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DIRECTOR'S NOTE

PROF. DR. I.P. MASSEY*

India being a former British colony has always faced the taint of borrowing its Constitutional Law from common law. The Indian Constitution despite being the longest and the most detailed in the world is often accused to be un-Indian or insufficiently Indian. However, a study of our Constituent Assembly Debates proves otherwise. The makers of the Constitution, indulged in constitutional gardening, picking certain principles from around the world and ignoring the ones that did not suit the needs of India. A conscious choice of undertaking a comparative study of several Constitutions was made and then the principles and provisions were tailored for their use in India. We learned from both the success and failure of Constitutions across the world. I believe this laid down the foundation for India, to keep up with global advancements in constitutional law, through its comparative vision.

Dr. Ambedkar envisioned a living Constitution, which continued to adapt and change, with every generation, instead of being bound by an archaic understanding. While traditionally, this vital task was vested in the Parliament, the mantle shifted to the Courts in the later years. Through its decisions, the Courts have acted as the *sentinel qui vive*, which step in to protect the rights of the people, where other organs fail to do so. This has especially been true in the area of human rights, where the Courts have incorporated novel judicial tools for better redressal. Inspiration for these tools has often come from judicial decisions of Courts across the world. I believe, this comparative approach of the Courts, has kept the Indian

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Constitution alive, unlike its counterpart in several countries where it has undergone a complete overhaul. Therefore, as members of the legal fraternity, it is imperative on us, to study and appreciate the comparative stance the Courts of India have taken for years.

It was with this vision, that the Comparative Constitutional Law and Administrative Law Quarterly **('CALQ')** was established in 2013. The aim was to initiate academic discourse in the subject of Constitutional Law and Administrative Law and the developments therein, both domestic and global. I believe the journal has served its purpose well, with regular issues carrying contributions from leading practitioners and students alike. The issues have respectfully critiqued topical developments that impact the lives of the citizens.

CALQ was first started as an online journal, however, on the demand from our esteemed readers the Editorial Board has decided to make the Journal available in print also. Hence, the copy in your hands is the first printed copy of CALQ.

At the very outset, I would like to express my sincere gratitude to the members of the Editorial Board of the Journal i.e. Aiswarya Murali, Subarna Saha, Athira Sankar, Gagan Singh, Tamizhoviya IT, Soumya Dwivedi, Aditya Nair, Akhil Shandilya, Anmol Jain, Shreshtha Mathur, Aditya Jain, Sandhya Swaminathan, Sayak Bannerjee and Shreya Daggar. Without their hard work and dedication, this issue would not have been possible.

We also place on record our sincere gratitude to Prof. (Dr.) Poonam Saxena, Vice Chancellor and Chief Patron for her encouragement and guidance.

Any democratic Constitution besides being a transformative document also lays down the structure and values of governance on the basis of which the relationship of the people with the state is regulated. Survival of a constitutional democracy largely depends on sagacity of the people, political morality of the ruling class and the creativity of the judiciary. Dr. Ambedkar had rightly remarked while signing the Constitution, that *'However good a Constitution may be, it is sure to turn out bad because who are called to work on it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good, if those who are called to work it, happen to be a good lot.'*

In most of the democracies having a parliamentary system of governance, the judiciary assumes centrality. This is especially true for developing countries as separation of powers in such countries simply means independence of the judiciary. The judiciary assumes the role of an interpreter of the Constitution, enforcer of constitutional values and morality and protector of human rights of the people.

Though the Indian Constitution did not envisage a very active central role of the judiciary, yet, the judiciary assumed its present activist role, to accept the challenges thrown by a developing constitutional democracy in India. It is a fact that when other organs of the state are in disarray only the judiciary is moving forward, though, at times, haltingly. It will not be an exaggeration to say that if a constitutional democracy is active and kicking today, the credit goes to the constitutional judiciary.

In every constitutional crisis, including those which posed existential threat to its existence, the judiciary rose to the occasion and saved the Constitution. History showed us that whenever a single party government came to power, it either tried to pack the Court or influence it's working. However, the judiciary, standing like a pillar, always acted as a break on this authoritarianism. The Court also warded off threats of tyranny of the majority, by acting as a counter-majoritarian force. It not only interpreted the Constitution progressively but also imaginatively shared the transformative passion of the Constitution for social change. For this purpose, the judiciary creatively deviated from originalism and textualism and moved towards living contextualism as a tool of interpretation of constitutional provisions, values and morality. Thus, the Apex Court 'did not merely recite the words of the Constitution, but also played its tune'.

The Apex Court has proved beyond doubt that it is a representative and responsible organ of the state. 'Representative' in the sense that it has been created by 'We, the People of India' through a Constitution which they have given to themselves and 'Responsible' in the sense that its survival depends on people's faith and trust in it.

However, it is rightly said that 'citadels never fall except from within'. Therefore, the judiciary must take care of certain problems which may appear to be of an existential nature. Such problems include rationalization of the collegium system for appointment of judges; Roster

Management; Post-retirement appointments; allowing its shoulder to the executive, to shoot; Involvement in governmental appointments which have political saliency. Certainly, the judiciary has the capacity and capability to deal with the 'self-coup and sabotage'.

In my opinion, the Apex Court has already committed a self-coup when it agreed to raise its strength to 31. The fact remains that meritocracy, excellence and commitment to constitutional values are virtues not evenly spread by the nature throughout the spectrum.

The Apex Court is considered the *sentinel qui vive* of justice in the country. I sincerely hope that it resolves its internal conflicts and wards off the question of its legitimacy, a concern being raised as of late. Nevertheless, it is heartening to note that in spite of its all limitations from within and outside, constitutional judiciary in India has always tried to push India into a right direction set by the Constitution and has kept alive the hope of the people in a constitutional democracy. The fact remains that if our direction is right, speed does not matter, which is mediated by various and varied societal factors.

EDITORS' FOREWORD

AISWARYA MURALI & SUBARNA SAHA*

As Editors-in-Chief, it gives us immense pleasure to present Issue 3 of Volume 4 of the Comparative Constitutional Law and Administrative Law Quarterly. At the onset, we would like to thank our Editorial Board for their contribution and dedication. Their determination and unparalleled dedication to the cause of widening our discourse on comparative constitutional and administrative law. As the first printed copy of the journal, this edition will mark a stepping stone. While we hand over the reign to the next editorial board, we hope that the journal attains new dimensions in its upcoming years.

Keeping in mind the upcoming General Elections in India, this edition covers articles which discuss the drawbacks of foreign political-funding and the nature of powers of the Election Commission. The edition also ponders upon questions pertaining to realities of legal assistance in India and the unprotected zones of freedom of speech and expression.

In '***Dancing in the Dark: The Right to Effective Legal Assistance in India***', Mr. Abhinav Sekhri takes up the cause of availability and implementation of effective legal assistance in India. The author suggests that despite there being a clear basis for one to claim a right to effective legal assistance, yet there are no clear test(s) laid out to regulate the ineffectiveness therein and there is lacuna in remedies available. To drive his point home, the author discusses the '*major signposts*' concerning the right to effective legal assistance in India. In order to do so, the article compartmentalizes the developments into two phases i.e. 1950-1978 and 1978-2018. Citing the example of *Mohd. Hussain (I) v. State*, the author argues that the Supreme Court departed from its approach in the former period. The Author cautions against the "I know it when I see it" approach of the court. In light of this, the article suggests that there is a doctrinal deficit. At the same time, it ponders over the questions, whether through the Supreme Court's application of the doctrinal test in *Strickland v. Washington* the gap has been filled. The article also discusses how the *Strickland test* juxtapose the Indian jurisprudence. In a word of caution, the

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author highlights the difference between the system and practices in the West and the East. The author contemplates possible reforms to the system, in light of the *Strickland test*.

In '***Freedom But Not Really: The "Unprotected" Zones of Article 19(1)(a)***', Mr. Shrutanjaya Bhardwaj starts with the proposition that the freedom of speech granted under Article 19(1)(a) of the Constitution of India, it may only be restricted vide the mandate of Article 19(2). The author identifies certain "problematic" judgments of the Indian Supreme Court, which have held that the freedom of speech shall not be applicable in certain circumstances. As a result, in practice the freedom of speech in India unknowingly reflects the U.S. First Amendment, which highlights certain "unprotected" speech. According to the author, the afore-mentioned problematic judgments are inconsistent with the Indian constitutional jurisprudence and tradition. The article argues against judicial discretion with regards to restriction on free speech. The Author concludes by arguing that, what may not be included under "reasonable restrictions" vide Article 19(2) shall not be restricted.

In '***Exploring the Duality of the Election Commission and the Scope of Judicial Review***', Ms. Sregurupriya Ayappan starts with the premise of the existence of multiple powers, which the Election Commission of India bears. She denotes the duality of Commission's powers with regards to disqualification of members and dispute relating to election symbols. Even though both may be regarded as *quasi-judicial,* the distinction lies in the test of whether the Commission bears the *trappings of the court*. The finality of the order in the two scenarios is also deemed essential for the determination of nature of the Commission's powers. The author also draws a distinction between the two functions, in terms of the discretionary powers that lie with the Commission, when adjudicating upon the two. Among other things, the article discusses whether the state's inherent powers to decide on two matters have been transferred to the Commission or not.

With the Supreme Court of India hearing public interest litigations challenging *inter alia* the 2016 and 2018 amendments to Foreign Contributions (Regulation) Act and the upcoming General Elections, we present '***The Dangers of Allowing Foreign Political Contributions: A Theoretical Perspective***', wherein Mr. Vasudev Devadasan and Ms.

Asmita Singhvi argue that allowing political contributions from entirely foreign-owned companies, retrospectively is alarming. The authors discuss the importance of legitimacy that is attached to the electoral process. They also discuss the negative impact on a constitutional democracy, in case the legitimacy is lost. The article discusses the drawbacks of allowing foreign contributions in the manner prescribed by the Parliament, which shall be detrimental to the interests of the constituents. The article discusses the impact of such foreign contributions on the right of political equality and freedom of speech. The authors suggest that though it is required that we strike a balance between the afore-mentioned, yet, the weight must be titled towards the freedom of speech. The article also considers the role of members of a political community and their interests compared to that of the foreign contributors. By doing so, the authors establish a distinction between the two groups and argue as to why allowing the latter to dominate (via foreign political contributions) would have adverse impact on the former and the constitutional democracy as a whole.

On behalf of the Journal, we extend our sincere gratitude to our Chief Patron, Prof. (Dr.) Poonam Pradhan Saxena, Director of the Centre for Constitutional Law and Administrative Law Prof. (Dr.) IP Massey and the esteemed members of the Advisory Board. We truly cherish the association with our readers and we hope that they would continue to contribute in the form of comments and criticisms, towards this issue.

DANCING IN THE DARK: THE RIGHT TO EFFECTIVE LEGAL ASSISTANCE IN INDIA

ABHINAV SEKHRI*

Conversations about legal aid and assistance in India have, by and large, been solely focused on the issue of access to counsel alone. As a result, courts, lawyers, and academics, are often unaware of the body of law that has developed over time on the related question of "effective" legal assistance by counsel. This short paper endeavors to fill the information gaps on this score. It focuses on a specific issue - shaping the contours of an accused person's right to effective legal assistance, when raised during an appeal after conviction. The paper demonstrates that while a right to effective legal assistance seems to have been affirmed, its contours are extremely difficult to discern at the moment. There is an urgent need for clarity on core questions in this field to help regulate claims of ineffective assistance by defendants with lesser arbitrariness and more certainty. Further, I also argue that this clarity in the right to effective assistance of counsel must work towards making it easier for defendants to litigate such claims reducing the many structural barriers that not only make it almost impossible for them to present their claim successfully, but also excludes key areas of legal assistance from any judicial scrutiny and potentially renders the right meaningless.

INTRODUCTION

One of the established truths about legal systems across the world, and especially those with a statutory framework as prolix and complicated as India, is that litigants need lawyers to help them navigate the system – especially when the litigants are criminal defendants whose liberty is on the line.

The abundance of lawyers in India means that legal assistance can be secured for quite cheap.[1] On top of which, the Indian legal system also

*Advocate. B.A. LLB (Hons.), 2014 (NLSIU); LL.M., 2018 (Harvard Law School). I am grateful to Justin Murray for introducing me to *Strickland* and the problems with the constitutional right to effective legal assistance as it exists in the United States. I am also grateful to Shri Singh, Ankit Agarwal, Gautam Bhatia, Utkarsh Saxena and Mansi Binjrajka, with whom I've had conversations about these issues. Sregurupriya Ayyapan offered excellent research assistance. All errors are mine.

offers free legal assistance to indigent persons.[2] For most parts, then, the system seems to cater sufficiently to the demand for legal assistance. However, the moment we shift our focus from mere availability to *effectiveness*, we encounter an entirely different scenario.

A short essay is not the space to tackle the regulatory travails of the legal profession in India: advocates are subject to minimal, almost non-existent professional regulations.[3] Instead, I squarely focus on one phenomenon that falls within this scope – judicial intervention to provide a guarantee of effective legal assistance. The anaemic performance of professional regulators exists in stark contrast with the active role played by the Indian Supreme Court [hereinafter "Supreme Court"] in the field of legal assistance since the late 1970s.

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[1] Figures from 2011 pegged the total number of registered advocates at approximately 13,00,000. *See*, *RTI Reveals: 1.3m Advocates*, *in* LEGALLYINDIA, https://www.legallyindia.com/the-bench-and-the-bar/rti-reveals-number-of-lawyers-india-20130218-3448 (February 18, 2013) (last accessed on December 15, 2018). There are no official reports on the variance between legal fees charged across the system. However, the gap between the top and the bottom is acknowledged to be extremely vast. *See*, Prachi Shrivastava, *How Much to Delhi's Top Advocates Charge?*, *in* LIVEMINT (September 16, 2015), https://www.livemint.com/Politics/BvOZE6z7Oyl6LiHZxWVlzL/How-much-do-Delhis-top-advocates-charge.html (last accessed on December 15, 2018).

[2] *See*, Article 39-A, Constitution of India; Legal Services Authority Act, 1987.

[3] The Bar Council of India is the primary regulator and the rules for professional ethics have not been updated since 1975. *See*, Chapter II, Part VI, Bar Council of India Rules, 1975. The calls for an updated code of ethics have been made since the 1980s, however no concrete steps have been taken in this regard. *See*, Law Commission of India, REPORT NO. 131 ON ROLE OF THE LEGAL PROFESSION IN ADMINISTRATION OF JUSTICE (1988); *BCI Floats Conflict Rules, Soft Legal Aid Duty, Ads and CFA Ban in New Ethics Code: Seeks Comments*, *in* LEGALLYINDIA (March 11, 2011), https://www.legallyindia.com/home/bci-floats-conflict-rules-soft-legal-aid-duty-cfas-a-advertising-ban-in-new-ethics-code-invites-comments-within-week-20110311-1904 (last accessed on December 15, 2018); Raghav Ohri, *Government, SC, in Favour of Ethics Body for Legal Profession*, *in* ECONOMIC TIMES (October 23, 2017), https://economictimes.indiatimes.com/news/politics-and-nation/government-sc-in-favour-of-ethics-body-for-legal-profession/articleshow/61177574.cms (last accessed on December 15, 2018); Ashok Bagriya, *Supreme Court Favours Law to Regulate Hefty Fees Charged By Lawyers*, *in* HINDUSTAN TIMES (December 7, 2017), https://www.hindustantimes.com/india-news/sc-favours-law-to-regulate-hefty-fees-charged-by-lawyers/story-n1OdH52JcfVi5IPdwPgxvI.html (last accessed on December 15, 2018).

The journey that led the Supreme Court from not recognising a right to legal aid even in capital cases to recognising a fundamental right to free legal assistance is an area well-traversed in scholarship and popular accounts. What is not equally well-discussed, however, is the Supreme Court's contribution towards buttressing this fundamental right by also recognising a right to *effective* legal assistance in the criminal process, specifically in context of post-conviction appeals by defendants.

This paper aims to contribute to this modest stream of scholarship, and my argument concerns the mechanics of how such claims are litigated and regulated. While there is a clear basis for claiming a right to effective legal assistance, I argue that currently there is no clear test for regulating ineffective assistance claims in India. No consistent answers have been provided for questions such as what is *effective* assistance, when can defendants raise a claim, and what remedies are available.

However, recently this doctrinal gap has been sought to be filled by resorting to American law. I argue that this will be a serious misstep for the development of Indian law in this context. Not only will it be a poor fit with existing in Indian law, but it will exacerbate the systemic issues that mechanics of these litigations have revealed, and quite probably work towards widening the chasm between the kind of justice available to defendants with means and those without.

I. PART ONE

The paucity of scholarship on the right to effective legal assistance in India requires charting an outline of the development of this right before tackling more substantive issues. This section does not attempt to provide a conclusive historical account, rather opts to flag major signposts from 1950 till the present.

a. 1950 – 1978: Effective Assistance through Rule-Enforcement

After much deliberation, the framers of India's Constitution decided against inserting a "Due Process" clause and instead voted in favour of a right protecting life and personal liberty against deprivations not as per

"procedure established by law".[4] This choice meant that claims of this right to personal liberty being violated would not be assessed on the basis of some independent, abstract values but instead on the basis of existing laws.[5] This interpretive approach was key to how the Supreme Court faced claims of effective assistance in the years between 1950 – 1978, i.e. till the time this interpretive approach itself was abandoned.

In 1951, the Court was presented with a petition that sought to overturn capital convictions on, *inter alia*, grounds of no legal assistance having been provided to the defendants.[6] The Court held that since Indian law only prescribed a right to counsel *of choice*, and not a right *to* counsel, there could be no rule vitiating trials conducted without counsel in capital cases.[7] However, it is also noted that superior courts retained discretionary powers to interfere if they found that "the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to a negation of a fair trial."[8]

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[4]INDIA CONST art 21. On the deliberations resulting in the exclusion of the phrase "due process" from the Constitution, *See*, CONSTITUENT ASSEMBLY DEBATES, VOL. VII 797–98 (Dec. 3, 1948), 842–857 (Dec. 6, 1948), 859 (Dec. 7, 1948), 999–1001 (Dec. 13, 1948); CONSTITUENT ASSEMBLY DEBATES, VOL. IX, 1496–1539 (Sept. 15, 1949), 1541–70 (Sept. 16, 1949).

[5]This view was affirmed by the Supreme Court in its first foray into testing Article 21 of the Constitution of India. *See*, A.K. Gopalan v. State of Madras & Ors., 1950 SCR 88 (Supreme Court of India, Six Justices' Bench).

[6]Janardan Reddy & Ors. v. State of Hyderabad & Ors., 1951 SCR 344 (Supreme Court of India, Five Justices' Bench).

[7]*Id. See* also, Tara Singh v. State, 1951 SCR 729 (Supreme Court of India, Four Justices' Bench) (Holding that Section 340 of the Criminal Procedure Code 1898 did not confer any *right* to counsel and only created a duty upon judges to inform the defendant that she could engage counsel). Importantly, the Court in Janardan Reddy expressly refused to apply the United States' Supreme Court decision of Powell v. State of Alabama, 287 U.S. 45 (1932), where convictions in capital cases were overturned for lack of effective legal aid. While the Bench in Janardan Reddy argued that the American decision relied upon the due process logic which was alien to the Indian Constitution, a close look at the facts in *Powell* suggest that the Indian Supreme Court was not entirely correct in its analysis. *See also*, K.K. Nigam, *Due Process of Law: A Comparative Study of Procedural Guarantees against Deprivation of Personal Liberty in the United States and India*, 4(1) J. INDIAN L. INST. 99, 114–17 (1962).

[8]Janardan Reddy, at ¶ 7.

Thus, although the Supreme Court did not speak a language of "rights" in the context of legal assistance for defendants, it did acknowledge the importance of the same towards ensuring a fair trial and so recognised scope for judicial intervention. Moreover, the Court also hinted that the claims might have been more successful had they been able to cite a breach of existing legal rules that *mandated* appointment of counsel – in fact already present in some Indian states at the time.

In the years following *Janardan Reddy*, this combination of factors proved successful in many High Courts which had issued practice directions for providing state-funded counsel in capital cases for indigent defendants. Capital convictions were overturned on grounds of ineffective legal assistance by the High Courts in Kerala, West Bengal, and Orissa, which examined the record to determine not only if counsel had been appointed but also whether any effective defence had been mounted and thus breathed substance into the state's duty to appoint counsel.[9]

In 1968, such a case reached the Supreme Court.[10] Bashira had been convicted and sentenced to death for having murdered his wife. While he had been provided state-funded counsel, the appointment was done just before the trial began. He contended that this amounted to a breach of the practice rules issued by the Allahabad High Court which required appointed-counsel to be provided "sufficient time to prepare the defence".[11]

The Supreme Court agreed, and found that this vitiated his conviction as it took away his right to life and personal liberty not as per the procedure

[9]*See*, Mathai Thommen v. State, AIR 1959 Ker 241 (Kerala High Court, Two Judges' Bench); Kunnummal Mohammed & Anr. v. State of Kerala, AIR 1963 Ker 54 (Kerala High Court, Two Judges' Bench); Panchu Gopal Das v. State, AIR 1968 Cal 38 (Calcutta High Court, Two Judges' Bench); Raj Kishore Rabidas v. State, AIR 1969 Cal 321 (Calcutta High Court, Two Judges' Bench); Kamala Domen v. State, 1971 (1) CWR 636 (Orissa High Court); Mangulu Behera v. State, (1971) 37 CLT 1180 (Orissa High Court, Two Judges' Bench).

[10]Bashira v. State of Uttar Pradesh, AIR 1968 SC 131 (Supreme Court of India, Three Justices' Bench).

[11]*See*, Rule 37, Chapter V, General Rules (Criminal), 1957, promulgated by the High Court of Allahabad and published under Notification No. 241/A/Vlll-a-1, dated September 4, 1956. Cf. Bashira v. State of Uttar Pradesh, AIR 1968 SC 1313 (Supreme Court of India, Three Justices' Bench).

established by law. Having found a rights violation, the Court moved to the question of remedies. It emphatically rejected the government claim that the conviction should not be disturbed without a defendant showing what prejudice was caused by any failure in following the rule,[12] and ordered a retrial.[13]

b. 1978 – 2018: From Duties to Rights

The 1970s saw a tectonic shift in the interpretive approach of the Supreme Court towards the Article 21 - right to life and personal liberty. To put it bluntly, it judicially inserted the same Due Process clause that the framers of the Constitution had deliberately excluded.[14] This opened the doors to test State practices against independent principles or values not specifically rooted in any statute or executive rule.

One of the first developments in this period was judicial testing of the criminal process through this lens, which led the Supreme Court to hold that *all* deprivations of liberty occasioned by the criminal process required legal assistance to satisfy a Due Process requirement.[15] This time, the Court expressly evoked a language of rights, moving beyond the

[12]Bashira, ¶ 11 at 1313. ("Learned counsel also urged that we should not hold the conviction and sentence to be void when it is not shown that there was any prejudice to the appellant by the failure of the court to observe the procedure laid down by the Rule. In our opinion, in such a case, the question of prejudice does not arise when a citizen is deprived of his life without complying with the procedure prescribed by law. We may, however, add that, in this case, the facts indicate that there was, in fact, prejudice to the accused caused by the non-compliance with the requirement of r. 37 of the Rules. … In fact, we feel that, in such cases, if sufficient time is not granted to the counsel to prepare defence, prejudice must necessarily be inferred and the trial will be vitiated.").

