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EDITORIAL: A DEFENCE FOR OVERREACH: THE ECI APPOINTMENTS CASE

Ayush Mehta[1] *& Prakhar Raghuvanshi*[2]

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INTRODUCTION

Democracy brings equality, fraternity and liberty to the citizens of a country. Adopting a democratic form of government signifies a transformation from the orthodox methods of governance, which more often than not, place humans on different pedestals.[3] This transformation is political, extending to social transformation as well. In the political sense, the litmus test for this transformation is periodic, along with free and fair elections. Elections are pivotal to a democratic nation. While franchise was restricted in parts of the world and gradually attained a universal status,

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[3] Justice D.Y. Chandrachud, Chief Justice, Supreme Court of India, Address at the 8th Dr. L.M. Memorial Lecture: Universal Adult Franchise: Translating India's Political Transformation into a Social Transformation (Dec. 2, 2022).

today the importance of elections is immense.[4] While it is not the sole vehicle of democracy, it is indeed the foundation.[5]

In India particularly, elections are tumultuous and frequently controversial. At the helm of this humongous exercise is the Election Commission of India ("**ECI**" or "**Commission**") a constitutional body authorised with 'superintendence, direction and control of elections' in India.[6] The ECI was set up on 25 January 1950, one of the democratic institutions established in India before it became a republic. Considering the importance of the functions it carries out, ECI's careful constitution and fair functioning, or lack thereof, is always a relevant discussion in the public domain (and rightly so). By this extension, it also becomes an important constitutional question. In March 2023, a 5-judge Constitution Bench of the Supreme Court of India [**"SC"**] gave a ground-breaking judgement regarding this question, primarily concerning the appointment of the Chief Election Commissioner and Election Commissioners.[7]

In this editorial, we dissect the appointment methods which have been used in the past and the one proposed by the SC. To contextualise the discussion, in the *first* part of this editorial, we discuss the role and powers of the ECI. In the *second* part, we discuss the intent behind the drafting of Article 324 and the history of appointment to the ECI. In Part IV, the authors have attempted to defend the judgment of the court.

FUNCTIONS AND POWERS

The ECI is a constitutional body which can be categorised as a fourth branch institution.[8] Fourth-branch institutions have the onus to protect a constitutional democracy.[9] Thus, making their role and power within the

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[4] Bhikhu Parekh, *The Dialetics of Elections* in THE GREAT MARCH OF DEMOCRACY (SY Quraishi ed., Penguin 2019).

[5] Mehta & Raghuvanshi, Editorial, *The Partial and Inconsistent Idea of Franchise and Democracy*, COMP. CONST. & ADMIN. L. J. vii (2022).

[6] INDIA CONST. art. 324.

[7] Anoop Baranwal v. Union of India, 2023 SCC Online SC 216 (India).

[8] Mark Tushnet, *Electoral Commissions: Case Studies from India, the United States, and South Korea in* THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY 123-157 (Cambridge University Press, 2021).

[9] *Id.*

constitutional framework is exceedingly important. The ECI has multifaceted functions to perform, with respect to the conduct of elections. Article 324 of the Constitution of India grants plenary authority to the ECI to ensure free and fair conduct of elections at the national and state level.[10] In terms of the Constitution, the ECI has the power of direction, superintendence and control over election to the Parliament and state legislatures. This power of the Commission is subject to: a) laws made by the parliament or state legislature; and b) norms of fairness i.e., it cannot act arbitrarily or with malafide intent.[11] In discharge of its constitutional duties, the ECI carries out numerous functions which can be categorised under three stages: a) pre-election; b) election; and c) post-election.

A. PRE-ELECTION

The pre-election stage primarily consists of two aspects. *First*, registration of voters and *second*, awareness campaigns or 'election literacy'.[12] One can understand these better by going over the history of the first elections in India. The Commission undertook the daunting task of conducting a nationwide election on the basis of universal adult suffrage.[13] Under the able leadership of Sukumar Sen, the first Chief Election Commissioner of India, the ECI started preparing electoral rolls for 176 million Indians aged 21 years or more.[14] Elections were conducted on a total 4500 seats, including 500 for Parliament and 4000 for state assemblies.[15] The ECI also ran a documentary on franchise and duties of the electorate in over 3000 cinema halls to encourage the citizens.[16] Since 2009, the task of voter

[10] Mohinder Singh Gill v. Chief Election Commissioner, New Delhi (1978) 1 SCC 405 (India).
[11] *Id.*
[12] S.Y. QURAISHI, AN UNDOCUMENTED WONDER: THE GREAT INDIAN ELECTION (1st ed. 2014).
[13] RAMACHANDRA GUHA, INDIA AFTER GANDHI: THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY (1st ed. 2008).
[14] *Id.*
[15] *Id.*
[16] *Id.*

education is run with the Commission's flagship program Systematic Voter Education and Electoral Participation ("**SVEEP**").[17]

B. ELECTION

The role of the Commission during the election is two-fold and includes administrative or organisational work as well as oversight. Administrative or organisation tasks include setting up of polling booths, arranging returning officers, security officers and such. In the first general election 224,000 polling booths, 2 million ballot boxes, 56,000 presiding officers, 280,000 helpers, 224,000 policemen and 16,500 clerks were arranged. Ensuring compliance of the Model Code of Conduct and relevant statutory provisions falls under its oversight role.[18] The Model Code of Conduct is a set of guidelines to be followed by the candidates and political parties.[19] In case of violation, the ECI passes prohibitory orders or imposes bans on campaigns. It also directs the police to investigate or forwards the complaint to be handled via ordinary legal mechanism.[20]

C. POST-ELECTION

The role of the Commission at the post-election stage is primarily adjudicatory. This adjudication is both at an individual and institutional level.[21] At the individual level, the adjudicatory role of the Commission is regarding disqualification of cases under Articles 103 or 192 of the Constitution of India.[22] The decision-making authority under Articles 103 and 192 falls with the President and the Governor respectively, however,

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[17] Voter Education, Election Commission of India, available at: https://eci.gov.in/voter/voter-education/ (Accessed on 30 May 2023). *See generally* S.Y. Quraishi, *Participation Revolution with Voter Education* in THE GREAT MARCH OF DEMOCRACY (SY Quraishi ed., Penguin 2019).

[18] Alistair McMillan, *The Election Commission of India and the Regulation and Administration of Electoral Politics*, 11(2) ELECTION LAW JOURNAL: RULES, POLITICS AND POLICY 187 (2014).

[19] Model Code of Conduct, Election Commission of India, available at: https://eci.gov.in/mcc/ (Accessed on 30 May 2023)

[20] Mohsin Alam Bhat, *Governing Democracy Outside the Law: India's Election Commission and the Challenge of Accountability*, 16(S1) ASIAN J. COMP. L. (2021).

[21] Sregurupriya Ayappan, *Exploring the Duality of the Election Commission and the Scope of Judicial Review,* 4(3) COMP. CONST. & ADMIN. L. J. 52 (2019).

[22] INDIA CONST. art. 102 & 193.

the opinion of the Commission ought to be sought.[23] While exercising this function, the Commission has powers akin to a civil court and the authority to regulate its own procedure. For instance, in a 2021 reference case from Odisha, the Governor of Odisha sought opinion of the Commission on disqualification of 22 Members of the Legislative Assembly for holding office of profit.[24] Upon inquiry, the Commission found that the offices in question were exempt from disqualification on grounds that these offices of profit fell under the government by virtue of Odisha Offices of Profit (Removal of Disqualifications) Amendment Act, 2016.[25] Thus, the commission opined that MLAs did not incur disqualification.[26]

The *second* role, which operates at an institutional level, is adjudication of symbols disputes. In case of a split in the political party, where both factions wish to retain the symbol of the party, the decision with respect to this rests with the Commission, under the terms of paragraph 15 of the Symbols Order. The 2023 decision of the ECI in the Maharashtra political crisis of 2022 regarding the allotment of the Shiv Sena symbol to the faction led by Eknath Shinde over the one led by Uddhav Thackrey is a prime example.[27]

APPOINTMENTS TO THE COMMISSION

The constitution grants the appointment authority to the President, subject to any law made by the Parliament in the regard.[28] Under the Government of India (Transaction of Business) Rules, 1961, any case of appointment,

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[23] INDIA CONST. cl. 2.

[24] Reference Case No. 9(G) of 2021 (Election Commission of India). The MLAs held the position of Chairperson of District Planning Committees.

[25] The Orissa Offices of Profit (Removal of Disqualifications) Act, 1961, No. 26, Acts of Parliament, 1961.

[26] It must be noted that 2 MLAs had already resigned from the office in question before the constitution of the 16th Legislative Assembly of Odisha while 20 were still holding the office (¶ 10).

[27] Final Order, Election Commission of India, Dispute Case No. 1 of 2022 (Feb. 17, 2023), https://eci.gov.in/files/file/14826-commissions-final-order-dated-17022023-in-dispute-case-no-1-of-2022-shivsena/.

[28] INDIA CONST. art. 324 cl. 2.

resignation or removal of the Chief Election Commissioner or the Election Commission must be submitted to the Prime Minister and the President.[29]

A. UNREALISED INTENTION

Theoretically, the possibility of rendering discretion of appointment lies with one individual, however, the surety of rendering it remains with the executive alone. Prof. Shibban Lal Saxena raised this concern in the constituent Assembly, while proposing an amendment which would require two-thirds majority of the Parliament to confirm the appointment of the Chief Election Commissioner.[30] He stated[31]:

> *"...Of course it [Election Commission] shall be completely independent of the provincial Executives but if the President is to appoint this Commission, naturally it means that the Prime Minister appoints this Commission. He will appoint the other Election Commissioners on his recommendations. Now this does not ensure their independence…the person who is appointed originally should be such that he should be enjoying the confidence of all parties—his appointment should be confirmed not only by majority but by two-thirds majority of both the Houses."*

Pandit Hriday Nath Kunzru voiced similar concerns and proposed a remedy that the Parliament may be authorised to lay down norms for such appointment. While pointing out the political reality, he unequivocally stated[32]:

> *"The Chief Election Commissioners will have to be appointed on the advice of the Prime Minister, and, if the Prime Minister suggests the appointment of a*

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[29] Government of India (Transaction of Business) Rules, 1961, Rule 8, Pausa 24, 1882(S), r/w Government of India (Transaction of Business) Rules, 1961, Sch. 3 Entry 22, Pausa 24, 1882(S).

[30] Shibban Lal Saksena, 8 CONST. ASSEMB. DEB. ¶ 8.105.221 (June 15, 1949) https://www.constitutionofindia.net/debates/15-jun-1949/.

[31] *Id.*

[32] Hriday Nath Kunzru, 8 CONST. ASSEMB. DEB. ¶ 8.106.20 (June 16, 1949)https://www.constitutionofindia.net/debates/16-jun-1949/. Similar concern was raised by Kuladhar Chaliha. Chaliha questioned the appointment by the President by calling him a 'party-man' with some biases towards his own party.

party-man the President will have no option but to accept the Prime Minister's nominee, however unsuitable he may be on public grounds."

The Constituent Assembly Debates also reflect the views that portray the Commission as a quasi-independent body and an ally of the government.[33] However, even such views carried the caution of executive appointment. Based on these concerns, Ambedkar is said to have favoured a flexible prescription in the Constitution which produces a less stringent structure, one that would be capable of being amended by the Parliament.[34] Ambedkar stated that one '*cannot deal with a constitution on technical points*.'[35] Constitution-making may be a farce in the face of a huge number of technicalities.[36]

The intent of the framers of the Constitution becomes abundantly clear from the discussion: a) the Commission ought to be independent from the Executive; b) the appointment process laid down in Article 324 was envisaged with an expectation that the Parliament will set the norms; and that c) the appointment authority resting solely with the Prime Minister was a matter of concern warranting the wisdom of future Parliaments.

B. HISTORY

A history of appointments to the ECI hints towards an inclination to misuse this discretion. The Constitution authorises the President to appoint election commissioners, alongside the Chief Election Commissioner. However, up until the late 1980s, this provision was a dead letter, despite recommendations of a Joint Parliamentary Committee on Electoral Reforms in 1972[37], Tarkunde Committee on Electoral Reforms in 1975[38] and Dinesh Goswami Committee on Electoral Reforms for a

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33 8 CONST. ASSEMB. DEB. (June 16, 1949), https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-06-16.

34 Alistair McMillan, *The Election Commission*, in THE OXFORD COMPANION TO POLITICS IN INDIA (Niraja Jayal & Pratap Mehra (eds), Oxford University Press, 1st ed. 2010).

35 *Id.*

36 *Id.*

37 Election Commission and Electoral Reform, 37(3) INDIAN J. OF PUB. ADMIN. 557 (1991).

38 *Id.*

multi-member commission. In 1989, the government headed by then Prime Minister Rajiv Gandhi, appointed two election commissioners alongside with the Chief Election Commissioner. Scholars have argued that this change was perceived as an attempt to undermine the independence of the Commission.[39] This expansion of the Commission to a multi-member body was short-lived and the VP Singh government returned to one-member body in 1990 itself.[40] This reduction was challenged by one of the election commissioners, SS Dhanoa, before the Supreme Court. The challenge was rejected by the court with an observation[41]:

> *"There is no doubt that two heads are better than one, and particularly when an institution like the Election Commission is entrusted with vital functions, and is armed with exclusive uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however, all-wise he may be. It ill-conforms the tenets of the democratic rule. It is true that the independence of an institution depends upon the persons who man it and not on their number. A single indi- vidual may sometimes prove capable of withstanding all the pulls and pressures, which many may not. However, when vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness.". (emphasis supplied)*

The history of India in the 1990s is a rather peculiar story, with minority and coalition governments forming an unstable centre.[42] In 1993 again, two election commissioners were added vide a presidential ordinance.[43] Christophe Jaffrelot remarks that *"[TN] Seshan [the then Chief Election Commission] turned out to be tough to manipulate. Finally, the prime minister had the President expand the Commission with two additional members."*[44] The Election Commission (Conditions of Service of the Election Commissioners and

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[39] Christophe Jaffrelot, *T.N.Seshan and the Election Commission* in THE GREAT MARCH OF DEMOCRACY (SY Quraishi ed., Penguin 2019).

[40] *Id.*

[41] SS Dhanoa v. Union of India, 1991 SCR (3) 159 (India).

[42] Atul Kohli, *Politics of Economic Growth in India, 1980-2005: Part II: The 1990s and Beyond*, 41(14) ECON. & POL. WKLY. 1361 (2006).

[43] The Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993, The Gazette of India, pt. II sec. 1 (October 1, 1993).

[44] Christophe Jaffrelot, *supra* note 39 at 107.

Transaction of Business) Act, 1991, was amended in 1993. A Chapter 2 was introduced, which granted parity to the opinion of the Chief Election Commissioner and Election Commissioners.[45] Upon challenge, the SC upheld this amended provision.[46]

From this discussion, a few inferences may be drawn: a) the independence of the Commission cannot be assured through the appointment process where such appointments are made at the behest of the Prime Minister and b) the addition and removal of election commissioners has been undertaken for fulfilling political motives.

GAP FILLINGS AND CONVENTIONS

The apex court in *Anoop Baranwal v Union of India,* [**hereinafter "Anoop Baranwal"**] directed that the appointment of the Chief Election Commissioner and other election commissioners be carried out through a three-member committee. This committee ought to include the Prime Minister, the leader of opposition in Lok Sabha (in absence of such leader, the leader of the single largest party in opposition in Lok Sabha)[47], and the Chief Justice of India.[48]

A similar process was proposed by the Dinesh Goswami Committee. It recommended a consultation by the President with the Chief Justice and the leader of opposition in Lok Sabha. Effectively, this would mean a consultation between the Prime Minister, Leader of Opposition and the Chief Justice of India. Another framework was proposed in 2002, by the National Commission to Review the Working of the Constitution, which proposed a committee of the Prime Minister, leader of opposition in both houses, speaker of Lok Sabha and Deputy Chairman of the Rajya Sabha. Several other recommendations included a permutation-combination of

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[45] The Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, No. 22 of 1991, India Code (1991), https://www.indiacode.nic.in/bitstream/123456789/1965/1/A1991-11.pdf.

[46] T.N. Seshan, Chief Election Commissioner of India v. Union of India, (1995) 4 S.C.C. 611 (India).

[47] For the sake of brevity, unless otherwise specified, leader of opposition is used in this article to mean the leader of opposition in Lok Sabha or the leader of the single largest party in opposition in Lok Sabha.

[48] Anoop Baranwal v. Union of India, 2023 SCC Online SC 216 (India), ¶ 239.

constitutional functionaries at the federal level.[49] A common feature in most of these recommendations was the inclusion of the Prime Minister and the Leader of Opposition in the Committee.

Justice Joseph has taken note of these proposed changes. Furthermore, while recommending the committee, he relied on the mode of appointment for Director of Central Bureau of Investigation[50] and Chairperson and Members of the Lokpal[51] which have the Prime Minister, the Leader of Opposition and the Chief Justice in common. Justice Joseph has referred to cases on constitutional silence and thereby classifying this as a gap-filling exercise. A natural response to constitutional silences is the development of conventions.[52] However, the actors responsible for development of conventions are political.[53] For a convention to develop, there ought to be precedents, respect for such precedent and conformity with such precedent by the political actors, as per Ivor Jennings.[54]

One may notice that while there may have been an original intent to discourage executive fiat in appointments, such intent never translated into practice, which may transform into a precedent for the purpose of development of a convention. The primary reason for this may be twofold: a) the non-mandatory nature of the legislation to be enacted for governing appointments; and b) lack of political will, reasons for which were raised as concerns by Constituent Assembly members. This leads us to an anxious conclusion, which Gautam Bhatia labelled as a 'weakness in the design of the Constitution.'[55] This flaw in the design, coupled with an optimism that the future parliament or the government would engage in such exercise is the foremost reason why a convention could not be developed. There were

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[49] *Id.* ¶ 68-72.

[50] The Delhi Special Police Establishment Act, 1946, § 4A, No. 25, Acts of Parliament, 1946.

[51] The Lokpal and Lokayuktas Act**,** 2013, No. 1, Acts of Parliament, 2014.

[52] Martin Loughlin, The Silences of Constitutions, 16(3) INT'L J. OF CONST. L. 922 (2018).

[53] Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 387 (2015).

[54] *Id.*

[55] Gautam Bhatia, Decoding the Supreme Court's Election Commission Judgment - I, INDIAN CONST. L. & PHIL. (Mar. 3, 2023) https://indconlawphil.wordpress.com/2023/03/03/decoding-the-supreme-courts-election-commission-judgment-i/.

undercurrents furthering a similar development and a broad consensus across the political spectrum for improving the appointment process, however, perhaps lack of political will ensured that the development of a convention is transformed into a gap-filling exercise by the judiciary. This has also opened the possibility of calling this decision a judicial overreach.[56] However, due to the failure of the political actors, the judiciary was compelled to exercise its role as the guardian of the constitution,[57] since the argument for gap-filling is not simply one that a convention should have mandatorily been developed.

First, the master-text of the Constitution[58] subjects the appointment to the law made by the Parliament. It is worth noting that a plain reading of the bare text does not mandate enactment of such a law. However, when the intent of the framers, as well as the scheme of the constitution is considered, the practice in place for appointment of up till 2023 stands in violation of the constitutional principles. The Constitution abhors concentration of power in the hands of one individual. This principle was also observed by the Supreme Court with respect to the Commission in *SS Dhanoa*.[59]

Second, non-enactment of such a law would not warrant interference of the SC if the practice developed conformed to the tenets of democratic rule i.e., exercise of discretion by more than one-individual. Such a practice, if it engaged relevant stakeholders, especially the leader of opposition, and created a balanced forum for appointments to the commission would not have required intervention of the judiciary.[60]

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[56] *Id.*

[57] Jayanta Boruah, *Judicial Dynamism in India: Supreme Court's Landmark Judgments in 2018*, 3(1) NLUA L. REV.,(2019).

[58] Albert, *supra* note 53, at 47.

[59] The observation was in context of a multi-member Commission, however, the key principle that it will conform with the tenets of democratic rule, squarely applies even for appointments to the Commission.

[60] The inclusion of Chief Justice of India in the committee for appointment, in opinion of the authors, was unwarranted. The role of Chief Justice in appointments concerning the political domain is not desirable. Appointments to such bodies ought to be made by a group composed of the representatives of the executive, opposition and neutral parties

CONCLUSION

Through this Editorial, we have attempted to detail the crucial functions carried out by the Commission, thereby highlighting its importance and centrality in the democratic setup of the country. Having discussed this aspect, we have highlighted the tumultuous history of appointments to the commission, with an aim to strengthen the argument for an appointment process, in line with the original intent of the framers of the Constitution.

In doing so, we believe that the judiciary engaged in a gap-filling exercise which ought to be taken care of by way of conventions. However, the development of a convention being dependent on the will of the political actors is not assured.

While we have argued that this exercise could not be classified as a judicial overreach, we agree that Gautam Bhatia is correct in stating that this may be a case of rewriting the constitution by the judiciary.[61] Such shifts in the operation of constitutional provisions, through judicial decisions, has also been referred to as informal constitutional change.[62] We would prefer calling this a disjuncture between the constitution and constitutional law.[63] This disjuncture would have taken place in case of development of a convention to this effect as well.

IN THIS ISSUE

The field of constitutional law, administrative law and their comparative aspects demand academic rigour from both the authors and the editors. Together, we are in a position to deliver something meaningful to the academic discourse. As the Editors-in-Chief of the Comparative Constitutional Law and Administrative Law Journal ("**CALJ**") under the

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like members of civil society. The exact composition, though, is outside the scope of this editorial.

[61] Bhatia, *supra* note 55, at 49.

[62] Anujay Shrivastava, *Mapping 'Unconstitutional Informal Constitutional Changes' by Constitutional Courts- A Comparative Study of Supreme Courts' in India, Bangladesh, Honduras and the USA*, 7(1) COMP. CONST. L. & ADMIN. L. J. 42 (2022).

[63] Chintan Chandrachud, *Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India in* AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES (Richard Albert & Bertil Emrah Oder eds., 2018).

Centre for Comparative Constitutional Law and Administrative Law ("**CCAL**"), it gives us immense pleasure to introduce Issue II of Volume VII of our journal to the readers.

Ritwika Sharma and Mayuri Gupta in ***The Omnipresence of Political Parties in India's Democratic Landscape: Building a Case for Future Constitutionalisation*** discuss the role played by political parties in the functioning of an electoral democracy, making an argument for greater regulation in consideration of their unique position at the intersection of private and public law. The authors begin with an overview of the institution of political parties, concluding that they remain largely unregulated, with the exception of the anti-defection law. Subsequently, the authors delve into the critical role of parties as a bridge between the people and the government, further examining the impact of the issues plaguing parties on the health of democratic governance. The authors finally offer a comparative analysis with various other jurisdictions to suggest a framework of principles guiding constitutional recognition of political parties in India.

Our next author Monika Polzin examines the recent use of comparative constitutional law by the Malaysian Federal Court in justifying on the existence of the basic structure doctrine in the Malaysian Constitution in ***The German Eternity Clause, Hans Kelsen and the Malaysian Basic Structure Doctrine***. The author begins with a brief history, stating that unlike India, Malaysian courts had never annulled constitutional amendments on the grounds of basic structure doctrine. However, recent rulings, relying upon the ideas of Hans Kelsen and the German Constitution, expressly support the usage of the doctrine to annul amendments, and extend the reading of constitutional supremacy provided under Article 4(1). However, the author asserts that these are weak justifications, and difficult to reconcile with the abstract understanding of the Federal Court that all constitutions require limits on amendments. Finally, the author looks into problems with this approach, concluding that while the basic structure doctrine should be employed only within a democratic and liberal constitution, the recent ruling is an excellent example of international constitutional dialogue.

In the present, highly polarised political climate, satire as a means of political dissent is heavily regulated, which raises the question of just how free satire really is. Avinash Kotval in ***A Jocular Landmine: Navigating the Position of Political Satire in the Sphere of Free Speech and Expression*** discusses the status of political satire. The author begins with a doctrinal understanding of the fundamental nature of satire – a dual-edged sword, both ridiculing the subject, as well as attempting to trigger social change. The author then examines satire in through the lens of free speech jurisprudence and the Supreme Court ruling expressly bringing satire within the protection of Article 19(1)(a); further, an attempt is made to determine the manner and extent to which satire may be regulated by formal as well as informal means. In this backdrop, the author attempts to situate satire in the free speech spectrum, suggesting the introduction of an objective standard that would allow the protection of satire as a means of dissent.

In ***Horizontal Application of Fundamental Rights: Benign or Misconceived?*** Sujith Nair critiques the recent judgment of *Kaushal Kishore* v. *State of Uttar Pradesh*, where the Supreme Court held that Articles 19 and 21 of the Indian Constitution may be enforced even against private parties, a tectonic shift in the prevailing view that fundamental rights may be enforced only against the State and its instrumentalities. The author undertakes a preliminary review of the various types of horizontality – direct & indirect horizontality and positive obligations – taking examples from jurisdictions all over the world. He then delves into the jurisprudence in India – where courts have steadily broadened the applicability of fundamental rights, and with this background, elaborates upon the Pandora's box of issues with Kaushal Kishore. The author concludes with words of caution on the development of this new avenue of jurisprudence.

And finally, Rudra Chandran reviews Abhinav Chandrachud's ***These Seats are Reserved: Caste, Quotas and the Constitution of India***, recommending it to understand reservations and caste dynamics. However, the author delves into shortcomings of the book – Chandrachud's failure to adequately engage with the primary aim of reservations – enforcing distributive justice – with no suggestions as to how inequalities may be addressed beyond the provision of quotas. Further, the book also does not address issues relating to economically weaker sections. The author

concludes that while the book may be referred to as a neutral, beginner's guide, neutrality is a position that one may no longer take in the present climate.

CCAL ACTIVITIES

Over the last five months, CCAL has undertaken several activities aimed to foster interest and development in the field of constitutional law and administrative law.

In 2022, CCAL started hosting *Writ[e] & Talk* podcast. With the help of this podcast, the Centre aims to bring clarity and build discussion when it comes to writing on Constitutional Law and Administrative Law. We aim to interview authors of academic papers on varied subject matters that the journal deals with. We seek to go in-depth with the theme of their piece, the arguments they raise in their article, their journey of discovering the topic, the methods and techniques used by them to derive their arguments and so on. This initiative is an attempt to increase dialogue, discussion and engagement with legal writing.

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

We hosted Mr. Lalit Panda, a Senior Resident Fellow at Vidhi Centre for Legal Policy, New Delhi. The episode discusses his paper titled "***The Weight of Secrets: Assessing the Regulatory Burden for Informational Privacy in India***", which suggests a broad data protection regime and various regulatory tools that may be employed in the creation of an effective Data Protection Authority.

Subsequently, we hosted Mr. Shrutanjaya Bhardwaj who is a practising lawyer at the Supreme Court and the Delhi High Court. The episode discusses Mr. Bhardwaj's paper titled "***Preventive Detention, Habeas Corpus and Delay at the Apex Court: An Empirical Study***", which draws from an empirical study on the delay in adjudication of habeas corpus petitions in preventive detention cases. He provides a fascinating analysis of successful habeas corpus petitions; with the three indicators

chosen for the study ultimately suggesting that the writ is often rendered ineffectual.

We are also delighted to announce the successful commemoration of the 132nd birth anniversary of Dr. Bhim Rao Ambedkar on April 14, 2023. The occasion duly recognized and appreciated Dr. Ambedkar for his extraordinary contributions to our nation and society, emphasizing his relentless pursuit of constitutional ideals. The commemoration featured musical tributes, eloquent speeches, and recitations of the Preamble in a myriad of regional languages. Additionally, the event was graced with a special address from Mr. Nagesh Jadhav, the esteemed Training and Programme Manager at Coro, India. His enlightening discourse focused on "*Ambedkar and the Grassroots Movement in India*", shedding light on the late jurist's profound impact on India's grassroots activism.

The endeavour of the Centre to encourage discourse on the subject matter of constitutional and administrative law is furthered by the bi-annual publication of CALJ, guest lecture events, *Writ[e] & Talk* podcast and the regular publication of articles on topics of contemporary relevance on our blog "*Pith and Substance: The CCAL Blog*".

ACKNOWLEDGMENT

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

The publication of this issue would not be possible without the guidance of our Patron, Hon'ble Vice-Chancellor of National Law University Jodhpur, Prof. (Dr.) Poonam Pradhan Saxena and our Director Prof. (Dr.) IP Massey. At this juncture, we would also take the opportunity to thank our faculty advisors—Asst. Prof. Sayantani Bagchi & Asst. Prof. Vini Singh for their constant support, mentorship and engagement with every initiative we undertake. The Registrar of National Law University Jodhpur has also ensured smooth functioning at every stage, and we are thankful for it.

