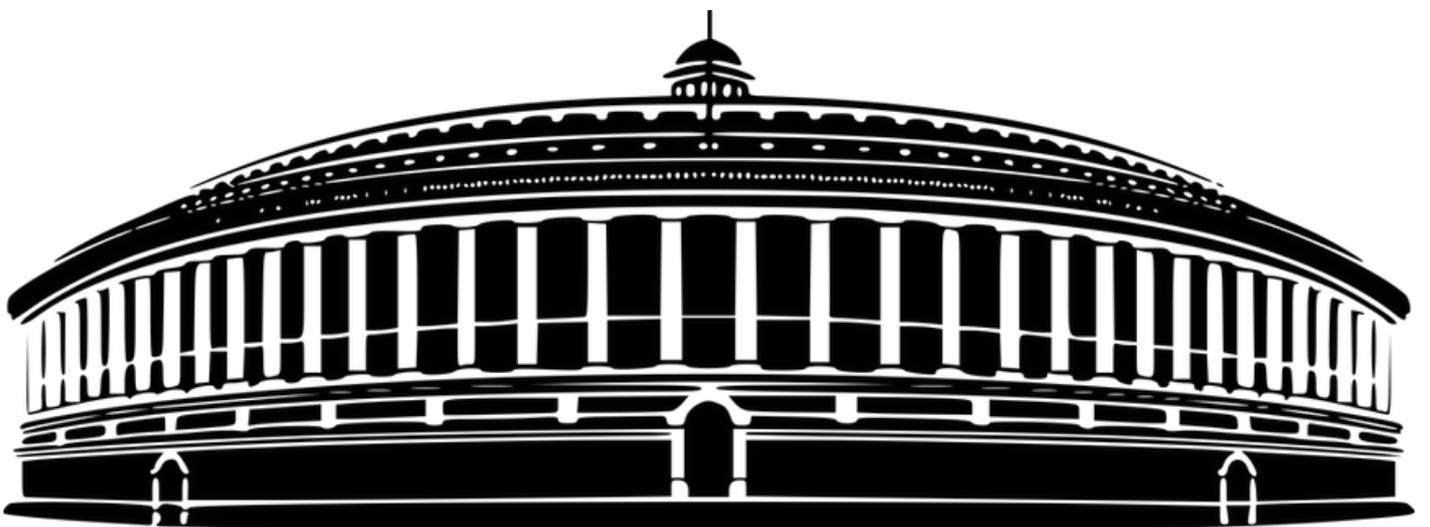


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EDITORIAL NOTE

Prof. Vinod Dixit, former Professor of Law, University of Delhi conceptualised an idea of an online journal titled, 'Journal of Comparative Constitutional Jurisprudence'. **The journal shall be double blind peer-reviewed.** Primary aim of this journal is to intellectually empower young faculty of law teachers. This journal is different from other journals on 'Constitutional Law' and on 'Jurisprudence' in as much as the focus of this journal is on jurisprudential and historical context of constitutional law, conventions and practices. Centre of our focus shall be the Constitution of India, though without reference to other constitutions in the context of history and philosophy of other countries the discussion may not be complete. The philosophy of the Constitution of India is inspired by the evolutionary changes in the written constitutions of many democratic countries as well as constitutionalism of others. We would not hesitate to appreciate a paper even if its major focus is on foreign constitution and its history with some reference to constitutionalism in general.

There is reason to believe that Dr. Bhim Rao Ambedkar and other members of the constituent assembly drafted the constitution on the corner stone erected by thousands of philosophers of other countries as well as of India. Indian Constitution and for that matter any other constitution, is not the brain child only of the framers of that constitution, framework of every constitution is the cumulative effort

of the framers of that constitution and thousands of acknowledged and unacknowledged philosophers of the world.

In the mediaeval and ancient periods, all kings derived their authority from God or gods and, therefore not answerable to the people. The authority of the King was derived from a perfect sky dweller who personally interfered in the matters of the State through the King. Thus, making the clergy and theocratic institutions as the repository of authority and the King and the clergy derived their legitimacy from one another. Social Compact theorists were able to change this source of power from God and gods to the people resulting in the demolition of the authority of the monarchy and the theocratic State. We are indebted to Locke for putting Fundamental Rights on a special pedestal. The 'general will' of Rousseau is without doubt the corner stone of democracy. The 'Long Parliament' and the 'Magna Carta' of Great Britain and the famous saying of Rousseau, when said, "Man is born free but everywhere he is in chains", are the foundations of liberty. The idea of liberty was further developed by J. S. Mill and the American judges of the US Supreme Court.

The Chief Justice of the Kings Bench Sir Edward Coke when pronounced that 'God and Law protecteth' the King and not vice versa, he was dismissed, but the idea of 'rule of law' implanted in the conscience of the people could not be. Justice H.R. Khanna for his dissent in ADM Jabalpur was superseded but he will be long remembered for espousal of human rights, that is what cannot be achieved through Article 21 of the Constitution can be achieved

through human right to life. Human Right discourse has close connection with the philosophy of Immanuel Kant and Nuremberg trials. If positive law becomes oppressive and grossly unjust, the only remaining hope is human rights discourse.

There does not seem to be any doubt that Gandhian philosophy also has a deep imprint on the Constitution of India. Though our constitution is a liberal constitution and liberty has been accorded a high value, there is a real possibility of creation of vast differences in the economic status of people, leading to estrangement between them. The idea of fraternity implies that the differences must not be allowed to grow to such an extent as to being capable of breaking the bonding of togetherness. Gandhi was devout Hindu belonging to the most orthodox denomination of Hinduism, that is *Sanatan Dharma*, yet he introduced the concept of equality in highly stratified caste system. The original idea of occupational specialisation found expression in varna system, which did not have any place for untouchability, rather the original varna system was based on occupational and varna mobility. At some stage of history, the system deteriorated into birth- discrimination was a necessary sequel of abolition of untouchability. (Articles 15 and based caste (jati) system. In order to abolish the practice of untouchability, the result is innovative Article 17, which criminalises the age-old practice of untouchability, the concept of protective 16). The caste-based society distributing rights and duties on grounds of birth had to make way for a meritarian society.

The evolution of Parliamentary form of government in Great Britain experienced many historical vicissitudes and necessarily intermingled with concepts of liberty, democracy and equality. But why did United States prefer Presidential form of government over the Parliamentary form? May be the assertion of a revolutionary change and desire of an autochthonous constitution gave the world a new form of government with stricter principles of separation of powers. Or maybe they more influenced by Montesquieu. Is it not that a stricter separation of powers ends up immensely empowering the head of the executive? These can be some stimuli for ideas on the themes of this Journal.

We are delighted to present the first edition of the *JOURNAL OF COMPARATIVE CONSTITUTIONAL JURISPRUDENCE*. These articles delve into critical legal issues, offering fresh perspectives on contemporary jurisprudence.

The opening article, *“Movement” from the “Status” Condition to “Contract” Condition for Indian Women: In the Context of the BNS 2023*, examines Sir Henry Maine’s theories through the lens of Indian women's progression toward autonomy. It critiques how constitutional and penal frameworks, including the Bhartiya Nyaya Sanhita 2023, address systemic challenges to gender justice.

In *Determinism and Freedom of Choice in Criminal Law: Battered Woman Syndrome*, the author explores the intersection of psychological determinism and legal culpability. Using case studies, it argues for incorporating mitigating factors such as the battered woman

syndrome into statutory and judicial considerations of criminal liability.

Analysis of Liberty and Its Components by the Supreme Court of India: A Critique critiques the Indian Supreme Court's interpretation of liberty through the dichotomy of positive and negative liberties. It emphasizes the need for the judiciary to ensure conditions for genuine self-realization, moving beyond the mere removal of obstacles.

The fourth article, *From Public to Private: Expanding the Scope of 'State' in Indian Constitutional Jurisprudence*, explores the evolving boundaries of state accountability under Article 12 of the Indian Constitution. It assesses how privatization challenges the traditional understanding of the state's role in safeguarding rights.

In *Homo Sacer: The Conditionality of Human Rights on Fundamental Rights*, the author examines the philosophical interplay between human and fundamental rights in India. Drawing on Giorgio Agamben's theory, it reflects on the tension between universal human rights and constitutional guarantees.

Revisiting the Indian Idea of a Secular Democracy delves into the complexities of secularism in India, tracing its evolution and contemporary challenges. The article critiques the deviations from constitutional ideals in the face of socio-political pressures.

The article, *Balancing Liberty and Surveillance: The Intersection of Digital Monitoring and Bail Jurisprudence in India* investigates the impact of digital surveillance on individual freedoms. The article

analyzes how bail jurisprudence in India navigates the delicate balance between state interests and personal liberty.

The next article, *Constitutional Morality and Public Morality: Finding a Balance in Judicial Interpretation*, delves into the intricate interplay between constitutional and public morality within the Indian legal framework. It explores how constitutional morality, rooted in the democratic ethos and the principles of justice, liberty, equality, and fraternity, often contrasts with public morality, which reflects societal norms and beliefs. Through a comprehensive analysis of landmark cases, the authors examine the judiciary's role in navigating conflicts between these constructs, ensuring that constitutional ideals prevail without disregarding societal ethos.

The penultimate paper explores the State of Exception, a legal concept describing emergency governance beyond constitutional norms, as theorized by Carl Schmitt. While rooted in Civil Law traditions, it has influenced Common Law systems, particularly post-9/11. The study examines India and the UK's legal frameworks on emergency powers, critiquing their impact on liberal constitutionalism. It further analyzes jurisprudential gaps, highlighting the lack of a Schmittian perspective in judicial discourse on extra-legal authority.