[13]The Supreme Court also considered the issue of ineffective assistance in post-conviction appeals in R.M. Wasawa v. State of Gujarat, (1974) 3 SCC 581 (Supreme Court of India, Two Justices' Bench).

[14]*See*, Abhinav Chandrachud, *Due Process*, *in* OXFORD HANDBOOK ON THE INDIAN CONSTITUTION, 778 (2016).

[15]M.H. Hoskot v. State of Maharashtra & Ors., (1978) 3 SCC 744 (Supreme Court of India, Three Justices' Bench). Since the focus was on deprivation of liberty, this judicially recognized right to legal assistance only extended to persons in custody. The centrality of the rights-based language is evident in how the Court renders a newly inserted and non-enforceable Directive Principle to provide legal aid in Article 39-A as an "interpretive tool" for the fundamental right to life and personal liberty recognised under Article 21. *See*, Hoskot, at ¶¶ 10–26.

perspective of considering legal assistance as part of a judicial duty to ensure fair trials to a guaranteed right for persons.[16]

Judicial and legislative engagement with the issue in the 1980s and 1990s was primarily with the first order problem of ensuring that defendants are provided some legal representation,[17] and providing adequate remedies.[18] It is not an exaggeration to suggest that the second order problem of *effective* assistance did not figure prominently on the agenda. While the rhetoric on the right to counsel did mention that *ineffective* assistance was pointless,[19] the focus was still on state obstruction of the right, much like the state's failure to provide counsel. Thus, courts frequently invoked the idea of a judicial duty of securing a fair trial when faced with ineffective

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[16] Here it is important to add a qualifier. Though the rights-rhetoric is central to how the Supreme Court engages with the issue of legal assistance at this time, it is still debatable whether the Court actually embraced the logic. I say this, because in subsequent decisions the Court somehow suggests that while legal assistance is essential to ensure fair trials, there might be certain cases where "social justice" demands no free legal aid be provided. *See,* Khatri & Ors. (II) v. State of Bihar & Ors., (1981) 2 SCC 627, at ¶ 6 (Supreme Court of India, Two Justices' Bench). The problematic nature of these observations has gone unnoticed on the bench. *See*, Rajoo v. State of Madhya Pradesh, (2012) 8 SCC 553, at ¶ 17 (Supreme Court of India, Two Justices' Bench).

[17] The Supreme Court and the many state High Courts were the site of immense litigation for enforcing the newly recognised right to legal assistance. *See, e.g.*, Hussainara Khatoon & Ors. (IV) v. Home Secy., State of Bihar, (1980) 1 SCC 98 (Supreme Court of India, __ Justices' Bench); Khatri & Ors. (II) v. State of Bihar & Ors., (1981) 2 SCC 627 (Supreme Court of India, Two Justices' Bench); Khatri & Ors. (IV) v. State of Bihar & Ors., (1981) 2 SCC 493 (Supreme Court of India, Two Justices' Bench); Ranjan Dwivedi v. Union of India, (1983) 3 SCC 307 (Supreme Court of India, Two Justices' Bench); P.C. Kakati & Anr. v. State of Assam, (1983) 1 Gau LR 80 (Gauhati High Court, Two Judges' Bench); Chandran v. State of Kerala, 1983 KLT 315 (Kerala High Court, Single Judge Bench); Unnikrishnan v. State of Kerala, 1983 KLT 586 (Kerala High Court, Single Judge Bench).

Legislative attention was harnessed with the passing of the Legal Services Authority Act, 1987 (Act No. 39 of 1987), which again was focused on providing free legal assistance and did not specify any tests for ensuring quality assistance. Similarly, no changes were made to the existing norms under the Bar Council of India, the national regulatory agency for legal professionals.

[18] *See, e.g.*, Suk Das v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401 (Supreme Court of India, Three Justices' Bench); Bani Singh v. State of U.P., (1996) 4 SCC 720 (Supreme Court of India, Three Justices' Bench); Badri v. State of Madhya Pradesh, 1988 Cri LJ 1592 (Madhya Pradesh High Court, Single Judge Bench).

[19] *See, e.g.*, Ram Awadh v. State of Uttar Pradesh, 1999 All LJ 1919 (Allahabad High Court, Two Judges' Bench);

assistance claims rather than suggest this amounted to a violation of Article 21.[20]

Today, the Supreme Court has confirmed that the right to effective legal assistance goes beyond state interference – by denying time for preparing a defence – to considering the adequacy of the legal assistance rendered. This was crystallised in the petition filed by Mohd. Hussain, a foreign national facing the death sentence on charges of extremist acts.[21] Hussain argued that his conviction should be overturned because he received no legal assistance – a claim that the High Court rejected as the trial record showed that Hussain did have a lawyer, albeit one who did not turn up often.[22] The Supreme Court saw things rather differently, and concluded that in a trial where Hussain was without the aid of counsel for major portions – 56 out of 65 witnesses –[23] it could not be said that he had the assistance of counsel "in a substantial and meaningful sense".[24]

While the Court did affirm that there was a fundamental right, and it had been violated, it did not tell us much more. Adopting an "I know it when I see it" approach,[25] both opinions said precious little on what could amount to *effective* assistance and how would defendants show ineffectiveness – could they file new evidence, for instance? Similarly, the

[20]*See*, Modiya v. State of Rajasthan, 1984 RLW 374 (Rajasthan High Court, Two Judges' Bench) (In an appeal against conviction the Court agreed that there was ineffective assistance by the legal aid counsel and ordered a partial retrial, but did not consider this a violation of any fundamental right.).

[21]Mohd. Hussain (I) v. State (Govt. of NCT of Delhi), (2012) 2 SCC 584 (Supreme Court of India, Two Justices' Bench); Mohd. Hussain (II) v. State (Govt. of NCT of Delhi), (2012) 9 SCC 408 (Supreme Court of India, Three Justices' Bench).

[22]Mohd. Hussain (I), at ¶ 4 (Dattu, J.).

[23]Mohd. Hussain (I), at ¶ 13 (Dattu, J.) ("It will, thus, be seen that the trial court did not think it proper to appoint any counsel to defend the appellant-accused, when the counsel engaged by him did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses. The accused did not have the aid of the counsel in any real sense, although, he was as much entitled to such aid during the period of trial. The record indicates, as I have already noticed, that the appointment of the learned counsel and her appearance during the last stages of the trial was rather pro forma than active. …").

[24]Mohd. Hussain (I), at ¶ 25 (Dattu, J.).

[25]Mohd. Hussain (I), at ¶¶ 13–26 (Dattu J.). The "I know it when I see it" approach refers to the famous opinion of Potter, J. in Jacobellis v. Ohio, 378 U.S. 184 (1964).

Court said nothing about whether the right extended to situations outside a post-conviction posture.

Hussain's case was referred to a different bench to decide the issue of remedy as while Dattu J. considered a retrial to be the correct remedy, Prasad J. considered an acquittal to be the right answer.[26] This offered another chance to the Supreme Court to fill the doctrinal gap, and erect a clear test to help regulate such claims in the future. It did nothing of the sort, adopting a vague balancing approach to conclude that the gravity of alleged offence merited a retrial.[27]

c. Supplying the Doctrinal Deficit?

Thus, the following can be stated with a measure of certainty: *first*, there is a legally enforceable right to effective legal assistance that can be claimed in a post-conviction context, and *second*, the remedy for breach of this right can be either an outright acquittal or a *de novo* trial. That is where the certainties end, though, as there remains no real test for courts to address the rights or remedies questions.

Or, perhaps not anymore. After *Mohd. Hussain*, the Supreme Court addressed an ineffective assistance claim based on the quality of assistance once again in *Ashok Debbarma*; another capital case involving allegations of extremist violence.[28] There, the Court agreed to apply the doctrinal test followed in the United States as devised in *Strickland* v. *Washington*.[29] This has led to suggestions that the doctrinal gap I identify above has indeed

[26]Justice Dattu awarded a retrial whereas Justice Prasad awarded an acquittal and set Hussain at liberty. *See*, Mohd. Hussain (I), at ¶ 62. The case was heard on this point by a bench of three Justices, which unanimously awarded a retrial. Mohd. Hussain (II), at ¶ 47.

[27]Mohd. Hussain (II), at ¶ 44. There was surprisingly no mention of Bashira, where the Court had addressed the remedial issue at length.

[28]Ashok Debbarma v. State of Tripura, (2014) 4 SCC 747 (Supreme Court of India, Two Justices' Bench). The Supreme Court has recently addressed an ineffective assistance claim akin to Bashira, where counsel was denied any time to prepare having been asked to submit final arguments in a capital case on the day of appointment. *See*, Ambadas Laxman Shinde & Ors. v. State of Maharashtra, Review Petition Nos. 18–19 of 2011 (Decided on October 31, 2018).

[29]Strickland v. Washington, 466 U.S. 668 (1984).

been filled. [30] In the next section, I engage with this recent development, and argue that these claims appear unfounded.

II. PART TWO

In the early years, the Indian Supreme Court had routinely refused to consider American cases on a constitutional right to legal assistance citing the exclusion of the Due Process guarantee in India. Since 1978, though, the Court eagerly seized upon the wisdom of American decisions as it affirmed constitutional status for a right to legal assistance in India.[31] This has meant that the decisions in *Powell* v. *Alabama*[32] and *Gideon* v. *Wainwright*[33] are not only well-known but also much appreciated.

The lack of an equal degree of judicial engagement with the nuanced issues of effective legal assistance in India perhaps explains why so little is known about *Strickland* despite it having been cited by Indian courts for a while. In this section, I first resolve that information gap by explaining *Strickland*. Following which I move on to discuss how elements of that test stand in conflict with pre-existing Indian law. Finally, I demonstrate how the *Strickland* test is being applied rather unfaithfully by Indian courts, rendering claims of incorporation quite dubious.

a. Strickland v. Washington

Strickland was admittedly different from the storied cases of *Powell* and *Gideon*, insofar as it involved no questions about state interference, or denial, of legal assistance. Doctrinally too, whereas the earlier cases had been litigated in the framework of the Fifth Amendment's Due Process clause, *Strickland* was a claim under the Sixth Amendment's legal

[30] *See* Saurav Datta, *Surinder Koli and the Case for Effective Legal Aid*, *in* CARAVAN (October 28, 2014); *Indian Supreme Court's Lesson in Effective Legal Aid*, *in* ASIA TIMES (June 21, 2018), http://www.atimes.com/article/indian-supreme-courts-lesson-in-effective-legal-aid/ (last accessed on December 15, 2018); *SC Recalls Death Sentences Owing to Lack of Effective Legal Representation*, *in* NEWSCLICK (November 10, 2018), https://www.newsclick.in/sc-recalls-death-sentences-owing-lack-effective-legal-representation (last accessed on December 15, 2018).

[31] *See*, Rajeev Dhavan, *Due Process in India: A Preliminary Exploration* (1981); *Borrowed Ideas: On the Impact of American Scholarship on Indian Law*, 33 AM. J. COMP. LAW. 505 (1985).

[32] 287 U.S. 45 (1932).

[33] 372 U.S. 335 (1963).

assistance clause,[34] which had been read to include a guarantee for *effective* assistance in 1970.[35]

What difference did this make? It meant courts would be asking very different questions. Legal assistance claims alleging Due Process violations alleged an unfair trial had occurred, requiring a judicial review of the entire trial proceedings. But a Sixth Amendment claim, theoretically, was not linked to the trial and invited courts to consider attorney performance.[36] As ineffective assistance cases began to come before courts, these doctrinal distinctions were often lost, and it resulted in different standards emerging across states to regulate such claims.[37]

Strickland was one such case. The facts were far from straightforward. David Washington pled guilty to multiple murder charges in spite of contrary advice by his state-appointed counsel, and also waived his right to a jury hearing to decide if his case warranted capital punishment. Having been awarded the death sentence, Washington hired new counsel who appealed the sentencing, citing ineffective assistance of counsel. After multiple losses, Washington secured a partial victory when the Court of Appeals for the 11th Circuit remanded the case for a fresh hearing on the ineffective assistance aspect on newly specified guidelines.[38]

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[34]Amendment VI to the United States' Constitution, 1791 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.").

[35]McMann v. Richardson, 397 U.S. 759 (1970).

[36]David Cole, Gideon v. Wainwright and Strickland v. Washington: *Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 101, 110–14 (Carol S. Steiker ed., 2006).

[37]For discussions on the development of the effective assistance doctrine before *Strickland*, *see*, Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths – A Dead End?* 86 COLUM. L. REV. 9 (1986); Sara Mayeux, *Ineffective Assistance of Counsel before* Powell v. Alabama*: Lessons from History for the Future of the Right to Counsel*, 99 IOWA L. REV. 2161 (2014).

[38]Strickland, at 671–83. For a further discussion on the case history itself, *see*, Brian R. Gallini, *The Historical Case for Abandoning Strickland*, 94 NEB. L. REV. 302 (2016).

The U.S. Supreme Court agreed to hear *Strickland* largely to resolve the confusion emanating from multiple standards and offer a clear standard to guide lower courts.[39] Writing for the majority, Justice O'Connor considered it inappropriate to offer rule-like guidelines and instead opted for a two-part test seeking compliance with broad standards.[40] It required defendants to show (i) that counsel's performance was deficient, i.e. she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment", and (ii) that this caused prejudice, i.e. "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[41]

The Court insisted that a high degree of deference must be accorded to counsel's performance while applying this test to prevent opening the proverbial floodgates, not only undermining the performance of counsel but also the finality of cases.[42] This concern also pervaded *Strickland's* companion case, *United States* v. *Cronic*,[43] where the Court recognised that in some cases the prejudice from ineffective legal assistance could be presumed, but restricted it to only the most egregious of errors.[44] Together, *Strickland* and *Cronic* continue to supply the test for courts to determine ineffective assistance claims in the United States.

b. The Uneasy Fit with Indian Law

While the Indian legal position on the issue of effective assistance is underdeveloped, it has had a chance to engage with the issue of

[39]Strickland, at 683–84. The message was received loud and clear, as besides the federal government, amicus briefs had been filed by almost every state. *See*, *Strickland*, at 670.

[40]Strickland, at 687–88.

[41]Strickland, at 687, 694.

[42]Strickland, at 689–90, 696–98.

[43]466 U.S. 648 (1984).

[44]The Court in Cronic held that the presumption applies where "counsel entirely fails to subject the prosecution case to meaningful adversarial testing", or if the trial was affected by "state interference with counsel's assistance", or in cases of "an actual conflict of interest" that the counsel had which "adversely affected [her] performance." Cronic, at 659.

establishing prejudice in this context, which forms the second prong of the *Strickland* test. The first engagement came back in *Bashira*, a case of state interference with the right to counsel by denying the appointed lawyer sufficient time to prepare for the case.[45] The second instance was the Supreme Court litigation in *Mohd. Hussain*, which involved a more subjective claim without allegations of state interference.

What was the result? In *Bashira* the Court unanimously held that "the question of prejudice does not arise when a citizen is deprived of his life without complying with the procedure prescribed by law."[46] Since this was a pre "Due Process" case, the fact of non-compliance with an existing rule was crucial. But, interestingly, the Court also went ahead to make a broad statement: "In fact, we feel that, in such cases, if sufficient time is not granted to the counsel to prepare defence, prejudice must necessarily be inferred and the trial will be vitiated."[47]

Since the Court had already spoken in terms of non-compliance with the rule at this point, the "in such cases" remark in *Bashira* could not have been a reference to that. Instead, I argue, it was a reference this being a criminal case with state-appointed counsel. This reading of *Bashira* might suggest that the Indian Supreme Court adopted a *Cronic* style test of presumed prejudice in cases of proven state interference with performance of counsel. But that is incorrect, for unlike *Cronic*, here the Court was entirely unconcerned with the result of a trial.

When the prejudice claim resurfaced in *Mohd. Hussain*, with the State arguing that actionable claims for ineffective assistance *must* have defendants showing prejudice, neither of the two opinions supported the claim. The split two Justices' bench did not inquire into the prejudice issue and instead straightaway proceeded to the question of remedies after having established serious error. The three Justices' bench did not conduct an inquiry into result-based prejudice either, instead opting for a wide-ranging balancing test.[48]

c. Indian Courts: Applying Strickland *Lite?*

[45] *Supra* note 10.
[46] Bashira, ¶ 11 at 1313.
[47] Bashira, at ¶ 11 at 1313.
[48] Mohd. Hussain, at ¶ 44.

Despite this, in *Ashok Debbarma* counsel for the appellant invited the Court to apply *Strickland* while arguing that the ineffective legal assistance received was a mitigating factor towards commuting the death sentence to one of life imprisonment.[49] The Court agreed,[50] observing that deciding such claims required a judicial finding arrived at by "independently reweighing the evidence" to determine if there was a "reasonable probability that, absent the errors, the court … would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence."[51]

This clear linkage of the *Strickland* test with sentencing issues should make anyone hesitant before claiming that India has adopted that test. Further, the legal basis of *Ashok Debbarma* is far from secure. The existing Indian position on prejudice that I described above was not cited in the 2014 decision,[52] and according to the doctrine of precedent the two Justices' bench of *Ashok Debbarma* was bound by it. Perhaps, these factors explain why High Courts handling ineffective assistance claims since 2014 have not relied upon it, following the balancing test of *Mohd. Hussain* instead.[53]

Interestingly, while the Delhi High Court has also refrained from applying *Ashok Debbarma*, it has adopted *Strickland* for deciding ineffective assistance claims more generally since at least 2009.[54] But upon reading the cases, one is left distinctly with the impression that only lip-service is paid to the prejudice prong of *Strickland*: The High Court focused mainly

[49]Ashok Debbarma, at ¶ 35.

[50]The Court summarised the test in this fashion: "[N]ot only that counsel was not functioning … so as to provide reasonable effective assistance, but also that counsel's errors were so serious as to deprive the defendant of a fair trial. … the convict should also show that because of a reasonable probability, but for counsel's unprofessional errors, the results would have been different." Ashok Debbarma, at ¶ 38.

[51]Ashok Debbarma, at ¶ 39.

[52]*Supra* notes 4–27.

[53]*See*, Rakesh v. State of Uttar Pradesh, (2018) 4 All LJ 595 (Allahabad High Court, Two Judges' Bench); M. Kannan v. State, 2018 Cri LJ 116 (Madras High Court, Two Judges' Bench); Rafique v. State (Govt of NCT of Delhi), 2017 SCC OnLine Del 10372 (Delhi High Court, Single Judge Bench); Subhash Bhardwaj v. State, 2016 SCC OnLine Del 5002 (Delhi High Court, Two Judges' Bench);

[54] *See*, State v. Sanjay Dass, (2009) 164 DLT 596 (DB); Salamat Ali v. State, (2010) 174 DLT 558 (DB) (Delhi High Court, Two Judges' Bench).

on whether any error was established, and if so, moved straight to the remedial question.[55]

Thus, even where we find *Strickland* being referred to by Indian courts, they exclude a major component of what that test requires – proving that serious error by counsel caused prejudice. This is not a bad thing at all. Scholars have demonstrated that the two-pronged test in *Strickland* makes proving ineffective assistance claims nearly impossible for defendants, not only because it operates with a hindsight bias but also because it deems all errors harmless until they prejudicially affect the *outcome* of the trial.[56]

Since this aspect of outcome-determinant prejudice is woven into the fabric of the right itself, it results in significant downstream effects. The scope of the right itself gradually shrinks with each claim that fails to prove prejudice, with the scope for deference towards poor performance increasing with every instance of bad lawyering that goes unpunished. Thus, infamously, *Strickland* has meant that lawyers sleeping through trial, drinking alcohol through trial, not questioning material witnesses, or not knowing any relevant law, were all deemed instances of poor legal assistance, but not *unconstitutionally ineffective* assistance.[57]

d. Summing Up

A close scrutiny of Indian courts' engagement with the *Strickland* test clearly shows that the American position is far from fully incorporated. Most courts continue to ignore the test. Those that have relied upon it are in fact applying only one aspect out of a two-pronged test: that the defendant must establish serious error to claim relief. Since this was the

[55]Sanjay Dass, at 627–30; Salamat Ali, at 562–63.

[56]*See*, Cole, *supra* note 36, at 113–118; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should legal Error be Tolerated?* 70 N.Y.U. L. REV. 1167 (1995); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH. L. REV. 1; NAT'L RIGHT TO COUNSEL COMM., AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 40–41 (2009)*;* Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165 (2016);

[57]Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425 (1996); Cole, *supra* note 36, at 114.

conventional position in India for decades, it explains why the few references to *Strickland* in the past decade have not ruffled many feathers.

III. PART THREE

Indian judicial treatment of *Strickland* might have rendered it synonymous with the existing law, but that does not mean that the existing position was sanguine or that even this limited infusion of American law is not without problems. The reason for this the structural reality in which claims of effective legal assistance are litigated in India.

In this section, I make two claims. *First*, describing structural differences between India and the United States I argue that the systemic barriers against defendants successfully litigating ineffective assistance claims are felt much more severely in the Indian context and truncates the scope of successful claims. *Second*, I argue that imagining ineffective assistance only as a *post-conviction* problem – as *Strickland* does – excludes vast parts of what legal assistance entails from scrutiny. It also prevents judicially-driven structural reform, especially in context of state-funded legal aid. All of which fossilises the right to effective legal assistance.

a. East is East

While ineffective assistance claims in India and the United States (I refer to federal courts here) have a measure of similarity in that they both place the onus on defendants to establish a breach, there are many systemic differences which affect how these claims are litigated.

Trials, whenever they do happen, are by jury in the U.S. federal system.[58] And all that is said in the courtroom forms part of the transcript – the

[58]A vast proportion of criminal cases at both the federal and the state level are decided by guilty pleas. Data released by the United States Sentencing Commission for criminal cases processed in the federal system shows that 97.3% cases were disposed through guilty pleas in 2016. The figure has been hovering around 97% since 2012. UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT 2016, FIGURE C – GUILTY PLEAS AND TRIALS, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/FigureC.pdf (last accessed on December 15, 2018). Data compiled in 2009 for felony defendants in state courts pegged convictions through guilty pleas at 53% and through trials at 2%. Brian A. Reeves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, BUREAU OF JUSTICE

arguments, witness examinations, objections, and the reserving of objections to agitate them later. This not only helps relive the spontaneity of trial but also offers a pretty conclusive record of exactly what counsel did or did not do.[59]

What happens when defendants file ineffective assistance claims in the appellate court? The papers – whatever the defendant files in addition to the trial transcript – are sent back to the trial judge to decide whether or not the case has merit. Here, defendants push for an evidentiary hearing seeking permission to examine the allegedly ineffective counsel as a witness, rather than have the judge make up her mind by solely reading the record. The trial judge has to apply *Strickland*, and if the defendant succeeds then a re-trial is normally directed.[60]

In India, trial judges cannot review their orders,[61] and so ineffective assistance claims remain solely with the appellate court. As appellate courts have powers to take further evidence,[62] it is possible to imagine a similar kind of process being forged entirely at the appellate level. But it is a very slim possibility: this power of calling for fresh evidence is invoked extremely rarely, and I have not found a single ineffective assistance case involving it.

