Though Justice Verma’s opinion emphasized upon the existence of a convention requiring bindingness of the consultation with the Chief Justice of India, a clearer picture around the involvement of conventions was provided by Justice Kuldeep Singh. The learned judge began by situating the issue squarely within the constitutional framework governing judicial appointments in Articles 124 and 217 of the Constitution. From Justice Singh’s perspective, the constitutional scheme governing judicial appointments reveals a clear structural tension i.e. although the President is bound to act as per the ‘aid and advice’ of the council of ministers in discharging executive functions, the text of Articles 124 and 217 explicitly mandates consultation with the Chief Justice of India. The key issue therefore is which institution holds actual primacy; the executive or the judiciary. Justice Singh viewed this as an opportune moment to contend that a binding convention has gradually crystallised rendering consultation with the Chief Justice effectively mandatory and thereby tipping the

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<sup>45</sup> Supreme Court Advocates on Record Association v. Union of India AIR 1994 SC 268.

<sup>46</sup> *SP Gupta v. Union of India* (1982) 2 SCR 365, ¶ 29.

<sup>47</sup> *SP Gupta v. Union of India* (1982) 2 SCR 365, ¶ 427.

balance in favour of the judiciary. He nestles this convention into a broader theory of constitutional interpretation emphasizing the authoritative role of established conventions contributing to the dynamic growth of the open textured constitutional provisions like “consultation”. The above analysis thus fulfills the first limb of the three-stage inquiry (laying down the legal framework) that, as this paper argues, is adopted by the courts in dealing with conventions.

Following the first stage of our inquiry, which focuses on determining the legal framework underpinning the convention, the analysis turns to whether a consistent pattern can be identified that supports the claim of judicial primacy. The judge here treats the classic three-pronged Jennings Test as the most authoritative toolkit to assess if conventions in general including the convention in question have acquired a binding status. What follows is an in-depth inquiry (in precisely 3097 words)<sup>48</sup> into whether the pattern in which the convention has evolved. To answer the first prong of the Jennings test (establishment of precedents), the judge began by examining the historical practice before the Constitution came into force. Although under the Government of India Act 1935, the Crown had absolute discretion to appoint judges, the Court notes that in practice appointments were made with the concurrence of the Chief Justice of India. He relied on the 1948 Memorandum of Federal Court judges and High Court Chief Justice which stated that a convention already existed requiring concurrence of the Chief Justice of India in judicial appointments. From here Justice Singh identifies how the practice came into place after the Constitution came into force (to answer the second prong of the Jennings test - belief in the obligation). He referred to the debates in Parliament during 1959 and The Law Commission report. He drew authority from the statements of Gobind Ballabh Pant and Ashok Sen indicating that in practice appointments had been made on the recommendation or concurrence of the Chief Justice of India. He relied on an affidavit filed before the court that between 1983 and 1993, 7 out of 547 judicial appointments were made contrary to the views of the Chief Justice of India. Lastly, the discussion addressed the third Jennings question - whether there is a reason for the rule. He relied on two reasons. *First*, judicial independence being a basic feature of the Constitution and limiting

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<sup>48</sup> S.P. Gupta v. Union of India (1982) 2 SCR 365, ¶¶ 455-474.

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the executive's role in appointment helps preserve that independence. *Second*, the judiciary possesses greater expertise and knowledge about the merit, integrity and suitability of candidates making it better equipped than the executive to assess potential judges. Having answered all the three questions posed by Jennings in the affirmative he concluded that a constitutional convention exists giving primacy to the opinion of the Chief Justice of India in judicial appointments. The above discussion demonstrates that the court successfully completed its inquiry in the second stage identified in the paper, by examining whether the convention exists and whether it has been consistently practiced. Finally, the Court reaches the final stage of inquiry identified in the paper which is to assess whether the convention is compatible with the constitutional framework. The court undertakes this assessment by emphasizing the need to preserve judicial independence particularly by granting primacy to the Chief Justice. The remaining and the pivotal question however is, how the court applies these findings to the facts of the present case.

The court begins by interpreting the constitutional requirement of consultation under Articles 124(2) and 217(1) holding that the consultation process is mandatory and must be understood in light of the principle of judicial independence. It reasons that because judicial appointments require consultation with members of the judiciary, the purpose of this requirement is to ensure that those best placed to assess judicial competence, the judges themselves, play the decisive role. Relying on prior observations, the court concludes that in practice the executive should ordinarily accept the advice of the Chief Justice of India but rejects the idea that the chief justice acts individually, interpreting the constitutional scheme as requiring *collective judicial making*. By applying the above indications of practice of the convention of judicial primacy, the Court formulates a concrete rule i.e. The opinion of the Chief Justice must be formed in consultation with the two senior most judges of the supreme court (and a senior judge familiar with the concerned High Court), while High Court chief justices must similarly consult their senior colleagues. On the above basis, the court concludes that appointments cannot be made unless they conform to the collectively formed opinion of the judiciary. This is how Justice Singh's ambitious expedition into the territory of conventions concluded by establishing judicial primacy and effectively institutionalizing the collegium style consultation process.

The second of the three cases is *Ambika Roy v. State of West Bengal*.<sup>49</sup> The dispute concerned the Chairman of the Public Accounts Committee (PAC) of the West Bengal Legislative Assembly. The petitioner sought a writ of quo warranto claiming that the *respondent did not have the lawful authority to hold the office of the chairman of the PAC*. The petitioner's challenge revolved around two factual assertions. *First*, it was claimed that though the Speaker has the authority to appoint any member of the Assembly as a Chairperson, for several decades the established practice of the Assembly has been to allow the Speaker to appoint the Chairman of the PAC from among members of the opposition. *Second*, the petitioner asserted that the respondent had originally been elected as a member of the opposition party but had subsequently defected to join the ruling party before his appointment as chairman. Despite this change in political environment the Speaker appointed respondent as Chairman of the committee. On the above basis the petitioner contended that the Speaker's decision departed from established constitutional convention governing the appointment and hence the *respondent did not have the lawful authority to hold the office of the chairman of the PAC*.

Against the backdrop, let us explore the strategy adopted by the Calcutta High Court to determine the dispute at hand. At the initial phase of its analysis, the Court laid down the constitutional framework within which the inquiry operates. Article 208 of the Constitution allows state legislatures to make rules for their own conduct. The Rules of Procedure of the West Bengal Legislative Assembly authorise the Speaker to appoint the Chairman of any Committee (including the Public Accounts Committee) from among its members (Rule 255). While it is clear that the Speaker has the authority to appoint any member, the petitioners claimed that the Speaker here is guided by a convention that requires him to appoint a member from the opposition. This leads to the next inquiry, verifying whether there exists such a convention. The court resorted to the three-pronged Jennings test (affirmed in *Supreme Court Advocates on Record Association v Union of India*) to examine whether the practice could be elevated to the status of a convention. It navigated through the official declarations of the Speaker where he claimed that there existed a 'healthy and rich tradition and convention' for 'fifty-four years' to appoint a

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<sup>49</sup> *Ambika Roy v. State of West Bengal*, WPA(P) 213 of 2021.

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member from the Opposition as the Chairperson of the Public Accounts Committee. This fact-finding inquiry led by the court eventually affirmed the longstanding and repeated appointment of opposition members as chairpersons of PAC. At the last stage of the inquiry on conventions, the Court turned towards testing whether the newly recognised convention is compatible with the constitutional framework. The Court's answer was in the affirmative. It held the said convention to be in consonance with "*the healthy democratic set up and maintaining the constitutional values.*"<sup>50</sup>

At the closing phase of the proceedings, the pivotal question was how did the court deploy its interpretation of the convention to resolve the central inquiry of the matter i.e. whether the respondent legitimately held the office of the Chairperson of the PAC. Applicability of the constitutional convention was contingent upon the respondent's status as a valid MLA which in turn depended on the outcome of the pending disqualification petition. The court treated the convention not as an automatic trigger to invalidate the appointment but as a guiding standard whose relevance could be assessed once the respondent's eligibility to hold office was first clarified. The court effectively waited for the disqualification question to be determined before it could determine whether the convention could properly inform the legality of the appointment. It may therefore be deciphered that constitutional conventions are indirectly enforceable. They do not have the force of law on their own so breaching a convention does not automatically invalidate an action. Instead, courts can take the convention into account when reviewing the legality or propriety of an act. Therefore, Courts do not treat conventions as free-standing claims, but use them within legal analysis to shape outcomes.

We now turn to the last decision to test whether Courts apply the same three step methodology. The petitioners in *K. Lakshminarayanan v. The Union of India*<sup>51</sup> challenged the nomination of three members to the Puducherry Legislative Assembly under Section 3(3) of the Government of Union Territories Act, 1963.<sup>52</sup> The challenge was grounded on two arguments:

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<sup>50</sup> *Ambika Roy v. State of West Bengal*, WPA(P) 213 of 2021, ¶ 49.

<sup>51</sup> *K. Lakshminarayanan v. The Union of India*, 2018 SCC Online Mad 2730.

<sup>52</sup> Government of Union Territories Act, 1963, § 3(3), No. 20 of 1963 (India), reads, "(3) *The Central Government may nominate not more than three persons, not being persons in the service of Government, to be members of the Legislative Assembly of 2 [the Union territory].*"

First that the nominations were in violation of a long-standing procedure which has now elevated it to the status of a well-established convention. The convention, argued the petitioner, required the elected govt. of Puducherry (Council of Ministers) to nominate the names of members which would thereafter be forwarded by the Lieutenant Governor to the President for approval.

In its analysis, the Madras High Court first clarified the legal context in which the dispute may be located. It traced the nomination to Article 239A of the Constitution that allows the creation of a legislature for Union Territories and provides for a legislature consisting of elected and nominated members. Further Section 3(3) of the Government of Union Territories Act, 1963 empowers the Central govt. to nominate three members to nominate three members to the Puducherry legislative assembly. At this point, the need to verify whether the convention claimed by the petitioners actually exists or not arises. The court scrutinised the past nomination practices and concluded that there was no clear documentary evidence proving if the procedure was followed in earlier nominations or if it was followed consistently. Also, considering the fact that earlier nominations were made when political parties at the Centre and in Puducherry were aligned, the court raised doubts about whether the convention had crystallized into a binding norm or was merely a matter of convenience. Testing the final question, the Court clarified that the said convention does not align with the constitutional and statutory scheme. Section 3(3) of the Act does not lay down a nomination procedure for Central Government. to follow and hence the power of the Central govt. cannot be restricted by a convention whose bindingness was not proved. Though the court rejected the convention argument, it did acknowledge the legislative gap and suggested that the Parliament should clarify the nomination procedure. The Court finally applied its findings to the facts and upheld the Central Government's nominations. Invalidation of the nomination required petitioners to prove that the nomination procedure was shaped by the convention demanding consultation with the govt. of Puducherry, which they failed. Without an established convention, no consultation was required. The nominations remained valid. Therefore, unlike the previous two instances, herein the Court chose not to engage with Conventions and not to enforce them in any manner on the basis of absence of conclusive evidence.

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### KEY FINDINGS: A COMPARATIVE PICTURE

Upon a complete assessment of the three cases and the extent of the court's intervention into matters involving conventions, the following findings emerge. In all the three cases, the application of the first prong was relatively straightforward. In each instance, the Court situated the question of constitutional conventions within a broader constitutional and legal framework. For example, in the *Second Judges case*, the relevant inquiry was rooted primarily in constitutional provisions particularly Articles 124 and 217 of the Constitution.<sup>53</sup> In *Ambika* the convention was considered within the wider framework provided by Article 208 of the constitution and the rules of the Legislative Assembly framed under it. Similarly, in *Lakshminarayan* the issue was located within Article 239A of the constitution<sup>54</sup> and the Government of Union Territories Act 1963.<sup>55</sup> A common feature across all the three cases is that the conventions in question were closely tied to the interpretation of the existing legal framework or aimed at streamlining the procedures prescribed by these laws. Each case involved the exercise of discretionary power whether by the President, the Speaker or the Central government that was procedurally under-defined. What may be inferred is that in the post-constitutional landscape, particularly in the cases examined in this paper, constitutional conventions tend to emerge as mechanisms that clarify and structure the exercise of discretionary power. At the same time they do so without undermining the core principles on which the constitutional framework is founded.

The second prong of the inquiry requires the Court to verify through strong and convincing evidence whether the alleged convention actually exists as a matter of institutional practice. This stage is concerned with establishing the factual existence of the convention. It assumes particular significance because as decisions discussed earlier show.<sup>56</sup> Indian courts place constitutional conventions on par with constitutional provisions only when their existence is demonstrated beyond doubt and when they do not

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<sup>53</sup> Supreme Court Advocates on Record Association v. Union of India AIR 1994 SC 268.

<sup>54</sup> INDIA CONST. art. 239.

<sup>55</sup> Government of Union Territories Act, 1963, § 3(3), No. 20 of 1963 (India).

<sup>56</sup> Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268.

run contrary to the constitution. Hence before treating a convention as authoritative, Courts must examine with considerable attention whether the practice has in fact been followed consistently.

In the *Second Judges' case* the Jennings test was recognised as a systematic method for assessing the frequency and consistency of such practices. The test helped determine whether a practice has been followed regularly enough to qualify as a convention. In the present analysis, the most detailed and engagement with this stage of inquiry appears in the *Second Judges' case*. Justice Singh undertook a careful and extensive examination of the elements proposed by the Jennings test addressing each question with considerable precision and attention in order to determine whether the convention has indeed emerged through institutional practice or not.

The approach in *Ambika Roy* was comparatively less rigorous. Although the court referred to the *Jennings test* it relied primarily on extracts from the Speaker's Declaration concerning the constitution of various Committees and the Appointment of their Chairpersons. On this basis, the Court accepted that “*a rich and healthy tradition*” has evolved over the previous 54 years of appointing a member of the opposition as the chairperson of the PAC. However, the Court did not go beyond the Speaker's Declaration to independently verify whether the practice had actually been followed consistently during that period. Thus, while the Jennings framework was involved, it was not applied with the same degree of scrutiny and methodological care that was visible in the *Second Judges' case*.

In *Lakshminarayan* where the outcome also depended significantly on whether a convention existed, the court's approach was considerably different than the previous two decisions. Rather than applying a structured method such as the Jennings test, it took a more sceptical view of the petitioner's claim. The petitioners in this case relied on six earlier instances of nominations to argue that a settled procedure had developed. The Court however noted that in those instances the political parties in power at the Union Territory and at the Centre were the same or broadly aligned. More importantly, the Court claimed that parties were unable to produce concrete evidence demonstrating that the said procedure had been consistently followed without deviation on those occasions. In the absence of reliable material establishing a uniform and interrupted practice the

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court concluded that it could not definitely hold the procedure had become so fairly established as to amount to a constitutional convention. The approach was considerably departed from the previous two decisions as the Court neither deployed any strategic method nor depicted willingness to engage with conventions to determine the issue at hand.

The judicial approach at the third stage of inquiry i.e. assessing whether a constitutional convention is compatible with the constitutional framework identified at the first stage, demonstrates a nuanced and evolving engagement with conventions. In the *Second Judges'* case, Justice Kuldip Singh adopted a clearly purposive interpretation of the Constitution. He held that the collegium system of judicial appointments, though not expressly stipulated in the constitutional text, served to reinforce the independence of the judiciary, a vision that the framers. The court recognised that the collegium convention system informs the exercise of constitutional power by limiting executive influence in judicial appointments, reflecting the concern that excessive involvement may erode judicial autonomy and undermine judicial independence. The Court effectively constitutionalised a convention by locating the collegium mechanism within independence of the judiciary, a foundational constitutional value. A similar yet distinct approach is visible in *Ambika Roy*, where the Court recognised a particular institutional practice as a 'healthy tradition' that operated in consonance with democratic constitutional framework. In this case, the practice of appointing members of the opposition as Chairperson of the Public Accounts Committee (PAC) was believed to strengthen democratic governance and institutional propriety. The judicial attitude shifted towards a more textual and formalist orientation in *Lakshminarayan*. The Court emphasised upon the language of Section 3(3) of the Act and clarified that in the absence of a statutory constraint; executive discretion could not be curtailed by reference to a convention whose obligatory character has not been established decisively. The Court here depicts a cautious approach towards practices that in its view have not crystallised into established constitutional conventions, though the approach it adopts to assess whether such a convention has attained sufficient certainty remains questionable.

## CONCLUSION

The paper began with a relatively modest question i.e. when Indian courts are confronted with claims about constitutional conventions, do they approach such questions through a consistently methodological strategy? The examination of the *Second Judges case*, *Ambika Roy* and *Lakshminarayan* suggests that the answer is at its best, tentative. While courts acknowledge the relevance of conventions within the constitutional order, the manner in which they evaluate such claims remains uneven.

Across these cases, courts clearly acknowledge that conventions often operate as informal norms that structure the exercise of constitutional power particularly in cases where the formal legal framework leaves room for discretion. Yet the depth, and form of judicial engagement vary significantly. In the *Second Judges case*, the inquiry into the existence of conventions was significantly elaborate so much so that the Courts did not just trace the historical roots of the conventions but also as an interpretative device capable of mediating between the constitutional text and the constitutional principle. The later decisions present a noticeably more restrained judicial intervention. In *Ambika*, although the Court invoked the vocabulary of the Jennings Test, the inquiry into institutional practice remained relatively thin. Thus, in effect the existence of the convention was inferred from merely a declaration that a convention exists. *Lakshminarayan* signals an even greater degree of judicial caution. When the Court was confronted with a claim that the process of consulting the Council of Ministers in the nomination process matured into an established convention, the Court subtly declined to embark upon a historical inquiry and returned to the statutory framework and treated the absence of clear and convincing evidence of the convention as decisive.

Together these decisions suggest that judicial engagement with conventions is shaped less by the mechanical application of a settled test and more by the courts interpretative posture in a given constitutional context. While in some cases courts undertake full enquiry into consistency and normative force of the convention in others, they rely purely on institutional declarations or selective evidence without subjecting the claim to the same degree of rigorous examination.

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The approaches in the cases do not necessarily indicate doctrinal incoherence. Rather they reflect the complex position that conventions occupy within the Indian constitutional practice. Conventions are neither fully codified rules nor nearly political habits, they operate in the interstitial space between constitutional text and constitutional practice. Courts recognise their potential to stabilize institutional relationships and discipline the exercise of discretion but they also remain cautious about the degree to which they can accord a normative status to conventions. The cases reveal a judiciary that is still negotiating the terms of its engagement with constitutional conventions. The methodological contours are not fully settled but the jurisprudence indicates an increasing awareness of the need to scrutinize institutional practice while remaining attentive to the Constitution.

### IN THIS ISSUE

Just as there are no innocent bystanders, there are no innocent silences, too. In a world that changes its political atmosphere by the minute, this year, we aim to move beyond conventional engagement and grapple with the more complex questions within constitutional law. Its intersections with administrative law, especially in a comparative perspective, call for careful thought and intellectual honesty. As the Editors-in-Chief of the Comparative Constitutional Law and Administrative Law Journal (“CALJ”) functional under the Centre for Comparative Constitutional Law and Administrative Law (“CCAL”), it gives us immense pleasure to introduce our Special Issue “*Decoding Constitutional Silences: Experiences from India*” to the readers.

In “*Constitutional Silences and Constitutional Conventions: Development of Constitutional Law*”, Senior Advocate V. Sudhish Pai contends that a constitution’s unwritten dimensions are as legally significant as its express provisions. Judicial interpretation is the primary mechanism through which these silences are given meaning. Drawing on Tribe, Frankfurter, Holmes, and Cardozo, Sr. Adv. Pai argues that what is left unsaid in a constitution is often as consequential as what is expressly stated. Using Tribe’s distinction between “door-opening” and “door-closing” silences as a conceptual anchor, the article illustrates how courts determine constitutional development by *choosing* whether to read meaning

into silence. Further, the expansion of fundamental rights under Article 21, and the basic structure doctrine in *Kesavananda Bharati*, are presented as landmark instances of judicial imagination filling constitutional gaps. The author concludes, however, that interpretive freedom must be exercised with restraint; the genius of constitutionalism lying in balancing continuity with change, and creativity with fidelity to foundational values.

In “*Blowin’ in the Wind: Reconnoitring the Constitutional Silences of Unconstitutional Statutes in India*”, Professor Shruti Bedi contends that India lacks a coherent doctrine for reviving statutes declared unconstitutional, creating an ambiguity that courts and legislators have inconsistently navigated. Drawing on the void ab initio doctrine and the doctrine of eclipse, the author argues that while *Deep Chand v. State of U.P.* and *Saghir Ahmad v. State of U.P.* firmly establish the validity of unconstitutional post-constitutional laws, the Supreme Court’s validation of the amended Section 45 of the Prevention of Money Laundering Act, 2002, (PMLA) in *Vijay Madanlal Choudhary v. Union of India* contradicts this position by accepting superficial legislative changes as sufficient revival. The twin bail conditions under the PMLA serve as the article’s central case study, illustrating how minimal amendments were judicially upheld despite failing to substantively address the constitutional infirmities identified in *Nikesh Tarachand Shah v. Union of India*. The author concludes by drawing on comparative jurisprudence from Canada, South Africa, the United Kingdom, the United States, and Australia, advocating for a structured Indian revival framework that demands genuine rectification rather than cosmetic legislative manoeuvring.

In “*Filling the Silences: Political Parties as de facto Constitutional Architects in Contemporary India*”, Dr. Manisha Mirdha contends that political parties, despite barely featuring in India’s constitutional text, are its most consequential informal architects. They shape constitutional meaning through legislation, executive action, judicial appointments, and amendments. Drawing on Foucault and Gandhian traditions of strategic silence, the author contends that constitutional gaps are not passive omissions but contested spaces where political parties exercise real normative power. Case studies spanning the *Basic Structure* doctrine, *GST*, the 1975 Emergency, and the *NJAC* controversy illustrate how party-driven negotiations have filled these gaps, sometimes strengthening

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democracy, sometimes undermining it. The author concludes that leaving political parties outside the constitutional framework has produced democratic deficits and judicial inconsistency. Therefore, the author advocates for gradual statutory reform and a stronger Election Commission to bring these informal architects within the reach of democratic accountability.

In “*Does the Indian Constitution Care? Plugging in Constitutional Silences on the Ethics of Care through Fundamental Rights*”, Jwalika Balaji and Anshul Dalmia contend that the Indian Constitution’s silence on care is a consequential doctrinal gap that leaves vulnerable populations without meaningful constitutional recourse. Drawing on feminist scholars including Gilligan, Noddings, Tronto, and Fredman, the authors argue that while Indian courts have invoked care across domains such as health, childcare, and household labour, they have done so derivatively by tethering care to Article 21 rather than recognising it as an autonomous constitutional value. Since Directive Principles remain explicitly non-justiciable, simply labelling care a value would be insufficient. Using South Africa as a comparator and the right to education as a domestic precedent, the authors propose two reform pathways: judicial anchoring of care within Article 21, or a standalone constitutional amendment inserting care into Part III. They conclude that elevating care to a fundamental right is essential for India to move from formal to substantive equality.

In “*Courts, Unwritten Conventions and the Constitution of India*”, Dr. Sayantani Bagchi contends that Indian courts engage with constitutional conventions not as free-standing enforceable claims but as instruments of broader constitutional inquiry, enforcing them only indirectly. Drawing on the Dicey’s distinction between law and convention, Ivor Jennings’ three-pronged test, and the Constituent Assembly’s deliberate choice to leave certain constitutional spaces uncodified, the author argues that courts follow a three-stage analytical method when confronted with convention-based claims: first, situating the convention within its constitutional, and statutory framework, then verifying its factual existence through consistent institutional practice, and finally assessing its compatibility with underlying constitutional values. The collegium system in *Supreme Court Advocates-on-Record Association v. Union of India*, the Public Accounts Committee chairmanship in *Ambika Roy v. State of West Bengal*, and the Puducherry

nomination dispute in *K. Lakshminarayanan v. Union of India* serve as the article's three central case studies, illustrating both the presence, and the variable rigor of this framework across decisions. The author concludes that while the three-stage structure provides a tentative methodological foundation, judicial engagement with conventions remains uneven, ranging from the exhaustive historical inquiry in the *Second Judges* case to the considerably more restrained approaches in the later decisions: reflecting a judiciary still negotiating the terms of its relationship with India's unwritten constitutional order.

In “*Majoritarian Interpretations of Constitutional Silences*”, Himanshi Yadav and Sinchan Chatterjee contend that constitutional silences in India have increasingly become sites of majoritarian appropriation, exploited by both the executive and judiciary to consolidate ideological dominance rather than advance constitutional values. The authors show how the executive has weaponised procedural silences through ordinance re-promulgation, delayed appointments, the Citizenship (Amendment) Act, 2019 (CAA), and vague security laws like the Unlawful Activities (Prevention) Act, 1967 (UAPA), to marginalise minorities and dissent. The authors claim that judiciary is shown to be strategically selective by being progressive in politically insulated cases like *Navej Singh Johar v. Union of India*, but deferential where majoritarian religious or nationalist identities are at stake, as in *Ayodhya* verdict and the pending CAA challenges. The authors conclude that constitutional silence is filled not by principle but by power, proposing a framework rooted in proportionality, constitutional morality, and civil society engagement to restore the Constitution's counter-majoritarian function.

## ACKNOWLEDGEMENTS

The editorial board of CALJ (“**Board**”) worked on the issue over the last twelve months with utmost dedication and determination. We dedicate this issue to **Ms. Aarushi Gupta**, a former editor of our journal. She filled our board with dedication, passion and above all, joy. She always made her presence felt, through her work and outside of it. We would like to thank her for everything she has given to this University.

## EDITORIAL: COURTS, UNWRITTEN CONVENTIONS AND THE CONSTITUTION OF INDIA

The publication of this issue would not have been possible without the guidance of our Patron, Hon'ble Vice- Chancellor of the National Law University, Jodhpur, Prof. (Dr.) Harpreet Kaur. At this juncture, we would also take the opportunity to thank our Chief Editor –Dr. Sayantani Bagchi, for her constant support, mentorship and engagement with every initiative we undertake. The Registrar of National Law University, Jodhpur, Dr. Sunita Pankaj, has also ensured smooth functioning at every stage, and we are thankful for it. We would also like to thank every member of the Board for working on the issue and ensuring that the standards of our journal improve constantly. Members of the Board —Dhruv Singhal, Kovida Bhardwaj, Manishka Baweja, Mayank Sinha, Amita Kaka, Prabhav Chaturvedi, Adithya A. Talreja, Sourabh Manhar, Sinchan Chatterjee, Aadisha Dhaliwal, Anand Shankar, Devvrata Purohit, Gurmehar Singh Bedi, Paavani Kalra, Suhana Gandhi, Tamanna, Udit Jain, Ananthajitha, Divita Joshi, Karlo Cruz, Mukund K., Kushal Pal, Princyy Sawant, Rini Varghese, Debanshi Shekhawat, Priyankashri A., Sidak Gyani, Trishla Sethi, V. Sai Deekshita, Veer Sharma — have been assets to our team.

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We are grateful to the writers for their persistence and cooperation throughout the editing process, which made the timely and smooth release of this issue possible. The Board hopes that readers will find this issue to be a useful resource and that it will encourage informed discussion on the topics of administrative law and constitutional law. Should our readers have any queries, suggestions or feedback for us, write to us at: **editorcalq[at]gmail[dot]com.**

Krishangee Parikh & Sonsie Khatri  
**Editors-in-Chief**

**CONSTITUTIONAL SILENCES AND CONSTITUTIONAL  
CONVENTIONS – DEVELOPMENT OF CONSTITUTIONAL  
LAW**

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**V. SUDHISH PAI, SENIOR ADVOCATE<sup>1</sup>**

*A Constitution is a country's supreme law, embodying the principles of government and regulating the relations between man and man, and man and the State. Many times, it is left incomplete and indeterminate to facilitate its evolution. Silences are natural and inevitable in a constitution. Every conceivable situation cannot be expressly provided for, even in a written instrument, including a constitution. Constitutional silences and conventions are like safety valves, lending it adaptability for its survival, successful working, and development. The provisions of a constitution are pregnant with meaning. The silences also sometimes speak very tellingly. They have to be sagaciously construed. Some silences open up possibilities of purposive construction; some silences are advisedly so left. It is judicial interpretation that breathes life into the provisions of a constitution, gives voice to constitutional silences and effectuates constitutional conventions. Looking only at the text and the letter may give rise to cacophony. What is important is not only what a constitution says, but even more what it means and does. It is when speech and silence are juxtaposed that one hears the melody of the constitution.*

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**INTRODUCTION**

A constitution is a country's supreme law, its very life breath and the vehicle for its progress. As Thomas Cooley says in his seminal work,

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<sup>1</sup> Sr. Adv. V. Sudhish Pai is a distinguished lawyer, and jurist, and an acclaimed author specializing in Constitutional Law and Administrative Law. The author may be reached at <vsudhishpai@gmail.com>.

## CONSTITUTIONAL SILENCES AND CONSTITUTIONAL CONVENTIONS – DEVELOPMENT OF CONSTITUTIONAL LAW

*Constitutional Limitations*,<sup>2</sup> a constitution is sometimes defined as the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of sovereign powers, and directing to what persons each of these powers is confided in and the manner in which it is to be exercised. A constitution embodies and expresses the goals and aspirations of the people, depending upon the history of that society. It contains certain core political values and beliefs which cannot be tinkered with by transient public opinion.

‘Constitution’ refers to the document—the Constitution of India or of the USA, while ‘Constitutional law’ refers to the justiciable parts of the document and those rules which have been evolved by courts in enforcing those justiciable provisions. Courts in interpreting the Constitution try to discover the intention behind it and thus enlarge or transform the words of the written Constitution. The mass of ‘constitutional law’ built up by the courts is thus wider than the text of the constitution. Conventions, customs, and usages are all part of Constitutional law. Conventions supplement the law of the constitution, which are accepted as binding and regulate political institutions and practices and thus form part of constitutional law.

As Prof Laurence Tribe says in the Preface to the first edition of his *American Constitutional Law*:

*“...The Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices. This process cannot be the special province of any single entity.”*<sup>3</sup>

Silences or gaps or abeyances in a constitution are both natural and inevitable. Silences and conventions are like safety valves providing flexibility and facilitating change: stability without stagnation and growth

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<sup>2</sup> T.M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 2 (Hindustan Law Book Company, 1st ed. 1871).

<sup>3</sup> LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (The Foundation Press, 1st ed., 1978).

without loss or destruction of core values. All this contributes to the survival and success of a constitution.

Anything written may present a problem of meaning, and that is the essence of the business of construing any legislation, including a constituent act like a constitution. The problem stems from the very nature of language and draftsmanship, which are necessarily imperfect. Words are symbols of meanings, but unlike mathematical symbols, the phrasing of a document rarely attains more than approximate precision. “*Such is the character of human language that no word conveys to the mind in all situations, one single definite idea.*”<sup>4</sup> A statute, and more so, a constitution is an instrument of government, partaking of its practical purposes and also its infirmities and limitations.

The Constitution, as much as any law, has an aim; it has an underlying policy. More importantly, it seeks to formulate a plan of government. That aim, policy and plan are not drawn, like some gas, out of the air; they are evinced in the language of the constitution, as read in the light of other external manifestations of purpose.

Generally speaking, every constitution has various aspects. It is, *firstly*, a historical product. *Secondly*, it expresses the philosophy—political, economic, sociological—of its makers. *Thirdly*, it is a political instrument for (good) governance, seeking to make an adjustment between the political forces operating in the body politic. The *fourth* aspect is its legal character, with which we, as students of law, are primarily concerned. This legal aspect is what empowers courts to exercise the power of judicial review and grant relief. This legal aspect, emphasised by the American Supreme Court in *Marbury v. Madison*,<sup>5</sup> has been incorporated in different express provisions of our Constitution. All these aspects need to be kept in view in expounding a constitution and construing its speech as well as silences.

The fact that there are more than 2000 decisions of 5-judge benches and larger benches of our Supreme Court adequately brings home the necessity and importance of constitutional interpretation.

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<sup>4</sup> McCulloh v. Maryland, 17 U.S. 316 (1819).

<sup>5</sup> Marbury v. Madison, 5 U.S. 137 (1803).

## CONSTITUTIONAL SILENCES AND CONSTITUTIONAL CONVENTIONS – DEVELOPMENT OF CONSTITUTIONAL LAW

Laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends, wrote Frankfurter, J. The concepts which laws embody are both explicit and immanent. Statutory language too has associations, echoes and overtones; judges must retain the associations, hear the echoes and capture the overtones.<sup>6</sup> “*The statutes are an outcome of a thousand years of history. They form a system with echoes of different moments, none of which is entitled to prevail over the other,*” remarked Holmes, J. in *Hooper v. Tax Commission*,<sup>7</sup> “*The legislature does not speak with finality as to the meaning of its own powers. The final word is for the courts.*”<sup>8</sup> All this is equally true of the Constitution and constitutional law. The task of interpreting is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered.

A constitutional court is a nice balance of jurisdictions. It declares the law as contained in the Constitution, but in doing so, it rightly reflects that the Constitution is living and organic and which of the instruments has the greatest claim to be construed broadly and liberally. A constitution is an enduring instrument providing for an expanding future. Therefore, there is greater reason in giving the language of a constitution a more liberal construction so as to include within its ambit the future developments in various fields of human activity. In the case of a constitution, it is really exposition: “*We must never forget that it is a constitution that we are expounding,*” as Marshall, CJ., famously said in *McCulloch v. Maryland*.<sup>9</sup>

The operation of a statute is not automatic; like all legal rules, it has to take effect through the interpretation of courts, remarked C.K. Allen.<sup>10</sup> So it is with a constitution. A constitution is framed for ages to come, to respond to the needs of an expanding future and designed to approach immortality as nearly as human institutions can approach it and consequently, to be

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<sup>6</sup> Felix Frankfurter, *Some Reflections on the Reading of States*, 47 COLUM. L. REV. 527 (1947).

<sup>7</sup> *Hooper v. Tax Commission of Wisconsin*, 284 U.S. 206 (1931).

<sup>8</sup> BENJAMIN CARDOZE, *THE PARADOXES OF LEGAL SCIENCE* 99 (Columbia University Press, 1st ed. 1928).

<sup>9</sup> *Supra* note 3, at 415.

<sup>10</sup> C.K. ALLEN, *LAW IN THE MAKING* 482 (7th ed. 1997).

adapted to the various crises of human affairs.<sup>11</sup> A constitution does not work itself or speak like an oracle. It is by judicial interpretation that many a time you breathe life into the provisions of a constitution. At the heart of this is the task of construing the true meaning and intent of the Constitution's provisions.

Constitutional interpretation or exposition is not an exercise in grammar or semantics. It is also crucially different from construing a statute. How does a constitution speak? How do we get its messages? Is it merely by reading the text and going by the letter of the law? Or is it something more profound and fascinating? Is there a sound in the silences also? These are issues of great moment. Looking only at the text and the letter may give rise to cacophony. What is important is not only what a constitution says, but even more what it means and does. Sometimes even the silences are eloquent. What is not expressly stated is also sometimes as eloquent and meaningful as what is said. It is when speech and silence are juxtaposed, you hear a fleeting message, that is the melody or symphony of the constitution. *“Under all speech and writing that is good for anything, there lies a silence that is better,”* said Carlyle.

It is judicial enunciation that imparts vitality to a constitution, gives voice to constitutional silences and effectuates constitutional conventions. It is a judicious and imaginative amalgam of this, which brings out the real import of the constitution and makes it meaningful and workable. Here, we dwell upon and try to analyse and understand how constitutional silences and constitutional conventions help in the development of constitutional law. What is discussed is only illustrative.

## **FROM TEXT TO INTERPRETATION: HOW THE CONSTITUTION FINDS ITS MEANING**

It is worthwhile to recall the views of some of the most illustrious men of law in the context of construing and expounding the Constitution.

### **A. THEORETICAL PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION**

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<sup>11</sup> Cohens v. Virginia, 19 U.S. 264 (1821).

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As Dean Roscoe Pound said, “*The principles established by the Constitution are not to be interpreted and applied strictly according to the literal meaning of words used by the framers as if they laid down rules.*”<sup>12</sup> Further, “*Constitutional provisions lay down great principles to be applied as starting points for legal and political reasoning in the progress of society. ... Interpretation of constitutional principles is a matter of reasoned application of rational precepts to conditions of time and place.*”

As Higgins, J. profoundly observed in “*words that have not withered or become sterile with years*”, “*...although we are to interpret the words of the Constitution on the same principles of interpretation that we apply to ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be.*”<sup>13</sup>

In *UNR Rao v. Indira Gandhi*,<sup>14</sup> the Supreme Court held, “*...But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which established a parliamentary system of government with a Cabinet. In trying to understand, one may well keep in mind the conventions prevalent at the time the Constitution was framed.*” Thus, the form of government—parliamentary or presidential, federal or unitary is also significant in understanding and expounding a constitution.

To quote Alfred Deakin, a distinguished former Attorney General of Australia: “*The nation lives, grows and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. ... Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps that enable the past to join the future, without undue collision and strife in the present.*”<sup>15</sup>

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<sup>12</sup> ROSCOE POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON* (University of Georgia Press, 1960).

<sup>13</sup> *Attorney-General for New South Wales v. Brewery Employees' Union* (1908) 6 CLR 469.

<sup>14</sup> *U.N.R Rao v. Smt. Indira Gandhi*, (1971) 2 SCC 63.

<sup>15</sup> 1 COMMONWEALTH, *PARL. DEB., H.R.*, 18 March 1902, 10962 (Austl.) (statement of Alfred Deakin).

*“Time works changes, brings into existence new conditions and purposes. In the application of the constitution, our contemplation cannot be only of what has been, but of what may be.”*<sup>16</sup> We cannot forget that constitutions are best worked, apart from their express provisions, on the basis of practices and conventions that have evolved. Further, there is a moral dimension to every constitutional issue; the language of the text is not necessarily a controlling factor. It is now well accepted that the text of a constitution is only the primary source for understanding the Constitution, and the silences of the Constitution are also to be explored, identified and comprehended to understand the Constitution.

The whole of the British Constitution is unwritten. It is the customs and the conventions which make that Constitution. We have Anson’s admirable classic, *Law and Custom of the Constitution*, which highlights its unwritten nature. Even in written constitutions, every conceivable situation is not and cannot be provided for. It is again customs and conventions that fill the gaps and the abeyances. Powers and limitations are implied from necessity or the scheme of the constitution.

## **B. RELATIONSHIP OF CONSTITUTIONAL SILENCES WITH THE RULES OF INTERPRETATION**

Prof Laurence Tribe in *The Invisible Constitution*<sup>17</sup> points out that constitutional silence pervades all of constitutional law. Invisible in the context means extra-textual. Constitutional silences, like silences of other kinds, are not just occasional gaps or omissions in an otherwise seamless design. They are everywhere and come in as many flavours and varieties as sounds. Ambiguity and multiplicity of meanings are, in a sense, manifestations of silence. There are many reasons to be silent as there are to speak, and as many ways to hear meaning in the sounds of silence.

*“The provisions of the Constitution are not mathematical formulas having their essence in their form. ... Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth.”*<sup>18</sup> *“A Constitution is an experiment as all life is an experiment.”*<sup>19</sup> *“A word*

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<sup>16</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>17</sup> LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (1st ed. 2008).

<sup>18</sup> *Gompers v. United States*, 233 U.S. 604 (1914).

<sup>19</sup> *Abrams v. United States*, 250 US 616 (1919).

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*is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.”*<sup>20</sup>

*“The great generalities of the Constitution have a content and a significance that vary from age to age.”*<sup>21</sup>

In the interpretation of a constitutional document, words are, but the framework of concepts and concepts may change more than the words themselves.<sup>9</sup> It is aptly said that *“the intention of a constitution is rather to outline principles than to engrave details.”*<sup>22</sup>

To quote Judge Learned Hand, in matters of constitutional law, the words that a judge must construe are empty vessels into which he can pour nearly anything at will.<sup>23</sup> And as Frankfurter, J. reminded us, constitutional law cannot be confined to the mere words of the constitution, disregarding the gloss which life has written upon them.<sup>24</sup> That is also the import of Holmes’ famous dictum—the life of the law has not been logic, it has been experience.<sup>25</sup> But Cardozo warned that Holmes did not tell us to ignore logic when experience is silent.<sup>26</sup> The judicial function in interpreting the Constitution presents an antinomy: the court must preserve its legitimacy and the ideal of law by involving a majestic sense of continuity, building upon a continuity of principle found in the instrument, its structure and purposes; and it must also discover some composition with the dominant needs and aspirations of the present.<sup>27</sup>

The starting point and the first rule of interpretation is strict adherence to the text, to the plain meaning of statutory language. Also, one of the most

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<sup>20</sup> *Towne v. Eisner*, 245 US 418 (1918).

<sup>21</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (Yale University Press, 1921).

<sup>22</sup> *R.C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324.

<sup>23</sup> *LEARNED HAND*, *THE SPIRIT OF LIBERTY* 81 (Alfred A. Knopf, 1952).

<sup>24</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>25</sup> *OLIVER WENDELL HOLMES JR.*, *THE COMMON LAW* 5 (1881).

<sup>26</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (Yale University Press, 1921).

<sup>27</sup> *ARCHIBALD COX*, *THE COURT AND THE CONSTITUTION* (Houghton Mifflin, 1987).

cardinal principles is that the meaning and intention of the framers of the Constitution must be ascertained from the language of the Constitution itself.