The final article of this volume discusses the Supreme Court's ruling in *Kaushal Kishor v. State of Uttar Pradesh & Ors.* as it marks a landmark shift in Indian constitutional law by recognizing the horizontal application of Articles 19 and 21 against private actors. This paper examines the judgment's reasoning, dissenting views, and

broader constitutional implications, comparing it with international approaches. It highlights Kaushal Kishor's role in reshaping constitutional accountability, balancing individual rights and private power in an era of expanding non-state influence.

This issue reflects the journal's mission to address pressing legal questions with academic rigor and practical relevance. We extend our gratitude to the contributors for their insightful perspectives and to our readers for their continued support. A note of thanks is not out of place here for the valuable and unconditional assistance provided by Mr. Himanshu K. Mishra and Mr. Kanishk Goyal, Under Graduate students of National Law Institute University, Bhopal in the editing process of this volume.

- *Editorial Board*

I. THE “MOVEMENT” FROM THE “STATUS” CONDITION TO “CONTRACT” CONDITION FOR THE INDIAN WOMEN: IN THE CONTEXT OF THE BNS 2023

- B.B. PANDE*

Abstract

Sir Henry Maine’s two theorizations propounded in the classic Ancient Law (1917) relating to static or “Status” condition in the earlier non progressive societies and “Contract” condition in the latter progressive societies, continues to impact every human development discourse. Here we have endeavoured to explore the “Status” to “Contract” theorization from the stand point of the Indian women, particularly the protection of the women’s interests under the Penal Code and the Bhartiya Nyaya Sanhita 2023 (BNS 2023). The four-part discussion begins with the Constitutional foundations of “gender justice” followed by the colonial penal policy and protection of the women, Protection of women under the newly introduced BNS 2023 and the Contemporary ground level realities of penal protection needs and practices. The conclusion is that though there are tall promises about “gender justice” in our political discourses and policies, but at the ground level the progress remains tardy. We are still to address and change the patriarchal and misogynist mindset that continues to impair the movement of the Indian women towards the “Contract” condition.

Keywords: *Contract, Status, Movement from Status to Contract, Gender Justice, Bhartiya Nyaya Sanhita*

* Former Professor of Law, University of Delhi, Delhi, India.

I. INTRODUCTION

Sir Henry Maine in the *Ancient Law*¹ propounds his first theorization around the idea of “family” that rested mainly on the patriarchal power of the male head/the father over all other members – wife/wives, sons, daughters, and slaves. For the members within the family unit, life remained static or in “Status” condition, subject to the wishes and whims of the pater familia. A direct fallout of such an accepted social condition was the Roman Law Rule of Agnation, that implied descent exclusively through males leading to a universal rule of perpetual tutelage of women. Equally strong and far-reaching is Henry Maine’s second theorization that has acquired the status of a famous aphorism: “The movement of the progressive societies has hitherto been a movement from Status to Contract”. Here “Contract” represents freedom from the “Status” condition and the loosening of the “family” stranglehold for the members, including the women. Thus, just as the first theorization of Maine has the tendency of limiting women, the second theorization liberated and ensured autonomy and equality for women. Perhaps in the early twentieth century when these theorizations were made, the author could not fully anticipate the varied interplay of these theorizations in different “progressive societies”, particularly from the point of view of women’s autonomy and dignified positioning within the “family” and the society. The interplay is still very skewed against women in India with respect to most of the matters which are vital for the “Contract” condition, such as upbringing, education,

¹ Sir Henry Maine, *Ancient Law* (Temple Press, Letchworth, GB, 1917).

marriage, employment, and bodily security. The latest revelations coming out of the Justice K. Hema Committee, AMMA Report relating to sexual exploitation of the Malayalam Cinema technicians and rape-murder of a female junior doctor on duty in the RG Kar Hospital, Kolkata, are clear evidences of the prevalent patriarchal and misogynist mindset in India. Since the movement towards autonomy and freedom for women is epitomized in modern societies by a value laden term “gender justice” it may be useful to understand here the true import of “gender justice” and its widening implications. The traditional categorization of persons based on biological sex, into males and females, appears to be coming under the influence of the idea of “choice” now a days. The Canadian Institute of Health Research provides a better rationalization of the “gender” categorization, thus: “sex refers to a set of biological attributes and gender refers to socially constructed roles, behaviours, expressions and identities... sex is usually categorized as female or male. Sex is what one is and gender is what one feels”. Thus, the “gender” categorization opens up the possibilities of expanding the horizons of liberation and freedoms for the new categories such as the LGBTQIA+ Couples.²

Our focus here is on how the laws, both the Constitutional and penal laws, are deployed in furthering the “progressive society” movement towards “Contract” for the women? In the foregoing pages the

² As a sequel to the Supreme Court ruling in Same Sex Marriages Petition in 2023, the Ministry of Social Justice and Empowerment has issued directions for issue of Ration Cards to the members of the LGBTQIA+ couples as well, THE HINDU 02.09.2024.

discussions are divided into four parts. First, is devoted to the enumeration of the Constitutional foundations of “gender justice”. Second, how the colonial penal law perceived women’s interest and extended protection to women under diverse social situations, Third, how the Bhartiya Nyaya Sanhita 2023 has tried to re-write the swadeshi brand of penal protection to women, and fourth, what are the ground realities of “gender justice”. The conclusion would underscore the unfinished task of “gender justice”.

II. THE CONSTITUTIONAL PROMISE AND THE ROAD-MAP FOR GENDER JUSTICE

A. Shared constitutional ownership of both genders

Unlike many other societies of the West, the resolve to constitute India into a **Sovereign Socialist Secular Democratic Republic**, itself comes from “**We, The People** of India”, comprising of men and women of every religion, race, caste, place of birth etc. Such a Perambulatory Constitutional vision is premised on the idea of complete gender equality in matters of the “ownership”, not only in respect to the form of governance, but also the aims and values enshrined in the governance of the society.

1. **Article 51-A (e)**: “The spirit of common brotherhood amongst all the people... to renounce practices derogatory to the dignity of women.”

2. **Article 51-A (h):** “To develop scientific temper, humanism and a spirit of inquiry and reform.”

Thus, the State officials and the ordinary citizens are equally bound by a Fundamental Duty to renounce practices derogatory to the dignity of women in a spirit of common brotherhood amongst all the people. At the same time Article 51A(h) impels the officials as well as the citizens to develop scientific temper, humanism, spirit of inquiry and reform in their approach towards customs and traditions, particularly those that tend to debase women.

3. **Article 14:** Right to Equality: Every citizen, both female and male are entitled to get from the state equality, before the law as well as the equal protection of the laws within the territory of India.
4. **Article 15(1):** “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
5. **Article 15(3):** “Nothing in this article shall prevent the state from making any special provision for women and children.

Thus, like males females are entitled to claim the guarantee of equality in matters of application of the law and in matters by protection of the laws. But by the application of intelligible differentia or reasonable classification, women’s special protection under the rape law becomes

justified. Likewise, though Article 15(1) lays down the general non-discrimination rule on ground of “sex”, but because of an exception created by Article 15(3) the state is empowered to go ahead for any special provision for women. The special provision shall be for the benefit, and not for the detriment, of women.

6. **Article 19 ‘Right to Freedom’:** “(1) All citizens the right to six freedoms [(a) to (e) and (g)]. Of these for the women the freedom of speech and expression, freedom to form association, and freedom to practice any profession or carry on any occupation, trade or business are of special significance. In a traditional society like India large number of women continue to earn their livelihood and survive through age old profession like prostitution/sex work, singing and dancing, therefore, indiscriminate clamp down on traditional means of earning, without creation of meaningful alternative, often compels them to seek constitutional intervention under Article 19(1)(g).

7. **Article 21: ‘Protection of life and personal liberty’** The Constitution guarantees of the personal liberty of the citizen/non-citizen ensures and umbrella protection to every person that includes and infinitely wide range of conditions that the Court can label as undignified, unjust or violative of basic human rights. Article 21 was successfully pressed into action to further gender justice cause in several cases: *Bodhisattwa*

Gautam (1996)³; Navtej Singh Johar (2018)⁴; Joseph Shine (2018).⁵

III. THE COLONIAL PENAL POLICY AND PROTECTION OF THE INTERESTS OF WOMEN

The colonial penal laws were mainly interested in imposing hitherto unknown crime concepts largely by coercive criminal justice machinery, which operated more for the legitimization of the ruling class power. According to Barry Wright, the colonial rule in India posed twin challenges of reconciliation between liberties and state power, thus: “These reflected unresolved tensions between the rule of law and liberties on the one hand and the requirements of sovereignty and state power on the other”.⁶ Thus, “Government by rules became the basis for the conceptualization of British colonial rule”⁷ Under such a dispensation the interests of women received scarce or even negative attention. the Draft Penal Code, 1837 that later developed into the Indian Penal Code, 1860, had defined the offence of rape in Clause 359: “The Fifthly” clause that lays down the elements of the rape offence read, thus: “intercourse with a woman with or without her consent, when she is under nine years of age”. This amounts almost to

³ *Bodhisattwa Gautam v Subhra* (1996) 1 SCC 490.

⁴ *Navtej Singh Johar v UOI* (2018) 1 SCC 791.

⁵ *Joseph Shine v UOI* (2018) 2 SCC 189.

⁶ Barry Wright, “Macaulay’s Indian Penal code: Historical Context and Originating Principles”, in Wing Cheong Chan at al. (eds) *Codifications, Macauley and the Indian Penal Code – The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate, Pub. 2011, p. 26).