This means that defendants are reduced to relying upon the existing record to make their claims, and here lies the problem. The trial court record as it exists in India and the United States is very different. Indian trial courts do not maintain transcripts, perhaps because they do not conduct jury trials. Instead, the record provides a dispassionate and neutral perspective on the proceedings. This includes a judicially dictated

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STATISTICS (December 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf (last accessed on December 15, 2018).

[59]*See*, United States Courts, *Covering Criminal Trials – A Journalist's Guide*, http://www.uscourts.gov/statistics-reports/covering-criminal-trials-journalists-guide (last accessed on December 15, 2018).

[60]*See*, Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 (3) CRIM. JUSTICE (2009), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_24_3_primus.authcheckdam.pdf (last accessed on December 15, 2018).

[61]Section 362, Criminal Procedure Code, 1973.

[62]Section 391, Criminal Procedure Code, 1973.

version of the day-to-day proceedings of the case, judicially dictated evidence recorded by a stenographer, and written pleadings wherever filed. The quality of this record can substantially alter across the country as it heavily depends upon resources – the availability of computers and staff. [63]

All these peculiar features of the Indian setting mean that the scope of ineffective assistance claims is greatly limited to those areas of a trial that are documented. The inference is supported by a review of existing cases on the subject: a vast majority concern alleged failures to cross-examine witnesses.[64] This, and the converse proposition – that undocumented parts make for bad claims – both find support, in what are perhaps the first reported Indian cases relying on *Strickland*: the Delhi High Court's decisions in *Sanjay Dass* and *Salamat Ali*.[65]

The first case to do so was *Sanjay Dass*: a challenge to a murder conviction and death sentence on many grounds, one among them an ineffective assistance claim. The defendant argued that due to counsel's errors he made many improper admissions that worsened his case. Not only this,

[63]Copies of daily orders and, in some cases, the evidence recorded by trial courts, are published online where the technology is available. *See*, www.ecourts.gov.in (last accessed on December 15, 2018). The failure to reform the infrastructure of trial courts across the country continues to be a sore issue, with the Supreme Court re-issuing old directive in August, 2018. *See*, *Supreme Court Issues Directions to Revamp Judicial Infrastructure*, *in* NEW INDIAN EXPRESS (August 3, 2018), http://www.newindianexpress.com/nation/2018/aug/03/supreme-court-issues-directions-to-revamp-judicial-infrastructure-1852585.html (last accessed on December 15, 2018).

[64] *See, e.g.*, Modiya v. State of Rajasthan, 1984 RLW 374; Ram Awadh v. State of Uttar Pradesh, 1999 All LJ 1919; State v. Sanjay Dass, (2009) 164 DLT 596 (DB); Salamat Ali v. State, (2010) 174 DLT 558 (DB); Mohd. Hussain (I)Vijay Kumar v. State of Punjab, 2012 SCC OnLine P&H 14603 (Punjab & Haryana High Court, Two Judges' Bench); State of Orissa v. Sukru Majhi, 2013 Indlaw ORI 183 (Orissa High Court, Two Judges' Bench); Pherbhungrai Reang v. State of Tripura, 2014 SCC OnLine Tri 571 (Tripura High Court, Single Judge Bench); Subhash Bhardwaj v. State, 2016 SCC OnLine Del 5002; Rafique v. State (Govt of NCT of Delhi*)*, 2017 SCC OnLine Del 10372; Rakesh v. State of Uttar Pradesh, (2018) 4 All LJ 595; M. Kannan v. State, 2018 Cri LJ 116; State of Maharashtra v. Raju, 2018 Indlaw MUM 1540 (Bombay High Court, Two Judges' Bench).

[65]State v. Sanjay Dass, (2009) 164 DLT 596 (DB); Salamat Ali v. State, (2010) 174 DLT 558 (DB). Both decisions were authored by the same judge, Pradeep Nandrajog. J.

while the defendant had pleaded not guilty at the start, he filed multiple applications to change his plea and even sought a transfer of his case because the court was not considering the request.[66]

Importantly, in the middle of trial there was a change in counsel, and it appears that these moves were not supported by the defendant's new counsel who filed applications to recall witnesses and actively resisted the transfer as well.[67] I already mentioned that the High Court resorted to *Strickland* for deciding the claim, and here it found that the first prong of proving error was not met.[68]

How the High Court arrived at this conclusion is remarkable. It found nothing suspicious in a murder accused filing more than five applications for pleading guilty and seeking a transfer, all of which was presumably resisted not only by the trial court but also by his counsel. It did not use its powers to ask for fresh evidence on this point. As the requests were

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[66]Sanjay Dass, at 627–29.

[67]Sanjay Dass, at 627–29.

[68]Sanjay Dass, at 630. ("109. It is most relevant to note that the accused first time pleaded guilty at the stage of the cross-examination when Gurpreet Singh PW-5, who was the first witness who incriminated him in the present case was examined. The fact that the accused did not plead guilty on the occasions when the formal witnesses who were examined prior to the recording of evidence of Gurpreet Singh is of utmost significance. The same is suggestive of the fact that the act of the accused pleading guilty to the charges framed against him had got nothing to do with the incompetence of his Counsel or any other fact. Another fact which stands out is that the accused kept on pleading guilty even after the change of Counsel. The accused pleaded guilty 5 times after the change of Counsel. It is most significant to note that second Counsel for the accused diligently appeared in the Court, effectively cross-examined the witnesses of the prosecution and also cross-examined the material witnesses of the prosecution who could not be examined on previous occasion. If the accused was intelligent enough to come to the conclusion that his first Counsel is incompetent and defending him in a shoddy manner he could very well also see that his second Counsel was most competent, in that he was curing all the defects which had so far occurred in his trial. From the above narrative of the proceedings of the trial Court it is clear that the accused was persistent in pleading guilty throughout the conduct of the trial. The extent of persistence of the accused to plead guilty can be gauged from the fact that he even sought to get his case transferred from one Court to another for the reason the Court dealing with his case was not considering the guilty plea taken by him. In the light of afore-noted facts, we do not agree that with the learned Counsel for the accused that the incompetence of his first Counsel led the accused to make admissions in his statement under Section 313, Cr.P.C.").

made even after a change in counsel, the High Court concluded it had "nothing to do with the incompetence of his Counsel or any other fact."[69] Instead, the High Court approved of counsel's move to recall witnesses and cross-examine them.[70]

Salamat Ali was also an appeal against a murder conviction, without a capital sentence but with an ineffective assistance claim. Here, the claim was more standard – counsel allegedly did not conduct an effective cross-examination of material witnesses. [71] Again, the High Court relied upon *Strickland* to decide the claim, and did not call for fresh evidence or examine the trial court lawyer to ask about strategic decisions. Rather, it concluded "a mere perusal of the cross-examination … brings out the hopelessness of the trial and highlights the ineffectiveness, inefficiency and low standards achieved by the learned defence Counsel."[72]

Thus, since Indian appellate courts demonstrate an aversion to taking fresh evidence in appeals, ineffective assistance claims end up relying upon the trial court record alone. This means that the claim will only be as good as the record upon which it is based. Since the trial court record in India at best offers a partial glimpse of what happened, it naturally decreases the chances of defendants succeeding in their claims.[73]

b. Fossilising a Right and Preventing Reform

All of this means that the conventional position, of making the defendants do the heavy-lifting and prove ineffective assistance through the trial record ultimately fossilises the nature of the right itself. It is prevented from growing beyond the most egregious cases – where 53

[69]*Id.*

[70]Sanjay Dass, at 630.

[71]Salamat Ali, at 562–63.

[72]Salamat Ali, at 563.

[73]Extending the point to its logical conclusion, one finds that it creates a potential for conflict between defendants and their counsel. It is always in the interests of defendants to ensure that a thorough record is maintained, whereas it might be in the interests of bad lawyers to do the exact opposite. And since defendants are often at the mercy of their counsel to help navigate the system, it is not difficult to imagine who will be the loser here. *See*, Abhinav Sekhri, *Pendency in the Indian Criminal Process: A Creature of Crisis or Flawed Design?* SOCIO L. REV. (Forthcoming, 2019) (Manuscript on file with author).

witnesses go un-examined, for instance – to touch upon important aspects legal assistance that the record can go silent about.

What are these aspects? Decisions on issues such as whether to apply for bail, or filing motions to ensure completeness of the record, or securing independent scientific testing of evidence, or pleading guilty. Also, decisions about whether or not to challenge procedural illegalities in trial proceedings, something that the Indian criminal process adopts a very liberal attitude towards.[74]

Poor legal advice in any of these contexts is critical to the defendant's right to life and personal liberty from which the right to effective assistance is derived. But claims alleging ineffective assistance in this context will have minimal chances of success, because the record is silent on these matters unless specifically informed by counsel.

This criticism has been made by American scholars[75] who extend it to argue that linking effective assistance claims to the outcome of trial in *Strickland* also engenders a different kind of fossilisation. By reducing the scope of what effective advocacy means in this fashion, the law normalises a poorer standard of advocacy for those who cannot afford private counsel and are at the mercy of state-funded legal aid networks, i.e. the bulk of criminal defendants across America.[76]

There are no publicly available statistics to confirm if a bulk of Indian criminal defendants are unable to afford counsel, but a bulk of them certainly qualify for it.[77] Even as not everyone entitled to free legal

[74]*See*, Abhinav Sekhri, *Pendency in the Indian Criminal Process: A Creature of Crisis or Flawed Design?* SOCIO L. REV. (Forthcoming, 2019) (Manuscript on file with author).

[75]Cole, *supra* note 36, at 115. The position has been ameliorated in the last decade, as the U.S. Supreme Court has upheld ineffective assistance claims at the stage of plea bargaining as well. *See*, *Missouri* v *Frye*, 566 U.S. 134 (2012); Lafler v. Cooper, 566 U.S. 156 (2012); Lee v. United States, 137 S. Ct. 1958 (2017).

[76]Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE 121 (Erik Luna Ed., 2017) (Citing statistics that more than 80% of defendants are indigent).

[77]Commonwealth Human Rights Initiative, 1 HOPE BEHIND BARS xiv-xv (2018), http://www.humanrightsinitiative.org/download/CHRI%20Legal%20Aid%20Report%20Hope%20Behind%20Bars%20Volume%201.pdf (last accessed on December 15, 2018).

assistance is claiming it, the pressures on legal aid networks are immense, much like their American counterparts.[78] There are, naturally, differences in the kind of quality that networks provide in different states across India, but the fact that per capita spending on legal aid is less than a rupee (0.014 USD) sums up the lamentable state of affairs.[79]

Strange as it may sound, having a legal test that normalises lower standards of advocacy for a bulk of defendants can be seen as having benefits. Since better lawyers will be able to poke more holes in prosecution cases – already lacking in quality – it would bring more acquittals and increase perceptions of failure in the criminal justice system for laypersons.[80] Some American scholars argue that this explains why proposals to improve legal aid networks are rarely supported by legislators who espouse a rhetoric of keeping the streets safe.[81]

Even if the perverse incentives explanation behind reforms in American legal aid systems does not apply fully to India, the outcome has been the same. Which means that here as well the impetus for reform is likely to come from the judiciary – the branch most closely witnessing bad lawyering and its consequences. The Indian judiciary can certainly boast an impressive record on this score. It has been very pronounced in its efforts to achieve structural reforms in all aspects of life,[82] and in context

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[78]*See*, Cole, *supra* note 36, at 118–121; RICHARD KLEIN & ROBERT SPANENBERG, AM. BAR ASS'N, THE INDIGENT DEFENSE CRISIS 26 (1993); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after* Gideon v. Wainwright, 122 YALE L.J. 2150 (2013); Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 Yale L.J. 2150 (2013); Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE 121 (Erik Luna Ed., 2017). The quality of legal aid at the federal level in the United States is generally accepted as being far better than at the state level. *See*, Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317 (2011).

[79]*Id*, at 1–7.

Volume 2 provides granular data from 24 different states of India. *See*, 2 HOPE BEHIND BARS (2018), http://www.humanrightsinitiative.org/download/CHRI%20Legal%20Aid%20Report%20Hope%20Behind%20Bars%20Volume%202.pdf (last accessed on December 15, 2018).

[80]Cole, *supra* note 36, at 118–25.

[81]*Id.*

[82]Manoj Mate, *The Rise of Judicial Governance in the System Court of India*, 33 B.U. Int'l L.J. 169 (2015).

of the legal system we find that a constitutional right to free legal aid, and the concomitant right to effective legal aid, were both the result of Supreme Court directives.[83]

While I have not found any petitions that have sought structural reform of legal aid networks, in the decades since the Supreme Court first assumed this interventionist mantle, it has often put pressure on the government to take steps for improving the *quality* of the legal system,[84] making it reasonable to suggest that the Court could certainly take steps to improve the quality of legal aid if presented with a claim.

However, importing *Strickland* and its view of the right to effective legal assistance as solely based on the outcome of trials would make it very difficult for the Court to take any such steps even if it were so inclined. I draw this conclusion based on how hopes for systemic reform through class-action lawsuits have been dashed by *Strickland* in the United States. The logic has been simple: since *Strickland* defines the right to effective legal assistance as contingent on *outcomes*, it has been seen as excluding any claims that dysfunctional legal aid systems *pre-emptively* violate the right to effective assistance.[85]

c. Summing up and Suggestions for Reform

[83] *Supra* notes 14–30.

[84] *See, e.g.*, Suk Das v. State of Arunachal Pradesh, (1986) 2 SCC 401 (Supreme Court of India, Three Justices' Bench) (Confirming that states required to set up legal aid networks to fulfil the constitutional mandate); Delhi Domestic Working Women's Forum v. Union of India & Ors., (1995) 1 SCC 14 (Supreme Court of India, Three Justices' Bench) (Requiring that victims of sexual assault be provided free legal assistance from the start of a case); All India Judges Association & Ors. v. Union of India & Ors., Writ Petition (Civil) No. 1022 of 1989, Orders dated 24.01.2011, 04.04.2011, 02.08.2018 (Interlocutory Application No. 279 of 2010) (Supreme Court of India, Three Justices' Bench).

[85] *See*, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005); Cara H. Drinan, *Getting Real About* Gideon: *The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309 (2013); Laruen Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197 (2013); Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 ST. LOUIS U. L.J. 625 (2017); Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89 (2018).

Strickland offers one perspective on how to balance claims to effective legal assistance with other interests such as the finality of criminal trials. By most accounts, its two-part test strikes a lopsided balance, shrinking the scope of the right to maximise government interests. The sharp-edge of which is faced by those who need effective legal assistance the most – criminal defendants facing serious, often capital, charges. This section argued that any importation of American law to India will accentuate existing trends of a similar scenario obtaining across the Indian legal system. Not only would the *Strickland* test propagate an unequal justice, it would also make it extremely probable that the gaps between the rich and poor become more concrete as time goes on.

A lot can be done to help rejig the balance and help achieve better regulation of ineffective assistance, and ultimately reduce the gap between the *quality* of justice that the Indian criminal process metes out to the rich and poor. A place to start could be taking steps to provide a set of criteria defining the scope of what is *effective* assistance. Without any clear idea of an objective standard of quality, litigating such claims will continue to be like dancing in the dark. At present, the regulators of the legal profession in India offer vague platitudes on the point of responsibilities. It must be supplemented with clear standards on what can defendants expect of counsel at each stage of the case.[86]

Clarity would help on many fronts. Currently, no data is collected for measuring the quality of free legal aid in India,[87] and such guidelines could form the basis for assessing counsel performance in addition to client interviews. It would naturally help resolve an information gap between clients and lawyers, and broaden the coverage of the trial court record which would have to reflect what counsel did in respect of each stage and why. Political will permitting, they can be taken forward to address doubts on question of timing in such claims as well – outlining when they can be raised in a pre-conviction posture. Note than I use when, rather than if, for in a system like India where lengthy trials are the norm, especially in serious cases, pegging any ineffective assistance claim to conclusion of trials renders it partially redundant. It would mean eliminating the question of legal advice on the crucial issue of seeking release from under-

[86] *See also*, Cole, *supra* note 36, at 126–28.

[87] *Supra* note 77, at 4–5.

trial custody – the kind of custody which a majority of Indian prisoners are subject to.[88]

CONCLUSION

Questions about the quality of the legal assistance rendered have been around for decades in India, but not much concerted attention has been paid to the problems. It has led to a situation where today a decently sized body of law exists on the subject, which confirms that defendants have a fundamental right to effective legal assistance, but offers minimal guidance to courts and litigants who are facing such issues.

In this regard, I addressed present uncertainty about whether or not India has, in fact, adopted the *Strickland* test followed in the United States to regulate these claims. At present, it can be safely stated that nothing of this sort has happened: *Strickland's* requirement that defendants prove ineffective assistance prejudicially affected the outcome of trial remains alien to Indian law.

Although *Strickland* has not been transplanted, there are already many similarities in litigation of ineffective assistance claims in the United States and India. Much like the case across America, the serious consequences of ineffective legal assistance are most likely to be visited upon indigent defendants. Further, it is extremely difficult for defendants in both jurisdictions to successfully establish ineffective assistance. The structural barriers against raising claims for any conduct except the most visibly glaring instances of deficient performance by counsel threaten to gradually normalise much lower expectations of legal assistance for the indigent who are at the mercy of state-funded legal aid systems.

Ensuring equal justice for the rich and poor alike is what informed judicial moves to recognise fundamental rights to legal assistance as well as effective legal assistance in India. But today it is clear that the gap between rhetoric and reality remains as wide as ever. What can be done to address this in context of the right to effective legal assistance? Should India

[88] 62 percent of prisoners are undertrial prisoners in India, as opposed to a global average of reportedly 18 – 20 percent. *See*, *In Re* Inhuman Conditions in 1382 Prisons, Order dated 22.11.2018 in W.P. No. 406 of 2013 (Supreme Court of India, Two Justices' Bench).

import what is left of *Strickland* – its prejudice prong, as well as linking effectiveness to the outcome of trials? The short is answer is an emphatic no. Doing so would, quite certainly, sound the death-knell for the right to effective legal assistance as opposed to resuscitating it.

FREEDOM BUT NOT REALLY: THE "*UNPROTECTED*" ZONES OF ARTICLE 19 (1)(A)

SHRUTANJAYA BHARDWAJ*

The structure of the Indian free speech clause is radically different from that of the First Amendment in the United States ["U.S."]. While some speech is "unprotected" under the First Amendment (in the sense of being completely invisible to it), all speech is visible to and protected under Article 19(1) (a) of the Indian Constitution. In India, therefore, restrictions on speech may only be placed by invoking Article 19(2). This difference matters: Article 19(2) is a rigorous provision which provides meaningful protections for speech.

This understanding of the free speech clause is in phase with most of the Indian Supreme Court's jurisprudence on the freedom of speech, which reflects a constitutional tradition of protecting this valuable right. This tradition is composed of judgments which have expansively interpreted Article 19(1) (a), hailing this right as one having paramount importance, with powerful rhetoric as to why it must be zealously protected.

There are, however, some incoherent patches in the Court's jurisprudence. Through some problematic judgments, the Court has effectively declared Article 19(1)(a) as inapplicable to certain areas of speech and expression. These include the speech of electoral candidates, commercial speech, compelled speech and loud speech. In two of these contexts, the Court placed heavy reliance on U.S. case laws. I argue that these judgments are wrong and inconsistent with our speech-protective constitutional tradition. I further argue that in any case, these aberrations are unnecessary, as Article 19(2) is sufficient to deal with all our speech problems.

Thus, even if the Court feels that Article 19(2) does not accommodate what are otherwise desirable restrictions on speech, it has no choice but to invalidate such restrictions. Our constitutional scheme does not leave the power of exception-making in the hands of judges.

INTRODUCTION

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Sixty years ago, the Indian Supreme Court declared certain kinds of trade as outside the purview of Article 19(1)(g) of the Indian Constitution [hereinafter a reference to "Article" shall mean reference to the Article of Constitution of India].[1] The reason given was that the subjects of trades such as gambling, liquor etc., are *res extra commercium* and the State enjoys complete control over their trade.[2] Senior Advocate, Arvind Datar has explained why this idea is a total misfit in our constitutional scheme.[3] He rightly points out that, Article 19(1) is a catchall provision: if the State wants to place restrictions on any of these rights, it must seek justification under the relevant restriction clause (Article 19(6) in case of the right to trade) and establish the reasonableness of the restriction.[4] And yet, as he observes, the Court has imported the doctrine of *res extra commercium* from the U.S. without regard to the context in which it originated. The U.S. runs this doctrine because its constitution recognizes the State as having "*police powers*", i.e. a general authority to regulate behaviour subject only to express constitutional limitations.[5] Our Constitution, Datar explains, explicitly rejects the notion of police powers by expressly defining the extent of the State's power.[6]

This paper is not about trade. It is about speech. My aim is to highlight that Article19(1)(a) has its own version of *res extra commercium* (perhaps, it can be referred to as *res extra speechum*?). Just like in the trade context, the Supreme Court has, in some cases, skirted the requirements of Article19(2) by carving out certain kinds of speech from the scope of Article19(1)(a) and it has done this after repeatedly proclaiming that it may not be done. It has often (inappropriately) relied on U.S. case law to achieve this result. But something differentiates this from the Court's approach in the trade context. There, the Court at least has an express rationale (*res extra commercium*) which it must invoke to explain why certain trade is unprotected. Here there is no such rationale; the Court often doesn't explain why it holds certain speech as unprotected.

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[1]State of Bombay v. R.M.D. Chamarbaugwala, 1957 SCR 874 ¶43.
[2]*Id.*; Har Shankar v. Excise & Taxation Commr., (1975) 1 SCC 737 ¶50.
[3]Arvind P. Datar, *Privilege, Police Power and Res Extra Commercium – Glaring Conceptual Errors*, 21(1) NLSIR. 133 (2009).
[4]*Id.*
[5]*Id.*
[6]*Id.*

Focusing on the importance of the restriction clause called Article 19(2), I argue as follows:

Part I. Most of the Indian Supreme Court's jurisprudence reflects a constitutional tradition of protecting the freedom of speech. This tradition is composed of judgments which have expansively interpreted Article 19(1)(a), hailing this right as one having paramount importance, with powerful rhetoric as to *why* it must be zealously protected. Part I is intended to set out necessary context for the remaining paper.

Part II. The structure of the Indian free speech clause is radically different from that of the First Amendment in the U.S. While some speech is "*unprotected*" under the First Amendment (in the sense of being completely invisible to it), all speech is visible to and protected under Article 19(1)(a). In India, therefore, restrictions on speech may only be placed by invoking Article 19(2). This difference is material: Article 19(2) is a rigorous provision which provides meaningful protections for speech. Its compulsory invocation, therefore, is in line with the constitutional tradition highlighted in Part I.

Part III. There are incoherent patches in the Supreme Court's jurisprudence. Through some problematic judgments, the Court has effectively declared Article 19(1)(a) as inapplicable to certain areas of speech and expression. These include the speech of electoral candidates, commercial speech, compelled speech and loud speech. In two of these contexts, the Court placed heavy reliance on U.S. case law. It is argued that these judgments are wrong and inconsistent with the constitutional tradition identified in Part I.

Part IV. Notwithstanding my argument in Part III, it is argued that these aberrations are unnecessary. Article 19(2) is sufficient to deal with all our speech problems. Further, if the Court feels that in some cases Article 19(2) is not adequate, we are talking of the need for a constitutional amendment, not of constitutional interpretation.