However, we may profitably refer to what Frankfurter, J. said<sup>28</sup>: Legislation is a form of literary composition. But construction is not an abstract process equally valid for every composition, not even for every composition whose meaning must be judicially ascertained. The nature of the composition demands awareness of certain presuppositions. For instance, the words in a constitution may carry different meanings from the same words in a statute precisely because “*it is a constitution we are expounding.*”

The range of this idea was expressed by Holmes, J. in *Missouri v. Holland* in language that remains fresh and telling: “*When we are dealing with words that are also a constituent Act like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen by the most gifted of its begetters. The case before us must be considered in the light of our whole experience and not merely in the light of what was said a hundred years ago.*”<sup>29</sup>

Frankfurter, J. remarked<sup>30</sup>: “*And so, the significance of an enactment, its antecedents as well as its later history, its relation to other enactments, all may be relevant to the construction of words for one purpose and in one setting but not for another. Some words are confined to their history; some are starting points for history. He went on to say: Words are intellectual and moral currency. They come from the legislative mint with some intrinsic meaning. Sometimes it remains unchanged. Like currency, words sometimes appreciate or depreciate.*”<sup>31</sup>

We may also recall the insightful enunciation of Dickson, J. of the Supreme Court of Canada: “*The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of*

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<sup>28</sup> *Supra* note 12.

<sup>29</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>30</sup> *Supra* note 12.

<sup>31</sup> *Id.*

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*governmental powers and, when joined by a Bill or Charter of Rights, for the unremitting protection of rights and liberties. Once enacted, its provisions cannot be easily repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.”*<sup>32</sup>

Nowadays, the courts adopt a living constitutionalist approach—interpreting the Constitution by reference to constitutional values, liberal democratic values, which form the bedrock on which the text sits. “*Judicial exegesis is unavoidable with reference to an organic Act like the Constitution drawn in many particulars with purposed vagueness so as to leave room for the unfolding future.*”<sup>33</sup> It has to adjust in response to the felt necessities of the time and the practical needs of government and society, which cannot foresee today the developments of tomorrow in their nearly infinite variety. The interpretation of the Constitution or its exposition cannot be frozen by its original understanding. The Constitution evolves and must continue to do so, and the courts must leave open the path for succeeding generations to meet the challenges unknown today.

The criticism of such an approach is that it may lead to uncertainty in the law and the arbitrary exercise of judicial power. But adaptability is not a lack of discipline in judicial reasoning. It is still the Constitution which acquires the necessary interpretative colours. But no violence should be done to the text by rewriting it. Filling the gaps and construing the words in the provisions or the silences therein is one thing; rewriting them is quite another. While the former is permissible and welcome within the accepted parameters, the latter would be quite impermissible and illegitimate. The court’s fidelity to the Constitution secures its own insubordination. But fidelity and creativity are not necessarily antagonistic; they may, with devoted insight, enhance each other.

The provisions of a constitution are pregnant with meaning. It is beyond the reach of human ingenuity for even a written instrument, including a

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<sup>32</sup> Hunter et al v. Southam Inc., 1984 (2) SCR 145.

<sup>33</sup> Graves v. New York, 306 US 466, 491 (1939).

constitution, to expressly provide for every conceivable situation. The silences also sometimes speak very tellingly. They have to be sagaciously construed, not lazily assumed or piously hoped. Some silences open up possibilities of purposive construction; some silences are advisedly so left. As Tribe tells us: In deciding how to give meaning to what Justice Jackson called the great silences of the Constitution' the issue typically is how to construe not constitutional silence alone, but rather the juxtaposition of constitutional statements in one realm with the absence of statement in an adjacent field.<sup>34</sup>

### THE ROLE OF CONSTITUTIONAL CONVENTIONS IN INTERPRETATION OF SILENCES

The silences in some areas are deliberate: gaps must be filled by developing proper conventions in the working of the constitution. This was also adverted to by Dr. Rajendra Prasad in the Constituent Assembly.<sup>35</sup> To quote Michael Foley in *The Silence of Constitutions*, "...Far from being a sign of decay, therefore, the presence of abeyances can denote the existence of an advanced constitutional culture, adept at assimilating diverse and even conflicting principles of government within a political solidarity geared to manageable constitutional ambiguity. If a constitution does not have the means to subdue conflict by these means, moreover, it will be a weaker and less adaptable constitution for that deficiency."

Gaps in a constitution should not be seen as simply empty space. They amount to a substantial plenum of strategic content and meaning vital to the preservation of a constitution. "*The abeyances are valuable not in spite of their obscurity but because of it; they are significant for the attitudes and approaches of the constitution that they evoke, rather than the content or substance of their strictures.*"<sup>36</sup> "*What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a constitution as its more tangible and codified components.*"<sup>37</sup> Constitutional silences are functional.

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<sup>34</sup> LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 42 (Harvard University Press, 1985).

<sup>35</sup> See 11 CONSTITUENT ASSEMB. DEB., (NOV. 29, 1949) 993.

<sup>36</sup> MICHAEL FOLEY, THE SILENCE OF CONSTITUTIONS: GAPS, 'ABEYANCES' AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF THE GOVERNMENT 10 (Routledge, 1989).

<sup>37</sup> *Id.* at 82.

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In *The Invisible Constitution*, Tribe is of the view that much of the Constitution (of the USA), including some of its most important parts, is invisible, i.e., extratextual; many of our most cherished principles and propositions of constitutional law cannot be found in the text.<sup>38</sup> He says that without the invisible constitution, the visible one is fatally, even logically, incomplete. According to him, we need the invisible Constitution to tell us “*what text to accept as the visible Constitution.*”<sup>39</sup>

“*The Constitution does not say that*” cannot and should not end an argument; for, to accept the position that whatever is not found in the constitution cannot become part of it, is very simplistic and jejune.

It has been argued by some critics<sup>40</sup> that constitutions, at least in part, maintain their authority by reason of their uncertain character and ambiguity. Constitutions leave room for time and experience; of necessity, they are unfinished. What is explicit in the text rests on implicit understandings; what is stated rests on what is unstated.

Views have also been expressed that the Constitution being a framework of government, silences are devices of political management.<sup>41</sup> A constitution’s authority is strengthened through the cultivation of tradition, which is the silent bond between contemporary political actors and the regime’s founders. Tradition is what conserves that which continues to work while discarding that which is no longer of practical value. It is to be noted that, as scholars have said, elimination of constitutional silences comes about through political judgment, something that the judiciary implicitly acknowledges. “*It should not be assumed that courts always have the capacity to provide authoritative answers to contentious constitutional questions. Courts assume the mantle of ‘guardian of the Constitution’ in cases of clear breach of legal rules, but the Constitution is not as much a system of norms as an intrinsically political framework.*”<sup>42</sup> But viewed from another perspective of the

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<sup>38</sup> Kermit Roosevelt III, *The Indivisible Constitution*, 25 CONST. COMMENT. 321, 321-42 (2013).

<sup>39</sup> LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (1st ed. 2008).

<sup>40</sup> Martin Loughlin, *The Silences of Constitutions* 16 INT. J. CONST. LAW, 927, 922-35(2018).

<sup>41</sup> *Id.* at 929, 930.

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

Constitution establishing an inherently legal rather than political framework, it is argued that the task of providing authoritative answers to political-constitutional questions falls to the judiciary.<sup>43</sup> That there are silences in a constitutional framework is clearly understood and accepted, but there is less appreciation and consensus about their functions.

What is said and what is not said in a constitution has bearing on decisions about how to interpret what a constitution says or fails to say. Tribe speaks of ‘door-closing silences’ and ‘door-opening silences’ and how they impact constitutional interpretation.

**A. CONSTITUTIONAL RIGHTS AND THE EXPANSION OF MEANING: A COMPARATIVE PRELUDE TO THE INDIAN CONSTITUTIONAL SILENCES**

In the famous *Steel Seizure* case,<sup>44</sup> the American Supreme Court opined that since ‘the Constitution is not silent’ about who shall make laws, Congress’s omission left the President powerless to act as he did. The majority of judges treated Congress’s silence as speech, its non-enactment of authorising legislation as a legally binding expression of intent to forbid seizure. This is a door-closing silence.

The development of jurisprudence on the right to privacy in American Constitutional law provides examples of door-opening silences. Even though there is no express mention of the word ‘privacy’ in the Constitution, the courts recognised the right to privacy under various amendments to the Constitution and also progressively extended the ambit of protection under that right. See, for example, *Griswold*<sup>45</sup>, *Katz*<sup>46</sup>, *Roe*<sup>47</sup>, *Obergefell*<sup>48</sup>. In all these cases, the Court treated the silences as invitations to fill in gaps which were not left because of any deliberate design. These are all instances of silences that allowed doors to open. “*The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family... surely does not show that the Government was meant to have*

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<sup>43</sup> *Id.* at 931.

<sup>44</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952).

<sup>45</sup> *Griswold v. Connecticut*, 381 US 479 (1965).

<sup>46</sup> *Katz v. U.S.*, 398 US 347 (1967).

<sup>47</sup> *Roe v. Wade*, 410 US 113 (1973).

<sup>48</sup> *Obergefell v. Hodges*, 576 US 644 (2015).

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*the power to do so. Rather, as the Ninth Amendment expressly recognises, there are fundamental personal rights which are protected from abridgement by the Government though not expressly mentioned in the Constitution.”*<sup>49</sup>

In one of the most conspicuous silences of the American Constitution- the dormant commerce clause, courts have heard an implied negative against unduly burdensome or discriminatory State or local interferences with free trade across State limits. In upholding State regulations, judges have purported to ‘hear’ in Congressional silence both tacit veto and tacit consent.<sup>50</sup>

Two of the American Constitution’s very enigmatic but important provisions illustrate how constitutional silences or juxtapositions of silence with speech have to be read.

The Tenth Amendment, which provides that powers ‘not delegated’ by the Constitution to the United States nor prohibited to the States are reserved to the States, has been understood as silence, meaning prohibition.<sup>51</sup> But even this read in the light of its own omission of the language which was used in the Articles of Confederation, reserving to the States all national powers ‘not expressly delegated’ was not construed to be a complete prohibition. In *McCulloch v. Maryland*,<sup>52</sup> it was held that, notwithstanding the absence of express constitutional delegation to Congress of power to create a national bank, such a power was implicitly delegated by the Constitution, within the meaning of the tenth amendment, through the entire edifice of national powers read in conjunction with the necessary and proper clause. And in *U.S. v. Nixon*,<sup>53</sup> the Court found in the Constitution’s silence re: executive privilege (as contrasted with the express immunity conferred on members of Congress by the speech and debate clause) no prohibition against judicial inference of such a privilege from unenumerated principles with constitutional underpinnings.

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<sup>49</sup> *Griswold v. Connecticut*, 381 US 479 (1965).

<sup>50</sup> LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 34 (Harvard University Press, 1985).

<sup>51</sup> US CONST. amend. X.

<sup>52</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>53</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

In illuminating contrast to the Tenth Amendment, the Ninth Amendment provides that the enumeration of certain rights in the Constitution shall not be construed to deny or disparage other rights retained by the people. Here, silence has been understood and interpreted as an invitation to identify unenumerated rights. Rights-related silences do not mean prohibition because they *shall not be so construed*. Further, the background of the amendment also supports this view: Madison introduced the Ninth Amendment in response to the arguments of Hamilton and others that those rights not enumerated in the Bill of Rights would otherwise be given up to the government.

One important feature about the fundamental rights guaranteed by our Constitution may be noted. There is no provision in our Constitution corresponding to the Ninth Amendment of the US Constitution, according to which the American people are not denied the enjoyment of other fundamental rights because the Constitution enumerates certain rights as such. That means that whatever is not expressly withheld is also available to the people. The enumeration of certain rights is not to be construed to deny or disparage other rights retained by the people. This is understood and interpreted as an invitation to identify unenumerated rights. On the other hand, in India, no one can claim a fundamental right outside the chapter on Fundamental Rights. But this has not prevented our courts from expounding new rights as emanations of the enumerated rights. This is one of the most fascinating sagas. Indeed, more than 25 rights have been read into the provisions of Article 21 alone.

It is important to evaluate every instance of a pronouncement of what the Constitution says—or what it fails to say—against the background alternative of somehow contriving to remain silent. And we should also be conscious that silences (whether it be regarding what the Constitution requires, allows or forbids) cannot be meaningfully evaluated without comparing them to the array of alternatives—comparing them to the background of soundings that those silences interrupt or replace. The question is always: silence—compared to what?

It is crucial and necessary that we should beware of ‘hearing’ silences when nearly everyone identifies determinative text that fills up the relevant field. “*The heart has its reasons that reason does not know,*” as Pascal famously said. Those heartfelt reasons deserve a hearing. But when they defy reason, the

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meaning of living by the rule of law is that reason should prevail. Observers of the work of courts would be familiar with what Cardozo described as ‘the tendency of a principle to expand itself to the limit of its logic.’<sup>54</sup>

It has been pointed out<sup>55</sup> that the principle of implication is fundamentally founded on rational inference of an idea from the words used in the text, and constitutional implications should be based on considerations which are compelling. Any proposition that is arrived at by such interpretation must be grounded in some words in the text or the scheme of the text. Otherwise, it may defeat the legitimacy of reasoning.

Prof. Archibald Cox’s sage caution also requires to be noted: The Court is charged with ‘interpretation’ of a written document, not with deciding what is good, or just or wise, with the freedom of a legislature or constitutional convention. When the proper application of the words of the Constitution to a particular situation is plain, it is the Court’s duty to give effect to the words. When the bearing of the words is uncertain, the words alone may not suffice. Then a reasoned search for the ‘intent’ of the instrument becomes important; but as history demonstrates, ‘intent’ is itself a slippery word as applied to unforeseen future conditions, and the evidence of intent is often subject to conflicting interpretations.<sup>56</sup>

We may see how all this has been worked in some Constitutions:

In the Constitution of then Ceylon, there was no express provision or mention of vesting judicial power in the judiciary, unlike in the USA. In *Liyanaige’s* case,<sup>57</sup> the appellants were put up for trial under a special law before a special court. Tracing the history and traditions of the various provisions bearing on the matter, the Privy Council speaking through Lord Pearce held: “*Those provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature.*”

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<sup>54</sup> BENJAMIN CARDOZE, THE NATURE OF THE JUDICIAL PROCESS 51 (Yale University Press, 1921).

<sup>55</sup> Manoj Narula v. Union of India, (2014) 9 SCC 1.

<sup>56</sup> ARCHIBALD COX, THE COURT AND THE CONSTITUTION, 68, (2<sup>nd</sup> Indian Reprint 1992).

<sup>57</sup> *Liyange v. R* [1966] 1 All E R 650, 658.

*... The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it has lain for more than a century, in the hands of the judicature."*

The High Court of Australia, in the absence of a Bill of Rights, has implied the concept of 'freedom of communication' from the Constitution's provisions providing for representative government. The rationale for this is that for a representative government in a democracy, it is necessary that the people make an informed decision in making the choice of their representatives; and for this, it is necessary that they must have full information of the diverse opinions, which can be achieved only through the freedom of communication.<sup>58</sup>

Coming to our Constitution, the emotive words Justice, Liberty, Equality, Fraternity in the Preamble open up a vast music of hope. They are words of passion and power and may be said to be the spiritual pillars of the Constitution. Fraternity is an expression not found anywhere in the Constitution except in the Preamble. Yet the idea of fraternity underpins the entire Constitution and fertilises its exposition. The silent thrusts and echoes of socialism and secularism were always present and guided constitutional enunciation. Socio-economic revolution and ushering in an egalitarian society were always high on the nation's agenda right from the days of the freedom movement. That is also in keeping with the Directive Principle in Article 39 - that the ownership and control of the resources are so distributed as to sub serve the common good and ensure that there is no concentration of wealth and means of production to the common detriment. It is not 'socialist' in any doctrinaire sense but in a pragmatic sense in tune with the Indian ethos. 'Secular' in our context is not anti-God or anti-religion. It is equal respect for all religions. While everyone is free to profess, practise and propagate their religion, the State does not support or aid any religion. That has always been the underlying theme of the Constitution. In *Bommai's* case,<sup>59</sup> it was held that secularism is part of the basic structure and any act that goes against that may be justified as 'failure of constitutional machinery', warranting action under Article 356.

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<sup>58</sup> Australian Capital Television Pty Ltd. v. Commonwealth [1992] 108 ALR 577; Nationwide News Pty Ltd. v. Wills [1992] 108 ALR 681; Theophanous v. The Herald and Weekly Times Ltd [1994] 68 ALJ 713.

<sup>59</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1.

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Our Constitution represents a charter of power granted by liberties and not a charter of liberty granted by power. Apart from providing a broad framework of government, it endeavours to protect liberties and secure justice. That is the constitutional vision and goal. The justice provisions in Part IV are declared fundamental to the governance of the country and underlie all human development. Democracy is not just a legal, constitutional, formal concept. It is also a social idea. The Constitution is not merely a legal document, it is first a social testament as also a political instrument. It may be said to provide for stability without stagnation and growth without destruction of essential values. A majority of the provisions are aimed at furthering the goals of the social revolution. The core of this commitment lies in Parts III & IV, which together with Part IVA and the Preamble may be said to be the conscience of the Constitution; the judiciary is the conscience keeper. And the judiciary in construing the Constitution's speech and silence and giving meaning and content to it is necessarily informed and tempered by all these considerations.

Most of the provisions of the Constitution, particularly the various (fundamental) rights, have no fixed content. They are mere empty vessels into which each generation pours its content by judicial interpretation in the light of its experience. Aharon Barak reminds us that constitutional interpretation is different from statutory as well as other legal interpretation; the difference lies in the special character of the constitutional text.<sup>60</sup> And as Hidayatullah, J. said, more freedom exists in the interpretation of the Constitution because in the domain of constitutional law, there is again and again novelty of situation and approach.<sup>61</sup>

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<sup>60</sup> See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (Princeton University Press, 2007).

<sup>61</sup> M. HIDAYATULLAH, *The First B.N. Rau Memorial Lecture: Judicial Methods*, delivered under the auspices of the Institute of Constitutional & Parliamentary Studies (NATIONAL PUBLISHING HOUSE) (1970).

Almost at the very inception of our Constitution, we have the cases of *Romesh Thappar*,<sup>62</sup> and *Brij Bhushan*,<sup>63</sup> where the Supreme Court construed Article 19(1)(a)—the right to freedom of speech and expression to include the freedom of the press. Much later, it was held to include the right to know and to know about the antecedents and credentials of the candidates contesting elections so that the electorate could exercise their right to vote meaningfully.<sup>64</sup> Going further in *Lok Prahari*,<sup>65</sup> the importance of the voter’s right to know, particularly the sources of income and accretion of assets of the candidates, was emphasised, and certain directions were issued. Purity of the electoral process is fundamental to the survival of a healthy democracy. That would imply and entail the right to know all relevant information about a candidate. For the people must make an informed decision in choosing their representatives in a democracy. These rights were read into the silences in Article 19(1)(a).

The import of ‘State’ in Article 12 has expanded over the years, beginning with the *Rajasthan State Electricity Board* case.<sup>66</sup> This expansion and liberalisation of ‘State’ reading beyond the textual provision enabled the enforcement of fundamental rights against a much larger number of authorities and their realisation for a much wider section of the people.

Article 14, the right to equality before law and equal protection of the laws—whose original idea was ‘reasonable classification’ was interpreted so as to prohibit any arbitrary action, saying that arbitrariness is the very antithesis of equality. ‘Arbitrariness’ or ‘non-arbitrariness’ are not words found in the Constitution. But they were read into the Constitution by judicial interpretation.

‘Life’ and ‘personal liberty’ in Article 21 have been interpreted very widely and infused with newer connotations. A large number of rights not expressed in Article 21 or elsewhere in the Constitution have been read into Article 21 to make the right guaranteed therein more real and meaningful. The enunciation of the right to privacy is a telling example of

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<sup>62</sup> *Romesh Thapar v. State of Madras*, AIR 1950 SC 124.

<sup>63</sup> *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129.

<sup>64</sup> See *Union of India v. Association for Democratic Reforms*, (2002) 5 SCC 294; *People's Union for Civil Liberties (PUCL) v. Union of India*, (2003) 4 SCC 349.

<sup>65</sup> *T.N. Sivaram v. State of Maharashtra*, (2018) 4 SCC 699.

<sup>66</sup> *Rajasthan State Electricity Board v. Mohan Lal*, AIR 1967 SC 1857.

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the Court employing different approaches and principles to amplify the content and import of fundamental rights. The development of jurisprudence on the right to privacy provides a vivid example of door-opening silence. Then again, the simple phrase ‘procedure established by law’ used in Article 21 was, over a period of time, construed to mean that life and personal liberty cannot be deprived except by a procedure which is reasonable, fair and just and established by a valid law, not any enacted apparition.

The original view that fundamental rights are water-tight compartments has given place to the theory that each of the fundamental rights is not a series of isolated points but a rational continuum of the legal concept of liberty. Articles 14, 19, and 21 form a vital trilogy whose ethos informs one another. To begin with, only civil and political rights were being enforced. Socio-economic rights embodied as Directive Principles of State Policy in Part IV are expressly non-justiciable. But the Court, by a process of brilliant exposition, harmonised and synthesised Parts III and IV for the realisation of the goals in Part IV. Judicial interpretation led to the reading into and inclusion of various rights as emanations, successfully endeavouring to translate human rights rhetoric into action. Even directives expressly non-enforceable were enforced, for example, equal pay for equal work. This attempt towards integration of Parts III and IV in the process of constitutionising socio-economic rights is one of the most fascinating sagas in our constitutional history. All these interpretations read beyond the text, probed the subtext, and plumbed the silences.

### **B. POLITICAL PRACTICE AND THE FORCE OF CONVENTION**

The Constitution speaks of the President in whom the executive power is vested, and all decisions and actions are in his name. But does he act personally? The President/Governor is only a metaphor or euphemism for the Council of Ministers headed by the Prime Minister/Chief Minister, on whose aid and advice alone he acts, except in narrow areas strictly defined and confined. The constitutional requirement of the satisfaction of the President/Governor is not his personal satisfaction, but satisfaction in the constitutional sense in the cabinet system of government, ie, satisfaction of the Council of Ministers. In constitutional law the

‘functions’ of the President/Governor and the ‘business’ of Government belong to the Ministers and not to the Head of State; ‘aid’ and ‘advice’ are terms of art which means the aider acts and the advisor decides in his own authority, not subject to the power of the President to accept or reject such action or decision.<sup>67</sup> All this is not construing the text of the Constitution, but finding meaning beyond the text, guided by constitutional conventions in this regard.

*M.P. Special Police Establishment v. State of M.P.*,<sup>68</sup> recognised that there may be situations where an action may be compelled which, from its very nature, is not amenable to Ministerial advice, like granting sanction to prosecute the Chief Minister or a Minister. In such cases, it would be permissible, and indeed necessary and constitutional, for the Governor (President) to act in his discretion and independent of Ministerial advice.

Another example of construing the Constitution and finding meaning beyond the text is *R. C. Poudyal v. Union of India*.<sup>69</sup> By a deft and profound interpretation, the majority judgment upheld the constitutional validity of Article 371F(f), which enables reservation of seats by law in the Sikkim Legislative Assembly for different sections of the people, as providing for a transitional phase in the political evolution of Sikkim. “*Accommodations and adjustments, having regard to the political maturity, awareness and degree of political development in different parts of India might supply the justification for even non-elected Assemblies, wholly or in part...*” Reservation of one seat in favour of the ‘Sangha’ was held to be permissible, the ‘Sangha’ being not merely a religious institution but historically a political and social institution in Sikkim and the reservation admitting of being construed as a nomination, the choice of the nominee being left to the ‘Sangha’ itself.

The Constitution does not stipulate that the senior-most judge of the Supreme Court must be appointed the next Chief Justice of India. Article 124 is silent about this. But convention has developed in this regard, and it is the senior-most judge who is normally appointed the Chief Justice.

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<sup>67</sup> *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192.

<sup>68</sup> *M.P. Special Police Establishment v. State of M.P.*, (2004) 8 SCC 788.

<sup>69</sup> *R.C. Poudyal v. Union of India*, AIR 1993 SC 1804.

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In *Bommai's* case,<sup>70</sup> the contours of Article 356 and Article 74(2) and judicial review were delineated with sharper edges. Article 74(2) bars a court from inquiring into the advice tendered by the Cabinet to the President; it does not bar an inquiry into whether there was any material on the basis of which such advice was given, whether it was relevant and whether, on such material, a reasonable person could have reached the conclusion under challenge. While the sufficiency of the material cannot be questioned, the legitimacy of the inference drawn from such material is open to judicial review. It is open to the court to examine whether there was relevant material on the basis of which power under Article 356 was exercised and whether it was bonafide. Clearly, the scope of judicial review was expanded. This is a watershed in the development of constitutional law and the strengthening of democracy and federalism. The development was carried forward in *Rameshwar Prasad v. Union of India*.<sup>71</sup> It was not a mere textual reading of Article 74(2), but going beyond the text to understand and enunciate a constitutional principle.

### C. JUDICIAL RESPONSES TO CONSTITUTIONAL OMISSIONS

The Constitution is silent as regards the removal of Governors. Article 156 lays down that the Governor shall hold office during the pleasure of the President. But it has been held that withdrawal of pleasure and consequent removal cannot be for whimsical reasons like the Governor not being in sync with the policies of the Union Government or the ideology of the party in power. The doctrine of pleasure was read subject to the fundamentals of constitutionalism.<sup>72</sup> Constitutional limitations were read into seemingly wide and unfettered powers. However, the Court in the same case said, and rightly, that in the context of removal of a Minister—who also holds office during the pleasure of the President/Governor (Articles 75 & 164)—such limitations would not apply; the pleasure doctrine has its full scope. This is having regard to the position of a Governor vis-à-vis a Minister. So also, in the case of the Attorney General or Advocate General who has a lawyer-client relationship with the Government. In law,

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<sup>70</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1.

<sup>71</sup> Rameshwar Prasad and Others v. Union of India, (2006) 2 SCC 1.

<sup>72</sup> B.P. Singhal v. Union of India, (2010) 6 SCC 331.

context is everything. Thus, while the constitutional provisions dealing with all three offices are couched in the same language and the same silence permeates the provisions, the exercise of construing and giving meaning to them is advisedly different.

In *Manoj Narula v. Union of India*, the Court refused to read any disqualification in Article 75(1) or 164(1)—that a person with criminal antecedents cannot be a Minister.<sup>73</sup> The Court observed that the Constitution is silent and held that reading such an implied limitation as a prohibition would tantamount to adding a disqualification which is neither expressly stated nor impliedly discernible from the provision. Thus, it is only the eligibility and not the suitability of the person to be a Minister which would be open to judicial scrutiny. The Constitution's silence in this regard was treated as speech and not an invitation to read anything further into it. It is an example of 'door-closing silence'.

Another example of 'door-closing silence' is seen in Article 110(1)(a)–(g) and the corresponding provision, Article 199(1)(a)–(g), that a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with those matters in sub clauses (a) to (g). The language of the Constitutional provision clearly prohibits the inclusion of any other Bill in the category of Money Bills. The door is shut for such expansion. The majority judgment in the *Aadhar* case,<sup>74</sup> seems unsupportable; the minority view commends itself as being in accord with the correct Constitutional interpretation.

The Constitution (Articles 123 and 213) is silent about the number of times an Ordinance may be promulgated repeatedly. But in *D.C. Wadhwa v. State of Bihar*, the Court held that repeated promulgation of Ordinances is illegal and impermissible, all powers are tempered with constitutional limitations and a colourable exercise of power is an anathema to our constitutional scheme.<sup>75</sup> This is based on the premise that it is the legislature, consisting of the elected representatives, which is to enact laws. This also flows from the rule of law principle that permeates the Constitution.

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<sup>73</sup> *Manoj Narula v. Union of India*, (2014) 9 SCC 1.

<sup>74</sup> *K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India*, (2019) 1 SCC 1.

<sup>75</sup> *D.C. Wadhwa v. State of Bihar*, AIR 1987 SC 579.

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Articles 111, 200, and 201 dealing with the assent by the President/Governor to Bills do not stipulate any time frame within which assent should be accorded. But this silence is not to be construed as permission to act whimsically. It has to be done within a reasonable time. Further, it is a grey area as to what matters the Governor can reserve for the President's consideration, and what is to happen when a State Bill returned by the President is reconsidered and passed a second time and presented to the President again. The Constitution is silent on these aspects. Can the President/Governor stifle validly passed legislation by withholding or delaying assent? Convention has been developed in all countries that the power to assent is never intended, designed or exercised to defeat or undo or delay legislation. In the UK, there has been no refusal of assent for more than 300 years now, not since 1707 during the reign of Queen Anne. Indeed, Hood Phillips remarks, "*To refuse assent would now be unconstitutional.*" Now, in *State of Punjab v. Governor of Punjab*,<sup>76</sup> it has been laid down that the Governor cannot withhold assent; he can only refer it back to the legislature under the first proviso to Article 200. This is another instance of constitutional conventions fertilising constitutional interpretation in the process of development of constitutional law.

The Constitution does not say anything about which House of Parliament the Prime Minister should be a member or whether the Prime Minister could be a person who is not a member of either House. Article 75 (and 164) is silent on this. Article 75(1) says that the Prime Minister is to be appointed by the President, and other Ministers are to be appointed by the President on the advice of the Prime Minister. With the Prime Minister's departure (by resignation or death), the entire Ministry goes; it is not so with any other Minister's departure. The Prime Minister is central to the life of the government and central to its death. Hogg in his treatise *Constitutional Law of Canada* observes that the resignation or dismissal of a Prime Minister involves the resignation or dismissal of the entire Ministry.<sup>77</sup> Constitutional practice in India also has been that when the Prime Minister dies, the other Ministers have also resigned: This happened when Jawaharlal Nehru, Lal Bahadur Shastri and Indira Gandhi died. The

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<sup>76</sup> *State of Punjab v. Governor of Punjab*, (2024) 1 SCC 384.

<sup>77</sup> PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 256 (Carswell, 4th ed. 1997).

Ministry enjoying the confidence of the majority of the Lower House means the Prime Minister enjoys such a majority. If he is not a member of that House, how can he be said to enjoy its confidence? The position is the same in the case of a Chief Minister. The constitutional conventions in this regard are unambiguous and are part of constitutional law. The Prime Minister has to be a member of the Lok Sabha. He cannot lawfully be Prime Minister, being a member of the Rajya Sabha or of neither House for six months by virtue of Article 75(5).

These are not issues to be interpreted literally, going merely by the Constitution's text. The Supreme Court's decisions in *S.P. Anand v. H.D. Deve Gowda*<sup>78</sup> and *Janak Raj Jai v. H.D. Deve Gowda*<sup>79</sup> following the earlier judgment in *Har Sharan Verma v. T.N.Singh*,<sup>80</sup> holding that it is permissible and lawful for a member of the Rajya Sabha to be Prime Minister, or that a person could be Chief Minister without being a member of the legislature for six months, it is submitted, have not taken the correct view and call for a revisit. The judgments have not taken note of the constitutional conventions in this regard. The Constitution Bench judgment in *Har Sharan Verma* (Sikri, CJ. speaking for the Court), contradicts the view taken by Sikri, CJ. himself, in *UNR Rao v. Indira Gandhi*,<sup>81</sup> Re: Constitutional Conventions. The Court did not delve into and expound on the silence. The flaw lies in equating a Minister with the Prime Minister or Chief Minister and overlooking the vital distinction between them. Article 75(5) or 164(4) permits a person who is not a member of either House to be a Minister for six months. But the position of the Prime Minister, though he is the first among equals, is totally different and paramount. There are again some differences between the positions of the Prime Minister and the Chief Ministers. While a State may be under the President's rule for some time, there is no such thing at the Centre. A Prime Minister has to be there always. The constitutional position reinforced by constitutional conventions is not simply what the constitutional text says, but it is to be interpreted and understood, remembering that 'we are interpreting a Constitution establishing a parliamentary system of government... and may well keep in mind the conventions prevalent when the Constitution

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<sup>78</sup> *S.P. Anand v. H.D. Deve Gowda*, (1996) 6 SCC 734.

<sup>79</sup> *Janak Raj Jai (Dr) v. H.D. Deve Gowda*, (1997) 10 SCC 462.

<sup>80</sup> *Har Sharan Verma v. Tribhuvan Narain Singh*, (1971) 1 SCC 616.

<sup>81</sup> *U.N.R. Rao v. Indira Gandhi*, (1971) 2 SCC 63.

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was framed.<sup>82</sup> Articles 124 and 217 ‘vest in the President’, a metaphor for the Union Government, the power to appoint and transfer judges of the superior judiciary in consultation with the Chief Justice of India. There is no silence in these provisions, they are complete, and there is no room for reading anything into them. Yet by judicial interpretation in *II and III Judges* cases,<sup>83</sup> consultation was held to mean concurrence, making the President a consultee. The Supreme Court innovated the apparatus and apparition of the collegium, wresting the power of appointment to itself, quite contrary to the language and intendment of the Constitution. The *NJAC* judgment,<sup>84</sup> in holding the Constitution 99<sup>th</sup> Amendment as unconstitutional carried this further. As Sir Alladi Krishnaswami perceptively said in the Constituent Assembly, “*The doctrine of independence (of the judiciary) is not to be raised to the level of a dogma...*” And Krishna Iyer, J. observed in *Sankalchand v. Union of India*,<sup>85</sup> “*Avoiding callous underestimations and morbid exaggeration, we must realise that independence of the judiciary is vital but is only an inset in the larger picture of the nation’s free, onward march.*” These are typically instances of where you wrongly hear sounds where what really reigns is silence. The determinative text fills up the relevant domain and there is no room or warrant for ‘hearing’ anything further.

It is settled constitutional law and parliamentary practice that it is only after the Head of State has opened the House/s with his opening address that the House is ready and competent to transact any business. The first session of a House commences only after the newly elected members take their seats by taking the oath (which is before the *pro tem* Speaker) and the Speaker is elected. The House is then ready to hear the opening address and thereafter proceed with the business of the session. Until the opening address, there is no legal beginning of a new House. These are mandatory requirements, and any breach thereof would render the purported proceedings, if any, a nullity. A vote of confidence or the test of majority is to be only on the floor of the House. It is the business of the House where members exercise their rights as members. ‘Floor of the House’ is a

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<sup>82</sup> Sikri, CJ in *UNR Rao*.

<sup>83</sup> Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441; Special Reference No. 1 of 1998, Re, (1998) 7 SCC 739.

<sup>84</sup> Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.

<sup>85</sup> Union of India v. Sankalchand Himatlal Sheth, AIR 1977 SC 2328.

term of art which, in legal and parliamentary parlance, in the context of our constitutional scheme, means that it is the House of the legislature duly constituted and constitutionally ready and competent to transact business. The Supreme Court's direction in the *Karnataka* case,<sup>86</sup> that the *pro tem* Speaker conduct the trust vote before the election of the Speaker and the opening address is constitutionally untenable, and the consequent vote cannot be regarded as a proceeding of the House and is a nullity. The decision becoming infructuous because of the Chief Minister's resignation does not absolve it of the vice of unconstitutionality. The Court did it again in the *Maharashtra* case.<sup>87</sup> As the Supreme Court has said, nothing that flows from a law is an evil; so too nothing that is opposed to the law can be good! These are clear instances of the Court not noticing and interpreting, and deciding in consonance with constitutional conventions. This is quite apart from the still larger issue that a court cannot issue any direction to the House or the Speaker regarding the business to be transacted or set the agenda. The House is the absolute master of its affairs, its proceedings and the time and manner of conducting them. Such directions have been complied with as a matter of grace and courtesy, not because they are binding and inviolate.

As the Supreme Court has observed, the silences of the Constitution must be imbued with substantive content by infusing them with a meaning which enhances the rule of law. The Constitution is a living document which cannot be frozen at any point in time, and interpretation must be resilient and flexible, with the court always attempting to expand the reach and the ambit of the fundamental rights rather than attenuate their meaning and content by judicial construction. Constitutional interpretation should be such as would promote constitutionalism and inculcate a constitutional culture. However, it is also important that in interpreting the Constitution, the court strikes a balance between idealism and pragmatism to make it workable.<sup>88</sup> The greatest example of construing the Constitution and exploring and voicing the meaning beyond the text is *Kesavananda Bharati* case,<sup>89</sup> which enunciated the doctrine of basic structure.

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<sup>86</sup> *Dr. G. Parameshwara v. Union of India*, (2018) 16 SCC 48.

<sup>87</sup> *Shiv Sena v. Union of India*, (2019) 10 SCC 809.

<sup>88</sup> *State (NCT) of Delhi v. Union of India*, (2018) 8 SCC 501.

<sup>89</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

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A constituent power cannot be limited or fettered, and Article 368 has no limitation in its language. But the Court read implied limitations into the power of amendment and laid down that while the power of amendment is plenary and no part of the Constitution is immune from amendment, it does not include the power to abrogate the Constitution or amend its basic structure, features, or framework. The Constitution is totally silent as regards the words basic structure, features, or framework. This doctrine flows from the silence of the Constitution. For it is to ensure that by the process of amendment, the Constitution is not denuded of its core or made to suffer a loss of identity that the theory has been conceived and evolved. This idea of the theory flowing from the Constitution's silence has been very neatly articulated in the concurring judgment of Chelameswar, J., in the *Privacy* judgment.<sup>90</sup> It is however, necessary and important, as the Supreme Court has observed in *Kihoto*,<sup>91</sup> that in appreciating an argument about violation of the basic features of the Constitution, one cannot ignore the essential, organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs.

### **INTERPRETING WITH RESTRAINT: JUDICIAL POWER AND ITS CONSTITUTIONAL LIMITS**

Having said all this about the need and the importance of constitutional exposition, it is equally necessary to enter a caveat. In the process of interpretation and in deciding matters, judges make law, but only interstitially. Law is moulded and sometimes changed by this process, which is quite legitimate. However, this is subject to legislative oversight and amenable to being overruled by the legislature by enacting a new law. It is thus subject to correction by popular sovereignty—the people who elect the legislators can influence and have the law changed. That is the theory in any case. It is, however, not uncommon now for the court to exercise full-fledged legislative and executive power and travel into realms not its own. In this process of legislating or issuing directions touching matters of law and policy, many constitutional limitations are breached.

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<sup>90</sup> K.S. Puttaswamy v. Union of India, (2017)10 SCC 1.

<sup>91</sup> Kihoto Hollohan v. Zachillu, 1992 Supp (2) SCC 65.

Legislative and executive actions are tested and corrected by the judiciary. But judicial action which partakes of both executive and legislative nature leaves one aghast and remediless. If the salt has lost its savour wherewith can it be salted?

It is not for the court in the guise of expounding the Constitution, to take a lead in matters of reform and assign to itself a reformatory role. That is something for the people and their representatives to evolve. Judicial review cannot be of anything and everything. Judicial proceedings and pronouncements must be informed “*by the great verity that the broad sweep of human history is guided by sociological forces beyond the ken of the noisy hour or the quirk of the legal nicety.*”<sup>92</sup> The court must be conscious of its own remoteness and lack of familiarity with many issues which it is ill-equipped to deal with and pronounce upon. Grounding judgments in concepts like ‘constitutional morality’ and ‘manifest arbitrariness’ to annul a law is treading on ice. These are totally subjective without any objective standard or criterion and would themselves be arbitrary. In one sense, it is simply the court’s inclination to intervene.

In a democratic society, issues confronting the people must be resolved through public deliberation, discourse and the engagement of citizens with their representatives and the constitution. The Constitution itself indeed contains open-textured provisions—quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the Constitution or the debates that led up to it. Hence, what is needed is a principled approach to judicial enforcement of the constitution’s open-ended provisions—one that is not hopelessly inconsistent with the nation’s commitment to representative democracy. Constitutional silence is not to be construed as permission to act whimsically.

*“In law, the moment of temptation is the moment of choice....To give in to temptation ...solves an urgent problem, and a crack develops in the foundation of the system.”*<sup>93</sup>

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<sup>92</sup> *Indira Gandhi v. Raj Narain*, (1975) 2 SCC 159.

<sup>93</sup> Cf. ROBERT H. BORK, *THE TEMPTING OF AMERICA—THE POLITICAL SEDUCTION OF THE LAW* 1 (1990).

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In the end, as Frankfurter, J. tells us, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment. Only if its premises are emptied of their human variables can the process of statutory construction have the precision of a syllogism.<sup>94</sup> But that is a utopia. We cannot avoid what Cardozo, J. deemed inherent in the problem of construction: making ‘a choice between uncertainties we must be content to choose the lesser’.<sup>95</sup>

To what extent does and can the court adhere to the understanding of the Founding Fathers? In construing the speech and silence of the constitution, what factors can the court call in aid—history, philosophy, sociology, logic, the ideas and understanding that informed the makers, the contemporaneous view of things, the mores of the day? The issue does not admit of straight and simple answers. Cardozo reminds us that there are few rules in this regard, there are chiefly standards and degrees.<sup>96</sup> The duty of a judge is also a question of degree. He must balance all his ingredients—his philosophy, logic, analogies, history, customs, his sense of right and all the rest—and, adopting something new at one end and sloughing off something old at the other, determine as wisely as he can which weight shall tip the scales. After the wearisome process of analysis is finished, the judge will have to make for himself a new synthesis. With his deep study and thinking, with his years of experience and with the aid of that inward grace which comes now and again to the elect of any calling, the analysis may help to make the synthesis a true one. Judges will have to feel their way here as elsewhere in the law.<sup>97</sup> “*Somewhere between worship of the past and exaltation of the present the path of safety will be found.*”<sup>98</sup>

The genius of constitutionalism, which supports the rule of law, lies in the Constitution—its resilience which provides ample opportunity for both continuity and change, in the method of interpretation, and in the wisdom

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<sup>94</sup> *Supra* note 12.