⁷ N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003).

the condonation of “child sex”. Similarly, Clause 359 “Exception” read thus: “Sexual intercourse by a man with his own wife is in no case rape”. The Draft Penal Code has perceived rape offence more as an invasion of patriarchal hegemony rather than as an offence against the bodily interest of the victimized female.⁸ Such an approach to the offence of rape was in sync with the then prevailing Indian society approach that viewed rape as an invasion of the family or community honour only by an “outsider”.⁹ Though in the final version of the Indian Penal Code, 1860 the age of consent was raised and under the “Exception”, that made intercourse by the husband punishable if the wife is below ten years of age. Even in the final version of the Penal Code there was little change of attitude towards the interest and the protection of women. They continued to be seen as weaker sections, perpetually under the protection either of the guardian or the husband. Such a patronizing attitude led to the inclusion of a few offences relating to women in the Chapter XVI ‘On Offences Affecting the Human Body’, under the sub-head such as ‘criminal force and assault’ under Section 354 and Kidnapping and Abduction under Sections 361-363. The same patronizing attitude is reflected in the six offences included in the Chapter XX ‘Of offences Relating to Marriage’. These offences were created mainly for the protection of the interest of ‘marriage’ institution, wife’s interest gets protection incidentally. Similar incidental protection of the women’s interest can be seen in

⁸ Pande, *B.B. Criminal Law and Criminal Justice: Advanced Legal Writings* (EBC, 2022 at p. 53).

⁹ Kalpana Kannabiran, “Sexual Assault and the Law”, in Kalpana. K. and Ranbir Singh (eds) *Challenging the Rule(s) of Law*, Sage Pub. 2008 at p. 81.

section 509 that falls in chapter XXII, that primarily designed to contain behaviours likely to disturb orderly life in the society.

The Indian Penal Code was subjected to several women centric amendments in the post-independence era such the addition of Section 498A 'Husband or relative of husband subjecting her to cruelty' (in 1983) and Section 304B 'Dowry Death' (in 1986). However, more comprehensive women-centric amendments in the Code were affected in the post Nirbhaya Gang Rape incident, by the Act 13 of 2013 that not only widened the ambit of 'criminal force and assault offences, the definition of rape offence and its punishment, which were thoroughly revised, but also for the first time the Code incorporated a comprehensive 'Trafficking of person' offence under Section 370. The trafficking of person offence was given additional teeth by the addition of Section 370-A 'Exploitation of a trafficked person, particularly sexual exploitation of a minor person', 'Habitual dealing in slaves' (S. 371), 'Selling or buying a minor for the purposes of prostitution' (SS. 372 and 572). All these offences aim at protecting the interest of women.

IV. PENAL LAW PROTECTION TO WOMEN UNDER THE BHARATIYA NYAYA SANHITA 2023

The Indian Penal Code perceived women only in their gross bodily form. That is the main reason for most of the offences protecting the interest of women being lumped under Chapter XVI that related to 'offences affecting the human body'. Even in Chapter XX where the

women's interest got protected incidentally, the sex offences centered around her body. The Bharatiya Nyaya Sanhita (BNS 2023) has taken the bold step by breaking away from the classificatory frame of the Penal code by creating a distinct and exclusive Chapter V 'Offences Against Woman and Child', as the first chapter in line of the specific offences under the Sanhita. By doing so the BNS 2023 has not only brought the penal law in line with the Constitutional guarantees enshrined in Articles 15(3), 53A (e) and (h), but also tried to bring the penal law in sync with the progressive feminist trends in the west. However, the western feminist trend being deeply entrenched in the social realities has been able to bring about real change, which is evident by how the Lord Hale's 1736 dictum of non-retractability of mutual matrimonial consent rule could be overruled by the House of Lords in *R v R* in 1991.¹⁰ It may be apposite to quote a few lines from Lord Keith's House of Lords ruling, thus : "Marriage is in modern times, regarded as a partnership of equals, and no longer one in which the wife must be subservient chattel of the husband". Such a deeply entrenched progressive feminist trend must have inspired Nicola Lacey and Celia Wells in *Reconstructing Criminal Law*¹¹ to bring together offences relating to women under Chapter 4, titled as: 'A Question of Integrity: Legal Construction of Sexually and Bodily Autonomy'. The Chapter is sub-divided into five parts such as: I The Social Construction of Sexuality and Bodily Autonomy, II Sexual Violence, III Regulating

¹⁰ (1991) 4 All ER 48.

¹¹ Lacey, Nicola, Wells, and Celia, *Reconstructing Criminal Law* (2nd Edition Law in Context series, Butterworths, London, 1998).

Sexuality, IV Regulating Maternity and V Euthanasia. Each of these sub-divisions are further divided into heads as under the ‘Sexual Violence’ part the divisions are 1. Sexual violence and Criminal process, 2. The Offence of Rape (a) Penile Penetration, (b) Rape and Marriage, (c) Consent, (d) Mistaken Belief, (e) Evidence and Rape Trial, and (f) Punishing Rape. Similarly Regulating Sexuality part is further divided into I, Forbidden Degrees, 2, Prostitution, and 3, Pornography.¹² Perhaps, for a traditional society like India the idea of re-grouping ‘Offences Against Woman’ under title such as “A Question of Integrity: Legal Construction of sexuality and Bodily Autonomy” sounded too radical. Therefore, the BNS 2023 merely reshuffled and rearranged the Penal Code offences, without any such philosophical pretensions.

Coming to the BNS 2023 the Chapter V that has moved away from the colonial classificatory frame by arranging the offences against women under four new groups/clusters as: ‘Sexual offences’ (SS. 63 to 73), ‘Criminal force and assault’ (SS 74 – 79), ‘Offences relating to marriage and cruelty’ (SS 80–87) ‘Causing miscarriage etc.’ (SS 88 – 92). All the above four cluster of offences have been picked up from chapter XVI or chapter XX of the Penal Code, more or less on the lines of the old offences, their explanations and even the illustrations. The ‘sexual offences’ cluster (that runs into 11 Sections) is more or less a detailed version of Sections 375 and 376 of the Penal Code. Section

¹² Pande, B.B. *Criminal Law and Criminal Justice: Advanced Legal Writings* (EBC, 2022, pp. 156-159).

376 and Section 376 A to E, have been spread over into seven Sections. Section 63 defines the offence of Rape exactly like Section 375, including repeating ‘marital Exemption’ under the Exception 2, but only with one change that such intercourse should not be with a wife below eighteen years of age. (this is perhaps in deference to the Supreme Court ruling in Independent Thought Vs. UOI (2017)).¹³ The ‘marital exemption’, retained in a restricted form under Section 63 Exception 2 has been done away in most of the western democracies and even in India in the RIT Foundation Vs. UOI the Delhi High Court in 2021, delivered a split decision in respect to it that is pending for final resolution before the Supreme Court. Perhaps the Drafters of Section 63 Exception 2 were inspired by the Union of India affidavit filed before the Delhi High Court in the RIT Foundation case, in August 2017.

‘The fact that other countries, mostly western, have criminalized marital rape does not necessarily mean that the India should also follow blindly. This country has its own unique problems due to various factors like literacy, lack of financial empowerment of majority of females, mind-set of the society, vast diversity, poverty etc. and these should be considered before criminalizing marital rape. It should be ensured adequately that marital

¹³ (2017) 10 SCC 800.

*rape does not become a phenomenon which may destabilize the institution of marriage apart from being a easy (sic) tool of harassing the husbands.*¹⁴ (emphasis supplied)

In effect the paramountcy of the institution of marriage and its sanctity prevailed upon the minds of the drafters at the time of retaining ‘marital exemption’ not ‘marital rape’, because every non-consensual intercourse ought to be deemed rape, whether it is by the husband or an ‘outsider’.

Yet, another change in this cluster of ‘sexual offences’ is the addition of a new sexual offence under Section 69, that arises whenever deceitful “promise to marry” is deployed to secure sexual intercourse with a woman, which is made punishable up to ten years imprisonment. The Section explains “deceitful means” to include inducement for or false promise of employment or promotion etc. It is significant that the BNS 2023 has tried to spread the protection net of the penal law from an unmarried girl-friend, on one end, a wife under 18 years of age, on the other. It is equally curious that in the third cluster of ‘offences relating to marriage’ all the eight offences of Chapters XX and XX-A of the Penal Code, have been repeated, excepting Section 497 dealing with the offence of Adultery (perhaps in deference to the Supreme

¹⁴ Pande, B.B. “The Immutability of the Marital Exemption Clause in the Indian Rape Law”, in M.P. Singh et al. (eds) *The Indian Yearbook of Comparative Law* 2018, Springer Nature Singapore Pvt. Ltd., 2019 at pp. 365-366.

Court ruling in *Joseph Shine v UOI*.¹⁵ The trust of Joseph Shine ruling is conveyed best by Justice DY Chandrachud's observations. "In enacting 497, the legislative made an ostensible effort to protect the institution of marriage. 'Ostensible' it is because the provision postulates a notion of marriage which subverts the equality of spouses... Section 497 is based on an understanding that marriage submerges the identity of the woman. It is based on a notion of marital subordination. In recognizing, accepting and enforcing these notions, Section 497 is inconsistent with the ethos of the Constitution".¹⁶ The move to withhold penalization of adulterous behaviour is a decisive swing towards de-criminalization on the lines of the Criminal Law realist Anthony Duff's theorization, thus:

*'Human beings live and love in a broad spectrum of relationships and desires, some of which transgress social norms. But if such a relationship is consensual and non-violent, it is not the business of the state to police it. Nor should the state invoke the paranoia of the collapse of social order to criminalize a breakdown in marital relations.'*¹⁷

Thus, in the matter of protection of the interests of women the BNS 2023 has not gone much beyond the colonial penal law, which treated

¹⁵ *Joseph Shine v UOI* (2018) 2 SCC 189.