I. A SPEECH-PROTECTIVE CONSTITUTIONAL TRADITION

The Indian Supreme Court's jurisprudence on the freedom of speech reflects a tradition of protecting this right as extremely valuable. Two aspects of this tradition can readily be analyzed by asking the following questions. First, how important is this right and why? Second, what is its scope?

a. How important and why?

It is extremely important, by virtue of being a natural right.[7] Just like the other Article 19 rights, it is not *conferred* upon the citizen by the State but is merely *recognized* by it.[8] Additionally, our constitutional scheme treats the freedom of speech as "*a cardinal value… of paramount significance*",[9] for it is "*the bulwark of a democratic government*".[10] The most important among the Article 19(1) rights,[11] it is characterized as the "*mother of all liberties*" for it gives "*succour and protection*" to other liberties.[12] The text of the Preamble supports this conclusion. The only Article 19(1) right it expressly mentions is the liberty of thought and expression.[13]

The upshot is that free speech is extremely important. But why? The Court gives three broad justifications. First, the right is valuable because it enhances one's freedom, enabling one to develop her personality in her own way.[14] Thus, it furthers self-fulfillment.[15] Second, it enables the pursuit of truth.[16] As no person is wise enough to conclusively determine

[7]K.S. Puttaswamy v. Union of India (2017) 10 SCC 1 ¶261 (Chandrachud, J.), 395-396 (Bobde, J.); National Legal Services Authority v. Union of India, (2014) 5 SCC 438 ¶69; Ramlila Maidan Incident, In re, (2012) 5 SCC 1 ¶11 (Hereinafter 'Ramlila').
[8]National Legal Services Authority v. Union of India, (2014) 5 SCC 438 ¶69.
[9]Shreya Singhal v. Union of India, (2015) 5 SCC 1 ¶17.
[10]Subramanian Swamy v. Union of India, (2016) 7 SCC 221 ¶112; Ramlila ¶11.
[11]*Id*; N.K. Bajpai v. Union of India, (2012) 4 SCC 653, ¶12.
[12]*Supra* note 11.
[13]INDIA CONST, Preamble.
[14]State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶37.
[15]The Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 ¶43.
[16]*Id.*

the truth, it is best to allow all ideas and opinions to be expressed openly.[17] "*Thought control*", therefore, "*is alien to our constitutional scheme.*"[18] All ideas can thus find their way to a "*marketplace*" where they can compete against each other.[19] Truth is bound to emerge from this competition, for the "*best test of truth*" is its power to survive this competition.[20]

Third, the freedom of speech and expression ensures a vibrant and responsible democracy.[21] People make better decisions when they are better informed; they are better informed when fewer fetters are placed on the dissemination of information.[22] A stronger version of this argument (quoted in *Shreya Singhal*)[23] was famously made by Brandeis, J. of the U.S. Supreme Court in 1927.[24] According to him, "*the greatest menace to freedom is an inert people*", and hence, "*public discussion is a political duty*".[25] Linked to this are two ideas: (1) that public criticism of institutions is crucial to the good functioning of a democracy;[26] and (2) that a "*culture of open dialogue*" is needed to "*sustain the collective life of the citizenry*".[27]

b. Scope

In line with its immense importance, the freedom of speech and expression is understood as having "*capacious content*".[28] The Indian Supreme Court has now expanded its scope by "*consistently adopting a very liberal interpretation*".[29] Illustratively and broadly speaking, Article 19(1)(a) covers one's right to educate, inform and even entertain others,[30] the

[17]Gajanan Visheshwar Birjur v. Union of India, (1994) 5 SCC 550 ¶10.
[18]*Id.*
[19]Abrams v. United States, 250 U.S. 616 (Holmes, J., Dissenting).
[20]*Id.*
[21]Shreya Singhal v. Union of India (2015) 5 SCC 1 ¶10.
[22]*Id.* ¶9; S. Khushboo v. Kanniammal, (2010) 5 SCC 600 ¶45 (Hereinafter 'Khushboo').
[23]*Supra* note 22 ¶12.
[24]Whitney v. California, 274 U.S. 357 (Brandeis, J., Concurring).
[25]*Id.*
[26]*Supra* note 22 ¶9.
[27]S. Khushboo ¶45.
[28]Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603 ¶25.
[29]State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶38.
[30]Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 ¶75.

freedom to commercially advertise,[31] and the freedom to discuss and advocate one's opinions notwithstanding their unpopularity.[32] The right extends to circulation of one's views/information through any available media of one's choice.[33] Also protected is the linked right to receive information,[34] which includes the right to be educated, informed and entertained.[35] Crucially, this right protects not just public acts but also private one-on-one telephonic conversations,[36] the right to choose one's partner,[37] the right to sexual preferences,[38] and a parent's right to decide the medium of primary school instruction for her child,[39] none of which have an essentially public character.

It is important to note that Article 19(1)(a) recognizes two distinct interests.[40] The fact that "*expression*" is separately protected must mean that it holds at least some distinct content that is not "*speech*". Thus, among the "*manifold meanings*"[41] of the freedom of expression lies the freedom of "*manifesting by action*".[42] Behaviour & mannerism expressing one's gender identity,[43] choice of dressing,[44] manifestation of one's emotions and feelings,[45] protests,[46] casting a vote,[47] and flying the national flag[48] are examples of protected conduct.

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[31]Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139 ¶17.
[32]*Supra* note 22 ¶13.
[33]*Supra* note 16.
[34]*Id.*
[35]*Id.* ¶75.
[36]PUCL v. Union of India, (1997) 1 SCC 301 ¶19.
[37]Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368 ¶18.
[38]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1¶¶132, 245 (Misra, C.J.), ¶415 (Chandrachud, J.) (Hereinafter 'Navtej').
[39]*Supra* note 30 ¶40.
[40]*Supra* note 22 ¶17.
[41]People's Union for Civil Liberties (PUCL) v. Union of India, (2003) 4 SCC 399 ¶95.
[42]*Id.*
[43]National Legal Services Authority v. Union of India, (2014) 5 SCC 438 ¶72.
[44]*Id.* ¶69.
[45]*Supra* note 42.
[46]Ramlila ¶7.
[47]Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294 ¶38.
[48]Union of India v. Naveen Jindal, (2004) 2 SCC 510 ¶90.

II. MATERIALLY DIFFERENT SPEECH CLAUSES

The argument as to the difference between the Indian and US position is that unlike in the U.S., where the absolutely-phrased[49] First Amendment compels judges to treat certain speech as "*unprotected*", no speech is unprotected under our Constitution. It follows that Article 19(1)(a) covers *all* speech, the only avenue for the State to justifiably interfere with that freedom being Article 19(2).

a. Not Absolute: Rewriting the First Amendment

The First Amendment is drafted in absolute terms. The relevant portion reads: "*Congress shall make no law… abridging the freedom of speech…*".[50] When faced with legislation desirably abridging the freedom of speech, the U.S. Supreme Court (SCOTUS) had to answer the question as to whether the First Amendment literally means what it says. The answer (understandably) came as a firm no, and what followed was an ad-hoc rule-making journey. Consider some of the famous decisions of early First Amendment law.[51]

1. Inciting violence

In *Gompers*,[52] the defendants were restrained by a court from boycotting the complainant by publishing statements accusing him of unfair trade.[53] The SCOTUS held that under prohibition in this case were "*verbal acts*", i.e. words having "*force*".[54] Since those are not properly characterized as speech, no First Amendment challenge lay.[55]

During the First World War, a man distributed leaflets to those who were conscripted encouraging them to abandon or obstruct the conscription.

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[49]U.S. CONST. amend. I.

[50]*Id.*

[51]It is to be noted that heads 1-3 are indicative and not exhaustive of the classes of unprotected speech. The crucial point is that no First Amendment challenge may lie in respect of an unprotected class of speech, no matter how disproportionately the State treats it.

[52]Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

[53]*Id.*

[54]*Id.*

[55]*Id.*

He was convicted for espionage.[56] The SCOTUS affirmed the conviction, holding that free speech protection would depend heavily on the context and circumstances of the case.[57] Holmes, J. famously wrote: "*The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.*"[58] In another contemporary espionage case, the SCOTUS upheld convictions of leaflet-distributors who called for a general strike of all workers to frustrate the U.S. Government's war attempts.[59] Holmes, J. (dissenting this time) wrote, again famously, that speech may only be curtailed when there is an "*emergency that makes it immediately dangerous to leave the correction of evil counsels to time*".[60] A modified version of this idea eventually became the law on incitement in 1969.[61]

2. Fighting words and Obscenity

In *Chaplinsky*,[62] the appellant called the City Marshal "*a God damned racketeer*" and "*a damned Fascist*", violating a prohibition on throwing insults at another person with intent to "*deride, offend or annoy him*".[63] Affirming, the SCOTUS held that the First Amendment did not protect "*fighting words*", i.e. words that "*cause an average addressee to fight*", because such words are "*no essential part of any exposition of ideas*" and thus have negligible social value.[64]

Likewise, in *Roth*,[65] the SCOTUS held that the First Amendment "*gave no absolute protection for every utterance*" merely on account of its "*unconditional phrasing*".[66] Though speech having "*the slightest redeeming social importance*" would be protected, obscene speech, having zero social value, was not.[67]

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[56]Schenck v. United States, 249 U.S. 47 (1919).
[57]*Id.*
[58]*Id.*
[59]Abrams v. United States, 250 U.S. 616 (1919).
[60]*Id.* (Holmes, J., Dissenting)
[61]Brandenburg v. Ohio, 395 U.S. 444 (1969).
[62]Chaplinsky v New Hampshire, 315 U.S. 568 (1942).
[63]*Id.*
[64]*Id.*
[65]Roth v. United States, 354 U.S. 476 (1957).
[66]*Id.*
[67]*Id.*

3. Schools, Workplaces and Prisons

These three are largely treated as unprotected zones. Schools are free to regulate speech that affects their "*basic educational mission*".[68] Employees may be subjected to any speech restrictions unless they are speaking as citizens on matters of public importance.[69] A prisoner loses First Amendment rights which are "*inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.*"[70]

4. All That's Left: Protected Speech

Protected speech is not immune from State's regulation. Rather, it gets varied levels of protection depending on *how* the State regulates it. A law or state measure that abridges it based on its content –for example, laws proscribing cross-burning,[71] flag-burning,[72] pornography,[73] etc. – target speech or expressive conduct based on its subject-matter. The SCOTUS uses strict scrutiny to test such laws, which means that the State must show (i) a compelling interest in prohibiting the speech and (ii) narrow tailoring of the restriction (i.e. unavailability of less speech-restrictive alternatives).[74] On the other hand, laws merely regulating the time, place, manner etc. of speech which are "*justified without reference to the content*"[75] of the speech – like a ban on protests near residences,[76] a zoning prohibition on adult movie theatres,[77] etc. are subjected to a lesser scrutiny.[78] Here, the State interest must be substantial (as opposed to compelling), the restriction must be narrowly tailored, and it must leave open alternate means of communication.[79]

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[68]Bethel School District v. Fraser, 478 U.S. 675 (1986).
[69]Gil Garcetti v. Richard Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 461 U.S. 138 (1983); Givhan v. Western Line Consolidated School, 439 U.S. 410 (1979); Pickering v. Board of Education, 391 U.S. 563 (1968).
[70]Jones v. North Carolina, 439 U.S. 119 (1977).
[71]RAV v St. Paul, 505 U.S. 377 (1992).
[72]Texas v. Johnson, 491 U.S. 397 (1989).
[73]American Booksellers Ass'n v. Hudnut, 771 F.2d. 323 (7th Cir. 1985).
[74]*Supra* note 71.
[75]Virginia Pharmacy v Virginia Citizens, 425 U.S. 748 (1976).
[76]Frisby v Schultz, 487 U.S. 474 (1988).
[77]Renton v Playtime Theatres, 475 U.S. 41 (1986).
[78]*Id.*; *Supra* note 75.
[79]*Supra* note 77; *Supra* note 76.

b. The Indian Setting

At least three differences between Article 19(1)(a) and the First Amendment are manifest. First, Article 19(2) opens with the words: "*Nothing in sub clause (a) of clause (1)…*".[80] This shows that the grounds in Article 19(2) are intended to justify restrictions on speech otherwise protected by Article 19(1)(a). Therefore, even obscene, inciteful and defamatory speech,[81] which is "*unprotected*" in the U.S. context,[82] is *prima facie* protected under Article 19(1)(a).[83]

Second, crucially, "*protected*" speech (i.e. not obscene, defamatory, inciteful etc.) may *also* be curtailed under the First Amendment upon the showing of a substantial or compelling state interest.[84] This is not so under Article 19(2): the nine stated grounds exhaust the permissible grounds for restriction.[85] A quick look at Article 19 reveals that the different rights are subject to restrictions on different grounds.[86] This reflects careful deliberation by the drafters. E.g., while Article 19(1)(d), Article 19(1)(e) and Article 19(1)(g) rights may be restricted in public interest, Article 19(1)(a) rights may not.[87]

Third, Articles 19(1)(a) and 19(2) do not incorporate the distinctions between content-neutral and content-based restrictions.[88] Neither does it exclude speech made in special contexts, such as in prisons, schools and workplaces.[89] It is apparent that such concerns would be considered at the time of determining the reasonableness of the restriction under Article19(2). Unlike the First Amendment in the U.S., the very presence of a restriction clause like Article19(2) negates the possibility of excluding any speech at the Article 19(1)(a) stage.

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[80]INDIA CONST art .19(2).
[81]*Id.*
[82]*See* Section II(a)(i)-(ii) *supra.*
[83]*Supra* note 22 ¶17.
[84]*Supra* note 71.
[85]INDIA CONST art.19(2); *Supra* note 83.
[86]INDIA CONST art.19(1).
[87]Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842 ¶34 (Hereinafter 'Sakal').
[88]*See* Section II(a)(iv) *supra.*
[89]*See* Section II(a)(iii) *supra.*

Hence, though the two constitutions are similar in the sense that the freedom of speech is absolute in neither, their approaches to speech-restrictions are radically different. However, a closer look at other jurisdictions will demonstrate similarity with India's position.

c. Foreign and International Jurisdictions

The point here is to only demonstrate a contrast between different constitutional structures. Consider Canada, the International Covenant on Civil and Political Rights ["ICCPR"] and the European Convention on Human Rights ["ECHR"] on the one hand, and South Africa on the other. The Canadian/ECHR/ICCPR model is increasingly like that of India. The South African model is mid-way between the U.S. model and the Indian/Canadian/ECHR/ICCPR model.

The Canadian Charter of Rights and Freedoms guarantees[90] to everyone the freedom of expression.[91] This freedom, just like all other rights under the Charter, is subject "*only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*".[92] Unlike the First Amendment in the U.S., and like the Indian Article19, the free speech clause protects all speech, notwithstanding its content and nature.[93] All restrictions must therefore be justified under the restriction clause.[94]

Likewise, the ECHR explicitly provides that rights may only be restricted for the purposes "*for which they have been prescribed*",[95] and an exhaustive list of legitimate aims is set out in the freedom of expression provision.[96] Similarly, under the ICCPR, a restriction is valid only if it pursues one of the enumerated legitimate aims,[97] and State Parties are simultaneously obligated to prohibit advocacy of hatred on select grounds.[98] Under both the ECHR and the ICCPR, speech restrictions are always subjected to the

[90]CONSTITUTION ACT §1 (1982) (Can.).
[91]*Id.* §2(b).
[92]*Id.* §1.
[93]R v Keegstra, [1990] 3 S.C.R. 697.
[94]*Id.*
[95]European Convention on Human Rights art.18, Nov. 4, 1950.
[96]European Convention on Human Rights, Art.10, Nov. 4, 1950.
[97]International Covenant on Civil and Political Rights art.19, Dec. 19, 1966.
[98]International Covenant on Civil and Political Rights art.20, Dec. 19, 1966.

"*three-part test*" of legality, legitimacy and necessity,[99] except if the person whose speech is restricted is trying to use his convention rights in order to destroy the rights of others, in which case the application is treated to be inadmissible.[100]

In contrast, the South African Constitution recognizes the freedom of expression but clarifies that it shall not extend to war propaganda, incitement to violence and hate speech.[101] There is a separate limitation provision (like the general provision in Canada) which provides that any right may be restricted "*only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedoms*" and lists relevant factors to be considered while judging the restriction.[102] Thus, except the three classes of speech excluded from protection,[103] speech may not be restricted without justifying it under this general provision.[104]

d. The Distinction Matters

Whether speech is restricted (A) by terming it "*unprotected*" and hence invisible to Article 19(1)(a), or (B) by terming it "*protected*" but nonetheless allowing restrictions under Article 19(2) – what difference does it make?

Choosing (B) yields three desirable consequences which are not shared by (A). First, the State cannot restrict speech for a reason outside Article 19(2), no matter how compelling the reasons are. The Supreme Court has said this repeatedly, constitution bench after constitution bench.[105]

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[99]Refah v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECtHR (2001); Faurisson v. France, Communication No. 550/1993, United Nations Human Rights Committee (1996).

[100]European Convention on Human Rights art.17, Nov. 4, 1950; International Covenant on Civil and Political Rights art.5, Dec. 19, 1966; Glimmerveen v. Netherlands App. Nos. 8348/78, 8406/78, ECtHR (1979).

[101]CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA §16 (1996).

[102]*Id.* §36(1).

[103]Afri-Forum v Malema, 2011 (6) SA 240 (EqC) (South African Equality Court).

[104]De Reuck v Director of Public Prosecutions 2004 (1) SA 406; Islamic Unity Convention v. Independent Broadcasting Authority 2002 (4) SA 294 (South African Constitutional Court).

[105]Romesh Thappar v. State of Madras, 1950 SCR 594 ¶10, Brij Bhushan v. State of Delhi, 1950 SCR 605 ¶5, Kameshwar Prasad v. State of Bihar, 1962 Supp (3) SCR 369

Second, the restriction must be "*reasonable*".[106] This means that it should be proportionate to the stated aim.[107] Further, the evil sought to be curbed must be substantial and sufficiently urgent.[108] Sometimes, the Court sets an even higher standard where the State must show that it adopted the least speech-restrictive alternative.[109] Third, the petitioner needs to show that Article 19(1)(a) stands *interfered* with.[110] The remaining burden[111] – of showing reasonableness and proximate nexus[112] with an Article 19(2) ground – is borne by the State.[113]

In contrast, under (A), "*unprotected*" speech could be restricted whimsically and disproportionately by the State. Therefore, (A) is a misfit with our speech-protective constitutional tradition (see Part I). And yet, we find traces of (A) in the Supreme Court Cases (SCC) volumes.

III. ABERRATIONS IN THE CONSTITUTIONAL TRADITION: THE SUPREME COURT'S EXPERIMENTS WITH THE "*UNPROTECTED*" ZONES OF ARTICLE19 (1) (a)

Four such zones are highlighted below: speech by electoral candidates, commercial speech, compelled speech and loud speech. The first is a question of eligibility. The last three pertain to the content of speech protected under Article 19(1)(a).

a. Electoral Candidates

"*All citizens*" enjoy the rights listed under Article 19(1).[114] However, its effectiveness remains questionable.

¶8; Sakal ¶34, State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶41.

[106] *Supra* note 80.

[107] State of Madras v. V.G. Row, 1952 SCR 597 ¶15.

[108] *Id.* ¶15.

[109] N.K. Bajpai v. Union of India, (2012) 4 SCC 653 ¶14; Ramlila ¶28.

[110] *Id.* ¶12.

[111] There is some tension between this and the notion of presumption of constitutionality. But that is not within the scope of this paper.

[112] Ramlila ¶28.

[113] *Supra* note 110.

[114] *Supra* note 86.

1. Jumuna Prasad Mukhariya

In *Jumuna*,[115] under challenge (*inter alia*) was a now-repealed legal provision that prohibited a candidate from making to voters a "*systematic appeal to vote or refrain from voting on grounds of caste, race, community or religion*".[116] Rejecting the Article 19(1)(a) challenge, the constitution bench held that since the right to contest elections as a candidate is not a fundamental right, but only "*a special right created by the statute*", it "*can only be exercised on the conditions laid down by the statute*".[117] Accordingly, Part III has "*no bearing on such a right*".[118]

The Court's reasoning is flawed for four reasons. First, this reasoning has absurd consequences. Suppose the Parliament prohibited candidates from using the country's economic development as the basis to appeal for votes. Or, suppose it prohibited them from discussing about the growing crime rate. In a more draconian world, suppose the Parliament totally prohibited election campaigning by candidates or their agents. It seems absurd to suggest that Article 19(1)(a) – the right most closely linked to the idea of a vibrant democracy[119] – would not come to the rescue in such cases. If the people directly involved in the political process are prohibited from talking about significant political issues,[120] what is left of the political process?

Some might believe that such laws could still be challenged as manifestly arbitrary under Article 14.[121] Unfortunately, that door is not necessarily open. Whether courts may strike down arbitrary legislation is still grey. At least one constitution bench has said no.[122] In any case, *Jumuna* excludes

[115]Jumuna Prasad Mukhariya v. Lachhi Ram, (1955) 1 SCR 608. (Hereinafter 'Jumuna').
[116]*See* Ebrahim Suleiman Sait v. M.C. Mohammed, (1980) 1 SCC 398, at para 5.
[117]*Supra* note 115 ¶5.
[118]*Id.*
[119]Khushboo ¶45.
[120]Abhiram Singh v. C.D. Commachen, (2017) 2 SCC 629 ¶120 (Chandrachud, J., Dissenting).
[121]Shayara Bano v. Union of India (2017) 9 SCC 1 ¶5 (Kurian, J.), ¶101 (Nariman, J.), Navtej ¶238 (Misra, C.J.), ¶82 (Nariman, J.), ¶380 (Chandrachud, J.), ¶523 (Malhotra, J.).
[122]K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1 ¶205.

the applicability of the *whole* of Part III (including Article14) to electoral candidates.[123]

Second, it is simply counter-intuitive that a candidate possesses no fundamental rights. Suppose a law prescribes that while male candidates may deliver public speeches as part of their election campaigns, female candidates may not. The female candidates can raise no discrimination claim because, says *Jumuna*, Article 14 has "*no bearing*" on the purely statutory right to be a candidate.[124] Suppose again that a law prohibits Dalit candidates from entering Brahmin-dominated constituencies throughout their period of candidature. As per *Jumuna*, Article 17 would not hit this law, as the purely statutory right of candidature "*can only be exercised on the conditions laid down by the statute*".[125]

Third, the *Jumuna* decision suggests that when a citizen signs up to be an electoral candidate, she *waives* or is *estopped from* claiming her Part III rights. The law on this point has shifted post *Jumuna*. At least one constitution bench has declared that no citizen can ever barter away Part III rights through doctrines such as waiver and estoppel.[126]

Fourth, the Supreme Court has held that the State cannot condition the receipt of a benefit or subsidy on the relinquishment of a fundamental right.[127] A similar constraint should operate when the State places conditions on the exercise of statutory rights (just like with subsidies and benefits, statutory rights are created at the State's discretion). *Jumuna* is inconsistent with this view.

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[123] *Supra* note 115 ¶5.