<sup>95</sup> *Burnet v. Guggenheim*, 288 U.S. 280, 288 (1933).

<sup>96</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 161 (Yale University Press, 1921).

<sup>97</sup> *Id.* at 161, 163.

<sup>98</sup> *Id.* at 160.

and ability with which the judges, despite a few bad mistakes, have steered between the horns of their dilemma.<sup>99</sup>

## **CONCLUSION: CONSTITUTIONAL ENDURANCE THROUGH DISCIPLINED IMAGINATION**

Ultimately, construing the sounds of the Constitution’s speech and giving meaning to the silences of the Constitution is an act of judicial wisdom and statesmanship. It calls for a measure of activism as well as of restraint. The question is where to draw the line. One must remember and heed the sagacious admonition of Cardozo that the judge, even when he is free, is not wholly free; yet wide enough is the field of discretion that remains.<sup>100</sup> Aharon Barak has said that the key word in judging is *balancing*—balancing between various competing claims and conflicting interests.<sup>101</sup> While there can be no fixed rules for all this, the genius is to find the limits. In this delicate act of balancing, in choosing where to draw the line, lies the wisdom and genius of the judge, a quality which is God’s gift, as Learned Hand says,<sup>102</sup> but which can also be acquired by experience, dedication and application.

As Martin Luther King, Jr, remarked, “*Everything that we see is a shadow cast by that which we do not see,*”<sup>103</sup> and “*Everything that we do not see is a shadow cast by that which we might have seen.*”<sup>104</sup>

*“Constitutions are seldom made by the will of men. Time makes them. They are introduced gradually and in an almost imperceptible way. Yet there are circumstances in which it is indispensable to make a constitution. But then do only what is indispensable. Leave room for time and experience so that these two reforming powers may direct your*

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<sup>99</sup> ARCHIBALD COX, *THE COURT AND THE CONSTITUTION*, at 15 (Houghton Mifflin, 1987).

<sup>100</sup> BENJAMIN CARDOZE, *THE NATURE OF THE JUDICIAL PROCESS*, 141 (Yale University Press, 1921).

<sup>101</sup> AHARON BARAK, *THE JUDGE IN A DEMOCRACY*, 63 (Princeton University Press, 2008).

<sup>102</sup> LEARNED HAND, *THE SPIRIT OF LIBERTY* 134 (Alfred A. Knopf, 1952).

<sup>103</sup> MARTIN LUTHER KING JR., *THE MEASURE OF MAN*, 32 (Yale Christian Education Press, 1959).

<sup>104</sup> LAURENCE H. TRIBE, *Soundings and Silences*, 115 *MICH. L. REV.* 26, at 66 (2016).

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*already constituted powers in the improvement of what is done and the completion of what is still to be done.*<sup>105</sup>

Profound truth- relevant and applicable everywhere!

The journey of the world’s largest democracy, its foundational document—our Constitution, and the Supreme Court expounding its meaning and content has been truly fascinating.

Z. Alkins, T. Ginsburg, and J. Melton, in their interesting and enlightening book, *The Endurance of National Constitutions*, say that the average life span of a written constitution is 19 years; only a handful last longer than 50.<sup>106</sup> The factors which help a constitution endure have been identified by them as the specificity of its provisions, the flexibility of the amending process and inclusiveness. And we may add a robust judicial process and interpretation of the Constitution. For, as Justice Douglas said in his Tagore Law Lectures *From Marshall to Mukherjea*, ‘the judiciary must keep the charter of government current with the times and not allow it to become archaic or out of tune with the needs of the day.’<sup>107</sup> Thus, even in the matter of endurance of a constitution, apart from its successful working, judicial interpretation—construing the sounds of the Constitution’s speech and giving voice to its silences, noticing and taking support from conventions and finding meanings beyond the text—has a significant part.

Judges tend the gate between order and anarchy. The role and contribution of our judiciary, especially the Apex Court, in realising the constitutional vision has been quite impressive. In that critical role, the Court has had to construe the words as well as the silences of the Constitution to expound its true intent and meaning and maintain it as a vibrant working constitution. Constitutional silences and constitutional conventions are

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<sup>105</sup> BIANCAMARIA FONTANA, *CONSTANT POLITICAL WRITINGS* (Cambridge University Press, 1988).

<sup>106</sup> TOM GINSBURG, JAMES MELTON & ZACHARY ELKINS, *The Endurance of National Constitutions*, JOHN M. OLIN L. & ECON. WORKING PAPER NO. 511 (2010).

<sup>107</sup> WILLIAM O. DOUGLAS, *From Marshall to Mukherjea: Studies in American and Indian Constitutional Law* 332 (Eastern Law House 1956).

important and have a vital part in the enunciation and development of constitutional law. The role and contribution of our Supreme Court in that regard has been laudable. At the end of the day, in spite of some ups and downs and well-meaning and justified criticisms, what was said about the American Supreme Court by Chief Justice Charles Evans Hughes, “*The Republic endures and this (the Supreme Court) is the symbol of our faith*”, truly applies to our judiciary, especially the Supreme Court.

**BLOWIN' IN THE WIND – RECONNOITRING THE  
CONSTITUTIONAL SILENCES OF UNCONSTITUTIONAL  
STATUTES IN INDIA**

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**Dr. Shruti Bedi<sup>1</sup>**

*Bob Dylan's timeless line, "The answer is blowin' in the wind," aptly captures the constitutional quandary surrounding the revival of statutes declared unconstitutional in India. This article examines whether legislative amendments can resurrect such provisions in light of the interpretative silence of Article 13 of the Constitution. Using the case of Section 45 of the Prevention of Money Laundering Act, 2002 as a pivotal study alongside landmark decisions, the article critiques the judiciary's inconsistent stance. It revisits principles like void ab initio and the doctrine of eclipse, exploring their interplay with judicial interpretation and legislative power. Drawing insights from comparative jurisprudence in Canada, South Africa, United Kingdom, United States of America, and Australia, the article underscores the need for India to adopt a coherent legal framework that balances legislative intent with constitutional integrity. Concluding with a call for a defined framework in Indian jurisprudence, this study underscores the need to address the silent gaps within Article 13, ensuring that constitutional interpretation evolves in a manner that respects both the legislature's role and the judiciary's duty to uphold fundamental rights.*

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<sup>1</sup> Dr. Shruti Bedi is a professor at University Institute of Legal Studies, Panjab University. The author may be reached at <dr.shrutibedi@gmail.com>

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**INTRODUCTION: A SILENT CONSTITUTION AND THE  
QUEST FOR CLARITY**

The evolution of analytical jurisprudence, as illustrated by jurists such as Hans Kelsen and John Austin,<sup>2</sup> underscores the foundational principle that a constitution serves as a “*higher law*,” one that governs the very architecture of all legal frameworks and actions.<sup>3</sup> Kelsen’s *Pure Theory of Law* emphasises the hierarchical nature of legal norms, where the constitution stands at the apex, shaping and restraining subordinate legal enactments.<sup>4</sup> Erwin Chemerinsky says that “*by enacting a constitution, society limits itself in an effort to protect the values it most cherishes.*”<sup>5</sup> This self-limiting function of a constitution is particularly visible in democratic societies like India, where the people have enshrined certain fundamental rights under Part III of the Constitution, intentionally positioning these rights beyond the reach of momentary political majorities or whims.<sup>6</sup> The inclusion of fundamental rights reflects a collective commitment to enduring values, limiting governmental power to ensure that the principles of liberty, equality, and dignity remain inviolable.<sup>7</sup>

In India, Article 13 safeguards this constitutional mechanism, serving as a formidable bulwark against infringements on fundamental rights. By

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<sup>2</sup> Paolo Carrozza, *Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes*, 67(1) UNIVERSIDAD DE DEUSTO 55, 59 (2019); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble, ed., Cambridge University Press, 1st ed., 2009); See also Damir Banović, *About John Austin’s Analytical Jurisprudence: The Empirical-Rationalist Legal Positivism*, 21(1) INTL. COMP. L. REV. 242, 248-49 (2021).

<sup>3</sup> See Upendra Baxi, *The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism* in ZOYA HASAN et al (eds.), INDIA’S LIVING CONSTITUTION, 32 (Permanent Black, 2002).

<sup>4</sup> Andrei Marmor, *The Pure Theory of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 18, 2002), <https://plato.stanford.edu/entries/lawphil-theory/>.

<sup>5</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 7 (Aspen Publishers, 2006); Also see Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1561 (1998).

<sup>6</sup> H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, at 349 (Universal Law Publishing, 4th ed., 2013).

<sup>7</sup> Justice Sonam Tobgye, *The Enduring Values of the Constitution*, 6 JOUR OF IND. L. & SOC. 25, 34 (2014).

empowering the judiciary to review and nullify any law that contravenes these entrenched rights, it positions the courts as the guardians of constitutional fidelity.<sup>8</sup> Judicial review under Article 13 embodies a critical check on governmental overreach, ensuring that legislative actions align with the higher principles enshrined in the Constitution.<sup>9</sup> However, the framers kept this article silent on the issue of reviving unconstitutional statutes through subsequent amendments, creating a peculiar ambiguity. This opens critical questions about legislative powers and judicial finality. The judiciary has grappled with this silence before, as can be seen in cases such as *Deep Chand v. State of UP*<sup>10</sup> (“**Deep Chand**”) where the Supreme Court addressed the inoperability of unconstitutional statutes and *Behram Khurshid Pesikaka (III) v. State of Bombay*<sup>11</sup> (“**Behram Khurshid Pesikaka (III)**”), which declared an unconstitutional provision of a statute “*absolutely*” void.<sup>12</sup> This paper thus examines the layered interpretations of “*law*” within Article 13 and explores the practical implications of this silence, particularly in light of India’s complex judicial precedents on the question of reviving unconstitutional statutes. By analysing this ambiguity, the paper seeks to shed light on the nuanced boundaries of constitutional authority and the evolving role of judicial interpretation in preserving India’s fundamental rights.

This silence presents a unique dilemma in Indian jurisprudence. When the judiciary finds a statutory provision violative of Part III of the Constitution, it declares it null and void.<sup>13</sup> The immediate effect of such a decision is that the provision, in theory, ceases to exist in the eyes of the law. However, the legislature, representing the will of the people, has the authority to re-enact laws, sometimes by amending the language or framing new provisions. But the question remains: does this legislative action cross into judicial territory, infringing on the concept of judicial finality?

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<sup>8</sup> JUSTICE JASTI CHELAMESHWAR AND JUSTICE DAMA SESHADRI NAIDU, eds., M. P. JAIN: INDIAN CONSTITUTIONAL LAW 882-883 (Lexis Nexis, 8th ed., 2018).

<sup>9</sup> Rabindra Kr Pathak, *Untangling the Constitutional Labyrinth*, 22(1) BOND L. REV. 60, 61 (2010).

<sup>10</sup> *Deep Chand v. State of U.P.*, 1959 SCC OnLine SC 12.

<sup>11</sup> *Behram Khurshid Pesikaka (III) v. State of Bombay*, (1954) 2 SCC 278.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> Article 13 of the Indian Constitution categorically empowers the constitutional courts to declare the whole or part of any statutory law void if it contravenes or violates the fundamental rights enshrined in Part III of the Constitution of India.

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Echoing Bob Dylan's sentiment, "*The answer is blowin' in the wind*,"<sup>14</sup> this silence in the Constitution continues to invite questions on the permanence of judicial declarations of unconstitutionality and their interaction with subsequent legislative actions. Unlike certain legal systems that provide explicit rules on the revival or re-enactment of statutes deemed unconstitutional, Indian law lacks a definitive framework, making way for exploring this issue.

### I. The Pivotal Role of Article 13 in Balancing Legislative Authority and Judicial Review

Article 13 of the Indian Constitution serves as a cornerstone for the protection of fundamental rights, invalidating laws that contravene these rights to the extent of their inconsistency, yet its silence on the revival of unconstitutional laws raises critical interpretative challenges. Legislatures face the dilemma of amending void laws to align with constitutional principles, prompting debates on whether partial amendments can suffice or whether full re-enactment is necessary to remedy constitutional defects. Scholars such as H.M. Seervai emphasise the transformative role of Article 13 in curbing legislative overreach while simultaneously advocating for clear procedural norms for addressing unconstitutional statutes.<sup>15</sup>

The doctrine that an unconstitutional law is *void ab initio*, articulated in *Deep Chand*, suggests that such laws hold no legal existence from the outset. However, they remain operational in practice until judicial review declares their invalidity. Justice Subba Rao's observation in the case clarifies that unconstitutional laws are akin to stillborn statutes, emphasising their nullity unless explicitly re-enacted to conform with constitutional requirements.<sup>16</sup>

The legislative revival of Section 45 of the Prevention of Money Laundering Act, 2002 ("**PMLA**"), despite its invalidation in the *Nikesh Tarachand Shah v. Union of India*<sup>17</sup> ("**Nikesh Tarachand**"), exemplifies the practical tensions arising from this issue. Subsequent amendments

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<sup>14</sup> Bob Dylan, *The Times They Are a-Changin'*, (Columbia Records 1964).

<sup>15</sup> SEERVAI, *supra* note 7, at 415-21. See also, Kerala High Court Senior Advocates' Association, *Lecture by V Sudhish Pai Senior Advocate*, YOUTUBE (Dec. 9, 2024), <https://www.youtube.com/watch?v=vRMzqGumiE0>.

<sup>16</sup> *Deep Chand v. State of U.P.*, 1980 3 SCC 231, ¶ 12.

<sup>17</sup> *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

introduced to restore these conditions failed to rectify the constitutional infirmities, raising concerns regarding the legislature’s circumvention of judicial mandates.<sup>18</sup>

The decision in *State of Madras v. V.G. Row*<sup>19</sup> categorically states that the courts have been assigned the role of a “*sentinel on the qui vive*” with respect to fundamental rights.<sup>20</sup> Scholarly insights such as those of M.P. Jain, advocate for a balanced framework that respects both legislative objectives and judicial finality, thus preserving the sanctity of constitutional governance.<sup>21</sup> However, the lack of procedural clarity within Article 13 on the status of unconstitutional laws after judicial invalidation highlights the need for interpretative consistency. To this end, this part delves into the doctrinal ambiguities of the *void ab initio* and *eclipse* doctrines.

#### A. *Void ab initio*: Permanent Invalidation of Unconstitutional Laws

Under the *void ab initio* doctrine, a law that is declared unconstitutional is considered null and void from the outset, as if it had never existed.<sup>22</sup> This principle emphasises the finality of judicial pronouncements, suggesting that an invalid law cannot be revived even through amendments, since it is deemed void from its very inception.<sup>23</sup> In the landmark case of *Behram Khurshid Pesikaka (III)*, the court was of the view that when the legislative power of the Parliament or a state legislature clashes with fundamental rights under Part III of the Constitution, such laws are nullities *ab initio*. It held:

“It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and

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<sup>18</sup> Devvrat Singh & Nishita Gupta, *Bail under PMLA: Comprehending the SC’s Imprimatur in Vijay Madanlal Choudhary vs UOI*, THE CRIMINAL LAW BLOG CCLSNU (Oct. 20, 2022), <https://criminallawstudiesnluj.wordpress.com/2022/10/20/bail-under-pmla-comprehending-the-scs-imprimatur-in-vijay-madanlal-choudhary-vs-uoi/>; See also, Ashok Kini, *PMLA Judgment: A Critique of Upholding of Twin Conditions for Bail*, LIVE LAW (July 29, 2022), <https://www.livelaw.in/columns/pmla-judgment-a-critique-of-upholding-of-twin-conditions-for-bail-205103>.

<sup>19</sup> *State of Madras v. V.G. Row*, (1952) 1 SCC 410.

<sup>20</sup> See Adithya Anil Variath, *Article 13 and Pro Tanto Supremacy of the Constitution of India*, 4(3) INTL. JOUR. L. 91-96 (2018).

<sup>21</sup> CHELAMESHWAR & NAIDU, *supra* note 7, at 1407-08.

<sup>22</sup> Ioannis A. Tassopoulos, *The Void Ab Initio Theory in Comparative Perspective: J Marshall, H Kelsen, and Beyond*, 17(3) ICL J. 213-232 (2023).

<sup>23</sup> See CHELAMESHWAR & NAIDU, *supra* note 7, at 900.

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*opposed to the fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The legislative power of Parliament and the State Legislatures as conferred by Articles 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of the Constitution. A mere reference to the provisions of Article 13(2) and Articles 245 and 246 is sufficient to indicate that there is no competency in Parliament or a State Legislature to make a law which comes into clash with Part III of the Constitution after the coming into force of the Constitution.*<sup>24</sup>

The American formulation of the *void ab initio* doctrine is found in *Norton v. Shelby County*<sup>25</sup> where Justice Field stated, “*an unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.*”<sup>26</sup>

The majority in *Keshavan Madhava Menon v. State of Bombay*<sup>27</sup> (“**Keshavan Madhava Menon**”) concluded that if any law made after 26<sup>th</sup> January 1950 was repugnant to the Constitution, then it shall have to be followed in India as is followed in America. Resultantly, the part of the section of an existing law which is unconstitutional, is not law, and it will be null and void.<sup>28</sup>

The Supreme Court in *Deep Chand*, and *Saghir Ahmad v. State of U.P.*<sup>29</sup> (“**Saghir Ahmad**”), has referred to Professor Cooley’s work on *Constitutional Limitations* which observes that “*a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted*”.<sup>30</sup> The Supreme Court in *Deep Chand* underscored the absoluteness of this principle. Justice Subba Rao clarified,

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<sup>24</sup> *Behram Khurshid Pesikaka (III) v. State of Bombay*, (1954) 2 SCC 278, ¶ 11.

<sup>25</sup> *Norton v. Shelby County*, 118 U.S. 425 (1886).

<sup>26</sup> *Id.* at 442.

<sup>27</sup> *Keshavan Madhava Menon v. State of Bombay*, (1951) SCC 16.

<sup>28</sup> *Keshavan Madhava Menon v. State of Bombay*, (1951) SCC 16, ¶ 40.

<sup>29</sup> *Saghir Ahmad v. State of U.P.*, (1954) 2 SCC 399.

<sup>30</sup> COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES, 201 (Little Brown and Co., 2d. Ed., 1871).

“...no post-Constitution law can be made contravening the provisions of Part III, and therefore the law, to that extent, though made, is a nullity from its inception. If this clear distinction is borne in mind, much of the cloud raised is dispelled. ... A plain reading of the clause indicates, without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State’s power to make law; the law made in spite of the prohibition is a still-born law.”<sup>31</sup>

He also relied on Willoughby on *The Constitutional Law of the United States*<sup>32</sup> on the issue of revival of the unconstitutional statute,

“The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested, it is beyond the legislative power, **it is not rendered valid, without re-enactment**, (emphasis mine) if later, by constitutional amendment, the necessary legislative power is granted. ‘An after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted.’”<sup>33</sup>

Justice Subba Rao’s observation in *Deep Chand* clarifies that unconstitutional laws are akin to stillborn statutes, emphasising their nullity until their explicit re-enactment to conform with constitutional requirements.<sup>34</sup> This interpretation supports the notion of complete judicial finality and restricts legislative powers to revive invalidated provisions. These cases underscore a conservative approach to judicial finality, where once a law is declared void, it loses any legal existence.

## B. The Doctrine of *Eclipse*: A Dormant State Allowing for Revival

The doctrine of eclipse holds that laws violating fundamental rights are not void but remain dormant and unenforceable unless the inconsistency is removed. The doctrine of *eclipse* offers a more flexible alternative by allowing laws rendered unconstitutional to remain in a dormant or “*eclipsed*” state, capable of revival if the inconsistency is cured later. This doctrine originated in the context of pre-Constitution laws, but the

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<sup>31</sup> *Deep Chand v. State of U.P.*, 1959 SCC OnLine SC 1, ¶ 12.

<sup>32</sup> WESTEL WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES*, 10 (Franklin Classics, 2d Ed. Vol. I, 2018).

<sup>33</sup> *Deep Chand v. State of U.P.*, 1959 SCC OnLine SC 12 ¶ 15.

<sup>34</sup> *Deep Chand v. State of U.P.*, 1959 SCC OnLine SC 12, ¶ 12.

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question is with respect to its selective application to post-Constitution laws as well.

The doctrine of eclipse was first examined in depth in *Behram Khurshid Pesikaka (I) v. State of Bombay*.<sup>35</sup> In this case, Justice Venkatarama Aiyar distinguished between two types of legislative invalidity: one due to the lack of legislative competence, and the other resulting from restrictions imposed by the chapter on fundamental rights.<sup>36</sup> This distinction was partly grounded in the earlier decision of the Supreme Court in *Keshavan Madhava Menon*.<sup>37</sup> It is notable, however, that both cases, *Keshavan Madhava Menon* and *Behram Khurshid Pesikaka (III)*,<sup>38</sup> involved pre-Constitution statutes, and the Court's analysis focused specifically on the impact of Article 13(1) in assessing their constitutional validity in the new framework.<sup>39</sup>

The Supreme Court's decision in *Saghir Ahmad* struck down the Uttar Pradesh Road Transport Act, 1951, for violating Article 19(1)(g). It dealt with a post-Constitution law, and the unanimous judgment by the Constitution Bench focussed on the effect of the Constitution (First Amendment) Act, 1951 enacted shortly after the challenged statute.<sup>40</sup> The Court observed that a constitutional amendment enacted after a law cannot retroactively validate a statute that was unconstitutional at the time it was passed.<sup>41</sup> Citing Prof. Cooley's principles on *Constitutional Limitations*, the Court reiterated the view that a law rendered void for unconstitutionality is effectively “dead” and cannot be revived by a

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<sup>35</sup> *Behram Khurshid Pesikaka (I) v. State of Bombay*, (1954) 1 SCC 240.

<sup>36</sup> *Behram Khurshid Pesikaka (I) v. State of Bombay*, (1954) 1 SCC 240, ¶ 7.

<sup>37</sup> *Keshavan Madhava Menon v. State of Bombay*, (1951) SCC 16 ¶¶ 13, 14, & 16.

<sup>38</sup> The cases of *Behram Khurshid Pesikaka (I)* and *(III)* involve different stages of legal scrutiny concerning the Bombay Prohibition Act, 1949, and its constitutional validity under Article 13. *Behram Khurshid Pesikaka (III)* expanded the analysis by incorporating the doctrine of eclipse, shaping how unconstitutional statutes are treated under Indian jurisprudence.

<sup>39</sup> See Sushila Rao, *The Doctrine of Eclipse in Constitutional Law: A Critical Reappraisal of its Contemporary Scope and Relevance*, 18(1) NLS IND. REV. 45, 48-52, (2006).

<sup>40</sup> *Saghir Ahmad v. State of U.P.*, (1954) 2 SCC 399 ¶ 15.

<sup>41</sup> *Saghir Ahmad v. State of U.P.*, (1954), 23, 2 SCC 399. See also Ananth Padmanabhan, *Rights: Breadth, Scope and Applicability*, in SUJIT CHOUDHRY MADHAN KHOSLA AND PRATAP BHANU MEHTA, (eds.), *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION*, 581, 598-99 (Oxford University Press, 2016).

subsequent constitutional amendment.<sup>42</sup> Therefore, the law in question, which violated the appellants' fundamental rights under Article 19(1)(g) and lacked the protection of Article 19(6) as it existed at the time of enactment, was held void under Article 13(2).<sup>43</sup> Thus, it is evident that the doctrine of *eclipse* was deemed inapplicable to a post-Constitution statute.

In *Mahendra Lal Jaini*, the apex court went on to hold that the doctrine of eclipse applied in the case of pre-Constitution laws and not in the case of post-Constitution laws.

*“...that it arises from the inherent difference between Article 13(1) and Article 13(2) arising from the fact that one is dealing with pre-Constitution laws, and the other is dealing with post-Constitution laws, with the result that in one case the laws being not still-born the doctrine of eclipse will apply while in the other case the law being still-born there will be no scope for the application of the doctrine of eclipse.”*<sup>44</sup>

Therefore, the applicability of the *eclipse* doctrine has primarily been restricted to pre-Constitution laws. Post-Constitution laws that are unconstitutional are *void ab initio* and are considered void from the outset and cannot be revived through later amendments.<sup>45</sup> These decisions reinforce this principle, underscoring that only pre-Constitution laws may benefit from the doctrine under certain conditions, while post-Constitution laws voided due to constitutional violations must be re-enacted to regain validity.

## II. Case Study: The Twin Conditions in Section 45 of PMLA and Legislative Revival Attempts

The twin conditions for bail under Section 45 of the Prevention of Money Laundering Act, 2002 (“**PMLA**”) present a compelling case study on

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

<sup>43</sup> *Saghir Ahmad v. State of U.P.*, (1954) 2 SCC 399 ¶ 23.

<sup>44</sup> *Mahendra Lal Jaini v. State of U.P.*, 1962 SCC OnLine SC 55, 24. Reiterated in *State of Gujarat v. Shri Ambica Mills Ltd.*, (1974) 4 SCC 656, 35; Also see M P Jain, S B Wad & V Krishna Murty, *Constitutional Law*, 6 JILI 566, 569 (1964).

<sup>45</sup> Also see, Vinayak Aren, *Retrospective Declarations of Unconstitutionality – CBI vs RR Kishore*, CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (Oct. 20, 2023),

<https://indconlawphil.wordpress.com/2023/10/20/guest-post-retrospective-declarations-of-unconstitutionality-cbi-vs-rr-kishore/>.

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legislative revival and the judiciary's role in safeguarding constitutional rights. This section explores the Supreme Court's decision in *Nikesh Tarachand*, which struck down these conditions as unconstitutional; the legislative response that attempted to revive them through amendments in 2018 and 2019;<sup>46</sup> and the Court's subsequent validation in *Vijay Madanlal Choudhary v. Union of India*<sup>47</sup> ("**Vijay Madanlal Choudhary**"), providing critical insights into the dynamics of legislative revival and judicial oversight in India.

### **A. Nikesh Tarachand Shah: Declaring the Twin Bail Conditions Unconstitutional**

In *Nikesh Tarachand*, the Supreme Court scrutinised Section 45 of the PMLA, particularly the "*twin conditions*" for granting bail. The two conditions that are to be established under Section 45 of the PMLA and the Court be cumulatively convinced of, are that *first*, the need for reasonable grounds to believe that the accused is not guilty of such offence and *second*, the probability that the accused is not likely to commit an offence while on bail. The Court observed that these stringent requirements imposed an onerous burden on the accused, violating the constitutional guarantee of right to personal liberty under Article 21 and the right to equality under Article 14 of Constitution.<sup>48</sup> Justice Rohinton F. Nariman, writing for the bench, emphasised that the twin conditions effectively presumed guilt before trial, contrary to the presumption of innocence – a cornerstone of criminal jurisprudence. He noted:

*"...All these examples show that manifestly arbitrary, discriminatory and unjust results would arise on the application or non-application of Section 45, and would directly violate Articles 14 and 21, inasmuch as the procedure for bail would become harsh, burdensome, wrongful and discriminatory depending upon whether a person is being tried for an offence which also happens to be an offence*

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<sup>46</sup> Section 45, Prevention of Money Laundering Act, 2002 (PMLA) has been amended vide Finance (No.13) Act, 2018 and Finance (No. 2) Act, 2019.

<sup>47</sup> *Vijay Madanlal Choudhary v. Union of India*, (2023) 12 SCC 1.

<sup>48</sup> See Shrutu Bedi, *Bail under Prevention of Money Laundering Act, 2002: A Critical Analysis of Nikesh Tarachand Shah Judgment* in SALMAN KHURSHID, SIDHARTH LUTHRA, LOKENDRA MALIK AND SHRUTI BEDI, (eds.), TAKING BAIL SERIOUSLY: THE STATE OF BAIL JURISPRUDENCE IN INDIA, 427, 432-438 (LexisNexis, 1st ed., 2020).

*under Part A of the Schedule, or an offence under Part A of the Schedule together with an offence under the 2002 Act.*<sup>49</sup>

The Court declared the twin conditions unconstitutional, reinforcing the principle that any statutory provision curtailing liberty must meet the test of reasonableness and proportionality.

### **B. Legislative Response and the Amendments of 2018 and 2019: Attempted Revival of Section 45**

The Supreme Court had struck off Section 45 since it linked the twin conditions of bail to the predicate offences, which were not money laundering offences. Following the *Nikesh Tarachand Shab* judgment, the legislature amended Section 45 of the PMLA through the Finance Act of 2018, aiming to address the Court's concerns while reintroducing the twin conditions.<sup>50</sup> The amendments sought to alter the language of Section 45, ostensibly in an attempt to comply with the judicial ruling. Specifically, the amendments removed the explicit reference to “*imprisonment for a term of more than three years under Part A of the schedule*” and substituted it with “*accused of an offence under this Act...*”<sup>51</sup>

Despite these modifications, critics argued that the amendments cannot revive the twin conditions since the amendment did not clarify whether it revived the twin conditions,<sup>52</sup> leading to judicial confusion. In *Upendra Rai v. Directorate of Enforcement*,<sup>53</sup> the Delhi High Court on July 9, 2019, ruled

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<sup>49</sup> Vijay Madanlal Choudhary v. Union of India, (2023) 12 SCC 1, ¶ 34.

<sup>50</sup> The section was amended vide Finance Act, 2018, w.e.f. 19.04.2018. Post this amendment, the language of Section 45 was brought on par with other special laws like Terrorist and Disruptive Activities (Prevention Act), 1987/Maharashtra Control of Organised Crime Act, 1999/The Companies Act, 2013 which provided for twin conditions for grant of bail.

<sup>51</sup> Shrutika Pandey, *S.45 PMLA: Twin Conditions for Bail Declared Unconstitutional by SC Stand Revived By 2018 Amendment Act: Jharkhand High Court*, LIVE LAW (May 2, 2022), <https://www.livelaw.in/news-updates/section-45-pmla-twin-conditions-for-bail-revived-2018-amendment-act-jharkhand-high-court-198104>.

<sup>52</sup> Kapil Madan & Saurabh Gauba, *Controversial Rule of Bail under the Prevention of Money Laundering Act, 2002*, SCC ONLINE (July 7, 2021), <https://www.sconline.com/blog/post/2021/07/07/controversial-rule-of-jail-under-the-prevention-of-money-laundering-act-2002/>.

<sup>53</sup> *Upendra Rai v. Enforcement Directorate*, 2019 SCC OnLine Del 9086.

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that the amendment did not reinstate the twin conditions invalidated in 2017. The court held:

*“A bare perusal of the amended Section 45 would reveal that the introduction of the words “under this Act” would not revive the twin conditions as imposed in Section 45(1) PMLA which view has also been expressed by two other High Courts. In Bail Application No. 286/2018 Sameer M. Bhujbal v. Assistant Director, Directorate of Enforcement, the Bombay High Court held:*

*“9. It is to be noted here that, after effecting amendment to Section 45(1) of the PMLA Act the words “under this Act” are added to Sub Section (1) of Section 45 of the PMLA Act. However, the original Section 45(1)(ii) has not been revived or resurrected by the said Amending Act. The learned counsel appearing for the applicant and the learned Additional Solicitor General of India are not disputing about the said fact situation and in fact have conceded to the same. It is further to be noted here that, even Notification dated 29.3.2018 thereby amending Section 45(1) of the PMLA Act which came into effect from 19.4.2018, is silent about its retrospective applicability. In view thereof, the contention advanced by the learned A.S.G. cannot be accepted. It is to be further noted here that, the original Sub-section 45(1)(ii) has therefore neither revived nor resurrected by the Amending Act and therefore, as of today there is no rigor of said two further conditions under original Section 45(1)(ii) of PMLA Act for releasing the accused on bail under the said Act.”<sup>54</sup>*

A similar view was expressed by the Madhya Pradesh High Court in *Vinod Bhandari v. Assistant Director, Directorate of Enforcement*.<sup>55</sup> The legislative response, therefore, raised critical questions about whether the attempted revival indeed addressed the constitutional deficiencies highlighted by the Supreme Court.

### **C. Judicial Validation in *Vijay Madanlal Choudhary*: Reconciling Revival with Constitutional Concerns**

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<sup>54</sup> *Upendra Rai v. Enforcement Directorate*, 2019 SCC OnLine Del 9086, ¶ 22.

<sup>55</sup> *Vinod Bhandari v. Asst. Director*, 2018 SCC OnLine MP 1559.

The Supreme Court revisited the issue of the twin conditions in *Vijay Madanlal Choudhary*, where it addressed the validity of the amended Section 45, PMLA in light of the *Nikesh Tarachand* judgment. The Court, in this instance, upheld the legislative amendments, ruling that the changes to Section 45 did not violate constitutional principles and deemed the revised twin conditions constitutional. The apex court was of the view that when a constitutional court declares a provision unconstitutional, it becomes inoperative but remains on the statute book until Parliament either repeals it or cures the identified defect through amendments. It observed:

*“It has been consistently held that such declaration does not have the effect of repealing the relevant provision as such. For, the power to repeal vests only in Parliament and none else. Only upon such repeal by Parliament, the provision would become non est for all purposes until re-enacted, but it is open to Parliament to cure the defect noticed by the constitutional court so that the provision, as amended by removing such defect gets revived. This is so because, the declaration by the constitutional court and striking down of a legal provision being violative of fundamental rights traceable to Part III of the Constitution, merely results in the provision, as it existed then, becoming inoperative and unenforceable, even though it may continue to remain on the statute book.”*<sup>56</sup>

The court was of the clear view that *“it was open to the Parliament to cure the defect noted by this Court and to revive the same provision as in the present form...”*<sup>57</sup> The court concluded that the legislature has the power to amend laws, and that as long as the amended provision aligns with constitutional principles, it should be upheld.

However, this decision has not been without controversy. The apparent validation of Section 45’s revival through largely superficial amendments has raised concerns regarding the judiciary’s role as the protector of fundamental rights. With a review petition pending before the Supreme Court, the case presents an opportunity to refine the boundaries of legislative revival and judicial oversight.<sup>58</sup>

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<sup>56</sup> *Vijay Madanlal Choudhary v. Union of India*, (2023) 12 SCC 1, ¶ 278.

<sup>57</sup> *Vijay Madanlal Choudhary v. Union of India*, (2023) 12 SCC 1, ¶¶ 284, 382.17.

<sup>58</sup> Debby Jain, *PMLA Review | Supreme Court Adjourns Hearing at Request of Parties*, LIVE LAW, (Oct. 17, 2024) <https://www.livelaw.in/top-stories/supreme-court-pmla-review-vijay->

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**III. Analytical Reflections: When Should Legislative  
Amendments Constitute Valid Revival?**

The question of when legislative amendments should be considered a valid revival of provisions once declared unconstitutional by the judiciary requires careful scrutiny of both substantive and procedural changes introduced by the legislature. In the Indian context, where the Constitution is silent on the revival doctrine, judicial precedents have been pivotal in shaping the framework for determining the validity of such legislative revivals. This section examines the essential jurisprudential requirements for substantive rectification, discusses the boundaries of judicial deference, and evaluates the *Vijay Madanlal Choudhary* ruling in light of separation of powers.

**A. The Test of Substantive Rectification in Revival: Revisiting  
*Behram Khurshid Pesikaka*, *Mahendra Lal Jaini*, and *Saghir  
Ahmad***

Critics argue that once a provision is declared unconstitutional, it becomes void and defunct, and cannot be revived through amendments; instead, it requires a re-enactment explicitly addressing the constitutional objections.<sup>59</sup> The question of whether an unconstitutional provision of a statute can be revived through subsequent amendments was decisively addressed in *Behram Khurshid Pesikaka*.<sup>60</sup> The Supreme Court clarified that once a statute or its provision is declared void under Articles 13(1) or 13(2) of the Indian Constitution, that “*declaration has the force of law, and the statute so declared void is no longer law qua persons whose fundamental rights are thus*

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madanlal-choudhary-re-listed-27-november-272710; See also, Oliver P. Field, *Effect of an Unconstitutional Statute*, 1(1) INDIANA L. JOUR. 1, 2 (1926).

<sup>59</sup> CHELAMESHWAR AND SESHADRI NAIDU, *supra* note 9, at 900; Also see Siddharth Karnawat, *PMLA Verdict: A Sui-Generis Legislation and a Great Schism from the General Principles of Criminal Law*, 3.3 JCLJ 475, 483 (2023).

<sup>60</sup> See Ashok KM, “*Money-Laundering A Heinous Crime; Twin Conditions for Bail Not Unreasonable*”: *Supreme Court Upholds Section 45(1) PMLA*, LIVE LAW (July 27, 2022), <https://www.livelaw.in/top-stories/supreme-court-money-laundering-heinous-crime-bail-twin-conditions-vijay-madanlal-choudhary-vs-union-of-india-2022-livelaw-sc-633-204972>.

*infringed.*<sup>61</sup> Consequently, such a provision ceases to be enforceable and loses its legal effect against persons whose fundamental rights it infringes.

The Supreme Court’s judgment in *Mahendra Lal Jaini* also laid down fundamental principles on unconstitutional statutory provisions that have been invalidated. Justice Wanchoo on behalf of the *Mahendra Lal Jaini* court stated, “*for nothing can be revived which never had any valid existence.*”<sup>62</sup> This was further clarified in *Somaiya Organics (India) Ltd. v. State of U.P.*,<sup>63</sup> when the Supreme Court declared, “*It is true that the effect of a legislation without legislative competence is that it is non est.*”<sup>64</sup>

The apex court in *Saghir Ahmad*, held that “*a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted.*”<sup>65</sup> More recently, a five-judge bench of the Supreme Court in *CBI v. R.R. Kishore*<sup>66</sup> has reiterated, “*once a law is declared unconstitutional, being violative of Part-III of the Constitution, then it would be held to be void ab initio, still born, unenforceable and non est in view of Article 13(2) of the Constitution ...*”<sup>67</sup>

Consequently, a mere re-enactment or cosmetic change cannot bypass judicial declarations of unconstitutionality. Also, the apex court in *NHPC Ltd. v. State of H.P.*, has held that the amendment to the statute should be such that “*the very premise of the earlier judgment should be removed, thereby resulting in a fundamental change of the circumstances upon which it was founded.*”<sup>68</sup> To constitute a valid revival, legislative amendments must rectify the core constitutional issues previously identified by the Court, thus ensuring that any re-enacted provision aligns with the standards of reasonableness, fairness, and non-arbitrariness established under Articles 14 and 21. These

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<sup>61</sup> *Behram Khurshid Pesikaka v. State of Bombay*, (1954) 2 SCC 278, ¶ 13.

<sup>62</sup> *Mahendra Lal Jaini v. The State of Uttar Pradesh*, AIR 1963 SC 1019, ¶ 24.

<sup>63</sup> *Somaiya Organics (India) Ltd. v. State of U.P.*, (2001) 5 SCC 519.

<sup>64</sup> *Somaiya Organics (India) Ltd. v. State of U.P.*, (2001) 36, 5 SCC 519. *See* *Behram Khurshid Pesikaka (III)*, (1954) 2 SCC 278, 13; *R.M.D. Chamarbaugwalla v. Union of India*, 1957 SCC OnLine SC 11, 21; *M.P.V. Sundararamier & Co. v. State of A.P.*, (1958) 9 STC 298.

<sup>65</sup> *Saghir Ahmad v. The State of Uttar Pradesh*, (1954) 2 SCC 399, ¶ 23.

<sup>66</sup> *CBI v. R.R. Kishore*, (2023) 15 SCC 339; *See also*, *State of Manipur v. Surjakumar Okram*, (2022) 19 SCC 723.

<sup>67</sup> *CBI v. R.R. Kishore*, *Id.* 96; *See also*, Earl T. Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 MICH. L. REV. 645, 646 (1951).

<sup>68</sup> *NHPC Ltd. v. State of H.P.*, (2023) 17 SCC 1, ¶ 35.

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cases articulate a clear jurisprudential stance that the essence of revival is substantive rectification, and any legislative amendment seeking to re-enact a struck-down provision must undergo rigorous scrutiny to ensure it genuinely remedies the constitutional deficiencies identified by the Court. Padmanabhan clarifies that, “*No subsequent action can revive such legislation, except where the initial invalidity of the provision was due to a procedural lapse—such as failure to take prior Presidential assent—rather than a substantive bar such as Part III or legislative incompetence.*”<sup>69</sup> This notion is also emphasised by JJ. Chelameswar and D. S. Naidu, who stated that “*an Act held invalid under Article 13(2) could not be revived merely by amending it but will have to be re-enacted.*”<sup>70</sup>

Applying this principle to the twin bail conditions in Section 45 of PMLA, the 2018 and 2019 amendments arguably fell short of satisfying the substantive rectification test. The amendments, although slightly modifying the language, failed to alleviate the excessive burden on the accused’s right to bail—a burden previously condemned by the Court in *Nikesh Tarachand*. The amendments retained the onerous conditions of presumption against innocence, raising questions about their adequacy in addressing the fundamental rights issues under Articles 14 and 21.<sup>71</sup> Given the minimal changes, the revival of Section 45’s twin conditions post-*Nikesh Tarachand* could be seen as insufficiently substantive, potentially undermining the core judicial mandate to protect personal liberty against arbitrary legislative encroachment.