¹⁶ *Ibid.*

¹⁷ Pande, B.B. *The Indian Yearbook of Comparative Law* (2018, at p. 381).

women as a weaker section, requiring perpetual protection. This is clearly reflected in the lack of new imaginations about crimes against women and recurring “gender justice” concerns. Expectation was that, after seventy-four years of Constitutional Law influence and thirty-one years of Human Rights influence, the BNS 2023 would carry a new ideal of ‘Womanhood’, neither over protected nor defenseless in a hostile environment. But, because in the scheme of governance it appears the gender issues could not muster up the desired priority heading the BNS 2023 to play it safe by repeating more or less the Penal Code line. However, the replacement of the old penal law by the BNS 2023 is likely to present paradoxical situations of ‘Differential Protection to Women’, thus:

Situation A: By not reenacting Section 497 that criminalized adulterous relations, the BNS 2023 has recognized the equality between marriage partners. Under the earlier law the penal law criminalized to protect the sexual exclusivity of the husband and not the wife.

Situation B: Retaining Section 63 Exception 2 extends ‘marital exemption’ to a husband to have intercourse without consent with a wife above the eighteen years age, though she has been a party to seven promises or *Saptapadi* in contrast to only one under section 69 at the time of the marriage.

Situation C: Creation of a new sexual offence under section 69 extends penal protection to a girl-friend who may be in search for a suitable matrimonial alliance. By extending penal protection to her the BNS 2023 appears to have followed an over-patronizing approach for the women by projecting her as naive, on the one hand and sexually vulnerable, on the other. Such an approach continues to feed the patriarchal and misogynist mind set further. The aforesaid changes in the BNS 2023 tends to create paradoxical situation in respect to women under the three situations: A married woman under Situation A, enjoys complete sexual freedom; A married woman above the age of eighteen appears to be worst-off, because she is compelled to suffer non-consensual sexual intercourse at the hands of her husband; A unmarried girl-friend has the best bargain under Situation C, she enjoys sexual freedom coupled with the prospects of a partner of her choice. This leads to the propagation of three shades of women's sexual autonomy: One, where, both female and male partners enjoy equal sexual freedom, Two, where the female partner's sexual freedom is subjected to the male partners whims and fancies, including non-consensual sexual intercourse, and three, where the female partner's sexual freedom prevails upon the male partner, who has freedom to sexual intercourse subject to promise to marry, under fear of punishment. There, is no clue from the side

of the Drafters of the BNS 2023 about the afore described anomalies.

V. THE CONTEMPORARY GROUND LEVEL REALITIES OF “GENDER JUSTICE”

At the ground level “gender justice” is still a distant dream for a majority of the Indian women who are struggling to come out of the “Status” condition in the family and outside. In this respect the plight of the working women is worst, because their every step towards “Contract” is paved by multiple kinds of discriminations, exploitations and even violence. This contemporary “gender justice” reality can be gleaned from the following sample news items:

- (i) *‘For 20 minutes, her body lay in the middle of the main road in a Meerut village. The neighbours stood in silence, a few made videos, and no one came to the rescue of the 17 years old girl who was strangled to death, allegedly by her 28 years old brother... The reason for the killing was that the girl was in love with a man from a different religion.’¹⁸*
- (ii) *‘As many as 17 persons were arrested for assaulting a woman and blackening her face in front of her three minor children during a village panchayat in Pratapgarh... The woman was tied to a tree, her hair was chopped off and she was garlanded with shoes over accusations of an “extra-marital affair...” the*

¹⁸ The Indian Express, Luck. edn. 08.08.2024.

*victim's family claimed that she was in a "illicit relationship" with a local resident (40) and frequently spoke with him over the phone. The victim's in-laws disapproved of this but she allegedly refused to snap ties with the man... Her husband runs a vegetable shop in another state.*¹⁹

- (iii) On the lines of Disha Bill passed by the Andhra Pradesh in November 2019 in response to a gang rape of a 26 years old veterinary doctor in Shamshadbagh in Hyderabad, the Shakti Bill passed by the Maharashtra legislature in 2020, to curb the menace of rape of working woman in the Textile Mill, the West Bengal Assembly has passed the Aparajita Bill, 2024 in response to the gruesome rape and murder of a junior doctor on duty in the K.G. Kar Medical College and Hospital in Kolkata. The Bill fixes a time period for investigation, trial and enhancement up to death penalty for the gruesome crime that threatens working women at their place of work. But like the Disha Bill and Shakti Bill that are still awaiting Presidential assent, the Aparajita Bill also will have to remain in waiting before it is accorded assent by the President. However, all these Bills are symbolic of the society's emphatic rejection of violence against working women.

To close the saga of tardy march of "gender justice" on an optimistic note, I borrow from a young Haryana, Rhodes Scholar at the University

¹⁹ The Indian EXPRESS Luck. edn. 31.07.2024.

of Oxford, Anupriya Dhonchak's recent writing on feminism in Haryana. The author observes: "Field work in rural Haryana demonstrates that gender, caste, age, and class roles, which are defined by society, determine women's mobility, making their access to masculine public space conditional on some compelling reason requiring adherence to a behavioural code of conduct. In that sense, sporting success becomes a badge of honour, discipline, and morality. It becomes a culturally sanctioned avenue for conditional, fragile and temporary freedoms".²⁰ Writing further "The trials, tribulations and triumphs of Phogat carry possibilities of a unique vernacularisations of feminism in Haryana. Vernacularisation is the process by which universalistic human rights are converted into local understandings of social justice. It has the advantage of fashioning change in communities from within"²¹

²⁰ Anupriya Dhonchak "Vinesh Phogat and Feminism in Haryana", THE HINDU Luck. Edn 03.09.2024.

²¹ *ibid.*

II. DETERMINISM AND FREEDOM OF CHOICE IN CRIMINAL LAW: BATTERED WOMAN SYNDROME

-VINOD DIXIT*

Abstract

In most of the cases, criminal liability depends on freedom of choice but in some cases, it depends on deterministic considerations. However, in some cases, though liability depends on freedom of choice, it is diminished on deterministic reasons. There are some situations where liability should be diminished but it is not. Battered women and poverty are some of such areas where liability is statutorily not diminished. In this paper we propose to discuss some cases of battered women whose liability was diminished by judiciary by alternative legal rules, appealing to the Executive for clemency or re-interpretation of law. In this paper we shall discuss only cases involving battered women, who were given some relief in sentencing, notwithstanding the fact that there is neither full nor qualified exemption in statutory provisions. What effect the perpetual humiliation of a woman by a person standing in close relation has, on her mind and behaviour, became subject matter of study by psychologists long after most of the cases discussed here have been decided, yet most of the judges in the period preceding psychological studies, understood the repercussions, which is caused on battered woman mind and behaviour. Neither the Indian legislature nor judiciary did anything positive to make battered woman syndrome

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and poverty a mitigating circumstance while deciding the culpability of the accused.

Keywords: *Battered Women, Battered Woman Syndrome, Determinism and Freedom of Choice, Grave and Sudden Provocation, Pure reason.*

I. INTRODUCTION

In most of the cases, criminal liability depends on freedom of choice but in some cases, it depends on deterministic considerations. However, in some cases, though liability depends on freedom of choice, it is diminished on deterministic reasons. There are some situations where liability should be diminished but it is not. Battered women and poverty are some of such areas where liability is statutorily not diminished. In this paper we propose to discuss some cases of battered women whose liability was diminished by judiciary by alternative legal rules, appealing to the Executive for clemency or re-interpretation of law. In this paper we shall discuss only cases involving battered women, who were given some relief in sentencing, notwithstanding the fact that there is neither full nor qualified exemption in statutory provisions.

In a number of cases criminal liability depends, not on freedom of choice but on determinism based on state of mind, age or position. Persons of unsound mind, and of age not more than seven years are not criminally liable, even if they exercise their freedom of choice in any manner, they like. Diplomats are immune from criminal liability, irrespective of what they do. All these persons are exempt from

criminal liability on deterministic considerations, exemption being given to them on status based on age, state of mind or position.

However, there are number of cases where liability depends on both the considerations, determinism and freedom of choice. In these cases, liability depends on freedom of choice but it is diminished on status-based considerations. Section 300 IPC [now repealed and replaced by a new law, Bhartiya Nyaya Sanhita 2023¹ (BNS)] creates 5 exceptions when culpable homicide is not murder.² One such case is culpable homicide committed under ‘grave and sudden’ provocation, caused by the victim. ‘Grave and sudden’ provocation is a state of mind sufficient

¹ Section 99 BNS is equivalent of section 300 of IPC.

² Five exceptions

- (1) When culpable homicide is not murder – Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.
- (2) Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence or person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.
- (3) Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.
- (4) Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender’ having taken undue advantage or acted in a cruel or unusual manner.
- (5) Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

to diminish criminal liability, still the person acting under ‘grave and sudden provocation’ has choice not to commit homicide even under this state of mind. In the second exception he has choice of not exceeding the right of private self-defence; in the third exception, the public servant has discretion not to exceed the powers given to him by law; in the fourth exception, the offender has choice not to take undue advantage against his adversary and in the fifth, the offender has the choice not to accept the consent given by the victim.