We would also like to thank every member of the Board for working on the issue and ensuring that the standards of our journal improve constantly. Members of the Board—Falguni Sharma, Palak Jhalani, Himanshi Yadav, Rachana R. Rammohan, Revati Sohoni, Akshay Tiwari, Atharva Chandra, Ayush Mangal, Siddhant Rathod, Siri Harish, Akshat, Anjali Sunil, Bharati Meena, Krishangee Parikh, Sinchan Chatterjee, Sonsie Khatri, Sri Janani S., Tasneem Fatma, Aarushi Gupta, Dhruv Singhal, Kovida Bhardwaj, Mohak Dua, Paavni Dua, Palash Singhal, Rishi Dev, Srishti Pandey & Vaibhav Singh —have been assets to our team.

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

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

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

Ayush Mehta & Prakhar Raghuvanshi

Editors-in-Chief

CALJ 7(2)

THE GERMAN ETERNITY CLAUSE, HANS KELSEN AND THE MALAYSIAN BASIC STRUCTURE DOCTRINE

MONIKA POLZIN[1]

The present article explores the use of comparative constitutional law through the recent development of jurisprudence by the Malaysian Federal Court to justify the existence of the basic structure doctrine in the Malaysian Constitution. Firstly, it reviews the dissenting opinion of Malaysian Chief Justice Tengku Maimun in 2021 and the unanimous decision of the Malaysian Federal Court in 2022. Here, the existence of implied limits for constitutional amendments is also explained with a reference to the works of the Austrian constitutional lawyer Hans Kelsen and German constitutional law. Secondly, the article describes in detail the German and Austrian sources used by the Malaysian decisions. Finally, it focuses on the crucial theoretical question about the limits on the use of abstract ideas of constitutionalism during constitutional interpretation in relation to the basic structure doctrine. It argues that the concept of a basic structure should only be applied in the framework of democratic and liberal constitutional orders or at least if there is a hybrid order only with regard to democratic and liberal constitutional elements. The reason is that the ultimate purpose of the basic structure doctrine should not be the preservation of a given constitution as such, but only the protection of a democratic and liberal constitution from autocratic erosion.

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* Cite it as Polzin, *The German Eternity Clause, Hans Kelsen and the Malaysian Basic Structure Doctrine*, 7(2) COMP. CONST. L. & ADMIN L. J. 1 (2023).

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** I am very grateful to the convenors Kevin YL Tan (National University of Singapoore) and Philip TN Koh (University of Malaya) and all participants of the Symposium on "Constitutional Amendments & Basic Structure in Malaysia" on 24&25 November 2022 in Singapoore, who inspired me to write this article.

INTRODUCTION

"*Und die Blumen blüh'n überall gleich*"

("*And the flowers bloom everywhere the same*")

is a song by the famous Austrian singer Udo Jürgens. This song describes the common theme of coexistence of all human beings. While their interdependence is appreciated on one hand, their individuality is appreciated on the other.

The field of comparative constitutional law possesses structural similarities to the aforementioned idea as constitutional orders are characterised by common features, themes, and legal links, while also possessing a unique constitutional individuality expressed in specific provisions which express a distinctive constitutional culture.[2] The relationships between constitutional individuality, foreign constitutional provisions, and their interpretation as well as the abstract ideas of constitutions and constitutionalism,[3] are very important subjects for a (comparative) lawyer. The core theoretical issues within are the limits on the use of comparative (foreign) law and the abstract ideas of constitutionalism in the course of a constitutional interpretation.

The present article explores the recent use of comparative constitutional law by the Malaysian Federal Court ("**The Federal Court**") to justify the existence of the basic structure doctrine in Malaysia. *First*, it shall review a

[2] The notion of constitutional individuality is different from the theoretical idea of constitutional identity as it is not related to the relevant identity of a community or a group of people but describes only the banal fact that every Constitution has different elements. On the different ideas and concepts of constitutional identity, *see, e.g.*, Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GER. L. J. 1595, 1595-1616 (2017).

[3] A different formulation resp. image is used by JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 3 (Yale Univ. Press 2012). He argues that "*convergent currents of foreign statutes, foreign constitutional provisions, and foreign precedents sometimes add up to a body of law that has its own claim on us: the law of nations, or ius gentium, which applies simply as law, not as the law of any particular jurisdiction*."

unanimous decision of the Malaysian Federal Court of Justice in 2022[4] and the dissenting opinion of the Malaysian Chief Justice Tengku Maimun in 2021,[5] which argued expressly that the Malaysian Federal Constitution ("**Malaysian Constitution**" **or** "**FC**") enshrines in itself the basic structure doctrine.

The peculiar nature of their arguments is that the existence of implied limits for constitutional amendments is not justified with a reference to the famous *Kesavananda Bharati* v. *State of Kerala* ("**Kesavananda**") judgement of the Supreme Court of India[6] but, surprisingly, with a reference to the works of the Austrian constitutional jurist Hans Kelsen and German constitutional law, which are seen as examples of the right idea of a constitution and constitutionalism by the Federal Court.[7] This aspect is discussed by the author in the first section of the paper. *Second*, the article shall attempt to comprehensively describe the German and Austrian sources used by the Malaysian Justices to support their rationale regarding the basic structure doctrine. *Third*, the author focuses on the crucial theoretical questions about the limits on the use of comparative constitutional law and abstract ideas which are referred to while justifying the basic structure doctrine.

The conclusion shall provide that the contemporary justifications of the Malaysian basic structure doctrine by the Federal Court are unfortunately based on weak comparative law arguments rather than the more persuasive rationale for this doctrine, which can be found in the idea that certain constitutional principles have to be protected because they constitute the very core of a democratic and liberal order.

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[4] Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356 (Malaysia).

[5] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (per Tengku Maimun, J., dissenting).

[6] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India).

[7] In this regard Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356, ¶ 196 (Malaysia): "*A consideration of constitutionalism in general bears out such a construction to be afforded to Article 4(1) of the FC, and thus the Constitution as a whole*." *See also* in more detail below.

THE RECENT JUSTIFICATIONS

A. THE BACKGROUND

The idea of implied limits for constitutional amendments, namely that certain basic features of a constitution cannot be modified by a Parliament having the amendment power, is an old and disputed constitutional doctrine.[8] The Supreme Court of India was the first constitutional court to adopt this doctrine with a slight majority (7:6) in its landmark *Kesavananda* judgement.[9]

In Malaysia, the situation is different, as a "*Kesavananda moment*"[10] is still missing. The Federal Court has never annulled constitutional amendments to date. Instead, the basic structure doctrine is used "only" as an interpretational device while deciding on the constitutional validity of an ordinary law[11] or interpreting constitutional amendments.[12] Moreover, in the absence of an express provision in the Malaysian Constitution,[13] the basic structure doctrine is an inherently contested idea.[14] The Malaysian

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[8] *See* regarding its origins in French and German constitutional thought at the beginning of the 20th century: Monika Polzin, *The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting*, 5 Indian L. Rev. 45 (2021); extensively on implied limits: YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (Oxford Univ. Press 2017).

[9] Kesavananda Bharati v. State of Kerala.

[10] Wilson Tze Vern Tay, *Basic Structure Revisited: The Case of Semenyih Jaya and the Defence of Fundamental Constitutional Principles in Malaysia*, 14 ASIAN J. COMP. L. 113, 143 (2019).

[11] *See* Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356 (Malaysia).

[12] Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Dearah Hulu Langat and another case, Federal Court, [2017] 3 MLJ 561, ¶¶ 61-91 (Malaysia); Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors, Federal Court, [2018] 1 MLJ 545 (Malaysia).

[13] MALAYSIA CONST.

[14] *See* discussions of the Malaysian basic structure doctrine before the recent decisions: *e.g.*, very comprehensively: Tze Vern Tay, *supra* note 10, at 113; Low Hong Ping, *The Doctrine of Unconstitutional Amendments in Malaysia: In Search of our Constitutional Identity*, 45(2) J. MALAYSIA & COMP. L. 53 (2018); Jaclyn L. Neo, *A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia,* 15 ASIAN J. OF COMP. L. 69 (2020); Hafidz Hakimi Haron, *The Doctrine of Basic Structure in Malaysia: Between the Protection of Fundamental Liberties, National Identity and Islam* (International Convention on the Basic Structure of the Constitution, 2021),

Constitution solely contains procedural requirements for constitutional amendments and imparts four different amendment procedures for the same.[15] The most important one is enshrined in Article 159, paragraph 3 of the Malaysian Constitution,[16] which provides a requirement for the adoption of a proposed constitutional amendment by at least a two-thirds majority of the total number of members in both the Houses of Malaysia's Federal Parliament[17] (**the Senate "*Dewan Negara*" and the House of Representatives "*Dewan Rakyat*"**).[18]

Therefore, it comes as little surprise that the Federal Court has rejected the basic structure doctrine in several decisions since 1977,[19] providing various justifications for the same. One core argument is that the Malaysian Constitution does not contain any express material limits, but only procedural limitations. Furthermore, it is provided that if the drafters of the Malaysian Constitution had intended to include material limits, they would have done so expressly.[20] Therefore, the courts are only allowed to

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https://oarep.usim.edu.my/jspui/bitstream/123456789/16096/1/The%20Doctrine%20of%20Basic%20Structure%20In%20Malaysia.pdf.

15 *See* Neo, *supra* note 14, at 75.

16 *Id.*

17 MALAYSIA CONST. art. 159, ¶ 3 reads as follows: "*A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.*"

18 *See* MALAYSIA CONST. art. 44.

19 *See, e.g.*, Loh Kooi Choon v. Government of Malaysia, Federal Court, [1977] 2 MLJ 187 (Malaysia); Phang Chin Hock v. Public Prosecutor, Federal Court, [1980] 1 MLJ 70 (Malaysia); Public Prosecutor v. Kok Wah Kuan, Federal Court, [2008] 1 MLJ 1, 15 (Malaysia); Goh Leong Young v. ASP Khairul Fairoz Rodzuan & Ors, Zabariah Mohd FCJ (majority), Federal Court, [2021] 5 MLRA 554 (Malaysia); Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor, Federal Court, [2021] 3 MLRA 1 (Malaysia); Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and Other Appeals, Federal Court, [2021] 3 MLRA 260 (Malaysia); Zaidi bin Kanapiah v. ASP Khairol Fairoz bin Rodzuan and other cases, Hasnah Hashim FCJ, [2021] 3 MJJ 830 (Malaysia).

20 *See, e.g.*, Phang Chin Hock v. Public Prosecutor, Federal Court, [1980] 1 MLJ 70, 72 (Malaysia); Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and Other Appeals, Federal Court, [2021] 3 MLRA 260; paras. 191 and 193 (Malaysia); see also Zaidi bin Kanapiah v. ASP Khairol Fairoz bin Rodzuan and other cases, Hasnah Hashim FCJ, [2021] 3 MJJ 830, ¶ 263 (Malaysia) citing the first judgement Loh Kooi Choon v. Government of Malaysia (1977).

strike down constitutional amendments that are not adopted in accordance with the procedural requirements as set out in the Malaysian Constitution, otherwise, it would amount to disregarding the supremacy of the Constitution contained in Article 4(1).[21]

Another line of analysis involves a comparison between the Constitutions of India and Malaysia. The key difference between both of them comes in their origins, wherein it is argued that, in contrast to the Indian Constitution of 1950, the Malaysian Constitution was not adopted by a constituent assembly and given by the people.[22] The Malaysian Constitution was instead approved by the British Parliament, the Malayan Legislative Council (the then-federal legislature) and the legislature of every Malay State after a draft of the same was agreed to by the British Government, the Malay Rulers and by the then-Alliance Government.[23] It is therefore argued that because the Malaysian Constitution was not elaborated by a constituent assembly and given by the people, the distinction between the power of the Parliament to amend the Constitution via a constituent capacity and to make ordinary laws in its legislative capacity is inapplicable.[24] The basic structure doctrine is viewed as a foreign concept that cannot be incorporated via an interpretation in the Malaysian Constitution, which in itself contains no indication that it enshrines such a doctrine.[25]

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[21] *See, e.g.*, Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and Other Appeals, Federal Court, [2021] 3 MLRA 260, ¶ 192 (Malaysia); repeated in: Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, Hasnah Hashim FCJ, [2021] 3 MJJ 830, ¶ 271 (Malaysia).

[22] Phang Chin Hock v. Public Prosecutor, Federal Court, [1980] 1 MLJ 70, 73-74 (Malaysia); repeated in Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, Hasnah Hashim FCJ, [2021] 3 MJJ 830, ¶ 268 (Malaysia).

[23] Phang Chin Hock v Public Prosecutor, Federal Court, [1980] 1 MLJ 70, 73 (Malaysia).

[24] *Id.*

[25] Very clear in Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and Other Appeals, Federal Court, [2021] 3 MLRA 260; ¶ 194: "*The basic structure concept which took root in an alien soil under a distinctly different constitution and differs from our own historical and constitutional context, should not be pressed into use in aid of interpretation of our very own FC*." Cf. already Loh Kooi Choon v. Government of Malaysia, Federal Court, [1977] 2 MLJ 187, 188-89 (Malaysia).

B. THE NEW JUSTIFICATIONS

Other decisions of the Federal Court have (sometimes) indicated a subtle support for the basic structure doctrine.[26] Finally, in 2022, the judgement written by Federal Justice Nallini Pathmanathan expressly stated, "*In this way, constitutional amendments cannot operate to change the identity of the FC itself as borne out by the express words of art. 4(1) of the FC.*"[27] (see under (i)). This judgement and a previous dissenting opinion of Chief Justice Tengku Maimun (see under (ii)) support the idea of a basic structure doctrine based on the supremacy clause in Article 4(1) ("**Art. 4(1)**"). Art. 4(1) of the Malaysian Constitution states, "*This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*"

Dhinesh Tanaphll v. Lembaga Pencegahan Jenaya 11th April, 2022 – (i)

While examining the constitutionality of Section 15B ("**S.15B**") of the Prevention of Crime Act, 1959 ("**POCA**"), an ordinary law,[28] Justice Pathmanathan argued that the Malaysian Constitution encompasses the basic structure doctrine, which can be understood as "*the constitutional principle that the basic features or basic structure of a constitution cannot be destroyed or emasculated by a constitutional amendment duly passed by Parliament in accordance with prescribed procedures …*"[29] S.15B of the POCA contains an ouster clause and limits the scope of judicial review for the decisions of the Prevention of Crime Board, an executive organ, in relation to preventive detentions. It

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[26] Cf. the obiter dictum in: Sivarasa Rasiah v. Badan Peguam Malaysia & Anor, Federal Court, [2010] 2 MLJ 333, 342 (Malaysia); alluding to the basic structure doctrine: Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Dearah Hulu Langat and another case, Federal Court, [2017] 3 MLJ 561, ¶¶ 75-91 (Malaysia); see also the review of this judgement by Tze Vern Tay, *supra* note 10; clearer statements in: Alma Nudo Atenza v. PP & Another Appeal, Federal Court, [2019] 3 MLRA 1; ¶¶ 69-74 (Malaysia) and Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors, Federal Court, [2018] 1 MLJ 545, ¶¶ 48-49, 58 and 90 (Malaysia).

[27] Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors., Federal Court, [2022] 3 MLJ 356, ¶ 195 (Malaysia).

[28] *Id.* ¶¶ 112 et seq.

[29] *Id.* ¶ 166. The Definition is the one adopted by the former Chief Justice of Singapore, the Right Honourable Dato' Seria Chan Sek Keong. (*Id.* ¶ 166).

excluded judicial scrutiny save for procedural irregularities relating to the procedural provisions in the POCA only.[30] Justice Pathmanathan argued that S.15B of the POCA is inconsistent with Art. 4(1) of the Malaysian Constitution as it prevents the scope of judicial review.[31] In order to come to this conclusion, she undertook an extensive interpretation of the supremacy clause in Art. 4(1). As the supremacy clause ensures that all laws comply with the FC, it "*also recognises, embraces and encompasses the concept of the basic structure or fundamental legal structure of the Federal Constitution*".[32]

The idea that the supremacy of the Constitution also implies implicit limits for constitutional amendments is based on three core arguments.

The first one is the well-known[33] idea that a modification or abrogation of the fundamental provisions or essential features of the Constitution would lead to the creation of "*a new Constitution*."[34] Such an amendment would be "*clearly contrary to the spirit, purpose and object of the Federal Constitution itself.* "[35]

The second line of argument is based directly on the wording of Art. 4(1). Justice Pathmanathan argues, like Chief Justice Mainum earlier (see below under II.), that the word "*law*" used in Art. 4(1) encompasses not only ordinary laws but also constitutional amendments. Amendments are introduced and enacted as federal laws adopted by the Parliament as

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[30] *Id.* ¶¶ 30-36 and ¶ 104. The Clause reads as follows: "15B(1) *There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision*." (¶ 30).

[31] *Id.* ¶ 212.

[32] *Id.* ¶ 120; *see also* ¶ 201.

[33] This argument can be found in various sources, such as *e.g.*, Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India), ¶¶ 91, 225-6, 311 (S. M. Sikri, J.); ¶ 580 (J.M Shelat & A.N. Grover, JJ); ¶¶ 1196-7, 1260 (P. Jagmohan Reddy, J.) and ¶ 1480 (H. R. Khanna, J.). *See also* the German constitutional lawyer CARL SCHMITT, VERFASSUNGSLEHRE [CONSTITUTIONAL THEORY] 104 (Dunker & Humblot 1928, repr. 2017). However, the decision does not refer to these sources.

[34] Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors., Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶¶ 125, 192.

[35] *Id.* ¶ 192.

required by Articles 159 and 160(2) of the Malaysian Constitution.[36] Art. 4(1) therefore prohibits amendments inconsistent with the Malaysian Constitution. In order to prevent the amendment provision in Article 159 from becoming nugatory, not all constitutional amendments are prohibited, but only those relating to the identity of the Constitution.[37]

The third idea is the justification of this interpretation with a reference to constitutionalism and comparative law arguments. The core argument is that the construction of Art. 4(1) as an eternity clause is required by the idea of constitutionalism.[38] To justify this outcome under the heading of "*constitutionalism*",[39] Justice Pathamanthan makes a short comparative exercise (encompassing 5 paragraphs)[40] by referring in particular to the Constitution of Germany and the works of the former German constitutional judge Dieter Grimm. This reference might be explained by the fact that Dieter Grimm had previously given a presentation (on Feb. 9, 2022) at the 12th Tun Suffian Memorial, Faculty of Law Golden Jubilee Lecture at the University of Malaya on "*Reflections and Lessons of a Constitutional Judge: Decision-Making, Law and Politics, Legitimacy and Acceptance*" [A1].[41] Justice Pathmanathan cites the work of Dieter Grimm,[42] arguing that the amending power as an intermediate power cannot enact a new constitution and refers to his statement that since the amendment power is a constituted power, there is no amendment power without limits.[43] She then refers to the express eternity clause of the German Basic Law which also incorporates substantial limits to constitutional amendments,[44] and

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[36] *Id.* ¶¶ 175-186.

[37] *Id.* ¶¶ 189-195.

[38] *Id.* ¶ 196. She wrote: "*A consideration of constitutionalism in general bears out such a construction to be afforded to Article 4(1) of the FC, and thus the Constitution as a whole.*"

[39] *Id.* ¶¶ 196-200.

[40] *Id.*

[41] Available at: Faculty of Law, Univisiti Malaya, The 12th Tun Suffian Memorial - Faculty of Law Golden Jubilee Lecture, YOUTUBE (Feb. 9, 2022), https://www.youtube.com/watch?v=tHqQm23g1NA.

[42] Dhinesh a/l Tanaphll v. Lembaga Pencegahan Jenayah & Ors., Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶ 196. She refers to Dieter Grimm, *Constituent Power and Limits of Constitutional Amendments*, 2 NOMOS. LE ATTUALITÀ NEL DIRITTO (2016).

[43] Dhinesh a/l Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶ 197.

[44] The German eternity clause in Article 79 ¶ 3 of the German Basic law reads as follows: "(3) *Amendments to this Basic Law affecting the division of the Federation into Länder, their*

cites Grimm's statement that the clause limits the amendment power in the interest of democracy.[45]

In the next paragraph she states, without giving further explanations, that the supremacy clause in Art. 4(1) is the "*eternity clause*" of the Malaysian Constitution and "*...ensures that the fundamental identity and the guarantees offered by the FC are not removed or abrogated.*"[46] Therefore, there is no need to adopt the basic structure doctrine of the Supreme Court of India, as the Malaysian Constitution itself contains Art. 4(1) that protects its identity.[47] The underlying idea here seems to be that every constitution either has express limits for constitutional amendments or implied limits. Justice Pathamanthan makes the distinction between constitutions with eternity clauses, including the Malaysian Constitution, and countries with constitutions without eternity clauses that develop the idea of implied limitations.[48]

Zaidi bin Kanapiah v. ASP Khairul Rodzuan 27th April 2021[49] – (ii)

The forerunner of Justice Pathmanathan's decision was the dissenting opinion of Chief Justice Tengu Maimun on April 27, 2021. The Chief Justice argued that the Malaysian basic structure doctrine is engrained in Art. 4(1). Art. 4(1) incorporates the principle of constitutional supremacy that also includes the basic structure doctrine given by the founding fathers of the Constitution. Therefore, there is no need to adopt the Indian basic structure doctrine.[50]

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participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." *See* English Translation of the German Basic Law at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0415.

[45] Dhinesh a/l Tanaphll v. Lembaga Pencegahan Jenayah & Ors., Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶ 198.

[46] *Id.* ¶ 199.

[47] *Id.* ¶ 200.

[48] *Id.* ¶¶ 199, 200.

[49] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (Tengku Maimun, J., dissenting).

[50] *Id.* ¶ 94. *See also* ¶ 102.

The dissenting opinion of Chief Justice Tengku Maimun is particularly based on the idea that the basic structure doctrine can be justified by the work of the Austrian constitutional jurist Hans Kelsen. She starts her justification with the assumption that the doctrine should rather be attributed to Kelsen and his idea of a "*Grundnorm*" developed in the book "*Pure Theory of Law*" than to the Supreme Court of India.[51] Kelsen lived at a time "*when the many States in Europe gained independence and started drafting their own written constitutions.*"[52] She directly links the basic structure doctrine to the works of Kelsen. She argues that according to Kelsen's theory, the "*Grundnorm*" is the "*First Constitution*" and is presupposed to be binding as the basis for validating all laws including the Constitution.[53] Therefore, according to her, "*changing the basic features of the FC would result in a change of the Grundnorm or the first Constitution of this country and thus effectively eliminate the very foundation of Malaysia itself.*"[54] This assessment is regarded as the "*thrust of*" the basic structure doctrine.[55]

The arguments provided by Chief Justice Maimun, like Justice Pathmanathan, are based on a formal reading of the text of the Malaysian Constitution, namely that Art. 4(1) is not limited to ordinary laws but also encompasses constitutional amendments.[56] The core idea is that the wording "*any law*" in Art. 4(1) indicates that it is more broadly defined than the words "*federal law*" in the amendment provisions in Art. 159 and that Art. 4(1) therefore also covers constitutional amendments.[57] Furthermore, another argument is that Art. 4(1) uses the term "*this Constitution*" and Art. 159 of the FC uses the words "*provisions of this Constitution*", implying that "*this Constitution*" is suggesting "*something wider.*"[58]

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[51] *Id.* ¶ 68.

[52] *Id.* ¶ 69.

[53] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (Tengku Maimun, J., dissenting) ¶ 71, she cites: Julius Cohen, *The Political Element in Legal Theory: A Look at Kelsen's Pure Theory*, 88 YALE L.J. 1, 12 (1978).

[54] *Id.* ¶ 72.

[55] *Id.* ¶ 72.

[56] *Id.* ¶¶ 79-85.

[57] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (Tengku Maimun, J., dissenting) ¶ 82.

[58] *Id.* ¶ 84.

It is further argued by Chief Justice Maimun that the formulation "*this Constitution is the supreme law of the Federation*" relates to the concept of constitutionalism, which validates the Malaysian Constitution.[59] She cites the works of Larry Baker, "*From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*" that "*Constitutionalism (…) might be understood as a systematisation of thinking about constitutions grounded in the development since the mid-20th century of supranational normative systems against which constitutions are legitimated.*"[60] Her conclusion is that the drafters of the Malaysian Constitution "*had in mind certain basic principles which ought to form the bedrock of this country and that under art 159(1), Parliament may amend certain provisions of it without amending the central tenets of 'this Constitution'. This is a safeguard as couched in the wide language of the first limb of art. 4(1) to cast away any attempt to cause the FC to implode on itself by abuse of the legislative process*."[61] The surprising conclusion is that Article 4(1) contains substantially the same principles as the eternity clause of the German Basic Law.[62]

C. CONCLUSION

The aforementioned observations justify, quite uniquely, that the Malaysian basic structure doctrine is in essence a required component of the principle of constitutional supremacy enshrined in Art. 4(1) of the Malaysian Constitution. This new line of reasoning distinguishes the Malaysian doctrine from the earlier classical theoretical explanations of the basic structure doctrine. *First*, it is completely different from the theoretical justification advanced by the German constitutional lawyer Carl Schmitt that there is a distinction between an amendment and constituent power and his idea of an almighty and mystical constituent power.[63] Furthermore, the recent Malaysian approach has no similarities with the related rule of law idea that the parliament, through its amending power, should not have

[59] *Id.* ¶¶ 86-7.
[60] *Id.* ¶ 87.
[61] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (Tengku Maimun, J., dissenting) ¶ 88.
[62] *Id.*
[63] *See* in detail below under "Constitutional Individuality and Constitutionalism", section B.

the power to destroy the constitution, as this power ultimately lies with the people acting through a constituent assembly.[64]

Second, even though it has some closeness with the theoretical justification that certain provisions are unamendable because they incorporate fundamental, natural law principles essential for a democratic constitutional state,[65] the Malaysian approach is quite unique. The justification is less concerned with the preservation of judicial independence as a specific natural law or fundamental principle to be identified in the Malaysian Constitution but is primarily guided by the core idea that the idea of a constitution and its supremacy itself necessitates the existence of the basic structure doctrine. This approach is accompanied by a special method of constitutional interpretation. Both the judges refer to foreign sources, in particular the German Constitution and/or the work of Hans Kelsen. However, they do not use these sources as particular examples but mostly as proof of a more abstract argument, that the basic structure doctrine is justified by the abstract and general idea of constitutionalism and the idea of a constitution. Chief Justice Tengku Maimun uses Kelsen's idea of a "*Grundnorm*" as the real basis of the basic structure doctrine[66] and the abstract idea of constitutionalism in order to determine that the drafters intended to incorporate the basic structure in Art. 4(1).[67] Justice Pathamanathan argues that constitutionalism, exemplified in particular by German constitutional law, is further proof that the supremacy clause contains the basic structure doctrine. She implies that every constitution has either express or implicit limits for constitutional amendments. It is observed that an examination and

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[64] *See, e.g.*, Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India), ¶¶ 570-71 (Shelat and Grover, JJ.). The idea that the amendment power should be distinguished from the legislative branch, i.e., the Parliament and should lie within a special constitutional organ (such as a constitutional assembly) was developed in particular in French constitutional thought by EMMANUEL JOSEPH SIEYÈS, QU'EST-CE QUE LE TIERS ÉTAT? 60 (Édition du Boucher 1789, repr. 2002). *See* extensively from a more modern perspective ROZNAI, *supra* note 8, at ¶¶ 103-175.

[65] *See* in particular the work of Maurice Hauriou, *see* in detail note 123.

[66] *See* above "The New Justifications", section B (ii).

[67] *See* above "The New Justifications", section B (ii).

discussion of the Indian basic structure doctrine is missing and instead, any similarities with the Indian basic structure doctrine are rejected.[68]

This new line of argumentation is also different from earlier pronouncements of the Federal Court that were in favour of the basic structure doctrine.[69] The main line of reasoning provided in particular by Federal Court Justices Tan Sri Zainun Ali and Richard Malanjum was that judicial review and the separation of powers are sacrosanct and of utmost importance and have therefore been protected as such and included in the basic structure doctrine.[70] Here, Federal Court Justice Tan Sri Zainun Ali also refers to the *Kesavananda* judgement for highlighting that judicial review and the idea of separation of powers are indispensable.[71]

CONSTITUTIONAL INDIVIDUALITY AND CONSTITUTIONALISM

The Austrian-German ideas in the justification of the Malaysian Basic Structure Doctrine are rather surprising, as the German eternity clause protects specific norms of the German Basic Law (see under A.) and the Austrian jurist Hans Kelsen was opposed to implicit constitutional limits (see under B.). Finally, the most interesting twist is that the important similarity between German and Malaysian constitutional thought, namely that both countries experienced a constitutional dispute on whether implicit limits for constitutional amendments exist, is blended out in the recent justifications (see under C.).