In determining the validity of legislative revival through amendments, the principles derived from *Behram Khurshid Pesikaka (III)*, *Mahendra Lal Jaini*, and *Saghir Ahmad* establish that a post-constitution statute held

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<sup>69</sup> Padmanabhan, *supra* note 40, at 599.

<sup>70</sup> CHELAMESHWAR AND NAIDU, *supra* note 7, at 900; *See also* B. Shama Rao v. The Union Territory of Pondicherry, AIR 1967 SC 1480.

<sup>71</sup> Aashish Gupta, Aditya Mukherjee & Puneeth Ganapathy, *Bail under PMLA—Presumed Guilty Until Proven Guilty*, SCC ONLINE BLOG EXP 77 (2023), <https://www.sconline.com/blog/post/2023/10/20/bail-under-pmla-presumed-guilty-until-proven-guilty/>. In parliamentary debates also, questions regarding the harshness of Section 45 were raised and appear to have remained unanswered. *See* Rajya Sabha (July 25, 2002), [https://rsdebate.nic.in/bitstream/123456789/100942/1/PD\\_196\\_25072002\\_9\\_p237\\_p288\\_21.pdf](https://rsdebate.nic.in/bitstream/123456789/100942/1/PD_196_25072002_9_p237_p288_21.pdf).

unconstitutional is *non est* and therefore substantive corrective changes in the unconstitutional provision are crucial for its revival. Any legislative amendment that seeks to revive an invalidated provision must directly address the constitutional flaws identified in prior judicial rulings. In cases like the PMLA amendments, where revival attempts may appear superficial, the judiciary has a crucial role in scrutinising the adequacy of these changes to prevent legislative circumvention.

The *Vijay Madanlal Choudhary* decision's emphasis on judicial deference, while reflective of a restrained judicial philosophy, raises significant concerns for constitutional jurisprudence. The Court's willingness to uphold minimal changes risks setting a precedent that could dilute the effectiveness of judicial review as a safeguard against unconstitutional legislation. This approach underscores the need for a nuanced framework to assess legislative revival attempts, one that prioritises substantive compliance with constitutional standards while respecting the doctrine of separation of powers.

The revival of unconstitutional statutes through simple amendments fails to meet the level of scrutiny required by constitutional principles. This is particularly relevant when considering two key distinctions. *First*, unlike statutes, constitutional provisions retain their text even after invalidation, necessitating deliberate legislative intent and effort for revival.<sup>72</sup> *Second*, while Parliament can repeal and re-enact laws, a court's declaration of unconstitutionality nullifies the law's legal existence, precluding mere amendments as a viable remedy.<sup>73</sup> These distinctions underscore the need for greater scrutiny, transparency, and alignment with constitutional values when attempting to address judicial invalidation.

Ultimately, the silent Constitution requires the judiciary to interpret revival doctrines in a manner that balances legislative intent with constitutional fidelity. Ensuring that legislative amendments genuinely rectify prior

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<sup>72</sup> Sarthak Sahoo, *To Breathe Life Back in – Constitutional Amendments and the Doctrine of Revival*, LAW SCHOOL POL. REV. (Oct. 19, 2024), <https://lawschoolpolicyreview.com/2024/10/19/to-breathe-life-back-in-constitutional-amendments-and-the-doctrine-of-revival/>.

<sup>73</sup> Recently in *State of Manipur v. Surjakumar Okram*, (2022) 19 SCC 723, the Supreme Court has held that, “*There is a distinction between declaration of a statute as unconstitutional by a Court of law and the repeal of a statute by the Legislature. On declaration of a statute as unconstitutional, it becomes void ab initio.*”

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constitutional deficiencies is critical to preserving the judiciary's role in upholding the rule of law and protecting individual liberties against excessive legislative intervention.

### **B. Legislative Revival in Indian Constitutional Law: Principles in Perspective**

Revival of unconstitutional statutes necessitates adherence to certain established principles, ensuring that any attempt to amend or reintroduce an unconstitutional statute aligns with constitutional mandates, judicial precedents, and the protection of fundamental rights.

1. *Substantive Rectification and Compliance with Fundamental Rights*: Revival efforts must address specific judicial concerns, aligning with Articles 14, 19, and 21 to uphold equality, liberty, and due process. For instance, in the amendments to Section 45, PMLA, Parliament faced criticism for failing to resolve constitutional flaws regarding bail provisions, demonstrating the need for rigorous scrutiny of legislative amendments.
2. *Legislative Intent and Transparency*: Clear legislative intent, supported by detailed deliberations and compliance statements, can lend legitimacy to revival efforts. The application of guarantee against *arbitrariness* under Article 14, as applied in cases like *Maneka Gandhi v. Union of India*,<sup>74</sup> demands substantive reasoning behind legislative choices to avoid any unjust consequences. Transparency ensures public trust in the legislative process and reinforces democratic accountability.
3. *Judicial Oversight and the Doctrine of Separation of Powers*: The judiciary plays a pivotal role in ensuring that revival aligns with constitutional mandates. The *Minerva Mills v. Union of India*<sup>75</sup> doctrine underscored the judiciary's authority to maintain the Constitution's basic structure, preventing legislative overreach. A "revival scrutiny framework," incorporating factors like substantive amendments, compliance with judicial rulings, and adherence to constitutional rights, could systematise judicial review. Judicial oversight remains central to safeguarding constitutional values

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<sup>74</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>75</sup> *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

against legislative attempts to revive unconstitutional provisions. *Indira Nehru Gandhi v. Raj Narain*,<sup>76</sup> emphasised the judiciary’s role as the ultimate interpreter of constitutional principles and that must be reinforced to prevent the erosion of fundamental rights. Institutional reforms, such as a specialised constitutional bench for revival cases, could strengthen this oversight mechanism and promote judicial consistency.

Promoting a constructive dialogue between the judiciary and the legislature could foster a collaborative approach to legislative reform. Any legislative response to judicial invalidation must involve genuine reforms addressing substantive defects rather than iterative re-enactments.

#### **IV. Comparative Perspectives on Mechanisms Employed Towards Unconstitutional Statutory Provisions**

Several common law jurisdictions have addressed the issue of statutory provisions that were once declared unconstitutional, employing various mechanisms to balance judicial authority with legislative sovereignty. This comparative analysis focuses on the approaches adopted in Canada, South Africa, United Kingdom (“UK”), United States of America (“USA”), and Australia. Each jurisdiction’s approach offers perceptions into managing unconstitutional laws.

##### **A. Canada and South Africa: Suspended Declarations of Invalidity and Legislative Corrections**

Canada provides a notable model for handling unconstitutional statutes through the use of *suspended declarations of invalidity* under Section 52 of the Canadian Charter of Rights and Freedoms, 1982.<sup>77</sup> This doctrine allows the judiciary to declare a law invalid while suspending the effect of that

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<sup>76</sup> *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCC 159.

<sup>77</sup> Section 52(1) of the Constitution Act, 1982: The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Section 52(1) recognises the primacy of the Constitution (*Ontario Attorney General v. G.*, 2020 SCC 38, ¶ 89). It imposes an obligation on bodies empowered to determine questions of law to do so in a manner consistent with the Constitution and to invalidate or treat as invalid a law to the extent of its inconsistency with the Constitution (*Mossop v. Canada*, [1993] 1 S.C.R. 554, at p. 582; *Nova Scotia (Workers Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, ¶ 28).

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declaration for a specified period, during which the legislature may amend the law to rectify its constitutional inconsistencies. The authority to suspend the impact of a declaration of invalidity is inherent in the power to deem legislation invalid.<sup>78</sup> This authority underscores the distinction between the act of declaring a legislation unconstitutional and the subsequent determination of the practical and legal consequences arising from that declaration.<sup>79</sup>

In *Reference re Manitoba Language Rights*,<sup>80</sup> the Supreme Court of Canada held that invalidating all unilingual laws in Manitoba would lead to a governance crisis. Thus, the Court suspended the declaration of invalidity, giving Manitoba time to translate and re-enact its legislation in both English and French. The Court postponed invalidating Manitoba's unilingual statutes to allow the legislature time to correct a mass translation omission. In *Schachter v. Canada*,<sup>81</sup> the Court found the suspension appropriate, reasoning that immediately invalidating the underinclusive law would risk depriving current beneficiaries of its protections, potentially leaving the applicant without an effective remedy.<sup>82</sup> As Carolyn Mouland states, “*This invention operates like a snooze button on an alarm clock: while the Court’s declaration lies dormant, the Legislature rises to the task of constitutional compliance.*”<sup>83</sup>

In comparison, South Africa’s Constitution expressly grants authority to suspend declarations of invalidity. Section 172 empowers judges to issue “*any order that is just and equitable,*” which includes the power to *suspend a declaration of invalidity* for a specified period and under certain conditions, allowing the competent authority time to rectify the defect.<sup>84</sup> Suspended declarations of invalidity serve key purposes, making them a valuable remedy: they promote public interest, and encourage constructive

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<sup>78</sup> See *Ontario Attorney General v. G.*, (2020) SCC 38, ¶ 121.

<sup>79</sup> *Ontario Attorney General v. G.*, (2020) SCC 38, ¶ 122.

<sup>80</sup> *Reference re Manitoba Language Rights*, [1985] 1 SCR 721.

<sup>81</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679.

<sup>82</sup> Government of Canada, *Section 52(1) of the Constitution Act, 1982 – The supremacy clause*, (July 31, 2023), <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art521.html>.

<sup>83</sup> Carolyn Mouland, *Remedying the Remedy: Bedford’s Suspended Declaration of Invalidity*, 41(4) MANITOBA L JOUR 281, 286 (2018). [Emphasis mine]

<sup>84</sup> S. AFR. CONST. ch. 8, § 172.

institutional dialogue between the judiciary and the legislature.<sup>85</sup> In the Indian context, this could offer a model for cases where an immediate invalidation might lead to social or administrative disruption, especially in statutes related to national security or public welfare.

Incorporating this mechanism would require judicial creativity within India's existing constitutional framework or a legislative amendment specifying the scope of suspended invalidity. Courts could start by crafting nuanced judgments that imply suspension periods for certain unconstitutional provisions, especially in contexts where an immediate remedy would have adverse social effects. Alternatively, a constitutional or statutory amendment mirroring Section 172 of South Africa's Constitution could formally empower Indian courts to issue suspended declarations, setting clear guidelines on the timeframe and conditions for compliance.

### **B. United Kingdom: Declarations of Incompatibility under the Human Rights Act, 1998**

The UK's Human Rights Act, 1998 (“**HRA**”) incorporates a unique mechanism to address unconstitutional (or incompatible) provisions.<sup>86</sup> Rather than rendering a law void, UK courts issue a *declaration of incompatibility*, which signifies that a law conflicts with the European Convention on Human Rights (“**ECHR**”),<sup>87</sup> but does not invalidate the statute. This process respects parliamentary sovereignty by leaving it to the legislature to decide whether and how to amend the law, thus avoiding judicial overreach while signalling the need for legislative correction. Section 4 of the HRA is viewed as the central mechanism through which Parliament's sovereignty is preserved. Lord Neuberger described this provision as “*a very elegant way of getting the courts to be free to do their job of deciding whether a statute is inconsistent with human rights, but then paying proper regard to parliamentary sovereignty by saying that it is over to Parliament to decide what to do about it.*”<sup>88</sup>

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<sup>85</sup> Mouland, *supra* note 81 at 285.

<sup>86</sup> Human Rights Act, 1998, c. 42, § 4.

<sup>87</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953.

<sup>88</sup> Joint Committee on Human Rights, *Oral evidence (Virtual Proceeding): The Government's Independent Human Rights Act Review, HC 1161*, HOUSES OF PARLIAMENT (Jan. 27, 2021) Q9, <https://committees.parliament.uk/oralevidence/1603/html/>.

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In *Bellinger v. Bellinger*,<sup>89</sup> the House of Lords declared that certain provisions of the Matrimonial Causes Act, 1973 were incompatible with Article 8 (right to private life) and Article 12 (right to marry) of the ECHR. Declarations of incompatibility allow the Parliament to exercise ultimate authority on whether, and how, to amend a legislation that violates Convention rights.<sup>90</sup> A declaration under Section 4 does not lead to the automatic invalidation of the statute but serves as a significant political and moral censure.<sup>91</sup> The House of Lords has emphasised that such a declaration cannot be issued in isolation or without the presence of victims whose rights have been violated.<sup>92</sup> This approach prevents the judiciary from invalidating statutes outright, instead inviting legislative review and potential reform. In the Indian context, this model suggests a way of respecting legislative intent while addressing constitutional flaws, especially in cases involving sensitive policy matters.

### **C. United States: Limited Judicial Overruling and Doctrines of Prospective Invalidation**

USA has developed a nuanced approach toward unconstitutional laws, primarily through doctrines such as *prospective overruling*<sup>93</sup> and *remedial discretion*.<sup>94</sup> The doctrine of prospective overruling, although sparingly used, enables courts to limit the retroactive effect of their judgments, allowing certain laws to continue to apply under limited conditions despite being declared unconstitutional.

The doctrine of prospective overruling allows courts to apply their decisions only to future cases, thereby mitigating their impact on actions or relationships formed under a previously valid statute. This principle aims to ensure fairness and stability in the legal system, especially where

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<sup>89</sup> *Bellinger v. Bellinger*, [2003] UKHL 21, <https://sex-matters.org/wp-content/uploads/2023/04/Bellinger-v-Bellinger-2003-2-A.C.-467.pdf>.

<sup>90</sup> Conall Mallory & Hélène Tyrrell, *Discretionary Space and Declarations of Incompatibility*, 32(3) KING'S L. J. 466, 466-496 (2021).

<sup>91</sup> Chintan Chandrachud, *Declarations of Unconstitutionality in India and the U.K.: Comparing the Space for Political Response*, 43(2) GEORGIA J. INTL. COMP. L. 309, 321 (2015).

<sup>92</sup> *R (Rusbridger) v. AG*, [2004] 1 A.C. 357 (H.L.).

<sup>93</sup> See John O. McGinnis & Michael Rappaport, *An Originalist Approach to Prospective Overruling*, 99 NOTRE DAME L. REV. 425 (2024).

<sup>94</sup> See John M. Greabe, *Remedial Discretion in Constitutional Adjudication*, 62 BUFF. L. REV. 881 (2014).

retroactive invalidation would lead to unjust or impractical outcomes. In *Linkletter v. Walker*,<sup>95</sup> the U.S. Supreme Court first articulated the framework for prospective overruling, emphasising its applicability in civil matters to avoid undue disruption of settled transactions.<sup>96</sup>

In cases of unconstitutional laws especially in the context of administrative law cases, the *doctrine of remedial discretion* permits courts to tailor the remedy, such as delaying the effect of a judgment to allow the legislature time to address deficiencies.<sup>97</sup> In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>98</sup> (“**Northern Pipeline Construction Co.**”), the U.S. Supreme Court identified a constitutional flaw in the structure of the bankruptcy court system. To mitigate disruption and allow Congress adequate time to address the deficiency, the Court postponed the issuance of its mandate for three months.<sup>99</sup> This extension was later prolonged for an additional three months,<sup>100</sup> providing Congress with a total of six months to restructure the system effectively. This delay exemplifies the Court’s use of remedial discretion to balance constitutional mandates with practical governance concerns.

#### **D. Australia: Emphasis on Judicial Finality and Strict Invalidity**

In contrast, Australia’s approach aligns closely with the *void ab initio* doctrine which is similar to the principles outlined in India’s Article 13. Under Section 51 of the Australian Constitution, once a law is declared unconstitutional, it is treated as void from the outset and lacks any enforceable validity.<sup>101</sup> The effect of a statute being declared unconstitutional is that an unconstitutional statute “*is not and never has been a law at all...[I]t is invalid ab initio.*”<sup>102</sup>

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<sup>95</sup> *Linkletter v. Walker*, 381 U.S. 618, 1965.

<sup>96</sup> Kenneth D. Steele, *Prospective Overruling and the Judicial Role After “James B. Beam Co. v. Georgia”*, 45 VANDERBILT L. REV. 1345, 1349-1350 (1992).

<sup>97</sup> Ronald M. Levin, “*Vacation*” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53(2) DUKE L. J. 291, 327-329 (2003).

<sup>98</sup> *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>99</sup> *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>100</sup> *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982).

<sup>101</sup> Section 51 of the Australian Constitution is the principal provision granting and outlining the federal legislature’s powers.

<sup>102</sup> *Ex rel McKellar v. Commonwealth*, [1977] 139 C.L.R. 527, 550, 560 (Gibbs, J.); *Victoria v. Commonwealth*, [1975] 134 C.L.R. at 361 (Barwick, C.J.); *Cormack v. Cope*, [1974] 131 C.L.R. 432, 464–65 (Barwick, C.J.); *S. Austl. v. Commonwealth*, [1942] 65

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In Australia's system of governance, the Federal Parliament is not free to legislate on any subject of its choosing. Its legislative authority is explicitly limited by the Constitution, which enumerates specific areas—referred to as “*heads of power*”—where the Parliament is empowered to enact laws. If a federal law falls outside the purview of these constitutional powers, it is deemed *ultra vires* (beyond the power of Parliament) and is therefore invalid.<sup>103</sup> The principle was asserted in the case of *Australian Communist Party v. Commonwealth*<sup>104</sup> (“**Australian Communist Party**”) which is “*probably the most important [decision] ever rendered by the High Court*” as it is the clearest expression in Australian jurisprudence of the judiciary's willingness to assert its supremacy over the Federal Parliament in the determination of the constitutionality of legislation.<sup>105</sup>

This stance underlines a commitment to judicial finality, leaving little room for the legislative correction of unconstitutional statutes without fresh enactment. This framework underscores the importance of constitutional boundaries on legislative power and could inspire India to adopt clearer principles for addressing unconstitutional statutes, emphasising fresh enactments over superficial corrections to safeguard judicial authority and constitutional values.

### **E. Lessons for India: Crafting a Pragmatic Framework**

India can draw valuable lessons from the approaches of other jurisdictions in handling unconstitutional laws, particularly while balancing legislative corrections with judicial review along with safeguarding constitutional supremacy. Canada and South Africa offer an instructive model through the use of suspended declarations of invalidity. In these systems, courts

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C.L.R. 373, 408 (Latham, C.J.)). See Kathleen E. Foley, *Australian Judicial Review*, 6 WASH. UNIV. GLOBAL ST. L. REV. 281, 291 (2007).

<sup>103</sup> Rule of Law Institute Person, *The Communist Party case: 65 years on*, RULE OF LAW EDUCATION CENTRE (Mar. 9, 2016), <https://www.ruleoflaw.org.au/65th-communist-party-case/>.

<sup>104</sup> *Australian Communist Party v. Commonwealth*, (1951) HCA 5; See *australiancstg*, *High Court Case Study: The Rule of Law*, AUSTRALIAN CONSTITUTION CENTRE (Jan. 2, 2023), <https://www.australianconstitutioncentre.org.au/the-rule-of-law-ndash-the-government-overreached-when-it-banned-the-communist-party/>.

<sup>105</sup> George Winterton, *The Communist Party Case*, in H.P. LEE & GEORGE WINTERTON (eds.), AUSTRALIAN CONSTITUTIONAL LANDMARKS 108, 127 (Cambridge University Press, 1st ed., 2003).

can declare a law unconstitutional but delay its nullification, allowing legislatures the time to amend the defect. This method minimises immediate social or administrative disruption, as seen in Canada’s *Reference re Manitoba Language Rights* and South Africa’s Section 172 framework. India could incorporate such mechanisms, either judicially or through legislative amendments, to address similar challenges.

The United Kingdom provides an alternative perspective through declarations of incompatibility under the Human Rights Act, 1998. Instead of invalidating incompatible statutes outright, UK courts signal the need for legislative correction while respecting parliamentary sovereignty. This approach could inform India’s handling of sensitive policy issues, ensuring constitutional scrutiny without abrupt statutory annulment. Similarly, the United States emphasises remedial discretion and prospective overruling, as in *Northern Pipeline Construction Co.* This strategy allows for phased implementation of judgments, ensuring stability while addressing constitutional concerns— a practice already partially adopted in India in *I.C. Golaknath v. State of Punjab*<sup>106</sup> (“**I.C. Golaknath**”).

For India, the doctrines followed in the United States, namely, prospective overruling and remedial discretion, present valuable strategies for addressing unconstitutional statutes, especially in situations like the revival of provisions post-amendment. Prospective overruling, for instance, could ensure a smoother transition when laws are invalidated, minimising legal and administrative upheaval. India has been applying the American doctrine of prospective overruling which was adopted initially in 1967 in *I.C. Golaknath*. Similarly, remedial discretion could offer Indian courts the ability to guide legislative correction while maintaining constitutional supremacy.

Australia, however, adheres to the void ab initio doctrine, declaring unconstitutional laws null from inception, as illustrated in the *Australian Communist Party* case. This strict approach emphasises judicial finality and demands fresh enactments rather than superficial amendments. It aligns with India’s Article 13 but underscores the need for legislative discipline. Adopting this principle more rigorously could reinforce India’s

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<sup>106</sup> *I.C. Golak Nath v. State of Punjab*, 1967 SCC OnLine SC 14; Also *see*, the recent judgment of the 9-judge bench of the Supreme Court in *Mineral Area Development Authority v. SAIL*, (2024) 10 SCC 1. It explains when the doctrine could be applied by the Supreme Court.

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commitment to constitutional supremacy while preventing the revival of flawed statutes.

Integrating these comparative lessons, India could refine its jurisprudence to ensure judicial clarity, minimise disruptions, and foster constructive legislative-judicial dialogue. Balancing judicial finality with procedural flexibility would strengthen constitutional governance and address the complex challenges posed by unconstitutional statutes.

### **Charting the Path Forward: Democracy, Justice, and Adaptability**

The issue of legislative revival underscores the interplay between democracy, justice, and constitutional adaptability. Revival must be a tool of genuine reform rather than an instrument to sidestep judicial determinations. As Bob Dylan aptly noted, “*The times they are a-changin’*,”<sup>107</sup> emphasising the need for laws to evolve in response to societal needs while upholding fundamental principles. Legislative revival should reflect the judiciary’s commitment to constitutional integrity and the legislature’s responsibility to enact meaningful corrections.

Incorporating these standards into Indian jurisprudence ensures a balanced approach that preserves judicial authority and protects individual rights. Mahatma Gandhi has remarked, “*the spirit of democracy cannot be imposed from without. It has to come from within.*”<sup>108</sup> Legislative revival, rooted in internal respect for constitutional values, can embody India’s commitment to justice, liberty, and equality. Establishing clear doctrines for revival will not only reinforce the Constitution’s ethos but also guide the nation through its evolving democratic journey.

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<sup>107</sup> Bob Dylan, *The Times They Are A-Changin’* (Warner Bros. 1963), <https://www.bobdylan.com/songs/times-they-are-changin/>.

<sup>108</sup> Mahatma Gandhi, *Quotations – S*, MANI BHAVAN GANDHI SANGRAHALAYA, <https://www.gandhi-manibhavan.org/quotations/quotations-s.html>.

**FILLING THE SILENCES – POLITICAL PARTIES AS DE  
FACTO CONSTITUTIONAL ARCHITECTS IN  
CONTEMPORARY INDIA**

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**Dr. Manisha Mirdha<sup>1</sup>**

*This study examines the less researched yet important work of political parties in shaping the constitutional landscape of India which in effect makes them de facto drafters of the Indian constitution. At a time when democratic decay, centralized party leadership and re-establishment of coalition politics had been the order of the day, the necessity of knowing how political parties generate constitutional meaning beyond formal structures became all too pressing. At the moment that India is experiencing greater centralisation of power and the bargaining of coalitions in the complex, the development of the ways in which parties produce constitutional meaning generates a significant evaluation of the future of Indian democracy. Although we tend to view political parties in the context of election and governance, their efforts towards the interpretation and administration of constitutional incoherence would be worth considering. This study finds these ambiguities as critical spaces on which political parties can practice their functions. The emerging process of constitutional meaning would not be possible without legislative agendas, executive action, judicial appointments and constitutional amendments. The case studies described in this research demonstrate the various ways in which political strategies and negotiations on behalf of political parties were able to meaningfully impact constitutional meaning. This project also narrows its focus to consider the function of political parties as informal constitutional actors in several countries, including the United States, the United Kingdom, South Africa and Germany, thereby highlighting varied global experiences. Finally, this research considers the pros and cons of formally recognising political parties within India's constitution, weighing the potential benefits of transparent and accountable governance against the difficulties that India's multi-party system presents in a diverse political party landscape.*

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<sup>1</sup> Dr. Manisha Mirdha is an Associate Professor of Humanities and Social Sciences at National Law University, Jodhpur. The author may be reached at <mmirdha@nlujodhpur.ac.in>. The author acknowledges the use of artificial intelligence tools for grammar correction and language refinement. All ideas presented in this work are solely those of the author.

# FILLING THE SILENCES – POLITICAL PARTIES AS DE FACTO CONSTITUTIONAL ARCHITECTS IN CONTEMPORARY INDIA

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## INTRODUCTION

### A. STRATEGIC CONSTITUTIONAL AMBIGUITY: THE POLITICAL UTILITY OF SILENCE IN DEMOCRATIC POLICY AND GOVERNANCE

*“The life of the law has not been logic; it has been experience.”*

– *Oliver Wendell Holmes Jr., The Common Law* (1881) p.1

Silence is often characterized as a communicative absence or a signal of hesitation. However, in the field of politics, it is often revealed as an intentionally employed and powerful tactic. Silence is not simply an absence or the absence of anything; political actors readily utilize silence as an intentional means of negotiating contested terrain, uncertainty, and contesting interests. This paper begins in earnest with a rethinking of silence, and its use in political discourse, not as a deficiency, but instead as a thought out and intentional decision in the political communication toolkit. It reflects on silence from a position that conceptualizes silence not strictly as an absence but instead as an intentional choice in the political discourse repertoire. Drawing on theoretical frameworks of constructive

ambiguity,<sup>2</sup> political bargaining,<sup>3</sup> and elite accommodation,<sup>4</sup> it considers the component of silence to obscure, delay confrontation, and preserve elite consensus. Additionally, it should be noted that different actors may utilize constitutional silence; political actors generate, maintain, and exploit silence to secure strategic flexibility or discretion to expand or entrench power, while judges usually seek out that silence to interpret or fill it in order to resolve ambiguity and protect constitutional coherence. In short, the normative function of silence varies based on who is producing the silence and for what purpose: for politicians silence functions as strategic agency and negotiation, while for judges silence becomes an act of interpretive accountability. The paper also contends that silence, when strategically used, is not simply a tool for hedging on uncertainty, but it also allows for leverage and stabilizes tenuous political situations.

## B. INDIA'S DESIGN

Constitutional silence is not an unconscious idea in India. The authors realized that to permit the Constitution to evolve and be applicable to evolving socio-political circumstances, the Constitution had to have some ability to be interpreted. The role of the judiciary is thus very important in interpreting such silences, although they are guided by rules of constitutional morality and justice. The Indian judiciary is more activist and interpretative in its approach as compared to the jurisdiction such as the United States whose judicial review is limited in its clarification of the ambiguity. In cases like *Kesavananda Bharati v. State of Kerala*, the Supreme Court of India established this.<sup>5</sup> By drawing on this judgment and *Justice K.S. Puttaswamy v. Union of India*,<sup>6</sup> particularly in connecting the Right to Privacy with Article 21, the court adds both depth and dynamism to the

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<sup>2</sup> Constructive ambiguity refers to the intentional use of vague or ambiguous language in political agreements or negotiations to allow for different interpretations by various stakeholders.

<sup>3</sup> In political bargaining, silence can signal a variety of intentions: it may reflect a strategic withholding of information, a calculated pause to observe opponents' reactions, or an attempt to shift the burden of initiative to other parties.

<sup>4</sup> Elite accommodation involves the implicit or explicit cooperation among political elites to maintain stability and power structures. In such arrangements, silence often plays a crucial role in preserving unity and preventing public dissent.

<sup>5</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>6</sup> *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

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discussion of constitutional silences. Complex tools of judicial power have also been applied by the courts including Article 142,<sup>7</sup> to interpret gaps in the text of the Constitution as well as to enhance socio-legal values of the ever-evolving society and emerging democracy to constitutional democracy. This wider interpretative power has been criticized as judicial overreach, but has also been thought to be required to guarantee constitutional integrity and existing relevance. This article looks at the constitutional silence and its jurisprudence and practicality in India.

Recent scholarship increasingly highlights how such silence may function as a strategic tool within democratic governance. Constitutional silence can decentralize power and provide political space in times of crisis or dispute rather than simply being an inadvertent gap in constitutional law.<sup>8</sup> Relying on strategic ambiguity and the constructivism of future delegation theories, this paper suggests that constitutional silence provides actors with an opportunity to negotiate contested policy spaces, maintain broad coalitions, and claim more pluralistic constitutional meaning over time.<sup>9</sup> More broadly, administrative silence empowers bureaucracies and courts to reach outcomes without rigid constitutional constraints, as we witness in different ways in India, the United States, and the European Union.<sup>10</sup> While this silence allows political actors flexibility, negotiability, and incrementalism, critics have warned of its democratic costs, including lack of accountability and possible judicial monopoly of constitutional meaning.<sup>11</sup> This paper thus challenges the dual nature of the constitutional

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<sup>7</sup> INDIA CONST. art. 142.

<sup>8</sup> MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, 6-7 (1999); Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 758–62 (1993).

<sup>9</sup> PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (Univ. of Chi. Press, 1999); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 52 STAN. L. REV. 1585 (2000); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995).

<sup>10</sup> MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (Univ. of Chi. Press 1981); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (Oxford Univ. Press 2000).

<sup>11</sup> Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (Harvard Univ. Press 2004).

silence in that it is both an enforcer of political flexibility and a potential instrument of technocratic stagnation in the institutional apparatus and citizen policy formulation of modern constitutional democracies and thus formulates its analysis.

## **THEORETICAL AND CULTURAL FOUNDATIONS OF SILENCE AS A POLITICAL STRATEGY**

### **A. SILENCES AS POWER: THEORETICAL FRAMEWORKS**

Silence occupies a paradoxical yet potent position within political theory; simultaneously concealing and disclosing relations of power. Michel Foucault's theory of discourse emphasizes that power functions not solely through explicit articulation but also through structured exclusions, and what remains unsaid are the silences. As Foucault asserts, "*there is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses.*"<sup>12</sup> In this view, silence is not merely a blank slate but instead serves as a tool used to signal what is knowable, what is acceptable, and who has the ability to speak or not. Silence shapes the discourse by determining what can be said, who has the right to say it, and under what context. Silence thus can be used effectively by those in positions of power in the context of political processes to avoid addressing uncomfortable issues, defer or avoid decisions, or empower existing power structures without causing conflict. Silence, therefore, is not a passive act; rather, it works to create meaning and exert influence. Silence also often works in tandem with speech, as it impacts both social perceptions and institutional outcomes.

In the same way, Judith Butler builds on this theoretical examination via their idea of performativity. Though they have largely connected this to the performative quality associated with speech, it provides a space to think about silence in performative terms.<sup>13</sup> For Butler, silence is not just the absence of speech, but always about deferring, shifting, or altering speech. Power for Butler does not just come from the spoken word, but also from

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<sup>12</sup>1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION*, at 27 (Robert Hurley trans., Vintage Books 1990).

<sup>13</sup>JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* (Routledge, 1997).

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societal norms that afford clarity or confusion about certain speech. Thus, silence can serve as a means of protest, disrupting the typical narrative in which clarity, openness, and understanding are the expectations. Silence calls forth a critique of the systems that inform our identity and our identities as they are understood in the public realm by disassociating from the modern modes of being recognized. This position, if nothing else, is a critique. It unsettles the liberal-democratic notion that political action is only articulated speech, therefore demonstrating silence as disruptive, imaginative, and creative political power in political action.

While Foucault views silence as structuring discourse and delimiting what can be thought or said, Butler demonstrates that silence can be a performative act in and of itself – resisting, subverting or otherwise changing societal norms. While they use different conceptualizations, both theorists argue that we can think about silence not as absence, but as something active within power and meaning-making. When we examine silence through these larger frameworks, it stands out as a fluid and strategic power that can create meaning, control visibility, or contest hegemonic narratives.

### **B. SILENCES IN INDIAN POLITICAL TRADITION**

In Indian society and politics, silence has deep philosophical and ethical significance. It has origins in spiritual traditions around *mauna* (silence) in Hinduism and Jainism, and in significant political reflection found in Gandhian philosophy. Silence has been historically prized as a practice of ethical self-control, inwardness, and moral authority, rather than a gesture of passivity. Mahatma Gandhi observed a regular *Maun Vrat* (vow of silence) every week, noting, “*It has often occurred to me that a seeker after truth has to be silent.*”<sup>14</sup> Silence for Gandhi, however, was more than an inward exercise; it was also a possibility of political action based on restraint, consideration, and resistance. In the context of colonial domination, this form of Gandhian silence became a legitimate ethical refusal. It was refusal to engage coercion through violence; a suspension of reactive speaking,

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<sup>14</sup> 36 M.K. GANDHI, THE COLLECTED WORKS OF MAHATMA GANDHI 35 (1958).

giving opportunity for considerations of action; and a form of moral witnessfulness in the moment of injustice.

Crucially, this understanding of silence (*śunyatā*) is drawn from Indic ways of knowing wherein it is believed that speaking (*vāk*) comes out of silence (*śunyatā*), which presupposes that having something meaningful to say is dependent on the practice of not saying anything. Silence comes to function simultaneously as a metaphysical ideal and method of political action, allowing for non-violent resistance, aspirational democratic spaces of deliberation, and the undermining of colonial power through dignified refusals to engage or communicate. Gandhi's use of silence, then, was consequential not only as a personal practice of spirituality but importantly as a collective practice of ethical comportment creating new ways of imagining dissent, authority, and truth in colonized and decolonizing India.

Nonetheless, a significant shift has occurred in contemporary Indian political practice. Today, silence is often utilized not as a principled or spiritual position, but as a political strategy. Political players may choose to remain noticeably silent in times of constitutional crisis, communal violence, or administrative irresponsibility not because they are merely reflective, but in fact to escape responsibility, maintain vagueness, or create strategic distance.<sup>15</sup> In these cases, silence is used to manage coalition politics, to stave off the media and to avoid alienating key constituencies. The movement from a Gandhian silence founded in a notion of ethical idealism, to a silence supported by *realpolitik* suggests silence now functions at the crossroads of political convenience and inherited tradition. Silence is no longer the privilege of one person's moral responsibility or spiritual practice; it is a complex form of governance providing mediation between public expectation, institutional ambiguity, and performative citizenship.

In modern political contexts, especially in democratic settings like India, silence has become a sophisticated instrument of statesmanship and politics. The shift from silence as a spiritual possibility to silence as a place of political manoeuvring illustrates its range and, importantly, why silence

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<sup>15</sup> CHRISTOPHE JAFFRELOT, *MODI'S INDIA: HINDU NATIONALISM AND THE RISE OF ETHNIC DEMOCRACY* (Princeton University Press, 2021).

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still matters in political theory and political practice. As this conversation progresses, the author will elaborate on this framework, specifically to discuss how political parties deliberately use silence as a tool in the constitutional and electoral realms. The author will work through silence as an active agent that colours institutional practice and constitutional meaning.

### **THE IDEA OF DE FACTO CONSTITUTIONAL ARCHITECTS AND INFORMAL CONSTITUTIONAL ACTORS**

Understanding silence as absence and strategy invites further investigation into the agencies and mechanisms that shape constitutional meaning in ways that go beyond the explicit commands of the text. It is often within these constitutional silences that less visible and informal agencies intervene and shape norms in ways that might go undetected if we just look at the written text. The ongoing evolution of the Constitution as a living document beckons the perspective to acquire a wider lens beyond the legislature, executive, and judiciary agencies. It is important to understand which agencies intervene and shape constitutional meaning outside of the official structure. In order to assess constitutional governance in India, we cannot only rely on the written text; we must be cognizant of the presence and influence of informal constitutional players. These players and institutions are not part of formal political society and tripartite structure, yet deeply affect constitutional norms, practices, and interpretations. Consider political parties, civil society organizations, the media, senior bureaucrats, and powerful political leaders, all of whom play an important role in the dynamic character of the Constitution. While they do not officially and legally hold authority in the Constitution, their actions often result in normative and institutional shifts for how the Constitution is interpreted and put into practice.<sup>16</sup> This paper considers these closest players to be “*de facto constitutional architects*” and “*informal constitutional actors*.” What matters especially to us, in this context, is political parties, and we will focus on their role.

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<sup>16</sup> RAN HIRSCHIL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCE OF THE NEW CONSTITUTIONALISM 123-126 (Harvard University Press, 2007).

The phrase “*de facto constitutional architect*” describes people who, while not legally authorized to write constitutions or interpret the law, are nevertheless significantly involved in the delineation and application of constitutional principles and, by extension, *de facto* constitutional authority. These individuals derive their authority not from some written delegation, but through political activity, creative institutional behavior, and through the establishment of norms that clarify to a community their shared future. There are many instances and traditions of informal constitutional authority in India which collectively illustrate how the meaning of the constitution has developed outside a formal alteration process. Below, there is an elaboration of specific examples.

#### **A. LEGISLATIONS AS INSTRUMENTS OF INFORMAL CONSTITUTIONAL CHANGE**

The Indian legislative program is a system of laws and also a means of constitutional change. The Constitution establishes the principles of fundamental rights and the interactions between institutions, but legislative action is a way in which the parliament can change the conditions that exist in reality, particularly under a dominant ruling party. The parliament has redefined the rights of Part III,<sup>17</sup> redefined Centre-State relations<sup>18</sup> and redefined institutional checks and balances through statutes, all without constitutional amendments. The introduction of the Goods and Services Tax (“*GST*”) was a transformative moment for fiscal centralization, undermining the federal principle codified in the Constitution. Similarly, the Citizenship Amendment Act of 2019 (“*CAA*”) raised widespread alarm over allegations that it contradicted the Constitution’s secular character by introducing explicit religious criteria to citizenship law. Enactment of these laws includes moments of diminished parliamentary analysis for various reasons, from majoritarianism to fleeting deliberation, all of which diminish democratic contestation. Judicial responses to laws that facilitate

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<sup>17</sup> Indian Parliament, by enacting various laws, has effectively expanded, limited, or clarified the interpretation and implementation of Fundamental Rights enshrined in Part III of the Indian Constitution (Articles 12 to 35).

<sup>18</sup> Union Parliament, through legislation (statutory laws), has modified the balance of power between the Centre and the States, thereby affecting the federal structure envisaged in the Constitution.

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substantial changes typically align with the laws enacted, a practice referred to as the “*operational constitution*.”<sup>19</sup>

### **B. EXECUTIVE PRACTICES AND THE REINTERPRETATION OF FEDERALISM AND SECULARISM**

While the executive branch in India operates under the general supervision of Parliament, it has positioned itself as a significant arbiter in assessing the interpretation and usage of foundational principles such as federalism and secularism. The central government has consistently utilized Article 356 in a manner that does either controversy or political expediency undermine the autonomy of states and recalibrate the distribution of federal power.<sup>20</sup> However, in a parliamentary democracy like India in which the executive derives its membership from the legislature, these actions rarely represent independent executive decisions alone; they are systematically linked to the mechanisms of dominant political parties controlling the executive bureaucracy, conflating institutional action with strategic political goals. In addition, the strategic use of central government agencies and conditional transfers has also worked to entrench central authority.

Secularism has also been subjected to executive reinterpretation. Incomplete attention to religious laws, state support for select religious festivals, inaction when communal violence occurs and public statements reflecting cultural nationalism have served to weaken the constitution’s commitment to secularism. Each of these executive actions do not occur through formal amendment processes; instead, it constitutes a slow and dubious change to constitutional norms, or what some have called “*governance-driven constitutionalism*.”<sup>21</sup>

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<sup>19</sup> GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE* (Oxford University Press, 2003).

<sup>20</sup> RAJEEV BHARGAVA, *SECULARISM AND ITS CRITICS* (Oxford University Press, 1998).

<sup>21</sup> Governance-driven constitutionalism refers to a constitutional framework shaped primarily by the practical needs and actions of governance, where constitutional meaning evolves through governmental policies, administrative practices, and political decision-making.

### **C. JUDICIAL APPOINTMENTS AND INFORMAL PRESSURES ON CONSTITUTIONAL JURISPRUDENCE**

Judicial appointments comprise a distinctive space for formal constitutional mechanisms and informal political and institutional pressures to intersect. Articles 124<sup>22</sup> and 217<sup>23</sup> detail the process for appointing judges to the Supreme Court and High Courts, however, adjudication has had a significant impact in shaping the process of judicial appointment, in particular through the Second and Third Judges Cases, which effectively formalized the collegium system of appointment.<sup>24</sup> While the collegium was introduced in order to protect judicial independence, it has been criticized as opaque and elitist, in effect establishing this informal or extra-constitutional gatekeeping institution. Attempts to re-shift the balance of power to the executive to shape judicial ideology, for example through the creation of the National Judicial Appointments Commission (“NJAC”) and later invalidation also illustrated the political stakes of judicial appointments.<sup>25</sup> The ambiguity of Articles 124 and 217 particularly who has control or authority over the process judicial appointments as well as the opacity of the collegium system exemplifies a key type of constitutional silence. This silence, rather than being passive, generates a space in which informal norms, executive influence, and political bargaining shape constitutional jurisprudence beyond the formal text. Moreover, the delays of the Executive in approving collegium recommendations and public campaigns about specific appointments amplify the importance of informal actors, namely civil society, the media, and legal scholars, to mention a few. These actors likely have a significant influence on the make-up of the judiciary, which in turn, influences the path of constitutional jurisprudence - even though they operate outside the formal constitutional framework.