[124] *Id.*

[125] *Id.*

[126] Olga Tellis v. Bombay Municipal Corpn. (1985) 3 SCC 545 ¶28; P. Rathinam v. Union of India, (1994) 3 SCC 394 ¶34; Nar Singh Pal v. Union of India, (2000) 3 SCC 588, ¶13; *See also* Behram Khurshid Pesikaka v. State of Bombay, (1955) 1 SCR 613 ¶12.

[127] Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717 ¶14 (Ray, C.J. and Palekar, J.), ¶171 (Mathew and Chandrachud, JJ.), ¶199 (Beg, J.). I admit that except Mathew and Chandrachud, JJ., the other justices state this proposition only in respect of minority rights under Art.30. But it is hard to see why it wouldn't apply also to cases where the relinquishment of other fundamental rights is sought by the State.

2. Ramesh Yeshwant Prabhoo

Under challenge in *Prabhoo*[128] was another provision of the same Act which prohibited a candidate from soliciting votes on the ground of "*his*" religion, caste etc.[129] Surprisingly, despite *Jumuna*, the Court bit the bullet and acknowledged the possible interference with Article 19(1)(a).[130] Assuming the interference (without giving a finding thereon),[131] it tested the legislation against Article 19(2) and upheld it as a reasonable restriction in the interests of "*decency*", i.e. the "*current standards of behaviour or propriety*".[132] It reasoned that the propriety standards of a "*secular polity*" did not allow a candidate to seek votes on the ground of his religion.[133]

3. Abhiram Singh

In *Abhiram*,[134] a bench of seven judges re-interpreted the meaning of the word "*his*". The majority, led by Lokur, J., expansively read the word to include not just the candidate's religion but also (*inter alia*) the voter's.[135] It was argued before the Court that such a broad interpretation would violate Article 19(1)(a).[136] In response, Lokur, J. simply extracted the discussion on this point from *Jumuna* and said: "*We need say nothing more on the subject.*"[137] This is strange. The Court could at least have explained *why* it agrees with a 60-year old decision despite the vast body of progressive case law that followed it.[138]

4. Comments

Something deeply contradictory belies the Supreme Court's approach. On the one hand, it waxes eloquent about how "*the essential concept of the freedom*

[128]Ramesh Yeshwant Prabhoo (Dr) v. Prabhakar Kashinath Kunte, (1996) 1 SCC 130.
[129]Representation of the People Act §123(3) (1951).
[130]*Supra* note 128 ¶27.
[131]*Id.* ¶30.
[132]*Id.* ¶29.
[133]*Id.*
[134]Abhiram Singh v. C.D. Commachen, (2017) 2 SCC 629.
[135]*Id.* ¶48.
[136]*Id.* ¶34.3.
[137]*Supra* note 135.
[138]*See* Part I *supra.*

of speech" lies in political discussion and an informed citizenry.[139] On the other hand, it feels that it "*need say nothing*" about the denial of constitutional speech protections to electoral candidates who are perhaps the primary players in political discourse. I see no way to reconcile these two positions.

b. Commercial Speech

Facing an Article 19(1)(a) challenge in *Hamdard*[140] was a law prohibiting the advertisement of certain drugs and remedies claiming that such drugs/remedies possess magical qualities.[141] The Court acknowledged that commercial advertisements are "*no doubt a form of speech*".[142] Yet, it held that the law did not even *interfere* with Article 19(1)(a). Why? Because the object of an advertisement is trade and commerce, not propagation of ideas.[143] Hence, says the Court, advertisements have "*no relationship*" with "*the essential concept of the freedom of speech*".[144]

But, under our constitutional scheme, all speech-restrictions are to be tested under Article 19(2).[145] How, then, did the Court go so wrong? It erred because it invoked U.S. case law[146] and diligently followed it despite the significant constitutional differences highlighted above. Thirty-five years later, in *Tata*,[147] the Court tried to correct its error and held that commercial speech, even if "*deceptive, unfair, misleading and untruthful*", is covered by Article 19(1)(a) and any restriction thereon must pass muster under Article 19(2).[148] But *Tata* was delivered by a bench of three judges (as opposed to *Hamdard*'s five). So, *Hamdard* is still good law.

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[139]Hamdard Dawakhana v. Union of India, (1960) 2 SCR 671 ¶17 (Hereinafter '*Hamdard*').
[140]*Id.*
[141]*Id.* ¶3.
[142]*Id.* ¶17.
[143]*Id.*
[144]*Id.*
[145]Romesh Thappar v. State of Madras, 1950 SCR 594 ¶10, Brij Bhushan v. State of Delhi, 1950 SCR 605 ¶5, Kameshwar Prasad v. State of Bihar, 1962 Supp (3) SCR 369 ¶8; Sakal ¶34, State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶41.
[146]Valentine v Chrestensen, 316 U.S. 52 (1942); *Supra* note 139.
[147]Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139.
[148]*Id.* ¶17.

c. The Law of Motion: Free Speech versus Public Interest?

In *Motion*,[149] the impugned law mandated every movie theatre to screen a short educational or scientific film (documentary, news clip etc.) along with the film being screened.[150] Under the Article 19(1)(a) challenge, the exhibitors argued that (i) this law compelled them to 'speak', and (ii) no ground under Article 19(2) could possibly justify a restriction of this nature.[151] The Court upheld the law, ruling (once again) that Article 19(1)(a) was not even implicated,[152] relying (once again) on U.S. case law.[153] This is because the law promoted "*informed decision-making*" which forms "*the essence*" of the freedom of speech. Article 19(1)(a) would be infringed if the law compelled the exhibitors to project a partisan viewpoint.[154] But, the Court said, that is not this case.

There are a number of problems with this reasoning. First, informed decision-making is not the only "*essence*" of the freedom of speech. Equally an essence of the right is individual self-fulfillment,[155] which stands violated the moment there is compulsion. Second, on an abstract level, the answer to "*Is X being forced to speak?*" cannot depend on the answer to "*What is X being forced to say?*". Indeed, the latter question may logically be asked only if and after the former is answered affirmatively. The Court reverses this order for no clear reason. Third, equally, the question "*Is X's freedom interfered with?*" cannot logically be answered based on *why* X's freedom is interfered with. The *why* question is a justification question. It is an Article 19(2) question. Fourth – and this is perhaps the most important one – the Court's reasoning flies in the face of the clear command issued by the constitution bench in *Sakal Papers*:[156] "*It is not open to the State to curtail or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law*

[149]Union of India v. Motion Picture Assn., (1999) 6 SCC 150.
[150]*Id.* ¶10.
[151]*Id.* ¶12.
[152]*Id.* ¶19.
[153]*Id.* ¶¶16-17; Turner Broadcasting System, Inc. v. Federal Communications Commission 512 U.S. 622 (1997).
[154]*Supra* note 149 ¶15.
[155]State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶37.
[156]Sakal.

competent under clause (2) of Article 19."[157] It must be noted that "*public interest*" is listed as a ground under Article 19(6) but not under Article 19(2). And yet, the law under challenge in *Motion* was undoubtedly a public welfare law and was characterized and upheld by the Court as such.[158]

The Court then discussed the mandatory printing of ingredients on food products and health warnings on cigarette packs.[159] It observed that these provisions exist to ensure that the consumer is well-informed about the product. Since such laws compel the dissemination of relevant information, the Court says, they *further* the freedom of speech rather than *curtail* it.[160] Similar is the law in question.[161] Hence, the Court concludes, while these provisions "*compel speech*", they don't violate Article19(1)(a) for they are "*designed to further free speech and expression and not to curtail it.*"[162]

But they could do both. They could curtail one person's freedom of speech in order to better secure another's. In fact, that is precisely what is going on here. Yet, instead of acknowledging the conflict between the speech rights of different groups, the Court holds that the individual's right to speak doesn't *exist* (as opposed to saying it is *outweighed*) where the public's right to receive information does. It seems like the Court sees "*freedom of speech and expression*" as one huge block that is held collectively by the Indian population – when some people learn, this block of freedom grows, and Article 19(1)(a) is enhanced. Individual freedom has no place in this view. It seems that if public information is enhanced as a result, the Court will not even factor individual freedom in its consideration. This view of Article 19(1)(a) seems wrong.

What if the law in *Sakal Papers* required every newspaper to dedicate two pages to articles on modern Indian history? What if the State passed a law mandating every song to start with a minute-long discussion on a scientific phenomenon of the singer's choice? The right to receive information is not a right to compel others to speak against their will.

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[157] *Id.* ¶34.
[158] *Supra* note 149 ¶17.
[159] *Id.* ¶15.
[160] *Id.* ¶17.
[161] *Id.*
[162] *Id.*

Holding otherwise turns Article 19(1)(a) on its head, as the right to freedom of speech and expression is possessed by "*all citizens*",[163] not by some citizens at the cost of others.

Further, suppose that a law criminally prohibits people from rejecting Darwin's Theory of Evolution as false. Suppose that it also prohibits the rejection of the Big Bang Theory. Would the Court say these prohibitions are not restrictions on the freedom of speech because they prevent misinformation? Or suppose that a law punished film directors for any pro-smoking or pro-alcohol statements made in their films. Would that not be a speech case? Perhaps the Court could draw distinctions between these hypothetical cases and *Motion*. But nothing in the Court's opinion suggests this. The Court makes blanket statements concerning the importance of reaching the illiterate masses who otherwise have no access to important information and the permissibility of placing restrictions on the freedom of speech for this purpose.[164] But it doesn't state the outer limits of this principle.

d. 'Loud' Speech and Article 21

Remember that freedom of speech includes the freedom to speak through any medium of the speaker's choice.[165] What if I want to choose to speak through loudspeakers and amplifiers in a residential locality in the middle of the night?

In *Noise Pollution*,[166] the question was whether the right to speak through loudspeakers (such as at political rallies and religious functions), which was "*undoubtedly*" part of the freedom of speech and expression,[167] could be invoked to violate others' rights against "*aural aggression*" under Article 21.[168] The Court says no: since the right under Article 19(1)(a) is "*not absolute*", it "*cannot be pressed into service*" when it conflicts with Article 21.[169]

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[163] INDIA CONST. art.19(1) (1950).
[164] Union of India v. Motion Picture Assn., (1999) 6 SCC 150 ¶17.
[165] S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574 ¶8; Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 ¶43.
[166] Noise Pollution (V), In re, (2005) 5 SCC 733.
[167] *Id.* ¶11.
[168] *Id.*
[169] *Id.*

Once again, the Court avoids the nuance it should have tackled and sweeps Article 19(1)(a) under the carpet. Its reasoning is flawed, like it was in *Motion*: because there is a good reason to *curtail* the right, there *exists* no right. Instead, the correct question to ask would have been: which ground under Article 19(2) has room for protecting the Article 21 right against aural aggression, or more generally, the right to privacy?

This is not the only occasion when the Court had to resolve a conflict between Article 19(1)(a) and Article 21. In *Sahara*,[170] the Court considered whether courts could pass orders prohibiting the media from publishing sensitive information on *sub judice* cases.[171] The case involved the media's press rights under Article19(1)(a) and, in conflict, the right to fair trial under Article 21 along with the Court's interest in administration of justice.[172] Acknowledging an interference with Article 19(1)(a) and observing that this case involved a clash between "*rights of equal weight*",[173] the Court held that the interests in fair trial and administration of justice were protected by the head of "*contempt of court*" in Article 19(2).[174] But, because such orders must be reasonable, they should be temporary and passed, after considering other alternatives, only in cases where there exists a "*real and substantial risk of prejudice*" to the said interests.[175] Thus, the Court invoked the doctrine of "*balancing*" to ensure that the two rights in conflict are "*given equal space in the constitutional scheme*".[176] It is submitted that this is the only proper approach in the case of a conflict between rights.

Also consider *Subramanian Swamy*[177] where the Court upheld the constitutionality of criminal defamation. The case was once again characterized as presenting a conflict between Article 19(1)(a) and the right to reputation under Article 21.[178] Yet, the Court located the justification for restricting the Article 19(1)(a) right in Article 19(2)

[170]Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603.
[171]*Id.* ¶15.
[172]*Id.* ¶25.
[173]*Id.* ¶42.
[174]*Id.* ¶46.
[175]*Id.* ¶42.
[176]*Id.*
[177]Subramanian Swamy v. Union of India, (2016) 7 SCC 221.
[178]*Id.* ¶144.

("*defamation*"),[179] citing *Shreya Singhal*[180] for the proposition that all restrictions on the right under Article 19(1)(a) must be located somewhere in Article 19(2).[181] These cases show that resolution of conflicts between Articles 19(1)(a) and 21 is possible through Article19(2). The Court's approach in *Noise Pollution* was therefore erroneous.

IV. THE ABERRATIONS ARE UNNECESSARY

Apart from being constitutionally problematic, the Supreme Court's reflex action in declaring some speech outside the purview of Article 19(1)(a) is wholly unnecessary. Article 19(2) provides an adequate framework to deal with the problems the Court is concerned about. Mostly responsible for this adequacy are the grounds of "*decency*" and "*morality*". But if Article 19(2) seems inadequate some cases, the judicial response should be to invalidate the restriction. Anything else would amount to a judicial amendment of the constitution.

a. Morality

After the recent Indian decision invalidating Section 377 of the Indian Penal Code, 1860 [hereinafter IPC], "*morality*" is to be construed as constitutional morality and not social/public morality.[182] Therefore, Article 19(1)(a) may be restricted to prevent outcomes that the *Constitution* considers wrong. I submit that morality is an adequate framework to resolve conflicts between rights. Depending on the rights in question, the Constitution may demand that they be balanced or, alternatively, that the hierarchy between them be enforced.[183]

Consider some IPC provisions that regulate speech. A man commits an offence by (a) making unwelcome sexual advances,[184] (b) making sexually

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[179] *Id.* ¶150.
[180] Shreya Singhal v. Union of India, (2015) 5 SCC 1.
[181] *Supra* note 177 ¶145.
[182] Navtej Singh Johar v. Union of India, 2018 SCC OnLine SC 1350. This decision is possibly in tension with the decisions on obscenity, such as Ranjit Udeshi v. State of Maharashtra, AIR 1965 SC 881. However, that potential conflict is not within the scope of this paper.
[183] E.g. Art.25 is expressly made "*subject to other provisions*" of Part III.
[184] Indian Penal Code §354A(1) (1860).

coloured remarks,[185] or (c) saying any word or making any gesture intending to insult the modesty of a woman.[186] It is also an offence to (d) say something intending to wound another's religious feelings,[187] (e) insult someone intending to provoke a breach of peace,[188] or (f) making someone act by inducing them to believe that they could otherwise be the object of divine displeasure.[189] At least (a) to (c) are desirable restrictions. They could be justified based on constitutional morality, which contains *inter alia* values of equality and fraternity.[190] This is also true of hate speech provisions. Insofar as they are grounded in the constitutional value of dignity,[191] i.e. equal social standing for all citizens,[192] they further constitutional morality.[193]

This view of "*morality*" also brings our Constitution in line with internationally accepted standards for restricting speech. Foreign jurisdictions and international human rights instruments often provide for and practice restrictions on speech for the legitimate aims of protecting others' (a) rights and (b) reputations.[194] the ECHR,[195] the American Convention on Human Rights i.e ACHR,[196] and the ICCPR.[197] The European Court of Human Rights has held hate speech legislation to be justified for the protection of rights and reputation of others.[198] The ICCPR Human Rights Committee has done the same.[199] The Canadian Supreme Court's hate speech jurisprudence is along similar lines: while

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185 *Id.*
186 *Id.* §509.
187 *Id.* §298.
188 *Id.* §504.
189 *Id.* §508.
190 Navtej Singh Johar v. Union of India, 2018 SCC OnLine SC 1350 ¶115 (Misra, C.J.), ¶497 (Chandrachud, J.)
191 Pravasi Bhalai Sangathan v. Union of India, (2014) 11 SCC 477, ¶15.
192 *Id.* ¶8.
193 GAUTAM BHATIA, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 155-169 (2016).
194 Universal Declaration of Human Rights art.29, Dec. 10, 1948.
195 European Convention on Human Rights art.10, Nov. 4, 1950.
196 American Convention on Human Rights art.13, Nov. 22, 1969.
197 International Covenant on Civil and Political Rights art.19, Dec. 19, 1966.
198 Vejdeland v. Sweden, App. No. 1813/07, ECtHR (2012); *See also* Jersild v. Denmark, App. No. 15890/89 (European Commission of Human Rights) (1993).
199 Faurisson v. France, Communication No. 550/1993, United Nations Human Rights Committee (1996).

hate speech is *prima facie* protected under the free speech clause, proscribing it is a reasonable limitation which serves the legitimate aim of preserving values of equality, multiculturalism and dignity.[200]

In addition to that, constitutional morality is not only about fundamental rights. Directive Principles, Fundamental Duties, Preamble etc. would all be relevant in determining what is constitutionally right and wrong. The aim of this paper is not to suggest final answers to the puzzles presented by the cases discussed. The aim is merely to propose that Article 19(2) is adequate to deal with all of them. Constitutional morality provides a solid framework to tackle issues of fraudulent commercial speech, misleading information about drug use and magical remedies, mandatory health warnings on cigarette packs,[201] electoral speech, and noise pollution, because it grounds justification for the restrictions within the constitution in a systematic way, i.e. by taking the Article 19(2) route.

b. Decency

Unlike morality, decency remains a social, not constitutional standard. Further, it is not a standard of right versus wrong. Rather, it is one of *proper* versus *improper*.[202] Recall *Prabhoo*: decency implies social standards of behaviour and propriety.[203] This ground may save some desirable restrictions on speech that may not be justifiable under morality or any other ground in Article 19(2).

Consider time-place-manner restrictions. A public library may prohibit talking inside the library premises. The prohibition would extend to protesting, singing or disseminating information in any other form inside the library. Similar prohibitions may be placed in and around a public hospital. A public university may prohibit students from talking during exams (or even regular class hours). A student may be punished for violating discipline if she keeps asking questions about star formation in a

[200]R v Keegstra, [1990] 3 S.C.R. 697.
[201]The ECtHR has upheld bans on tobacco advertising as serving the "*fundamental considerations of public health*". *See* Société de Conception De Presse et D'édition et Ponson v. France, App. No. 26935/05, ECtHR (2009).
[202]Ramesh Yeshwant Prabhoo (Dr) v. Prabhakar Kashinath Kunte, (1996) 1 SCC 130 ¶29.
[203]*Id.*

literature class. Even the teacher may be fired for talking international politics during a chemistry class and wasting everyone's time. Similarly, a soldier in the military may be punished for preaching religion to his fellow soldiers during drills and exercise. He could be punished even for expressing his anger by staring back at his superior.

All these restrictions seem to be justifiable. Most of them are about discipline. More broadly, all of them are about preservation of order in some sense. As per *Prabhoo*'s definition, they would all further the State's interest in maintaining decency.[204] They can therefore be upheld upon a showing of reasonableness and proportionality by the State.

CONCLUSION

When a court is called upon to decide whether a speech-restriction is constitutionally permissible, adjudication must proceed as follows:

Step 1. Decide if the state has (a) stopped the citizen from speaking or expressing, (b) punished her for doing so, or (c) compelled her to do so.

Step 2. If the answer to any of the three is yes, hold that the State has interfered with the freedom of speech and expression. Automatically go to Article 19(2).

Step 3. Decide if there is a ground under Article 19(2) that justifies the prohibition. If there isn't, case over – the State's measure is unconstitutional.

Step 4. If there is a ground under Article 19(2), decide if the measure was reasonable.

It is concluded that substantive adjudication about the permissibility of restrictions must happen at Article19(2), not at Article19(1)(a). Otherwise, courts unconstitutionally assume the power to decide when censorship is subject to Article19(2) and when it isn't. Such an approach is not only unnecessary but also inconsistent with our speech-protective constitutional tradition.

[204] *Id.*

EXPLORING THE DUALITY OF THE ELECTION COMMISSION AND THE SCOPE OF JUDICIAL REVIEW

SREGURUPRIYA AYAPPAN*

Recently, there has been a spate of litigation in cases of disqualification of members of parliament and legislative assemblies. Given the existence of the Election Commission, a constitutional body that has been vested with quasi-judicial powers, one must examine the scope of these powers. This author seeks to explore the duality of its adjudicatory powers – in cases of disqualification and in cases of dispute regarding election symbols. It appears that in the former, the Commission has greater procedural constraints and that its decision acquires the finality of a presidential or gubernatorial order. However, in the latter, the Commission's decision is subject to judicial review as it is a Tribunal as under Article 136. The author reasons that given this constitutional scheme, there is a substantial difference in the procedural constraints and rigour exercised by the Commission while dealing with these two categories of cases – the legislature has conferred considerable powers of Courts to the Commission for reference cases. This is necessary given the reduced scope of judicial review of these decisions and the centrality of elections in our democratic polity.

INTRODUCTION

Elections are the touchstone upon which democracy is built and are, thus, fundamental to the Indian polity.[1] Given the practical realities of electoral competition, it is inevitable that disputes arise out of them. The Election Commission is a constitutional body set up for the smooth conduct of free and fair elections.[2] It also has quasi-judicial powers[3]comprehended in

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[1]INDIA CONST., Preamble.

[2]INDIA CONST., art. 324.

[3]All Party Hill Leaders' Conference v. Captain W.A. Sangma and Ors, (1977) 4 S.C.C 161 (India) para 42.("*The Commission is created under the Constitution and is invested under the law*

power of "*superintendence, direction and control*" vested in it. In this paper, I shall argue that although the proceedings in the case of reference from the President or Governor under Article 103(2) or 192(2) of the Constitution [hereinafter a reference to "Article" shall mean reference to the Article of Constitution of India] and in cases under Paragraph 15 of the Election Symbols (Reservation and Allotment) Order, 1968 are both quasi-judicial, they materially differ to the extent that in the former proceedings, there is greater investiture of "*trappings of the court*"[4] in the Commission and this is necessary since unlike the latter, the decision of the Commission takes the form of Presidential (or gubernatorial) order and is final. Further, by virtue of this, the Election Commission would not be a tribunal for the purposes of Article 136(1), while it could be considered one in case of symbols disputes.

This distinction is extremely relevant today given the rise of coalition politics and increased involvement of courts in cases of disqualification of the elected representatives to the legislature. It is at the heart of this distinction that the scope and route of judicial review in disqualification disputes lie. This is important because these disputes, are often considered "urgent", listed before the Courts and heard immediately. It is necessary to examine whether this expenditure of judicial time and addition to the backlog of cases is following the right routes given the number of disqualification disputes in the recent past. For instance, recently, the dispute regarding the disqualification of the members of the Tamil Nadu legislative assembly saw considerable judicial intervention. The matter in the High Court saw a split verdict and had to be heard afresh by a third judge. Then the parties concerned moved the Supreme Court seeking a transfer which was ultimately rejected and a third judge was appointed.[5] Similarly, the dispute regarding the disqualification of the members of the

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with not only the administrative powers but also certain judicial powers of the State, however fractional they may be.").

[4] Engineering Mazdoor Sabha v. Hind Cycles Ltd., AIR 1963 SC 874 para 6 (India) ("*It would thus be noticed that apart from the importance of the trappings of a Court, the basic and essential condition which makes an authority or a body a Tribunal under Article 136, is that it should be constituted by the State and should be invested with the State's inherent judicial power*.").