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[68] *See* above "The New Justifications", section B (i). Differently the previous justification in Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors., Federal Court, [2018] 1 MLJ 545 (Malaysia), ¶¶ 48-9.

[69] *Supra* note 26.

[70] Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Dearah Hulu Langat and another case, [2017] 3 MLJ 561 (Malaysia), ¶¶ 75-91, in particular ¶¶ 87-90; Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors., Federal Court, [2018] 1 MLJ 545 (Malaysia), ¶¶ 48-51, 58; Alma Nudo Atenza v. PP & Another Appeal, [2019] 3 MLRA 1 (Malaysia), ¶¶ 72-4.

[71] Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Dearah Hulu Langat and another case, [2017] 3 MLJ 561 (Malaysia), ¶ 87; Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors., Federal Court, [2018] 1 MLJ 545 (Malaysia), ¶ 48.

A. THE CONSTITUTIONAL INDIVIDUALITY OF THE GERMAN ETERNITY CLAUSE

The German eternity clause, which is referred to in the recent justification[72] of the Malaysian basic structure doctrine has a variety of individual features that are hard to reconcile with the idea that it can be incorporated into the supremacy clause of the Malaysian Constitution.

The first ground is that the content of the German eternity clause is specifically related to the German Constitution, the current German Basic Law that entered into force in 1948.[73] The German eternity clause in Art. 79 para. 3 states, "*amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible*". Art. 1 of the Basic Law enshrines the protection of human dignity (para. 1), the general acknowledgement of the German people of inviolable and inalienable human rights as the basis of every community, of peace and justice in the world (para. 2) and that the basic rights of the German Basic Law directly bind the legislature, the executive and the judiciary (para. 3). Art. 20 of the Basic Law contains the constitutional principles regarding state organisation. It states that Germany is a democratic and social federal state (para. 1); that the state's authority is derived from the people, exercised through elections, votes, and specific legislative, executive, and judicial bodies (para. 2). Finally, it incorporates the legality principle and constitutional supremacy, namely that the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice (para. 3).

The second ground is that the German eternity clause is justified with different theoretical ideas but never with the argument that it is a necessary component of the principle of constitutional supremacy. Several constitutional jurists,[74] as well as the German constitutional court, argue

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[72] Dhinesh a/l Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶ 197; Article 79 ¶ 3 of the German Basic law.

[73] The official English translation of the German Basic Law can be found here: https://www.gesetze-im-internet.de/englisch_gg/.

[74] *See*, *e.g.*, DIETRICH MURSWIEK, DIE VERFASSUNGGEBENDE GEWALT NACH DEM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [THE CONSTITUENT POWER UNDER THE BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY] 97 et seq. (Duncker

that the eternity clause encapsulates the general principle that the constituted powers cannot decide upon the identity of the Constitution and that this is a decision that is reserved for the constituent power, which is the people. This became particularly clear in the famous Lisbon judgement of June 30, 2009. Here, the German Constitutional Court held:

> "*From the perspective of the principle of democracy, the violation of the constitutional identity codified in article 79.3 of the Basic Law [the German eternity clause] is at the same time an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential pursuant to article 79.3 of the Basic Law. The Federal Constitutional Court monitors this*."[75]

Only the constituent power of the people can, to the extent that it is not limited by natural law principles,[76] determine the constitutional identity and provide the people with a new Constitution. However, another perspective regards Art. 79 para. 3 as a norm that protects certain norms and values as such because they are of paramount importance for the existence of a democratic and constitutional order.[77] This approach was eminent during

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& Humblot 1978); Peter Badura, *§ 270 Verfassungsänderung, Verfassungswandel und Verfassungsgewohnheitsrecht* [*Constitutional Amendment, Constitutional Change and Constitutional Customary Law*], *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, Vol. XII ¶¶ 20-1 (Josef Isensee & Paul Kirchhoff eds., C.F. Müller, 3rd ed., 2014).

[75] BVerfGE 123, 276 (343), Lisbon Judgement (Germany), ¶ 218, the official English translation of the judgement is available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

[76] BVerfGE 123, 276 (343), Lisbon Judgement (Germany), ¶ 217: "*It may remain open whether, due to the universal nature of dignity, freedom and equality alone, this commitment even applies to the constituent power, i.e. to the case that the German people, in free self-determination, but in a continuity of legality to the rule of the Basic Law, gives itself a new constitution [citation omitted]. Within the order of the Basic Law, the structural principles of the state laid down in Article 20 of the Basic Law, i.e. democracy, the rule of law, the principle of the social state, the republic, the federal state, as well as the substance of elementary fundamental rights indispensable for the respect of human dignity are, in any case, not amenable to any amendment because of their fundamental quality.*"

[77] *See, e.g.*, MONIKA POLZIN, VERFASSUNGSIDENTITÄT 130-132 (Mohr Siebeck 2018).

the first draft of the German eternity clause. During the first round of drafting of the German Basic Law (the preparatory work of the Constitutional Convention on the Isle of Herrenchiemsee), material limits on constitutional amendments were proposed to protect the free and democratic order as given by natural law and to safeguard the Constitution from destruction. The draft Basic Law produced by the Constitutional Convention provided that "*[p]roposals for constitutional amendments that would abolish the liberal and democratic basic order . . . shall be inadmissible.*"[78] This idea was later articulated by Hans Nawiasky, who was a scholar of Hans Kelsen, and a law professor in Germany. Nawiasky proposed an eternity clause for the Constitution of the German land "*Bavaria*" and also took part in the first deliberations regarding the German Basic Law. He commented on the introduction of the German eternity clause in 1950,

> "*The newest development in constitutional law has led to the general insight that there are unchangeable constitutional provisions, which cannot be amended by legal means. Those provisions can only be eliminated through extra-legal force – i.e. a revolution or coup d'état – that cannot be regarded as legal. Such unamendable provisions theoretically have a higher rank than the constitution itself, as they are binding on the constitution. They can be described as the fundamental norms of a state.*"[79]

B. THE WORKS OF HANS KELSEN

Hans Kelsen opposed implied limits to constitutional amendments. His works are therefore not suitable for justifying the basic structure doctrine. This becomes evident in light of the famous German constitutional

[78] Translation provided by the author. The draft Basic Law adopted by the Constitutional Convention on the Isle of Herrenchiemsee is reprinted in: *Bericht über den Verfassungskonvent auf Herrenchiemsee vom 10. bis 23. August 1948*, in DER PARLAMENTARISCHE RAT: 1948 – 1949, AKTEN UND PROTOKOLLE. VOL. 2: DER VERFASSUNGSKONVENT AUF HERRENCHIEMSEE 504, 558 (Deutscher Bundestag/Bundesarchiv eds., Harald Boldt Verlag 1981).

[79] HANS NAWIASKY, DIE GRUNDGEDANKEN DES GRUNDGESETZES FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [THE BASIC IDEAS OF THE CONSTITUTION FOR THE FEDERAL REPUBLIC OF GERMANY] 123 (Kohlhammer 1950).

dispute[80] that took place in the 1920s. Like today in Malaysia, German constitutional jurists discussed whether the then-German Constitution, the Weimar Constitution, contained implicit limits for constitutional amendments. The amendment provision in Article 76 of the Weimar Constitution stated that the constitution could be amended through the legislative process.[81] Constitutional amendments needed a two-thirds majority in the Reichstag (the parliamentary assembly) and the Reichsrat (the assembly of the representatives of the Länder, which however, only had the right to an objection) or the majority of the votes in a referendum.[82] Based on Art. 76, the majority of constitutional lawyers during the Weimar Republic (e.g., Anschütz[83] and Thoma[84])[85] argued that there were no material limits on constitutional amendments. They based their arguments

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[80] Christoph Gusy, *Demokratische Verfassungsänderung: Selbstschutz oder Selbstpreisgabe der Verfassung* [*Democratic constitutional change: Self-protection or self-surrender of the constitution*], 20 DER STAAT 159, 159-60 (Supp. 2012).

[81] WEIMAR CONST. art. 76 reads as follows: "*The Constitution can be amended via legislation. However, a decision of the Reichstag regarding the amendment of the Constitution only takes effect when two-thirds of those present consent. Decisions of the Reichsrat regarding amendment of the Constitution also require a two-thirds majority of the votes cast. If a constitutional amendment is concluded by initiative in response to a referendum, then the consent of the majority of enfranchised voters is required. If the Reichstag passes a constitutional change against the objection of the Reichsrat, the President is not permitted to promulgate this statute if the Reichsrat demands a referendum within two weeks*." The English translation of the Weimar Constitution can be found in: CARL SCHMITT, CONSTITUTIONAL THEORY 421 (Jeffrey Seitzer trans., orig. publ. 1928, Duke Univ. Press Books 2008).

[82] This part is based on previous publications, in particular Monika Polzin, *Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law*, 14 IN'TL J. CONST. L. 411, 419-421 (2016); Polzin, *supra* note 8, at 46-51.

[83] GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHES, KOMMENTAR FÜR WISSENSCHAFT UND PRAXIS [THE CONSTITUTION OF THE GERMAN REICH – COMMENTARY FOR ACADEMICS AND PRACTITIONERS], 401-06 on Article 76 (Verlag von Georg Stilke, 14th ed., 1933).

[84] *E.g.*, Richard Thoma, *§16 Das Reich als Demokratie* [*The Reich as a Democracy*], *in* HANDBUCH DES DEUTSCHEN STAATSRECHTS VOL. 1 at 186, 199 (Richard Thoma & Gerhard Anschütz eds., Mohr Verlag 1930).

[85] Other proponents of this view were, *inter alia*, SIGMUND JESELSOHN, BEGRIFF, ARTEN UND GRENZEN DER VERFASSUNGSÄNDERUNG [CONCEPT, MODES AND LIMITS OF CONSTITUTIONAL AMENDMENTS] 62–64 (especially at 62) (1929); Margit Kraft Fuchs, *Prinzipielle Bemerkungen zu Carl Schmitts Verfassungslehre* [*Principle Remarks on Carl Schmitt's Constitutional Theory*], 12 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [ZÖR] 511, 532 (1930).

on the wording of Art. 76 itself and on the theoretical assumption that the Reichstag (the then-parliamentary assembly) was both the legislature and constitution-making body.[86] A different approach was advanced by the well-known theory of Carl Schmitt, who justified material limits on constitutional amendments according to his idea of an almighty constituent power existing outside the constitution and not subject to any legal regulations. Schmitt derived his theory of implied limits on constitutional amendments from the idea that the constituent power was the basis for all powers ("*Grundlage aller Gewalten*").[87] He argued that the constituent power was a legal entity that existed outside, or alternatively alongside, a Constitution. The will of this almighty constituent power (which could either be the people or the monarch)[88] was the reason for the existence and validity of a Constitution.[89] Only the constituent power itself was able to decide on fundamental questions relating to the "*manner and form of its own political existence*" ("*Art und Form der eigenen politischen Existenz*").[90] These fundamental decisions, such as the form of government, the introduction of fundamental rights, the separation of powers and so on, formed the "*constitution in its positive sense*" ("*Verfassung im positiven Sinn*"), which had to be distinguished from the written Constitution.[91] According to this distinction, the then-German Constitution of 1919 consisted of norms that incorporated fundamental decisions, which made up the "*real Constitution*", and further, less important norms that were not part of the "real Constitution", and that could be described as being only "*constitutional laws*" ("*Verfassungsgesetze*").[92] Schmitt further argued that under the amendment provisions as provided by Art. 76[93] of the Weimar Constitution, only such provisions which constituted constitutional laws could be amended by the amending power as a constituted power ("*pouvoir constitué*").[94] The amending power was not permitted to change those norms that made up the Constitution in the material sense. Those provisions

86 ANSCHÜTZ, *supra* note 83, at 401.
87 SCHMITT, *supra* note 33, at 77.
88 *Id.* at 23, 75 et seq.
89 *Id.* at *e.g.*, 9, 75-6.
90 *Id.* at 76.
91 *Id.* at 21.
92 *Id.* at 20 et seq. 76 and 104.
93 WEIMAR CONST. art. 76. *See also* SCHMITT, *supra* note 33.
94 SCHMITT, *supra* note 33, at 101-2.

could only be amended or altered by the constituent power. In relation to the Weimar Constitution, this constituent power was the people.[95] Schmitt wrote,

> "*A competence given only by a constitutional law to amend the constitution means that one or several constitutional laws can be changed, but only on the condition that the identity and continuity of the constitution as a whole are preserved.*"[96]

However, Schmitt did not specify how the people could act as the constituent power. The use of the constituent power was not and could not be subject to a legal process.[97] Neither a real constitution nor a constitutional law could regulate the use of the people's constituent power as the basis for all powers.[98] The people could instead use this constituent power "*through any recognizable or visible expression of direct will that is directed towards deciding on the manner and form of existence of a political union.*"[99]

Kelsen, along with the majority of German constitutional jurists at that time,[100] did not recognise the idea of an almighty constituent power outside the constitution. The arbitrary and dangerous approach of Schmitt which can be used to overcome any constitutional provision with the argument that there is a different will of a non-tangible and almighty constituent power was rejected. Instead, Kelsen adopted a rule of *law-based* approach and regarded the constituent power, in contrast to the ordinary legislative branch, as a special constitutional organ (for example, a special constituent assembly) that had the authority to amend the Constitution. Kelsen wrote

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[95] *Id.* at 27, 105 and 177-8.

[96] *Id.* at 103. The German original text reads as follows: "*Die Grenzen der Befugnis zur Verfassungsänderungen ergeben sich aus dem richtig erkannten Begriff der Verfassungsänderung. Eine durch verfassungsgesetzliche Normierung erteilte Befugnis, die ‚Verfassung zu ändern', bedeutet, daß einzelne oder mehrere verfassungsgesetzliche Regelungen ersetzt werden können, aber nur unter der Voraussetzung, daß Identität und Kontinuität der Verfassung als eines Ganzen gewahrt bleiben*." Translation by the author.

[97] *Id.* at 82 and 84.

[98] *Id.* at 79.

[99] *Id.* at 82. The German original text reads as follows: "*durch irgendeinen erkennbaren Ausdruck seines unmittelbaren Gesamtwillens, der auf eine Entscheidung über Art und Form der Existenz der politischen Einheit gerichtet ist.*" Translation by the author.

[100] Nawiasky, supra note 79; Gusy, supra note 80; WEIMAR CONST. art. 76.

that some constitutions distinguished between the legislative and the constituent powers. This was the case if constitutional laws could only be amended by a special constitutional organ (such as a special assembly) and not by the ordinary legislative branch.[101] According to Kelsen, the doctrine of constituent power consisted of situations where positive law demanded special provisions, i.e., more elaborate procedures for amending certain norms either by a special majority of the legislative organ, approval by a special organ, such as a constitutional assembly, or by a referendum.[102] Kelsen emphasised that the idea that certain norms could exclusively be amended by the will of the people could only be derived from natural law.[103] In line with this positivist view, Kelsen concluded that unamendable constitutional norms (which he regarded rather sceptically) exist if a constitution contained an express provision declaring the whole constitution or certain norms eternal.[104]

Finally, his theoretical works on the "*Grundnorm*" cannot be used in order to justify implicit limits for constitutional amendments. Kelsen developed his theory of a "*Grundnorm*" for the sole reason to explain the validity of a constitution.[105] His theory is not concerned with the question of implied limits for constitutional amendments.[106] Rather, his remarks in his work on the pure theory of law confirm his positivist view that if a constitution does not contain an express eternity clause, the constitution can be amended in accordance with the procedural norms.[107]

C. CONSTITUTIONAL INDIVIDUALITIES AND THE MISSING COMMONALITY

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101 HANS KELSEN, ALLGEMEINE STAATSLEHRE [GENERAL THEORY OF THE STATE] 253 (Springer 1925).

102 *Id.* The German original reads as follows: "*Es kann sich bei der Lehre von dem pouvoir constituant nur um einen der positivrechtlich zu begründenden Fälle erschwerter Normänderung handeln*." Translation by the author.

103 *Id.*

104 *Id.* at 254.

105 Expressly HANS KELSEN, REINE RECHTSLEHRE [PURE THEORY OF LAW], 196-227 (Verlag Österreich, 2nd ed., 1960, repr. 2020).

106 Aptly and extensively Stephanie Chng, *The Federal Constitution of Malaysia: A Kelsenian Perspective*, 17(2) ASIAN J. OF COMP. L. 323 (2022).

107 Cf. KELSEN, *supra* note 105, in particular at 213.

As outlined, the constitutional individualities of the German eternity clause and the works of Kelsen make them doubtful examples for the current justification of the Malaysian basic structure doctrine. Kelsen was opposed to implicit limits, and the German eternity clause is a specific feature of the German constitution. However, the most obvious link between Malaysian and German constitutional thought is that both legal orders know that the existence of implied limits for constitutional amendments is not discussed. The current Constitution of Malaysia as well as the Weimar Constitution of 1919 does not contain express material limits for constitutional amendments, and the discussions in Germany in the 1920s and the 2020s in Malaysia are the same, raising questions about whether implicit material limits for constitutional amendments exist. The interesting twist here is that even though the Federal Court in recent statements refers to the current German eternity clause and German constitutional law, the Weimar dispute is not mentioned and the German and Malaysian discussions in themselves are again very different: The German conflict was sparked by anti-democratic[108] constitutional lawyer Carl Schmitt and was centred around the question of whether it is possible to read material limits into a constitution due to a certain understanding of the idea of constituent power. Namely, the idea that there exists an absolute and almighty constituent power outside the Constitution that is competent to decide about the basic features of a constitution. The Malaysian discussion is determined by the conflict about whether it is possible to have an implied eternity clause due to the principle of the supremacy of the Constitution enshrined in Article 4(1) of the Malaysian Constitution in order to protect the role of the judiciary in the separation of powers.

D. CONSTITUTIONAL INDIVIDUALITY AND CONSTITUTIONALISM

The final question of this article relates to the relationship between the constitutional individuality of the Malaysian Constitution and the use of abstract ideas of constitutionalism during constitutional interpretation.

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[108] *See, e.g.*, Carl Schmitt, *Der Führer schützt das Recht* (*The leader protects the law*), 34 DEUTSCHE JURISTEN-ZEITUNG [DJZ] 946, 947 (1943) as an example of his works during the Nazi-regime in Germany.

As already outlined, the perspective adopted by Justice Nallini Pathmanathan and Justice Tengku Maimun is particular. Their core argument is not that the Malaysian basic structure is derived from foreign sources but that it is a doctrine incorporated in the Malaysian Constitution itself and also justified by the ultimate idea of constitutionalism. The foreign sources are not used as particular examples but as proof of an even more general and abstract idea, namely that all constitutions in the end require an interdiction of amendments of their basic and core elements or their identity either by way of explicit or implicit material limits for constitutional amendments. Therefore, the core question is to what extent the abstract idea of implicit limitations for constitutional amendments can be used to justify an innovative interpretation of a constitution that itself does not contain an express provision in this regard.[109]

The first problem with abstract ideas of constitutions or constitutionalism is that they are generally disputed theoretical ideas and not absolute truths. This is also relevant to the basic structure doctrine. The basic structure doctrine is not a universally accepted doctrine,[110] but an inherently disputed one.[111] The very idea of material limits for constitutional amendments is disputed as it gives the judiciary a "*super-strong*" and in principle, an unreviewable power.[112] It increases the power of judges to the detriment of a democratic parliamentary decision.[113] Furthermore, it is debatable whether material limits are advisable as they might be overruled by factual movements for constitutional amendments.[114] Another argument is that the proponents of constitutional changes might not frame them as a new

[109] *See* the recent discussion in Kenya of the judgement of the Supreme Court of Kenya, the Hon. Attorney General v. David Ndii & Others (2022) 8 KLR (S.C.K) (Kenya) (M. K. Koome, SCJ.), available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/PETITION_NO_12_OF_2021.pdf.

[110] *See, e.g.*, Richard Albert, Malkhaz Nakashidze & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendment*s, 70 HASTINGS L. J. 639 (2019).

[111] *See also*, *e.g.*, Tze Vern Tay, *supra* note 10, at 139-140.

[112] Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 IN'TL J. OF CONST. L. 606, 611 (2015).

[113] More problems regarding the relationship to democratic decision arise if the basic structure doctrine is applied to constitutional referendums or constituent assemblies. *See generally* on the relationship between constitutionalism and democracy regarding unamendable provisions: Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L. REV. 663 (2010).

[114] KELSEN, *supra* note 101, at 254.

constitutional provision, but try to redefine the constitutional notions in their own sense in order to circumvent the limits of constitutional amendments. Furthermore, the question remains as to how to determine the basic elements of a constitution[115] and whether this competence should be a judicial one.[116] Finally, the basic structure doctrine can only be read into a constitution by way of judicial creativity disregarding the constitutional text and using arguments similar to or close to natural law. Therefore, there exist very good arguments for rejecting the basic structure doctrine as a concept of judicial interpretation and for the idea that it should rather be introduced by way of a formal constitutional amendment.[117] This is particularly true if the parliament is not the only body having the amending power, but the constitution also enshrines different amendment procedures including a constitutional referendum. A classic example is Art. 44 para. 3 of the Constitution of Austria, that states,

> "*Every total revision (Gesamtänderung) of the Federal Constitution (…), is to be submitted to a referendum (Abstimmung) by the entire nation.*"[118]

However, judges might find themselves in a particularly difficult situation if they are confronted with a constitutional amendment that would abolish or destroy core elements of a liberal constitutional order. The classic historical example is the German Enabling Act of March 24, 1933,[119] which regulated that laws can also be adopted by the executive branch and that these laws could deviate from the then-German Constitution, the Weimar Constitution of 1919.

In such an instance, recourse to the basic structure doctrine based on natural law ideas might seem justified. However, this also means that the concept of a basic structure should only be applied in the framework of democratic and liberal constitutional orders or at least if there is a hybrid

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115 Kesavananda Bharati v. State of Kerala (note 6), ¶ 949 (India).

116 Neo, *supra* note 14, at 71.

117 *See* the Hon. Attorney General v. David Ndii & Others (2022) 8 KLR ¶¶ 178-227 (S.C.K) (Kenya).

118 An English translation of the Austrian Constitution is available at: https://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf.

119 Gesetz zur Behebung der Not von Volk und Recht, Reichsgesetzblatt 1933 I p. 141.

order only with regard to democratic and liberal constitutional elements. The reason is that the ultimate purpose of the basic structure doctrine should not be the preservation of a given constitution as such, but only the protection of a democratic constitution from autocratic erosion. The basic structure doctrine has to be used restrictively and only as an instrument of last resort in order to protect the democratic polity and rule of law at the core of a constitution.[120] The reason for the strict limitation is the inherent risk of the basic structure doctrine. If it is used outside of a democratic and liberal constitution, it becomes an instrument for the protection of an autocratic order. If it is applied extensively within a liberal constitutional order or a hybrid system, it can turn into a device for judges to prevent social change and even be used to hinder a more democratic rule of law development within a state.[121]

CONCLUSION

The recent justification of the basic structure doctrine of the Federal Court is based on rather weak comparative law arguments. The recourse to German and Austrian jurisprudence is not very convincing as the German eternity clause is a particular provision of the German Constitution and Kelsen was opposed to implicit limits for constitutional amendments. Therefore, it shows clearly the risks of the use of foreign sources while interpreting a constitution as the use of comparative constitutional law is a difficult legal exercise and prone to errors.

This is unfortunate, as more convincing arguments for the basic structure doctrine exist. Such persuasive arguments can be found in particular in the idea that certain constitutional principles have to be protected as such, as they are the very core of a democratic and liberal order.[122] Such an approach is visible in earlier decisions of the Federal Court, particularly those written by Justice Tan Sri Zainun Ali that underline the utmost importance of

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120 *See also* Dixon & Landau, *supra* note 112, at 606; Akech Migai, *The Basic Structure 'Doctrine' and the Politics of Constitutional Change in Kenya: A Case of Judicial Adventurism?* to be published in: STELLENBOSCH HANDBOOK IN AFRICAN CONSTITUTIONAL LAW (Charles M. Fombad and Nico Steytler eds., Oxford Univ. Press 2023*). See also* the Hon. Attorney General v. David Ndii & Others, (2022) 8 KLR ¶ 747 (S.C.K.) (Kenya) (Ibrahim, SCJ., dissenting).

121 *See also* Dixon & Landau, *supra* note 112, at 606.

122 NAWIASKY, *supra* note 79.

judicial review and separation of powers and includes it for this very reason in the basic structure doctrine.[123]

Finally, coming back to the overall theme of the article "*And the flowers bloom everywhere the same*", the recent justification of the Malaysian basic structure doctrine is, despite its methodical shortcomings, an example of an international constitutional dialogue and an example of the legal links between our constitutional orders as well as common themes of constitutional jurists, namely, how to assure the protection of judicial independence and the separation of powers.

[123] *See* above under I.3. A similar idea can also be found in the work of Maurice Hauriou, a French constitutional lawyer. Maurice Hauriou (1856-1929) developed a structured and rule of law-based unconstitutional amendments theory rooted in a commitment to democracy in his constitutional law treatises "*Précis de Droit Constitutionnel*" and "*Précis Elémentaire de Droit Constitutional*" that were first published in 1923. Hauriou argued that certain principles are so important and essential that they have a higher rank and legitimacy than the written Constitution itself, irrespective of whether those principles are contained in the Constitution or not. He describes them as "principles that have a higher legitimacy than the text of the written constitution and that are unnecessary to be expressly embodied in the constitution. MAURICE HAURIOU, PRÉCIS ÉLÉMENTAIRE DE DROIT CONSTITUTIONNEL 81 (1st ed., Recueil Sirey 1923). *See* in more detail Polzin, *supra* note 8, 51-4.

THE OMNIPRESENCE OF POLITICAL PARTIES IN INDIA'S DEMOCRATIC LANDSCAPE: BUILDING A CASE FOR FUTURE CONSTITUTIONALISATION

RITWIKA SHARMA[1] & MAYURI GUPTA[2]

Political parties have emerged as pivots to democratic governance and democratisation. In India, parties are not only vehicles to win elections or represent politically diverse views but also a bridge between the state and its people, coordinating between public opinion and the policies of the government. Unlike other democratic institutions, parties enjoy direct and simultaneous access to the people as well as the government. Employing their relations at both ends, parties prepare 'election manifestos', which are eventually put into practice by the party that comes into power. Although state capacity is essentially exercised by the government, its functioning is equally dependent on the ideologies of the party (or parties) forming the government. Considering that India follows a Westminster-style parliamentary system of government, the influence of party organisation and ideology never fades away. Opposition parties, on their part, act as watchdogs to keep the government and its policies in check.

Although democracy is unimaginable without parties, they have remained largely unregulated in India. Constitutional theory in India has maintained an implausible silence on parties. While their initial absence from the Indian Constitution can be attributed to influences of the British and American Constitutions, no subsequent legislative interventions were made until the introduction of the anti-defection law in 1985. The Tenth Schedule (India's anti-defection law) was inserted into the Constitution by the Fifty-second Amendment Act, 1985. This law, however, only gives indirect recognition to parties, regulating (if at all) defections by individual members of any house.

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THE OMNIPRESENCE OF POLITICAL PARTIES IN INDIA'S DEMOCRATIC LANDSCAPE: BUILDING A CASE FOR FUTURE CONTITTUTIONALISATION

The primary focus of the statutory election law also continues to be individual candidates. Consequently, despite the multiple crises faced and caused by Indian political parties, a constitutional and regulatory vacuum continues with respect to them. With elections becoming alarmingly expensive, transparency in matters of party funding remains a cause for concern. Simultaneously, the absence of adequate intra-party democracy has, on certain occasions, prompted elected legislators to depart ways from the parties which fielded them as electoral candidates. Such movements have raised concerns about the efficacy of the anti-defection law, while also triggering wider conversations about enforcing discipline among political parties. Given the significant position of parties as institutions of democracy and their influential role in the exercise of state capacity, their regulation has become imperative. This article examines the role of parties in electoral democracy and their influence on democratisation and state capacity and it argues in favour of their constitutionalisation and regulation in India.