### **D. POLITICAL STRATEGIES AND THE REINFORCEMENT OR EROSION OF PARLIAMENTARY CONVENTIONS**

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<sup>22</sup> INDIA CONST. art. 124.

<sup>23</sup> INDIA CONST. art. 217.

<sup>24</sup> Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441; In re Special Reference No. 1 of 1998, (1998) 7 SCC 739.

<sup>25</sup> Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 1.

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In India, parliamentary democracy functions not only on the basis of the written constitution, but also on a culture of conventions and ethical norms that give shape to the work of institutions. The enactment of political behaviours by the party in power or the opposition can either support these vital norms or contribute to their decline. For example, the executive's domination of the Parliament, the muzzling of dissent, the misuse of anti-defection legislation, and the politicization of oversight institutions serves to degrade meaningful parliamentary deliberation and the essence of democratic diversity.<sup>26</sup> On the other hand, when political actors respect the consultative processes of governance, preserve the autonomy of institutions, and ensure that the representation of the people is inclusive, they will uphold the idea of constitutional morality, as the Indian Supreme Court has referred to, which represents fidelity to the values that underpin constitutional democracy.<sup>27</sup> In both cases, political behaviour enacts the "*lived constitution*"<sup>28</sup> and contributes to the norms of governance. Political parties, therefore, are not just election machines, but also informal constitutional actors whose action strategies will help define constitutional futures.

### INFORMAL CONSTITUTIONAL ACTORS AND THE SHADOW CONSTITUTION

As we think of constitutions, we tend to imagine them as written papers, which explain the way that power of the government is structured and constrained. That is, constitutions are written documents. But our experience with constitutionalism teaches us that even the meaning of constitution(s) is much more expansive than just the (written) text. In India, the vibrant and complex constitution of democratic life has enabled many scholars to refer to our constitutional order as a "*shadow constitution*." This idea of a "*shadow constitution*" suggests that the constitutional order is not simply determined by formal, institutional arrangements but also has a far broader group of actors who shape it. Particularly important among these are political parties. Political parties, because of their position, are

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<sup>26</sup> SUJIT CHOUDHRY ET. AL. (EDS.), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, 2016).

<sup>27</sup> Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.

<sup>28</sup> DAVID A. STRAUSS, THE LIVING CONSTITUTION (Oxford University Press, 2010).

able to straddle both the formal constitutional arrangements and more broadly, the socio-political reality of our context, thus becoming de facto architects of the constitution.<sup>29</sup> Through their manifestos, legislative processes, public discussion, and actions in government, parties are consistently reshaping our foundational principles of constitutional order, including federalism, secularism, and the meaning of free expression. They shape institutional conduct in quasi-independent agencies like the Election Commission as well as in constitutional institutions like the Speaker and the Governor, by redefining the operational autonomy and democratic accountability of these institutions.<sup>30</sup> The instrumental use of constitutional amendments often sought to cement political agendas illustrates the dominant role of the party system in ordering informal constitutional change, even as the judiciary uses doctrines like the basic structure to check majoritarian excesses.<sup>31</sup>

In a parliamentary democracy like India, which adheres to the Westminster model, unwritten conventions constitute an essential part of governance, functioning alongside the Constitution. The strategies and behaviours of political parties affect the likelihood of adherence to conventions, or the weakening of conventions. Activities of institutional executive overreach, curtailment of dissent, unethical exercise of legislative majorities, and politicization of independent institutions, each serve to erode constitutional morality.<sup>32</sup> Alternatively, practices such as commitment to consultative governance, institutional autonomy, and inclusive political representation preserve the ethos of representative democracy. Political parties, through these contrasting strategies, reconstruct the lived Constitution, often redefining its meaning and scope outside the formality of legal amendments.<sup>33</sup> Accordingly, the evolution of this praxis has spurred constitutional scholars to theorize about whether a “*shadow*

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<sup>29</sup> Richard H. Pildes, *Constitutionalism and the Politics of Government*, 119 YALE L. J. 2516, 2516-2570 (2010).

<sup>30</sup> KATHLEEN THELEN, *HOW INSTITUTIONS EVOLVE: THE POLITICAL ECONOMY OF SKILLS IN GERMANY, BRITAIN, THE UNITED STATES, AND JAPAN* 3-5 (Cambridge University Press, 2004).

<sup>31</sup> Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

<sup>32</sup> MADHAV KHOSLA, *INDIA’S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY* 219-222 (Harvard University Press, 2020).

<sup>33</sup> JAN-WERNER MULLER, *Three Constitutional Responses to Globalisation* in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 239, 239-55 (Jeffrey K. Tulis & Stephen Macedo, 2010).

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*constitution*” exists as a parallel normative order, conjoining informal norms, unspoken expectations, and extra-legal uses of power as a system of governance in parallel with, and at times in conflict with, the constitutional text.<sup>34</sup> For example, the shift towards coalition politics in the 1990s introduced new conventions around cabinet responsibility, party discipline, and inter-party negotiations, which were not originally anticipated in the framework of the constitution. Together with the party-based appropriation of constitutional offices such as the Governor and the Speaker, new practices of institutional behaviour have also emerged that sometimes counter the constitutional spirit of neutrality and accountability.<sup>35</sup>

The conceptual basis for this condition comes from constitutional realism, which emphasises the disconnect between ideals grounded in text and political practice by positing that meaning is made by power and not simply legality. Acknowledging informal constitutional actors, particularly political parties, as the actual creators of the meaning of the constitution, does not imply abandoning the legitimacy of a constitution. Rather, it urges us to reconsider constitutionalism as being transactional in a system that operates on both formal and informal systems. This realisation compels a re-examination of accountability measures to address power structures that are outside the normal instantiation of law. Simultaneously, it opens up questions about the role of informal action: when is this behaviour supporting constitutional democracy, and when is it undermining its very core? On what basis can we differentiate the perniciousness of the creations of action from the assertion of change from self-interest?

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<sup>34</sup> CHRISTOPHE JAFFRELOT & SANJAY KUMAR, *RISE OF THE PLEBEIANS? THE CHANGING FACE OF INDIAN LEGISLATIVE ASSEMBLIES* (Routledge, 2009).

<sup>35</sup> D. D. BASU, *COMMENTARY ON THE CONSTITUTION OF INDIA*, 85-88 (LexisNexis, 27th ed., 2012).

## **POLITICAL PARTIES AND CONSTITUTIONALISM: RECONSIDERING THE FRAMEWORK IN CONTEMPORARY INDIA**

### **A. CONSTITUTIONALISATION OF POLITICAL PARTIES: AN ANALYTICAL OVERVIEW**

The problem of constitutionalisation of political parties which is the process of making the parties formally constitutional, supervised, or recognised is the source of the critical problems on the relationships between the concepts of democracy, representation, and institutional accountability. Proponents of constitutionalisation argue that the process may lead to the improvement of democratic responsiveness in the political party, internal party democracy, transparency of the political party funding, and the construction of constitutional values. Critics caution that formalisation will either protect political elites, or even quash political dissent, or give extremist groups validity, which reduces actual participation of the population.

This is not a recent development and Dr. B.R. Ambedkar, with a keen sense of the part that political parties were likely to play in what he termed the democratic experiment in India, but even during the context of actually attempting to institutionalise a political party within the constitutional structure of a post-colonial state was somewhat sceptical of formalising that dichotomy. He was concerned that political parties would instil inflexibility with factionalism instead of flexibility, which is usually available through constitutional life. But as Ambedkar noted during the Constituent Assembly Debates, it was not the Constitution but the “*working of political parties*” which would decide the trajectory of Indian democracy. This sentiment, which from afar, the author too assesses, portrays not an outright rejection of constitutionalism with political parties, but an acknowledgment of their place in historical time which has only deepened significance since Ambedkar's inscription in 1950-1952.

Understanding and engaging with the constitutionalisation of political parties in contemporary time is not a contradiction of Ambedkar's caution but rather reflects the historical time. Political parties have evolved in a short period of time to become de-facto constitutional actors that

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determine electoral competition, are part of executive formations, and constitutionally influence judicial appointments. Because of the urgency of this formative time, it is necessary to review their legal and normative status. What Ambedkar worried about as possible premature institutional entrenchment has instead happened informally. The issue now is whether any formal constitutional recognition and regulation would help remedy some of the distortions that unregulated party power has created.

While supporters argue that political parties enhance democratic responsiveness, critics contend that they also legitimize the empowerment of extremists and the inaccessibility of the general public. This conflict is particularly acute in the context of newer democracies that are attempting to reconcile representation and good governance. A cursory reading of the formal text might suggest that political parties are peripheral and scarcely implicated in the constitutional framework. Nonetheless, many constitutional forms of governance properly order how things should work in theory, but their workings in practice are often at odds with theory. Political parties matter insofar as they have important implications for the operation of the institutions of the state.<sup>36</sup>

Political parties remained conspicuously absent from the constitutional text of India until the enactment of the Fifty-Second Amendment in 1985, which introduced the anti-defection provisions into the Tenth Schedule of the Constitution.<sup>37</sup> Beyond the narrow confines of this anti-defection framework, the Constitution makes no explicit reference to political parties. This constitutional silence becomes all the more striking when juxtaposed with the otherwise detailed codification of administrative structures, conventions, and political norms embedded within the Indian

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<sup>36</sup> D. GRIMM, *CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE* 28-29 (Oxford University Press, 2018); S. Choudhry, "He had the mandate": the South African constitutional court and the African National Congress in a dominant party democracy, 2 CCR 1, 80 (2009).

<sup>37</sup> INDIA CONST. sch. X, *amended by* The Constitution (Fifty-second Amendment) Act, 1985.

constitutional framework.<sup>38</sup> As Dr. B.R. Ambedkar presciently observed in his concluding speech to the Constituent Assembly,

*“The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the workings of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play.”*<sup>39</sup>

While Dr. Ambedkar acknowledged the indispensable role of political parties in mediating between the constitutional state and the political will of the people, he nonetheless viewed them as unsuitable subjects for constitutional entrenchment. Within the domain of conventional constitutional theory, which prioritizes the normative architecture of formal state institutions, political parties have often been treated as empirical anomalies rather than integral constitutional actors.<sup>40</sup> They are often interpreted as external effects - occurrences that undoubtedly affect constitutional practice, but are conceptually separate from constitutional design's internal logic.<sup>41</sup> The empirical impact of political parties may inspire praise or disparagement; but, as traditionally conceived, design offers little in the way of an engagement with their intrusion into this space.

## **B. THE SIGNIFICANCE OF POLITICAL PARTIES**

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<sup>38</sup> Even statutes or secondary legislation did not recognise or regulate political parties until 1968. The first explicit recognition of political parties came in the form of the Symbols Order, 1968. The Symbols Order is a Standing Order made by the Election Commission of India exercising its constitutional powers under the Art. 324 of the Constitution of India.

<sup>39</sup> 11 CONSTITUENT ASSEMB. DEB., (NOV. 29, 1949) <https://www.constitutionofindia.net/debates/25-nov-1949/>.

<sup>40</sup> The general constitutional theory scholarship, too, has largely ignored the normative status of political parties. See Tarunabh Khaitan, *Political parties in constitutional theory*, 73 CLP 89 (2021).

<sup>41</sup> Akshat Sethia, *Where's the party?: towards a constitutional biography of political parties*, 3 INDIAN L. REV. 1, 2 (2019).

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Political parties are collectives of citizens who come together around shared political beliefs, aiming to gain power within government systems to push their policy goals. Yet, they often function without sufficient constitutional or legal oversight. In India, even though they are vital in shaping the nation's democratic landscape, political parties exist outside the formal constitutional framework, as the Indian Constitution does not specifically mention or regulate them. The primary statutory provision governing their formation and registration is found in Section 29A of the Representation of the People Act, 1951. According to this section, a political party must meet certain criteria to be eligible for registration with the Election Commission of India ("*ECI*") as per which the party must consist exclusively of Indian citizens, its primary objective must be to contest elections to Parliament or State legislatures, it must have at least 100 registered electors as its members, and finally, it must affirm allegiance to the Constitution of India and commit to the principles of socialism, secularism, democracy and the sovereignty and integrity of India.

To initiate the registration process, a party must submit a formal application to the Secretary of the ECI, accompanied by requisite supporting documents. Once a party is registered, its legal duty is to inform the ECI about any changes to their name, constitution, office-bearers, headquarters, or any other organizational details. Though Indian law does mandate the disclosure of certain elements of organizational structure and organization of political parties, such as the inner workings and approaches to leadership selection, it does not fully control what is known as the so-called internal party democracy. A term that includes such processes as open leadership election by the members, their involvement in organizational decision-making and internal oversight processes.

The regulatory framework raises a very real issue of a dilemma in Indian political parties: as an essential element of our democratic system, their inner mechanisms and conformity to the constitutional values are only marginally controlled. The need to overcome such inadequacies is critical towards improving democratic accountability where political parties, which are fundamental pillars of democracy, can work in a transparent manner and to do so within constitutional values.

A comparative approach with other jurisdictions shows that both constitutional and institutional definitions of political parties differ significantly, which is very informative in the case of India. As an illustration, in Germany a constitutional recognition of political parties occurs in the Basic Law (Grundgesetz) that defines parties' rights and duties and requires internal democracy.

In the United Kingdom, political parties do not have constitutional recognition *per se*, but parties like the Conservative Party incorporate democratically defined internal processes, which include the National Conservative Convention, board of members, and Central Council, that govern decisions related to party leadership and organizational matters. Likewise, political parties in the United States do not have constitutional recognition, but both the Democratic and Republican Party have powerful National Committees to direct candidate selection, campaigns, and platforms, and can direct substantial ritual and informal authority without specific constitutional framework. These comparative examples illustrate how parties can institutionalize internal governance in degrees even without constitutional rights enumerated through institutional recognition and constitutional recognition (as in the German model where the presence of full constitutional legitimacy may be expected to reinforce clarity, accountability, and normativity in the scope of democratic duties).

### **C. THE NEED FOR CONSTITUTIONALISATION**

Political parties are the institutional framework for democracy; they arise as practical solutions to collective-action dilemmas that legislators, candidates, and citizens face. In legislatures, they help organize policy priorities and settle on stable bargaining; in elections, they reduce the costs of mobilization by coordinating candidates and providing the public with party labels as sideboards to help with difficult electoral choices.<sup>42</sup> More generally, parties serve to link society to the state, they aggregate disparate interests, offer a counter to elite power, and facilitate citizen accountability in government. Without strong party systems, democracies risk the rise of political alienation and distrust in democratic institutions. Studies in the

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<sup>42</sup> J. H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (University of Chicago Press 1995).

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empirical literature increasingly link strong and institutionalized party systems to costly, democratic stability, and decreased risk of authoritarian backsliding.<sup>43</sup> An institutionalized party system raises the costs of erosion of democracy and makes civic mobilization easier.<sup>44</sup> Additionally, comparative evidence supports such claims: Self and Hicken<sup>45</sup> find that populists advance with greater success where party systems are underdeveloped; Bernhard et al.,<sup>46</sup> again find that democracies are at greater risk of breakdown when there is a lack of established party organizations and active civil society groups.

In a nation as diverse and multifaceted as India, with profound social divides and significant regional differences, political parties' formal recognition is even more important in empowering citizens. Acknowledgment of political parties is in fact a response to continuing challenges within the party system. Because, frequently, party organizations are influenced by caste and religious identities, which undermine the process of representation. Also, indistinct financial and spending practices undermine democratic accountability, and elite politics elicit major parties in control of only a handful of families, distorting actual civic and competitive interactions. Lastly, with few internal elections or membership, undemocratic leaders remain officially in place. These internal problems are dangerous to the democratic framework because political parties are one of the most important actors in representative democracy. It is hence crucial that the political parties be made constitutional to enhance democracy in the political parties, financial transparency, and to limit communal interests, which will eventually enhance the pillars of Indian democracy.

Although the constitution has had little constitutional involvement with political parties, other than the Tenth Schedule (anti-defection) and

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<sup>43</sup> Barbara Geddes et al., *Autocratic breakdown and regime transitions: A new data set*, 12(2) PERSPECT. POLITICS 313–331 (2014).

<sup>44</sup> STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (Crown, 2010).

<sup>45</sup> Tirza Self & Allen Hicken, *Party Institutionalization and the Prospects for Democratic Consolidation*, 16 POL. STUD. REV. 192, 192–203 (2018).

<sup>46</sup> Michael Bernhard et al., *Institutional Subsystems and Democratic Survival*, 54 GOV'T & OPPOSITION 1, 1–26 (2019).

occasional references in the electoral laws, their place in constitutional practice has been both systemic and revolutionary.<sup>47</sup> Political parties are not peripheral entities but central actors through which democratic deliberation and governance are realised.<sup>48</sup> The concept of “*constitutional partocracy*”<sup>49</sup> sheds light on the significant and often overlooked dimension of political parties in relation to the operation and interpretation of the Indian Constitution. While textual authority on political parties is confined in the Constitution (other than the anti-defection provisions added by the Fifty-Second Amendment in 1985), it cannot be denied that political parties have played a vital role in the development of Indian constitutional democracy. In the analysis by Aradhya Sethia, political parties are shown to be de facto constitutional actors with considerable authority over elections, legislative priorities, constitutional amendments, and even judicial appointments.<sup>50</sup>

Despite this power, political parties in India are largely not regulated by the Constitution or statutory provisions in respect of their internal functioning, democratic practices, or financial accountability. This asymmetry gives rise to a tension, in that the principal institutions of democratic representation do so through internal structures that are often opaque, exclusionary, and hierarchical. As a result, the constitutional state in India reflects not just the will of legal formal institutions, but the internal dynamics and strategic imperatives of its political parties. Sethia’s contribution requires constitutional scholars to think more expansively about the frontiers of constitutionalism, urging closer normative attention to the role of political parties as formal, albeit informal, constitutional actors in India’s parliamentary democracy. The relative lack of scholarly attention has contributed to a status quo in which the parties are the primary modes of democratic representation but do so within frameworks that are largely opaque, exclusionary, and hierarchical. As a result, it is not

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<sup>47</sup> INDIA CONST. sch. 10.

<sup>48</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (Princeton University Press, 1999).

<sup>49</sup> ABHINAV SETHIA, *CONSTITUTIONAL PARTOCRACY: POLITICAL PARTIES AND THE INDIAN CONSTITUTION* (2024).

<sup>50</sup> *Partocracy* denotes a form of constitutional practice where political parties, rather than the formal institutions of the state alone, assume a primary role in determining the meaning and operation of constitutional governance.

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just the formal institutional design of India’s constitutional order that is key, but institutions paradoxically add constitutional significance when contextualised through the political parties’ internal dynamics and strategic imperatives. Sethia’s claims, therefore, invite a broader imagination of constitution-making, one in which political parties’ complex and constitutive role is understood in the everyday functioning of parliamentary democracy.

Comparative constitutional experiences clarify this dynamic. For example, Germany’s post-war Basic Law affirms the importance of political parties in Article 21, requiring internal democratic processes and obligating parties to protect the constitutional order—a recognition shaped by the historical lesson that the decline of parties and party pluralism often precedes the first democratic decline. Conversely, the United States Constitution—shaped by Enlightenment-era skepticism toward factionalism—remains entirely silent on political parties, reflecting the Founders’ deep-seated *anti-partyism*.<sup>51</sup> Comparative analyses, including cross-national studies using the Electoral Democracy Index (also known as the “Polyarchy” index) developed by Varieties of Democracy (“**V-Dem**”),<sup>52</sup> suggest that the quality of democracy is strongly associated with the robustness of party systems. In general, the most democratic and politically stable nations feature well-institutionalised political parties that provide organisational continuity, mediate between society and the state and foster accountability and responsiveness.

India’s experience with constitutional development offers modest and ambiguous insights. There are few official references in either the constitution or legislation to distinguish political parties as a component of that constitution, yet almost all discussions about the political history of the country demonstrate the deep entanglement of party politics with constitutional practices. From the deliberations of the Constituent

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<sup>51</sup> NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* (Princeton University Press 2008).

<sup>52</sup> Varieties of Democracy (V-Dem) produces the largest global dataset on democracy with over 31 million data points for 202 countries from 1789 to 2024. Involving over 4,200 scholars and other country experts, V-Dem measures over 600 different attributes of democracy.

Assembly to the governmental practices that followed independence, the parties have been decisive in shaping the nature of Indian constitutional democracy. Notions of primacy, resulting in a myriad of contradictions, accompany this importance of parties. Party politics, as an essential carrier of democratic contestation and collective interests, at the same time poses unavoidable threats to constitutionalism and constitutional integrity. The consequence of the concentration of power in dominant parties in practice, their ability to commandeer state institutions for objectives of a party, and their impulsion to circumvent parliamentary procedures, all exemplify an ongoing resistance to the norms of constitutional morality.<sup>53</sup> Complicated yet further by global calls for banning or regulating extremist political agents who utilise democratic avenues to undermine or destroy the very system of democracy, encourages tensions in the constitutional question of the complexity of representation across pluralism and the demands of secular, democratic equality for its institutional, normative legitimacy.<sup>54</sup>

There have been substantial changes in India's political landscape, from the time of one-party rule and the declaration of emergency, to coalition politics and a succession of constitutional crises. Over time, numerous parties, leaders, and social movements have contributed to the creation and reconstruction of the democratic continent in India. New ideologies and forces may frequently emerge, but they remain inextricably tied to prior events in the evolution of the political landscape. Addressing these ongoing challenges requires a fresh look at the gaps. Although the Indian constitution doesn't explicitly define the role of political parties, it does rely on them to bridge the gap between state power and the will of the people. Therefore, we need to see political parties not just as players in the constitutional game but as powerful influencers of it. Their actions deserve careful constitutional examination, not just political evaluation. The contemporary challenge for Indian constitutionalism is thus twofold: to articulate a jurisprudence that legitimises the centrality of parties in democratic functioning while simultaneously constructing safeguards

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<sup>53</sup> DEVESH KAPUR & PRATAP BHANU MEHTA, *India's Judiciary: The promise of Uncertainty*, in PUBLIC INSTITUTIONS IN INDIA: PERFORMANCE AND DESIGN 231, 231–258 (Oxford University Press, 2005).

<sup>54</sup> SUJIT CHOUDHRY, *Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 123, 123-157 (Oxford University Press, 2008).

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against their potential to erode constitutional norms and institutional balances.<sup>55</sup>

### THE CHALLENGES OF MAKING POLITICAL PARTIES CONSTITUTIONAL: THE CASE OF INDIA

I would like to draw your attention to the concerns articulated by B.G. Kher, who was a member from Bombay in the Constituent Assembly, about the dangers that political parties may pose to the fulfilment of India's aspirational constitutional purposes post-independence. He paid a compliment to the Assembly for having accomplished the historic task of drafting the Constitution for a multi-faceted nation in such a relatively brief period of time and added:

*“In our anxiety to achieve our dreams of equality, liberty, fraternity, and social justice, let us not lose sight of the fact that even the attainment of these great things is possible only if we do not collapse at the very beginning of our new life, and the whole machine is not wrecked either through ignorance or through wickedness. There are political parties who are anxious to create chaos in the country because they believe that in that way alone, and through violence alone, they can achieve the fulfilment of their dreams.”<sup>56</sup>*

Even now, more than seventy years later, his caution is as pertinent as it was then. India has made impressive strides toward making its constitutional ideals a living reality; nevertheless, political parties in India have played a contradictory role in this process. They are also necessary for democratic governance, and yet, political parties exist mainly outside of the formal constitutional structure. Political parties are great instruments for political mobilisation and translating public will into policy action as long as they are congruent with the constitutional mandates. Still, to formally integrate and incorporate political parties into the

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<sup>55</sup> Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandisement and Party-State Fusion in India*, 15 LAW ETHICS HUM. RIGHTS 49, 49–83 (2021).

<sup>56</sup> 11 CONSTITUENT ASSEMB. DEB., (NOV. 29, 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).

constitutional structure has faced a myriad of complications: historical, legal, political, and institutional.

India is considered a successful case of democracy in the Global South. After it became independent in 1947 and debated extensively the adoption of a liberal-democratic Constitution in 1950, India held regular elections, had democratic freedom, and considerable political competition (with the exception of the Emergency period between 1975 and 1977). This is particularly impressive given the lack of all the preconditions typically considered necessary for stable democracy, including high income, mass literacy, and widespread industrialisation.

The following discussion explores the key challenges of constitutionally recognising political parties in India:

#### **A. HISTORICAL AND CONSTITUTIONAL CONTEXT**

The authors of the Constitution, influenced by governing experiences from colonial rule and a strong sense of nation-building, did not formally recognise political parties in the Constitution. Instead, they constructed a system of government based on Westminster-style parliamentary democracy and allowed, in effect, political parties to be operational entities outside of the Constitution. Dr. B.R. Ambedkar, while emphasising the importance of parliamentary institutions, did not support the idea of explicitly including political parties in the Constitution. Political parties in India derive their legal status from statutory provisions, notably Section 29A of the Representation of the People Act, 1951.<sup>57</sup> Over time, the judiciary has acknowledged their centrality to democratic functioning, as seen in landmark cases like *Indian National Congress v. Institute of Social Welfare*<sup>58</sup> and *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra*<sup>59</sup>. However, judicial recognition has not translated into constitutional entrenchment. Importantly, Indian constitutional jurisprudence lacks a coherent doctrinal framework when it comes to the status and role of political parties. Most of the constitutional focus has been on fundamental rights, federalism, and ensuring checks and balances within institutions. If

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<sup>57</sup> Representation of the People Act, § 29, No. 43, Acts of Parliament, 1951 (India).

<sup>58</sup> *Indian National Congress v. Institute of Social Welfare*, (2002) 5 SCC 685.

<sup>59</sup> *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra*, (2010) 5 SCC 246.

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we want to include political parties in this conversation, we'd need to create a more detailed understanding of their constitutional responsibilities, particularly around issues like internal democracy, transparency, and how they relate to rights such as freedom of speech and association.

One of the biggest hurdles India faces is the political pushback from the parties themselves. If we were to recognise them constitutionally, it would probably mean stricter rules around internal democracy, financial transparency, and increased accountability. Since many political parties in India tend to be family-run or revolve around a single leader, these kinds of reforms could really threaten their established power dynamics. One of the key arguments for recognising these constitutional rights is the noticeable lack of internal democracy within political parties. Yet, this very shortcoming creates a bit of a paradox: parties that don't operate democratically on the inside are unlikely to embrace reforms that would weaken their secretive and hierarchical systems. The Supreme Court's observations in *Kuldip Nayar v. Union of India*<sup>60</sup> underscore the contradictions inherent in this scenario. For any meaningful constitutional incorporation, recourse would have to be made to formal amendment procedures, potentially entailing the insertion of a new constitutional provision or modifications to the existing framework governing electoral processes. However, given the fragmented and pluralistic character of India's parliamentary system, the emergence of a meaningful political consensus to effectuate such amendments appears unlikely in the foreseeable future.

Even if constitutional recognition were to be secured, significant questions would persist regarding the institutional mechanisms responsible for the enforcement of such norms. While the ECI possesses constitutional authority to regulate electoral processes, it does not presently enjoy a clearly defined mandate to oversee the internal functioning of political parties. Any expansion of its jurisdiction in this regard would necessitate careful institutional reform, aimed at safeguarding its independence while ensuring that it is adequately resourced to discharge these additional

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<sup>60</sup> *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1.

responsibilities effectively. India's federal structure further complicates the prospect of such reform; regional political parties are likely to perceive constitutional incorporation as an instrument of enhanced central oversight, thereby threatening their autonomy within the federal framework. Concerns regarding the potential misuse of regulatory authority by the Union only deepen this resistance, making political consensus more difficult to achieve.

While comparative experiences from jurisdictions such as Germany and South Africa demonstrate that political parties can be constitutionally embedded with requirements of internal democracy, transparency, and adherence to constitutional values, India's distinct socio-political context renders the direct transplantation of such models challenging. In the absence of a broad-based national consensus on both the desirability and the design of such incorporation, the reform process is likely to remain deeply contested.

## **B. DEFECTIONS AND THE LIMITS OF LEGAL SOLUTIONS**

As eminent constitutional experts like M.C. Setalvad and C.K. Daphtary noted in their committee reports, legal or constitutional mechanisms alone cannot address the problem of defections.<sup>61</sup> They argued that *“the more lasting solution to the problem can only come from the adherence of political parties to basic political morality and the observance of certain proprieties and decencies of public life.”*<sup>62</sup>

This insight remains relevant today. For instance, countries like the United States and the United Kingdom do not have anti-defection laws, yet party discipline is maintained through internal deliberative mechanisms rather than rigid legal compulsion. In India, the persistence of defections and floor-crossing highlights the failure of political parties to maintain discipline internally through democratic engagement with their members. This also raises a fundamental question: *Why should the Constitution be amended to rescue political parties from problems largely of their own making?* Unless

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<sup>61</sup> Chakshu Roy, *The Anti-Defection Law That Does Not Aid Stability*, PRS INDIA (Oct. 5, 2022), <https://prsindia.org/articles-by-prs-team/the-anti-defection-law-that-does-not-aid-stability>.

<sup>62</sup> *Id.*

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parties embrace internal reforms voluntarily, constitutional amendments alone will not guarantee better democratic practices.

Notably, political parties across the globe are experiencing a significant decline in public trust. Scholars, like Ian Shapiro<sup>63</sup>, have argued for the necessity of genuine reform in areas like campaign financing, the influence of money in politics, or independent commissions to address gerrymandering. The same goes for catalogue issues throughout the world; here at home, we also experience the same dilemma – dark money in politics and a profound lack of trust in the institutions of government. Integrating political parties into the Indian Constitution is no simple task; the problem is multifaceted and rife with complexity. While providing political parties with constitutional status could prop up accountability and internal democracy, there are several hurdles to overcome which are politically entrenched in history, institutions, pushback from political entities, and the realities of Indian federalism. Ultimately, the answer might rest not only in a formal constitutional change, but also in the willingness of political parties to positively reform themselves from within and adhere to a higher ideal of ethical democratic forms of behaviour.

### **POLITICAL PARTIES AS INTERPRETERS OF CONSTITUTIONAL SILENCES: CASE STUDIES**

This section of the paper discusses four illustrative case studies, which highlight the role of political parties as tacit constitutional actors in India. These instances illustrate how strategies that leverage politics, partisan interests, and interparty negotiation have indeed played an important role in shaping the development, interpretation, and implications of the Indian Constitution, often outside the bounds of explicit constitutional wording – but important nevertheless.

#### **A. THE BASIC STRUCTURE DOCTRINE AND PARTY-DRIVEN CONSTITUTIONAL AMENDMENTS**

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<sup>63</sup> I. SHAPIRO, *POLITICS AGAINST DOMINATION* (Harvard University Press, 2016).

The Basic Structure Doctrine came into being through that key ruling in the Kesavananda Bharati case against the State of Kerala back in 1973.<sup>64</sup> It stood out as a major turning point in the story of India's constitution. Courts put the doctrine in place officially. Yet its roots and the way it developed came from moves by political parties using constitutional angles. In the 1970s, the Congress Party held a firm grip on Parliament. They took advantage of that to get constitutional amendments approved. Those changes matched up with the party's own political aims and beliefs. Part of it involved shielding social and economic shifts from court interference. Land redistribution efforts got special attention in that regard. The 24th and 25th Amendments made those intentions clear. At the same time, the amendments pointed to a broader push. They sought to bring judicial authority more directly under executive influence. The whole constitutional clash reached its high point with the 42nd Constitutional Amendment Act of 1976.<sup>65</sup> People often refer to it as the "Mini-Constitution". Lawmakers passed it right in the middle of the Emergency period that ran from 1975 to 1977. The amendment worked to concentrate power in fewer hands. It aimed to limit how courts could review laws. Also, it altered the overall setup of powers in the constitutional framework. All of this got wrapped up in obvious party agendas. Those interests hid behind discussions on socialism and keeping the nation together. Courts stepped in against these developments. They developed the Basic Structure Doctrine as a counter. It drew hard lines around Parliament's ability to alter the constitution. On paper, the doctrine stayed a creation of the judiciary. Even so, it connected closely to the heated tactics that political parties pursued. Those tactics drew straight from constitutional ideas. Parties never acted as formal experts on the constitution. That held true whether in social roles or through legislation. Still, they played a real part in setting the boundaries for what could change in the document. Granville Austin pointed that out in his 1999 work.<sup>66</sup>

## **B. GST IMPLEMENTATION: FEDERAL NEGOTIATION THROUGH PARTY CHANNELS**

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<sup>64</sup> Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

<sup>65</sup> INDIA CONST. *amended* by The Constitution (Forty-second Amendment) Act, 1976.

<sup>66</sup> GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION* (Oxford University Press, 1999).

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The introduction of the Goods and Services Tax (“**GST**”) in 2017 transformed India’s fiscal federalism. Encoded in the 101st Constitutional Amendment, the GST structure established a unified indirect tax system for both the Union and states. However, this constitutional shift was not purely the result of formal “government” machinery but was also an outcome of prolonged and complicated negotiations and party politics involving multiple parties. The GST Council, as a constitutionally mandated cooperative federal body has not emerged from theory. It is a product of sometimes rancorous, sometimes opaque discussions involving the national-level ruling party Bharatiya Janata Party (“**BJP**”) and various regional and state parties’ context within India’s colourful political context. These negotiations demonstrated how the lacunae in constitutional rules about intergovernmental fiscal relations were ably addressed through informal, yet very salient, party politics.<sup>67</sup>

The BJP, with its dominance in electoral politics and effective organisational structure, played a key part in garnering support. Regional parties such as the AIADMK and TMC used their political power to extract finances and retain some degree of administrative independence. The vote on the GST demonstrated the pragmatics of a negotiated version of constitutionalism and politics, and that federalism changes are seldom only formal constitutionalism. This emphasises an important observation: in India, federalism is not solely exercised through formal institutional mechanisms, but also through informalism that political parties have created, which makes it a fundamental element of the constitutional landscape.

### **C. POLITICAL PARTY RESPONSES TO EMERGENCY AND POST-EMERGENCY CONSTITUTIONALISM**

The announcement of Emergency pursuant to Article 352<sup>68</sup> in 1975 has left an indelible mark in the history of Indian constitutionalism. During the Emergency period, fundamental rights were suspended, the independence of the judiciary was restricted, and the powers of the executive were

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<sup>67</sup> M.P. SINGH, *FEDERALISM IN INDIA* (Oxford University Press, 2020).

<sup>68</sup> INDIA CONST. art. 352.

expanded tremendously. These changes were made possible because of the partisan measures employed by the ruling Congress Party, which supports the idea that political parties can be destabilising forces in the realm of constitutionalism. After the Emergency period, however, party politics showed its restorative role. The rise of the Janata Party in 1977 was not simply a case of winning the election, but it also represented a political and constitutional reaction against what was defined by many as an era of authoritarianism. The introduction of the 44th Constitutional Amendment in 1978 intended to undo some of the authoritarian measures that the Congress imposed under the 42nd Amendment, such as modifications to fundamental rights and the declaration of national emergencies. Although the actions of the Janata Party were not entirely altruistic, since political forces were at play as well, it employed constitutional amendments as a method of purifying the constitutional political realm by in effect saying no to what it viewed as Congress's constitutional overreach.<sup>69</sup> Most importantly, the Emergency and following events created an informal constitutional norm: subsequent governments, from whichever political party they may be, have been very cautious to invoke emergency powers; thus an unwritten constitutional convention has emerged as a result of history and partisanship.

#### **D. JUDICIAL APPOINTMENTS AND THE COLLEGIUM CONTROVERSY**

The development of judicial appointments in India is an important case of constitutional gap and political manoeuvring. Initially, while the Constitution had established the judiciary to play a consultative role in appointments with finality in the hands of the executive, political interference, especially during the period of Emergency, provoked a strong response from the judiciary. This culminated in the historic Second Judges Case (*Supreme Court Advocates-on-Record Association v. Union of India, 1993*),<sup>70</sup> when the Supreme Court established the collegium system, thereby transferring the power of judicial appointments from the executive to the judiciary itself. While the collegium process was purportedly conceived as a measure to secure judicial independence, it was more a response to politically based appointment practices that had emerged as a consequence

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<sup>69</sup> 5 B. SHIVA RAO, *THE FRAMING OF INDIA'S CONSTITUTION* (Indian Institute of Public Administration, 2006).

<sup>70</sup> *Supreme Court Advocates-on-Record Association v. Union of India* (1993) 4 SCC 441.

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of executive intervention. Political parties, now decidedly not wanting to cede an inch to judicial independence, countered with the 99th Constitutional Amendment and NJAC (proposed National Judicial Appointments Commission). This initiative, which was passed by Parliament during Prime Minister Narendra Modi's NDA government, was designed to restore parliamentary control over the judicial appointment process. The Supreme Court struck down the NJAC in 2015, voicing concerns once again about a potential infringement on judicial independence.<sup>71</sup> This ongoing contest points to a deep-rooted debate in the constitution. Political parties work like unofficial designers of it. They make room for talks or changes in how independent institutions stay that way. All this comes through official updates and quieter kinds of pressure.

The examples in this chapter bring out a pattern that keeps showing up. It is pretty significant too. Parties in India have really acted as the hidden builders of the constitution. They adjust its sense, its boundaries, and how it runs in response to things. This happens whether they carefully use the process for changes, build agreements across the federation, push back against too much control, or even undermine the freedom of institutions completely. In all these ways, the parties fill in the empty spots the constitution left behind with real political weight. What these patterns tell us is that just describing how the constitution grew in India through its words or strict readings falls short. They make clear we need another sort of lively theory about the constitution. One that sees how vital political parties are. And one that puts them right in the middle of how India's constitutional landscape keeps evolving over time. As constitutional scholars Mark Tushnet<sup>72</sup> and Madhav Khosla<sup>73</sup> remind us, constitutions are not static. They are living embodiments permanently reshaped by political practice and partisan contestation. In the case of India, therefore, political parties are not merely electoral tools but informal constitutional actors, crucial for the academic analysis of law, power, and democratic governance.

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<sup>71</sup> SUJIT CHOUDHRY, *CONSTITUTIONALISM IN INDIA* (Oxford University Press, 2013).

<sup>72</sup> MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* (Edward Elgar, 2018).

<sup>73</sup> MADHAV KHOSLA, *INDIA'S FOUNDING MOMENT* (Harvard University Press, 2020).

## **IMPLICATIONS FOR INDIA OF EXCLUDING POLITICAL PARTIES FROM THE FORMAL CONSTITUTIONAL FRAMEWORK**

This section examines the multifaceted consequences of leaving political parties outside India's constitutional framework.

### **A. EROSION OF INTERNAL DEMOCRACY AND THE DEMOCRATIC DEFICIT**

Even though the Election Commission of India has issued instructions regulating internal elections and parties' transparency in functioning, these instructions have been largely advisory in nature and non-enforceable due to not having constitutional or statutory backing.<sup>74</sup> Consequently, the major political parties in India are seriously entrenched fundamentally centralised, personality-driven parties, often headed by family dynasties. As Milan Vaishnav<sup>75</sup> puts it, this phenomenon is described where advancement of "clientelistic centralization," that is, control of party structures becomes concentrated in a few with less extensive deliberation and participatory methods, all of which weaken internal cultures and through this contribute to larger democratic deficits at systemic levels, as political parties are the principal way citizens interact with democratic governance. Historically, when parties lacked internal democracies, the result was factionalism from the 1960s and 1970s, to such an extent that led to instability and eventually the 52nd Amendment to the Constitution (1985), which introduced an anti-defection law.<sup>76</sup> The legal response to party infighting and factionalism was both incomplete and incoherent due to the lack of constitutional basis for democratic deficits as processes leading to under- representative functioning of parties remained strong and undermined India's democratic character from within.

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<sup>74</sup> Yogendra Yadav, *Strengthening Democracy: Political Party Reforms in India*, Working Paper, CTR. FOR POLY RES (2020).

<sup>75</sup> MILAN VAISHNAV, *WHEN CRIME PAYS: MONEY AND MUSCLE IN INDIAN POLITICS* (Yale University Press, 2017).

<sup>76</sup> T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (Oxford University Press, 2018).

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### **B. CONSTITUTIONAL SILENCES AND JUDICIAL AMBIGUITY**

Political parties in India exist in what constitutional scholar Aradhya Sethia<sup>77</sup> calls a “jurispathic zone”, a realm in which constitutional silence catalyses courts into making or improvising doctrines without a cohesive jurisprudential anchor. The Supreme Court has intervened in matters concerning political parties’ conduct, clearly seen in *Union of India v. Association for Democratic Reforms*<sup>78</sup> (requiring disclosure regarding candidates’ criminal history and assets) and *Kuldip Nayar v. Union of India*<sup>79</sup> (addressing electoral reforms in Rajya Sabha elections), however, these interventions have been irregular, and jurisprudentially inconsistent. The lack of constitutional status creates ambiguity as to the extent of judicial oversight over party functioning, resulting in contradictory judgments and interpretative instability. As Sethia argues, the void of legality prevents courts from exercising any consistency in safeguarding the democratic ethos, thereby undermining the coherence of constitutional adjudication. The absence of a constitutional basis for party regulatory powers has resulted in fragmentary jurisprudence that weakens the rule of law, in addition to giving political actors licence to exploit constitutional silences.