It is surprising that a culpable homicide under ‘grave and sudden provocation’, which is clearly biased in favour of the powerful, strong and influential comes under exception but poverty and battered woman syndrome are not. It is a well-known fact that poverty forces a person to commit any crime for survival and battered women tend to behave irrationally. It is the privilege of the strong physically or in status or culturally. A sick old man cannot afford to be violent when insulted by a wrestler; a woman living in a patriarchal and conservative society cannot afford to be violent against her husband when found her with another woman in a compromising situation. There are a large number of decided cases where husbands, finding wives with another man in intimate relations, killed their wives, or her paramour or both under ‘grave and sudden’ provocation, were punished for culpable homicide not amounting to murder. But there are relatively a few cases of women killing their husbands in similar situations.

In 1979 a psychologist Lenore Walker wrote a book ‘The Battered Woman Syndrome’³ According to her, “Battered woman syndrome is the psychological effects of living with intimate partner’s violence.” However, a number of battered women are also associated with a mental illness which is called Post Traumatic Stress Disorder (PTSD). But in some cases, it is continuous trauma of living with a violent partner, who regularly treats her with physical and psychological abuses. She develops a very low self-esteem, which results in suicidal tendencies or violence against others. PTSD means, with reference to battered women, that a woman has gone through experience of living with violent partner and threat of death, violence, serious physical injury or continuous insults. It may result in attempted suicide, hypertension, anxiety, negative thoughts or/and beliefs.

There is a conflict between the psychologist and the lawyer. The psychologist (including a criminologist) believes in the principle of ‘causality,’ that is a human being is surrounded on all sides by the physical world, his actions are ‘conditioned’ by the circumstances and environment surrounding him. His actions are determined, he is not a free willing self-determining person. On the other hand, the lawyer assigns him a will that transcends his experience and environment. The difference is between ‘a priori’ and ‘a posteriori’ in the words of Kant.⁴ Using Kantian epistemology, based on his ‘Critique of Practical

³ Lenore E. A. Walker, *The Battered Woman Syndrome* (Springer Publishing Company, New York 2016).

⁴ Morrison 137-138.

Reason,' man lives in two worlds, 'empirical' and 'moral.' Both of them are governed by 'causality', the causality of a posteriori and of morality. If we use 'reason then we may arrive at action guided by 'a priori.' In the realm of morality an individual is self-determining autonomous person, uninfluenced by his environment.⁵ However, the legislature and the judge also partially recognise and does a balancing act. Some of the concerns of the psychologists are treated as mitigating factors. However, in India the balancing act was not done by the legislature, but by judiciary. The Legislature continue to believe the battered woman is a self-determining autonomous free-willing individual, like any other free-willing individual but unlike a 'gravely and suddenly provoked' individual.

Kant rejects David Hume's empiricism and prefers 'practical reason' which can be achieved only if will is dictated by 'a priori.' In the sphere of penal laws; he prefers a morality that is universal not affected by environments. Kant writes, "whatever the life-form patterns of the phenomenal world, which constitutes a person's sociological and psychological...position, these do not affect the evil of his deed, an evil which is his evil, introduced in the world by him in his exercise of freedom. A wrong is not converted into a non-wrong on account of activities which preceded it, nor can it be dissolved by what comes afterwards."⁶ The Kantian position is different from that of Hume, the empiricist, for him what happens before and after the prohibited act is

⁵ *ibid* 138-139.

⁶ Morrison p. 141

material. The legislature is uncertain, in the IPC (section 300) as well in BNS (section 99) mitigating circumstances are the same. Some circumstances before the prohibited act are treated as mitigating circumstances other relevant circumstances are not. This empty space is partially filled in by the judges.

In this paper it is proposed to discuss some cases on battered women who were victims of battered women syndrome. Some cases were decided in colonial period, some after independence of India and one by the Court of Appeal of U.K. An important case was decided by the Allahabad High Court per Braund J., *Emperor v. Dhirajia*.⁷ The trial court, the sessions court found her guilty under section 302 IPC but the jury did not find her guilty of attempted suicide with which the judge did not agree. Therefore, he made a reference to the High Court. The evidence clearly showed, the High Court observed, that her husband Jhugga did not treat Dhirajia well (battered woman syndrome was not yet in use. Wife beating was considered normal in this part of the world at that time). Dhirajia had a six-month-old girl child at the relevant time. One day Dhirajia insisted on visiting her parental home but the husband declined to grant her permission and told her if she tried to do so he will beat her. Late at night (or early in the morning) after awakening the husband did not find her in the house. He went out to peruse her, she was going towards her parental home. When she saw her husband perusing her, in panic, she jumped into a well, along with the baby. She was rescued but the child died. She was charged under

⁷ AIR 1940 All 486.

sections 302 and 309 IPC. She was found guilty under section 302 but the jury gave a verdict of not guilty under section 309. The Judge did not agree with the jury, and a reference was made to the High Court. As to why she jumped into the well, to the prosecution and to the committing Magistrate she stated, “There had been a quarrel in my house for three or four days. My husband threatened to beat me. Thereupon I fled away. He followed me. When I saw my husband coming after me, I through fear jumped into the well.” Later, before the sessions court she stated that she accidentally fell into the well. The High Court preferred to believe her statement before the committing Magistrate. The Sessions Judge also preferred to believe her statement before the committing Magistrate and concluded, “I am, therefore, of opinion that the evidence of Jhagga supported as it is by the two previous statements of the accused clearly shows that the accused had jumped down into the well and had not fallen down accidentally.⁸” However Braund J. was of the opinion that it is not a case of murder but of culpable homicide not amounting to murder. The High Court believes that what she did, she did in terror for the purpose of escaping from her husband. Section 299 defines culpable homicide: -

“Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

⁸ *ibid* 487.

Mr. Shekhar Saran, who was appointed by the government to represent her, as she has no representation, asserted that she neither has intention nor knowledge to cause the death of her child. The high Court agreed that the mother had no intention to cause the death but did not agree that she has no knowledge. Braund, J. said, “but to our minds, knowledge stands upon a different footing than intention. Some degree of knowledge must, we think, be attributed to every sane person”. Dhirajia must have knowledge that the act of jumping into the well was likely to cause the death of the baby.

After deciding that Dhirajia did not intended to cause the death of her daughter but certainly she had knowledge that the act of jumping into the well was likely to cause the death of the child, the Court proceeded to examine if it was a case of murder. The Court decided not to go to the extent to which Bombay High Court went in *Supadi v. Emperor*.⁹ The Bombay H.C. decided that Supadi neither had the intention nor knowledge to cause the death of her infant, but it was a case of causing death by negligence. Section 300 of the IPC provides that in four cases, culpable homicide is murder with certain exceptions, the first three relate to cases where the act was done with intention of causing death. As it had already been determined that Dhirajia did not intend to cause the death of the child but has knowledge, the Court applied the fourth case of murder where she had the knowledge to cause the death and if there was any exception to make it a case of culpable homicide not

⁹ AIR 1925 Bom 310.

amounting to murder. The fourth case of murder under section 300 was as follows: -

“If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any *excuse* for incurring the risk of causing death or such injury as aforesaid.” (Emphasis supplied). “

In this fourth case culpable homicide is ‘murder’, however it is not ‘murder’ if such act is done with an excuse for incurring the risk of causing death. In the IPC section 300 the word has not been defined as to what is the quality and degree of ‘excuse’ which warrant taking the risk of causing death. The determination of the quality and degree of ‘excuse’ may differ from situation to situation to be determined by the judge. The Judge observed that, “Now looking at the facts of this case which we need not repeat again, we think that it is not possible to say that Mt. Dhirajia in jumping into this well did so without excuse. We must consider in assessing what is excuse or is not excuse, the state of mind, she was in. She feared her husband and she had reason to fear her husband. She was endeavouring to escape from him at dawn and in the panic into which she was thrown, when she saw him behind her, she jumped into the well. We think she had excuse and that excuse was panic or fright or whatever you like to call it. For these reasons we do not think that Mt. Dhirajia is guilty of murder.¹⁰” it is significant to note

¹⁰ *ibid* 489.

that the Judge did not at all use the words ‘battered woman syndrome’, obviously for the reasons that psychologists have yet not fully understand the impact of the battered woman syndrome on the behaviour of the victim. However, Braund, J. was alive to the gravity of the situation and to the abnormality in her behaviour that was caused by the humiliation she suffered at the hands of her husband. In this situation the Judge was convinced that ‘excuse’ was sufficiently of the quality and degree to bring her case out of the category of ‘murder’.

The Judge further observed,

‘As regards the charge of attempted suicide we think that upon that Mt. Dhirajia was rightly acquitted. To our minds, the word ‘attempts’ connotes some conscious endeavour to do the act which is the subject of the particular section. In this case the act was the act of committing suicide. We ask ourselves whether when Mt. Dhirajia jumped into the well, she did so in a conscious effort to take her own life. We do not think she did. She did so in an effort to escape from her husband. The taking of her own life was not, we think, for one moment present to her mind. For that reason, we think that Mt. Dhirajia was rightly acquitted under Section 309, I.P.C.’

The High Court set aside the conviction under section 302 by the sessions court and substituted it with conviction under section 304 IPC. The verdict of ‘not guilty’ under section 309 by the jury must stand. The unfortunate woman has already been in prison for a period of

eight months and we think the proper sentence is that she should be sentenced to undergo six months' rigorous imprisonment which in effect means that she will be at once released unless she is required upon some other charge. As in the preceding case Mr. Shekhar Saran, the lawyer who was appointed by the Government to represent Mt. Dhirajia relied on Supadi case, it will be appropriate to discuss that case.