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INTRODUCTION

Historically, and especially since the end of the Second World War, political parties have remained crucial for democracies to function.[3] Simultaneously, the workings of political parties as well as interactions between them are crucial to understanding how constitutions work or do not work.[4] In Weimar Germany of the mid-to-late 1920s, the instability of the party system as well as the unfurling of its constitutional order are presumed to be the reasons for its inability to arrest the rise of fascism.[5] Most modern

[3] RUSSELL J. DALTON ET AL., POLITICAL PARTIES AND DEMOCRATIC LINKAGE: HOW PARTIES ORGANIZE DEMOCRACY, at 5-6 (2011).
[4] Cindy Skach, *Political Parties and the Constitution*, 1 THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 874, 875-876 (2012).
[5] *Id.* at 876.

democracies now witness the outsized role of political parties in representative governance, regardless of whether an electoral contest is underway. In fact, some European democracies that emerged after the Second World War, such as Spain, have explicitly identified parties as crucial instruments for the expression of "*political pluralism*".[6]

India, of course, is no different. The dance of Indian democracy relies heavily on the tune played by political parties. With six recognised national parties[7] and fifty-four recognised state parties,[8] representative governance in India relies heavily on the institution of the political party. Parties are indispensable to the functioning of the political system in a democracy, a fact that has also been acknowledged by the Supreme Court of India.[9] In recent times, however, rather paradoxically, while parties remain crucial to the working of the democratic system, they are simultaneously weakening as agents of democratic representation.[10] Political parties present a puzzle – while parties are instrumental in democratising the state and society, they are themselves marred by dwindling internal democracy.[11]

For any institution, assuming a pivotal position in a functioning democracy must come with its share of responsibilities. Other institutions in India that are crucial for the sustenance of a democratic order, such as the Parliament, the Cabinet, and the Supreme Court, find mention within the Constitution. They are products of intense deliberation among the drafters of the Constitution, with their composition and functions detailed within its text. These institutions exist within a carefully crafted constitutional scheme of

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6 Ingrid van Biezen, *Constitutionalising Party Democracy: The Constitutional Codification of Political Parties in Post-war Europe*, 42(1) BR. J. POLIT. SCI. 187, 197 (2004) ("**Biezen I**").

7 ELECTION COMMISSION OF INDIA, NO.56/2023/PPS-II (NP) https://eci.gov.in/files/file/14999-commissions-main-notification-dated-15052023-containing-list-of-national-parties-their-symbols-and-addresses/.

8 ELECTION COMMISSION OF INDIA, NO.56/2023/PPS-II (SP) https://eci.gov.in/files/file/15000-commissions-main-notification-dated-15052023-containing-list-of-state-parties-their-symbols-and-addresses-english/.

9 Desiya Murpokku Dravida Kazhagam v. Election Commission of India, (2012) 7 SCC 340 (India).

10 Biezen I, *supra* note 6, at 189. *See also* Ingrid van Biezen, *How Political Parties Shape Democracy*, UC IRVINE: CENTER FOR THE STUDY OF DEMOCRACY (2004) https://escholarship.org/uc/item/17p1m0dx ("**Biezen II**").

11 K C Suri, David Hundt & Carolyn Elliott, *Democracy, Governance and Political Parties in India: An Introduction*, 4(1) STUD. INDIA POL. 1, 6 (2016) ("**Suri I**").

checks and balances. Even the Election Commission of India ("**ECI**"), a crucial driver of the nation's democratic health, is a product of the Constitution.[12]

It may, of course, be unfair and illogical to make similar arguments for constitutionally regulating political parties. Parties are, after all, characterised as private associations formed by the coming together of voluntary individuals. Given their relationship with the state and the functions they perform, parties effectively lie at the intersection of the public-private divide. This duality of their nature and existence cannot be reason enough to fully keep political parties outside the realm of constitutionalisation, especially given the challenges they currently face as well as pose to democratic governance in India.

Political parties have been the subject of consistent analysis in electoral studies but have rarely been studied as well in constitutional and public law.[13] To that end, this article analyses the institution of political parties against the backdrop of the Constitution. The first part of this article begins with a description of the current scheme of the Constitution and the election laws in force and how they deal with political parties. This analysis is crucial to understanding who or what these laws intend to regulate – the conduct of individual candidates or the functioning of political parties. Following that, the second part delves into the role of political parties in democratic governance in India. Parties, the ones in power as well as the ones outside it, are pivotal to governance and policy-making in India. In a parliamentary system, the opposition serves as a watchdog by constructively criticising the policies and decisions of the government, both inside and outside of the Parliament, and holding the government responsible for its actions.[14] Thus, in many ways, they are at the fulcrum of

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12 INDIA CONST. art. 324.

13 Mobrand rues the absence of political parties from studies in public law in Asia. *See* Erik Mobrand, *Constitutionalisation of Political Parties in East and Southeast Asian Democracies* (NUS Centre for Asian Legal Studies, Working Paper No. 18/05, 2018), https://law.nus.edu.sg/wp-content/uploads/2020/04/CALS-WPS-1805.pdf.

14 Devandra Kumar, *Role of Opposition in a Parliamentary Democracy*, 75(1) INDIAN J. POLIT. SCI. 165, 166-167 (2014).

how democracy is brought to life. An institution as crucial to democracy as a political party must carve a space for itself in the Constitution. The third part deals with the issue of constitutionalisation head-on. It starts with a comparative analysis of how certain European and Asian constitutions approach political parties. This part ends with certain principles that can throw a guiding light on how India can consider constitutionalising political parties. The article ends with a conclusion which summarises the findings and suggestions.

STATUS OF POLITICAL PARTY REGULATION IN INDIA

It would be naïve to think that political parties have been inadvertently left outside the purview of modern constitutional law, or beyond regulation generally. As mentioned earlier, parties inherently lie at the intersection of private law and public law. Despite being private associations formed by the voluntary coming together of individuals, parties can be categorised as a "*public utility*", owing to the functions they perform.[15] Consequently, parties continue to get pulled in multiple directions. For instance, as voluntary associations, parties remain entitled to certain freedoms, but simultaneously, their special ties with the state open them up to a certain degree of regulation.[16] Recent academic scholarship has been geared towards identifying and conceptualising political parties as quasi-public bodies, primarily because of their closeness with the state.[17] Needless to say, the extent of parties' roles in the state's performance of its functions has expanded over the decades.

Given the backdrop concerning political parties, it is imperative to glean over the scheme of regulatory framework — both constitutional and legislative — that political parties are currently subject to. This part commences with a brief description of what transpired in the Constituent

[15] Biezen II*, supra* note 10, at 2.

[16] Mobrand*, supra* note 13, at 15.

[17] For a general discussion on this theme, *see* Udit Bhatia, *What's the Party Like: The Status of the Political Party in Anti-Defection Jurisdictions*, 40(3) LAW & PHILOS. 305, 305-334 (2021); Udit Bhatia & Fabio Wolkenstein, *Freedom of Speech Within Political Parties*, 13(4) EPSR 431, 431-448 (2021).

Assembly when political parties came up for discussion and is followed by a discussion of relevant constitutional and statutory provisions.

A. THE CONSTITUENT ASSEMBLY — WHERE DID THEY LAND ON POLITICAL PARTIES?

As mentioned earlier, after the Second World War, several nations recognised the relevance of political parties as vehicles of democratic governance and made express provisions in their constitutions concerning political parties.[18] In fact, several European, Asian, and African Constitutions expressly mention parties in the text of their constitutions.[19] Parties existed in India at the time of Independence — in fact, India experienced elections contested along party lines even before the Constituent Assembly was formed.[20] Thus, when the making of our Constitution began, the Constitution framers were aware of both the significance of political parties in a constitutional democracy as well as the intersection of political dynamics and constitutional arrangements.[21] Political parties were mentioned several times in the Constituent Assembly, some instances of which merit attention.

Aradhya Sethia, a doctoral candidate at the University of Cambridge, has helpfully charted a constitutional biography of political parties.[22] Sethia's work references a statement by Dr. Sachchidananda Sinha (the then-Provisional Chairman of the Constituent Assembly), which traced the

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[18] Biezen II, *supra* note 10, at 1.

[19] *See* Biezen II*, supra* note 10; *see also* Mobrand*, supra* note 13.

[20] Indian National Congress, All India Muslim League, and All India Hindu Mahasabha were the three prominent political parties at the time of independence. Pre-independence elections to provincial assemblies in 1935 and 1946 were contested on party lines. Although elections were contested on party tickets before 1935 also, partisanship became more pronounced after the 1935 election. *See* A. Avasthi, *Political Parties in India*, 12(1) INDIAN J. POLIT. SCI. 6, 6–12 (1951); William Vanderbok & Richard Sisson, *Parties and Electorates from 'Raj' to 'Swaraj': A Historical Analysis of Electoral Behavior in Late Colonial and Early Independent India,* 12(2) SOC. SCI. HIST. 121, 121-142 (1988); Aradhya Sethia, *Where's the Party? Towards a Constitutional Biography of Political Parties*, 3(1) IND. L. REV. 1, 25 (2019).

[21] Sethia, *supra* note 20, at 26.

[22] Sethia, *supra* note 20.

legitimacy of the Assembly to its acceptance by political parties. In his opening statement at the first meeting of the Assembly, Dr. Sinha stated:

> "*...the idea of a Constituent Assembly, as the only direct means for the framing of a constitution in this country, came to be entertained and accepted by the two major political parties in 1940.*"[23]

The framers of the Indian Constitution were influenced by the prevailing historical trend in the constitutions of many common law democracies, such as the United States of America ("**USA**") and Great Britain, that considered the rise of large political parties undesirable. This becomes evident from the mentions of the American and British systems on several occasions in the Constituent Assembly Debates.[24] While discussing the principle of separation of powers in the Assembly, K. Hanumanthaiya voiced his concerns on how political parties have altered the actual functioning of the American Constitution. He noted how the party system, dominated by two parties, had softened the rigour of the separation of powers (between the governmental organs).[25] So, despite the American Constitution advocating for a strict separation of powers, the working of the party system irons out potential conflicts that may arise between the three branches of government.[26] Essentially, Hanumanthaiya alluded to the fact that the strict separation principle in the USA, which was meant to keep the different governmental branches in check, can get undone by the practical functioning of political parties. If the same party is in majority in the executive as well as the legislature in the USA, their conflicts may get resolved at their respective party meetings, thereby reducing the scope of inter-branch conflict.[27] Needless to say, political parties and their conduct are crucial in determining the workings of any constitution itself.

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[23] 1, LOK SABHA SECRETARIAT, CONSTITUTIONAL ASSEMBLY DEBATES, DEC. 09, 1946 *speech by* SACHIDANANDA SINHA , www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-09.

[24] 7 LOK SABHA SECRETARIAT, CONSTITUTIONAL ASSEMBLY DEBATES, DEC. 10, 1946, https://www.constitutionofindia.net/debates/10-dec-1948/.

[25] 7 LOK SABHA SECRETARIAT, CONSTITUTIONAL ASSEMBLY DEBATES, DEC. 10, 1946 *speech by* K. HANUMANTHAIYA, https://www.constitutionofindia.net/debates/10-dec-1948/.

[26] *Id.*

[27] *Id.*

Further, recognising the relevance of political parties, Dr. B.R. Ambedkar, Chairman of the Drafting Committee of the Constitution, in his concluding remarks at the Assembly, distinctly stated that the working of the organs of the state depends on the people and the political parties they will set up.[28]

In the end, however, the original text of the Constitution maintained silence on political parties and did not carry any provision for regulating them or laying down principles for their composition.

However, the existence of political parties was implicit in the nature of democratic government, which India had adopted under the Constitution.[29] Elections in India were always fought on party lines.[30] Why political parties found no mention in the constitutional text has remained difficult to answer.

The non-recognition of political parties in our constitutional text is now being taken up with curiosity due to the significance of the Constitution in creating a basic structure within which the political system of the country operates.[31]

B. TRACING POLITICAL PARTIES IN THE CONSTITUTION

Dr. Tarunabh Khaitan, in his analysis of political parties against constitutional theory, emphasises on the normative distinction between "*big-C*" constitutional codes and "*small-c*" constitutional statutes.[32] In common parlance, while the big-C constitution refers to the formal, written

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[28] 12 Lok Sabha Secretariat, Constitutional assembly debates, Nov. 25, 1949 *speech by* Dr. B.R. Ambedkar, www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25.

[29] Kanhiya Lal Omar v. R. K. Trivedi and Ors., (1985) 4 SCC 628 (India).

[30] V.S. RAMA DEVI & S.K. MENDIRATTA, HOW INDIA VOTES: ELECTION LAWS, PRACTICE AND PROCEDURE 443 (3rd ed. 2013).

[31] ANIKA GAUJA, POLITICAL PARTIES AND ELECTIONS – LEGISLATING FOR REPRESENTATIVE DEMOCRACY 28 (1st ed. 2016).

[32] Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73(1) CURRENT LEGAL PROS. 89, 90 (2020).

constitution of a nation, the small-c refers to the other sources of constitutional law, such as conventions, judicial precedents, constitutional statutes, and the like.[33] Although political parties emerged as prominent players in Indian polity, they found no mention in the Constitution (or the big-C constitutional code) of India.

In other words, political parties remained "*constitutional externalities*"[34] in India until the provisions regulating political defections were added as the Tenth Schedule to the Constitution in 1985.[35] The anti-defection law, introduced through the Constitution (Fifty-second Amendment) Act, 1985, made an incidental reference to political parties in the context of disqualification of defecting legislators[36]. The Tenth Schedule was inserted as a reaction to the rise in political defections among elected members of the Parliament and members of state legislatures.[37] In 1967, the Parliament set up a "*Committee on Defections*"[38] under the chairmanship of the then Union Home Minister, Y. V. Chavan, consisting of representatives of political parties and constitutional experts "*to consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floor in all its aspects and make recommendations in this regard.*"[39] To give effect to the recommendations of the Committee, the Tenth Schedule was inserted into the Constitution.

As per the amendment, an elected member of the House (either the House of Parliament or a State Legislature) may be disqualified in case they cross the floor in one of the following ways:

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[33] *Id.* at 91.

[34] Sethia, *supra* note 20, at 27.

[35] INDIA CONST. sch. 10.

[36] INDIA CONST. sch. 10, § 1 cl.(b), §1 cl.(c), §2, §4, §5 and §8.

[37] *Constitution (Fifty-Second Amendment) Bill,* LOK SABHA DEBATES, https://eparlib.nic.in/bitstream/123456789/319/1/lsd_08_1_30-01-1985.pdf.

[38] MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, REPORT OF THE COMMITTEE ON DEFECTIONS 1967 https://indianculture.gov.in/flipbook/2558.

[39] G.C. MALHOTRA, ANTI-DEFECTION LAW IN INDIA AND THE COMMONWEALTH 6 (1st ed. 2005).

(i) If a member of a House belonging to any political party voluntarily gives up membership of such party, or if they vote in the House against such party's whip;[40]
(ii) If a member elected as an independent candidate joins any political party after the election;[41] and
(iii) If a nominated member of a House joins any political party after the expiration of six months from their nomination.[42]

The disqualification on grounds of defection, however, was not attracted in the cases of "*split*" and "*merger*" between political parties.[43]

The anti-defection law makes only a peripheral reference to political parties to the extent of regulating defection by a sitting legislator who forms part of a party. Although the insertion of the Tenth Schedule marked the recognition of political parties under the constitutional text, it is at best an indirect recognition, granted only for the purpose of implementing the anti-defection law.[44] Thus, the amendment recognises political parties only within the framework of anti-defection, without reference to any other issue regarding their working.

The constitutional validity of the Tenth Schedule was challenged before the Supreme Court in 1992 in the case of *Kihoto Hollohan v. Zachillhu*.[45] A majority of judges in a five-judge bench of the Supreme Court upheld the validity of the anti-defection law while making pertinent observations on political parties. Speaking for the majority, Justice M.N. Venkatachaliah observed how a political party presents a programme to the electorate and sets up candidates for the election based on that programme.[46] The candidate, in turn, is elected by the electorate on the basis of the

[40] INDIA CONST. sch. 10, § 2 cl.(1)(a) and § 2 cl.(1)(b).
[41] INDIA CONST. sch. 10, § 2 cl. (2).
[42] INDIA CONST. sch. 10, § 2 cl. (3).
[43] INDIA CONST. sch. 10, § 3 & § 4. Paragraph 3, which dealt with "splits" within political parties, was omitted by the Constitution (Ninety-first Amendment) Act 2003.
[44] RAMA DEVI & MENDIRATTA, *supra* note 30, at 547.
[45] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651(India).
[46] *Id.* ¶13.

programme of that party.[47] Observations like these signified how the Tenth Schedule marked an important departure in the constitutional position on representative democracy. The anti-defection law, arguably, marked a significant shift from the candidate-centred approach to democracy in the Constitution to a party-centred approach.[48] This was evident from how the anti-defection law was written about and conceived. A rather succinct instance of this occurs in the judgement of the Bombay High Court in *Narsinghrao Gurunath Patil v. Arun Gujarathi, Speaker*.[49] When faced with competing concerns around the freedom of speech of elected legislators and the need to duly implement the Tenth Schedule, the High Court held thus:

> "*...it is clear that the freedom of speech of a member is not an absolute freedom. The electorate essentially votes for a party and the legislature mainly consists of parties. It is the party which decides whether they sit on the Government side or opposition side. It is because of the party that the members are in the House. To abstain from voting when required by the party is to suggest a degree of unreliability. To vote against the party is disloyalty. To join with others in abstaining or voting for other side smacks of conspiracy. For legislator whose party is in the Government, to vote against the Government is to vote against the party; to rebel against the Government is to leave the party….*"[50]

The National Commission to Review the Working of the Constitution also alludes to how candidates get elected on the basis of the party that gave them a ticket, and defections allow candidates to move away from that basis.[51] Essentially, the view that has come to be established is that non-allegiance to one's political party is to be penalised, even if it prejudices an individual legislator's freedom of expression. The political party is vital to the formation of a government. Individual candidates become part of the government by virtue of their membership of a certain party. Essentially,

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[47] *Id.* ¶13.

[48] Sethia, *supra* note 20, at 22.

[49] Narsinghrao Gurunath Patil v. Arun Gujarathi, Speaker, (2003) 105 (3) Bom LR 354 (India).

[50] *Id.* ¶ 67.

[51] MINISTRY OF LAW & JUSTICE, GOVERNMENT OF INDIA, Report of the National Commission to Review the Working of the Constitution, Electoral Processes and Political Parties, ¶ 4.18 https://legalaffairs.gov.in/sites/default/files/chapter%204.pdf.

their foremost allegiance is to the party they belong to, and their individual freedoms remain subservient to the interests of the party.

C. WHAT LIES OUTSIDE THE CONSTITUTION

The Representation of the People Act, 1951 ("**RP Act, 1951**"),[52] the statute governing election processes in India, was enacted much before the introduction of the Tenth Schedule in 1985. Although political parties were mentioned in several instances during the debate on the Representation of the People Bill, 1951, the statute by itself did not seek to explicitly regulate political parties.[53] This becomes clear from both the debates on the bill as well as its Statement of Objects and Reasons.[54]

Till now, all disqualifications under the RP Act, 1951, whether it be disqualification from membership of Parliament or state legislatures[55] (such as disqualification for conviction under certain offences,[56] for corrupt practices,[57] for corruption to the state,[58] for entering into a subsisting government contract[59]) or disqualification from voting[60] (on grounds of conviction for an offence and indulging in corrupt practices[61]), are aimed towards individuals. The RP Act, 1951, does not provide for the regulation

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52 The Representation of People Act, 1951, No. 42, Acts of Parliament, 1951 (India).

53 *Representation of the People (No. 2) Bill,* PARLIAMENTARY DEBATES, https://eparlib.nic.in/bitstream/123456789/760579/1/ppd_09-05-1951.pdf.

54 Statement of Objects and Reasons of the Representation of the People Bill, 1951 reads thus: "*That the Bill to provide for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt and illegal practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections, as reported by the Select Committee, be taken into consideration.*"

55 The Representation of People Act, 1951, Part II, Chapter 3, No. 42, Acts of Parliament, 1951 (India).

56 *Id.* § 8.

57 *Id.* § 8A.

58 *Id.* § 9.

59 *Id.* § 9A.

60 *Id.* Part II Chapter IV.

61 *Id.* § 11A.

of political parties for electoral malpractice or any offences,[62] or in relation to electoral finances and non-disclosure of electoral expenditure. This is reflected in Dr. Ambedkar's statement made in May 1951, while introducing the Representation of the People Bill before the Provincial Parliament, where he firmly asserted that only expenses made by political parties towards the advancement of any candidate(s) during the period of election shall become part of the election expenditure of such candidate(s).[63]

Thus, the RP Act, 1951 only regulates expenses by an individual candidate.[64] Besides a few amendments concerning the registration of political parties with the ECI,[65] entitlement to accepting contributions,[66] declaration of donations above twenty thousand rupees,[67] and allocation of election symbols,[68] political parties have primarily remained outside the realm of regulation even under the small-c codes (which primarily refer to the RP Act, 1951) in India.

On its part, the Supreme Court of India has also recognised the relevance of political parties for representative democracy.[69] It has also taken note of the current regulatory scheme that governs political parties in India. In one such case, *Kanhiya Lal Omar v. RK Trivedi*,[70] the Supreme Court noted that the existence of parties was implicit in the nature of the democratic system that India adopted.[71] The working parts of the political system, the Court

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[62] *Id.* § 123.

[63] B. R. Ambedkar, Provincial Parliament 8368-8369 (May 9, 1951) https://eparlib.nic.in/bitstream/123456789/760579/1/ppd_09-05-1951.pdf.

[64] The Representation of People Act, 1951, § 77, No. 42, Acts of Parliament, 1951 (India).

[65] *Id.* § 29A.

[66] *Id.* § 29B.

[67] *Id.* § 29C.

[68] The Election Symbols (Reservation and Allocation) Order, 1968, India Code, https://upload.indiacode.nic.in/showfile?actid=AC_CEN_3_81_00001_195143_1517807327542&type=order&filename=Election%20Symbol%20Order,%201968.pdf.

[69] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651 (India); Desiya Murpokku Dravida Kazhagam v. Election Commission of India, (2012) 7 SCC 340 (India); State NCT Delhi v. Union of India, (2018) 8 SCC 501(India).

[70] Kanhiya Lal Omar v. R. K. Trivedi and Ors., (1985) 4 SCC 628 (India).

[71] *Id.* ¶ 10.

observed, are based on "*systematised differences and unresolved conflicts*" between parties.[72]

While the Supreme Court alludes to the recognition of political parties by the Constitution, the fact remains that this recognition is in the specific (and limited) context of the anti-defection law. Also, several aspects of political party regulation have not been conclusively decided upon by the judiciary or await hearing. For instance, issues related to the regulation of political parties with respect to irrational campaign promises and the promise of distribution of electoral freebies,[73] disclosure of information under the Right to Information Act, 2005,[74] disclosure of the sources of party funding, transparency on matters concerning the sale of electoral bonds,[75] intra-party democracy,[76] and concerns surrounding the practise of bulk defections by legislators[77] are a few areas that have remained highly controversial in the absence of a strong judicial position.

Several aspects concerning political parties, which have a tremendous bearing on the sanctity of electoral democracy in the country, beg for answers. Despite serving as an inevitable link between the people and the government, political parties remain outside the purview of direct constitutional recognition in India. But why do political parties, which are voluntary associations, need regulation of some kind? The following part attempts to shed light on this concern.

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[72] *Id.* ¶ 10.

[73] Mayuri Gupta, *Freebies debate highlights the limits of judicial overreach*, THE LEAFLET (Oct. 10, 2022). https://theleaflet.in/freebies-debate-highlights-the-limits-of-judicial-overreach/.

[74] Jagdeep S Chhokar, *Saying "Political Parties Need Not Reveal Funding Sources" Kills the Spirit of RTI Act*, THE WIRE (Dec. 25, 2020) https://thewire.in/rights/political-parties-public-interest-means-reversing-gains-made-rti-act.

[75] *Id.*

[76] Indian National Congress (I) v. Institute of Social Welfare & Ors., (2002) C.A. Nos. 3320-3321(India); s*ee* Deeksha Bhardwaj, *Delhi high court seeks EC's response on plea to regulate internal party polls*, HINDUSTAN TIMES (Oct. 29, 2021) https://www.hindustantimes.com/india-news/delhi-high-court-seeks-ec-s-response-on-plea-to-regulate-internal-party-polls-101635476990841.html.

[77] Jayashankara Gowda v. Chief Secretary, (1988) ILR KAR 1005 (India).

POLITICAL PARTIES AND DEMOCRATIC GOVERNANCE

A. POLITICAL PARTIES, STATE CAPACITY AND DEMOCRATISATION

Political parties have enjoyed a prominent status in Indian representative democracy since before Independence. This status was only enhanced when the framers of the Constitution adopted a Westminster-style parliamentary government for the nation. The parliamentary form inherently furthers a party-style government.[78] The executive remains directly accountable to the legislature, with the Prime Minister being directly elected by a majority in Parliament, the Prime Minister appointing their cabinet, and members of the cabinet being selected from among members of Parliament.[79]

State capacity may be broadly understood as the ability of the state, as an institution, to preserve law and order, enact and enforce policies for welfare and development, and deliver certain necessary benefits and services to citizens.[80] Much of this function is performed through the instrumentality of the political party. It is through the agency of political parties that democratically elected governments realise their objective of governance.[81] Scholarship in political science now considers the role of political parties as between citizens and the state as a given.[82] In fact, in complex and heterogeneous societies, democratic government is made possible by political parties operating at their utmost.[83] It then becomes crucial for parties to deliver governance in a way that promotes democracy and civic well-being.[84] Some of the avowed aims of political parties can be summed up thus:

> "…*As part of this chain, political parties serve to reconcile and aggregate diverse and often conflicting interests in society; to provide an arena for citizen*

[78] Sethia, *supra* note 20, at 9.
[79] *Id.*
[80] Francesca Refsum Jensenius & Pavithra Suryanarayan, *Fragmentation and Decline in India's State Assemblies: A Review: 1967-2007* 55(5) ASIAN SURV. 862, 863 (2015).
[81] Suri I, *supra* note 11, at 1–2.
[82] GAUJA, *supra* note 31, at 30.
[83] Kate O'Regan, *Political Parties: The Missing Link in our Constitution* 1(1) S. AFR. JUD. EDUC. J. 61, 65 (2018). In this article, O'Regan writes about political parties in South Africa.
[84] Suri I, *supra* note 11, at 7.

> *participation in politics; serve as vehicles for political communication; to recruit political elites through processes of candidate selection and once elected to the legislature, perform a governance function, to represent diverse and partisan interests in society, and through the mechanism of regular general elections, act as a conduit through which the government can be held accountable…*"[85]

Political parties are central to representative democratic systems. While strictly private in the way they are composed, parties perform largely public-facing functions. They are not just a vehicle to win elections or to represent politically diverse views; they also form a bridge between the state and its people, coordinating between public opinion on one hand and the policies of the government on the other. For this, every political party has a strong local cadre that maintains continuous interaction with the public.[86] Drawing upon these interactions with the electorate, parties prepare what Khaitan calls "*policy packages*".[87] In order to form a government, they promote these policy packages to voters during their long (and oftentimes expensive and exhausting) election campaigns.[88]

Unlike any other democratic institution, political parties enjoy direct and simultaneous access to the people as well as the government. Employing their relations at both ends, political parties prepare 'election manifestos' which reflect the policies that the future government will introduce if the party is voted into power. Given that when a political party is voted into power by the people, the actions and policies of the government largely aim to implement the policy promises made in the party's election manifesto. This way, political parties strongly influence public policy and state capacity.

While state capacity is essentially exercised by the government, its functioning may be equally dependent on the ideologies of the political

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[85] GAUJA, *supra* note 31, at 23.

[86] Rahul Verma, Cadres of Political Parties: The Unsung Heroes of Democracy, OUTLOOK (May 29, 2022), https://www.outlookindia.com/magazine/national/cadres-of-political-parties-the-unsung-heroes-of-democracy-magazine-191473.

[87] Khaitan, *supra* note 32, at 95–96.