### **C. WEAKENING OF CONSTITUTIONAL MORALITY**

Constitutional morality, as understood in *Navtej Singh Johar v. Union of India*<sup>80</sup> as a loyalty to the substantive values of the Constitution, requires political actors to be more responsible than merely following a formalistic understanding of legal rules. However, the decision to exclude political parties from the Constitution has significant implications for institutionalising this spirit into party behaviour. Political parties, as essential political intermediaries, enjoy considerable authority when it comes to candidate selection, policy position-setting, and the framing of ideologies of governance. Without attaching constitutionally binding

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<sup>77</sup>ARADHYA SETHIA, CONSTITUTIONAL PARTICRACY: POLITICAL PARTIES AND THE INDIAN CONSTITUTION FORTHCOMING IN APARNA CHANDRA ET. AL. (EDS.), THE CAMBRIDGE COMPANION TO THE CONSTITUTION OF INDIA (Unpublished Manuscript).

<sup>78</sup> *Union of India v. Association for Democratic Reforms*, (2002) 5 SCC 294.

<sup>79</sup> *Kuldip Nayar v. Union of India*, (2006) AIR 2006 SC 3127.

<sup>80</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

obligations to the conduct of political parties, there is no formal requirement for parties to abide by values of secularism, equality, or dignity. This has created a troubling dissonance between electoral strategy on the one hand and constitutional values on the other. The growing reliance of some political parties on hate speech, religious division, and populist majoritarianism is representative of the gap.<sup>81</sup> The decline of constitutional morality diminishes accountability of political actors and increasingly risks normalising unconstitutional behaviour in everyday electoral politics.

#### **D. THREAT TO THE PRINCIPLE OF REPRESENTATION AND ELECTORAL INTEGRITY**

Political representation in India remains skewed due to systemic biases within party structures. The chronic under-representation of women, Dalits, Adivasis, religious minorities, and marginalized communities is perpetuated by the absence of constitutional obligations on parties to promote inclusive representation.<sup>82</sup> Constitutional recognition could introduce affirmative action mandates or diversity quotas for candidate selection, aligning party structures with the broader constitutional commitment to equality and social justice. Furthermore, the integrity of elections is undermined by opaque campaign financing and unregulated funding mechanisms. The introduction of electoral bonds, while purportedly designed to curb black money in politics, has been criticised for increasing the opacity of political donations and enabling a corporate-political nexus.<sup>83</sup> Without constitutional obligations to transparency, parties can exploit regulatory gaps, perpetuate electoral malpractices, and weaken public faith in democratic institutions.<sup>84</sup>

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<sup>81</sup> SUJIT CHOUDHRY, *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Cambridge University Press, 2013).

<sup>82</sup> DEVESH KAPUR, & MILAN VAISHNAV, *COSTS OF DEMOCRACY: POLITICAL FINANCE IN INDIA* (Oxford University Press, 2018).

<sup>83</sup> Prashant Bhushan, *Electoral Bonds: Instruments of Opacity*, 56 *ECON. & POL. WKLY.* 9 (2021).

<sup>84</sup> ASSOCIATION FOR DEMOCRATIC REFORMS, *ELECTORAL BONDS AND OPACITY IN POLITICAL FUNDING* (Oct. 18, 2023), [https://adrindia.org/sites/default/files/Updated\\_Background\\_Note\\_Electoral\\_Bonds\\_October\\_2023\\_Final.pdf](https://adrindia.org/sites/default/files/Updated_Background_Note_Electoral_Bonds_October_2023_Final.pdf).

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### **E. CRISIS OF ACCOUNTABILITY AND POLITICAL CORRUPTION**

One of the biggest issues stemming from the lack of constitutional recognition is the accountability crisis within our party system. Political parties play a crucial role in connecting citizens with the government, but without constitutional requirements, they tend to operate with little financial oversight and hardly any responsibility to their members or the public. Even though they receive substantial public funding both directly through electoral subsidies and indirectly via tax breaks and state resources, these parties often slip through the cracks of strict oversight. The introduction of electoral bonds has only made this situation worse by keeping major corporate donors out of the public eye. Without constitutional protections, we see a rise in political corruption, rent-seeking, and cozy relationships between economic elites and political figures. By embedding parties within a constitutional framework, we could establish enforceable standards for financial transparency, which would be a much-needed remedy to the growing influence of money that's skewing Indian elections.

### **F. POTENTIAL FOR EXECUTIVE OVERREACH AND PARTY-STATE FUSION**

Another alarming outcome of constitutional silence is the creeping fusion of the ruling party with the state apparatus. This “party-state fusion” phenomenon erodes the distinction between partisan interests and state neutrality, thereby compromising the federal structure, judicial independence, and civil service impartiality. India's experience during the Emergency (1975-77) is a stark illustration of this danger, where the ruling party leveraged state institutions for partisan ends, severely undermining constitutional governance.

Contemporary scholarship on authoritarian populism, such as Levitsky and Ziblatt's *How Democracies Die*,<sup>85</sup> warns that executive overreach often begins with weakened party institutions. In the absence of constitutional

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<sup>85</sup> STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (Crown Publishing, 2018).

restraints, the ruling party can capture public institutions, marginalise opposition voices, and blur the boundaries between government and party. This trend, if unchecked, threatens the very foundations of constitutional democracy in India.

### **G. MISSED OPPORTUNITY FOR INSTITUTIONAL INNOVATION**

Lastly, the refusal to constitutionally recognise political parties constitutes a missed opportunity for institutional innovation in Indian democracy. Comparative experiences from Germany (Article 21, Basic Law)<sup>86</sup> and South Africa (Section 19, Constitution)<sup>87</sup> demonstrate how constitutional embedding of parties enables the development of sophisticated regulatory frameworks, independent party commissions and enforceable mechanisms of internal democracy.

The continued exclusion of political parties from India's constitutional framework entrenches systemic deficits in governance. While statutory reforms and judicial interventions have addressed some symptoms of this malaise, they remain piecemeal and inconsistent. Given the transformative role that parties play in shaping political life, their constitutional recognition is not a luxury but a democratic imperative. As India aspires to strengthen its constitutional republic, embedding political parties within its constitutional structure emerges as a foundational reform for safeguarding its democratic future.

### **PROSPECTIVE PATHWAYS FOR REFORM**

Recognising the challenges associated with the immediate constitutional incorporation of political parties, several prospective pathways for gradual reform can be envisioned. These pathways balance the need for accountability with the prevailing political and institutional realities in India. Rather than opting for a sudden constitutional amendment, India could initiate a phased approach through statutory reforms. Amendments to the *Representation of the People Act, 1951*, could mandate internal democratic procedures within political parties, alongside compulsory

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<sup>86</sup> GG art. 21 (Ger.).

<sup>87</sup> S. AFR. CONST. § 19, 1996.

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financial disclosures. Such reforms would lay the groundwork for enhanced transparency and internal accountability. The ECI could additionally be empowered through legislative action to play a more robust regulatory role. This would include explicit authority to audit party finances, supervise internal party elections, and enforce compliance with democratic norms. Strengthening the ECI's mandate would enhance its institutional capacity to regulate political parties more effectively. The judiciary can play a constructive role by interpreting and applying existing constitutional provisions creatively. For instance, Articles 19(1)(c) (freedom of association)<sup>88</sup> and 324 (ECI's powers to supervise elections) could be invoked to incrementally develop a jurisprudence of accountability for political parties. Judicial intervention, though limited in scope, can help fill legislative gaps.

Beyond formal institutions, active participation by civil society organisations and independent media is essential in catalysing reform. An informed electorate, bolstered by investigative journalism and civic activism, can exert sustained pressure on political parties to democratise their internal functioning or face electoral backlash. India could benefit from structured engagement with other constitutional democracies that have formally recognised political parties, such as Germany, South Africa, and Nepal. Learning from their experiences can offer valuable models adaptable to the Indian context, particularly concerning party registration, financing, and internal democracy.

The question of whether political parties should be recognised in India's constitution is a complex and often debated topic. While it's clear that these parties play a crucial role in shaping governance, the journey toward formal recognition is blocked by legal uncertainties, political pushback, institutional challenges, and the intricacies of federalism. Still, the argument for giving them constitutional status is strong, especially when it comes to enhancing democratic accountability and promoting internal democracy within the parties themselves. Given the significant resistance to changing the constitution, a gradual approach seems to be the most sensible path forward. This would involve a mix of legal reforms,

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<sup>88</sup> INDIA CONST., art. 19(1)(c).

empowering institutions, interpreting laws through the judiciary, and encouraging civic participation. Without these changes, India risks maintaining a constitutional democracy that has serious structural flaws, where political parties, the key players in governance, function with minimal legal accountability and transparency. It's essential for everyone involved in the democratic process to commit to upholding the values enshrined in the constitution.

Democratic frameworks require safeguards against the concentration of power and the potential erosion of institutional integrity through authoritarian practices or procedural manipulation by any constitutional actor.<sup>89</sup> In this regard, constitutional mandates play a pivotal role in ensuring that all actors, including political parties, remain firmly within the bounds of democratic constitutionalism.

## ANALYSIS AND SUGGESTIONS

This research looks into the crucial yet often overlooked role that political parties play in shaping, interpreting, and implementing the Indian Constitution. Rather than just being players within the constitutional system, they act as its very architects. By thoroughly examining the constitutional silences, those areas where the text is vague, poorly defined, or open to interpretation, this study reveals that political parties are essential in giving substance to India's constitutional framework. The idea of "*filling the silences*" within the Indian Constitution is frequently seen as necessary, a means to address textual gaps and ensure that democratic governance continues to thrive. However, this study raises an important question: when political parties take on the primary role in this process, should we allow the current informal arrangements to persist, or is it time to rethink and formalise how political parties relate to the constitutional order?

As evidenced through this analysis, political parties have consistently occupied and defined constitutional silences, especially in important areas

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<sup>89</sup> Uday Shankar, *Constitutional regulation of the political parties: Need of a new legal order*, SCC ONLINE (Mar. 14, 2021) <https://www.scconline.com/blog/post/2021/03/14/constitutional-regulation-of-political-parties/>.

## FILLING THE SILENCES – POLITICAL PARTIES AS DE FACTO CONSTITUTIONAL ARCHITECTS IN CONTEMPORARY INDIA

like judicial appointments, federal structures, emergency powers, and the development of unwritten democratic practices. Their interventions have not only influenced how institutions operate, but also set the tone for what is expected, often creating binding precedents even without formal constitutional backing. In many cases, political parties have acted as interpreters of the constitution, sometimes stepping in ahead of the judiciary to clarify what constitutional provisions really mean. Whether it's about coalition governance, electoral financing, or managing relationships between the Centre and the States, the practices led by political parties have gained considerable constitutional importance over time. This research highlights that constitutional growth in India isn't just about judicial interpretation or formal amendments. Instead, it's a lively, ongoing process shaped by political players who address interpretive gaps and adjust constitutional balances through their legislative actions, executive decisions and negotiations between parties. The case studies reviewed, including the development of the basic structure doctrine, the debates over judicial appointments, the implementation of GST, and the restructuring of constitutional norms after the Emergency, show how political parties actively shape constitutional meaning in real-time, responding to both political needs and democratic principles.

A look at how different countries like the United States, the United Kingdom, and South Africa handle their legal systems helps us understand India's situation in a global light. These examples show that the way political practices interact with gaps in the constitution isn't just an Indian issue. However, the hurdles India faces stemming from its diverse, multi-party democracy are especially significant and intricate.

### **A. CHALLENGES OF FORMAL CONSTITUTIONALISATION**

While recognising political parties in India in the constitution could lead to more transparency, internal democracy, and accountability, it also comes with a host of challenges. The deeply rooted identity-based politics, regional divides and the strong influence of charismatic leaders make it politically sensitive and practically tough to integrate these parties into a constitutional framework. There is a likely pushback from established political elites, many of whom thrive in the current murky systems of party

funding, decision-making, and discretionary power, which could be a significant hurdle for any reforms. Moreover, formalising this recognition could lead to unintended issues, like judicial overreach or the political manipulation of constitutional provisions, which might ironically weaken democratic accountability instead of enhancing it. Striking a balance between regulatory oversight and the independence of political groups is a particularly tricky challenge. The inherent fragmentation of India's party system, marked by coalition necessities, shifting alliances, and frequent factional disputes, adds another layer of complexity to the practical implementation of constitutional reform in this area.

The study of informal constitutional actors in India, especially political parties, reveals the plural and contested nature of constitutional development. By actively participating in both the interpretation and implementation of constitutional norms, these actors shape the operational meaning of the Constitution in ways that demand serious scholarly and institutional attention. The preservation of constitutional democracy thus requires not only legal vigilance but also sustained engagement with the informal forces that continuously rewrite the unwritten rules of governance.

## **CONCLUSION**

Finally, this paper underlines the significant yet frequently disregarded role of Indian political parties in creating constitutional norms that are not external to the practice of constitutions but rather to their silences. At the heart of this investigation into the concept of constitutional silence is the fact that it is not merely absence or omission, as it is characterised, but is a domain in which political judgement, discretion, institutional ambiguity and democratic negotiation take place. The political parties have become influential players that are in and even exploit these silences as they would rebuild and redefine the meaning of constitutional principles such as federalism, secularism, accountability and representation. The recognition of this dynamic does not require the exaltation of the political judgement or political discretion being exercised or indicate that all silences have to be codified normatively. Instead, it makes us pay attention to the normative and institutionally dense implications of these silences, their fillings, fillers and effects. It urges scholars, institutions, and citizens to

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question informal architectures of power that make the constitutional democracy of India work and to inquire into the generation of political practices that are practised beyond the spatial limits of formal textual descriptions of the Constitution. Although it would eliminate some of these uncertainties and enhance the accountability of the democracy, this study cautions against prompt action and a dogmatic formalisation of that action.

The constitutional silences of India do not just constitute an empty space that needs to be occupied; they also tend to be mandatory tolerances and multiplicities of pluralisation. The reforms should, thus, be gradual, vehement, and delicate in institutional protective measures and mindful of the political situation in India. Finally, the formal constitutionalism and political practice would be more than mere legal innovation; bridging formal constitutionalism and political practices requires a reconceptualization of constitutional accountability that incorporates political parties as sub-constitutive informal actors within a constitutional order. It is hoped that this work will render the work which political parties practice being accessible to the Constitution and give an analytic horizon to the constitutional theory in India. By appealing to an elusive capacity of constitutionalism, it aims to create a generative space of constitutional epistemology.

**DOES THE INDIAN CONSTITUTION CARE? PLUGGING IN  
CONSTITUTIONAL SILENCES ON THE ETHICS OF CARE  
THROUGH FUNDAMENTAL RIGHTS**

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**Jwalika Balaji<sup>1</sup> & Anshul Dalmia<sup>2</sup>**

*Care is a form of labour and a value that is enjoyed by everyone, but have we cared enough about 'care' as a legal concept? In India, the idea of 'care' has primarily been housed in philosophy and gender studies, and has only been engaged with to a certain extent in some strands of legal theory. This has restricted the usage of, and analytical insights from, the concept of 'ethics of care' vis-à-vis the Constitution, and legal jurisprudence more broadly. In this article, we interrogate the silence in the Indian Constitution about the concept of care, and also highlight the forms through which the concept of care can be constitutionally addressed and duly incorporated.*

*The article begins by tracing the notion of 'care' in Indian legal and judicial traditions, critically examining how jurisprudence has engaged with care-related concerns in diverse areas such as family, health, environmental protection, and labour law. The article then evaluates whether the constitutional discourse treats care as a coherent normative value or whether its invocation remains sporadic, inconsistent, or instrumental. Moving from description to normativity, the second section argues for a deeper constitutional anchoring of care, drawing from philosophy, feminism and comparative legal doctrine. It warns of*

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<sup>1</sup> Jwalika Balaji is a Research Fellow at the Vidhi Centre for Legal Policy. She holds a Bachelor of Civil Law (LL.M.-equivalent) from the University of Oxford and a B.A. LL.B. (Hons.) from the National Law School of India University, Bengaluru. The author may be reached at <jwalika00@gmail.com>.

<sup>2</sup> Anshul Dalmia is a lecturer at the Jindal Global Law School, OP Jindal Global University, and teaches public law and constitutional theory. He holds a Bachelor of Civil Law (LL.M.-equivalent) from the University of Oxford and a B.A LL.B. (Hons.) from the West Bengal National University of Juridical Sciences. He is extremely interested in constitutional law, theory and governance. The author may be reached at <anshuldalmia31@gmail.com>.

At the outset, this article would not have been possible but for the stimulating discussions that we had in our courses at the University of Oxford. We are very grateful to Professors Sandra Fredman, Jonathan Herring, and Barbara Havelkova, who not only introduced us to the ethics of care but also patiently engaged with us on several of our ideas. We would also like to thank Tanmay Durani and Kunal Khilnani for the research assistance provided by them.

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*the consequential risks of excessive state paternalism disguised as care, while emphasising upon the potential of care to guide responsive and equitable state action. The final section reimagines the architecture of constitutional rights and suggests ways to integrate the ethics of care within existing doctrinal frameworks by exploring the interplay between Fundamental Rights and Directive Principles. Engaging with Sandra Fredman's argument on envisioning care as a constitutional value, the article goes a step further and argues for reconceptualising care not merely as a moral aspiration but as a precept backed by constitutional force. It thus proposes care as a justiciable right that bridges the normative gaps in India's rights jurisprudence and challenges the silence of the Constitution on affective and relational dimensions of care. The article finally concludes that a constitutional right to care ought to be located securely within the Constitution and not be left to the vagaries of the judicial system.*

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## INTRODUCTION

The phenomenon of constitutional silence, which refers to those matters left unaddressed, underdetermined, or altogether absent from constitutional texts, presents a persistent and profound challenge for constitutional law. The need and extent of this challenge have been widely debated. While some scholars believe that constitutional silences offer a platform for future constitutionalism to be housed,<sup>3</sup> others have stressed upon the need to resolve all constitutional ambiguities.<sup>4</sup> As scholars have observed, constitutional texts are never fully comprehensive; there will always be gaps that must be navigated by constitutional designers, judges,

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<sup>3</sup> MICHAEL FOLEY, *THE SILENCE OF CONSTITUTIONS: GAPS, "ABEYANCES" AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT* (Routledge, 2013).

<sup>4</sup> Martin Loughlin, *The Silences of Constitutions*, 16(3) INT'L J. CONST. L. 922, 922-935 (2018).

and politicians.<sup>5</sup> In this sense, constitutional silence is not merely the absence of text, but a space where convention, culture, and judicial interpretation must fill the void. This shapes the evolution and application of constitutional principles in ways that may be both unpredictable and transformative.

The Indian Constitution is a document lauded for its detailed elaboration of rights, principles, and duties. Yet, within its expansive framework lies a profound omission: the concept of care. Dixon and Stone outline two forms of invisibility within constitutionalism.<sup>6</sup> The first being conceptual invisibility – where norms exist in jurisprudence, conventions, and unwritten practices.<sup>7</sup> The second form is sociological invisibility – where norms are overlooked due to social blind spots.<sup>8</sup> We submit that care within the Indian constitutional framework satisfies both these axes. It is both conceptually invisible due to the lack of constitutional embeddedness and sociologically invisible as it pertains to gendered, undervalued, and under-recognised forms of labour. It appears that the Indian Constitution's silence on the justiciability of care is not merely an inadvertent omission but rather the product of a reasoned choice to relegate it to the status of a principle, making it a historical silence that warrants constitutional redress.

This article interrogates this constitutional silence, asking whether the notion of care as an ethical and relational cornerstone has been relegated to the periphery of India's legal discourse. While care occasionally appears in judicial reasoning or legislative frameworks, it is treated as a derivative value, tethered to other established rights or principles, rather than being recognised as a stand-alone, singular, coherent and transformative constitutional precept.<sup>9</sup> Scholars have argued that such silences within

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<sup>5</sup> JOHN GARDNER, CAN THERE BE A WRITTEN CONSTITUTION?, in Leslie Green & Brian Leiter eds., *OXFORD STUDIES IN PHILOSOPHY OF LAW* (OUP, 2011); Richard Albert & David Kenny, *The challenges of constitutional silence: Doctrine, theory, and applications*, 16(3) INT'L J. CONST. L., 880–886 (2018).

<sup>6</sup> ROSALIND DIXON & ADRIENNE STONE, *THE INVISIBLE CONSTITUTION IN COMPARATIVE PERSPECTIVE*, 5-10 (CUP 2018).

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

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

<sup>9</sup> Ira Chadha Sridhar, *Care – A Thick Concept: Conceptual Significance and Emerging Directions*, IJFAB BLOG (May 15, 2025) <https://www.fabnet.org/post/care-a-thick-concept-conceptual-significance-and-emerging-directions-a-guest-post-by-ira-chadha>.

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constitutional texts do not necessarily indicate the lack of meaning or force.<sup>10</sup> We challenge such an understanding and argue that this fragmented treatment constrains care's potential to serve as an animating force for law, policy, and governance - a limitation explored in this article.

The ethics of care, as a constitutional principle, demands more than a passing reference or a derivative status tethered to another substantive second-order fundamental right (for example, the right to care stemming from the right to health as recognised under Article 21). The core argument of this article is that the ethics of care must transcend its current status as an episodic or instrumental value, and instead be embedded as a constitutional precept, either as a standalone fundamental right or derived directly from Article 21. The article calls for recognition of care as a foundational *precept* that enables and obligates affirmative action. By precept, we refer to a tangible, justiciable right or rule that has legal backing, as opposed to a norm, value or principle. In a country as diverse and complex as India, where issues of social justice, gender equity, and public health are pervasive, the absence of an explicit constitutional mandate for care can have far-reaching consequences. It may leave vulnerable populations without recourse, and it may allow governments to sidestep their responsibilities under the guise of textual ambiguity.<sup>11</sup> Thus, drawing from feminist philosophy and comparative and doctrinal constitutional jurisprudence, the article contends that care must be elevated to a legal precept that demands action, accountability, and institutional arrangements.

The article is structured as follows. The first section traces the conceptual foundations of care within legal and philosophical traditions, with particular emphasis on feminist ethics and their application to law. The

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<sup>10</sup> REBECCA ANANIAN-WELSH & JONATHAN CROWE, CONSTITUTIONAL SILENCES AND INSTITUTIONAL INTEGRITY. JUDICIAL INDEPENDENCE: CONTEMPORARY CHALLENGES, FUTURE DIRECTIONS 124-140 (Annandale, NSW, Australia: Federation Press, 2016).

<sup>11</sup> Anshul Dalmia, *Neither Leftovers nor Crumbs: Misunderstanding the Right to Food in India*, OXFORD HUMAN RIGHTS HUB (Apr. 17, 2024) <https://ohrh.law.ox.ac.uk/neither-leftovers-nor-crumbs-misunderstanding-the-right-to-food-in-india/>. This piece discusses that the right to food, despite being a recognised right, is not adequately enforced by the government.

second section undertakes an empirical examination of Indian jurisprudence, investigating how courts have invoked care across five domains: life and dignity, early childhood development, care-work remuneration, family relations, and ecological stewardship. These judicial trends are assessed against the normative framework outlined earlier, identifying gaps where the absence of an explicit constitutional right to care impedes systemic solutions. The final section offers a forward-looking approach, proposing ways to integrate care into the architecture of constitutional rights and suggesting its placement within Article 21, or as a standalone Fundamental Right. We do not seek to design the exact form of the right and have rather left it open, conditional on the substance of the right being both comprehensive and meaningful.

By weaving together theory, comparative analysis, and doctrinal critique, this article seeks to challenge the silence of the Constitution and argue for a jurisprudential shift that envisions care as a foundational principle of Indian constitutionalism.

## **CONCEPTUAL FOUNDATIONS: THE ETHICS OF CARE WITHIN LAW**

### **A. PHILOSOPHY OF THE ETHICS OF CARE**

Feminist ethics of care began with Carol Gilligan's *In a Different Voice*,<sup>12</sup> which used empirical interviews with adolescents to demonstrate that moral judgement is often expressed through a vocabulary of empathy, context and responsibility rather than the abstract logic of rights and rules privileged by male philosophers such as Kohlberg, Kant and Rawls. Gilligan argued that the "*care perspective*" had been systematically discounted because it was more frequently articulated by girls and women. Nel Noddings extended that intuition in *Caring: A Feminine Approach to Ethics and Moral Education*,<sup>13</sup> building a relational ontology in which the "*one-caring*" and the "*cared-for*" are bound in an encounter marked by receptivity, relatedness, and responsiveness. She distinguished "*caring-for*" (the concrete labour of meeting another's needs) from "*caring-about*" (the wider ethical

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<sup>12</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE* (Harvard University Press, 1982).

<sup>13</sup> NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (2nd ed., California University Press, 2013).

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stance that prompts one to take action). Joan Tronto's *Moral Boundaries: A Political Argument for an Ethic of Care*,<sup>14</sup> and her later article *Beyond Gender Difference to a Theory of Care*,<sup>15</sup> recasts care as a democratic practice, identifying four (initial) normative phases of care with corresponding values: "caring about"—recognising an unmet need in someone, which requires attentiveness; "caring for"—taking up the need as one's task, which requires responsibility; "caregiving"—performing the labour of caring in a suitable manner, which requires competence; and "care receiving"—evaluation of the task by the recipient, which requires responsiveness. Later on, Tronto added a fifth phase: "caring with"—plurality, communication, trust and respect—which requires solidarity. In her 2013 monograph *Caring Democracy*,<sup>16</sup> Tronto insists that quality care requires structural arrangements such as childcare, elder-care leave, adequate wages that distribute caring labour and resources fairly; personal virtue is therefore necessary but insufficient.

Legal theorists have carried these insights into constitutional discourse. Martha Fineman's article *The Vulnerable Subject: Anchoring Equality in the Human Condition*<sup>17</sup> uses care theory to argue that universal human vulnerability, not autonomous individualism, should ground equality jurisprudence and restructure state entitlements. Sandra Fredman, in *Reversing Roles: Bringing Men into the Frame*,<sup>18</sup> contends that constitutions must secure both breadwinner rights to work and carer entitlements such as parental leave, childcare and elder-care. This would ensure that men and women could share and equalise paid and unpaid labour. Fredman rejects the false binary that treats care as private altruism and work as public productivity; she proposes a relational model in which the State bears positive duties to support care because it is the pre-condition for

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<sup>14</sup> JOAN TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1st ed., Routledge, 1993).

<sup>15</sup> Joan Tronto, *Beyond Gender Difference to a Theory of Care*, 12 *SIGNS* 4, 644-663 (1987).

<sup>16</sup> JOAN TRONTO, *CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE* (NYU Press, 2013).

<sup>17</sup> Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J. L. FEM.* 1, 8-40 (2008).

<sup>18</sup> Sandra Fredman, *Reversing Roles: Bringing Men into the Frame*, 10(4) *INT'L J. L. IN CONTEXT*, 442-459 (2014).

everyone’s capability to participate in society. Jonathan Herring’s book *Caring and the Law*,<sup>19</sup> and article *Compassion, Ethics of Care and Legal Rights*,<sup>20</sup> press courts to shift from the language of individual entitlement to that of relational care. Negligence law, family law, and medical law should ask not merely whether a duty of care is owed but how legal rules can cultivate good caring relationships.

Comparativists have found legal footholds for the argument of integrating care into the legal structures of countries. Canada’s Supreme Court in *Fraser v. Canada* interpreted Section 15 of the Charter, i.e., the equality clause, to condemn pension rules that disadvantaged women who took unpaid caring leave; the judgment cites Fredman on structural disadvantage.<sup>21</sup> South Africa’s Constitutional Court has relied on the intertwined rights to dignity, housing and parental care (sections 10, 26 and 28 respectively) to order emergency shelter for families in *Government of the Republic of South Africa & Ors. v. Grootboom*,<sup>22</sup> and to require State-supported foster grants in *Khosa v. Minister of Social Development*.<sup>23</sup> In India, the Supreme Court’s decision in *Maniben Maganbhai Bhariya v. District Development Officer, Dahod & Ors.*,<sup>24</sup> affirmed the value of Anganwadi labour. The Court held:

*“Jurisprudence developed by passage of time under Article 21 of the Constitution by this Court underlines the primary importance of early childhood developments. ... A pivotal role is being played by Anganwadi workers and Anganwadi helpers, by taking care of children.”*<sup>25</sup>

Thus, the Court grounded claims for payment of wages for Anganwadi workers within Article 21 (i.e., the right to life) and Article 45 (i.e.,

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<sup>19</sup> JONATHAN HERRING, *CARING AND THE LAW* (Hart Publishing, 2013).

<sup>20</sup> Jonathan Herring, *Compassion, Ethics of Care and Legal Rights*, 13(2) INT’L J. L. IN CONTEXT, 158-171 (2017).

<sup>21</sup> *Fraser v. Canada*, [2020] 3 SCR 113 (Canada).

<sup>22</sup> *Government of the Republic of South Africa & Ors. v. Grootboom & Ors.*, 2001 (1) SA 46 (CC) (South Africa).

<sup>23</sup> *Khosa & Ors. v. Minister of Social Development & Ors.*, 2004 (6) SA 505 (CC) (South Africa).

<sup>24</sup> *Maniben Maganbhai Bhariya v. District Development Officer, Dahod & Ors.*, (2022) 16 SCC 343 (India).

<sup>25</sup> *Id.* J. Rastogi at ¶ 24, 33.

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provision for early childhood care and education to children below the age of six). Collectively, this literature and jurisprudence transform care from a sentimental trope into a juristic principle: dependence and vulnerability are not deviations from the norm of autonomy but point to a universal human condition. Legal orders must accordingly embed institutional arrangements such as leave, services, and income support, thus making caring relationships possible and equitable.

### **B. CARE AS A CONSTITUTIONAL VALUE – FREDMAN’S INTERVENTION**

Responding to and building on existing scholarship on care, legal scholar Sandra Fredman has proposed an explicitly constitutional turn. In *Care as a Constitutional Value*, she argues that care should “*complement express constitutional commitments to freedom, dignity and equality*”, furnishing a lens through which every branch must ‘pay attention to the value of care’.<sup>26</sup> Drawing on her substantive-equality framework, Fredman examines how “*constitutions should be shaped to encompass the foundational value of care in society*”.<sup>27</sup> Constitutionalising care, from her perspective, would correct the false binary that pits productive and reproductive labour against one another by recognising that both are foundational to individual capability and democratic participation. Fredman also highlights how embedding care as a constitutional value can enable the judiciary to do many things: weave care into equality law, and hold the state accountable for saying that caring was too costly. In short, Fredman’s model thus seeks to transpose insights from the ethics of care about dependency and relational justice into the interpretation of constitutional and legislative provisions, thereby converting what is often treated as a moral aspiration into a justiciable standard for evaluating state action.

The literature traced above thus furnishes both a vocabulary and a normative template to enable us to weave care as a legal value into hard law. Yet it remains an open question whether these ideas can be repositioned into a constitutional order in India that, unlike South Africa

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<sup>26</sup> Sandra Fredman, *Care as a Constitutional Value*, 22 INT’L J. CONST. L. 3, 741-771 (2024).

<sup>27</sup> *Id.*

or Canada, does not yet acknowledge care in its justiciable text and has historically relegated socio-reproductive labour to the Directive Principles. Fredman's claim that care can operate as a *constitutional value* therefore demands an empirical test: *do Indian courts already treat care as a pervasive interpretive principle despite its textual absence, or does the absence of an explicit right confine care to a derivative, contingent status?*

The next section undertakes that test. By tracing how Indian courts have invoked care across five doctrinal sites (life and dignity, early-childhood development, care-work remuneration, family relations and ecological stewardship), we can observe both the reach and the limits of value-based reasoning. Each cluster of cases is read through the lens supplied by section I: Do judges identify vulnerability and relationality as constitutional foundations? Do they impose duties on the state relating to caring for its citizens? Last, and crucially, how does the absence of a justiciable right to care affect the courts' abilities to adjudicate upon ad-hoc statutory or welfare schemes? The answers generated in section II will provide the evidentiary basis for section III's normative claim: that the ethical architecture sketched by the scholars above cannot achieve full constitutional traction in India until care is elevated from an aspirational value to an enforceable norm.

## **MAPPING CARE IN INDIAN JURISPRUDENCE**

The preceding section situated care within a normative framework that treats vulnerability, dependence, and relational labour as constitutive features of the human condition and, therefore, legitimate objects of constitutional concern. Yet, that ambition may find challenges within the textual landscape of the Indian Constitution. Save for the lone (and non-justiciable) reference in Article 45,<sup>28</sup> care is neither enumerated as a right nor expressly identified as a value that can claim parity with dignity or equality. This constitutional silence is not a merely semantic omission; it is a doctrinal void. Where the text is silent, adjudication becomes the

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<sup>28</sup> INDIA CONST., art. 45; Jwalika Balaji & Anshul Dalmia, 'Caregivers as nation builders', DECCAN HERALD (Aug. 15, 2025) <https://www.deccanherald.com/opinion/caregivers-as-nation-builders-3681653>.

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principal venue through which any constitutional meaning for care can be constructed, contested, or, indeed, foreclosed.

To interrogate the practical impacts of this silence, the article now adopts a doctrinal-mapping methodology. The exercise proceeds from the premise that judicial decisions operate as additions to the constitutional text, filling the void through interpretive adjudication. Mapping those decisions across discrete sites allows us to measure the extent to which courts have (a) recognised care-related claims and (b) endowed such claims with normative force, notwithstanding the absence of an explicit textual basis.

By systematically analysing five clusters of case law (medical and dignitary claims, early-childhood development, recognition of unpaid labour, family-law entitlements, and ecological stewardship), section II undertakes an evidence-based audit of how far adjudication has compensated for the constitutional silence on care and where it has fallen short. The ensuing analysis will, in turn, furnish the empirical basis for Section III's argument: that India cannot achieve a coherent, rights-based care regime without elevating care to a justiciable Constitutional precept.

### A. ARTICLE 21 AS A PORTAL TO STATE-FACING DUTIES OF CARE

The Court first constitutionalised medical attention in *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*:

*“Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state... Article 21 imposes an obligation on the State to safeguard the right to life of every person.”*<sup>29</sup>

Subsequent benches folded maternal health into the same guarantee. In *Laxmi Mandal v. Deen Dayal Harinagar Hospital*, the Delhi HC linked nutritional schemes, reproductive care and the right to food, underscoring

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<sup>29</sup> *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, 1996 SCC (4) 37 (India).

“the indivisibility of basic human rights as enshrined in the Constitution” and held that no pregnant woman may be “turned away from a Government health facility.”<sup>30</sup> These rulings echo Fredman’s reference to Constitutional human rights obligations to “respect” and “protect” medical care-related duties. In these instances, care was framed as a positive, state-facing obligation flowing from an expanded interpretation of the right to dignity rooted within the right to life under Article 21. However, the outcome of all these cases depended on Article 21’s life-and-dignity test rather than on a separate right to care.

## B. EARLY CHILDHOOD CARE CONSTRUED THROUGH ARTICLE 21–A AND 45

When the Supreme Court decided *Maniben Maganbhai Bhariya v. Dahod DDO*, it reframed the Integrated Child Development Scheme as an entitlement:

*“ICDS scheme is... a means of protecting the rights of children under six—including their right to nutrition, health and joyful learning... ‘Socialised childcare’ also contributes to the liberation of women... ICDS deserves far greater attention in public policy since it acts as an institutional mechanism for realization of child and women rights.”*<sup>31</sup>

The Supreme Court once again only grounded Anganwadi workers’ claims as derived from Articles 21, 21-A and 45. However, the reasoning was not an individualistic reasoning of the right to life for the child alone. The Court’s reasoning echoed the basis of Tronto’s *caring-with* phase, as the Court spoke about how care-labour led to the entanglement and realisation of both women’s and children’s rights. This judgement thus implicitly nodded to the importance of taking a relational perspective in policy making—if we want our children to be taken care of, fed nutritiously, and nursed to pink health, we must ensure adequate compensation to the women who are their caregivers.

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<sup>30</sup> *Laxmi Mandal v. Deen Dayal Harinagar Hospital*, 2010 SCC OnLine Del 234 (India).

<sup>31</sup> *Maniben Maganbhai Bhariya v. District Development Officer, Dahod & Ors.*, (2022) 16 SCC 343 (India).

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### C. VALUING UNPAID AND PRECARIOUS CARE LABOUR

In maintenance litigation, the Court has begun to monetise invisible household work. *Rajnesh v. Neha* required family courts to account for years of caregiving when awarding alimony:

*“If the wife... had to give up her employment opportunities to look after the needs of the family... this factor would be required to be given due importance.”*<sup>32</sup>

Similarly, in the motor-accident case of *Shiv Kumar v. Gainda Lal*, the bench revised compensation by recognising a 25-year-old homemaker’s economic contribution, adding future prospects.<sup>33</sup> In *Kirti v. Oriental Insurance Co*, the Supreme Court held as follows:

*“One category of nonearning victims that Courts are often called upon to calculate the compensation for are homemakers.*

*The sheer amount of time and effort that is dedicated to household work by individuals, who are more likely to be women than men, is not surprising when one considers the plethora of activities a housemaker undertakes. A housemaker often prepares food for the entire family, manages the procurement of groceries and other household shopping needs, cleans and manages the house and its surroundings, undertakes decoration, repairs and maintenance work, looks after the needs of the children and any aged member of the household, manages budgets and so much more. In rural households, they often also assist in the sowing, harvesting and transplanting activities in the field, apart from tending cattle. However, despite all the above, the conception that housemakers do not “work” or that they do not add economic value to the household is a problematic idea that has persisted for many years and must be overcome.”*<sup>34</sup>

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<sup>32</sup> *Rajnesh v. Neha*, AIR 2021 SC 569 (India).

<sup>33</sup> *Shiv Kumar v. Gainda Lal*, (2022) 14 SCC 342 (India).

<sup>34</sup> Civil Appeal Nos. 19-20 of 2021 (India).

These decisions reflect the reasoning of scholars such as Martha Fineman,<sup>35</sup> who call for economic support and compensation for care providers; however, these decisions do so in a piecemeal manner, anchored in tort and personal law doctrines. This makes outcomes inconsistent and unpredictable.

#### D. CARE AS THE DETERMINANT OF FAMILY LAW ENTITLEMENTS

Custody and guardianship jurisprudence increasingly privileges actual caregiving over formal status. In *Githa Hariharan v. RBI*, the Court interpreted Section 6 of the Hindu Minority and Guardianship Act,<sup>36</sup> and held that a mother becomes the natural guardian whenever the father is “*absent*” from day-to-day care, reasoning that:

*“While both the parents are duty bound to take care of the person and property of their minor child ... the mother can act as natural guardian ... even during the life-time of the father, who would be deemed to be ‘absent’ ... where the minor is in the exclusive care and custody of the mother.”*<sup>37</sup>

For elder care, *Ashwani Kumar v. Union of India* connected Article 21 dignity to material support,<sup>38</sup> relying on the *Maintenance and Welfare of Parents and Senior Citizens Act, 2007*.<sup>39</sup>

*“The right to live with dignity is, in effect, a part of the right to life as postulated in Article 21 ... Such a right would be rendered meaningless if an aged person does not have the financial means to take care of his basic necessities.”*<sup>40</sup>

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<sup>35</sup> Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 1, 13-30 (2000).

<sup>36</sup> Hindu Minority and Guardianship Act, § 6, No. 32, Acts of Parliament, 1956 (India).

<sup>37</sup> *Githa Hariharan v. RBI*, AIR 1999 SC 1149 (India) ¶ 16.

<sup>38</sup> INDIA CONST., art. 21.

<sup>39</sup> Maintenance and Welfare of Parents and Senior Citizens Act, No. 56, Acts of Parliament, 2007 (India).

<sup>40</sup> *Ashwani Kumar v. Union of India*, AIR 2019 SC 1002 (India) ¶ 16.

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*“There is a need to continuously monitor ... geriatric care. ... The only available solution is a continuing mandamus ... to ensure that the rights of the people are respected, recognised and enforced.”*<sup>41</sup>

These cases foreground relational dependence but again draw on derivative rights and statutes.

### E. ECOLOGICAL AND ANIMAL–WELFARE STEWARDSHIP AS A FORM OF COMMUNAL CARE

In *Animal Welfare Board v. A. Nagaraja*, the Supreme Court folded compassion for non-human life into constitutional doctrine, invoking Article 51-A(g),<sup>42</sup> and noting that welfare statutes “*should be liberally construed in favour of the weak and infirm.*” The Court justified striking down contrary regulations by invoking its *parens patriae* role:

*“PCA Act is a welfare legislation ... Court has also a duty under the doctrine of parens patriae to take care of the rights of animals, since they are unable to take care of themselves as against human beings.”*<sup>43</sup>

*“Article 51-A(g) states that it shall be the duty of citizens to have compassion for living creatures.”*<sup>44</sup>

Here, attentiveness and responsibility are extended beyond human relationships, yet enforcement still hinges on existing legislative schemes.