[5] Ani, *SC Refuses to Transfer AIADMK Disqualification Case*, THE NEW INDIAN EXPRESS (June 27, 2018, 02:48 PM),http://www.newindianexpress.com/nation/2018/jun/27/sc-refuses-to-transfer-aiadmk-mla-disqualification-case-1834448.html.

Delhi legislative assembly came before the Delhi High Court which then sent it back to Election Commission.[6]

In order to explore this difference and its implications, I shall first briefly discuss the distinction between a court and a tribunal. I shall then discuss how the Election Commission has the authority to adjudicate in both – cases of disqualification and disputes of symbols. I shall further explain the nature of adjudication by the Election Commission under Article 103(2) or 192(2) and Paragraph 15 of the Election Symbols (Reservation and Allotment) Order, 1968 respectively. I shall then look at what the "finality" of the presidential or gubernatorial order means for judicial review and procedural route to be followed. To conclude, the difference between the two forms of adjudication have been summed up and the need for this difference shall be highlighted.

I. DIFFERENCE BETWEEN A TRIBUNAL AND A COURT

The distinction between the nature, powers and procedural rigour of courts and tribunals has often been dealt with by the Courts and the position is settled law. In this section, I shall not be delving into it in depth. My aim is merely to provide sufficient backdrop for the distinction I draw between the capacities of the Election Commission when it is adjudicating different kinds of disputes.

Simply put, courts refer to places where justice is administered and vested with the judicial power of the state to maintain and uphold rights, impose penalties and to adjudicate disputes.[7] Tribunals, on the other hand, are statutorily created special alternative mechanisms. Their power is limited and they can only decide disputes arising with reference to that particular stature or to adjudicate upon administrative issues.[8]Tribunals may be very similar to Courts but they are not courts. They are outside the pale of the

[6]*AAP MLA Disqualification Case: Delhi High Court Restores Membership*, THE TIMES OF INDIA (Mar 23, 2018, 10:00PM), https://timesofindia.indiatimes.com/india/office-of-profit-case-delhi-hc-restores-membership-of-20-disqualified-aap-mlas-refers-case-to-ec/articleshow/63428405.cms.

[7]Union of India v. R. Gandhi, President of Madras Bar Association, (2010) 11 SCC 1para12 (India) .

[8]*Id.*

hierarchy of civil judicature.[9] Merely acting "judicially" does not make the authority a Court – it only establishes a standard of conduct. Tribunals, unlike Courts, are not required to follow a strictly prescribed procedure.[10] Tribunals do not have the inherent power of the State for the administration of justice at large. They can also be presided over by technical members or experts in a field to which the Tribunal relates and do not need to be exclusively operated by Judges. They do not have the detailed statutory rules and are not bound by the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872. They are generally allowed to regulate their own procedure as long as they follow the principles of natural justice.[11]

To summarise, as the Court observed in *Kihoto Hollohan* v. *Zachilhu*, "*Where there is a lis - an affirmation by one party and denial by another - and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal if it does not have all the trappings of a court*."[12]Hence, for a body to be considered to be discharging the functions of a Tribunal, it must at the very least: (a) be vested with and exercise judicial power and (b) adjudicate upon a *lis*. With this understanding in place, I shall proceed to locate the source of the Election Commission's adjudicatory power when it is discharging different quasi-judicial functions.

II. SOURCE OF ADJUDICATORY POWER – TRIBUNAL OR NOT?

The Election Commission performs multiple functions and it derives power from different sources for each of them. Here, we shall just be looking at the source of the adjudicatory power of the Election Commission. It can be seen that different sources vest the Election Commission with the power to adjudicate reference cases and symbols disputes. I shall show that the two sources of adjudicatory power differ

[9] Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala, (1962) 2 SCR 339para 13 (India).
[10]Associated Cement Companies v. P.N.Sharma and Anr., AIR 1965 SC 1595 (India).
[11]*Supra* note 6, para 14.
[12] Kihoto Hollohan v. Zachilhu , (1992) Supp (2) SCC 651 (India).

substantially in their nature and that the Election Commission is *not* a tribunal for the purposes of Article 136(1) when it deals with reference cases.

In the case of the President or the Governor referring an election petition regarding disqualification of an existing member of the Parliament or the Legislative Assembly,[13] technically the Election Commission does not "*discharge judicial functions*"[14] and has not been "*clothed with the State's inherent judicial power to deal with disputes between parties*."[15] Instead, it *tenders opinion* to the President or the Governor.[16] It does not "*act judicially and reach a (their) decision.*"[17] Here, it is pertinent to note the language of Article 103(1) which states that the "*decision of the President*" shall be final.

The Commission is not required to conduct an inquiry in such cases unless it "*considers it necessary or proper*" and it "*cannot come to a decisive opinion on the matter*".[18] In other words, in all matters where such a reference as above is made to the Commission, there is no "*lis between two groups*" and the Commission is not the "*specified and exclusive adjudicating authority of the lis*."[19] Since it is not a *lis* the Commission tenders an opinion upon reference, even if the complainant wishes to withdraw his petition.[20]Even in case of an inquiry, it is deemed to be a judicial proceeding only insofar as Sections 193 and 228 of the Indian Penal Code, 1860 are concerned.[21] This implies that it is not a judicial proceeding but is considered to be one for the limited purpose of imposing penalty for furnishing false evidence or insulting and intentionally interrupting the inquiry.[22]

The Election Commission derives its adjudicatory power (in reference cases) from the judicial power vested in the President or the Governor.[23]

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[13]INDIA CONST., art. 103 (2); art 192 (2).
[14]*Supra* note 9.
[15]*Supra* note 9.
[16]INDIA CONST., arts. 103(2) and 192(2); Government of Union Territories Act, No. 20, Acts of Parliament, 1963 (India), § 14.
[17]*Supra* note 4.
[18]Representation of People Act, No. 43, Acts of Parliament, 1950 (India)[hereinafter *Representation of the People Act*], § 146(1).
[19]*Supra* note 3, at paras. 36-37.
[20]*In Re*: Maharaja Anand Chand, 5 ELR 197 (India).
[21]Representation of the People Act, § 146 (4).
[22]Indian Penal Code, No. 45, Acts of Parliament, 1860, §§ 193, 228.
[23]MP JAIN, INDIAN CONSTITUTIONAL LAW , VOL 2 1581 (7th ed., 2012).

This is buttressed by the powers conferred on it by provisions of the Representation of People Act to facilitate the inquiry.[24] Thus, the Election Commission has *not* been vested with the judicial powers of the State. Rather, it has the authority to adjudicate to *facilitate* the exercise of the powers vested in the President.

However, in case of disputes regarding symbols, the Election Commission has been conferred plenary powers by Rule 5, 10(4) and 10(5) of the Conduct of Election Rules, 1961 read in consonance with Article 324.[25] The Election Symbols (Reservation and Allotment) Order, 1968 has been framed by the Commission in the exercise of this power. It also finds direct statutory backing in Section 29A of the Representation of People Act, 1951 which states that the Election Commission is responsible for the registration of associations and bodies as political parties. One of the matters which arise in relation to the specification, reservation, choice and allotment of symbols is disputes when two rival sections of a recognised political party claim to be that party for the purpose of the Symbols Order. Paragraph 15 of the Order "*provides the machinery as well as the manner of resolving such a dispute*."[26] The *decision* of the Commission in such disputes has been made binding on all the rival sections or groups in question.[27] As the apex Court has clarified, "*the power to decide this particular dispute*," of which rival faction is the party for the purposes of the Symbols Order, "*is a part of the State's judicial power*."[28] "*The principal and non-failing test which must be present in order to determine whether a body or authority is a tribunal within the ambit of Article 136(1) is fulfilled in this case when the Election Commission is required to adjudicate a dispute between two parties*."[29] Hence, here, the Election Commission has been vested with the judicial power of the State.

III. ADJUDICATION IN DISQUALIFICATION DISPUTES

On the successful conduct of elections, questions may arise regarding the disqualification of duly elected members to either house of the

[24]Representation of the People Act, §§ 146, 146A, 146B.
[25]Sadiq Ali and Anr. v. Election Commission of India and Ors, (1972) 4 SCC 664 (India); *See also,* Roop Lal Sathi v. Nachhattar Singh Gill, (1982) 3 SCC 487 para18 (India).
[26]Sadiq Ali and Anr. v. Election Commission of India and Ors, (1972) 4 SCC 664 para 20 (India).
[27]*Id.,* para 22.
[28]*Supra* note 3, para 38.
[29]*Id.*

Parliament[30] or the legislature of a state.[31] The grounds for disqualification are provided in the Constitution itself.[32] Since the Election Commission has not been conferred with original jurisdiction regarding the question of disqualification, it must confine its inquiry to the allegations referred to by the President in terms of Article 103.[33] The scope of inquiry is restricted to disqualifications to which a member *becomes subject to after he is elected* as such and neither the President or Governor, nor the Commission has jurisdiction to inquire into disqualifications which arose *before* the election. In other words, there must be a *change in the position* of the member *after* he was elected.[34]

There is no prescribed procedure which the Commission must follow for the purposes of this inquiry and it can regulate its own procedure.[35] Nonetheless, it has been granted certain powers of a civil court under Section 146 of the Representation of People Act, 1951 while trying a suit. Some of these powers include summoning and enforcing attendance of persons, requiring production of documents as evidence, receiving evidence on affidavits, requisitioning public records and issuing commissions for examination of witnesses and documents.[36] This implies that it has been "*clothed with some powers of the court*".[37] While administrative adjudication does not require the concerned authority to have all the powers that the Election Commission has been granted for this purpose, it is argued that this provision, that is, the aforementioned Section 146, has made the proceedings of the Commission more formal, or closer to court proceedings, than in other cases of administrative adjudication, specifically the disputes regarding symbols.

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[30]INDIA CONST., art. 103, cl. 1.

[31] INDIA CONST., art. 192, cl. 1.

[32]INDIA CONST., art. 102; art 191.

[33]HS DOABIA, DOABIA AND DOABIA LAW OF ELECTIONS AND ELECTION PETITIONS VOL 2, 3085 (5th ed. 2016).

[34] Election Commission of India v. Saka Venkata Rao, AIR 1953 SC 210 paras. 14-16 (India); s*ee also,* Brundaban Naik v. Election Commission, AIR 1965 SC 1892 (India); Election Commission v. N.G.Ranga, AIR 1978 SC 1609 (India).

[35]Representation of the People Act, § 146B.

[36]Representation of People Act, § 146.

[37]*Supra* note 4 at para. 6 ("They can compel witnesses to appear, they can administer oath, they are required to follow certain rules of procedure...they must decide on evidence adduced before them.")

Although the Commission cannot take cognizance of a complaint directly, once a question has been referred to by the President to the Commission for its opinion, all further correspondence by the Commission by way of its notices or otherwise is done directly with the concerned parties. All pleadings, be it written statements, rejoinders, affidavits are filed by the parties directly before the Commission. It does not have to be routed through the President's Secretariat. This is the procedure followed by the Commission in the exercise of its powers under Section 146B of the Representation of People Act, 1951 in reference cases.[38]

The Election Commission has itself clarified that the inquiry in cases of references from the President and Governors under Articles 103(2) and 192(2) respectively is a quasi-judicial proceeding. It has further stated that it "*is guided by and follows the principles, procedures and policy adopted by the Supreme Court and the High Courts*."[39] This, read in consonance with Section 146B of the Representation of People Act, 1951, indicates that it has opted to follow the rigour of court proceedings, despite such procedures and principles not automatically being applicable to administrative proceedings.[40] The Commission has chosen to be bound by the previous decisions it has rendered. It also strictly complies with judicial precedents and all applicable statutory provisions in its analysis. In many cases, it has held documentary and other evidence to a strict standard. For instance, in the case where the question of disqualification of Digambar Vasant Kamat, a Member of the Legislative Assembly of Goa was referred to the Commission, the issue was whether he stood disqualified under Section 9A of the Representation of People Act for a subsisting government contract. The Commission examined the evidence before it to conclude that there was no evidence to support the conclusion that Mr. Kamat was personally associated with the company, managed the company or entered into a government contract in the course of business or trade. In order to

[38] Prashant Patel v. Praveen Kumar and Ors, Reference Case No. 5 of 2015, Decided on 26.7.2016 (Election Commission of India) para 6.

[39]Reference Cases No. 7, 8, 10, 11 and 36 of 2006, Decided on 7.4.2006 (Election Commission of India). These cases deal with the alleged disqualification of Sonia Gandhi, Jaya Bachan, Balbir Punj amongst others.

[40]Union of India v. T.R.Varma, AIR1957 SC882 (India); New Prakash Company Ltd. v. The New Suwarna Transport Company Ltd., AIR 1957 SC 232 (India). They agree on the proposition that only principles of natural justice apply to administrative and quasi-judicial tribunals and not the strict technicalities of the Indian Evidence Act, 1872.

reach this opinion, it relied upon the principle of documentary evidence. His resignation letter tendered to the Registrar of Companies and the transfer of shares to his wife *before* he filed his nomination being primary evidence was given adequate weight during appreciation of evidence to conclude there was no subsisting contract.[41]In yet another case, the Election Commission employed the principles of burden of proof and documentary evidence to support the conclusion that the concerned members of the legislative assembly were not holding any office of profit. It observed that the log books of vehicle usage could not be considered evidence proving any relevant fact. It further stated that there was no other forthcoming documentary evidence furnished by the Complainant to support the claim that the respondents were holding offices of profit and hence, there were no grounds to support the disqualification.[42]The rigour with which principles of documentary evidence are followed can be seen in the opinion of the Commission in yet another case. Here, the Commission admonished the parties for not following procedure while furnishing evidence. It also did not take cognizance of a certain document because only a photocopy, that is secondary evidence, was available. It also pointed out that the manner of procurement of the photocopy was in question and did not place any reliance on the same.[43]

As seen above, there are considerable 'trappings of the court' in the way the Election Commission deals with reference cases which follow a high degree of procedural rigour. At this junction, it must be pointed out that in court proceedings and administrative proceedings, there needs to be application of the judicial mind and judicial determination of the issues at hand. However, the degree of procedural rigour in administrative adjudication differs depending on the powers and object of the authority concerned for that particular purpose and is lesser than what courts are mandated to follow. It is not always as high as it is in the treatment of reference cases by the Election Commission.

[41]Reference Case No. 7(G) of 2017, Decided on 1.8.2017 (Election Commission of India).

[42]Reference Case No. 9(G) of 2018, Decided on 18.10.2018 (Election Commission of India). This involved Uma Shankar Gupta and Deepak Joshi, both Members of the Legislative Assembly of Madhya Pradesh.

[43]Reference Case No. 7(G) of 2015, Decided on 23.6.2917 (Election Commission of India). This pertained to the disqualification of Praveen Kumar and 20 other Members of the Delhi Legislative Assembly.

IV. ADJUDICATION IN SYMBOLS DISPUTES

Courts have opined that symbols play a crucial role in the electoral process of our country, given that an overwhelming majority is illiterate and cannot cast an informed vote unless there is some pictorial representation by which the voter can identify the candidates of his choice.[44] Over time, symbols have acquired tremendous value because they are so intertwined with the identity of parties and are a central feature of all election campaigns. It is often the symbol and not the individual candidate which garners the vote for a party. Hence, in case there is a split in a political party, both rival factions are keen to capitalize on the goodwill and vote-bank associated with the symbol, which generally gives rise to disputes.

Under Paragraph 15 of the Symbols Order, the Commission has discretion to the extent that it can decide either that one rival section is the recognised political party or that none of the sections are. In order to arrive at this decision, it has to take into account all available facts and circumstances of the case and hear the representatives of the sections or groups and other persons who desire to be heard. This is the *only* procedural requirement that has been stipulated for the purpose of adjudicating disputes that arise from this provision. It must be noted that the Commission has not been granted powers to regulate its own procedure for this purpose. This implies it will be bound by general judicial principles and the principle of natural justice.[45] This, in turn, means that the aforementioned procedural requirement of hearing "*all available facts and circumstances*" and "*other persons as desire to be heard*" is diluted by the rules of absurdity and the pragmatic realities of administrative adjudication.[46] This means the Commission can selectively refuse to hear facts or statements if it considers them to be irrelevant or

[44] *Supra* note 17 at para 21.

[45] This is a corollary that follows from the established premise that the Election Commission is considered to be "tribunal" for the purposes of symbols disputes. All tribunals and administrative proceedings are supposed to be follow the principles of natural justice. This has been held to be the position of law in a catena of cases including the case of Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

[46] Mohinder Singh Gill v. The Chief Election Commission, AIR1978 SC 851 para. 43 (India) ("Audi alteram partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self- defeating or plainly contrary to the common sense of the situation.")

that it would inordinately prolong the proceedings[47] since this matter has to be dealt "*with a certain measure of promptitude and it has to see that the inquiry does not get bogged down in a quagmire*."[48] Further, the decision of the Commission, while binding, is not final and can be subject to judicial review by virtue of a special leave petition.[49]Further, there is reduced procedural compliance in the symbols disputes decided by the Commission. As noted above, apart from the sole criterion of examining all facts and circumstances, which is also diluted, there are no stipulated procedural requirements. This has been noted by the Supreme Court where it stated the Commission is a "*constitutional functionary*" and the bench was "*absolutely certain that it shall be guided by the procedure known to law*."[50]Albeit the vote of judicial confidence in the body, this betrays the fact that there is currently no procedure established by law to govern the proceedings of the Election Commission in this regard.

The test that the Commission has to apply to determine which rival faction is the recognized political party has been approved by the Supreme Court. It is a test of the majority, that is, the numerical strength of the rival groups, both in the legislative and organisational wings of the party,[51] and remains the law today.[52]Recently, the argument that in the event of a split in the political party, the test ought to be based on the

[47]*Supra* note 36, at para 14. ("Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands.")

[48]*Supra* note 17, at para 28.

[49]*Supra* note 3. In this case, the Court held that the Election Commission was a tribunal for the purposes of Article 136(1) thereby giving the Court appellate jurisdiction by virtue of special leave petition.

[50] T.T.V. Dhinakaran v. B. Ramkumar Adityan and Ors., SLP (C) No, 26811-26812 of 2016, Order passed on 6.10.2017.

[51]*Supra* note 17, at para 24. This decision was rendered before the introduction of Section 29A in the Representation of People Act, 1951 but is still good law. The Commission itself has clarified this issue by stating that Section 29A is restatement of what is encapsulated in Paragraph 3 of the Symbols Order. There has been no material change in the procedure of registration of political parties and the applicant parties were required to furnish the party constitutions even under Paragraph 3.

[52]Section 6, Representation of People (Amendment) Act, No. 21 of 1989 § 6.

provisions of the party constitution was dismissed.[53] The materials provided before and relied on by the Commission for adjudication are mainly the party constitution and affidavits of members and submissions are made by counsels with rare, if any, examination of witnesses.[54] These affidavits are not in the nature of affidavits of evidence in a civil suit.[55]

In the dispute between the two rival factions of All India Anna Dravida Munnetra Kazhagam following the death of J. Jayalalithaa, one of the contentions raised by the respondents was that the deponents of almost all affidavits filed by the petitioner had first given affidavits of support to the respondent and had later retracted them. Given the circumstances under which the retraction happened, there was a high chance of the signatures on the affidavits being false and fabricated. On this ground, they asked to be allowed to produce and cross-examine the deponents. The Commission reiterated that it was not bound by the law of evidence and the "*right to cross-examine was not an indispensable concomitant of natural justice.*"[56] It denied the respondents the right to cross-examine on the ground that it would lead to an interminable inquiry and would contradict the judicial dictum to act with promptitude. Further, while discussing the discrepancies in the affidavits and the allegations regarding them, the Commission stated that it is "*a quasi-judicial authority and not a court, and therefore, the provisions of the Civil Procedure Code and the Evidence Act do not strictly apply to the present proceedings before the Commission under para 15 of the Symbols Order.*"[57] More importantly, in this case, the Commission discussed the powers vested in it and analysed whether it has any "trappings of the Court" as against the criteria listed by the apex Court in *Jaswant Sugar Mills*

[53]Group led by Akhilesh Yadav and Ram Yadav v. Group led by Mulayam Singh Yadav, Dispute Case No. 1 of 2017, Decided on 16.1.2017 (Election Commission of India).
[54]Group led by Akhilesh Yadav and Ram Yadav v. Group led by Mulayam Singh Yadav, Dispute Case No. 1 of 2017, Decided on 16.1.2017 (Election Commission of India); P.J. Joseph v. P.C. Thomas, Dispute Case of 2010, Decided on 11.6.2012 (Election Commission of India); Kennedy Afonso group v. Antonio Gauncar group, Dispute Case of 2012, Decided on 9.2.2012 (Election Commission of India).
[55] E. Madhusudhanan and Ors v. V.K. Sasikala and Anr., Dispute Case No. 2 of 2017, Decided on 23.11.2017 (Election Commission of India) para 22.
[56]*Id.,* at para 44,
[57]*Supra* note 45, at para 59.

v. *Laxmichand and Ors.*[58] It would be useful to cite the extract from the decision to better conclude this argument,

> "*In that case, the court discussed the meaning of investiture of "trappings of a court", such as sitting in public, power to compel attendance of witnesses and examine them on oath, provision for imposing sanctions by way of imprisonment, fine, damages etc. On that standard, the Commission is not a court for the purposes of proceedings under paragraph 15 of the Symbols Order, not being invested with any of the aforementioned 'trappings of a court'.*"[59]

V. SCOPE OF JUDICIAL REVIEW IN DISQUALIFICATION CASES

Having now established that the Election Commission performs its adjudicatory functions in two different capacities, it is now important to look at the implications of the same. What does the finality of the presidential or gubernatorial order in reference cases mean? The Supreme Court, in *Brundaban Nayak* v. *Election Commission of India*,[60] stated that under Article 192(1), the power to render a decision in disqualification cases vests solely on the Governor and Governor alone (or the President, as the case may be under Article 103(2)). "*No other authority can decide it, nor can the decision of the said decision as such fall within the jurisdiction of the Courts*."[61]

Does it oust the jurisdiction of the Courts entirely? It would be helpful to look at the case of *Union of India* v. *Jyoti Prakash*.[62] In this case, the word "final" in Article 217(3) of the Constitution was considered and the Supreme Court observed that "*Notwithstanding the declared finality of the order of the President, the Court has jurisdiction in appropriate cases to set aside the order if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence, placed before the President on which the conclusion is founded if they were*

[58] 1963 Supp 1 SCR 242.
[59] *Supra* note 45, at para 60.
[60] 1965 SCR (3) 53.
[61] *Id,* atpara 13.
[62] 1971 SCR (3) 483.

called upon to decide the case they would have reached some other conclusion."[63] Given the peculiarities of Articles 103(2) and 192(2), this observation will undoubtedly have to be qualified: *one*, here, the President or the Governor is constitutionally mandated to adhere to the opinion tendered by the Election Commission. *Two*, the appreciation of evidence is within the realm of the Election Commission's duties. Nonetheless, it is submitted that the import of the decision remains applicable to the cases of disqualification as well. It is evident that due to the "finality" of the order, the scope of judicial review is much narrower than how it is currently being exercised. The Courts must restrain themselves to examining whether there has been any violation of the principles of natural justice, any consideration of collateral issues or if the opinion tendered by the Election Commission is entirely unfounded on evidence.