[88] *Id.*

party (or parties) forming the government. The ideologies of the government, in turn, influence the state personnel (bureaucrats) who devise and implement policies at the level of different government agencies. Economist Stuti Khemnani explains that politics fundamentally shapes the culture of bureaucracies.[89] State capacity works within a series of interdependent "*principal-agent*" problems in which one type of actor, the agent, takes actions on behalf of, or at the behest of another, the principal.[90] Public policies are selected and implemented by the state within the following principal-agent relationships: (i) between citizens and political leaders, (ii) between political leaders and public officials who lead government agencies, and (iii) between public officials and frontline providers.[91]

Khemani mentions that politicians influence the day-to-day functioning of the numerous agencies within the bureaucracy.[92] When the political culture revolves around the extraction of private benefits from public resources, it creates a culture of low performance in the bureaucracy, whereas when these political forces turn to deliver broader benefits from public resources, they improve the performance of bureaucrats.[93] An instance of this can be drawn from Bihar, a state which was infamous for its rampant lawlessness until the mid-2000s. The Janata Dal (United) contested the assembly elections in Bihar promising development, law and order, and social justice, and formed the government in 2005. This was done in coalition with the Bharatiya Janata Party ("**BJP**"), the product of which was the National Democratic Alliance ("**NDA**"). The government's first move under the leadership of Chief Minister Nitish Kumar was to enforce law and order more effectively within the state. In the next three years, Bihar's law and order took a sharp turn for the better, enabling a virtual rebuilding of the

[89] Stuti Khemani, *What is State Capacity* (World Bank Development Research Group, Policy Research Working Paper No. 8734, 2019) https://documents1.worldbank.org/curated/en/336421549909150048/pdf/WPS8734.pdf.
[90] *Id.* at 6.
[91] *Id.*
[92] *Id.* at 3.
[93] *Id.* at 6-8.

state on all fronts.[94] This rebranding was made possible by the same set of bureaucrats who ran the state before 2005.[95]

In order to attract voters and win electoral contests, there has been a growing and palpable trend among political parties to promise free schemes (including the distribution of or making available free laptops, LPG cylinders, transportation, water, and electricity, among other things) during their election campaigns, which are to be introduced by the government out of public funds.[96] Governments are formed by political parties. After an election, the political party that forms the government exercises its powers through governmental routes to fulfil its election promises. These political parties use their positions to influence public policy when they come to power and form a government in the future. Evidently, political parties play a crucial role in democratic governance through the indirect exercise of state power and state capacity in India.

While members of the winning political party remain directly responsible, those who do not make the cut also partake in governance by keeping a check on the government's powers. Even parties in opposition hold a large cadre of party workers and supporters stationed throughout the country who can continue to interact directly with the voters. These parties gather information about the concerns and demands of the electorate, which they can periodically raise before the government. Thus, all parties that campaign and prepare "*policy packages*" are in a position to provide information to state institutions. Parties that do not form government (or become part of the government) are instrumental in reducing the information gap and the information cost for other democratic institutions.[97] They do this by revealing to the concerned institutions what combination of policies will be acceptable to what percentage of the population.[98] Moreover, political parties that remain out of the government

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[94] RAJESH CHAKRABARTI & KAUSHIKI SANYAL, PUBLIC POLICY IN INDIA 11 (1st ed. 2017). Chakrabarti and Sanyal have explicitly referred to the case of Bihar.
[95] *Id.* at 11.
[96] Gupta, *supra* note 73.
[97] Khaitan, *supra* note 32, at 88.
[98] *Id.*

and form the opposition also act as watchdogs to keep a check on the government and its policies.

B. PARTIES AND THE STRUGGLE FOR SURVIVAL

As Indian electoral politics grew more complex, parties began to find it difficult to respond to the pressures of governance. Inter-party as well as intra-party dynamics impacted the working of the parliamentary system as well. Inter-party dynamics are manifested through the unit that helms a government – whether it is a single-party or a multi-party coalition. India has witnessed many coalition governments contest elections to the Lok Sabha. Since the 1990s, the Indian National Congress ("**INC**" or "**Congress**") has not won an absolute majority in the parliamentary elections, and the years following witnessed three coalitions of parties forming the government, two of which could not complete their Lok Sabha terms.[99] The National Front,[100] for instance, brought together distinct parties (including regional parties and left parties) on the basis of a common manifesto.[101] Owing to ideological incompatibility between the coalescing partners, the coalition soon unravelled, and the National Front government fell in 1991.[102] While coalition governments can offset the authoritative tendencies of single-party-dominated governments, they can also cause instability in government formation. Trends may, of course, vary given how two successive coalition governments witnessed electoral successes at the end of the 1990s – the NDA and the United Progressive Alliance ("**UPA**").

Needless to say, political parties continue to be intrinsic to representative governance in most modern democracies. However, parties in India are weakly institutionalised, which probably explains the frequent splits and mergers among them as well as politicians habitually resorting to monetary

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[99] Eswaran Sridharan, *Coalitions and Party Strategies in India's Parliamentary Federation* 33(4) PUBLIUS 135 (2003).

[100] Formation of the National Front witnessed the coming together of Janata Dal, Telugu Desam Party, Dravida Munnetra Kazhagam Party, Asom Gana Parishad Party and Indian Congress (Socialist) Party.

[101] Sridharan, *supra* note 99, at 139.

[102] DH Web Desk, *Why do third fronts at national level fail?*, DECCAN HERALD (May 24, 2019), www.deccanherald.com/lok-sabha-election-2019/why-do-third-fronts-at-national-level-fail-735456.html.

incentives for gathering electoral support.[103] On account of being in competition with each other to gain an electoral edge, political parties have attempted to gain access to state resources and distribute it to the constituencies they represent.[104] Between 1947 and 1967, the Congress dominated both politics and the party system and placed the state at the fulcrum of development. It has been argued that the Congress derived its electoral strength and patronage from the strength of the state.[105] As a developing state, the Indian government had a significant range of resources at its disposal. As a single party dominating the electoral realm, the Congress had access to goods and services that it could distribute to diverse social and political constituencies, thus keeping its electoral support base intact.[106] The relationship between the developmental state and the party system remained harmonious until the mid-1960s and early 1970s. In the decades that followed, the gradual retreat of the state from the economic sphere coincided with a crisis of political institutions, including that of political parties.[107] This was also the time when the one-party Congress dominance began to be replaced by subsequent non-Congress governments.

The rise of coalitions (and coalitional governments) has been explained through two primary themes in Indian politics – democratisation and decay.[108] As Indian voters became more assertive, India itself became more democratic and difficult to govern.[109] Simultaneously, the capacity of institutions, including political parties, to respond to these pressures dwindled.[110] Especially for parties, the trends of democratisation and decay

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103 Suri I, *supra* note 11, at 5.

104 V. Bijukumar, *Developmental State and Party Politics in India: From Consolidation to Crisis*, 9(2) REV. DEV. & CHANGE 163, 165 (2004).

105 *Id.* at 165.

106 *Id.* at 165–168.

107 *Id.*; *see also* James Manor, *Parties and the Party System,* in INDIA'S DEMOCRACY: AN ANALYSIS OF CHANGING STATE SOCIETY RELATIONS (Atul Kohli ed., 1990), as cited in K.C. Suri, *Parties Under Pressure: Political Parties in India Since Independence* 20–21 (2005) ("**Suri II**").

108 Suri II, *supra* note 107.

109 *Id.*

110 *Id.*

led to greater competition between them and increased instability, eventually leading to personalised control of parties in some instances.[111]

This crisis within political parties and the party system has manifested itself in multiple ways. For starters, elections in India have become flagrantly expensive, bringing issues concerning party funding to the forefront. Election costs in India have increased manifold, which is attributable to factors such as growth in population as well as the size of constituencies and increased competition.[112] Issues concerning the procurement of funds through anonymous sources and their disclosure have remained at the fulcrum of much controversy. In the years gone by, the majority of electoral reforms initiated by the government have sought to protect the anonymity of donors and secure the interests of political parties.[113] The electoral bonds scheme, which was introduced in 2017 and lowered the limit of anonymous donations from Rs. 20,000 to Rs. 2,000, is seen as meaningless without a cap being placed on the entire donation that can be received from anonymous sources.[114]

Another compelling concern plaguing the working of political parties in India is the constraints placed on intra-party democracy. Intra-party dynamics are instrumental to the functioning of parliamentary governments. India is one of the few democracies in the world to have adopted a legislation that penalises party-switching by elected legislators.[115] The grounds under the Tenth Schedule, based on which an elected member may be disqualified for crossing the floor, were mentioned in a previous section of this article.

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111 *Id.* at 21.

112 For a detailed account on the role and presence of money and crime in democratic processes, see MILAN VAISHNAV, WHEN CRIME PAYS: MONEY AND MUSCLE IN INDIAN POLITICS (2017).

113 SUCHINDRAN BASKAR NARAYAN & LALIT PANDA, MONEY AND ELECTIONS: NECESSARY REFORMS IN ELECTORAL FINANCE 8 (VIDHI CENTRE FOR LEGAL POLICY, 2018),https://vidhilegalpolicy.in/research/money-and-elections-necessary-reforms-in-electoral-finance/.

114 *Id.*; at 10.

115 Kenneth Janda, *Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments* 4 (The Economic and Social Research Council, Working Paper 2, 2009), www.partylaw.leidenuniv.nl/uploads/wp0209.pdf.

The purported disqualification of a member of the House on grounds of voting against the party whip has had implications for intra-party democracy. The anti-defection law seems to have muzzled free-flowing legislative debates on issues of national importance. An instance of this emerges from a vote in the Lok Sabha on Dec. 5, 2012, on the introduction of 51% foreign direct investment in multi-brand retail. Interestingly, while all members of Parliament belonging to the INC (then in power at the Centre) voted in favour of the policy, the members belonging to the BJP voted against it.[116] Possibly to not attract the ire of the anti-defection law, all members of a certain party voted identically, even if they might have had contrary views on this issue of compelling significance.

More worrisome is the fact that, despite the existence of the anti-defection law, governmental instability has persisted. Given its complicated language, the Tenth Schedule gives rise to several interpretational concerns, especially the exception it gives to mergers between political parties.[117] Paragraph 4 of the Tenth Schedule provides that when two-thirds of members of a political party agree to merge with another party, they are exempt from disqualification under the anti-defection law.[118] In its current form, this provision has become a vehicle for bulk defections and does little to ensure discipline within parties.[119] In the recent past, incumbent governments have fallen due to bulk defections by legislators in states such

116 *FDI in retail vote: SP & BSP abstain, propel UPA to victory*, THE ECONOMIC TIMES (Dec. 5, 2012), https://economictimes.indiatimes.com/news/politics-and-nation/fdi-in-retail-vote-sp-bsp-abstain-propel-upa-to-victory/articleshow/17493058.cms?from=mdr.

117 Mayuri Gupta & Ritwika Sharma, *The anti-defection law - political facts, legal fiction*, THE HINDU (Jun. 30, 2022),https://www.thehindu.com/opinion/op-ed/the-anti-defection-law-political-facts-legal-fiction/article65582855.ece.

118 INDIA CONST. sch. 10, § 4 cl. (2).

119 The Hindu Bureau, *Vice President Venkaiah Naidu bats for reform of anti-defection law*, THE HINDU (Apr. 24, 2022), https://www.thehindu.com/news/national/vice-president-m-venkaiah-naidu-bats-for-amending-anti-defection-law-to-plug-loopholes/article65351005.ece.

as Madhya Pradesh (2020),[120] Karnataka (2019),[121] and Arunachal Pradesh (2016).[122] In Madhya Pradesh, for instance, 22 Members of the Legislative Assembly from the ruling Indian National Congress party rebelled against former Chief Minister Kamal Nath in March 2020. The rebellion toppled the government at a time when the COVID-19 pandemic had just hit, bringing governance to a grinding halt in the state.[123] Owing to the exception given to mergers between political parties, legislators defecting in bulk have rarely been disqualified under the Tenth Schedule.[124]

These are only a few of the issues that impact the working of political parties as well as the health of democratic governance (which, in turn, is impacted by political parties). Is this the right place for the Constitution to intervene? How are modern democracies addressing concerns regarding political parties? The next part will delve into the same.

CONSTITUTIONALISATION AND REGULATION OF POLITICAL PARTIES

A. WHAT HAVE OTHER JURISDICTIONS BEEN UP TO?

Interesting perspectives are offered by a comparative assessment of modern democratic constitutions, vis-à-vis political parties. Article 21 of Germany's Basic Law, which deals with political parties, provides a good starting point for this discussion:[125]

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120 Scroll Staff, *Madhya Pradesh crisis: 22 MLAs resign from Assembly after Congress's Jyotiraditya Scindia exits party*, SCROLL.IN (Mar. 10, 2020), https://scroll.in/latest/955721/mp-political-crisis-jyotiraditya-scindia-quits-congress-19-other-mlas-also-resign-from-assembly.

121 Amritananda Chakravorty, *Karnataka crisis focuses on loopholes in anti-defection law*, THE LEAFLET (Jul. 16, 2019), https://theleaflet.in/karnataka-crisis-focuses-on-loopholes-in-anti-defection-law/.

122 Jagdamba Mall, *Congress Collapsed in Arunachal Pradesh*, THE MORUNG EXPRESS (Sept. 28, 2016), https://morungexpress.com/congress-collapsed-arunachal-pradesh.

123 Ritwika Sharma, The Gradual Erosion of Democracy at the Hands of the Tenth Schedule, VIDHI CENTRE FOR LEGAL POLICY (Aug. 19, 2020), https://vidhilegalpolicy.in/blog/the-gradual-erosion-of-democracy-at-the-hands-of-the-tenth-schedule/.

124 Gupta and Sharma, *supra* note 117.

125 GG, art. 21.

"*(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.*

(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.

(3) Parties that, by reason of their aims or the behaviour of their adherents, are oriented towards an undermining or abolition of the free democratic basic order or an endangerment of the existence of the Federal Republic of Germany shall be excluded from state financing. If such exclusion is determined, any favourable fiscal treatment of these parties and of payments made to those parties shall cease.

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(5) Details shall be regulated by federal laws."

While more granular regulation is reserved for federal law, the top-level principles for the organisation of political parties are housed under Article 21. Evidently, adherence to democratic principles is constitutionally non-negotiable for political parties in Germany. Equally noteworthy is how the functioning of parties is expected to be in conformity with a "free democratic basic order", and must not endanger the existence of the Federal Republic of Germany. Germany's historical experiences with the Nazi regime are understood to have necessitated the mention of political parties in its Basic Law.[126] Among other things, the Nazi regime was characterised by the centralisation of political power. Through Article 21 of the Basic Law, the democratic organisation of political parties was enforced externally.[127] Simultaneously, such constitutionalisation is also considered a means to ensure popular control of the government.[128] Ingrid van Biezen, in her work on party constitutionalisation in Europe after the Second World War, explains that the German Basic Law's insistence on

126 GAUJA, *supra* note 31, at 26; Biezen I, *supra* note 6, at 9; O'Regan, *supra* note 83, at 70.
127 GAUJA, *supra* note 31, at 26-27.
128 *Id.*

democracy for party organisations is premised on a "substantive" rather than a "procedural" conception of the term, encompassing the need for participation and representation in electoral democracy.[129]

The process of constitutional recognition for political parties gained traction in other European democracies as well, with Spain, Luxembourg, and Portugal emerging as examples of this trend. For most post-Second World War democracies, the process of constitution-making and nation-building marked a break in history. Recognition of political parties, in a way that ensured conformity to democratic norms, appears to have been a good starting point for constitutional reform. Further, given the interconnection between institutional designs and general political outcomes, the constitutional design of institutions carries significant implications.[130] In fact, the widespread recognition of political parties in Europe signifies the "*importance of the diffusion or transference of constitutional norms and principles in playing a key role in shaping the regulatory regime of nation-states.*"[131] Their constitutional codification has tended to solidify their material position within the political system and made them intrinsic to democracy.[132]

With democratisation and institution-building as key motivating factors, constitutions in many developing and transitional democracies outside of Europe have also recognised political parties within their texts.[133] In a study on party constitutionalisation in Asia, Erik Mobrand alludes to the Philippine Constitution of 1935 and the Taiwanese Constitution of 1947, both of which made references to political parties.[134] He also cites certain direct references to parties, such as those in the South Korean Constitution of 1948, which guaranteed the right to form political parties.[135] In fact, the Constitution of the Republic of South Korea categorically stated that "*Political parties shall be democratic in their objectives, organisation and activities, and shall have the necessary organisational arrangements for the people to participate in the*

129 Biezen I, *supra* note 6, at 20.
130 GAUJA*, supra* note 31, at 27.
131 *Id.*
132 Biezen I, *supra* note 6, at 24.
133 GAUJA*, supra* note 31, at 27.
134 Mobrand*, supra* note 13, at 7.
135 *Id.*; DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 8 (S. Kor.).

formation of the political will".[136] To balance out the freedoms given to political parties, a system of checks was also provided for. If the purposes or activities of a political party were to run contrary to the democratic basic order, the government was empowered to approach the Constitutional Court against the party, seeking its dissolution.[137]

Japan, on the other hand, did not reference political parties within its constitution. Given that Japan is one of Asia's oldest democracies, Mobrand attributes this omission to the influence of the American constitutional tradition, which "*may not have conceived of democracy in terms of parties*".[138] At a more general level, Asia has followed a tradition of understanding parties as subjects of some regulation, whatever the extent of that regulation may be.[139] Following this regulation, their position in the political system must be directly acknowledged.

B. CONSTITUTIONALISATION OF POLITICAL PARTIES IN INDIA – NEED AND DIRECTION

Discussions around the constitutionalisation of political parties in India should remain cognisant of their role in democratisation.[140] At a practical level, Sethia's work on the intersection between constitutional law and political parties in India provides important insights. On the role of political parties in a democracy, Sethia observes that the exercise of state power is crucially reliant on parties and party systems in a democracy, regardless of the scheme for the organisation of powers.[141] The actual functioning of the organs that exercise power is constitutionally dependent on the internal and external operations of parties.[142] Needless to say, party

136 *Id.* at art. 8(2).
137 *Id.* at art. 8(4).
138 Mobrand, *supra* note 13, at 6.
139 *Id.* at 15.
140 GAUJA, *supra* note 31, at 27-28.
141 Sethia, *supra* note 20, at 6.
142 *Id.* at 6-7.

dynamics are an important factor to be considered in the design of constitutions.

The constitutional organs Sethia refers to include the legislature, executive and judiciary, all three of which owe their existence, composition and functions to the text of the Constitution. Parties, of course, find limited mention. Besides underlining the importance of political parties in the Indian democratic landscape, it is imperative to fathom what difference constitutional recognition can make for an institution. For that, a useful example to consider would be that of local governments in India. Both urban and rural local bodies (in the form of Panchayats and Municipalities) had existed prior to the coming into force of the Constitution (Seventy-third Amendment) Act, 1992[143] and Constitution (Seventy-fourth Amendment) Act, 1992 (which inserted Part IX and Part IXA in the Constitution, respectively).[144] So, what difference did constitutional recognition make for these institutions? Economist Dr. Shubham Chaudhuri, in his work on the implementation of the Constitution (Seventy-third Amendment) Act, 1992 responds to this question by reposing faith in constitutional reforms, and how they "*lie at the top of the reform hierarchy in terms of their purported impact and degree of irreversibility*."[145] Chaudhuri also outlines the importance of the consequences of non-compliance, which add to the sanctity of constitutional contracts.[146] Needless to say, there is some merit to arguing for constitutional recognition, and a certain degree of constitutionalisation of political parties. In fact, Khaitan argues that the concern is not whether to regulate political parties, but why and how.[147]

The challenge, as Khaitan alludes to, is one of preserving parties' ability to organise and channel popular will, while at the same time preventing them from threatening democratic governance.[148] While considering a

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143 INDIA CONST. *amended by* The Constitution (Seventy-third) Amendment Act, 1992.

144 INDIA CONST. *amended by* The Constitution (Seventy-fourth) Amendment Act, 1992.

145 Shubham Chaudhuri, *What Difference Does a Constitutional Amendment Make? The 1994 Panchayati Raj Act and the Attempt to Revitalize Rural Local Government in India*, in DECENTRALISATION AND LOCAL GOVERNANCE IN DEVELOPING COUNTRIES: A COMPARATIVE PERSPECTIVE 154, 198 (Pranab Bardhan & Dilip Mookherjee eds., 2006).

146 *Id.* at 198.

147 Khaitan, *supra* note 32, at 98.

148 *Id.*

framework for constitutionalising political parties, it is imperative to remember that a successful political party operates at three levels – within the party itself, within the broader community, and within the structures of government.[149] Simultaneously, it must be borne in mind that the character and role of parties in a democracy are also dependent on the nature of the electoral system.[150] India follows a first-past-the-post system, which is regarded as one of the simplest forms of electoral systems. Each voter gets a single vote, and a candidate wins if they receive the highest number of votes polled in a constituency.[151] While it is true that candidates win or lose elections, their affiliation with specific parties remains decisive to the outcome of both national as well as sub-national elections.[152] Independent candidates performing poorly in elections tend to indicate that the electoral contest in India is fought primarily between parties.[153]

GUIDING PRINCIPLES FOR POLITICAL PARTIES	**ASPECTS OF POLITICAL PARTY FUNCTIONING CONCERNED**	**LEVEL AT WHICH THE PRINCIPLE OPERATES**
Democracy	● Expression of dissent and differing points of view within the party ● Consensus-building before crucial decisions are taken	● Within the party

[149] O'Regan, *supra* note 83, at 65.
[150] *Id.* at 67.
[151] Law Commission of India, 255th Report on Electoral Reforms (2015) 80, ¶ 4.2.
[152] Pradeep Chhibber et al., *Political parties dominate India's national elections, not candidates*, THE PRINT (Mar. 25 2019), https://theprint.in/opinion/political-parties-dominate-indias-national-elections-not-candidates/210932/.
[153] *Id.*

Representativeness	● Periodic elections within the party ● Representation of diverse constituencies in positions of authority	● Within the party ● Within the broader community
Transparency	● Disclosures in the context of party financing and election expenditures	● Within the party ● Within the broader community ● Within structures of government
Integrity	● Prohibition on fielding candidates with criminal antecedents ● Non-procurement of funds from prohibited sources	● Within the party ● Within the broader community ● Within structures of government
Forums for redressal of non-adherence to the principles ● Election Commission of India (in the first instance) ● High Courts and the Supreme Court		

Thus, establishing certain constitutional principles which guide the working of political parties becomes imperative. Drawing inspiration from the European tradition, these principles need not be detailed or prescriptive but rules to guide the formation and sustenance of parties. With broad principles outlined in the Constitution, detailed processes can be set out in the text of specific laws.[154]

[154] It is worth noting that the Law Commission of India, in its 255th Report, recommended the insertion of Part IVC in the RP Act, 1951. The proposed Part IVC comprises certain basic principles concerning the constitution of political parties, voting procedures, the conduct of regular elections, and penalties for failure to contest elections, among other aspects. *See* LCI 255th Report, *supra* note 151, 77-79 (2015).

The table that follows briefly mentions these proposed principles, what aspects of political parties they affect, and whom they face (the party itself, the broader community, or the government). It also mentions institutions through which non-adherence to any principles can be addressed. The role of the ECI becomes crucial, as it is well-placed to effectively regulate party organisation and internal structures as well as patterns of inter-party competition.[155]

Constitutional principles to guide political parties: A starter pack

As mentioned above, this is a largely illustrative framework for what constitutional principles can guide political parties. The eventual shape of a constitutional provision that gives effect to these principles, can be the subject of further study and deliberation.

CONCLUSION

In India's specific context, political parties can be viewed through specific themes – through their role in modern party government, as defenders of democracy, and as public utilities. Each of these themes reflect a specific understanding of the place of political parties within democracy. It is imperative for research to focus on the interlinkages between "*democracy, governance and political parties*."[156]

A starting point for that can be the exploration of political parties against the backdrop of the Constitution. A comparative assessment of modern democracies around the globe presents interesting perspectives on constitutionalisation of political parties. After the Second World War, several democratic constitutions made express provisions recognising political parties within their constitutional text. Interestingly, several Asian Constitutions which were drafted around the same time as the Indian Constitution also made such express references.

[155] Suri I, *supra* note 11, at 6.
[156] *Id.*

Given the nature of political parties and their significance as institutions that influence public policy, some form of regulation becomes necessary. One approach could be to outline broad principles in the big-C constitutional code while leaving detailed processes to be set out in the text of specific laws or small-c codes. The illustrative framework provided in this article is a means to that end. The article shies away from a detailed and precise constitutional design that such a framework can take, but hopes to start a conversation on the need for constitutional recognition of political parties.

A JOCULAR LANDMINE: NAVIGATING THE POSITION OF POLITICAL SATIRE IN THE SPHERE OF FREE SPEECH AND EXPRESSION

AVINASH KOTVAL[1]

With the growing number of arrests and contempt cases against political satirists, the conversation regarding satire as a means of free speech and expression has become pertinent. While the Supreme Court has opined that satire amounts to expression that is protected under Article 19(1)(a) of the Constitution of India, determining when satire may be reasonably restricted under the Constitution has become highly controversial. The question of how constitutionally free political satire is as a means of expression must find its starting point in the fundamental building blocks of what amounts to satire. This paper first undertakes a foundational analysis of what satire truly is – appreciating its linguistic 'quantum' nature of simultaneously being serious and non-serious speech that has perlocutionary impacts. Then, a doctrinal study of the freedom of speech and expression under the Indian Constitution is undertaken to understand that the framework within which political satire must operate is one that is not intrinsically dangerous to public interests, adjudged from the perspective of a reasonable, strong-minded person, free from the fear of the mob. Finally, it is argued that understanding the true intention of satire to serve as a powerful catalyst for social change, while operating within its comedic play frame at all times, would show that satire would always fall within the limits of Article 19(1)(a) of the Constitution.

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A JOCULAR LANDMINE: NAVIGATING THE POSITION OF POLITICAL SATIRE IN THE SPHERE OF FREE SPEECH AND EXPRESSION

INTRODUCTION

Political satire is a hotly contested topic of discussion in today's world – often finding itself awkwardly positioned at the frontier dividing fair criticism and defamation, advocacy and incitement. Nonetheless, it remains one of the most potent tools to keep the wheels of social revolution turning. Political satire is not a new phenomenon. From Sajjad Husain's *Awadh Panch*, to R.K. Laxman's cartoons to All India Bakchod's (AIB) YouTube videos, the country is quite familiar with using satire to mimic and criticise structures of power. With the advent of technology and the internet boom, it has become a form of expression that the country's youth relate to the most. Tweets, memes, YouTube clips of stand-up comedians and Instagram reels, among others, have become the fastest way to put forth disagreement in a satirical manner while simultaneously making it accessible to a large audience. Despite this, satire is arguably one of the most regulated forms of speech and expression. Instances such as the arrest of comedian Munawar Faruqui[2] and the contempt cases against cartoonist Rachita Taneja[3] and comedian Kunal Kamra[4] are testament to the same, which reignites the long-running debate on how truly free satire is. Considering these issues, this paper analyses the unique position of political satire in the tricky minefield of free speech and expression, its power as an instrument to bring about social change, and its vulnerability to political suppression.

Firstly, the article undertakes an analysis of the fundamental nature of satire as a tool for social change while placing emphasis on satire's 'quantum' nature, simultaneously existing as serious and non-serious speech. *Secondly*, the article provides a doctrinal overview of the sphere of free speech and expression in the Constitution, within which the laws governing satire must operate. This is followed by an overview of the methods by which speech is formally and informally regulated.

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[2] *Munawar Faruqui: Bail for jailed India comic who did not crack a joke,* BBC NEWS (Feb. 5, 2021), https://www.bbc.com/news/world-asia-india-55945712.

[3] *Supreme Court initiates contempt action against Kunal Kamra, Rachita Taneja*, THE HINDU, (Dec. 18, 2020), https://www.thehindu.com/news/national/supreme-court-initiates-contempt-action-against-kunal-kamra-rachita-taneja/article33361881.ece.

[4] *Id.*

Upon undertaking such an analysis, in the second half of the paper, an objective, reasonable person standard is suggested to be adopted by courts. This would enable courts to adjudge whether a case of political satire would amount to outright incitement, upon which it may be reasonably restricted by the State. *Finally*, it is argued that, following the objective, reasonable person standard and keeping satire's quantum nature in mind, political satire would fall within the ambit of constitutionally protected free speech. While satire may critique a wide range of topics from religion and politics to social norms, this paper is restricted to the analysis of satire as a means of political dissent.