Against this backdrop, in a nutshell: Indian courts invoke “*care*” in two distinctive ways: *first*, as a state obligation to provide services that uphold life and dignity, and *second*, as a normative lens to recognise and value relational labour, often unpaid, feminised, and invisible. Yet the doctrine stops short of recognising a free-standing right to care; courts still tether care to second-order fundamental rights (for example, medical care as a

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<sup>41</sup> *Id.* at ¶ 47.

<sup>42</sup> INDIA CONST., art. 51A, cl. (g).

<sup>43</sup> *Animal Welfare Board of India v. A. Nagaraja & Ors.*, (2014) 7 SCC 547 (India) ¶ 26.

<sup>44</sup> *Id.* at ¶ 57.

facet of the right to health under Article 21) or to welfare statutes (such as the Prevention of Cruelty to Animals Act, 1960). There is no independent recognition of anything akin to a multifaceted right to care and right to be cared for within Article 21. The jurisprudence, therefore, demonstrates both the elasticity of “*care*” within Article 21’s penumbra and the limits of an approach that treats care as derivative rather than autonomous.

The judicial strategy thus validates Fredman’s insight that care can operate as an interpretive principle, yet it simultaneously confirms the shortcomings of such a position: without an explicit constitutional footing in India, care remains derivative, and its enforcement contingent on sympathetic judicial adjudication. Section III will therefore argue that only by embedding a separate right to care within Part III can India move from episodic intervention to a coherent, rights-based care regime.

## **THE CONSTITUTIONAL LACUNA – FROM VALUE TO PRECEPT**

Fredman suggests that recognising care as an overarching value can replicate the expressive and catalytic functions performed by dignity or equality. Yet, there is a significant obstacle in the Indian context.

Unlike the South African Constitution which places the values of “*human dignity, equality and freedom*” in a *foundational norms* that informs the substance of other rights,<sup>45</sup> any references to values in the Indian Constitution, unless crystallised as a Fundamental Right, are either implicit (in the Preamble),<sup>46</sup> or explicitly non-justiciable (Part IV).<sup>47</sup> Simply recognising care as an important value would therefore probably default to the weaker, directive tier. While Indian courts have shown inventiveness in reading new rights based on DPSPs into Fundamental Rights, they have simultaneously policed the line between Parts III and IV. Without textual relocation, care will continue to be treated as an unenforceable aspiration, subject to executive discretion. Transformative redistribution of care labour requires positive obligations such as adequate public childcare, recognition and support of parental care-giving, elder-care allowances, and caregiver social

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<sup>45</sup> SOUTH AFRICA CONST., Foundational Clause.

<sup>46</sup> INDIA CONST., Preamble.

<sup>47</sup> *Id.* at Part IV.

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security that cannot be consistently and coherently commanded by a court unless grounded in a Fundamental Right.

In this section, we further delve into the South African model since the foundational values substantively inform other Constitutional provisions, unlike India. We have chosen South Africa as a comparator for the following reasons: First, the socio-economic conditions prevailing within South Africa and India are similar; and second, there has been robust jurisprudence surrounding the treatment of foundational constitutional values in South Africa, which would be useful to contrast with India. Against this backdrop, we use South Africa as an appropriate comparator from which comparative lessons could be borrowed.

### A. THE SOUTH AFRICAN MODEL

The South African Constitution offers a contrasting template because its core values “*human dignity, the achievement of equality and the advancement of human rights and freedoms*” are meant to inform the substance of all the rights and provisions in the Constitution.

Section 1 declares that “*The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms...*”<sup>48</sup> and Section 2 makes any law or conduct “*inconsistent with the Constitution*” invalid.<sup>49</sup> Those founding values are not ornamental. While they do not give rise to discrete, enforceable rights, the Constitutional Court in *Minister of Home Affairs v. National Institute For Crime Prevention And The Re-Integration Of Offenders* held that:

*The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution.*<sup>50</sup>

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<sup>48</sup> SOUTH AFRICA CONST., § 1.

<sup>49</sup> *Id.* at § 2.

<sup>50</sup> *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders* [2004] ZACC 10 (South Africa) ¶ 21.

Further, Section 39 of the Constitution commands every court to interpret legislation and develop the common law to “*promote the values that underlie an open and democratic society based on human dignity, equality and freedom.*”<sup>51</sup> The Constitutional Court can invoke these values either implicitly or explicitly while deciding issues. Using these values along with rights, the Court struck down the death penalty in *S v. Makwanyane*,<sup>52</sup> required a reasonable housing programme in *Government of the Republic of South Africa v. Grootboom*,<sup>53</sup> compelled anti-retroviral roll-out in *Minister of Health & Ors v. Treatment Action Campaign*,<sup>54</sup> and insisted on an independent anti-corruption unit in *Glenister v. President of the Republic of South Africa*.<sup>55</sup>

Care therefore enters South African jurisprudence not as a peripheral aspiration but as a direct offshoot of those substantive values which underlie the guarantees embedded in the Bill of Rights. Section 27 guarantees everyone “*the right to have access to health-care services,*”<sup>56</sup> while Section 28 promises every child “*family care or parental care, or appropriate alternative care.*”<sup>57</sup> In *Minister of Health v. TAC* the Constitutional Court anchored the duty to prevent mother-to-child HIV transmission in the need for care of infants and as part of the state’s obligations regarding healthcare.<sup>58</sup> Section 26 promises everyone “*the right to have access to adequate housing*” and obliges the state to take “*reasonable legislative and other measures*” to progressively realise this right.<sup>59</sup> In *Government of the Republic of South Africa & Ors. v. Grootboom*, the Constitutional Court located shelter for destitute families in the inter-locking rights to dignity, housing and parental care, holding that “*Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all*

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<sup>51</sup> SOUTH AFRICA CONST., § 39.

<sup>52</sup> *S v. Makwanyane & Another*, 1995 (3) SA 391 (CC) (South Africa).

<sup>53</sup> *Government of the Republic of South Africa & Ors. v. Grootboom & Ors.*, 2001 (1) SA 46 (CC) (South Africa).

<sup>54</sup> *Minister of Health & Ors. v. Treatment Action Campaign & Ors.*, 2002 (5) SA 721 (CC) (South Africa).

<sup>55</sup> *Glenister v. President of the Republic of South Africa & Ors.*, 2011 (3) SA 347 (CC) (South Africa).

<sup>56</sup> SOUTH AFRICA CONST., § 27.

<sup>57</sup> *Id.* at § 28.

<sup>58</sup> *Minister of Health & Ors. v. Treatment Action Campaign & Ors.*, 2002 (5) SA 721 (CC) (South Africa) ¶¶ 78, 79, 80, 81.

<sup>59</sup> SOUTH AFRICA CONST., § 26.

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*circumstances and with particular regard to human dignity*”.<sup>60</sup> In *Daniels v. Scribante* it relied on dignity to oblige a farm owner to permit a tenant’s self-improvements upon an occupied property, holding that “*occupation is not simply about a roof over the occupier’s head, [but rather] occupation that conduces to human dignity and the other fundamental rights.*”<sup>61</sup>

The values mentioned in the founding clause thus are substantive, they are reflected in fundamental rights as well; thus, courts can require the State to budget, regulate and act on that basis. Thus, if care is conceptualised as a value in South Africa, the Constitutional schema can provide a means for it to strongly enumerate the content of rights-based guarantees. This turns the affective concern of care into potential concrete, enforceable obligations.

### **B. THE INDIAN MODEL**

As mentioned above, if not crystallised as a fundamental right, Indian constitutional values are either mentioned in the Preamble<sup>62</sup> or explicitly stated in the Directive Principles of State Policy, which are non-justiciable aspirational principles.<sup>63</sup> Simply labelling care as a value would therefore default to the weaker, directive tier.

India’s Constitution is famously generous in its length,<sup>64</sup> yet one of the most pervasive and necessary human activities, i.e. care, is nowhere articulated as a fundamental right. The only reference to care within the Indian constitution is in Article 45, which is a Directive Principle of State Policy:

*“45. Provision for early childhood care and education to children below the age of six years.—The State shall endeavour to provide*

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<sup>60</sup> Government of the Republic of South Africa & Ors. v. Grootboom & Ors., 2001 (1) SA 46 (CC) (South Africa) ¶ 83.

<sup>61</sup> Daniels v. Scribante & Anr., 2017 (4) SA 341 (CC) (South Africa) ¶ 31.

<sup>62</sup> INDIA CONST., Preamble.

<sup>63</sup> *Id.* at Part IV.

<sup>64</sup> Ornit Shani, *The long making of India’s Constitution: Letters from the past*, 18(3) INT’L J. CONST. L, 1036-1043 (2021).

*early childhood care and education for all children until they complete the age of six years.*<sup>65</sup>

Sandra Fredman has recently argued that constitutional silences can be remedied if courts recognise care as a constitutional value that should “permeate the interpretation of constitutional and other provisions” and *guide legislative accountability*.<sup>66</sup> While values provide normative guidance, this section contends that recognising care as a constitutional value is insufficient in the current Indian context. India must transform care from a value (Directive Principle of State Policy) into a precept (Fundamental Right) if the Constitution is to bridge its most significant normative gap. By precept, we refer to a tangible, justiciable right or rule that has legal backing, as opposed to a norm, value or principle.

We argue that the main difference between Part III and Part IV pertains to enforceability. Article 37, introducing Part IV, which contains Directive Principles of State Policy states: “*The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.*”<sup>67</sup> The Constituent Assembly accordingly treated Directive Principles as aspirations whose fulfilment depended on future political will and economic capacity, whereas Fundamental Rights were “*a solemn undertaking*” safeguarded by the superior courts.<sup>68</sup> This founding compromise created a hierarchy within the Constitution: values in Part IV supply guidance, but precepts in Part III trigger judicial remedies. Gautam Bhatia argues that Directive Principles are best

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<sup>65</sup> INDIA CONST., art. 45.

<sup>66</sup> Sandra Fredman, *Care as a Constitutional Value*, 22(3) INT’L J. CONST. L. 741-771 (2024).

<sup>67</sup> INDIA CONST., art. 37.

<sup>68</sup> INTERIM REPORT OF THE ADVISORY COMMITTEE ON THE SUBJECT OF FUNDAMENTAL RIGHTS, (1947), [https://ia801801.us.archive.org/21/items/dli.iipa.framing.2/Rao.The\\_Framing\\_of\\_Indi\\_a\\_s\\_Constitution\\_Vol\\_2.pdf](https://ia801801.us.archive.org/21/items/dli.iipa.framing.2/Rao.The_Framing_of_Indi_a_s_Constitution_Vol_2.pdf); NOTES ON FUNDAMENTAL RIGHTS BY B.N. RAU, (1946) [https://ia801801.us.archive.org/21/items/dli.iipa.framing.2/Rao.The\\_Framing\\_of\\_Indi\\_a\\_s\\_Constitution\\_Vol\\_2.pdf](https://ia801801.us.archive.org/21/items/dli.iipa.framing.2/Rao.The_Framing_of_Indi_a_s_Constitution_Vol_2.pdf).

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understood as “*providing the framework of values that structure and constrain the interpretation and construction of fundamental rights.*”<sup>69</sup>

However, we argue that these ‘values’ are qualitatively different from those mentioned in the South African Constitution. Firstly, it is not required that DPSPs are meant to inform the content of fundamental rights or other provisions of the Indian Constitution, contrary to the way Section 1 is interpreted in the South African Constitution. There is also no direction as to when a DPSP is to be judicially invoked, and how it is to be done. Secondly, unlike the handful of values considered most prominent in the South African context, in India, there are far too many DPSPs. They are neither uniformly regarded, nor is there consensus on following all the values enumerated by the DPSPs. In fact, many DPSPs are contested, controversial, and do not expressly reflect consensus either at the level of principle or at the level of operation. For example, the direction in Article 44 to move towards a Uniform Civil Code, and the prohibition mentioned in Article 48 on the slaughter of calves and cows, have routinely attracted debate, criticism and even conflict regarding the underlying norms and their interpretations.<sup>70</sup> Therefore, the DPSP ‘values’ hold diminished authority, normatively and legally, as compared to the treatment of foundational values in the South African constitution.

This position was solidified in the Constituent Assembly Debates themselves. The Constituent Assembly’s debate on Draft Article 29 (now Article 37) exposed an early schism over whether socio-economic guarantees should be cast as binding “*precepts*” or left as vague “*values.*” The Assembly ultimately rejected every amendment: attempts to rename the

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<sup>69</sup> Gautam Bhatia, *Directive Principles of State Policy*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press 2016).

<sup>70</sup> Nivedita Menon, *A Uniform Civil Code in India: The State of the Debate in 2014*, 40(2) FEMINIST STUDIES, PROJECT MUSE 480-486 (2014); Rajeswari Sunder Rajan, *Women between Community and State: Some Implications of the Uniform Civil Code Debates in India*, 18(4) SOCIAL TEXT 55-82 (2000); Shradha Chigateri, *Negotiating the ‘Sacred’ Cow: Cow Slaughter and the Regulation of Difference in India* in MONICA MOOKHERJI (ed), DEMOCRACY, RELIGIOUS PLURALISM AND THE LIBERAL DILEMMA OF ACCOMMODATION (Springer 2011); Sambaiah Gundimeda, *Debating Uniform Civil Code: the making of Article 44 in the Constituent Assembly of India*, 9(3) INDIAN L. REV., 341-366 (2025).

principles “*fundamental*,” to substitute “*every State*” for “*the State*,” and to strip the non-justiciability clause all failed on division.<sup>71</sup> By adopting Draft Article 29 unchanged, the framers entrenched a bright line between justiciable Fundamental Rights and aspirational Directive Principles, deliberately insulating courts from direct enforcement of welfare goals.<sup>72</sup>

The Supreme Court has also routinely held that DPSPs are not directly enforceable. In *State of Madras v. Champakam Dorairajan*,<sup>73</sup> a communal-reservation order was struck down for violating Article 15(1); the Court held that “*Directive Principles cannot override Fundamental Rights*” because they are “*not enforceable by any court*” (Article 37). In *Minerva Mills Ltd. v. Union of India*,<sup>74</sup> the Court struck down clauses of the 42nd Amendment that gave DPSPs precedence over Fundamental Rights, reiterating that Part III rights are “*transcendental*” whereas DPSPs are “*fundamental in governance but non-justiciable*.”

If care has to be converted from a value to a precept, there are two possible models that we envision- *first*, the DPSP could explicitly be recognised as a fundamental right through judicial interpretation and incorporation. A similar approach has been taken in the case of maternity benefits and maternity care, as will be explained below. *Second*, a DPSP could explicitly be recognised as a fundamental right through a constitutional amendment. This was the approach taken in the case of the right to education. These are two of the more likely routes to ensure justiciability of care as a governing legal principle, but we remain agnostic to the route or to the final form of the right, as long as it is substantially meaningful and can be claimed in courts.

### **C. THE PROBLEM WITH PART IV – THE CASE OF MATERNITY BENEFITS**

Indian courts have shown inventiveness in reading new rights into Article 21, but they have simultaneously policed the line between Parts III and

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<sup>71</sup> CONSTITUTIONAL ASSEMBLY DEBATES, Official Report Vol. VII, 1948, Nov. 19, 1951, <https://www.constitutionofindia.net/debates/19-nov-1948/> (India).

<sup>72</sup> *Id.*

<sup>73</sup> *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226 (India).

<sup>74</sup> *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (India).

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IV. Without textual affirmation, care will continue to be treated as an unenforceable aspiration, subject to executive discretion.

Uttarakhand illustrates how untenable it is to rely on a DPSP to reach an outcome of constitutionality, or the lack thereof. In 2018, a single-judge bench in *Urmila Masih v. State of Uttarakhand* struck down the second *proviso* to Fundamental Rule 153, which denied paid leave to mothers for a third pregnancy.<sup>75</sup> The judge relied on Section 27 of the Maternity Benefit Act (MBA),<sup>76</sup> and crucially, on Article 42's Directive Principle promising “*just and humane conditions of work and maternity relief*.”<sup>77</sup> But in 2019, a division bench reversed the ruling, holding that maternity leave is merely a statutory service condition and that the MBA does not automatically override state rules; because Directive Principles are non-justiciable, they said, Article 42 could not sustain a declaration of unconstitutionality.<sup>78</sup>

That doctrinal gap has now narrowed. In May 2025, the Supreme Court, in *K. Umadevi v. Government of Tamil Nadu*, re-read Tamil Nadu's Fundamental Rule 101(a) to allow paid leave for a third child and aligned it with the MBA.<sup>79</sup> More important than the outcome was the route the Court took: it grounded maternity benefits in the constitutional right to reproductive autonomy, recognised firmly in the Supreme Court case of *Suchita Srivastava* as part of Article 21's guarantee of life and personal liberty.<sup>80</sup> By treating paid maternity leave as a logical extension of that

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<sup>75</sup> *Urmila Masih v. State of Uttarakhand*, 2018 SCC OnLine Utt 717 (India).

<sup>76</sup> The Maternity Benefit Act, 1961, § 21, No. 53, Acts of Parliament, 1961 (India).

<sup>77</sup> INDIA CONST., art. 42.

<sup>78</sup> *State of Uttarakhand v. Urmila Masih*, 2019 SCC OnLine Utt 927 (India).

<sup>79</sup> *K. Umadevi v. Government of Tamil Nadu*, 2025 SCC OnLine SC 1204 (India).

<sup>80</sup> *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1 (India); Jwalika Balaji, *Balance reproductive choices with population policy push*, HINDUSTAN TIMES (June 16, 2025) <<https://www.hindustantimes.com/opinion/balance-reproductive-choices-with-population-policy-push-101750082155660.html>>; Jwalika Balaji, *Two children too many? Expanding maternity benefits to mothers with more than two children in India*, OXFORD HUMAN RIGHTS HUB (July 2, 2025) <<https://ohrh.law.ox.ac.uk/two-children-too-many-expanding-maternity-benefits-to-mothers-with-more-than-two-children-in-india/>>.

fundamental right, the Court moved the debate out of the Directive-Principles arena and into enforceable rights territory.

Because *Umadevi* roots maternity benefits in Article 21 rather than in unenforceable policy goals, the single-judge reasoning in *Urmila Masih* now has a stronger constitutional footing. Although the Supreme Court stopped short of striking down every two-child ceiling, its affirmation that reproductive choice demands maternity protection gives litigants a powerful tool against such rules in states. Therefore, affirming a value through a Fundamental Right has a strong binding effect and is considered a binding precedent, as opposed to using the interpretive principle route through a DPSP.

#### D. IDEAL SUCCESS – THE LEGISLATIVE ROUTE INTO PART III

Article 45 of the original Constitution consigned free and compulsory education to the Directive Principles, instructing the State to secure schooling for all children up to fourteen “*within ten years.*” Because Part IV norms are explicitly non-justiciable, this directive lingered for decades as a political aspiration rather than an enforceable entitlement. The Supreme Court altered that position in the early 1990s by reading education into Article 21’s guarantee of life and dignity. It began with *Mohini Jain v. State of Karnataka* (1992), where the Court struck down capitation fees and declared education “*a fundamental right flowing from Article 21*”.<sup>81</sup> This was closely followed by *Unni Krishnan v. State of A.P.* (1993), where a Constitution Bench read the right to education as a fundamental right along with DPSPs; they directed the State to provide free education to every child until the age of fourteen and to expand access “*progressively*” thereafter.<sup>82</sup> Although the Court’s interim solution relied on creative interpretation rather than textual change, it effectively shifted schooling from Part IV’s realm of policy to Part III’s domain of judicially cognisable duties.

Parliament completed the migration through the 86<sup>th</sup> Amendment in 2002, inserting Article 21-A in the Constitution to mandate free and compulsory

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<sup>81</sup> *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858 (India).

<sup>82</sup> *Unni Krishnan, JP & Ors. v. State of Andhra Pradesh & Ors.*, AIR 1993 SC 2178 (India).

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education for the six-to-fourteen age group. They also amended Article 45 to instead cover early-childhood care (zero to six), and added Article 51-A(k) to impose a corresponding duty on parents and guardians to educate their children.<sup>83</sup> With those changes, the right to education gained full constitutional status. The Right of Children to Free and Compulsory Education Act, 2009 (“*RTE Act*”) fleshed out justiciable standards on infrastructure, pupil-teacher ratios, and a 25% reservation for ‘disadvantaged children’ in private schools.<sup>84</sup> What began in 1950 as an aspirational principle of governance thus solidified, over half a century, into a rights-based enforceable framework.

The lesson of the RTE story is instructive: when Indian constitutionalism converts a fundamental value into a legal *precept*, the shift equips citizens with enforceable claims and reduces the discretion of the state to work towards achieving the goal in question.

Care could thus be recognised as a part of a Fundamental Right by the judiciary—for example, the right to care and be cared for under Article 21. The other option is to incorporate care as a standalone fundamental right through a constitutional amendment. Translating it from a value into a precept is the only sustainable manner in which the ethics of care can be integrated into Indian constitutional law.

### CONCLUSION: TOWARDS A CARING CONSTITUTION

This article has traced the concept of care from its theoretical roots in feminist ethics through to its incomplete reception in Indian constitutional doctrine. It showed that Indian courts somewhat gesture toward care in diverse contexts such as health, childcare, household labour, family relations, and animal welfare, yet always by tethering it to allied guarantees such as life, dignity, or equality. That derivative strategy yields a patchwork of contingent protections. Drawing on South Africa as a comparator and on India’s own journeys in reproductive rights and the right to education,

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<sup>83</sup> The Constitution (Eighty-sixth) Amendment Act, 2002 (India).

<sup>84</sup> The Right of Children to Free and Compulsory Education Act, 2009, No. 35, Acts of Parliament, 2009 (India).

the article proposed two pathways for doctrinal reform: first, courts could explicitly anchor caregiving entitlements within Part III and recognise care as a fundamental right; second, Parliament could consolidate judicial momentum by inserting a standalone right to care into Part III of the Constitution.

Recognising care at the constitutional level would first confer long-overdue visibility on labour historically relegated to the private sphere. Once designated as a fundamental right, public childcare, elder-care services, and caregiver allowances become legal obligations rather than discretionary state policies or schemes. Litigation could stress the enforceability of justiciable rights, mirroring the way the RTE Act transformed schooling infrastructure from aspiration to enforceable standards.

Second, a constitutional right to care would deepen India's equality jurisprudence by targeting structural discrimination rather than isolated prejudice. Because the burdens of unpaid and under-paid care fall disproportionately on marginalised communities, elevating care to constitutional status could help sharpen Articles 14 and 15, obliging legislators to introduce statutory labour, economic, and social-security regimes that redistribute care costs and burdens. In so doing, the State would move firmly beyond formal equality toward substantive equality.

Recognising care must, however, guard against paternalism. Genuine empowerment arises when individuals make choices within supportive and relational networks, not when the State dictates relational norms from above. Judicial and legislative design must therefore balance positive duties to supply resources to carers with respect for the plural ways in which families, communities, and individuals organise their caring relationships.

Constitutional silence is never neutral; it decides whose work counts and whose does not. By elevating care from a normative value to an enforceable fundamental right grounded in dignity and relational autonomy, India can ensure that its constitutional promise of freedom and equality is realised not only in courtrooms but in the everyday lives of those who give and receive care.

## MAJORITARIAN INTERPRETATIONS OF CONSTITUTIONAL SILENCES

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HIMANSHI YADAV<sup>1</sup> & SINCHAN CHATTERJEE<sup>2</sup>

*This paper examines how constitutional silences, gaps, ambiguities, or deliberate omissions in the constitutional text have increasingly become sites of majoritarian appropriation in India. Drawing on precedents and critical legal scholarship, the paper explores the mechanisms through which both the executive and the judiciary exploit these silences to consolidate ideological dominance. It demonstrates that, far from being passive textual voids, constitutional silences often function as politically contested spaces whose interpretation significantly affects institutional autonomy, minority rights, and the balance of powers.*

*Through a detailed analysis of executive practices such as ordinance-making, discretionary appointments, and majoritarian policymaking, the paper reveals how the absence of procedural safeguards and legal thresholds enables governance by fiat. Judicial interpretation is shown to be equally ambivalent, oscillating between rights-expansive decisions that reaffirm constitutional morality and deferential postures that legitimise majoritarian narratives.*

*To address the risks posed by unchecked interpretive discretion, the paper proposes a jurisprudential framework rooted in proportionality, constitutional morality, and institutional independence. It further calls for legislative intervention to codify safeguards and clarify ambiguous areas of governance, particularly those affecting civil liberties and minority protections. Finally, it underscores the indispensable role of civil society and academia as democratic backstops when formal institutions falter.*

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<sup>1</sup> Himanshi Yadav is a Delhi-based lawyer and researcher. She served as former Editor-in-Chief of the Comparative Constitutional Law and Administrative Law Journal. The author may be reached at: <himanshiyadav799@gmail.com>.

<sup>2</sup> Sinchan Chatterjee is a B.A. LL.B. (Hons.) Candidate (2021-26) at National Law University, Jodhpur, and served as former Editor-in-Chief of the Comparative Constitutional Law and Administrative Law Journal. The author may be reached at: <sinchan.chatterjee@nlujodhpur.ac.in>.

# MAJORITARIAN INTERPRETATIONS OF CONSTITUTIONAL SILENCES

*By situating India's interpretive dilemmas within a global and pluralist context, the paper argues for a rights-centered and structurally restrained approach to constitutional interpretation—one that ensures silence is not filled by power, but by principle.*

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## INTRODUCTION

### A. CONCEPTUALISING CONSTITUTIONAL SILENCES

Constitutions, by their very nature, are incomplete documents. Their longevity and relevance is possible not merely through what they codify but also through what they leave unsaid. The concept of constitutional silence refers to the absence, either intentional or incidental, of textual direction on matters that demand interpretive or institutional resolution.

Comparative constitutional scholar Hanna Lerner observes that constitutions in divided societies often rely on deliberate vagueness to avoid immediate confrontation on divisive issues. This allows fragile polities to navigate periods of foundational uncertainty.<sup>3</sup> Scholars have argued that such silences are necessary for the adaptive evolution of constitutionalism in democratic societies.<sup>4</sup> Three factors typically account for their inclusion. *First*, textual economy: constitutions are not statutes – they are intended as broad charters of governance and cannot address every legal contingency; *second*, political compromise: particularly in diverse or divided societies, silence can serve as a mechanism to defer contentious

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<sup>3</sup> HANNAH LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES, 32–35 (Cambridge Univ. Press, 2011).

<sup>4</sup> ARUN K. THIRUVENGADAM, THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS, 15–18 (2014); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO, 222–25 (2001).

debates (e.g., on religion, identity, or federalism) and enable consensus-building; *third*, institutional flexibility: constitutional silences allow other state organs, especially the judiciary, to fill gaps based on evolving social norms and political contexts.

However, as Tarunabh Khaitan has warned, such silences are double-edged.<sup>5</sup> When left unchecked, they risk becoming tools of majoritarian domination, enabling the ruling power to reshape constitutional meaning without formal amendment. In India, over the past decade, constitutional silences have ceased to be neutral gaps awaiting good-faith interpretation. Instead, they have become active sites of struggle, routinely filled by majoritarian readings that privilege executive dominance, marginalise dissent, and recalibrate the constitutional balance without explicit textual disruption. What emerges is not a breakdown of constitutionalism through overt suspension or amendment, but its gradual re-engineering through interpretation.

Thus, it becomes imperative to distinguish between normative silences, which preserve the Constitution's open texture and invite inclusive interpretation, and pragmatic or strategic silences, which serve for power retention rather than pluralism. Normative silences are purposive; they decentralise power to foster pluralism. For example, the absence of a detailed definition of "secularism" in the Indian Constitution allows for a diverse, context-sensitive understanding of the term. At times, it has aided in maintaining the principle of articles 14 and 15, while the UCC directives in more recent times, through article 44, have caused several transgressions on the very same principles.<sup>6</sup> On the other hand, pragmatic silences emerge from compromise or oversight and can render the Constitution vulnerable to manipulation. A stark example is the lack of clear guidelines on the use of Article 356 (President's Rule), which was historically misused for partisan ends until the Supreme Court intervened in *S.R. Bommai v. Union of India* (1994).<sup>7</sup>

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<sup>5</sup> Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 LAW & ETHICS HUM. RTS. 49, 61–63 (2020).

<sup>6</sup> MP Singh, *On Uniform Civil Code, Legal Pluralism and the Constitution of India*, 5 J. IND. L. & Soc., (2021).

<sup>7</sup> *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, 247-48.

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The language used in the article, “*failure of constitutional machinery*” provides no objective standards or procedural safeguards for determining such failure, and only after the inclusion of the floor test in *Bommai*, where the government requires to demonstrate they still command majority support to continue to be in power, the Supreme Court holding that the President’s satisfaction is subject to judicial review and that secularism and federalism constrain the exercise of Article 356<sup>8</sup>, the law has evolved to be protected from misuse.

As political theorist Rajeev Bhargava and historian Granville Austin have noted, the Indian Constitution reflects both idealism and accommodation.<sup>9</sup> This foundational ambivalence has left several key areas of governance, such as the scope of religious freedom (Essential Religious Practices, under articles 25 and 26)<sup>10</sup>, the meaning of secularism (the state regulates temples, funds pilgrimages, simultaneously claiming neutrality)<sup>11</sup>, and the role of personal laws (as demonstrated through *Mohd. Ahmed Khan v. Shab Bano Begum* and *Shayara Bano v. Union of India*), shaped more by post-constitutional political practice than by settled constitutional norms.

### **B. RELEVANCE IN A PLURAL DEMOCRACY**

In recent years, the interpretation of such silences has tilted significantly in favour of majoritarian readings. From the use of executive ordinances to dissent, India has witnessed a strategic deployment of constitutional indeterminacy<sup>12</sup>. For instance, the Uttar Pradesh Recovery of Damages to Public and Private Property Ordinance, 2020, empowered authorities to

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

<sup>9</sup> GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 308–12 (1966); Rajeev Bhargava, *Introduction: Outline of a Political Theory of the Indian Constitution*, in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION, 1, 11–15 (Rajeev Bhargava ed., 2008).

<sup>10</sup> See generally, Rushil Batra, *The Essential Religious Practice Test: A Sorry Tale of Judicial Misreading*, IND. J. CONST. L. Ind. J. Const. L., (2024).

<sup>11</sup> See generally, Siddharth Acharya, *Regulation of Temples: An Aberration in a Secular State*, India Foundation, (Sept. 1, 2020), <https://indiafoundation.in/articles-and-commentaries/regulation-of-temples-an-aberration-in-a-secular-state/>; Ministry of Tourism, Prashad Scheme, <https://tourism.gov.in/prashad-scheme>.

<sup>12</sup> Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, Harv. Int’l L.J. Blog (2020); Gautam Bhatia, *Executive Lawlessness and the Rule of Law in India*, 14 NUJS L. Rev. 1 (2021).

assess and recover compensation from persons accused of causing damage during protests<sup>13</sup>, a measure widely criticised for its potential chilling effect on dissent.

The Indian state has, at times, weaponised constitutional silence to marginalise minority identities. For instance, the Constitution does not explicitly define “minorities”, leaving it to statutory or judicial explication.<sup>14</sup> This silence has enabled exclusionary practices, such as the introduction of the Citizenship (Amendment) Act, 2019 (CAA).<sup>15</sup> The CAA creates a religion-based criterion for fast-tracked citizenship (fast-tracking non-Muslim refugees from neighbouring countries), arguably violating the guarantee of equal treatment under Article 14 of the Constitution.<sup>16</sup> Similarly, with hate speech, the absence of a clear statutory framework has not operated neutrally in practice. Decisions such as *Pravasi Bhalai Sangathan* and *Amish Devgan*<sup>17</sup> demonstrate that courts have sought to balance free speech with public order by relying on context-specific, case-by-case reasoning. By contrast, executive reliance on vague penal provisions has facilitated selective prosecution, where dissenting and minority speech is disproportionately criminalised while majoritarian provocations are tolerated.<sup>18</sup> In this sense, constitutional silence has not functioned as a safeguard against over-criminalisation but as a conduit for partisan enforcement.

Despite the Law Commission’s recommendations and repeated judicial observations on the need for clear hate speech legislation,<sup>19</sup> Parliament has failed to legislate in this area, perpetuating a legal void. Thus, in plural

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<sup>13</sup> The Uttar Pradesh Recovery of Damages to Public and Private Property Ordinance, 2020, PRS India, <https://prsindia.org/bills/states/the-uttar-pradesh-recovery-of-damages-to-public-and-private-property-ordinance-2020>.

<sup>14</sup> See generally, INDIA CONST., art 30.

<sup>15</sup> The Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament (2019).

<sup>16</sup> Mohsin Alam Bhat, *The Constitutional Case Against the Citizenship Amendment Act*, 54(3) ECON. & POL. WEEKLY (2019).

<sup>17</sup> *Pravasi Bhalai Sangathan v. Union of India*, (2014) 11 SCC 477; *Amish Devgan v. Union of India*, (2021) 3 SCC 306.

<sup>18</sup> Subhajit Basu & Shameek Sen, 33(1) *Silenced voices: unravelling India’s dissent crisis through historical and contemporary analysis of free speech and suppression*, Info. & Comm. Tech. L., 42 (2024).

<sup>19</sup> Law Comm. India, Report 267 (Aug. 16, 2022), <https://lawcommissionofindia.nic.in/report267/>.

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democracies, constitutional silences are not merely passive textual gaps but active sites of political contestation and legal interpretation.

This paper argues that the danger lies not in constitutional silence, but in who is permitted to speak through it, and by what constraints. The concern highlighted is not merely of interpretive disagreement but of interpretive power. Silences that were once defensible as instruments of flexibility are now increasingly deployed to justify governance by discretion, whether through expansive ordinance-making, delayed or partisan appointments to constitutional offices, or selective enforcement of vague public order and security laws.<sup>20</sup> In each case, the absence of procedural guardrails enables power to operate without visibility, accountability, or meaningful institutional resistance.

Silence must not be allowed to speak in the voice of power alone. If it is to remain a feature of a living Constitution (one that the authors agree with), it must be interpreted through principle rather than expedience and with conscious sensitivity to structural inequality and democratic fragility.

### **EXECUTIVE EXPLOITATION OF CONSTITUTIONAL SILENCES**

#### **A. CONSTITUTIONAL FRAMEWORK AND EXECUTIVE POWERS**

The Indian Constitution vests considerable authority in the executive, both through explicit provisions, and discretionary zones which are enabled by constitutional silences. Key provisions such as Article 74 (Council of Ministers to aid and advise the President), Article 75 (appointment of the Prime Minister and ministers), Article 123 (ordinance-making power), and Article 356 (President's Rule) constitute the foundational architecture of executive authority.<sup>21</sup> While some of these are regulated through judicial interpretation and conventions, there are persistent silences, particularly in

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<sup>20</sup> DC Wadhwa v. State of Bihar, (1987) 1 SCC 378; Supreme Court Advocates-on-Record Association v. Union of India, (2015) 12 SCR 1; Anil Kumar Neotia v. Union of India, 1988 (2) SCC 587; Shreya Singhal v. Union of India, 2015 (5) SCC 1 & Anuradha Bhasin v. Union of India, AIR 2020 SC 1308.

<sup>21</sup> INDIA CONST., arts. 74, 75, 123 & 356,.

their procedural aspects, that have enabled strategic exploitation by the executive.

A striking example of such silence is the absence of constitutionally mandated timelines or detailed procedures for certain crucial executive actions. The Constitution, for instance, does not stipulate timeframes for appointments of high officers: the appointment of State Governors under Article 155,<sup>22</sup> of the Chief Election Commissioner under Article 324,<sup>23</sup> or of judges to the higher judiciary under Articles 124 and 217.<sup>24</sup> This procedural silence creates a vacuum that the executive can manipulate for political ends, such as delaying appointments that are politically inconvenient, or rushing through appointments in anticipation of impending electoral or judicial developments. By exploiting the lack of clear deadlines or criteria, a government can hold up positions (or leave them vacant) to suit its convenience, thereby influencing institutional outcomes. The prolonged delay in appointing a Lokpal (national anti-corruption ombudsman) even after Parliament enacted the enabling law in 2013 is illustrative: for years, the government cited the absence of a Leader of Opposition (a technicality) to not constitute the selection committee, until the Supreme Court finally intervened to hold that this silence in the law was no excuse for inaction.<sup>25</sup>

While the Constitution itself does not prescribe timelines for such appointments, the prolonged delay in constituting the Lokpal reveals how statutory silences, when coupled with executive dominance at the Union level, can undermine institutional accountability. Unlike several State Lokayukta enactments, which mandate time-bound appointments and allow limited executive discretion,<sup>26</sup> the Lokpal and Lokayuktas Act, 2013 left critical aspects of the appointment process unspecified, enabling prolonged inaction by the Centre. This contrast illustrates that constitutional and statutory silences need not inevitably result in governance failure; where States have proactively filled such gaps through

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<sup>22</sup> INDIA CONST., art. 155.

<sup>23</sup> INDIA CONST., art. 324.

<sup>24</sup> INDIA CONST., arts. 124 & 217.

<sup>25</sup> *Common Cause (A Regd. Society) v. Union of India*, (2018) 5 S.C.C. 1, 20-23.

<sup>26</sup> *See* Maharashtra Lokayukta and Upa-Lokayuktas Act, No. 74 of 1971 §§ 3-6 (India); Kerala Lokayukta Act, No. 8 of 1999 §§ 3, 5 (India).

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clear legislative design, oversight institutions have functioned with greater continuity. The Lokpal episode thus underscores how the power to fill legal silences, when concentrated at the Centre, can reinforce executive advantage rather than accountability.

The Lokpal incident has enabled avoiding scrutiny over controversial decisions, including major contracts and allegations like those surrounding the *Rafale* deal (India's purchase of 36 fighter jets from Dassault Aviation to modernise the Air Force. Controversy arose over pricing transparency and the selection of Reliance Defence as an offset partner, raising allegations of favouritism<sup>27</sup>), while simultaneously projecting a rhetoric of clean governance. The delay also allowed the ruling party to consolidate control over the eventual appointment process, which was carried out in 2019 under conditions of diminished public pressure and with limited transparency, just ahead of the general elections.<sup>28</sup> As a result, potential probes into politically sensitive matters, such as electoral bonds, or banking scandals, were forestalled during a period when they might have been most effective, thereby neutralizing a key accountability institution through procedural inaction.

Furthermore, Articles like 123 (ordinance power)<sup>29</sup> and 356 (President's Rule)<sup>30</sup> confer exceptional tools intended for use in emergent circumstances. Yet the constitutional text provides only broad strokes for their exercise, with few built-in checks, effectively placing trust in executive self-restraint.

The absence of granular textual constraints or procedural safeguards in constitutional provisions such as Articles 123 and 356 has permitted their repeated invocation in ways that facilitate political and ideological consolidation, often far afield from the exigencies their framers likely anticipated. Article 356, which empowers the President to impose

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<sup>27</sup> Siddharth Varadarajan, *Missing Links: The Supreme Court's Verdict on the Rafale Deal*, *The Wire*, (Dec. 16, 2018), <https://thewire.in/law/missing-links-the-supreme-courts-verdict-on-the-rafale-deal/>.

<sup>28</sup> Raju Z Moray, *Gook takes a serious look at India's first Lokpal panel*, *The Leaflet*, (Mar. 22, 2019), <https://theleaflet.in/humour/gook-takes-a-serious-look-at-indias-first-lokpal-panel>.

<sup>29</sup> INDIA CONST., art. 123.

<sup>30</sup> INDIA CONST., art. 356.

President’s Rule in states upon a breakdown of constitutional machinery, has historically been deployed not merely to address governance crises but to dislodge duly elected opposition governments. Between the 1950s and the early 1990s, this provision was invoked over 90 times, with marked spikes during periods of single-party dominance at the Centre. The most egregious example was in 1977, when the Janata government dismissed nine Congress-ruled states in one stroke, mirroring Congress’s own earlier dismissals of opposition governments. While the Supreme Court in *S.R. Bommai v. Union of India* sought to curb such misuse by subjecting proclamations to judicial review; its decision came after decades of unchecked executive discretion.<sup>31</sup> Similarly, Article 123, which enables ordinance-making by the executive when Parliament is not in session, has often functioned as a legislative bypass. In *D.C. Wadhwa v. State of Bihar*,<sup>32</sup> the Court condemned the serial re-promulgation of ordinances, yet the absence of binding procedural checks allowed this practice to persist. More recently, the repeated promulgation of the Land Acquisition Ordinance in 2014–15 despite parliamentary resistance underscored how ordinances are used to pre-empt deliberative accountability. The phenomenon is not limited to ordinary governance; in *ADM Jabalpur v. Shivkant Shukla*,<sup>33</sup> during the Emergency, the executive claimed, and the majority of the Supreme Court accepted, that even the right to life under Article 21 could be suspended without judicial remedy, a position enabled by the Constitution’s failure to articulate non-derogable rights or a robust emergency rights framework. These instances collectively highlight how constitutional silences—whether in the form of vague thresholds, absent procedural guardrails, or undefined limits—have repeatedly enabled the concentration of power, often to the detriment of democratic resilience and rights-based adjudication.

## **B. USE (AND MISUSE) OF THE ORDINANCE POWER**

The ordinance-making power under Article 123 empowers the President of India to promulgate ordinances when either House of Parliament is not in session, allowing the executive to enact temporary laws with immediate effect. In practice, however, it is the Union Cabinet (headed by the Prime

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<sup>31</sup> *SR Bommai v. Union of India* (1994) 3 SCC 1.