It is trite law now that judicial review is a facet of the basic structure of the Constitution and cannot be ousted barring a few exceptional cases.[64] However, it is submitted that since the Election Commission is not a tribunal for the purpose of adjudication of reference cases,[65] the Supreme Court must not entertain disqualification cases directly since they are outside the ambit of Article 136. The High Courts can still exercise their power of judicial review due to the relatively expansive nature of Article 226 but it too must restrain its examination to the aforementioned grounds. The Supreme Court can only allow an appeal from this decision of the High Court and even then the scope of examination remains limited.

CONCLUSION

Through this article, I first established that there is a clear difference in the adjudication that the Election Commission does under Articles 103(2) and 192(2), and under Paragraph 15 of the Symbols Order. To summarise

[63] *Id*, at para 31.

[64] This has been held and reiterated in several cases. *See* Keshavnanda Bharti v. Union of India, AIR 1973 SC 1471 (India) ; Minerva Mills Ltd.v. Union of India, AIR 1980 SC 1789 (India); I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861 (India); L Chandrakumar v. Union of India, (1993) 4 SCC119 (India); Waman Rao v. Union of India, (1981) 2 SCR1 (India).

[65] S.P. Sampath Kumar v. Union of India(1987) 1 SCC 124 (India): It held that the order of a Tribunal is always subject to the power of Judicial review of the High Court and the Supreme Court.

this difference, in disqualification disputes, the judicial power remains vested in the President (or Governor, as the case may be) and there is no transfer of the state's inherent judicial power to the Commission which merely in a facilitative capacity. The Commission tenders its *opinion* and does not *decide* the dispute. On the other hand, in case of symbols disputes, the judicial power of the state has been vested in the Commission and can be sourced from the Constitution and statutes. It has sole adjudicatory jurisdiction with respect to disputes that arise under the concerned provision. It renders a decision regarding the dispute between two parties, that is, the rival factions of the political party.

I also highlighted the difference in the procedural rigour. In disqualification cases, the Election Commission has the discretion to conduct an inquiry in order to arrive at an opinion. It has been statutorily vested with certain powers of a civil court to aid this inquiry. It has the freedom to regulate its own procedure and it has opted to follow the policy, principles and process of the higher judiciary. Whereas when it adjudicates upon symbols disputes, it does not have to follow any particular procedure other than taking into account all the facts and circumstances and hearing the parties. It is governed by the principles of natural justice and has not been statutorily vested with any 'trappings of the Court'. It has not adopted any standard procedure.

Thus, I drew the distinction that the Election Commission is not a tribunal for the purposes of disqualification cases but it will be considered as one when it comes to symbols disputes. Based on this, I argued that there is a difference in the scope of judicial review. Under Articles 103(2) and 192(2), the opinion of the Election Commission takes the form of decision of the President or the Governor and is declared to be "final." It is this finality that reduces the scope of judicial review and the judiciary can only intervene to the extent of determining whether the petition before the President was within the scope of Article 103(1) and if the order was consistent with principles of natural justice and backed by evidence. Further, since it is not a tribunal, the aggrieved parties cannot directly approach the Supreme Court under Article 136. On the other hand, the Commission is a tribunal under Article 136(1) for the purposes of symbols disputes and its decisions are subject to judicial review by virtue of both writ and special leave petitions filed before the Supreme Court and the High Courts. Finally, I submit that this decreased scope of

judicial review in disqualification cases is not inherently unfair since it adheres to a greater standard of procedural rigour which is necessary since "*an election dispute is not like an ordinary lis between private parties. The entire electorate is vicariously, not inertly, before the Court.*"[66]

[66]Mohinder Singh Gill v. The Chief Election Commission, AIR 1978 SC 851 para 15 (India).

THE DANGERS OF ALLOWING FOREIGN POLITICAL CONTRIBUTIONS: A THEORETICAL PERSPECTIVE

VASUDEV DEVADASAN* AND ASMITA SINGHVI**

Campaign contributions are often condemned as a necessary evil associated with elections. However, the Indian parliament's decision to allow political contributions from entirely foreign owned companies with retrospective effect calls for scrutiny. This article examines how political contributions (in particular, foreign contributions) impact the legitimacy-generating role of elections in a constitutional democracy. We explore the role of political contributions in promoting the deliberative ideals of democracy, the resulting political inequality, and the potentially corrupting impact on governance, post-elections. Acknowledging that a balance must be struck, we argue that the Supreme Court of India's conception of free speech and political equality requires that in the Indian context, the balance must tilt towards political equality. Assessing the impact of foreign political contributions, we argue that permitting foreign corporations to participate in the electoral process interferes with a nation's ongoing process of self-definition. In an increasingly globalised world, foreign contributions challenge the notion of a perfectly defined political community and careful regulation. However, by providing for a blanket acceptance of foreign contributions, the Indian parliament risks de-legitimising the electoral process – which plays a crucial role in the continued legitimate existence of government, and the nature of, and the outcomes within, the nation.

INTRODUCTION

The 2016 presidential elections in the United States raised the spectre of a nation's elections being susceptible to foreign influences. While the United States' Congress appointed a special counsel to determine whether Russia had interfered in American elections, the Indian parliament took a step in a different direction. Tucked away in the Union budget for 2016, was an amendment to the Foreign Contributions (Regulation) Act, 2010 ("the FCRA") that allows foreign owned corporations to donate to political parties in India.[1]

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The FCRA, prohibits a few select groups from receiving contributions from "foreign sources".[2] Broadly speaking, nobody engaged in print or broadcast media, a judge, or any member of a state-owned corporation can receive foreign contributions.[3] Crucially, (i) political candidates, (ii) political parties, or (iii) organisations of a political nature are prohibited from receiving contributions from a "foreign source".[4] Before the 2016 amendment, the FCRA, defined "foreign sources" to include a "foreign company".[5] Under the FCRA, a "foreign company" included a multi-national corporation, a company that was incorporated outside India, or a company incorporated in India but having more than 50% of its share capital owned by either foreign governments, foreign citizens or other foreign corporations.[6]

The 2016 amendment added a proviso to the definition of "foreign company" which stated that a "foreign company" was not a "foreign source" if it complies with the Foreign Exchange Management Act, 1999 ("FEMA"). Subject to restrictions in certain sectors (e.g. defence and real estate), the FEMA allows investment by companies that are one hundred percent foreign owned.[7] Thus, post the 2016 amendment, even if a company is entirely owned and controlled by foreign citizens, corporations or governments, as long as it complies with the FEMA's minimal foreign investment restrictions, it can contribute to Indian political parties. In 2018, parliament went one step further, giving this amendment retrospective effect from 1976,[8] the year the FCRA's precursor, the Foreign Contribution (Regulation) Act, 1976 was enacted.[9]

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[1] The Finance Act, No. 28 of 2016, § 236, (2016).

[2] The Foreign Contribution (Regulation) Act, No. 42 of 2010, § 2(j), (2010).

[3] *Id.* §3(1).

[4] *Id.*

[5] *Id.* § 2(j)(iii).

[6] *Id.* §2(j).

[7] D/o IPP F. No. 5(1) 2017-FC-1, Consolidated FDI Policy, 2017 (the Department of Industrial Policy and Promotion makes policy pronouncements on the levels of foreign direct investment which are subsequently notified by the Reserve Bank of India as amendments to the Foreign Exchange Management (Transfer or Issue of Security by Persons Resident outside India) Regulations.

[8] The Finance Act, No. 13 of 2018, § 220, (2018).

[9] The Foreign Contribution (Regulation) Act, No. 49 of 1976, (1976).

This legalises any donation that Indian political parties and candidates may have received from foreign owned companies in the four decades that India prohibited foreign political contributions.[10]

While the rules surrounding political donations in India are unfortunately honoured more in the breach than in the observance, 2014 saw a significant development in the realm of foreign political donations. The Delhi High Court declared that political donations made by Sterlite Industries were illegal as fifty-nine percent of Sterlite Industries was owned by a company in the United Kingdom (Vedanta Resources).[11] This breached the fifty percent threshold set out under the FCRA as it stood in 2014. In explaining its decision, the Delhi High Court noted, the FCRA was enacted to "*insulate the sensitive areas of national life like – journalism, judiciary and politics from extraneous influences stemming from beyond our borders.*"[12] In using the phrase, "*national life*" the Delhi High Court identifies elections as an area of national life which is the sole domain of members of the Indian political community, where the participation of foreign individuals and entities may be restricted.

While the 2016 and 2018 amendments to the FCRA are currently under challenge in the Supreme Court ("SC"), this article examines the impact of political donations, and in particular, foreign political donations ("foreign contributions") in a constitutional democracy from a theoretical perspective. In Part II, we consider the legitimacy generating role of elections in a democracy. Part III examines how contributions interfere with this role. We conclude that the question of contribution brings into conflict two democracy-enhancing values: freedom of speech and political equality. We argue that in the context of the Indian democracy, the line-drawing exercise of regulating contribution should favour political equality. In Part IV, we examine how foreign contributions, as an interference by non-members of a political community, specifically erode the legitimacy of elections. Part V considers the corrupting effects of contributions and unpacks the democracy-related harms that extend beyond episodic elections. We argue that allowing foreign contributions compounds these effects. We conclude by evaluating the 2016 and 2018 amendments in the context of the Indian democracy.

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[10] *Id.* § 4.

[11] Association of Democratic Reforms v. Union of India, (2014) 209 DLT 609 (India).

[12] *Id.* ¶20.

I. THE ROLE OF ELECTIONS IN A DEMOCRACY

What makes democracy distinct from other types of government is that members of a political community covenant to collectively select a representative. In a democracy, only a government whichthe people have chosen, and thus consented to, can be legitimate.[13] Free and fair elections are a *sine qua non* of any democracy for several reasons. While they act as a check on the government and allow members to *speak,* their most important function is to legitimise the government of the day.[14] Thus, as James Gardner notes, "*the laws and procedures* [that govern elections] *influence the legitimacy of the elected government in proportion to their ability to identify accurately the particular individuals chosen by the people as their agents and to whose rule the people have in fact consented.*"[15] The laws and rules that govern elections are relevant because these laws ensure the legitimacy and neutrality of the electoral process, which in turn ensures the legitimacy of the government. Electoral laws can also play a determinative role in the outcome of elections. In the words of James Madison, "*the result will be somewhat influenced by the mode.*"[16]

If an individual is compelled to abide by the obligations of a political community yet has not consented through their vote to be governed by the elected government, the rule by this government *vis-à-vis* this individual cannot be legitimate under this framework. Of course, there are exceptions to this understanding, most notably children. However, as we argue in Part IV, foreigners can legitimately be denied a vote and even participation in the electoral process. Before that however, we first consider how contributions interfere with the legitimacy of the electoral process, which in turn creates legitimacy concerns for the elected government.

II. THE EFFECT OF CONTRIBUTIONS ON ELECTIONS

Monetary resources in the form of contributions facilitate more effective campaigns and lead to a wider political discourse. These speech-enhancing effects provide a principled basis for allowing contributions.

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[13] James Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 205 (1990).
[14] *Id.* at 215.
[15] *Id. at* 267.
[16] JAMES MADISON, THE FEDERALIST, NO. 51 423 (C. Rossiter ed. 1961).

At the same time, the translation of economic inequality into political inequality is a reason for resisting the influence of money on politics. This section examines these opposing claims to conclude that regulations governing contributions are modelled on a compromise between these values. Finally, we attempt to analyse the nature of this compromise in the Indian context.

a. The argument from Free Speech

Recall that elections allow voters to signal consent and legitimize a government.[17] However, for elections to achieve this end, information about political candidates must be freely available. Even if the status of the right to vote is unclear, the SC has recognised that the voter's right to be informed about political candidates is concomitant to the voter's freedom of expression under Article 19(1)(a) of the Indian Constitution.[18] In *Union of India v Association for Democratic Reform,* the Court noted that, *'…voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is* [a] *must'*.[19] In other words, the exercise of voting loses value[20] if the freedom of voting is not protected by allied free speech rights of the audience such as the ability to know, to reject and to do so secretly.[21]

It is a practical necessity of modern democracies, that this constitutional role of informing the electorate is carried out through campaigns – often financed by private contributions to political parties. Money makes it possible to reach out to the masses, conduct rallies, use social media and advertise. In this sense, campaigns occupy an important role in democratic theory by providing a platform for political deliberation by the general population.[22] Thus, this deliberative ideal compels structuring political contribution models to promote discourse and persuasion.

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[17] See *infra* Part II.

[18] Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294.

[19] *Id.* ¶29.

[20] GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION, 270 (2016).

[21] Peoples' Union for Civil Liberties v. Union of India, AIR 2003 SC 2363.

[22] James Gardner, *Deliberation or Tabulation?: The Self-Undermining Constitutional Architecture of Election Campaigns*, BUFFALO L. STUDIES Research Paper No. 2016-013.

It is for precisely this role of money, that the U.S. Supreme Court in *Citizens United v FEC* struck down contribution limits by independent corporations towards 'electioneering communications' as inconsistent with the First Amendment.[23] The Court considered the role of contributions in facilitating deliberation equivalent to speech in two ways. First, the candidate or party converts the donors' contribution into speech and therefore, the contribution amounts to speech as proxy.[24] Second, the contribution constitutes symbolic speech because the donors' contribution register both the content and the intensity of her political views, as a larger contribution is assumed to express a stronger opinion.[25] Notably, in order to prevent *quid-pro-quo* corruption, there is a federal ban on direct contributions to campaigns and candidates from corporations.[26] However, the First Amendment rights of corporations remain protected through other mechanisms such as political action committees (PACs) and freedom to engage in 'issue advocacy'.

Such an issue has not arisen before the Indian SC and the claim here is not that political contributions be deemed constitutionally protected under Article 19(1)(a). The freedom of speech carries corresponding rights for the speaker as well as the audience.[27] The discussion here is intended to highlight that the constitutionally recognised *right of the audience to be informed* makes contributions a pragmatic necessity to protect the audiences' right to speech, if not the speakers'. While we may refrain from giving contributions the stature of a right, we would certainly allow them and contain its ill-effects through responsible regulation. The next section considers some of these ill-effects.

b. The argument from Political Equality

Political contributions are opposed on the ground that they undermine the political equality enjoyed by citizens. Robert Dahl, in his theory of procedural democracy identifies the essential requirements for a truly democratic functioning of a state. In *On Democracy,* he notes,

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[23] Citizens United v FEC, 558 U.S. 310 (2010).
[24] Buckley v. Valeo, 424 U.S. 1,21 (1976).
[25] *Id.*
[26] FEC v Beaumont, 539 U.S. 146 (2003). *See gen* Bipartisan Campaign Reform Act, 2002.
[27] State of UP v. Raj Narain, AIR 1975 SC 865, ¶74.

> *"And your constitution must be in conformity with one elementary principle: that all the members are to be treated (under the constitution) as if they were equally qualified to participate in the process of making decisions about the policies the association will pursue.* "[28]

Similarly, in *National Capital Territory of Delhi v Union of India* J. Dipak Misra notes,

> *"the cogent factors for constituting the representative form of government are that all citizens are regarded as equal and the vote of all citizens… is assigned equal weight. In this sense, the views of all citizens carry the same strength and no one can impose his/her views on others."*[29]

This requirement stems from the claim that all citizens inherently possess equal moral worth that entitles them to the same basic rights. At its core, political equality entails equal opportunity of participation in the political process so that the resultant distributive choices remain free of existing inequality.[30] A thicker conception of 'opportunity' would give more force to political equality and entail a state where each citizen has equal effective control over the government so that no citizen's preferences are weighted more heavily than another.[31]

It is important to understand that this is a moral claim that guides the design of democratic processes. Under this thicker conception of 'opportunity', formal equality enshrined in the principle of one person one vote is not enough to achieve this ideal.[32] Contributions can offend political equality by translating economic inequality into political inequality.[33] They play a central role in shaping the agenda and deciding

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[28] ROBERT DAHL, ON DEMOCRACY 37 (New Haven, Conn: Yale University Press) (1st ed., 1998).

[29] National Capital Territory of Delhi v Union of India, (2018) 8 SCC 501, ¶ 52.

[30] Maria Paula Saffon, Nadia Urbinati, *Procedural Democracy, The Bulwark of Equal Liberty* accessible at http://ptx.sagepub.com/content/early/2013/02/19/0090591713476872.

[31] Eric Freedman, *Campaign Finance and the First Amendment: A Rawlsian Analysis*, 85 IOWA L. REV. 1065, 1067 (2000). *See gen* ROBERT A. DAHL & CHARLES E. LINDBLOM, POLITICS, ECONOMICS AND WELFARE 41 (1953).

[32] R. C. Poudyal v. Union of India, AIR 1993 SC 1804, ¶ 21.

[33] Edward Fowley, *Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance,* 94 COL. L. REV. 1204.

which issues become key in the campaign. Unequal economic resources make it possible for some constituencies to disproportionately highlight certain issues and 'drown' out the needs of other constituencies that cannot afford to compete with the economic influence.[34] Thus, while every person may have an equal formal vote, the needs of some may end up better represented than others.[35] In this manner, private contributions can defeat political equality.

This is a complex claim and not without its weaknesses. The argument assumes that campaigning is sufficiently similar to voting to require the conditions of equality to be applied with the same vigour.[36] This proves too much as citizens are unequal in terms of other resources like time, talent and skill as well.[37] This argument, as Kathleen Sullivan claims, is a constitutional choice. It is equally possible to equate contributions to speech and prohibit any regulation based on economic standing of the contributor – the position in the United States.[38] For example, in *Buckley v Valeo,* the U.S. Supreme Court noted, *"the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"*.[39] This is true despite the fact that the requirement of equipopulous districts in the United States implicitly recognises that all votes must be equally weighted.[40] The decision in *Buckley* can be understood as a compromise when the thick conception of political equality clashed with individual rights under the First Amendment.

Others disagree with this choice and argue that the analogy between contributions and voting stems from the role that citizens are entitled to in the deliberative process of elections. Dworkin claims that in an election citizens are not simply decision-makers but also participants.[41] He notes, '*They are candidates, supporters and political activists … and participate in the*

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[34] CASS SUNSTEIN, THE PARTIAL CONSTITUTION 223-224 (1993).
[35] *Id.*
[36] Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 672 (1997).
[37] *Id.* 674.
[38] See *supra* note 36.
[39] See *supra* note 24.
[40] Reynolds v Sims, 377 U.S. 533, 563 (1964).
[41] RONALD DWORKIN, THE CURSE OF AMERICAN POLITICS, N. Y. REV. Book, (1996) 19, 23.

contests that they collectively judge'.[42] If their role as the constituent power entails participation, then the formal equality of voting power implies a corollary right to equality in the opportunity to speak out on political matters.[43] Citizens are entitled to persuade others of a certain viewpoint in ways other than quietly going to the booth on voting day. Reducing the role of a citizen to only a voter during an election casts their identity as participants into a blind spot.[44] This protects only a diluted conception of citizenship and in turn offends the legitimacy and deliberative function of elections.

This political inequality in providing input at the election stage can lead to further entrenchment of inequality. Governments of the day routinely make distributive choices. Political contributions are a vital input into these political processes, as they can determine which issues are at the forefront of the distributive agenda of government. For example, an industrialist can make a better claim for relaxing environmental regulations while underrepresented tribal constituencies are unable to make a rival claim for increased control over their own resources. Therefore, private money not only hinders equal participation but also threatens to affect the substantive outcomes on questions of justice.

As a result, most states regulate political contributions to contain the resulting political inequality. In India, Section 77 of the Representative of People's Act, 1951 ("the RPA") achieves this by imposing expenditure ceilings on political parties.[45] While theoretically a step in the right direction, as the National Commission for the Working of the Constitution put it, '*The limits of expenditure prescribed are meaningless and almost never adhered to'*.[46] The inefficacy of this check requires us to take a hard look at the threats of private contribution notwithstanding expenditure limits under Section 77.

This conflict between political equality and free speech can be resolved if campaigns are publicly funded i.e. through taxpayer money. This is a

[42] *Id.*
[43] See *supra* note 36, 674.
[44] See *supra* note41.
[45] P Nalla Thamby Thera v. UOI, 1985 SCR Supl. (1) 622.
[46] Report of the National Commission for the Working of the Constitution, Electoral Processes and Political Parties (2002) ¶ 4.14.1.

popular campaign reform proposal and, without getting into the details, has the advantage of equalising the financial means of all citizens while meeting the monetary demands of campaigning.[47]

Suggestions of such a reform are not unheard in the context of India but remain academic and aspirational.[48] While public financing of campaigns may theoretically resolve the conflict between political equality and free speech, until meaningful political will for such a proposal exists, cognisance must be taken of the challenges raised by private – and foreign – contributions. Thus, for the present purposes, we set aside the idea of public financing and attempt to strike a balance between free speech and political equality through the effective regulation of private contributions.

As free speech and political equality are both democracy-enhancing values, it should remain open and coherent for any constitutional order to prioritise one at the cost of the other. This provides a spectrum of choice – from the *liberal* unregulated use of private money to the *egalitarian* public funding of elections.[49] The real question, therefore, is a political question - 'which vision would better serve the aims of democracy'?[50] Campaign finance models should be so designed as to better protect the democratic ideal closer to our conception of democracy. In the following section, we mount a case that the principle of political equality is more central to the Indian democracy and consequently it is this ideal which must be protected at the cost of minimising potential speech effects of contributions.

c. Locating Political Contributions in India

Political equality has not only been construed central to Indian democracy but has played an important factor in shaping electoral laws as well. In *R.*

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[47] Edward Fowley, *Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance,* 94 COL. L. REV. 1204; *See also* BRUCE ACKERMAN, IAN AYRES, VOTING WITH DOLLARS – A NEW PARADIGM FOR CAMPAIGN FINANCE (2004).

[48] Report of the High-Powered Expert Committee on the Companies and MRTP Acts (1978) ¶13.12; *See also* P Nalla Thamby Thera v Union of India, 1985 SCR Supl. (1) 622, 639.

[49] Edward B. Foley, *Philosophy, the Constitution, and Campaign Finance*, 10 STAN. L. & POL'Y REV. 23 (1998).

[50] *Id.* at 27.

C. Poduyal, observing the varying conceptions of the term democracy, the Court noted, "*In our Constitution, it refers to denote what it literally means that is 'people's powers'… It conveys the state of affairs in which each citizen is assured of the right equal participation in the polity*".[51] Similarly, in *Kanwar Lal Gupta v Amar Nath Chawla,* where the SC interpreted expenditure limits under Section 77 of the RPA, it noted, "*that democratic process can function efficiently and effectively… only if it brings about a participatory democracy in which each and every man… should be able to participate on a footing of equality with others.*"[52] The Court justified this as one of the reasons behind parliament enacting an expenditure ceiling.