UNDERSTANDING THE FUNDAMENTAL NATURE OF SATIRE

Before delving into the intricacies of the law, it is essential to undertake a scholarly analysis of political satire itself. For this purpose, James E. Caron puts forth an excellent working definition of satire. He defines satire as:

> "*an act of judgment based on an implicit or explicit (moral) value often made with an intent to reform or change the comic butt (target) of a ridiculing presentation.*"[5]

Over the years, courts from various jurisdictions have made attempts to define the main characteristics of what they deem to be 'satire'. One of the first jurisprudential discourses on satire was undertaken by the United States Supreme Court in *Hustler Magazine* v. *Falwell*,[6] ("**Hustler Magazine**") a case involving the publication of a satirical article by Hustler Magazine on a prominent conservative televangelist. The Court, while delving into the elements of a satirical piece of literature, noted that it is a form of literature "*often calculated to injure the feelings of the subject of the portrayal*".[7] It may not always be reasoned or even-handed and may be used as a "*weapon of attack, of scorn and ridicule*".[8] Through this analysis, the Court

[5] James E. Caron, *The Quantum Paradox of Truthiness: Satire, Activism, and the Postmodern Condition*, 2 STUD. AM. HUMOR 153, 156 (2016).
[6] Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
[7] *Id.*
[8] *Id.*

seems to be lending a negative connotation to satire – seemingly analogizing it with a crime like libel.

While it is true that satire relies on injuring the subject of its ridicule, it is that very effect that enables it to trigger social change. It is because of this that the United States Supreme Court in *Hustler Magazine* simultaneously acknowledged that satirical literature has played a significant role in political debate.[9] Satire's "*transgressive, anti-authoritarian impulses*" enable it to criticise institutions of power.[10] Recognising this, the European Court of Human Rights recently noted in the case of *Vereinigung Bildender Künstler* v. *Austria*, that satire essentially involves "*inherent features of exaggeration and distortion of reality*", with an aim to "*to provoke and agitate*."[11] A holistic understanding of the jurisprudence surrounding satire suggests that it's a misconstruction to view satire solely as a weapon of attack, ignoring its ultimate aim.

Satirists often express their craft through mediums such as stand-up sets, cartoons, films, stories, etc. Satire does not belong to any particular genre of literature; instead, it pierces through various genres.[12] Political satire uses members of the government, the rich and powerful, the State, and the judiciary, among others, as its targets, with the intention to reform government actions, policy decisions, judicial pronouncements etc.[13]

The reformative nature of political satire need not be direct social change in the form of legal or social reform. In its true sense, political satire, just like all forms of satire and comedic art forms, is restricted to the play frame that it creates around itself. Rather, political satire serves as a trigger for socio-political transformation. It can provoke the audience and the satirical target to reconsider thoughts, perceptions and beliefs concerning a particular issue – to the extent of even making them repent their old beliefs

[9] *Id.*

[10] Jonathan Greenberg, *Part III*, *in* THE CAMBRIDGE INTRODUCTION TO SATIRE 157–276 (2018).

[11] Vereinigung Bildender Künstler v. Austria, [2007] ECHR 79.

[12] Historically, satire found its first incarnation in the form of poetry and prose. However, as noted by Jonathan Greenberg, today, satire cannot be limited to these forms. The permeation of satire into other modes over time, Greenberg argues, positions it as a genre that resists the very idea of a genre. *See generally* Greenberg, *supra* note 10, at 10.

[13] Jonathan Greenberg writes of "*transgressive, anti-authoritarian impulses of satire*" that enables it to criticise institutions of power. *See* Greenberg, *supra* note 10, at 23.

and actions. In its true essence, it is perlocutionary speech – wherein there is a temporal gap between the expression of speech and the consequences of said speech.[14]

This indirect, albeit strong reformative nature of satire has led to a new wave of activism by satirists – what scholars call 'satiractivism'.[15] Satiractivism is not activism; instead, it paves the way for activism on the audience's behalf through its perlocutionary effect. Satiractivism is a powerful parrhesia when used against those in seats of power. To capture the proactive nature of political satire, Rebecca Krefting uses the metaphor 'charged humour' to describe political satire aimed at provoking social change and crusading for political and civil rights.[16] The *raison d'etre* of such charged humour is social justice. Charged humour aims at challenging societal evils like social inequality, wherein the comic often relies on the crowd relating to or identifying with the toil of "*being a second-class citizen*".[17] It engages the crowd by being a humorous reminder that everything is not okay in the world.[18]

The most interesting aspect of satire is its 'quantum nature'.[19] Comparing it to the quantum nature of light – which has both particle and wave-like properties – Caron highlights the paradoxical nature of satire.[20] Satire has the ability to simultaneously convey serious and non-serious (comedic) speech at all times.[21] Political satire, therefore, has the rhetorical effect that serious speech could have; however, as previously mentioned, it operates within its play frame at all times. Satire's quantum nature often gives it the

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[14] Perlocutionary speech may be differentiated from illocutionary speech, wherein there is no delay between the expression of speech and its effect. *See* Lawrence Liang, *Free Speech and Expression, in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 815, 825 (Sujit Choudhry et al. eds. Oxford University Press 2016); JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS 108, 115–117 (J. O. Urmson & Marina Sbisa eds. Clarendon Press 1962).

[15] SOPHIA A. MCCLENNEN & REMY M. MAISEL, IS SATIRE SAVING OUR NATION? 196 (Pallgrave Macmillan 2014).

[16] REBECCA KREFTING, ALL JOKING ASIDE 25 (Johns Hopkins University Press 2014).

[17] *Id.* at 5.

[18] *Id.* at 6.

[19] Caron, *supra* note 5 at 156.

[20] Caron, *supra* note 5 at 156-157.

[21] Caron, *supra* note 5 at 156-157.

perception of being solely serious speech, thereby appearing to jump in and out of its play frame.[22] This is when satirists find themselves at odds with the law.

FREEDOM OF SPEECH AND EXPRESSION IN THE INDIAN CONTEXT

The foundation upon which political satire operates is the freedom of speech and expression. In India, the right to freedom of speech and expression is a fundamental right protected under Article 19(1)(a) of the Indian Constitution. It is a political right that imposes a negative obligation of restraint on the state by "*carving out an area in which the state shall not interfere*".[23] While doing so, it simultaneously imposes a positive mandate on the state, obligating it to ensure that vital conditions for this freedom to thrive are maintained.[24] However, free speech and expression in India is not unconditional – it is subject to reasonable restrictions under Article 19(2). The few grounds on which free speech and expression can be restricted include interests of the sovereignty and integrity of India, security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[25] The drafters of the Constitution[26] intended to allow "*very narrow and stringent limits*"[27] on free speech and expression, acknowledging that its existence is essential for the functioning of a popular government.[28]

Textually, no specific medium of communication is specified. However, Indian constitutional jurisprudence and case laws through the years have, with the intention to expand the ambit of Article 19(1)(a), comprehended the press, films, broadcasting, advertisements, etc. within its scope.[29] While

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[22] *Id.*

[23] Indibility Creative Pvt. Ltd. and Ors. v. Govt. of West Bengal and Ors., 2020 12 SCC 436.

[24] *Id.*

[25] INDIA CONST. art. 19 cl. 2.

[26] GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 52 (Oxford University Press 2016).

[27] Romesh Thappar v. The State of Madras, 1950 SCC 436.

[28] *Id.*

[29] Subhradipta Sarkar, *Right to Free Speech in a Censored Democracy*, 7 U. DENV. SPORTS & ENT. L. J. 62, 74 (2009).

one can use this constitutional right to propagate ideas, thoughts, responses, and dissent, the manner in which this may happen also finds itself as a contentious topic. As recently as 2019, in a significant victory for advocates of free speech and expression, the Supreme Court in *Indibility Creative Pvt. Ltd. and Ors.* v. *Govt. of West Bengal and Ors.* ("**Indibility**") upheld satire as a form of expression protected under Article 19(1)(a).[30] The case involved the unofficial ban of a Bengali film 'Bhobishyoter Bhoot' (English translation: 'Future Ghosts'), that portrayed a political satire "*about ghosts who wish to make themselves relevant in the future by rescuing the marginalized and the obsolete.*"[31] Despite receiving official certification for screening, the film was removed from theatres after its release due to the instruction of "*higher authorities*", as the screening may lead to "*political law and order issues*".[32] Stressing on the previously mentioned positive mandate of the State, the Court held that unless this positive obligation is upheld and realised, art and literature, including satire, would fall victim to intolerance.[33]

While the Supreme Court in the *Indibility* case expressly brings satire within the ambit of constitutionally protected speech, there is significant jurisprudence on the various oscillating stances taken by the Supreme Court on what amounts to reasonable restriction against speech. Acknowledging this judicial discourse is essential to understand the manner in which free speech, including political satire, may be regulated.

DIRECT AND INDIRECT REGULATION OF POLITICAL SATIRE

Political satire in India is far from immune to regulation. Due to the way law functions in India, political satire may be formally regulated on multiple fronts. This includes regulations stemming from the Constitution, the Penal Code, as well as special laws. Although these formal modes of regulation are in place to deter legitimate offences, we see that they are increasingly weaponised to curb free speech, including political satire.

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[30] Indibily Creative Pvt. Ltd. and Ors. v. Govt. of West Bengal and Ors., 2020 12 SCC 436.
[31] *Id.*
[32] *Id.*
[33] *Id.*

Constitutionally, political satire may be restricted under all seven heads under Article 19(2). Disruption of public order is one of the most common heads invoked to curtail free speech. The Supreme Court has seen a multitude of cases oscillating from an expansive understanding of what a reasonable restriction can be, to a speech-protective understanding of reasonable restrictions. Four important cases may be used to illustrate the judicial discourse surrounding the scope of reasonable restrictions to free speech under Article 19(2) of the Constitution.

After Article 19(2) was amended to its current form,[34] the first case to deal with its scope was *Ramji Lal Modi v. State of Uttar Pradesh* ("**Ramji Lal Modi**").[35] The Supreme Court, posed with the question of whether §295A of the Indian Penal Code fell within the ambit of Article 19(2) of the Constitution, looked at the wording of Article 19(2), which allowed reasonable restrictions "*in the interest of*" public order. Noting that the phrase in question has a wide ambit, the Court noted that when the matter comes to activities likely to cause public disorder,

> "*a law penalizing such activities as an offence cannot but be held to be a law imposing reasonable restriction "in the interests of public order" although in some cases those activities may not actually lead to a breach of public order.*"[36]

Three years later, the Supreme Court, in *Superintendent, Central Prison* v. *Dr. Ram Manohar Lohia* ("**Ram Manohar Lohia**")[37] came up with an understanding that is more speech-protective than that of the bench in *Ramji Lal Modi*. The Court, while assessing the scope of Article 19(2), noted that it is essential that while assessing a reasonable restriction, the ground of "*public order*" be "*demarcated from the others*".[38] The Court further added that while assessing whether a measure can reasonably restrict free speech, it is imperative that the court assess whether there is a reasonable connection between the measure and the public order it intends to

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[34] INDIA CONST. art. 19. cl. 2, *amended by* The Constitution (First Amendment) Act, 1951.
[35] Ramji Lal Modi v. State of Uttar Pradesh, 1957 AIR 620.
[36] *Id.*
[37] The Superintendent, Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia, AIR 1960 SC 633 (India).
[38] *Id.*

achieve.[39] By doing so, the Court brought in a proximity element for any reasonable restriction to sustain.

In *Kedar Nath Singh* v. *State of Bihar* ("**Kedar Nath**"),[40] the question of the constitutionality of §124A of the Indian Penal Code was placed before the Supreme Court. In what seemed to be an attempt to save the provision from unconstitutionality, the Court created greater uncertainty in the assessment of what amounts to a reasonable restriction. Firstly, the Court acknowledged that,

> "*...comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal.*"[41]

The Court then proceeded to say that words "*which have the pernicious tendency or intention of creating public disorder or disturbance of law and order*" can be reasonably restricted by the State.[42] In doing so, the Court in *Kedar Nath* cited *Ramji Lal Modi*, and created a "*pernicious tendency*" test to adjudge the nature of free speech. Further, the Court made no mention of the proximity test noted in *Ram Manohar Lohia*, which narrows the power of the State to regulate speech, and assures a real connection to its intention to maintain public order.[43]

The aforementioned oscillations eventually led to the landmark case of *S. Rangarajan* v. *P. Jagjivan Ram* ("**Rangarajan**").[44] The Supreme Court, dealing with a matter pertaining to the revocation of a film's certificate issued by the Censor Board, noted that the Constitution's commitment to free speech may only be suppressed in a situation where "*community interest is endangered*".[45] Noting that this danger should be proximate, the Court opined that the nature of speech must be "*intrinsically dangerous to the public interest*". More importantly, there must be an inseparable connection

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[39] *Id.*
[40] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955.
[41] *Id.*
[42] *Id.*
[43] Liang, *supra* note 14, at 827.
[44] S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574 (India).
[45] *Id.*

between the words and the action contemplated, "*like the equivalent of a 'spark in a powder keg*".[46]

The "*spark in a powder keg*" test laid down in *Rangarajan* serves as useful guidance for determining the constitutionality of satirical literature. It gives due importance to the requirement of lack of temporal disjuncture between the utterance of speech and its effect when it comes to speech that may be reasonably restricted.[47] However, to this day, the judiciary is still grappling with questions like, to what extent courts should view individuals as morally responsible and autonomous, capable of deciding what kind of speech or expression they want to be exposed to. Additionally, to what extent should courts be willing to restrict content due to the potential harm individuals may cause if such content is not filtered?[48]

The Indian Penal Code is another legislation with various provisions that could be deployed against the legitimate exercise of free speech. Be it the ever-controversial law on sedition,[49] laws on hate speech,[50] disruption of public tranquillity,[51] or even criminal defamation,[52] these laws are worded in such a manner with a far-reaching, all-encompassing scope. This makes them extremely easy to abuse. Furthermore, the way politics operates in India, satirists portraying political burlesque often find their actions tied to hurting (often the majority's) religious sentiment, for which they can be booked as well.[53] While such laws intend to prevent inter-community discord, and though people seldom get judicially convicted under most of these laws, it does not stop people from approaching the police to book others for exercising their legitimate right to free speech. We often find the State pursuing such complaints as well.[54] Political satirists, who often use

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46 *Id.*

47 Liang, *supra* note 14, at 828.

48 BHATIA, *supra* note 26, at xxxv.

49 PEN. CODE, §124A.

50 PEN. CODE, §153A; PEN. CODE, § 505(2); PEN. CODE, §505(1)(c).

51 PEN. CODE, §505(1)(b).

52 PEN. CODE, §499; PEN. CODE, §500.

53 PEN. CODE, §295A; PEN. CODE, §298.

54 HUMAN RIGHTS WATCH, STIFLING DISSENT: THE CRIMINALIZATION OF PEACEFUL EXPRESSION IN INDIA 48 (2016), https://www.hrw.org/report/2016/05/24/stifling-dissent/criminalization-peaceful-expression-india.

popular authorities as their comic butt, are particularly vulnerable to complaints and arrests for criminal defamation or so-called hate speech.[55]

Special laws dealing with particular areas of the law also have provisions that can blatantly silence political satire. Be it the State's power not to certify[56] or prevent exhibition of films in certain areas,[57] or its power to prohibit cable operators from transmitting anything in public interest[58] or which "*promotes anti-national attitudes*",[59] or its competence to censure any news agency publishing anything against "*public taste*",[60] we see that textually, special laws have an extensive scope.

One of the most damaging laws to the modern-day expression of political satire is §69A of the Information Technology Act, 2000. This empowers the State to block any content *that it believes* violates grounds similar to those laid out in Article 19(2) of the Indian Constitution.[61] In an era where

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[55] An example of the usage of the law which has led to the incarceration and curtailment of free speech and personal liberty of individuals is the arrest of comedian Munawar Iqbal Faruqui. The comedian was arrested in Indore, Madhya Pradesh under § 295A of the Indian Penal Code, for a deliberate act intended to outrage religious sentiments. The arrest solely relied on the word of an intruder who interrupted one of Faruqui's shows to accuse him of hurting Hindu sentiments. What followed were months of hearings at lower courts, where he was continuously denied bail. Simultaneously, a warrant arising from a complaint lodged a year prior to the arrest was issued by the Uttar Pradesh police, which could have led to Faruqui's re-arrest, in case he is to be granted bail. The matter was eventually appealed to the Supreme Court, which finally granted him bail after he spent 37 days in prison. While passing the order granting bail and staying the warrant issued by the Uttar Pradesh police, the apex court noted that the allegations against Faruqui were "vague", with several procedural lapses on part of the police during the arrest and custody process. *See* Sonia Faleiro, *How An Indian Stand Up Comic Found Himself Arrested for a Joke He Didn't Tell*, TIME (FEB. 10, 2021), https://time.com/5938047/munawar-iqbal-faruqui-comedian-india/.

[56] The Cinematograph Act, 1952, §5B(1), No. 43, Acts of Parliament, 1952 (India).

[57] The Cinematograph Act, 1952, §13., No. 43, Acts of Parliament, 1952 (India).

[58] The Cable Television Networks (Regulation) Act, 1995, §19, No. 7, Acts of Parliament, 1995 (India).

[59] The Cable Television Networks Rules, 1994, G.S.R. 729 (E), Rule 6(e).

[60] The Press Council of India Act, 1978, §14, No. 37, Acts of Parliament, 1978 (India).

[61] The Information Technology Act, 2000, §69A, No. 21, Acts of Parliament, 2000 (India). A contemporary example of the usage of §69A of the Information Technology Act, 2000, is the recent directions by the Central Government directing Twitter India to take down multiple tweets pertaining to and containing links to the controversial documentary by the British Broadcasting Company (BBC) – "India – The Modi Question". The Ministry of

political satire flourishes through stand-up comedy/YouTube videos, OTT content, memes, tweets, etc., this provision enables almost immediate blocking of content. Often, authorities cite no reasons for the blocking of content.[62]

As political satire can target all organs of the State as its comedic butt, they often tend to criticise the decisions of courts as well.[63] However, political satirists disagreeing with and criticising a court's decisions may find themselves caught up with a charge of contempt of court. Although the law only criminalises speech that scandalises or lowers the authority of any court,[64] and expressly excludes fair criticism on merits from the scope of contempt,[65] there is unfortunately no clear distinction between what amounts to fair and what amounts to unfair criticism.[66]

Information and Broadcasting sent the legal notice pursuant to §69A of the Information Technology Act, 2000, read with Rule 16(3) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Members of the Central Government had publicly tweeted that the documentary was blocked on video hosting websites like YouTube, using 'emergency powers' under the 2021 Rules. While the matter is, as of March 2023, in the process of being heard in the Supreme Court, the apex court has dismissed petitions seeking the ban of BBC's India operations, labelling them as 'highly misconceived'. *See* Krishnadas Rajagopal, *Supreme Court will hear a plea on February 3 to restrain government from 'censoring' BBC documentary*, THE HINDU (Jan. 30, 2023), https://www.thehindu.com/news/national/sc-agrees-to-hear-pil-challenging-centres-decision-to-block-bbc-documentary/article66449344.ece; Krishnadas Rajagopal, *Supreme Court dismisses Hindu Sena petition seeking to ban the BBC in India*, THE HINDU (Feb. 10, 2023), https://www.thehindu.com/news/national/supreme-court-dismisses-plea-seeking-complete-ban-on-bbc-from-operating-in-india/article66493078.ece.

62 HUMAN RIGHTS WATCH, *supra* note 54, at 95.

63 Such a form of political satire is extremely common in the United States, with late night TV shows airing live, daily episodes critiquing the legislature, executive, and judiciary. A contemporary example is the viral video clip from *The Daily Show*, wherein the host, Trevor Noah, undertakes a satirical deep-dive of the consequences of the United States Supreme Court overturning the landmark case – Roe v. Wade, 410 U.S. 113 (1973), wherein the United States Supreme Court had ruled that the country's constitution protects a woman's right to choose to seek an abortion. *See* The Daily Show, *Abortion Rights Under Siege as Roe v. Wade Overturned | The Daily Show*, YouTube (Jun. 28, 2022), https://www.youtube.com/watch?v=BptGmN1LQJs.

64 The Contempt of Courts Act, 1971, §2(c)(i), No. 70, Acts of Parliament, 1971 (India).

65 The Contempt of Courts Act, 1971, §5, No. 70, Acts of Parliament, 1971 (India).

66 HUMAN RIGHTS WATCH, *supra* note 54, at 90.

A common characteristic of all such laws is overbreadth[67] – they contain provisions with the capability to muffle constitutionally protected free speech. Although many such provisions have been challenged, the Supreme Court often reads the law extremely narrowly to save the impugned provisions. Nevertheless, as argued, they are extremely easy to misuse. As Gautam Bhatia argues, apart from being constitutionally skewed, overbreadth causes what is known worldwide as the "*chilling effect*" – when citizens are forced to self-censor to avoid being penalised, stifling free speech to the point of harming political discourse.[68]

Formal regulations are not the only way political satire, and by extent dissent, is muffled. India is notorious for informal and often extrajudicial regulation of free speech.[69] Mob violence, criminal intimidation by goons, vandalism and trespass to property are just some of the methods in the arsenal of the rich and the powerful to suppress their critics and turn them

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[67] Gautam Bhatia argues that speech-regulating laws suffer from 'overbreadth'. Overbreadth is the phenomenon by which the language employed in phrasing a law is so broad as to allow the State to regulate speech that it is constitutionally not permitted to regulate. Laws mentioned in this section, like The Cinematograph Act, 1952, and the Cable Television Networks Rules, 1994, Bhatia argues, suffer from such overbreadth by employing a concerning amount of vagueness in its structuring. See BHATIA, *supra* note 26, at 29-30, 182.

[68] An example of the chilling effect was elaborated by the Delhi High Court in the case Petronet v. Indian Petro Group (158 (2009) DLT 759), wherein the Court ruled that any injunction restraining the publication of news articles by the Respondent on negotiations by the Plaintiff company using a large amount of public money, and the removal of published articles, would have a chilling effect on the exercise of the fundamental right to speech and expression. The law pertaining to protective injunctions cannot operate in a manner that leads to self-censoring by news agencies. For a more elaborate discussion, *see* BHATIA, *supra* note 26, at 32.

[69] An example of the usage of the mob to informally regulate speech was seen in 2012, when a 21-year-old was arrested under §295A of the Indian Penal Code and §69A of the Information Technology Act, 2000, for questioning why the city was completely shut down for Bal Thackeray's funeral through a Facebook post. Even though the person apologized and retracted her comment, her uncle's orthopaedic clinic was trespassed and ransacked by a mob of over forty Shiv Sena party workers. *See*, *Two girls arrested for Facebook post questioning 'Bal Thackeray shutdown' of Mumbai, get bail*, THE INDIAN EXPRESS (Nov. 20, 2012), http://archive.indianexpress.com/news/two-girls-arrested-for-facebook-post-questioning-bal-thackeray-shutdown-of-mumbai-get-bail/1033177/.

into orderlies.[70] These formal and extrajudicial mechanisms epitomise what renowned jurist Harry Kalven refers to as *"the heckler's veto"*.[71] The Supreme Court, in *Indibility*, noted that it is the State's responsibility to "*ensure that speech is not silenced by the fear of the mob*", recognising that such informal regulation cannot exist in the constitutional framework of free speech.[72]

As mentioned previously, while convictions and sentencing may be rare – people, police and authorities nonetheless file cases against political satirists. This drags them through a lengthy process of arrest, judicial or police custody, courtroom battles and media trials. In effect, while there might not be any judicially pronounced punishment, in many ways, the process itself is a form of punishment.[73]

LOCATING POLITICAL SATIRE'S UNIQUE POSITION

All things considered, the quantum nature of political satire puts it in a peculiar position while examining the right to free speech. Political satire's paradoxical disposition makes it vulnerable to incorrect analysis. As it serves as serious and non-serious speech simultaneously, people often try to characterise it as one or the other. When one splits political satire into its components – serious, didactic speech and humour - and ignores the former, they fatally impair its true essence.[74] This is because political satire without the intention to trigger some form of reform appears as mere amusement with a holier-than-thou attitude. On the other hand, when one ignores the latter, they forget that satire operates within its specified comedic play frame. This leads to the target political satire's charged humour attempting to suppress comics.

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[70] For a detailed overview of the usage of mob violence and vigilantism in India as a substitute for law, *see* Ishan Gupta, *Mob Violence and Vigilantism in India*, 23(4) WORLD AFFAIRS: THE JOURNAL OF INT'L ISSUES 152 (2019). Gupta notes the usage of mob lynching to commit heinous crimes against minority communities for a variety of matters – from cow vigilantism to regulation of speech.

[71] DAVID HAMLIN, THE NAZI/SKOKIE CONFLICT 57 (1980).

[72] Indibility Creative Pvt. Ltd. and Ors. v. Govt. of West Bengal and Ors., 2020 12 SCC 436.

[73] HUMAN RIGHTS WATCH, *supra* note 54, at 8-10; RAJEEV DHAVAN, PUBLISH AND BE DAMNED: CENSORSHIP AND INTOLERANCE IN INDIA 175, 197-201 (Tulika Books 2008).

[74] Caron, *supra* note 5, at 165.

Perhaps one of the best ways to understand the elements of free speech under Article 19(1)(a) is through the Supreme Court's opinion in *Shreya Singhal* v. *Union of India*, the case which lead to the striking down of the extremely vague and expansive §66A of the Information Technology Act, 2001.[75] The Court, a two-judge bench led by Nariman, J. identified three fundamental concepts of free speech: discussion, advocacy and incitement.[76] The bench correctly pointed out that only when free speech leads to incitement would even the possibility of reasonable restrictions under Article 19(2) kick in. It recognised the importance of differentiating between advocacy and discussion that "*may be annoying or inconvenient or grossly offensive to some*",[77] and outright incitement. This analysis helps navigate political satire's position within the gamut of free speech and expression.

The mechanics of political satire, its efficacy, and its signature trait rely on it being "*annoying or inconvenient or grossly offensive to some*". Consumption of political satire requires that the audience accept its paradoxical nature. The moment people (and by extension, the law that they use) equate this feeling of discomfort, inconvenience or annoyance purely because they disagree with it as outright incitement, the rudimentary requirement of restriction of free speech being reasonable is thrown out of the window. If the person consuming the political satire keeps its quantum nature in mind, irrespective of whether they agree or disagree with it, political satire will fall short of incitement – it is mere discussion and advocacy.

However, one could argue that incitement and hurting one's personal sentiments are effectively the same. To this effect, the Supreme Court in *Ramesh* v. *Union of India* ("**Ramesh**") has held that the effect of words should be analysed,

> "*from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view*".[78]

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

[76] *Id.*

[77] *Id.*

[78] Ramesh v. Union of India, (1988) 1 SCC 668. Another example of courts recognising such a reasonable person standard can be seen to have been set by the Madras High Court.

This is where the previously mentioned questions put forth by Gautam Bhatia become extremely important. If the State and Courts uphold the restriction of free speech based on personal sentiments being hurt under the façade of incitement or disruption of public order, they abysmally fail as bastions of civil rights. It is vital that the Courts set an objective perspective to judge speech and expression – one, it is argued, should be in line with what was observed by the Supreme Court in *Ramesh*. Conforming with such a standard, without oscillating to a subjective perspective is essential for the sustenance of political satire as a mode of dissent.

While such an understanding can aid in eventually weeding out illegitimate claims by people to restrict free speech or legalise their violent behaviour, the deeper issue is the State's weaponisation of the law to stifle dissent, a problem deeply embedded into the socio-political fabric of India. As Lawrence Liang rightly pointed out, the extent to which a government can tolerate dissent and criticism indicates the self-confidence and security of democracy.[79] Political satire augments the opinion of the noted British columnist Polly Toynbee, that "*the best way to destroy an undesirable idea is not to brush it under the carpet but to air it in public*."[80] It asks uncomfortable questions and makes people think while they laugh. By making people in power the comic butt (as opposed to the sanctimonious status such people assign to themselves), political satire attacks their egos in such a manner that backs them into a corner with no option other than misusing the law. It is not the possibility of public incitement that causes the State and people in power to make or misuse ambiguous laws. Rather, such acts amplify the

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The Court, while adjudicating a case of criminal defamation lodged by members of the state's ruling party against a cartoonist and editor of a daily newspaper for the publication of an allegedly defaming cartoon, noted that "*No doubt, law has to come to the rescue of a person who feels defamed. But then, law envisages a reasonable person and not a touchy and hyper-sensitive individual like the respondent*." *See* Karna v. M. Jothisorupan, MANU/TN/1745/2018 (India).

[79] Liang, *supra* note 14, at 826.