<sup>32</sup> *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378.

<sup>33</sup> *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

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Minister) that advises the President to issue an ordinance, making this power a potent tool for the executive to bypass the normal legislative process.<sup>34</sup> Ordinances have the same force as Acts of Parliament, but they lapse if not approved by Parliament within six weeks of reassembly. The constitutional text is silent on how often or under what conditions the executive may re-issue ordinances, beyond the requirement that Parliament eventually approve them. This silence was exploited for decades until the Supreme Court stepped in.<sup>35</sup>

In *D.C. Wadhwa*, the Supreme Court famously held that the repeated re-promulgation of ordinances without placing them before the legislature constitutes a “fraud on the Constitution”.<sup>36</sup> The Court observed that such use of the ordinance power to perpetuate laws subverts the democratic process envisioned by the Constitution, converting what was meant to be a short-term emergency provision into a parallel law-making authority for the executive. Wadhwa’s case underscored that while Article 123 is silent on re-promulgation, basic constitutional principles of parliamentary supremacy and responsible governance cannot be circumvented in this manner.

Despite the ruling, successive governments (at both Union and state levels) have continued to misuse the ordinance mechanism, especially when facing legislative resistance, resorting to mechanical re-promulgation.<sup>37</sup> An egregious and one of the first noticeable instances was the practice in some states of keeping ordinances alive indefinitely by re-promulgating them at the end of each legislative session. The Supreme Court held that re-promulgation of ordinances, absent extenuating circumstances, is unconstitutional and that acts done under an ordinance which lapses without approval do not have enduring effect (unless validated by the legislature).<sup>38</sup> The Court stressed that the failure of the executive to get legislative sanction is not a justification for renewing an ordinance, and that

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<sup>34</sup> SHUBHANKAR DAM, *PRESIDENTIAL LEGISLATION IN INDIA: THE LAW AND PRACTICE OF ORDINANCES* (Cambridge Univ. Press, 2014).

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

<sup>36</sup> *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 387, 387-89.

<sup>37</sup> *Krishna Kumar Singh v. State of Bihar*, (2017) 3 S.C.C. 1, 59-61.

<sup>38</sup> *Id.*

doing so violates the separation of powers and the temporariness inherent in Article 123.

Yet, even with clear judicial pronouncements, the underlying constitutional silence remains: the text still does not expressly prohibit re-promulgation or require a statement of reasons when an ordinance is issued. Nor does the Constitution restrict the subject-matter of ordinances, except the condition that they must relate to areas on which Parliament is allowed to make laws. This has two consequences: *first*, a government with a majority in the Lok Sabha but not in the Rajya Sabha (or vice versa) may be tempted to use ordinances to push through policies, banking on the delay or difficulty of parliamentary disapproval; *second*, ordinances may be used to introduce significant changes suddenly, without the open debate that accompanies normal legislation.<sup>39</sup>

While conventions have weakened in the face of realpolitik, the judiciary can only act *ex post facto*, as seen in *Wadhwa* and *Krishna Kumar Singh*. In the meantime, ordinances have been used to enact sweeping changes, from economic policies to criminal laws. For instance, an ordinance was used in 2019 to ban the practice of instant triple talaq before a law was passed<sup>40</sup>. They are often justified as urgent responses but sometimes reflect ideological agendas – a majoritarian interpretation of silence where a government with a parliamentary majority may stretch an emergency provision to avoid scrutiny or dissent, thereby undermining the spirit of deliberative democracy.

### C. APPOINTMENT DISCRETION

Another significant zone of constitutional silence concerns the executive's discretion in making high-level appointments to constitutional and statutory offices. The Constitution often spells out *who* appoints (e.g., the President or Governor, acting on advice) but not *how* appointments are to be made or *what* qualifications or process should be followed. This silence in procedural detail has enabled ruling governments to influence key

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<sup>39</sup> *Supra* note 16.

<sup>40</sup> Vijaita Singh, *Govt. Re-promulgates Triple Talaq Ordinance*, THE HINDU (Jan. 13, 2019), <https://www.thehindu.com/news/national/govt-re-promulgates-triple-talaq-ordinance/article25986908.ece>.

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institutions through timing and personnel choices, sometimes undermining those institutions' autonomy and integrity.

For instance, the Constitution does not provide a specific process for appointment of the Chief Election Commissioner (CEC) and Election Commissioners beyond stating they are to be appointed by the President, subject to any law made by Parliament under Article 324(2).<sup>41</sup> For decades, no such law was made, effectively leaving the choice to the Prime Minister (via the President's formal act). This gap allowed a perception (and occasionally reality) of partisan appointments to an office that is supposed to be neutral and fair in supervising elections. In *Anoop Baranwal v. Union of India* (2023), the Supreme Court addressed this very issue, noting that the constitutional silence had resulted in an "exclusive executive monopoly" over appointments to the Election Commission.<sup>42</sup> The Court invoked the basic values of electoral integrity and, until Parliament legislates a proper process, directed that appointments be made by a committee consisting of the Prime Minister, the Leader of the Opposition, and the Chief Justice of India. This ruling was a direct response to the exploitation of silence: it sought to fill the gap with a fairness safeguard, acknowledging that unchecked executive discretion in appointments can threaten free and fair elections.

### D. POLICY DECISIONS TARGETING MINORITIES

Perhaps the most troubling manifestation of executive exploitation of constitutional silences lies in the arena of minority rights and secularism, where policy decisions disproportionately affecting minority communities are taken under the cover of discretionary executive power or vague laws. The Constitution proclaims equality and non-discrimination under Article 14<sup>43</sup> and guarantees religious freedom Articles 25–28,<sup>44</sup> but it is silent or ambiguous on several specific questions of how to handle the interface of religion, citizenship, and state power. In recent years, this has enabled a

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<sup>41</sup> INDIA CONST., art. 324(2).

<sup>42</sup> *Anoop Baranwal v. Union of India*, 2023 S.C.C. OnLine S.C. 214, 61–68.

<sup>43</sup> INDIA CONST., art. 14.

<sup>44</sup> INDIA CONST., arts. 25–28.

majoritarian executive to push through policies that redefine the constitutional compact in subtle but significant ways.

One such policy is the Citizenship (Amendment) Act, 2019 (CAA), coupled with a proposed National Register of Citizens (NRC) and the preparatory National Population Register (NPR). The CAA introduced, for the first time, a religious classification into India's citizenship law: it expedites citizenship for certain immigrants from neighboring countries *only if* they belong to specific religions (Hindu, Sikh, Buddhist, Jain, Parsi, or Christian) – excluding Muslims. Article 11<sup>45</sup> The Constitution empowers Parliament to regulate citizenship but is silent on permissible criteria. That silence, arguably meant to allow flexibility in inclusive nation-building, was used to justify a highly selective and exclusionary framework. The government portrayed CAA as a humanitarian law for persecuted minorities in neighbouring states, but critics note it undermines India's secular ethos by making religion a basis for citizenship eligibility.<sup>46</sup> When combined with a nationwide NRC (a citizenship verification drive) – something the Constitution does not explicitly mention or forbid. By amending Section 2(1)(b) of the Citizenship Act, 1955 and inserting Section 6B, the CAA expressly introduces religion as a criterion for exempting certain migrants from the consequences of illegality and for fast-tracked naturalisation.<sup>47</sup>

There is a fear that CAA coupled with the NRC could result in many Muslims being left in a legally precarious position (as non-Muslims without documents could be legitimised *via* CAA, while Muslims could not). The concern comes directly from the law's wording: the CAA grants citizenship eligibility only to certain non-Muslim migrants from neighbouring countries, excluding Muslims<sup>48</sup>, which means that if a nationwide NRC were introduced, Muslims without documents could be treated as illegal migrants without access to this legal route to citizenship, while similarly placed non-Muslims could use it. This potential outcome leverages a constitutional silence (no explicit bar on discriminatory criteria in

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<sup>45</sup> INDIA CONST., art. 11.

<sup>46</sup> *Harsh Mander & Anr. v. Union of India*, 2022 S.C.C. OnLine S.C. 1878 (India).

<sup>47</sup> Citizenship (Amendment) Act, 2019, §§ 2(1)(b), 6B; *see* Amit Sahni v. Commissioner of Police.

<sup>48</sup> *Id.*

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citizenship) to effect what could be a profound demographic and rights impact.

Another area is the use of national security and anti-terror laws, which, while being *prima facie* neutral, have been enforced in a manner that often correlates with religious or ideological profiles. The Unlawful Activities (Prevention) Act (UAPA)<sup>49</sup> is a prime example. The UAPA, especially after amendments in the 2000s has been used to designate individuals as “terrorists” and detain people for extended periods without trial.<sup>50</sup> Terms like “unlawful activity” or membership in a “terrorist gang” are broad and the thresholds of evidence low, effectively placing immense discretion in executive hands. The Constitution is silent on what specific conduct amounts to “terrorism” or when free speech crosses into sedition or terrorism, these definitions are left to ordinary legislation and judicial interpretation.<sup>51</sup> Successive governments have used this space to enact stringent laws that accord with the majority’s security narrative. In practice, UAPA has been used disproportionately against minorities and government critics (for instance, Muslim youth accused of radicalism, or human rights activists dubbed as Maoists), with a very low conviction rate (around 2–3%).<sup>52</sup> The silence of the Constitution on preventive detention standards (beyond Article 22’s minimal safeguards) and on banning organizations leaves the field open to executive-driven laws like the UAPA, which become instruments of majoritarian policy when checks are not rigorously applied. Sedition under IPC §124A)<sup>53</sup> is another colonial-era law that survived into independence and was upheld in 1962 under certain

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<sup>49</sup> The Unlawful Activities (Prevention) Act, No. 37 of 1967, Acts of Parliament (1967).

<sup>50</sup> The Unlawful Activities (Prevention) Amendment Act, No. 29 of 2004, Acts of Parliament (2004); The Unlawful Activities (Prevention) Amendment Act, No. 35 of 2008, Acts of Parliament (2008); The Unlawful Activities (Prevention) Amendment Act, No. 3 of 2013, Acts of Parliament (2013); The Unlawful Activities (Prevention) Amendment Act, No. 28 of 2019, Acts of Parliament (2019).

<sup>51</sup> Mayur Suresh, *Between Rule and Prerogative: Petitions by Terror-Accused Individuals and the Imaginings of Indian Law*, Asian Journal of Law and Society (2024).

<sup>52</sup> Between 2015 and 2020, out of 10,552 persons arrested under UAPA, only 253 were convicted – a conviction rate of 2.4%. See *Less than 3% of UAPA arrests result in conviction*, Scroll.in (Feb. 11, 2022). This statistic suggests that many accused (often activists or minorities) spend years in custody without trial or eventual conviction. See also *PUCL Report Alleges Abuse of UAPA*, The Hindu (Feb. 2023).

<sup>53</sup> PEN. CODE § 124A; *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 955.

limits; yet, in the absence of an updated constitutional standard (the Constitution doesn't mention "sedition"), the executive has continued to slap sedition charges on dissenters, journalists, and opposition figures for speeches or social media posts, often to chill criticism rather than to address genuine threats to the state. The pattern, prior to the Supreme Court suspending the use of sedition law in 2022,<sup>54</sup> had been the executive using vague offenses to silence voices at odds with majoritarian sentiment, exploiting the judiciary's historical reticence to invalidate such laws outright.

## JUDICIAL INTERPRETATION OF CONSTITUTIONAL SILENCES AND MINORITY RIGHTS

### A. ROLE OF THE JUDICIARY IN FILLING CONSTITUTIONAL GAPS

Through doctrines and judgments, the Supreme Court and High Courts have often filled in constitutional gaps to advance justice.. However, when courts do create doctrines to fill silences, questions arise about legitimacy: Are they crafting new law beyond their remit?" The basic structure doctrine itself was controversial for this reason. Critics argued it was an "invented" constraint with no textual basis, albeit many deemed it to be necessary.<sup>55</sup> Similarly, the judiciary's later creation of the collegium system for judicial appointments<sup>56</sup> (filling the silence of "consultation" in Articles 124 and 217 by giving primacy to judges' opinions) was seen by some as a power grab to the detriment of checks and balances. On the other hand, not stepping in can equally be seen as abdication. For example, for a long time, the Supreme Court was reluctant to enforce directive principles or certain rights for marginalized groups because the text did not clearly mandate it, leading to criticism that it was ignoring the Constitution's silences that called out for a voice of justice.

The judiciary's role in managing constitutional silences is a study in contrasts. It has the power to breathe life into the Constitution's ideals by

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<sup>54</sup> *S.G. Vombatkere v. Union of India*, 2022 S.C.C. OnLine S.C. 1024 (interim order). See Order dated May 11, 2022 in *Vombatkere*, at ¶¶7–8.

<sup>55</sup> SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* 154-55 (Oxford Univ. Press, 2009); Aharon Barak, *Unconstitutional Constitutional Amendments in Separation of Powers* 77, 85–86 (2018).

<sup>56</sup> *Supreme Court Advocates-on-Record Association v. Union of India*, 1993 (4) SCC 441.

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interpreting what isn't explicitly said but is imbued in the document's spirit. But how it uses that power can either reinforce the Constitution's moral arc or bend it towards the prevailing political winds. The subsequent sections analyse concrete instances of the judiciary's engagement with constitutional silences, particularly as they affect minority rights and majoritarian power.

### **B. INCONSISTENCIES IN PROTECTING MINORITY RIGHTS**

One area where the Indian judiciary's treatment of constitutional silences has been notably inconsistent is in the protection of minority rights (religious, cultural, or otherwise) and secular values. At times, the Supreme Court has stepped into the silence to uphold individual rights against societal or majoritarian pressures; at other times, it has remained silent or even aligned with the majority's perspective, avoiding a principled stand. A survey of key judgments illustrates this oscillation.

#### **Shayara Bano v. Union of India (Triple Talaq Case)**

In *Shayara Bano*, the Supreme Court through a divided bench with 3:2 majority struck down instant triple talaq, holding it to be violative of fundamental rights, either as arbitrary under Article 14 or lacking Quranic sanction and thus not protected by religious freedom.<sup>57</sup>

However, it also revealed a selective intervention into personal laws.<sup>58</sup> Personal laws of religious communities in India have generally enjoyed a constitutional silence: the text does not explicitly subject personal laws to fundamental rights. By intervening in the Muslim personal law on grounds of gender justice, the Court effectively filled that silence where legislature had not acted to protect fundamental rights of women.

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<sup>57</sup> *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1 (by 3:2 majority, setting aside the practice of instantaneous triple talaq as unconstitutional). The plurality (Rohinton J.) found it violative of Article 14 for being manifestly arbitrary, while another concurring opinion (Kurian J.) found it not protected by Article 25 since not an essential Islamic practice. The minority (Khehar C.J. and Nazeer J.) would have enjoined the practice for 6 months and left it to legislation.

<sup>58</sup> *Id.*

Critics, however, including constitutional scholar Faizan Mustafa, argue that this approach reflected “*reform from above*,” where Muslim personal law was scrutinised disproportionately under the guise of gender justice while patriarchal or discriminatory practices in Hindu personal law were not subjected to similar judicial rigor.<sup>59</sup> For instance, while triple talaq (a distinctly Islamic practice) was invalidated, practices like desertion of wives or difficulties in obtaining divorce under The Hindu Marriage Act did not receive the same urgent attention, arguably because those issues were less in the political spotlight. The judiciary did not, for example, proactively strike down the Hindu law provisions that discriminate between genders in matters of guardianship or inheritance (some of those have been reformed legislatively over time, but not all – for example, coparcenary rights have been extended to women under the Hindu Succession Act<sup>60</sup>, while intestate succession under Section 15 of the Hindu Succession Act continues to create harsh consequences for the property of a dead woman<sup>61</sup>). These laws are particularly gendered, and if the purpose is proactive judicial review, Hindu Law escaping such scrutiny seems concerning. Justice Kurian Joseph’s concurrence in *Shayara Bano* grounded the invalidation on Islamic theological grounds (finding talaq-e-biddat un-Islamic), which sidestepped a direct confrontation with the constitutional question of whether personal laws are subject to fundamental rights.<sup>62</sup> This avoided a direct ruling on whether personal laws are subject to fundamental rights, instead resolving the issue through religious doctrine. This leaves unresolved the long-standing question raised in *Narasu Appa Mali* of whether uncodified personal law is subject to fundamental rights.<sup>63</sup> Underlying *Shayara Bano* is also the controversial “essential practices doctrine.” This doctrine says that only those religious practices “essential” to the religion are protected by Article 25, whereas non-essential practices can be regulated by the state.<sup>64</sup> Courts have thus

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<sup>59</sup> Faizan Mustafa, *Power, not Justice*, THE INDIAN EXPRESS (Aug. 1, 2019), <https://indianexpress.com/article/opinion/columns/triple-talaq-bill-passed-in-parliament-pm-modi-bjp-5867634/>.

<sup>60</sup> Vineeta Sharma vs Rakesh Sharma, AIR 2020 SC 3717.

<sup>61</sup> Omprakash v. Radhacharan, 2009 INSC 671.

<sup>62</sup> *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1

<sup>63</sup> *The State Of Bombay vs Narasu Appa Mali*, AIR 1952 Bom 84.

<sup>64</sup> *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*, 1954 S.C.R. 1005, 1023-26.

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assumed the role of determining theological essentiality.<sup>65</sup> In *Shayara Bano*, some Justices assessed whether triple talaq is fundamental to Islam. Critics like Suhrith Parthasarathy argue that this judicial exercise of defining religion's essentials lacks constitutional or scholarly foundation and risks delegitimising minority religious expressions.<sup>66</sup> By arrogating to itself the power to determine core religious tenets, a silence in the Constitution on who decides what a religion's tenets are, the judiciary can, even inadvertently, privilege a majoritarian understanding of religion. For example, courts composed of judges from the majority community may consciously or unconsciously view minority practices through a majoritarian lens, thus casting certain minority practices as non-essential or illogical while taking majority practices for granted. The inconsistent application of the essentiality test in other religious cases (for instance, on legality of animal sacrifice<sup>67</sup>) reinforces the concern that exists in *Shayara Bano*.

### **Ram Janmabhoomi–Babri Masjid Verdict (Ayodhya Case, 2019)**

The Supreme Court unanimously awarded the disputed land for construction of a Ram temple, while directing allotment of alternate land in Ayodhya to the Muslim community for a mosque.<sup>68</sup>

The Court acknowledged that the act of demolishing the Babri Masjid in 1992 by a mob was illegal, and that the placement of Hindu idols inside the mosque in 1949 was unlawful. Yet, when it came to granting relief, the Court effectively validated the result sought by the Hindu litigants (and by the mob in 1992), the construction of a Ram temple at that exact site, *albeit* through the legal mechanism of a trust. The verdict relied on certain findings: that Hindus had shown a longer, continuous pattern of worship at the site (even in the mosque's outer courtyard) and that a pre-existing underlying structure (claimed to be a Hindu temple from centuries ago)

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<sup>65</sup> *Id.*

<sup>66</sup> Suhrith Parthasarathy, *In Defense of the Anti-Exclusion Principle: Why the Essential Practices Test Needs Reform*, 2 INDIAN L. REV. 263, 265–68 (2018).

<sup>67</sup> Mohd. Hanif Quareshi v. State of Bihar, AIR 1958 SC 731.

<sup>68</sup> M. Siddiq (Dead) v. Mahant Suresh Das, (2020) 1 S.C.C. 1.

indicated the mosque was built atop something. On a balance of probabilities, the Court preferred the Hindu claim

Critics like legal scholar Gautam Bhatia note that the judgment placed faith over legal principles.<sup>69</sup> The Court, in this case, prioritised social pragmatism over constitutional principle. Bhatia and others argue that the Court's reasoning side-stepped a deeper engagement with *constitutional secularism*. The Constitution is silent on how to resolve such religious property disputes except through the normal law; there is no rule that "faith" or majority sentiment gets a priority. Yet the judgment, reading between its lines, seems to elevate the religious significance of the site for the Hindu majority as a factor beyond just property law. The Court, for instance, took note of the belief that Lord Ram's birthplace is there and treated the deity as a juristic person owning the land, concepts imbued with religious deference.

This ruling set a troubling precedent – it suggested that illegal actions motivated by majoritarian impulses (like the mosque demolition, which was clearly in defiance of court orders and rule of law) could effectively be retrospectively legitimised through a judicial settlement that aligns with the outcome sought by those actions.<sup>70</sup> The ruling raises concerns that unconstitutional acts driven by majoritarian mobilisation may ultimately be regularised through judicial settlement. The message perceived by many was that might (in terms of numbers and passion) makes right, eventually. In prioritising closure over strict restoration, the judiciary left unresolved the counter-majoritarian function of constitutional adjudication. But in doing so, it arguably failed to vindicate the principle that the Constitution protects minorities against even the most deeply held majority religious aspirations when they clash with legal rights. That principle was left in constitutional silence.

### C. INSTANCES OF JUDICIAL RESISTANCE

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<sup>69</sup> Gautam Bhatia, *The Ayodhya Judgment*, Indian Constitutional Law and Philosophy (Nov. 9, 2019).

<sup>70</sup> Gautam Bhatia, *The Ayodhya Judgment*, Indian Constitutional Law and Philosophy (Nov. 9, 2019).

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Despite the concerns above, there have been notable moments in the last decade where the judiciary acted as a counterweight to majoritarian or traditional impulses, reaffirming constitutional morality and the dignity of marginalized groups. These instances of judicial resistance shine a light on the judiciary's potential to interpret silence in a manner that *expands* liberty and inclusion.

One landmark case is *Navtej Singh Johar v. Union of India* (2018), where the Supreme Court decriminalized consensual homosexual conduct between adults by reading down Section 377 of the IPC.<sup>71</sup> The Constitution itself never explicitly mentioned sexual orientation or a right to intimacy; this was a space of silence and, historically, of stigma reinforced by an old colonial law. In 2013, the Supreme Court had shamefully abdicated by re-criminalising homosexuality in the *Koushal* decision<sup>72</sup>, effectively deferring to Parliament. But in *Navtej Johar*, a 5-judge bench reversed course, invoking the spirit of the Constitution – equality, liberty, privacy, and fraternity, to fill the silence with a resounding affirmation of LGBTQ+ rights. Justice Chandrachud, in his concurrence, expounded on constitutional morality, the idea that societal morality (which may be prejudiced against homosexuals) must bow to the moral values inscribed in the Constitution, such as individual dignity, non-discrimination, and the protection of minorities against the tyranny of the majority.<sup>73</sup> This use of constitutional morality explicitly provided a visionary interpretation of constitutional silence on LGBTQ+ identity, declaring that silences or ambiguities in the law cannot be filled with majoritarian prejudice. This judgment not only struck down a law but also laid down a marker that the absence of explicit mention of a right (here, the right to love and partnership regardless of gender) does not mean its exclusion – if it is an integral aspect of liberty and equality, the Court will read it into the living document. *Navtej Johar* stands as a high point of the Court's counter-majoritarian role, especially since at that time (and even now) a significant segment of public or political opinion was not fully comfortable with LGBTQ+ rights. The Court led social change rather than followed, demonstrating how to fill silence with justice.

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<sup>71</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1, 65–68, 93.

<sup>72</sup> *Suresh Kumar Koushal v. Naz Foundation*, 2014 (1) SCC 1.

<sup>73</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1, 65–68, 93.

Another example of judicial resistance is *Indian Hotel and Restaurants Association (AHAR) v. State of Maharashtra* (2019), which dealt with a state government’s ban on “dance bars” in Mumbai.<sup>74</sup> These bars featured performances by dancers (often women from disadvantaged backgrounds) and were seen by some as immoral or facilitating prostitution. Maharashtra’s government, riding on a morality narrative popular with the majority, had effectively banned them, causing loss of livelihood to thousands of women. The Supreme Court struck down the ban and unreasonable licensing conditions as unconstitutional, invoking the doctrine of proportionality. It emphasised that merely because of moral disapproval or isolated incidents, a blanket prohibition on an occupation cannot be imposed. The Court noted that under the constitutional scheme, fundamental rights (here, freedom of occupation and expression for the dancers, and life with dignity) could only be curtailed by the state in a reasonable, proportionate way. This was a situation of silence or vagueness in fundamental rights – the Constitution doesn’t detail “morality” beyond saying “public order, decency, morality” can limit free expression (Article 19(2)). The state argued the ban was to uphold morality. The Court responded by carefully examining if lesser restrictions could achieve the goal of preventing trafficking or obscenity (they could), thereby defending the economic and personal autonomy of a stigmatized group of workers against a populist measure.<sup>75</sup>

By doing so, the Court confronted a form of moral majoritarianism (the idea that society’s disgust can justify closing an entire profession) and protected fundamental rights. This judgment signaled a judicial willingness to look beyond societal prejudices (many see bar dancers pejoratively) and ensure the state’s actions pass strict scrutiny. In effect, the judiciary filled the silence around how far “morality” can justify restrictions by asserting that only a constitutionally grounded morality – one that values individual choice and uses evidence-based reasoning – can pass muster.

These cases exemplify what scholar Rosalind Dixon calls “responsive judicial engagement” – where courts respond to the needs of marginalized groups and engage with social realities in a manner that challenges

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<sup>74</sup> *State of Maharashtra v. Indian Hotel & Restaurants Ass’n (AHAR)*, (2019) 8 S.C.C. 519, 550–52.

<sup>75</sup> *Id.*

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structural hierarchies.<sup>76</sup> In both *Navej* and the *Dance Bar* case, the Court engaged with voices and perspectives that are often overlooked, thereby broadening the ambit of rights. The Court also cited scholarship and global jurisprudence, showing an openness to learning and adapting, in contrast to a parochial majoritarian view.

However, such decisions, while heartening, remain exceptions, not the norm. For every *Navej Johar*, one can point to a pending or avoided case affecting another minority (e.g., the delay in hearing challenges to the effective nullification of Jammu & Kashmir's special status, which impacted Kashmiri Muslims significantly, or the muted approach to atrocities against minorities in several instances). It highlights that the judiciary's engagement with constitutional silences has been thematically inconsistent and often *politically contingent*. Progressive rulings tend to emerge in areas where the immediate political stakes are lower or where a social movement has built up support (the LGBTQIA+ movement had galvanized public opinion to some extent by 2018, and no government in India was actively opposing decriminalization at that time, easing the Court's path). In contrast, where issues are front-and-center in political discourse (religion, caste-based benefits, etc.), the Court has treaded more cautiously.

The challenge ahead is developing an interpretive culture that treats constitutional silence not as an invitation to abdicate but as a call to *reaffirm the Constitution's inclusive vision*. When the Constitution is silent, the values of the Constitution (liberty, equality, fraternity, justice) should guide the interpreter. The judiciary at its best has done so; at its worst, it has left the silence to be filled by the loudest or most powerful voices of the day.

## TOWARD A JURISPRUDENTIAL FRAMEWORK FOR CONSTITUTIONAL SILENCES

The discretionary space that constitutional silences create is a two-edged sword, as we have seen. When the judiciary or executive engages these

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<sup>76</sup> Rosalind Dixon, *Responsive Judicial Review in Comparative Constitutional Law* 345, 348–50 (Tom Ginsburg & Rosalind Dixon eds., 2011); *See also* Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 Int'l J. Const. L. 636, 653 (2011).

silences without principled limits or structural constraints, it becomes a vector for institutional drift, majoritarian capture, and erosion of constitutional morality. To safeguard the Constitution's ethos, it is essential to establish guardrails for interpretation and decision-making in these grey areas.

In plural societies like India, judges often must mediate between conflicting social, cultural, and religious claims, particularly in the absence of explicit constitutional text. If a judge's approach to silence is unmoored, guided by personal predilections or prevailing orthodoxy rather than principled reasoning, the outcome might reinforce majority sentiments or the status quo, rather than constitutional values. As Hanna Lerner argues in her work on interpreting constitutions in divided societies, judicial decisions in such contexts can either reinforce pluralism or aggravate divisions, depending on the normative frameworks guiding interpretation.<sup>77</sup> In India, silence on issues such as religious conversions, hate speech, or criteria for affirmative action allows judges substantial latitude. Without transparent and consistent jurisprudential guardrails, this discretion can too easily be shaped by dominant social narratives or biases, thus reproducing majoritarian hegemony under the guise of neutrality. The disparate outcomes in cases like *Navej Jobar* versus *Sabarimala Review* illustrate how wildly different approaches to silence (value-driven in one, expedient in the other) can lead to expansion of rights in one instance and contraction in another.

It is clear that unchecked judicial discretion can exacerbate minority marginalization. For instance, if courts give police wide berth under vague security laws (a judicial choice to defer to the executive), minorities suffer. If courts uphold laws tinged with majoritarian morality without scrutinizing their necessity or impact (as might be in some anti-conversion or beef-ban cases), it is an interpretive choice that sides with majority values by default. These examples underscore why courts need internal disciplines: to ensure that when a silence is interpreted, it's done in a way that is conscious of power imbalances and rights implications.

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<sup>77</sup> Hanna Lerner, *Interpreting Constitutions in Divided Societies*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 13, 24–26 (2018).

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Pluralism in India is not just a social fact; it's a normative commitment embedded in the constitutional scheme (the Preamble's fraternity assuring dignity of the individual and unity of the Nation, fundamental rights for religious and linguistic minorities, etc.). Constitutional morality, a term famously elaborated by Dr. B.R. Ambedkar in the Constituent Assembly, entails adherence to the core principles of the Constitution, including respect for diversity, rule of law, and institutional integrity, even when the text is silent or ambiguous. Tarunabh Khaitan warns that when political culture normalizes executive aggrandizement and judicial timidity, pluralism can be hollowed out without a single formal amendment.<sup>78</sup> In other words, the slow death of a pluralist constitution can occur through the cumulative effect of silent interpretations that always err on the side of the powerful or the majority.

To counter this, courts and interpreters must intentionally anchor their reasoning in constitutional morality. This concept has been increasingly referenced by the Supreme Court in recent years. Notably, both *Navtej Johar* (2018) and *Government of NCT of Delhi v. Union of India* (2018) invoked constitutional morality as a guiding star.<sup>79</sup> In *Navtej*, it meant upholding rights despite social disapproval. In the *NCT of Delhi* case (concerning the powers of Delhi's elected government versus the Lieutenant Governor), it meant emphasising cooperative federalism and respect for democratic mandates over bureaucratic literalism. Constitutional morality, in practice, requires that silence must be filled with the spirit of the Constitution (values of justice, equality, liberty, and accountability) rather than populist or sectarian values.

Even with sound principles, the judiciary does not operate in a vacuum. Mark Tushnet and others have noted that courts are often influenced by the dominant political culture and social movements; they rarely get too far ahead of or behind societal currents.<sup>80</sup> A healthy democratic society has

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<sup>78</sup> Tarunabh Khaitan, *Constitutional Directives: Morally-Committed Constitutionalism*, 17 INT'L J. CONST. L. 1245, 1260 (2019).

<sup>79</sup> *Navtej Johar*, 10 S.C.C. at 119–20 (Malhotra J., concurring) (invoking Dr. Ambedkar's conception of constitutional morality as a compass for the Court's decision); *Gov't of NCT of Delhi v. Union of India*, (2018) 8 S.C.C. 501, 573 (Chandrachud J., concurring).

<sup>80</sup> Mark Tushnet, *The Role of Courts in Social Change: Looking Forward?*, 54 DRAKE L. REV. 895, 901–02 (2006).

external checks and voices that can help correct or prevent judicial missteps. In India, public interest litigation, media reporting, and civil society advocacy have sometimes spurred the courts to take up issues or have provided crucial information and perspectives that informed court decisions. The *Puttaswamy* privacy case (2017),<sup>81</sup> for example, was driven by civil society litigants and buttressed by academic scholarship on privacy, leading to a unanimous Supreme Court ruling that located privacy in the constitutional scheme broadly. Similarly, *Navej Johar* was the culmination of years of activism, pride marches, and sensitization efforts that helped create an environment for the Court to act.

Comparative insights reinforce this interplay. Niranjan Sahoo's comparative study on minority rights in Asia found that in places like Indonesia and Malaysia, robust civil society pressure sometimes influenced courts to rule in favour of minorities, even when formal institutional frameworks were weak.<sup>82</sup> In India, we have seen movements like the Right to Information campaign result in new laws and interpretations favouring transparency, or environmental movements leading to the Court's expansive reading of Article 21 (right to life) to include environmental protection.

To prevent the abuse or neglect of constitutional silences, we need a multipronged approach that combines doctrinal clarity, institutional reform, and societal participation. The subsequent sections propose concrete guidelines along these lines: guiding principles for judges, legislative measures for the executive realm, and empowering the broader interpretive community (civil society and academia) to serve as watchdogs and innovators when formal institutions falter.

## **PATTERNS OF SELECTIVE ENGAGEMENT: BETWEEN CONSTITUTIONAL MORALITY AND POLITICAL ACCOMMODATION**

The Indian judiciary's interpretation of constitutional silences reveals a striking duality. In certain moments, courts have filled gaps in the

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<sup>81</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

<sup>82</sup> Niranjan Sahoo, *Factoring Justice in Minority Rights: Comparative Lessons from India, Indonesia, and Malaysia*, Carnegie India Paper No. 13 (July 2019), at 8–10.

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constitutional text with bold, justice-oriented interpretations rooted in the values of liberty, equality, and dignity, what is often described as constitutional morality. Yet in other instances, particularly where dominant religious, cultural, or nationalist identities are at play, the same courts have responded with restraint, deferral, or selective reasoning that effectively preserves the majoritarian status quo. This divergence does not stem merely from differences in judicial philosophy or bench composition. Rather, it reflects a deeper institutional logic, one that balances constitutional ideals against prevailing political forces, social legitimacy, and the perceived risks of enforcement.

The most consistent thread running through progressive constitutional interventions, such as in *Navej Singh Johar* (decriminalisation of homosexuality), *Joseph Shine* (criminalisation of adultery), and *Indian Hotel and Restaurants Association* (dance bar restrictions) is their political insulation. In these cases, the claimants were members of marginalized or socially stigmatized groups, but their demands for recognition and liberty did not directly challenge the dominant religious or national identity of the majority. Moreover, there was little organized political opposition to these causes at the time of judgment. In *Navej*, for example, while homosexuality remained socially taboo in many quarters, the absence of any government-led moral panic, coupled with growing international jurisprudence and a visible civil society campaign, created space for the Court to read sexual autonomy and dignity into the Constitution's silences. The same was true in *Joseph Shine*, where no significant political constituency opposed the Court's decision to decriminalize adultery on grounds of gender equality and autonomy. These cases also shared a critical feature: the practical impact of the rulings was legally manageable and did not require a wholesale reordering of public policy or state power.

Contrast this with the Court's conduct in cases like *Ayodhya, Shayara Bano*, or the judicial inaction following the abrogation of Article 370. In these instances, the constitutional questions were inextricably tied to the anxieties, aspirations, or mobilized power of the majority. In *Ayodhya*, the Court acknowledged illegality in both the 1949 and 1992 incidents but chose to balance those findings against a narrative of faith and longstanding religious belief. The final remedy aligned with the majoritarian demand, temple construction, while cloaking the judgment in

legal and conciliatory language. This was not merely judicial timidity, but a recognition that an outright ruling in favor of the mosque's restoration would have been politically explosive and likely unenforceable.

A similar logic shaped the Court's intervention in *Shayara Bano*. While the Court struck down triple talaq, it notably refrained from articulating a broader principle that personal laws across religions must conform to fundamental rights. Instead, the reasoning was either confined to arbitrariness under Article 14 or, in the case of Justice Kurian Joseph, detoured into Islamic theological analysis. This selective scrutiny has not been applied with equal rigor to patriarchal practices within Hindu personal law, which continue to contain discriminatory elements (e.g., unequal guardianship rights, biases in divorce and maintenance). That the judiciary chose to intervene boldly in one context but not in the other suggests that the political cost of reforming Hindu personal law, more closely linked with the cultural identity of the national majority, is perceived as significantly higher.

Further examples reinforce this pattern. In the Sabarimala case (*Indian Young Lawyers Association v. State of Kerala*, 2018), the Court invoked gender equality and constitutional morality to allow women of menstruating age to enter the temple. The ruling attracted severe backlash, including protests, non-compliance by the temple board, and political mobilization across party lines. The state apparatus was reluctant to enforce the decision, and soon after, a review petition was admitted, effectively stalling implementation. While the judgment was doctrinally aligned with the Court's other gender equality cases, its enforcement failure and the social backlash revealed the risks of confronting entrenched majoritarian religious norms.

Similarly, in the Citizenship Amendment Act (CAA) cases, the Supreme Court has thus far avoided a substantive ruling on the constitutionality of a law that explicitly creates religious distinctions in access to Indian citizenship. Despite massive protests, international concern, and significant constitutional questions relating to secularism and equality, the Court has not delivered a decision. The inaction here is revealing: the issue touches directly upon state policy backed by majoritarian sentiment, and a ruling against the CAA could have been interpreted as a political challenge to the executive's ideological agenda. In such contexts, the judiciary

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appears hesitant to confront the state, even when the constitutional silence, here, regarding the permissible limits of religious classification in citizenship law, cries out for clarification.

The pattern, then, is not of principled inconsistency but of strategic selectivity. The Court is most likely to invoke constitutional morality and fill silence with progressive content when, *first*, the affected group is politically weak but socially visible; *second*, the issue does not touch core majoritarian identities (religious or national); *third*, there is support from civil society or international jurisprudence; and, *fourth*, the enforcement is administratively feasible and unlikely to provoke mass resistance.

When one or more of these conditions is absent, especially when political power and majority sentiment are deeply invested, the Court's interpretive posture shifts. It may dilute its reasoning, avoid doctrinal clarity, or delay adjudication altogether.

This strategic behaviour is not unique to India. Comparative scholars of judicial behaviour have long argued that courts in constitutional democracies often act as “dialogic” institutions, expanding rights only when the political environment allows for it. But the Indian case is distinctive in how frequently constitutional silence is filled in ways that reinforce rather than disrupt dominant narratives. The result is a judiciary that can appear progressive without being radical, moral without being confrontational, and independent without being oppositional.

Ultimately, this calls into question the extent to which constitutional morality functions as a consistent judicial lodestar. In theory, it should guide interpretation when the text is silent or ambiguous. In practice, it is invoked selectively, depending on the social cost of moral clarity. The real test of constitutional morality lies not in its deployment for causes with broad elite support, but in its ability to challenge the deeply held assumptions of power. The Court's record in this regard remains uneven. Constitutional silence is not inherently emancipatory or conservative, it is what the interpreter makes of it. In India today, that interpretation is often filtered through the lens of majoritarian accommodation and institutional self-preservation.

## CONCLUSION

This paper has critically examined how constitutional silences (intentional or incidental) have become powerful instruments of political and judicial discretion in India, often in ways that reinforce majoritarian ideologies. It has been demonstrated how the *executive branch* has strategically exploited constitutional silences – from re-promulgating ordinances repeatedly (to bypass Parliament), to delaying or manipulating appointments to independent offices, to deploying vague national security or public order laws that disproportionately target minorities. We also discussed how the *judiciary*, despite its mandate as guardian of the Constitution, has been inconsistent in its approach to constitutional silences. In some instances, the courts have responded with transformative judgments that filled silences with constitutional values and protected minorities or fundamental rights.

The article further turns towards normative solutions, arguing for a structured jurisprudential and institutional framework to govern interpretive discretion. We proposed that through doctrinal tools like proportionality (to ensure any limitation of rights is necessary and minimal) and through revitalizing concepts like constitutional morality, courts can discipline their approach to silence. Institutional reforms were suggested, such as bolstering judicial independence in appointments and case assignment, and encouraging a culture of reasoned dissent within the judiciary – so that alternative perspectives are not stifled even when the majority leans a certain way.

A framework, rooted in constitutional morality, not majoritarian morality; pluralism, not cultural homogenisation; and substantive equality, not mere formal neutrality is the need of the hour. Courts must internalise and consistently apply interpretive tools that promote reasoned decision-making (such as proportionality and the value-based approach of constitutional morality). Ambiguities and silences should be resolved in line with the overarching principles of the Constitution (justice, liberty, equality, dignity).

Both the judiciary and the executive must be subject to procedural constraints, transparency, and external checks in exercising discretion. For the judiciary, this means reforming internal processes so that who gets to

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interpret a silence (bench composition) is not a matter of chance or preference. For the executive, it means parliamentary oversight, independent watchdog agencies (Comptroller and Auditor General of India, Central Vigilance Commission etc.), and judicial review remain effective even in areas the Constitution is less explicit (such as matters regarding marriage equality, labour laws etc.). Finally, recognition is needed that safeguarding the Constitution is not the sole province of courts or governments. Civil society, media, and academia must be respected and protected as co-stewards of constitutional norms. They often operate as the “long stop” as in cricket, preventing the boundary when earlier fielders have missed the ball. Engaging citizens in constitutional dialogue (for example, through public consultations on laws, or civic education on constitutional rights) can help create a culture where any attempt to subvert the Constitution’s spirit, even via silence, is met with public resistance.

As Justice D.Y. Chandrachud observed in *Puttaswamy v. Union of India* (2017), “*the Constitution is not a mere parchment of paper. It is a living document*”. But for it to live and breathe, its silences must speak with the voice of constitutional values, for the marginalized and the minority, not merely echo the will of the majority or the state. If the guardians of the Constitution remain vigilant and the people insist on accountability, silence can be an opportunity for deliberation and progress rather than an invitation to arbitrariness.