Supadi v Emperor¹¹, is a case decided by a Divisional Bench of Bombay High Court in its revisional jurisdiction. "The accused Supadi is a girl of seventeen years of age unhappily married to a man called Lukadu. Her mind was distracted by the illness of her infant daughter and she was anxious to go back to her father's house where she would get rest after the drudgery of her unhappy home, and time to attend to her ailing infant. Her father and sister came to see her home but the husband refused because he wanted her to stay at home and do the household work. Supadi was much disappointed and the next morning her father tried to take her back when the husband was absent. But the husband intercepted the cart and forced Supadi to return. This fresh disappointment was too much for Supadi who was already sorely tried by her husband's ill-treatment and the illness of her infant. She did go back, but instead of going to her husband's house she jumped into a well in order to drown herself. At the time she jumped in, her infant was tied on her back. She was found in the well the next day. but the infant was drowned. When she was taken out, she burst into tears and

¹¹ AIR 1925 Bom 310.

clasped the dead body of her child.”¹² Pratt, J. found that she was rightly convicted for attempting to commit suicide but he cannot bring himself to believe that she is guilty of committing murder of her infant child.

The Sessions Judge convicted her for attempting to commit suicide and with reference to section 300(4) convicted her for committing murder of the infant under section 302 IPC, though agreed that she did not intend to cause the death of her child. She has knowledge of the likely death of the infant (without any excuse). According to Prett, J. there was neither ‘intention’ nor ‘knowledge’, therefore, it was neither culpable homicide nor amounting to murder nor murder. It was a case of causing death by negligence, and sentenced her to six-month simple imprisonment to undergo concurrently with the imprisonment under section 309. Section 300 (4) would have been applicable “if the accused at the time she jumped into the well was conscious of the presence of the child on her back. But her mind was in so abnormal a condition, that she was at the moment attempting to commit suicide. I believe, therefore, that she was not thinking at that time of the child and that she was not conscious of the child's presence. As she was not conscious of the child, there was not such knowledge as to make Section 300 (4) applicable. But that lack of consciousness implies negligence for, as said by Holloway, J. in *Reg. v Nidamarti Nagabhushanam*¹³ "culpable negligence is acting without the consciousness that the illegal and

¹² *ibid.*

¹³ 7 M.H.C.R. 119, 120.

mischievous effect will follow but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness."¹⁴ Instead she was convicted to undergo simple imprisonment for six-months, concurrently with imprisonment under section 309.

Crump, J. agreeing with the judgement stated that, " It is a matter of some ' difficulty to determine what was the precise intention or knowledge of the accused at the moment when she threw herself into the well, and though it might be argued that she must have known that her child was with her, and that even if she did not intend its death, she knew that her act was so imminently dangerous that death was the most probable result, still the conclusion which commends itself to my learned brother is equally one which can be drawn from the proved facts. Where the balance is so equal, I prefer to lean in favour of the accused. Therefore, I agree with the order proposed"¹⁵.

The decisive factors, that gave different turn to the case are her 'unhappy home' and her 'sorrow' on seeing the dead body of her child. In another case battered woman syndrome was found sufficient to construe deciding factor of abetment to committing suicide by the wife.

State v. Hari Prashad¹⁶ is a Delhi High Court judgement, per Pradip Nandrajog and Mukta Gupta, JJ. Judgement was delivered by

¹⁴ *ibid.*

¹⁵ AIR 1940 All 486.

¹⁶ 2016 SCC OnLine Del 751.

Nandjog, J. on behalf of Mukta Gupta, J. and himself. Hari Prashad after one month of his marriage with Pushpa began beating her, under influence of alcohol, on ground that the dowry she brought was insufficient. The regular beating traumatised her. She would often be turned out of the house by Hari Prashad but later would be persuaded to return she also made complaints to the woman-cell of the police. Ultimately in 1993 she poured kerosine on her body and immediately rushed to the hospital by her husband where she succumbed to burns. In her dying declaration she blamed the cruelty of her husband for her death. The trial Court acquitted her husband of dowry death as well as of abetment to commit suicide. The High Court disagreeing with the trial court convicted him under section 306 for abetment to commit suicide. 'She was brutalised worse than beast.' Amply makes it clear that Court treated the case as that of 'battered woman syndrome'. He points out the bias of 'sudden and grave provocation' stating that had she killed her husband it would have been considered a mitigating circumstance under 'grave and sudden provocation'. The Court acquitted the accused of dowry death but convicted him for abetment to commit suicide. (Obviously on grounds of battered woman syndrome).

Manju Lakra v. State of Assam,¹⁷ is a case when a wife, the victim of battered woman syndrome, killed her husband under 'grave and sudden provocation.' After she was arrested by the police, she confessed before a magistrate in a statement under section 164 Cr.P.C. "My name is

¹⁷ 2013 (4) GLT 333

Manju Lakra. The incident took place last Sunday night. My husband was in the habit of coming home in a drunken state at night and beat me up. On the night of the incident also he came home drunk and beat me up. I sustained injury in my head. Blood came out. Failing to bear it anyone, I beat my husband with that lathi. I hit him in the legs, head and back of the neck. He had been in a drunken state and could not get up again. Later, he died. Subsequently, leaving him at home, I went to the police station and informed of his death. I gave the police the lathi with which I had killed him. The man died at 5.00 a.m. Since husband used to always commit atrocity on me, I killed him out of anger.” ‘The accused-appellant has, however, clearly stated, in her confession, that she killed her husband out of anger’ Ansari, J.

What is of immense importance to note in the evidence of PW1(daughter of the accused and the victim) is that according to her evidence, her father, under the influence of liquor, used to always quarrel with her mother and chased her around the garden (i.e., the tea estate) with dao in his hand in order to cut her and that her father used to drink liquor all the time and abused all of them and that after getting drunk, her father used to become unsteady. Appellant’s statement has been corroborated by, therefore, Ansari, J. said, “, we are clearly of the view that the judicial confession can be safely relied upon.” Situated thus, we can have no escape from the conclusion that it was the accused-appellant, who had assaulted and killed her husband. Was the killing of her husband by the accused-appellant a murder, is, now, the question for determination?

We cannot, while answering the question, posed above, be oblivious of the surrounding circumstances, whereunder the accused- appellant happened to have assaulted her husband, which caused injuries on his person resulting into his death. If not murder, what offence, if any, the accused-appellant has committed is the question, which falls for consideration before us.

II. GRAVE AND SUDDEN PROVOCATION

To find answer to the question, posed above, what becomes necessary to consider is that the deceased used to remain drunk and in drunken state, he used to pick up quarrel and beat the accused- appellant and, at times, he used to chase the accused-appellant in order to cut her by means of dao. Thus, their relationship, as the evidence establishes, was sour and marred by marital discord.

Exception 1 to Section 300, which provides as follows:

"Exception 1.-When culpable homicide is not murder-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

It would be necessary to undertake an exercise of appreciation of evidence from the perspective as to whether there was provocation from the end of the deceased and if so, whether the 'provocation' was

'grave and sudden' enough so as to deprive the accused-appellant of her power of self-control. To apply the concept of grave and sudden provocation, it is necessary that it must result in loss of self-control. But what deprived the power of self-control? Two factors are important, namely, mental background of the accused and the fatal blow must be related to the act of provocation. Mental background means the circumstances building rage in the mind of the accused. The background battery, resulting in battered woman syndrome which resulted in building the rage. Is the fatal blow direct result of the grave and sudden provocation? Whether there was intervening period of cooling off? If there is cooling off period it cannot be the direct result of the built-up rage. In the instant case, the beating with a lathi by the husband, immediately before the wife gave him a fatal blow brings the case to mitigating category. But the sentence of rigorous imprisonment for five years seems to be excessive in view of the practice in other similar cases where it generally extended to three years.

In *Gyarsi Bai v State*¹⁸ the sessions Court sentenced her to transportation for life under section 302- and six-months simple imprisonment u/s. 309. The prosecution alleged that the appellant, her children, her husband Jagannath and her sister-in-law Kaisar Bai used to reside together. There were constant quarrels between the appellant and her sister-in-law and very often Jagannath used to slap the appellant for picking up a quarrel with her sister-in-law Kaisar Bai. It is alleged that one such quarrel took place on the morning of 14.8.1951

¹⁸ 1953 CRILJ 588.

when Jagannath was away from his home. In this quarrel Kaisar Bai asked the appellant to leave the house. Thereupon, the appellant left the house, taking her three children aged 7 years, 5 years and 1½ years and saying that on account of her sister-in-law she would jump into a well. Soon after, the appellant went to a well in the village and threw herself into the well along with her three children. A few hours after, some inhabitants of the village found Gyarsi Bai supporting herself on an edge of the well and the three children dead in the well. The appellant admitted before the Committing Magistrate as well as before the Sessions Judge that she jumped into the well together with her children on account of her sister-in-law Kaisar Bai's harassment. Kesar Bai also admits that her brother Jagannath would beat her occasionally for quarrelling with her.