[80] DARREN J. O'BYRNE, HUMAN RIGHTS – AN INTRODUCTION 126 (Pearson Education Limited, 2003).

government's insecurity. It augments their fear of criticism and casts the spotlight on their paranoia of losing their clutch on the electorate.[81]

CONCLUSION

In a democratic government, while elected representatives are required to work towards societal betterment, they cannot claim a monopoly over values, opinions and characteristics that define India's society.[82] A plurality of opinion is intrinsic to the Constitution's liberal promise, and providing avenues for dissent is essential to foster and protect social, economic and political growth.[83] Social revolution is what catalyses such growth, and political satire stands firmly planted in this exercise. However, with the way the State and people in power treat the law as an armament, it is challenging to sustain a Panglossian outlook towards social revolution.

This paper sought to analyse, justify and secure the position of political satire in the sphere of free speech. It finds that the acknowledgement of satire's fundamental quantum nature in any judicial analysis is necessary to understand if it may be reasonably restricted. Existing jurisprudence and judicial discourse on this topic lay down an important, objective, reasonable-person standard through which free speech must be judged. Consistency in conformity with such a standard laid down by the Supreme Court, whilst recognising that satire, at all times, operates within its comic play-frame, would enable the cultivation of a political system in which

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[81] An incident, which arguably displays such an attitude on the government's part, is the response to comedian Vir Das' viral clip "*I Come From Two Indias*". The clip contains Das' monologue from his performance in Washington D.C., USA, wherein he recites a poem of sorts, describing the contrasting values found in Indian society. While the clip, as expected, received polarising reactions from the audience, what was most noticeable was the reaction by the Home Minister of Madhya Pradesh, Narottam Mishra. Mishra publicly stated that 'jesters' like Das would not be allowed to perform in Madhya Pradesh. The Minister said that 'they' (the government) would think about allowing the comedian to perform in the state only after he issues a formal apology for his monologue. *See* PTI, *Vir Das can't perform in M.P.: Minister*, THE HINDU (Nov. 18, 2021), https://www.thehindu.com/news/national/other-states/vir-das-cant-perform-in-mp-minister/article37568054.ece.

[82] *Labelling Dissent Anti-National Strikes at Heart of Democracy: Justice Chandrachud*, THE WIRE (Feb. 15, 2020), https://thewire.in/rights/justice-chandrachud-dissent-anti-national-democracy-caa.

[83] *Id.*

robust dissent may sustain. Without such a system, through any appraisal of the Indian Constitution, it is hard to see the tumbler of social revolution as anything but half-empty, rather than half-full. Until then, satire remains a mighty bludgeon in the arsenal of the vulnerable – indicating that there is the potential to foster a safe environment for discourse, debate, and of course – humour.

HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS: BENIGN OR MISCONCEIVED?

SUJITH NAIR[1]

The Indian jurisprudence concerning the applicability of fundamental rights until recently, has followed the dictum that fundamental rights can only be enforced against the State, its instrumentalities, or an entity that is impregnated with the characteristics of the State. However, with the recent decision of a constitutional bench of the Supreme Court, in Kaushal Kishor v. State of Uttar Pradesh, there has been a tectonic shift from this preponderant view. In its decision, the Supreme Court held that Articles 19 and 21 of the Constitution can be made enforceable even against private parties other than the State and its instrumentalities. This approach undertaken by the Supreme Court is known as the "horizontal" application of fundamental rights. This novus view adopted by the Supreme Court, though seemingly laudatory at first glance, raises a number of questions, not merely on the feasibility of such an approach, but also on its rationale in the Indian context. In this article, the author endeavours to map the prevalent legal perspectives with regard to the enforcement of fundamental rights, both in India and across the world, in an attempt to ascertain a more nuanced approach that the Supreme Court could have adopted.

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INTRODUCTION

A five-judge constitution bench of the Supreme Court in *Kaushal Kishor v. State of Uttar Pradesh*[2] ("**Kaushal Kishor**") was, *inter alia*, faced with the

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[2] Kaushal Kishor v. State of Uttar Pradesh, 2023 4 SCC 1.

question of whether fundamental rights under Articles 19[3] and 21[4] could be claimed against entities other than the State and its instrumentalities, *i.e.*, private actors. Two matters before a 3-judge bench[5] – originating from two different states, where the common prayer was to undertake strict action against ministers of the respective states who had made derogatory remarks against women – were tagged together and placed before the said constitution bench. The Supreme Court, with a 4:1 majority (Nagarathna J. dissenting), held that Part III of the Constitution,[6] and therefore Articles 19 and 21 can be enforced even against private actors.[7] *Per contra*, Nagarathna J. concluded in her dissent that the fundamental rights under Articles 19 and 21 may not be justiciable against private actors before constitutional courts except in cases where those rights have been statutorily recognised.[8] Where these rights have not been given statutory recognition, Nagarathna J. held that the only recourse for an aggrieved party is to seek common law remedies in civil courts.[9]

Thus, while the majority adopted the horizontal approach to fundamental rights, implying that fundamental rights can be made applicable not only in instances of "*state action*," but against private bodies as well, the dissent subscribed to a vertical reading of the fundamental rights, wherein a contention of violation of fundamental rights can be attracted only in instances involving state action.

However, it is pertinent to note that the view of the majority in *Kaushal Kishor* is in direct conflict with previous constitutional bench decisions of

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[3] INDIA CONST. art. 19 includes, "*Right to: freedom of speech and expression; assemble peaceably and without arms; form associations or unions; move freely throughout the territory of India; reside and settle in any part of the territory of India; practise any profession, or to carry on any occupation, trade or business.*"

[4] INDIA CONST. art. 21 reads as, "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*"

[5] Writ Petition (Criminal) No.113 of 2016 & Special Leave Petition (Diary) No.34629 of 2017.

[6] INDIA CONST. Part III (Fundamental Rights).

[7] Kaushal Kishor v. State of Uttar Pradesh, 2023 4 SCC 1, ¶ 78.

[8] *Id.* ¶ 43 (Nagarathna J.).

[9] *Id.* ¶¶ 39-43 (Nagarathna J.); *See also* RAFAL ZAKRZEWSKI, REMEDIES RECLASSIFIED 103–120 (Oxford University Press, 1st ed., 2005).

the Supreme Court in *P.D. Shamdasani v. Central Bank of India Ltd.*[10] ("**P.D. Shamdasani**") and *Vidya Verma v. Shiv Narayan Verma*[11] ("**Vidya Verma**"), wherein it was held that Articles 19 and 21 did not apply to instances of invasion of a right by a private actor, and consequently, no writ under Article 32 would lie in such circumstances. Thus, with the decision in *Kaushal Kishor*, the entire jurisprudence of fundamental rights in India has turned topsy-turvy, with a drastic shift from one extreme position (no enforceability of Articles 19 and 21 against private actors) to another (plenary enforceability of Articles 19 and 21 against private actors).

In this article, in an endeavour to find a middle ground between these two jurisprudential extremities, the author shall first undertake a study of the different models pertaining to the horizontal application of fundamental rights. Since the jurisprudence on the same is still in its nascent stage in the Indian context, the author shall advert to different jurisdictions around the world for the same. Having laid the necessary conceptual groundwork, the author shall proceed forward to trace the evolution of the understanding of fundamental rights in the context of their enforcement in India, and finally, in this background, attempt to discern what challenges and opportunities the *Kaushal Kishor* judgement brings to the subsequent development of the said concept.

A. DISTINGUISHING THE TYPES OF HORIZONTALITY

As explained above, we are now confronted with two contrarian ratios as laid down by constitutional benches of equal strength On one extreme is the ratio laid down in *Kaushal Kishor*, which subscribes to a direct horizontal model for the enforcement of fundamental rights. On the other extreme are the decisions in *P.D. Shamdasani* and *Vidya Verma* that adhere to the conventional wisdom of vertical application of fundamental rights, *i.e.*, fundamental rights regulate only the conduct of state actors in their dealings with private citizens but not relations among private citizens.[12] Though the bench in *Kaushal Kishor* had the opportunity to refer to notable works of prevailing scholarship on the issue, the same was glossed over. A

[10] P.D. Shamdasani v. Central Bank of India Ltd., 1951 SCC 1237, ¶ 9.

[11] Vidya Verma v. Dr. Shiv Narain Verma, AIR 1956 SC 108, ¶ 7.

[12] Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights,* 102 MICH. L. REV. 387 (2003).

crucial aspect that has been overlooked by both the majority opinion and the dissent is the scope of rapprochement between the two extremes of strict horizontality and strict verticality through what is known as "*indirect horizontality*".

Direct Horizontality

To understand the concept of "*indirect horizontality*", it must first be distinguished from "*direct horizontality*." In jurisdictions where direct horizontality is adopted, individuals can bring an action even in private law on the anvil of constitutional rights. Thus, fundamental rights apply, not only against the State but also directly against private actors.[13] Therefore, in these jurisdictions, the Constitution imposes constitutional duties on private actors and the state alike, thereby regulating interpersonal relations between private actors, who can sue each other for the violations of these duties.[14]

The best example of such jurisprudence can be found in Ireland, where the Courts have developed the mechanism of a "*constitutional tort action*".[15] In *Lovett v. Gogan*,[16] the Irish Supreme Court granted an injunction against the operations of a private company's unlicensed passenger road service, which was deemed to be interfering with the plaintiff-licensed transport company's constitutional right to earn a living through lawful means. Similarly, in *Murtagh Props., Ltd. v. Cleary*,[17] the Irish High Court ordered an injunction against a trade union for violating women employees' constitutional right to equality and livelihood by objecting to their employment by the plaintiff employer, despite such employment being in breach of an agreement between the plaintiff employer and the trade union.

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[13] A.N. Malik, *Horizontal Application of Fundamental Rights in India*, (2007) (Published Master's thesis, University of Toronto).
[14] Gardbaum, *supra* note 12.
[15] *See* Meskell v. Coras Iompair Éireann, [1973] I.R. 121; Glover v. B.L.N. Ltd., [1973] 1 LR. 388.
[16] Lovett v. Gogan, [1995] I.L.R.M. 12.
[17] Murtagh Props. Ltd. v. Cleary, [1972] I.R. 330.

A similar string of rationale can be found in the decisions of the European Court of Justice ("**ECJ**") in the two seminal cases of *Walrave v. Association Union Cycliste Internationale*[18] and *Defrenne v. Sabena*.[19] While in the former, the ECJ held that Article 7 of the Treaty of Rome,[20] which prohibits discrimination on the ground of nationality, applies even to private organisations, in the latter case, the principle of "*equal pay for male and female workers for equal work*," contained in Article 119 of the said Treaty,[21] was given direct horizontal application against private employers.

Indirect Horizontality

Indirect horizontality is the third position that lies between the two polar extremes of the vertical and the direct horizontal model. In essence, this model proposes that although constitutional rights can be directly enforceable only against the State, they are nonetheless permitted to have some degree of indirect application upon private actors as well.[22] This indirect application is realised when private laws that govern relationships and interactions between private actors are subjected to the restraints of constitutional rights. Thus, the word 'indirect' in 'indirect horizontality' indicates that there is a layer of non-constitutional (statutory, common, or judge-made) law mediating between the Constitutional rights and the private dispute.[23] In short, while the direct horizontal effect of constitutional rights results from imposing straightforward constitutional duties on the private actors themselves, the indirect horizontal effect is achieved through the influence of constitutional rights on the private law that the private actors invoke in civil disputes. Hence, under direct horizontal effect, fundamental rights govern all actions, while under the indirect horizontal effect, they govern all laws.[24]

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[18] Walrave v. Association Union Cycliste Internationale, [1974] E.C.R. 1405.
[19] Defrenne v. Sabena, [1976] E.C.R. 455.
[20] *See* Treaty on the Functioning of the European Union, art. 18.
[21] *See* Treaty on the Functioning of the European Union, art. 157.
[22] Gardbaum, *supra* note 12.
[23] GAUTAM BHATIA, HORIZONTAL RIGHTS: AN INSTITUTIONAL APPROACH (Bloomsbury Publishing, 1st ed., 2023).
[24] Stephen Gardbaum, *The Indian Constitution and Horizontal Effect*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, Sujit Choudhury, et al. eds., 1st ed., 2016).

Since the model of indirect horizontality is actualised when the values embodied in the constitution are extrapolated and applied to laws governing litigation between private parties, this usually occurs *via* the imposition of a duty on the courts to take the constitutional values into consideration while interpreting, applying and developing non-constitutional law, in congruence with those values.[25] Thus, private action is not directly implicated, but the law that authorises the action is at issue.[26] Taken a step further, private law can be modified, or even struck down by the courts, if it fails to meet constitutional standards.[27] The indirect horizontality approach has necessarily required juristic innovations whereby the State is held responsible for an individual's deprivation of fundamental rights, resulting from the acts of a non-state player.[28]

A personification of the indirect horizontality approach can be found in the jurisprudence of Canada, where courts have drawn a distinction between constitutional "*rights*" and "*values*".[29] This permits them to allow, to some extent, a horizontal application of constitutional rights to private actors, even in the absence of state action, through the inherent power of the courts to develop the common law in line with the constitutional values as enshrined in the Canadian Charter of Rights and Freedoms[30] ("**Charter**"). This position was succinctly explained by McIntyre J. in the landmark case of *Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd.,*[31] in the following words:

> "*Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the*

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[25] Gardbaum, *supra* note 12.

[26] Gautam Bhatia, *Horizontality under the Indian Constitution: A Schema*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 24, 2015) https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/.

[27] Stephen Gardbaum, *Where the (State) action is*, 4(4) INT'L J. CONST. LAW 760 (2006).

[28] Shameek Sen, *Transformative Constitution and the Horizontality Approach: An Exploratory Study*, 10 INDIAN J.L. & JUST. 141 (2019).

[29] Andrew S. Butler, *Constitutional Rights in Private Litigation: A Critique and Comparative Analysis*, 22 ANGLO-AM. L. REV. 1 (1993).

[30] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.

[31] Retail v. Dolphin Delivery Ltd., [1986] 2 SCR 573.

> *Charter rights of another, the Charter will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences between individuals.*"[32]

In other words, while the courts continue to maintain the distinction between private and public law, the values enshrined in the Charter do not directly apply to private law, but they do influence it.[33] Therefore, though the litigant may not be able to argue that his Charter rights have been violated by another private actor, he will be able to argue that the private law that governs his case must be construed and developed in a manner which is consistent with the values of the Charter.[34]

Similar jurisprudence of indirect horizontality can be found in Germany, where the rights contained in the Grundgesetz[35] render a "*radiating effect*" (Ausstrahlungswirkung)[36] on private law. In the landmark case of *Luth*,[37] the Federal Constitutional Court held that Eric Luth's right to free speech protected his political expression in organising a boycott of a film by Veit Harlan (a Nazi-era film director), even though Harlan's economic interests were protected by private law.[38] Thus, the right to freedom of expression was held to permeate even private law in the following words:

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[32] *Id.* ¶ 39.

[33] *Id.*; *see also* Hill v. Church of Scientology, (1995) 2 SCR 1130.

[34] Malik, *supra* note 13.

[35] GRUNDGESETZ [GG] [BASIC LAW].

[36] Lüth, BVerfGE 7, 198.

[37] *Id.*

[38] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] §. 826 reads as "*[a] person who wilfully causes damage to another in a manner contrary to good morals is bound to compensate the other for the damage.*"

> "*The Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.*"[39]

In the classic Supreme Court of the United States[40] decision of *New York Times v. Sullivan*,[41] the Court reversed a libel damages judgement against the New York Times, and held that the common law of defamation to impose heavy damages upon the New York Times, as applied by the Alabama courts for libel was inconsistent with the First Amendment safeguards of free speech.[42] Consequently, the Court also framed the "actual malice" test in order to make the grounds on which a libel action can be successful more stringent.[43] Likewise, in *Du Plessis v. De Klerk*[44] (also a case regarding libel), the South African Supreme Court held that courts were required to apply, and thus develop common law while having due regard to the spirit of Chapter 3 of the South African Constitution.[45]

Positive Obligation

There is another model, which, though is seen as a form of indirect horizontality,[46] is distinct in some fundamental aspects. This is the model of "positive obligation." Under this model, the courts impose an affirmative duty upon the state to safeguard the fundamental rights of citizens even against infringements by private actors, and in doing so, bring the private actors under the aegis of fundamental rights. This theory posits that the constitutional rights vested in individuals against the State are

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[39] Lüth, *supra* note 36.
[40] SCOTUS stands for "*Supreme Court of the United States*".
[41] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[42] U.S. CONST. amend. I reads as, "*Congress shall make no law abridging the freedom of speech, or of the press.*"
[43] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[44] Du Plessis v. De Klerk, (1996) 3 SA 850 (CC).
[45] S. AFR. CONST., Part III (Fundamental Rights).
[46] Gardbaum, *supra* note 24.

violated not only when the State actively impinges on their enjoyment, but also when the state fails to secure these rights through its omission or inaction.[47] Thus, unlike conventional indirect horizontality, which brings private actors within the cover of constitutional rights by subjecting private laws to constitutional scrutiny, the model of positive obligation does the same by imposing positive constitutional duties on the state to enact certain laws and to take certain actions that regulate private individuals in accordance with the constitutional framework.[48] Hence, the fundamental rights of individuals as enshrined in the Constitution cast a positive obligation upon the State to regulate private actors in a manner that ensures that these rights are not violated.

An example of this approach could be found in the decision of the Constitutional Court of South Africa in the case of *Government of the Republic of South Africa. & Ors v. Grootboom & Ors.*[49] In this case, the Court held that Article 26 of the South African Constitution[50] obliges the state to devise and implement a coherent, co-ordinated housing programme and that in failing to provide for those in most desperate need, the government had failed to take reasonable measures to progressively realise the right to housing.

The approach of positive obligation also becomes apparent in many of the decisions of the European Court of Human Rights.[51] For example, the case of *Storck v. Germany,*[52] which concerned an 18-year-old woman, who had been placed in a locked ward of a private psychiatric institution at her father's demand, who believed her to be suffering from psychosis. In its decision, the Court held that the State can be responsible for the deprivation of liberty in three ways:

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47 Gardbaum*, supra* note 27.

48 C. O'Cinneide & M. Stelzer, *Horizontal effect / State Action, in* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW (Taylor & Francis, M. Tushnet, T. Fleiner and C. Saunders eds., 1st ed., 2013).

49 Government of the Republic of South Africa. & Ors v. Grootboom & Ors., 2000 (11) BCLR 1169 (CC).

50 S. AFR. CONST., art. 26 reads as, "*Everyone has a right to have access to adequate housing.*"

51 *See* IB v. Greece, App. No. 552/10 Eur. Ct. H.R. (2013); Osman v. United Kingdom, App. No. 23452/94 Eur. Ct. H.R., (1998).

52 Storck v. Germany, App. No. 61603/00 Eur. Ct. H.R., at 4061 (2005).

(i) the direct involvement of public authorities in the person's illegal detention;
(ii) if the courts fail to interpret the law governing any claim for compensation for unlawful deprivation of liberty in the spirit of Article 5 of the European Convention on Human Rights[53];
(iii) the State has breached its positive obligation to protect the person against interferences with his or her liberty by private persons.

To surmise the three models of horizontality, direct horizontality binds individuals; indirect horizontality binds courts in their interpretation of the law; and positive obligations bind state authorities.[54]

JURISPRUDENCE IN INDIA

Since "State" occupies such a pivotal space in our understanding of the applicability of fundamental rights, a gainful reference can be had by paying attention to the scheme of Part III of the Indian Constitution. *First*, Part III begins with the definition of "State" for the purposes of the said part, which includes the Government and the Parliament of India along with the Government and the Legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India.[55] A mere glance at this provision will evince the fact that, while the terms "government," "legislature," and "local authority" present no difficulty in interpretation, the term "other authority" is ambiguous in its intended meaning and scope and thus became the focal point of many judicial pronouncements. The most comprehensive of these decisions was in the case of *Ajay Hasia v. Khalid Mujib Sehravardi*,[56] ("**Ajay Hasia**") where the court held that factors like the extent of financial control the Government has over the concerned entity, whether the concerned body enjoys monopoly status, which is either conferred or protected by the State, deep and pervasive state control over the institution,

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53 European Convention on Human Rights, 1950, art. 5 reads as "*Everyone has the right to liberty and security of person.*"
54 ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Oxford University Press, 2002).
55 INDIA CONST. art. 12.
56 Ajay Hasia & Ors. v. Khalid Mujib Sehravardi, (1981) 1 SCC 722, ¶ 9.

and if the function deployed by the entity is of public importance and resembles government function, are potent indicators as to whether the authority in question is a "State" within the meaning of Article 12. However, I must emphasise that, as stated in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*[57] ("**Pradeep Kumar**"), the tests laid down in *Ajay Hasia* are not a rigid set of principles such that if a body falls within any one of them, it will *ipso facto* be considered "State" within the meaning of Article 12. The real question will be whether, in light of the cumulative facts of a given case, the body is financially, functionally, and administratively dominated by or under the control of the Government or whether the Government merely exercises regulatory control over the said body. If it is the former, the body will come within the meaning of "State" as per Article 12, and if it is the latter, it will not.[58]

Another aspect of note is that the definition of "State" under Article 12 is an inclusive one and not an exclusive or exhaustive one. This allowed the Courts to steadily augment the ambit of the term "other authorities" with a view of preventing the Government from by-passing its constitutional obligations by creating companies, corporations, etc. to perform its duties.[59] This has led to the steady expansion of the concept of "State" under Article 12 over time to include even entities that perform functions that closely resemble those performed by the government in its sovereign capacity.[60] However, unlike in the United States,[61] judicial pronouncements in India have kept the courts of the country, exercising their judicial powers, outside the purview of "State" and consequently, a decision of a court of competent jurisdiction cannot violate a fundamental right.[62]

On a perusal of all the rights enshrined in Part III of the Constitution, it can be noticed that some fundamental rights would be rendered otiose if not made applicable against private actors. For example, the right of a citizen not to be discriminated against on the grounds of religion, race, caste, sex, place of birth, or any of them, while accessing shops, public

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[57] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.
[58] *Id.* ¶ 40.
[59] Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649, ¶ 14.
[60] Ramakrishna Mission v. Kago Kunya, (2019) 16 SCC 303.
[61] *See* Virginia v. Rives, 100 U.S. 313 (1880).
[62] Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388.

restaurants, hotels, places of public entertainment, public wells, and tanks;[63] the abolition of untouchability;[64] the interdiction against human trafficking[65] and child labour,[66] are rights that are "*plainly and indubitably enforceable against everyone*."[67] For example, in the case of *People's Union of Democratic Rights v. Union of India*,[68] the Supreme Court observed:

> "…*whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. Of course, the person whose fundamental right has been violated can always approach the court for the purpose of the enforcement of his fundamental right, but that cannot absolve the State from its constitutional obligation to see that there is no violation of fundamental right*…"[69]

Similarly, in *Indian Medical Association v. Union of India*,[70] the Supreme Court gave an expansive interpretation to the word 'shops' in Article 15(2) and brought within its ambit all kinds of establishments that provide goods or services.

However, with regard to other fundamental rights that expressly identify the "State" (as defined under Art. 12) as the addressee, the courts in India have predominantly taken the stand that these rights are safeguards of the citizens' freedoms against the arbitrary invasion by the State.[71] This view

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63 INDIA CONST. art. 15, cl. 2.
64 INDIA CONST. art. 17.
65 INDIA CONST. art. 23.
66 INDIA CONST. art. 24.
67 Gardbaum*, supra* note 24; Sen, *supra* note 28; *see also* the discussion regarding art. 15(2) *in* 7 CONST. ASSEMB. DEB. (Jan 8, 1948) https://www.constitutionofindia.net/constituent-assembly-debate/volume-7/.
68 People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235.
69 *Id.* ¶ 15.
70 Indian Medical Association v. Union of India, (2011) 7 SCC 179.
71 State of West Bengal. v. Subodh Gopal Bose, AIR 1954 SC 92, ¶¶ 50-52; P.D. Shamdasani v. Central Bank of India Ltd., 1951 SCC 1237, ¶ 9.

also found support in the statements of Dr. Ambedkar before the Constituent Assembly.

> "*The object of the fundamental rights is two-fold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority ---- I shall presently explain what the word "authority" means ---- upon every authority which has got either the power to make laws or the power to have discretion vested in it.*"[72]

This approach adheres to the classical view of freedom as conceived in the tradition of western liberalism, where the Constitution is meant to serve as a check on the tyrannical potential of the State and not on the individual conduct of citizens.[73] The philosophical underpinning being that there are private realms, *albeit* circumscribed by the State and society, in which individual actions must be autonomous and protected from the overreaching tendencies of the State and where individuals are free to pursue their own conception of the good.[74] Thus, limiting the scope of constitutional rights to the public sphere has been deemed to preserve the liberty and autonomy of citizens, preserving a heterogeneous private sphere free from the uniform and compulsory regime constructed by constitutional norms.[75]

The two cases that epitomise this "*vertical*" approach by the Indian Supreme Court are – *Zee Telefilms Ltd. v. Union of India*[76] ("**Zee Telefilms**") and *Zoroastrian Cooperative Housing Society v. District Registrar*[77] ("**Zoroastrian Cooperative**"). In *Zee Telefilms*, the Supreme Court categorically held that the prerequisite for invoking the enforcement of a fundamental right under Article 32[78] is that the violator of that right is the State. In this case, the Board of Cricket Control of India ("**BCCI**") terminated a contract for

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[72] 7 CONST. ASSEMB. DEB. (Jan 8, 1948) https://www.constitutionofindia.net/constituent-assembly-debate/volume-7/, at 610.
[73] Malik, *supra* note 13.
[74] Brest, *State Action and Libel Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U.PA. L. REV. 1296 (1982).
[75] Gardbaum, *supra* note 12.
[76] Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.
[77] Zoroastrian Cooperative Housing Society v. District Registrar, (2005) 5 SCC 632.
[78] INDIA CONST. art. 32. reads as "*The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part [III] is guaranteed.*"

exclusive broadcasting rights with the petitioner. Consequently, the petitioner brought an action by way of a Writ Petition under Article 32 of the Constitution to restrain the BCCI from arbitrarily terminating the contract. The Court held that since the BCCI was not a "State" as per the *Pradeep Kumar*[79] *guidelines*, an Article 32 petition cannot lie against it. In *Zoroastrian Cooperative*, the Supreme Court had to adjudge the constitutional validity of the said society's bye-law, which prohibited the sale of land by its members to any non-Parsi. Justice Balasubramanyan, speaking for the Court, upheld the validity of the said bye-laws, holding that even though the Constitution provides that there shall be no discrimination based on religion in any state action, Part III of the Constitution has not interfered with the right of a citizen to enter into a contract for his own benefit while at the same time incurring a certain liability arising out of the contract.[80]

However, since the State has increasingly distanced itself from commercial activities and ceded ground to private actors such as large conglomerates, fundamental rights are more likely to be violated by private enterprises rather than by the State.[81] As a result, the Supreme Court has progressively expanded the applicability of fundamental rights, especially in environmental and labour matters, and we start to see some semblance of horizontal application, albeit in a very rudimentary form.

This can be observed in *M.C. Mehta v. Union of India*,[82] where, though the Supreme Court refrained from conclusively holding private corporations as "*State*",[83] it opined that when laws of the past do not keep pace with the changing socio-economic realities, the Courts should evolve new laws and that the ambit of the term "*State*" must be expanded to advance human rights jurisprudence. Whereas in *M.C. Mehta v. Kamal Nath*,[84] ("**Kamal Nath**") the Supreme Court developed a novel jurisprudence by holding that the state was itself in breach of public trust by granting a lease of forest

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79 Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.

80 For a contrary view on a similar set of circumstances, *see* Shelly v. Kremer, 334 U.S. 1 (1948).

81 V.N. SHUKLA, CONSTITUTION OF INDIA 29 (Eastern Book Company, 13th ed., 2003).

82 M.C. Mehta v. Union of India, (1987) 1 SCC 395.

83 *See also* Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212.

84 M.C. Mehta v. Kamal Nath, (2000) 6 SCC 213.

land to a private company for commercial purposes and thereby invoked its Article 32 jurisdiction to foist liability for exemplary damages on the private company under the "*polluter pays principle*".

Over time, the Supreme Court has become bolder in expanding its reach under Article 32. For example, in *Bodhisattwa Gautam v. Subhra Chakraborty (Ms.)*,[85] it granted relief to a rape victim under its Article 32 jurisdiction for the violation of the victim's fundamental rights, holding that fundamental rights under Article 21 can be enforced even against private bodies and individuals. On similar lines, in *Consumer Education & Research Centre v. Union of India & Ors.*,[86] the Supreme Court held that the "right to life" under Article 21 includes not just the right to livelihood, but also the right to better standards of living and hygienic conditions in the workplace. Thus, the Court found it within its powers to issue directions, even to private employers, to pay compensation to workers affected by hazardous working conditions. Even the right of private educational institutions to freely contract has been subjected to the rigours of fundamental rights when the Court in *Mohini Jain v. State of Karnataka*[87] held that it was not permissible for the State to permit universities to charge a capitation fee in consideration of admissions as it amounts to denial of a citizen's right to education.