More importantly, unlike the First Amendment, free speech jurisprudence under Article 19(1)(a) does not favour the idea of privatising free speech. Gautam Bhatia has argued that "*regulating market conditions to guarantee access is entirely in line with the requirements of Article 19(1)(a).*"[53] J. Mathew in his dissent in *Bennet Coleman* noted, "*the restraining the hand of the government is quite useless in assuring free speech, if a restraint on access is effectively secured by private groups. A Constitutional prohibition against governmental restriction on the expression is effective only if the Constitution ensures an adequate opportunity for discussion.*"[54] In other words, the requirement of equality is internal to the free speech jurisprudence under the Indian Constitution. The same is not true for the First Amendment. Indeed, Kathleen Sullivan claims that, "… *short of major revision of general First Amendment understandings, campaign finance reform may not be predicated on equality of citizen participation*".[55] These alternate orientations help explain why the line may be drawn differently under different constitutional orders while remaining true to the democratic agenda of enhancing the electoral process. The disagreement lies in the differing means through which the consent of the electorate may be better actualized. Therefore, given the primacy of political equality to the conception of democracy in India and free speech rights, we conclude that the balance between the two should be resolved in favour of protecting political equality.

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[51] *Supra* note 32, ¶ 46.
[52] Kanwar Lal Gupta v Amar Nath Chawla, AIR 1975 SC 308, ¶ 9.
[53] *Supra* note 20, 295.
[54] Bennett Coleman v. Union of India, AIR 1973 SC 106, ¶¶ 126-7.
[55] *Supra* note 36, 675.

III. POLITICAL MEMBERSHIP AND FOREIGN CONTRIBUTIONS

While the section above provides a framework to conceptualise the democratic values underlying political contributions, this section argues that political contributions by foreigners, as a distinct sub-set of contributors specifically reduces the legitimacy-generating function of elections. To understand the impact of foreign campaign contributions (as opposed to domestic campaign contributions) we begin by demonstrating why States, as political communities, make a distinction between members (citizens) and non-members (foreigners). Based on this distinction, we argue that States may impose restraints on non-members, particularly in critical areas of '*national life*', and finally that limiting the participation of non-members in the electoral process by prohibiting foreign political contributions is one such legitimate restraint.

a. Political Communities and Membership

Under contractarian theories of statehood, a central claim is that an individual is autonomous and capable of self-rule. But such autonomy and self-rule are likely to be short-lived in the face of hunger, the forces of nature, and the hostility from other individuals. From the dawn of time, individuals chose to live together in communities, acknowledging that their survival and well-being depended on the common effort of other members of their community.[56] To protect the mutual obligations of security and well-being members owe each other, members separate themselves from "mankind as a whole" and set up their own distinct community.[57] Take the example of the smallest community, a family living within the four walls of a house. The reason the family chooses to live within these four walls and permits only family-members to reap the benefits of the goings on in the house is in part because the members of the family have mutually covenanted to live in a particular manner, to eat a kind of food and to spend money on particular items. Even if family members disagree, disagreements are expressed in a manner that is acceptable to all. As the community gets larger, members find it beneficial to create a system of governance to handle public functions associated with living together.

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[56] MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENCE OF PLURALISM AND EQUALITY 65 (Basic Books 1983); *Supra* 13, 202.
[57] *Id.*

The idea that some individuals should benefit from the membership of a community to the exclusion of others is often challenged on two grounds. First, the claim that certain benefits are owed to *all* individuals even if they belong to another community. Alternatively, it is argued that all individuals are in fact members of an overarching global community.[58] In response to the first claim, it is true that members of a community owe certain obligations to all individuals irrespective of whether they are members or not. For example, a State owes certain obligations to refugees that arrive at their borders. However, these are broadly limited to "non-coercion, good faith, and good samaritism".[59] As Michael Walzer notes, if our obligations to other individuals were limited to these "*external principles*", every individual would effectively be a stranger.[60] If all we owed our co-citizens was food and shelter, matters that require complex coordination such as nationalised healthcare or state infrastructure (even driving on the same side of the road) would be beyond our reach. It is precisely because we owe some individuals, our family-members, or co-citizens greater obligations than merely food and shelter, which the distinction between members and non-members arises.

The problem with the second claim, concerning the global community, is that individuals experience communities at different levels. The further removed from an individual, the thinner the notion of community becomes. One may have a vivid experience of one's family as community, a thinner experience of the State as the community, and an almost non-existent sense of community at the level of supra-national frameworks such as international human rights. There are also inherent dangers to strengthening such efforts at global membership. The larger the community, the higher the risk of an individual's agency being drowned out and the lower the community's reflexivity to the individual's interest. This can easily lead to increasingly authoritarian decisions. While a meaningful notion of democracy beyond the state is yet being imagined,[61] supra-national organisations that set increasingly more detailed and intrusive regulations are largely impervious (or non-reflexive) to

[58] *Id.* at 34.
[59] *Id.*
[60] *Id.*
[61] G de Burca, *Developing Democracy Beyond the State*, 46 COLUMBIA J. OF TRANSNATIONAL L. 101, 105 (2008).

individuals within a state.[62] For example, the extent to which a citizen or group of citizens can make themselves heard, or challenge the actions of an international norm-setting body (e.g. in international trade law) is drastically reduced when compared to the accountability expected of elected local or national government. Thus, authority should ideally be imposed at a level commensurate to the problem being tackled. If a neighbourhood seeks to build a road, it is the members of that neighbourhood who form the community, and the authority will be of the local council. For elections that result in national governments, the community is the citizens of that nation. In any case, to argue that the State has been subsumed by a global community is simply at odds with reality.

A consequence of maintaining a defined set of members is that there will exist certain restraints on becoming a member of a political community.[63] This is not to say that the content of such restraints will always be justified. (E.g. restricting membership on the grounds that non-members don't look or talk the same as members cannot be justified as such difference does not impact the non-members ability to live by the community's agreed obligations.) However, the point sought to be made is that restrictions *per se* will exist. Common examples of such restrictions are a minimum number of years before one can apply for citizenship or an examination to acquire citizenship. Further, non-citizens are often not allowed to hold high governmental offices, be members of the judiciary and, as we argue, make political contributions. Extending our example of a family, while a stranger may eventually be permitted to sleep in the house, they are unlikely to be given access to the family's bank account until they become a part of the family itself.

However, foreigners within a country *do* have certain obligations and are owed certain rights. But because citizenship influences the content of other crucial distributive choices,[64] citizenship determines who is entitled to certain rights. Citizens vote for a government on issues such as taxation, state welfare and immigration. Allowing foreigners to participate in elections would allow them to participate in the *process which determines*

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[62] Marco Dani, *The Rise of the Supra-National Executive and the Post-Political Drift of European Public Law*, 24(2) INDIAN J. OF GLOBAL LEGAL STUDIES 399-428 (2017).
[63] *Supra* note 56.
[64] *Id.*

how the resources of a community are shared. Further, because it is the elected government that decides on matters of immigration and citizenship, allowing foreigners to participate in the elections allows foreigners to have a say on the contours of membership itself. Therefore, while foreigners may be owed certain rights, they are not provided the right to participate in elections because elections are crucial to how a democratic community defines *itself*. Because of this central role that elections play, a high premium is placed on restricting the influence of non-members in elections. As the U.S. Supreme Court notes, "*although we extend to aliens the right of education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.*"[65]

In the case of corporations, the case is often made out that just an individual's legal rights are protected, so too should the interests of corporate persons. However, it is crucial to recognise that any rights a corporate person has stems from the right of association that its members possess. The extent of this right of association is democratically determined by citizens taking into consideration the good of those associating as well as the good of the citizens. Thus, as Philip Pettit argues, the rights of a corporate person in a political community should be determined by the members of that community by considering the "*interests of the individuals associating and the individuals affected, they ought not to be determined by reference to the good or the status of the corporate entity.*"[66] Thus, just as restrictions may be placed on foreign individuals, citizens may limit the rights of foreign owned corporate persons taking into account the interests of the citizens to define their own political community. Corporations are, in the words of Gallanter, "*economically well-resourced, they are also legally privileged, politically powerful and* [potentially] *democratically uncontrolled.*"[67] Given the case against contributions by foreign individuals in elections, these harms are only exacerbated in the case of foreign corporations.

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[65] Foley v. Connelie, 435 U.S. 292, 297 (1978).

[66] Philip Pettit, *Two Fallacies about Corporations*, in PERFORMANCE AND PROGRESS: ESSAYS ON CAPITALISM, BUSINESS, AND SOCIETY 379-395 (Oxford University Press. 2015).

[67] Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 BUFFALO L. REV. 1369-1417 (2006).

b. Campaign Finance

Recall that while a campaign contribution is not akin to voting, it is an integral part of the electoral process. A good articulation of the problems campaign finance can raise in the context of non-members was put forth by American legislators when defending a measure to prohibit members from outside the state from contributing to local political races. It was contended that:

> *"The people of Oregon's specific sovereignty interests in banning non-resident money contributions in elections parallel their sovereignty interests in banning non-resident voting and candidacy* [...] *Non-citizen campaign contributors' intervention in state legislative races changes the definition of the political community and distorts the character of the campaign process."*[68]

Allowing foreigners to make contributions towards political parties or candidates broadens the political community with respect to electoral *inputs*, without subjecting them to the restraints on membership that are crucial to defining a community, *in the very process which defines a political community*. In the words of the U.S. Supreme Court in *Cabell v Chavez-Solido*, the "*exclusion of aliens from basic governmental process is not a deficiency in the democratic system, but a necessary consequence of the community's process of political self-definition*."[69] This is not to say that States should seek to reject divergent views during elections. Rather, that those divergent views in an election should stem from the members of the political community themselves because elections constitute moments of democratic self-definition of a community. As noted above, the existence of political communities necessitates a defined set of members and consequent restrictions on non-members. Further, as argued below, allowing these new 'members' to influence the outcomes of elections also dilutes the influence that existing citizens have over their own elections, reducing the ability of the electoral process to accurately reflect the consent of the citizens, and consequently reducing the legitimacy of any government

[68] Bruce Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL. REV. 503, 548 (1997).
[69] Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982).

elected in such a process. This is exacerbated when a few foreign companies can drown out the demands of domestic citizens.

In *Bluman v FEC*, the Federal District Court of Columbia expressly upheld the U.S. prohibition on foreign campaign contributions.[70] (This decision was summarily affirmed by the U.S. Supreme Court.)[71] The Court began by noting that foreigners are prohibited from participating on par with citizens in several areas of American life. For example, foreigners in America are barred from serving as jurors, working as police officers, or public-school teachers.[72] The Court notes that permitting non-members to make political contributions can lead to far greater consequences than allowing a non-member to be a police officer, concluding that,

> *"A state's historical power to exclude aliens from participation in its democratic political institutions* [is] *part of the sovereign's obligations to preserve the basic conception of a political community*. […] *In other words, the government may reserve 'participation in its democratic political institutions' for citizens of its own country.*"[73]

In declaring Sterlite Industries' contributions, a violation of the FCRA (on the ground that fifty-five percent of Sterlite's shares were owned by a foreign company), the Delhi High Court noted that the FCRA was intended to exclude foreign participation in certain areas of '*Indian life'*, such as government, journalism and politics.[74] It is important to understand that the court did not strike down foreign contributions because they interfered with any particular conception of *"Indian life"*, but rather because foreign contributions interfered with the *ongoing process of political self-definition*, which, through the FCRA, is restricted to citizens. Exploring the legislative intent of the FCRA, the Court noted;

> *"The Foreign Contributions (Regulation) Act, 1976 was enacted by the parliament to serve as a shield in our legislative*

[70] Benjamin Bluman v. Federal Election Commission, 800 F.2d 281.
[71] On 9 January 2012 the U.S. Supreme Court summarily affirmed the decision of the federal district court (Docket No: 11-275) by a vote of 9-0.
[72] *Supra* note 70.
[73] *Id.*
[74] *Supra* note 11, ¶ 20.

> *armoury, in conjunction with other laws, and insulate the sensitive areas of national life – journalism, judiciary and politics from extraneous influence stemming from beyond our borders."*[75]

The use of the phrase, "*national life*" highlights the court's implicit claim that non-members, despite being owed certain minimum obligations, are not entitled to participate in the core aspects of the political self-definition of a community. Elections are fundamental to the definition of the political community because citizens vote for the distributive choices and substantive outcomes to questions of justice they wish to see in their community.

It may be argued that, if non-members of the community are not allowed to participate, then members from federal unit in a country should not be able to donate to political races in another federal unit. The court in *Bluman* addressed exactly this argument when it noted that, "*American corporations, and citizens of other states and municipalities are all members of the American political community. By contrast, aliens are by definition those outside of this community.*"[76] Thus, in the context of elections, the political community in question is undoubtedly the country, echoed by the Delhi High Court's use of the phrase, "*national life*." Recall also that it is the national government which patrols the border and demands taxes. Without the State as we know it, it is unlikely that individual communities *within* that State would have the necessary level of security to flourish as distinct groups.

Under the original FCRA, companies having more than fifty percent of their share capital owned by foreign governments, companies or citizens were prohibited from making any political donations in India. In *Association of Democratic Reforms v Union of India*, where fifty-five percent of the Sterlite's shares were owned by Vedanta (a foreign company), it was precisely this restriction that allowed the Delhi High Court to hold that the political contributions were illegal. By removing this restriction and allowing foreign companies to make donations so long as they comply with foreign investment restrictions opens the door for corporations that

[75] *Supra* note 11, ¶ 34.
[76] *Supra* note 70.

are wholly foreign owned to influence the outcome of elections in India. These foreign corporations may be owned and controlled by foreign governments who seek to leverage favourable outcomes in the sphere of foreign policy. Alternatively, they may be corporations seeking to secure *quid-pro-quo* arrangements with legislators and regulators. In either case, the controlling interests of these entities are not members of the Indian political community, and while they may be regulated by Indian law, an elected Indian government should treat these entities' interests with circumspect for their interests are their own.

VI. CORRUPTION: THE EFFECT OF POLITICAL CONTRIBUTIONS ON POST-ELECTION GOVERNANCE

The extent to which governmental legitimacy is reduced through the introduction of lax electoral laws also depends on the extent of electoral accuracy a community has agreed upon (e.g. a country that has no history of voter fraud is unlikely to have stringent voting ID requirements). In the case of India, a high degree of electoral accuracy has been sought primarily due to the spectre of political corruption. As the SC noted, "*The likely evasion of the law by using big money through political parties is a source of pollution of the Indian political process*."[77] In 1968, the government banned corporate donations to political parties outright, to ensure that large businesses could not affect electoral outcomes. However, it is speculated that because no alternative source of funding (e.g. public funding) was provided, corporate donations continued, but were merely unreported.[78] In its 1996 judgement of *Common Cause v Union of India*, the SC directed political parties to file tax returns, observing that until that day, political parties had not submitted audited accounts.[79] In an effort to stop funnelling of 'black' (illicitly obtained) money from corporations to political parties, political contributions are exempt from income tax provided political parties maintain accurate financial records of the income earned.[80] Further, as noted above, the Section 77 of the RPA places expenditure limits on candidates.

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[77] *Supra* note 45, 634.

[78] R. Gowda and E. Sridharan, *Reforming India's Party Financing and Election Expenditure Laws*, 11(2) ELECTION L. J. 226, 228 (2012).

[79] Common Cause v. Union of India (1996) 4 SCC 33 (India).

[80] The Income Tax Act , No. 43 of 1961, §13A, (1961).

Polemic statements about the intrinsic connection between corruption and contributions have an intuitive appeal. However, provocative tags of 'pollution' and 'corruption' prevent us from analysing the real interests implicated in this debate.[81] This section is an attempt to unpack the real interests implicated in the process and assess how contributions lead to continuing post-election harms for the democratic functioning of a state. We conclude with analysing how the foreign nature of these contributions compounds these effects.

a. Policy-Selling

The necessity of securing political contributions can influence parties to enact policies which favour their donors. Essentially, contributions open the possibility to a *quid-pro-quo* situation, wherein campaign donors make the funding contingent on some legislative favour in return. In this sense, policy can be 'sold'.[82] Even in the U.S., where there exists a high threshold to strike down campaign contribution restrictions due to free-speech concerns, the Supreme Court recognised the possibility of this danger, noting, "*To the extent that large contributions are given to secure a political quid pro quo from current and potential officeholders, the integrity of our system of representative democracy is undermined.*"[83] Even if representatives do not engage in intentional policy-selling, in *Kanwar Lal Gupta,* the SC observed, "*office bearers and elected representatives may quite possible be inclined, though unconsciously and imperceptibly to the policies… that will attract contributions*".[84]

b. Distortion

Contributions also act as an external influence and distort the agency relationship between the representative and her constituency. In *NCT v Union of India,* Misra CJI, noted, "*The representatives so elected are entrusted by the citizens with the task of framing policies which are reflective of the will of the electorate*".[85] In doing so, they should not possess an '*ulterior motive*' and

[81] Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 112.
[82] Jonathan Hopkin, *The Problem with Party Finance: Theoretical Perspectives on the Funding of Party Politics*, 10(6) Party Politics 627, 632 (2004).
[83] *Supra* note 24, ¶¶ 26-27.
[84] *Supra* note 52, ¶ 10.
[85] *Supra* note 29, ¶ 49.

misuse the popular mandate to covertly transform it to '*own rule*'.[86] As Lawrence Lessig argues, the constitution envisages the representative's independence by making it dependent on the will of the people *alone*.[87] Political contributions are 'corrupting' because they do not correlate with public opinion and therefore distort policymaking.[88] In other words, the dependency on contributions competes with the dependency on the constituency and hurts the independent nature of the representative.[89] Similarly, Lowenstein has argued that contributions create a 'cash-motivated' reason for the representative to deflect from their 'natural position' – where their decisions are determined only by considerations of constituency, ideology and party.[90] By opening a private channel to the political elite, contributions distort the reflexivity between the politician and the people. In a sense, policy-selling is an extreme example of distortion where the agency with the constituency is wholly outside the consideration of the representative.

Legislative restrictions on campaign contributions reflects the desires of citizens to elect a government based on the *issues that the citizens face*, not on the amount of money spent to become elected. As James Gardner argues, the legislative choice in limiting campaign contributions shows that the citizens were dissatisfied with the idea of electoral consent simpliciter, valuing a citizen's vote more when it was based on a substantive judgement as opposed to the impact of advertising or targeted campaigning.[91]

c. Perception

The requirements of accountability and transparency are not only a matter of substance but equally of perception.[92] In India, increased instances of corruption and questionable dealings between politicians and

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[86] *Id.* ¶ 54.
[87] LAWRENCE LESSIG, REPUBLIC, LOST, 127-8 (2011).
[88] Thomas Burke, *The Concept of Corruption in Campaign Finance*, Constitutional Commentary 1089 (1997).
[89] *Supra* note 87.
[90] Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted,* 18 HOFSTRA L. REV. 301, 302 (1989).
[91] *Supra* note 13, 251.
[92] *Supra* note 29, ¶ 277.

businessmen have led to "*the loss of systematic legitimacy*".[93] This lack of trust can potentially lead to a reduced participation by voters.[94] Voters as rational self-interested beings would prefer to spend less time undertaking the responsibilities of informed citizenry if the perception is that only big money is running politics. This loss of public engagement is compounded because the politically vulnerable financial arrangements of all parties provide a strong incentive for inter-party collusion.[95] Therefore, contributions can lead to a net loss in the level of deliberation and public contestation in a democracy.

The now relaxed regulation of foreign contributions only enhances these threats further. It opens a separate avenue for money-laundering and round-tripping of funds. Domestic companies, in order to escape the restrictions imposed on political contributions by Indian law, can arguably transfer funds abroad and then transfer them back into the country through a foreign company and subsequently donate to a political party. With effective forum shopping, shell companies can be set up in lax jurisdictions with limited regulation so that they can possibly donate 100% of the money sent to them. Therefore, the challenges of countering the 'polluting' effect of private money gets compounded by this additional channel of contribution. Making the amendment retrospective with effect from 1976 only further erodes the trust of the electorate.

Add to this, the ever-present threat that a wholly foreign influence can interfere with domestic policies. The scope for policy selling and the subsequent loss of legitimacy from outcomes that are inconsistent with the electorate's will can damage the democratic functioning of the state. For example, countries in Europe sought to ensure electoral accuracy by excluding foreign contributions when Europe was polarised during the Cold War.[96]

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[93] Report of the National Commission for the Working of the Constitution, Electoral Processes and Political Parties (2002) ¶ 4.5; *See also* Santhanam Committee's Report on Prevention of Corruption in 1962.
[94] *Supra* note 87, 166.
[95] *Supra* 82, 634.
[96] European Commission for Democracy Through Law (Venice Commission), Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources, No. 366 of 2006, CDL-AD (2006)014, ¶21.

CONCLUSION

This article has endeavoured to evaluate the impact of contributions on the democratic functioning of a state from a perspective of constitutional theory. We sought to evaluate its impact in the episodic election and the continuing life of the polity beyond the election. Designing a model of contribution regulation entails considering the maximizing the deliberative function of campaigns so that citizens can best exercise their vote and signal consent. We argued that in the socio-political context of the Indian democracy, political equality concerns are likely to trump the speech benefits received from more money in campaigns. In addition to the democratic values engaged in the question of contributions, states have to address the accountability and transparency concerns of permitting big money in politics. We analysed the different ways in which money can 'corrupt' and identify the democracy-related harms it creates. Unfortunately, the reality of the need for funds to successfully run a campaign makes it a necessity for states to address these factors and balance them to protect the sanctity of the electoral process. The difficulty in striking this balance is both in the *content* of a balanced regulatory regime and in elected legislators mustering the *political will* to regulate a system that resulted in their election. It is perhaps telling that both of India's largest political parties challenged the verdict of the Delhi High Court in the Sterlite case, but withdrew their appeals after the 2016 amendment to the FCRA.[97]

The 2016 amendment marks a landmark moment where electoral participation through contributions was opened to wholly foreign corporations. In addition to the numerous democracy-related harms highlighted above, foreign political contributions pose the additional question of who constitutes the political community in a country. This is a multifaceted conundrum that involves issues such as the electoral status of non-resident Indians, or, contrastingly, individuals who have not been

[97] Indian National Congress v Union of India, Petition for Special Leave of Appeal (Civil) No 1819/2014 (Arising out of impugned final judgement and order dated 28 March 2014 in Association of Democratic Reforms v. Union of India, (2014) 209 DLT 609 (India)); *see also* PTI, *Foreign Funding: BJP, Congress Withdraw Appeals from Supreme Court*, The Economic Times (Nov. 29, 2016, 04:24 PM), https://economictimes.indiatimes.com/news/ politics-and-nation/foreign-funding-bjp-congress-withdraw-appeals-from-supremecourt/articleshow/55685400.

granted citizenship but have been residing in the country for an extended period. A well thought out legislative agenda on the topic has the potential to *increase* the democratic credentials of the Indian electoral process by making it more accountable to a broader range of concerns without undermining the ongoing process of political self-definition. However, by merely opening the door to political contributions from foreign corporations, the 2016 amendment to the FCRA risks exacerbating the democracy harms raised by political contributions and allows foreign money to paint a few strokes on the canvas that is the Indian political community.

CORRIGENDUM TO ISSUE 4.3

In *Freedom But Not Really: The "Unprotected" Zones Of Article19 (1) (A)*, the author states that there are nine grounds of challenge because he interprets that "decency or morality" as mentioned in Article 19(2) of the Constitution of India are actually two grounds. This has been supported by *Dr. Ramesh Yeshwant Prabhoo vs Shri Prabhakar Kashinath Kunte & Ors* (1996 AIR 1113). However, the editors would like to clarify that in *Shreya Singhal v. Union of India* [(2015) 5 SCC 1] it is held that there are only eight grounds of challenge.