Dixit, J. was satisfied that Gyarsi Bai jumped into the well to escape from the harassment by Kesar Bai. Only question for determination is whether she is guilty of murdering her three children and of attempted suicide. She did not intend to kill her children, but did she have the knowledge of the killing? First three clauses of s. 300 relating to intention are not applicable. But the fourth is. Is she guilty of murder under clause four? She can be guilty of committing 'murder' of her children if she knew that the act of jumping into the well is so imminently dangerous that it is likely to cause the death of her children without any 'excuse'. Dixit, J. said that, 'I think it cannot be said in the present case, with any degree of force that when the appellant jumped

into a well with her children, she had not the knowledge that her act was so imminently dangerous as to cause the death of her children.¹⁹

‘Her life might have become unbearable owing to domestic troubles and perhaps on account of these troubles, she decided to take her own life. I am also prepared to hold that on account of the discord in the house, the appellant was subjected to severe exasperation and to a long course of conduct causing suffering and anxiety. But when on account of all these reasons, she left the house on the day of the occurrence saying that she would jump into a well with her children, it cannot be said that she was in such an abnormal state of mind that could not have any Knowledge of the nature of her act.’²⁰

Regarding ‘excuse’ to take the risk of such imminently dangerous act, Dixit, J. says that “I do not find any circumstances to come to the conclusion that the appellant had some excuse for incurring the risk of causing the death of her children.” Distinguishing the case of *Emperor v Mt. Dhirajia*,²¹ the Judge observed, “Here there is no question of any panic or fright of the appellant,” which was present in the case of Mt. Dhirajia, considering the state of mind in which Mt. Dhirajia was. The Judge also distinguished the Bombay High Court case of *Supadi v Emperor*.²² *Supadi*, it was held by the Bombay High Court, was in such a state of mind as led to inference that she was oblivious to the presence

¹⁹ *ibid* 589.

²⁰ *ibid* 589.

²¹ AIR 1940 All 486.

²² AIR 1925 Bom 310

of the ailing child, and therefore, she was convicted under 304A. according to the judge she (Gyarsi Bai) was rightly convicted under sections 302 and 309 of IPC. What Dixit J., in the last para says is very significant. “The appellant has been sentenced to transportation for life under Section 302, Penal Code, this is the only sentence which could *legally* be passed in this case. But having regard to the facts and circumstances of the case and also to the fact that the appellant though not legally insane was not and could not be in a normal state of mind when she jumped into a well with her three children, I think *this is not a case deserving of a severe punishment*. Perhaps the Judge was referring to a state of mind which is neither ‘unsound’ nor ‘sound’. ‘Grave and sudden’ provocation is such a state of mind which stands between ‘sound’ and ‘unsound’, but legally it can only be a temporary, immediately following the ‘provocation’ without a ‘cooling-off’ period. Indian Penal Code does not recognise a longer lasting period between ‘soundness’ and ‘unsoundness,’ which is a characteristic of ‘battered woman syndrome.’ “I would, therefore, recommend to the Government to commute the sentence of transportation for life to one of three years rigorous imprisonment. The sentence of six months’ simple imprisonment awarded to the appellant for the offence under Section 309 is appropriate,” said the Judge. (Emphasis supplied)

Certain inferences can be drawn from the observations made by the Judge. The author of this paper thinks that it was not merely Gyarsi Bai who was on trial, but more than Gyarsi Bai, it was the law of culpable homicide. The use of the word ‘legally’ might have been used in

contrast to ‘morally.’ When the Judge said she does not deserve such severe punishment as transportation for life and the Executive, using its clemency powers, should reduce the sentence to three years. He, it appears, was not satisfied with the existing legal provisions. Probably he meant to say that ‘battered woman syndrome’ (the term was not used by him as the term was not in use at the time) should be a mitigating circumstance just like ‘grave and sudden provocation. Had Gyarsi Bai, when her sister-in-law insulted her, killed her sister-in-law in the bout of ‘sudden and grave’ provocation, her case might have fallen in the category of culpable homicide not amounting to murder. But this mitigating provision legally cannot be applied for the killing of the children, because Kesar Bai, the sister-law, was the source of provocation and the children were not.

R v. Kiranjit Ahluwalia²³ is a case of battered woman decided by Court of Appeal of U.K. **Southall Black Sisters** led Ahluwalia’s campaign, with support from Justice for Women. Kiranjit was persuaded into an arranged marriage by her brothers. Both her parents had died by the time she was 16 and so at the age of 23 she had to give up studying law and marry Deepak Ahluwalia. The violence and humiliation started two days after the wedding. Deepak’s manner “changed dramatically” Kiranjit recounted later. This marked the beginning of ten years of violence, rape and sexual abuse; Deepak was so obsessed with controlling Kiranjit's behaviour that he even forbade her to eat chillies or drink black coffee. She was not allowed to go out to see friends or

²³ (1993) 96 Cr App R 133

family and was treated like a slave. Deepak was a big man Kiranjit was slight.

Deepak saw other women while he continued to abuse Kiranjit on an almost daily basis. He did not want her “westernised” and kept her in almost total isolation. Kiranjit was kicked, punched and slapped, beaten with belts, shoes and pieces of furniture, threatened with knives and hot irons and nearly strangled. Deepak also regularly threatened to kill Kiranjit. She was afraid to have children because she feared that she would never be able to leave her husband, but she was pressurised by Deepak's family to undergo medical examinations to find out why she had not yet become pregnant. Deepak forced Kiranjit to have sex with him and she subsequently had two sons. The boys were terrified of their father and were also subjected to his violence. Kiranjit attempted to seek help from her family, who merely told her to go back and be “a good wife” and that it was her duty “to make the marriage work”. She also approached her GP (General Practitioner), and obtained two court injunctions in an effort to stop Deepak's attacks on her, but to no effect. Kiranjit ran away but he found her and brought her back. She began to drink in order to dull the pain, but was deeply ashamed of her drinking. She took two overdoses, attempted suicide twice, pushed beyond endurance by the misery of her existence. Finally, on May 9, 1989, Kiranjit could stand it no longer – she was terrified of staying and equally terrified of the consequences of running away; she felt trapped and, in order to stop Deepak coming after her and to make him understand what pain was, she set fire to his bedclothes, with petrol

mixed with caustic soda, (making the mix napalm) while he slept. She, said, she had no intention of killing him.

Ten days later Deepak died of his injuries and Kiranjit was charged with his murder. The trial judge declared that the violence she had suffered was “not serious” and the prosecution claimed that she had merely been “knocked about”. Because of her shame about the incidents of sexual abuse, Kiranjit could not face her family hearing about them at the trial and gave no evidence in her own defence. Her plea of manslaughter due to provocation was overturned and the jury found her guilty of murder.

A key reason for the failure of Kiranjit's plea of provocation was the bias towards male behaviour in such cases. The time that had elapsed between Deepak's last attack on Kiranjit and her retaliation (a few hours) was deemed to be a “cooling down” period and not a “boiling over” period as her defence suggested. Men tend to react instantaneously when provoked, whereas women cannot do so in the context of male violence because of men's greater physical strength and size, not merely physically but culturally as well. With the support of Southall Black Sisters led by Justice for Woman, Kiranjit was granted an appeal in 1992 on the grounds that expert evidence and psychiatric reports had not been presented at the original trial. A re-trial was ordered and on September 25, 1992 Kiranjit was found guilty of manslaughter due to diminished responsibility and sentenced to three

years and four months (the time she had already served). Kiranjit was released immediately.

The appellant's doctor made a statement which was read at the trial. He confirmed that he found bruising to her face and wrist on 18th April and fresh bruising on the left cheek, temple and arm on 24th April. At Easter 1989 the deceased knocked the appellant unconscious. She suffered a broken tooth, swollen lips and was off work for five days. Her work supervisor gave evidence that she lost weight and showed signs of nervousness and distress. Other evidence to like effect was given by a work mate, by her Canadian sister-in-law who came to stay and even by the deceased's brother, who spoke to the deceased about it on 7th May. On the evidence at the trial there was, therefore, no doubt that the appellant had been treated very badly over a long period. In addition, she discovered in March 1989 that the deceased was having an affair with a woman who worked with him at the Post Office. He taunted the appellant with this relationship. Despite all of this, the appellant wished to hold the marriage together, partly because of her sense of duty as a wife and partly for the sake of the children.

The state of humiliation and loss of self-esteem to which the deceased's behaviour over the ten years of the marriage had reduced her, is evidenced by a letter she wrote him after he left her for three days about April 1989. It is a letter on which Mr. Robertson strongly relies. In the course of begging him to come back to her and to grant her 10 minutes

to talk it over, she made a number of self-denying promises of the most abject kind:

"Deepak, if you come back I promise you - I won't touch black coffee again, I won't go town every week, I won't eat green chilli, I ready to leave Chandikah and all my friends, I won't go near Der Goodie Mohan's house again, Even I am not going to attend Bully's wedding, I eat too much or all the time so I can get fat, I won't laugh if you don't like, I won't dye my hair even, I don't go to my neighbour's house, I won't ask you for any help."

The appellant visited her mother-in-law on the afternoon of 8th May. She then returned home with her younger son who was unwell. The deceased spoke to his girlfriend from his work place telling her that the appellant was going to pack and leave that evening. He arrived home about 10.15 p.m. What happened thereafter was described by the appellant in police interviews, although she has not been wholly consistent. It seems she put her son to bed and gave the deceased his dinner. He then tried to mend a television set. The appellant tried to talk to him about their relationship, but he refused indicating that it was over. He demanded money from her to pay a telephone bill and, according to her, threatened to beat her if she did not give him 200 the next morning. He then began to iron some clothes and threatened to burn the appellant's face with the hot iron if she did not leave him alone.