Furthermore, it is interesting to note that we find examples of both indirect horizontality and positive obligation models being applied in India. To find a case in point for the positive obligation model in India, one needs to only refer to the judgement of the Supreme Court in *Vishakha v. State of Rajasthan*[88] ("**Vishakha**"), where it was held that the State's failure to enact legislation against workplace sexual harassment in public and private employment amounted to a violation of the Petitioner's constitutional rights under Articles 14,[89] 19, and 21. In *Medha Kotwal Lele v. Union of India*,[90]

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[85] Bodhisattwa Gautam v. Subhra Chakraborty (Ms.), (1996) 1 SCC 490.

[86] Consumer Education & Research Centre v. Union of India & Ors., (1995) 3 SCC 42.

[87] Mohini Jain v. State of Karnataka, (1992) 3 SCC 666.

[88] Vishakha v. State of Rajasthan, (1997) 6 SCC 241.

[89] INDIA CONST. art. 14 reads as "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*"; art. 15 refers to "*Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*"

[90] Medha Kotwal Lele v. Union of India, (2013) 1 SCC 297.

the Court even proceeded to direct states that had not yet implemented a workplace sexual harassment law to do so within two months.

Similarly, the indirect horizontality model is exemplified in the case of *R. Rajagopal v. State of Tamil Nadu*,[91] where the Supreme Court read the common law of defamation in a way to bring it into stricter compliance with Article 19(1)(a) of the Constitution.[92] An example of interpreting a private law statute in consilience with Part III of the Constitution rather than invalidating it is *Githa Hariharan v. Reserve Bank of India*.[93] Here, the Supreme Court held that Section 6 of the Hindu Minority and Guardianship Act, 1956,[94] which granted natural guardianship of a Hindu minor to the father and only after him, to the mother, could be interpreted to mean that the mother becomes the guardian only following the death of the father. However, as per the Court, this interpretation would be an obvious instance of the state discriminating on the basis of sex under Article 15(1). Thus, rather than annulling the provision, the Court interpreted the provision to mean that the mother could become the guardian of the minor even in the father's absence or as a result of his indifference or mutual understanding between the father and mother of her guardianship.

ANALYSIS OF KAUSHAL KISHOR V. STATE OF UTTAR PRADESH

Given the background as detailed in the foregoing paragraphs, we can now better scrutinise the majority judgment in *Kaushal Kishor*. Though giving fundamental rights a horizontal application is in consonance with recent judicial developments both in India and around the world, the majority opinion has left much to be desired.

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

92 INDIA CONST. art. 19, cl. 1(a) reads as "*All citizens shall have the right to freedom of speech and expression.*"

93 Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228.

94 Hindu Minority and Guardianship Act, 1956, § 6, No. 32, Acts of Parliament, 1956 (India).

Firstly, the decision in *Kaushal Kishor* follows in the tradition of landmark judicial pronouncements of the Indian Supreme Court, wherein the Court, in certain circumstances, recognised the folly of inhibiting the application of fundamental rights to the "State" alone, because every private act necessarily derives its legal validity from the extant legal landscape, which, in turn, is the creation of the State.[95] However, the Supreme Court has, in the past, been very circumspect in giving a direct horizontal application to fundamental rights, except in cases where the fundamental right itself would become nugatory if not made applicable against private actors.[96] This reluctance on the part of the Supreme Court to make the operation of fundamental rights against private actors unqualified and absolute, as it has now done in *Kaushal Kishor*, stems from the fact that doing so puts the very purpose of Article 12 into question.[97] If indeed all fundamental rights were intended to have direct horizontal application, then there remains no requirement to look to Article 12 to see if the entity in breach of any of those rights qualifies for such enforcement in the first place.[98] Furthermore, even the phrase "*except by procedure established by law*" in Article 21 and the language and structure of Article 19 necessarily preclude their vertical application.[99] Thus, with the decision in *Kaushal Kishor*, the decades-long jurisprudence that the courts have developed through various precedents in mapping the scope of 'State' under Article 12[100] and trying to balance the sanctity of Article 12 on the one hand with an attempt to expand the ambit of fundamental rights on the other hand[101] has been made inconsequential.

Secondly, the dissent by Nagarathna J. itself delineates much of the difficulty in permitting fundamental rights to operate horizontally.[102] For one, many times, an interest may simultaneously be recognised as a common law right

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95 Gavin Phillipson & Alexander Williams, *Horizontal Effect and the Constitutional Constraint*, 74(6) MOD. L. REV., 878-910 (2011).

96 *See* discussion in part C.

97 Ishika Garg & Abinand Lagisetti, *Who Killed Article 12? – Horizontal Rights and the Judgment in Kaushal Kishor*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Jan. 10, 2023) https://indconlawphil.wordpress.com/2023/01/10/guest-post-who-killed-article-12-horizontal-rights-and-the-judgment-in-kaushal-kishor/.

98 *Id.*

99 P.D. Shamdasani v. Central Bank of India Ltd., 1951 SCC 1237.

100 *See* discussion in part C.

101 *Id.*

102 Kaushal Kishor v. State of Uttar Pradesh., 2023 4 SCC 1 (Nagarathna J. dissent).

and a fundamental right.[103] In such cases, can a citizen still claim violation of his fundamental rights by a private actor before a Writ Court even if there exists a common law right that is identical in content to the fundamental right and which may be enforced by having recourse to a civil court?[104] If this is allowed, there will be countless private disputes that will now flood the writ courts,[105] which will make it increasingly difficult for the already burdened Constitutional Courts to entertain such cases of fundamental rights violation between private persons[106] and since private disputes invariably involve disputed questions of fact, the essential difference between civil jurisdiction and writ jurisdiction will be rendered redundant, eventually relegating the symbolic status of fundamental rights to that of ordinary private laws.[107] Therefore, the decision of *Kaushal Kishor* inadvertently creates more problems than it resolves. It is for this reason that Courts in other jurisdictions have developed the doctrine of horizontality incrementally, arising out of concrete cases, and not as abstract philosophical exercises.[108]

The majority decision in *Kaushal Kishor* presupposes the non-existence of Article 12 as a whole,[109] annuls the precedents on writ jurisdiction and operability of fundamental rights, and through its interpretation, blatantly violates the text of Articles 19 and 21. In view thereof, it has even been argued[110] that the court failed to uphold the supremacy of the constitution, and the judgment under discussion here is an instance of a needless

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103 K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

104 Kaushal Kishor v. State of Uttar Pradesh, 2023 4 SCC 1, ¶ 39, 43 (Nagarathna J. dissent).

105 Garg & Lagisetti, *supra* note 97.

106 Ashwin Vardarajan, *Supreme Court's Horizontality Judgment: Errors, Omissions and Questions Left Unanswered,* LAW SCHOOL POLICY REVIEW & KAUTILYA SOCIETY (Jan. 19, 2023) https://lawschoolpolicyreview.com/2023/01/19/supreme-courts-horizontality-judgment-errors-omissions-and-questions-left-unanswered/.

107 *See* Eleni Frantziou, *The Horizontal Effect of the EU Charter of Fundamental Rights: Rediscovering the Reasons for Horizontality*, 21(5) EUR. L. J., 657-679 (2015).

108 Gautam Bhatia, *Kaushal Kishor, Horizontal Rights, and Free Speech: Glaring Conceptual Errors*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Jan. 27, 2023) https://indconlawphil.wordpress.com/2023/01/27/kaushal-kishor-horizontal-rights-and-free-speech-glaring-conceptual-errors/.

109 Garg & Lagisetti, *supra* note 97.

110 *See* discussion in part C.

"*unconstitutional informal constitutional change*",[111] which is an exercise of judicial interpretation by a constitutional court that creates a binding informal constitutional change that substantially replaces or destroys a Constitution or its contents.[112] However, these issues could have been addressed had the majority not been silent on the kind of horizontality that it sought to make applicable in the Indian context. While not all fundamental rights can be applied in the same way, unless the wording of the fundamental right itself calls for direct horizontality,[113] in which private actors are directly subject to fundamental rights, indirect horizontality should be employed in other cases. Under this framework, Courts will be bound to interpret statutes (including private laws)[114] and even matters of public policy[115] in a way that is concordant with Part III of the Constitution. Furthermore, horizontal operations that impose positive obligations on the State can continue to be adopted when the State has failed in its constitutional, statutory, or common law duties, as in *Vishakha* and *Kamal Nath*. In this manner, Writ Courts will be bound to interfere only when any prevailing statute, common law, custom, or usage is in conflict with Constitutional values, thus fortifying the fundamental rights of the citizens. But at the same time, the Courts will be able to eschew using their writ jurisdiction for private disputes, thereby maintaining the normative difference between private law and public law.

CONCLUSION

In an age where some private parties, like large multinational corporations, are increasingly accumulating power equivalent to that of the state,[116] the

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111 Anujay Shrivastava, *Indian Supreme Court's Judgment on 'Horizontal Application' of Fundamental Rights: An 'Unconstitutional Informal Constitutional Change'?*, IACL-AIDC BLOG, (Jan. 31 2023) https://blog-iacl-aidc.org/2023-posts/2023/1/31/indian-supreme-courts-judgment-on-horizontal-application-of-fundamental-rights-an-unconstitutional-informal-constitutional-change.

112 Anujay Shrivastava, *Mapping 'Unconstitutional Informal Constitutional Changes' by Constitutional Courts – A Comparative Study of Supreme Courts in India, Bangladesh, Honduras and the USA*, 7(1) COMP. CONST. L. & ADMIN L. J., 42-94 (2022).

113 *See generally* Indian Medical Association v. Union of India, (2011) 7 SCC 179 [Horizontal applicability of art. 15(2)]; M.C. Mehta v. State of Tamil Nadu, (1996) 6 SCC 756 [Horizontal applicability of art. 24].

114 *See generally* Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228.

115 *See generally* Central Inland Water Transport v. Brojo Nath Ganguly, (1986) 3 SCC 156.

116 J.H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L LAW 1, 19 (2008).

majority in *Kaushal Kishor* may have been, through their opinion, trying to meet the ideals of Martin Loughlin, according to whom the modern state exists to protect the interests of right-bearing individuals through constitutional arrangements.[117] However, in an attempt to do so, they may have opened a Pandora's Box of practical infeasibility and judicial uncertainty. It does not suffice merely to acknowledge that a degree of horizontality is needed in order to accommodate fundamental rights in a modern social setting.[118] The Court has thus missed an invaluable opportunity to explicate the jurisprudence on the varying degrees of horizontality with respect to different fundamental rights. Thus, along with tackling the issues presented in the previous part, the Supreme Court and the High Courts are now tasked with developing this new avenue of jurisprudence, which is still in its incipient stage in India. For e.g., the Courts have always struck a balance between fundamental rights and the State's imperative to abrade these rights for the purposes of remedying a greater evil.[119] However, under a direct horizontal jurisprudence, will individuals have an absolute claim to fundamental rights against other individuals, and if not, how will the interests of one individual be assessed in relation to the rights of others in a setting where "state action" has become unnecessary? Also, for fundamental rights mandating direct horizontality, questions such as what types of private actions give rise to violations of fundamental rights, whether and how such actions should be punished, and what are the limits of subjecting private interactions to fundamental rights remain to be further explored and developed.[120]

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117 MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 342-343 (Oxford University Press, 1st ed., 2010).

118 Frantziou*, supra* note 107.

119 *See generally* State of Madras v. V.G. Row, (1952) 1 SCC 410; Mohd. Subrati v. State of West Bengal, (1973) 3 SCC 250; Director General, Directorate General of Doordarshan v. Anand Patwardhan, (2006) 8 SCC 433.

120 Frantziou*, supra* note 107.

BOOK REVIEW: 'THESE SEATS ARE RESERVED: CASTE, QUOTAS AND THE CONSTITUTION OF INDIA' BY ABHINAV CHANDRACHUD

RUDRA CHANDRAN[1]

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> "*But how can we even start to be strong when there is a disease in our midst? This disease, my brothers and sisters, is the notion of untouchability ravaging us for centuries, denying dignity to our fellow beings. This disease must be purged from our society, from our hearts and our minds*"[2]

INTRODUCTION

Keeping the above words in mind, Abhinav Chandrachud's Book 'These Seats are Reserved: Caste, Quotas and the Constitution of India' seems like a stoic account of the Reservation Policy in India analysing the same even before India got her independence. It traces the measures taken by the British in India to that of Dr. B.R. Ambedkar and how the reservation policy was shaped in India.

The issue of caste and reservation is still plaguing the country, and the same is being affirmed by news of instances such as the one where a young Dalit student in IIT Bombay took his life allegedly due to being a victim of harassment due to his caste. Unfortunately, such instances are recurring, especially amongst the youth. On January 17, 2016, Rohit Vemule, a Dalit student and Ph.D candidtate at the University of Hyderabad committed

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* Cite it as Rudra Chandran, *Book Review: 'These Seats are Reserved: Caste, Quotas and Constitution Of India' by Abhinav Chandrachud*, 7(2) COMP. CONST. L. & ADMIN L. J. 96 (2023).

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[2] ROHINTON MISTRY, A FINE BALANCE 107 (1st ed. 1996).

suicide as he was not able to get grants for his study, and because of the prejudices he had faced in the University. His suicide note was a scalding reminder of the social situation and how he felt his "*birth was his fatal accident*".[3] Therefore, it is imperative that as conscious citizens of this country, we read the book to understand the reservation and caste dynamics.[4]

Chandrachud addresses that the reservation policy in India remains incomplete without addressing case laws and through it, the role played by the Hon'ble Supreme Court of India.

In India, the traditional caste system divides the society into the following four Varnas, the Brahmins, the Kshatriyas, the Vaishyas, and the Shudras (who are generally referred to as untouchables).[5] Shudras were restricted in their access to temples, wells, schools, and shops. There were strict rules of segregation amongst the castes which were rigidly enforced by the higher castes through strict rules of endogamy and coercion.[6]

Countries like the United States of America ("**U.S.**") and South Africa have a comparable history of discrimination in matters of their treatment of Blacks. Slavery, like untouchability in India, was deeply rooted in both the countries' history. In both these countries, since discrimination is based on the racial origin of people, compensatory discrimination forms the basis of such action.[7] In the U.S., it can be read into the Fourth Amendment.[8] In

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[3] The Wire, *My Birth is My Fatal Accident: Rohith Vemula's Searing Letter is an Indictment of Social Prejudices*, THE WIRE (Jan. 17, 2019), https://thewire.in/caste/rohith-vemula-letter-a-powerful-indictment-of-social-prejudices.

[4] S. Shantha, *IIT Bombay Suicide: Did Authorities Fail to Act Even After Surveys Pointed to Rampant Casteism?*, THE WIRE (Mar. 11,2023), https://thewire.in/caste/iit-bombay-suicide-did-authorities-fail-to-act-even-after-surveys-pointed-to-rampant-casteism.

[5] *Id.*

[6] Edward B. Harper, *Ritual Pollution as an Integrator of Caste and Religion*, 23 J. ASIAN STUD., 151-197 (1964).

[7] P. Anthony Raj & Nagaraju Gundemedu, *The Idea of Social Justice: A Sociological Analysis of the University Students' Reflections on the Reservation Policy in India*, 6 J. SOC. & SOC. ANTHROPOLOGY, 125-135 (2015).

[8] M. Varn Chandola, *Affirmative Action in India and the United States: the Untouchable and Black Experience*, 3 IND. INT'L & COMP. L. REV., 101-134 (1992).

India, the State strives to achieve social justice by distributing opportunities to the deprived class through the reservation policy.

OVERVIEW OF THE BOOK

The Book is a historical account of the reservation policies adopted right from the Montague Chelmsford Constitutional Reforms in 1918 to the latest EWS judgement.[9] The author describes in detail the political situation which existed from the coining of the term 'depressed classes' to its evolution as 'socially and educationally backward classes.' Throughout the book, he addresses that the objective of the policy is to ensure formal equality by correcting historical wrongs which led to inequalities in the society.[10]

The book is divided into seven major chapters. Chandrachud, through the first three chapters, provides a detailed account of the pre-independence reservation policy. He delves in detail regarding the 'depressed classes' where the British identified their degradation due to the false religious systems in the country. It was through the Montague Chelmsford reforms that they first got nominated to legislatures, starting the discourse for separate electorates.

Dr. Ambedkar participated in deliberations with the Simon Commission where he asked for separate electorates for the 'depressed classes' (who were later on divided into Scheduled Castes and Scheduled Tribes) which could be abolished after ten years. It is important to note that Dr. Ambedkar asked for adequate representation and not proportional representation, wherein proportional number of seats in the Parliament and assemblies shall be reserved based on their population across India. While addressing the Constituent Assembly, he stated that for the purpose of reservation, there must be a reconciliation of three separate points of view; *first*, there should be equality of opportunity for all citizens, *second*, as a general principle, there should be no reservation for any class or community, and *third*, "*there shall be reservations in favour of certain communities*

[9] Janhit Abhiyan v. Union Of India, (2022) SCC OnLine SC 1540.
[10] P. ISHWARA BHATT, FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP 217 (1st ed. 2004).

which have not, so far, had a 'proper look-in,' so to say, into the administration".[11] Moreover, Dr. Ambedkar wanted to have a sunset clause for the purpose of reservation. So, his major contention for 'adequate representation' was that reservation must be confined to the minority of seats, otherwise, the very first principle, i.e., equality of opportunity will be violated. At the same time, there was a historical development of the reservation of other Backward Classes.[12]

It is interesting to note that the seeds which were sown by Shahu Chatrapati Maharaj by funding the communal hostels for Marathas in Maharashtra were re-applied by the Maharashtra government in 2014 to give reservation to Marathas. Shahu funded communal hostels on the grounds of encouraging merit wherever it was found, and called for a non-Brahmin movement. Most importantly, he passed a resolution in 1902 where he said that fifty per cent of all vacancies in his administration had to be filled with recruits from backward classes. This resolution was relied on, when the Maharashtra government wanted to grant reservation to Marathas which was declared unconstitutional by the Hon'ble Supreme Court in the case of *Jaishri Laxmanrao Patil v. Union of India.*[13] It is also very interesting to note that Chandrachud is indirectly addressing vote bank politics, where political appeals are made on the basis of caste, language, religion, and sect already existing in India which was not the intention of Dr. Ambedkar.

Chandrachud, in the second Chapter of his book, points out that the original intent of the Constituent Assembly was to allow reservations only in legislative bodies and government jobs, and not in other areas, including the Rajya Sabha and the Cabinet. The members of the Constituent Assembly felt that there is no requirement for reservation of seats in the Cabinet as it would be 'constitutionally improper'. It can also be connected to Dr. Ambedkar's three-point formula, as he had repeatedly made it clear that reservation is an exception to equality of opportunity and that it should not be excessive. He, for this purpose, said that there should be a sunset

[11] 7 CONST. ASSEMB. DEB. (Dec 30, 1948), https://eparlib.nic.in/bitstream/123456789/762989/1/cad_30-11-1948.pdf.
[12] *Id.*
[13] Jaishri Laxmanrao Patil v. State of Maharashtra, (2021) 8 SCC 330.

clause of ten years for it. The reservation policy which was the original intent of Dr. Ambedkar had long walked into the pyre, but the social purpose of the same is still burning in the strata of society.

The next few chapters of the book are a very objective account of the reservation policy adopted in India after independence, where the author goes on to analyse the case laws and amendments brought by the Centre to address the issues relating to caste. He analyses in detail the role played by various judgements in shaping the reservation policy in India. The first major case of *State of Madras v. Champakam Dorairajan*[14] was decided in 1951, where the Hon'ble Supreme Court held that the Communal G.O. of 1927 (which stated that seats in Engineering & Medical Colleges should be filled on the following basis: six seats for Non-Brahmin Hindus, two seats for Backward Hindus, two seats for Brahmins, two seats for Harijans, one seat for Anglo Indians & Indian Christians, and one seat for Muslims), was in violation of the fundamental rights guaranteed to the citizens of India under Article 15(1) and Article 29(2) of the Indian Constitution. This led to the first amendment to the Indian Constitution, where they added Clause (4) to Article 15[15] which furthered reservation for socially and educationally backward classes or for the Scheduled Castes and the Scheduled Tribes.

Another difficulty that was soon faced was the identity of the 'Other Backward Class' and the question that whether caste is the sole factor in determining backwardness was still not figured out. This led to the formation of the Kaka Kalelkar Commission, 1955, which put out four criteria into determining who is a backward class. The Committee said that a backward class is based on a low social position in the traditional caste hierarchy, with no means of education, no adequate representation, or being inadequately represented in trade, commerce and industry policy. Even though the Supreme Court took the stance that caste should be a factor of backwardness and not the sole factor[16] got watered down. The

[14] State of Madras v. Champakam Dorairajan, (1951) SCC 351.

[15] Clause (4) to Article 15 allows the State to make special provisions for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes and Scheduled Tribes.

[16] M.R. Balaji v. State of Mysore, AIR 1963 SC 649.

adoption of the creamy layer was a welcome change.[17] But the Mandal Commission, 1979, was set up which said fifty-two percent of the population are SEBC and made recommendations for twenty-seven percent of reservations for SEBC and twenty-two point five percent for SC/STs, as it was categorically mentioned in the case of *Indira Sawhney*[18] that the reservation should not exceed fifty percent. The judgement recognised that reservation could not be restricted to a minority of seats but at the same time, it could not be extended to seventy percent.

Chandrachud, in a way, traces the evolution of reservation for Other Backward Classes through different cases and the possibilities of reservation, but he does not address whether social justice through distribution was achieved. Furthermore, he addresses the question that Dr Ambedkar's vision of reservation got watered down due to the issue of vote bank politics and its misuse. Chandrachud also seems to assume that vote bank politics is bad for democracy as it is still a much-debated topic in India. He points out how the legislature brought up the 77th Amendment to overcome the Indira Sawhney judgement. He touches upon horizontal reservation where he also argues that the same has to be determined by quantifiable data as was specifically mentioned in the case of M. Nagaraj.[19]

Chapter seven of the book focuses on issues relating to marriage, conversion, and migration, where Chandrachud raises important questions on whether a woman loses her caste when she converts to another religion. This Chapter is extremely important in matters relating to migration, as reservation is usually provided by the State in matters of education and employment, hence migration results in the loss of such status. This is something which happens in the everyday life of a common man. He might not have knowledge that if he settles in another state, he can lose his stature relating to reservation and thus, the 'no migration rule' assumes that social disabilities are not the same everywhere. But, sometimes, it may yield an unfair result which defeats the whole purpose of justice. This Chapter

[17] State of Kerala v. N.M. Thomas, (1976) 2 SCC 310.
[18] Indira Sawhney & Ors. v. Union of India, AIR 1993 SC 477.
[19] M. Nagaraj v. Union of India, (2006) 8 SCC 212.

seemed very interesting, especially with the latest judgement of *D Kumar v. A Raja.*[20] The case pertained to the constituency of Devikulam which was reserved for the Scheduled Caste among Hindus, within the State of Kerala. The question before the Court was whether a Christian in Kerala could claim reservation for being a Hindu Parayan under Section 5 of the Representation of the People Act, 1951. It was found that his grandparents migrated to Kerala from Tamil Nadu in 1951, and hence he cannot claim to be a member of the Hindu Parayan under Part 8 of the Constitution (Schedule Castes) Order, 1950. Even if Hindu Parayan is a Scheduled Caste in Tamil Nadu, the Court pointed out that since his grandparents only had temporary arrangements in Kundala Estate and later they converted to Christianity, the protection granted to the Hindu Parayan community with respect to election to Devikulam constituency cannot be claimed.[21] This conundrum related to the no migration rule and further, on matters of conversion, marriage was what the author was trying to provide in this chapter. The sheer fact that every citizen has a fundamental freedom to travel across all parts of India and reside freely in any part of India, coupled with no migration rule with respect to reservation, acts detrimental to the rights of such people.

While concluding, Chandrachud is treading carefully. Mostly, he sums up what he was trying to say in the previous chapters and calls for quantifiable data, as the last Census happened in India in 2011. As part of the conclusion, he gives arguments for and against reservations.

CRITICISM OF THE BOOK

The constitutional provisions to enable reservations shows the constitutional commitment to enforce distributive justice. Distributive justice assumes that different groups or communities in a society are not equal in terms of the resources possessed by them and their capacity to improve their own economic standards and in turn, their social status.[22] The fundamental objective of distributive justice is equality, and the Constitution of India embodies principles of distributive justice in both Part III of the Constitution, as well as in the Directive Principles of State

[20] D. Kumar v. A. Raja, 2023 SCC OnLine Ker 1643.
[21] *Id.*
[22] Raj & Gundemedu, *supra* note 7.

Policy. The reservation policy in India acknowledges various deprivations that are a result of historical wrongs and through that, it strives to achieve social justice by distributing opportunities to such deprived classes. But Chandrachud, through the book, failed to bring out this aspect of the constitutional spirit of this country.

Even though the author traces the history of quotas in this country, the book seems incomplete without addressing how the inequalities can be rectified through the methods adopted or whether it is even possible. The caste system in the society cannot be rectified just by giving the quotas, it is something which requires more equitable representation in the hopes of achieving social, economic, political and cultural justice. The problems relating to the caste system are obviously deeply ingrained into the societal scheme of India and identifying the backwardness of communities has to take into consideration their castes as well. In the case of Scheduled Castes (SC) and Scheduled Tribes (ST), the Presidential List is the determinant, however, who has to be identified as an SC/ST, has also been motivated by political reasons in the past. The major kind of dichotomy between higher and lower caste communities is not based on economic disparities alone, but also social stigma and untouchability.

Hence, there is a need to address the alternative requirements of quota-based reservations. The Anti-Discrimination and Equality Bill, 2016 was a comprehensive and universal legislation that could address all forms of discrimination. This particular legislation is a good example because it is universal, as it acts on it in a manner that would result in the protection and welfare of the backward classes. The above Bill had, in fact, recommended the setting up of Central and State level Equality Commissions to issue guidelines regarding discriminatory collection of data and formulation of a diversity index, etc. The enactment of such universal laws shall be beneficial to address problems that cannot be addressed through quota-based reservations.

Moreover, the book does not address the issues related to economically weaker sections. The issue is completely avoided. In relation to access to public goods, the book does not talk about how the 103rd Amendment is

utterly arbitrary. The whole purpose of the concept of reservations is to ensure that the substantive equality provided by the Constitution can only be achieved through some special provision, ensuring representation of the most backward class of citizens on account of caste practices, that at the same time will be controlled by the adequacy of representation. In simple words, reservations arise from the prevention of discrimination, which forms the central theme of the Constitution to produce a just social order.[23] The EWS reservation provides reservation benefits to a section of the population that is not socially backward, and whose communities are already represented in public employment, violates the very purpose of reservations and the essence of equality of opportunity, as mentioned under Article 16 of the Indian Constitution.

The important question of the Caste Census, of whether there should be one, was not even addressed by the author. He clearly points out the lacunae present in the reservation policy in India, majorly in matters relating to horizontal discrimination in favour of groups like women, differently abled, etc. Perhaps, the most important matter is that, if reservations are inherent in the principle of equality of opportunity and not an exception, it is also required that reservations be made a fundamental right, which the courts have continuously negated by saying that it is not one, rather affirming that it is an enabling provision.

CONCLUDING REMARKS

The book is accessible to the general public. Through historical legal research, the author establishes a link between the past and the present, between the depressed and reserved classes, and between Phule and Vemule. Therefore, it serves as a prologue to the much debated topic of reservations. But having said that, Chandrachud's book has its own drawbacks as well.

Although the book traces quota-based discrimination, it does not seem to understand the very precondition to such laws, which are relative group disadvantages. When a society has been horizontally and vertically split and stratified on the basis of caste and creed for ages and is breeding a system

[23] Abhiram Singh and Ors. v. C.D. Commachen, (2017) 2 SCC 629.

of inequality which keeps on perpetuating. Discriminatory laws are to be designed in such a way that the tangible benefits reach the most deprived.

In conclusion, it must be noted that the book acts as a beginner's guide on the matter of reservations, but it's not the chef-d'-oeuvre. The basic problem lies in the fact that the book gives a very neutral position on the subject of reservations, unfortunately, which is where lies its biggest weakness too. When it comes to issues relating to 'Caste, Quotas and the Constitution of India', one can no longer take a neutral stand.