The appellant went to bed about midnight. She was unable to sleep and brooded upon the deceased's refusal to speak to her and his threat to beat her the next morning. She had bought some caustic soda a few days earlier with a view to using it upon the deceased. She had also bought a can of petrol and put it in the lean to outside the house. Her mind turned to these substances and sometime after 2.30 a.m. she got up, went downstairs, poured about 2 pints of the petrol into a bucket (to make it easier to throw), lit a candle on the gas cooker and carried these things upstairs. She also took an oven glove for self-protection and a stick. She went to the deceased's bedroom, threw in some petrol, lit the stick from the candle and threw it into the room. She then went to dress her son. The deceased, on fire, ran to immerse himself in the bath and then ran outside screaming "I'll kill you" and shouting for help. He was assisted by neighbours. The appellant was arrested. She wrote to her mother-in-law from prison saying, amongst other things, that the deceased had committed so many sins, "so I gave him a fire bath to wash away his sins". However, in the course of interview she repeated a number of times that she did not intend to kill the deceased, but only to give him pain.

The trial judge gave instructions to jury in accordance with the law laid down in *R v. Duffy*²⁴ by Lord Devlin, which is as follows: 'Provocation is some act, or series of acts, done [or words spoken] ... which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so

²⁴ [1949] 1 All ER 932.

subject to passion as to make him or her for the moment not master of his mind.’

‘The appellant did not give evidence. No medical evidence was adduced on her behalf. Her case was that she had no intention either of killing her husband or of doing him really serious harm, only to inflict some pain on him. Provocation was a secondary line of defence. To support it, reliance was placed upon the whole history of ill-treatment throughout the marriage, culminating on the night in the deceased's refusal to speak to her, his threat to use the hot iron upon her, his threat to beat her the next morning if she did not provide him with money and his clear indication that he wished the marriage to end. The defence therefore sought a verdict: of manslaughter but, the jury convicted of murder.’²⁵

However, the concept of sudden and temporary loss of control, cannot apply in case of Kiranjit as the evidence suggested that it was a well-thought-out plan. There was sufficient cooling off period between the provocation and the act leading to the death of the deceased. Mr. Geoffrey Robertson preferred to be guided by DPP v. Camplin²⁶. But the Lord Justice Taylor refused to be guided by this case, as the case is concerned only with definition of ‘reasonable man’.

Mr. Robertson referred to the phrase "cooling off period" which has sometimes been applied to an interval of time between the provocation

²⁵ *R v Thornton* (No 2) [1996] 1 WLR 1174 (CA).

²⁶ *DPP v Camplin* [1978] 2 All ER 168.

relied upon and the fatal act. He suggests that although in many cases such an interval may indeed be a time for cooling and regaining self-control so as to forfeit the protection of the defence, in others the time lapse has an opposite effect. He submits, relying on expert evidence not before the trial judge, that women who have been subjected frequently over a period to violent treatment may react to the final act or words by what he calls a "slow-burn" reaction rather than by an immediate loss of self-control.

Lord Justice Taylor reacted thus, "Mr. Robertson's argument in support of this ground of appeal amounted in reality to an invitation to this court to change the law. We are bound by the previous decisions of this court to which reference has been made, unless we were convinced that they were wholly wrong. Where a particular principle of law has been re-affirmed so many times and applied so generally over such a long period, it must be a matter for Parliament to consider any change.

Second line of defence according to Robertson, given by the trial judge to jury relates to characteristics of the appellant, thus, "She is an Asian woman, married, incidentally to an Asian man, the deceased living in this country. You may think she is an educated woman; she has a University Degree". The directions given by the trial judge to jury criticised by the defence. The instructions did not mention the fact that the appellant suffers from battered woman syndrome and the instructions were not open, nor permitting jury to include any other characteristics. Continuous ill-treatment produced in the appellant a

state of 'learnt helplessness'. 'The offender must be presumed to possess in general the power of self-control of the ordinary man save in so far as his power of self-control is weakened because of some particular characteristic possessed by him.' 'In the present case, there was no medical or other evidence before the judge and jury, and none even from the appellant, to suggest that she suffered from a post-traumatic stress disorder, or "Battered Woman Syndrome" or any other specific condition which could amount to a "characteristic." Lord chief Justice rejected the argument that the instructions given by the trial judge to jury were wrong but the third argument of Mr. Robertson is plausible.

“There has been put before this court a significant number of reports of a psychiatric and similar nature, most of them obtained only recently. These express the opinion that at the time of the killing, the appellant's mental responsibility for her actions was diminished within the meaning of the Homicide Act 1957”. “The present case is most unusual. We have been shown a report which was available before the trial from a recognised medical practitioner for the purposes of the Mental Health Act. That doctor expressed the opinion that the appellant was suffering from endogenous depression at the material time, a condition which, in the opinion of some experts, would be termed "a major depressive disorder". “We have concluded that it would be expedient in the interests of justice to admit the fresh evidence under section 23(1) of the Criminal Appeal Act 1968. Nevertheless, we have been driven to the conclusion that without, it would seem, any fault on

the part of the appellant, there may well have been an arguable defence which, for reasons unexplained, was not put forward at the trial. In these circumstances, we consider that the verdict must be regarded as unsafe and unsatisfactory. We emphasise that the circumstances we have described and which have led us to this conclusion are wholly exceptional. We consider the proper course here is for us to order a retrial.”

In the retrial the charge was reduced from ‘murder’ to ‘manslaughter’. And the sentence was reduced to three years and four months which she has already undergone. She was immediately released. ‘Sudden and temporary loss of control’ became, in this case ‘temporary loss of control’.

III. CONCLUSION

The cases discussed here make a very interesting reading. What effect the perpetual humiliation of a woman by a person standing in close relation has, on her mind and behaviour, became subject matter of study by psychologists long after most of the cases discussed here have been decided, yet most of the judges in the period preceding psychological studies, understood the repercussions, which is caused on battered woman mind and behaviour. These judges were as sympathetic to these women as the judges to-day are and perhaps even more, at least, in Supadi case. In Dirajia case, Braund, J. innovatively using the 4th exception to section 300, treated the background of

sufferings experienced by a battered woman, sufficient excuse to apply the exception.

Perhaps the most lenient view in favour of a battered woman was taken by Pratt, J. in Supadi case. Unlike any other judge not only he did not impute intention to Supadi, but knowledge as well. Why it was held that Supadi did not at the time of jumping into the well, know about the ailing child. Perhaps because of two reasons. First, the child was tied on her back, the existence of whom she was unaware of, in the backdrop of her mental trauma. Secondly, after being rescued from the well, when she saw the dead body of her child, tied on her, she clasped the dead body and cried bitterly. In conclusion she was let off with simple imprisonment of six month for causing death by negligence. Crump, J. was in doubt if it was a case of culpable homicide not amounting to murder or causing death by negligence, but leaned in favour of the accused, Supadi.

Most interesting case is that of Gyarsi Bai, who, on the basis of the proved facts was awarded life imprisonment, but taking into consideration her traumatised personality, recommended to the Executive to let her off after approximately 3 years imprisonment. The High Court without saying so was not satisfied with the law of homicide and mitigating provisions. Hari Prashad was rightly convicted of abetment for causing the suicide of his wife.

There are also cases where the battered woman instead of harming herself harmed the tormentor. Manju Lakra was a battered woman her

husband, almost every day under the influence of alcohol, used to beat her and threaten to kill her. On the relevant day the husband hit her on head with a stick, she retaliated with returning the blow, which caused his death. This 'grave and sudden provocation' was in the background of 'battered woman syndrome' yet the Court sentenced her to five years rigorous imprisonment. The punishment seems to be bit harsher.

The judgement delivered by Lord Chief Justice Taylor in the case of Kiranjit is an excellent example of juridical activism. This is the case which replaced the intervening period between 'the act causing death' and the 'provocation' from 'cooling down' to 'boiling over,' period. However, neither the Indian legislature nor judiciary did anything positive to make battered woman syndrome and poverty a mitigating circumstance.

III. ANALYSIS OF LIBERTY AND ITS COMPONENTS BY THE SUPREME COURT OF INDIA: A CRITIQUE

-*RANJAN KUMAR** AND *ARUSHI BHAGOTRA***

Abstract

Against the backdrop of positive and negative liberty, this paper analyses the evolution of the Indian legal system, focusing on the role of the Supreme Court of India. The courts in India have traditionally interpreted constitutional guarantees as forms of negative liberty, requiring the State to remove specific obstacles or hindrances. This approach, however, offers a limited view of liberty. When an individual approaches the Court, demonstrating that an act of the State or an administrative process hinders their liberty, the Court intervenes only if it is convinced of such an obstacle. In such cases, can we truly say the individual's choice reflects genuine liberty? Or is it influenced by an overarching system that clouds independent thinking? True self-realization requires not only the removal of obstacles but also the capacity and conditions to explore new, unknown possibilities. Ignorance is often an invisible obstacle, as the lack of information or targeted knowledge creation restricts the individual's ability to make fully informed choices. The most realistic way to understand the State's role in enabling the unhindered exercise of liberty is by recognizing that it must go beyond removing barriers. The State should empower individuals to distinguish between free choices and those driven by external influences. The State's role, therefore, should be both

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minimal and positive, aiming to capacitate individuals to genuinely realize their liberty by overcoming externally imposed, driven choices.

Keywords: *Positive Liberty, Negative Liberty, Rights, Right to Life, No-Right.*

I. INTRODUCTION

Enlightenment was neither a big bang nor a lightening within the stratosphere of the Earth. Enlightenment conceded wo/man as creator. Creator, who was omnipotent because there were no obstacles on her/his expression of their exercise of free will. This unfettered permission could be exercised and expressed in the form of art, writing, discovery or innovation. In fiction the State, originally, promised the individual to have the autonomy to express as well as create according to their capacity. It was this promise that capacitated the individual to throw away their subjugation to the super State of Church and the feudal society and submit their Rights to the State. A submission and surrender of some of natural rights in lieu of protection as well as provision; to provide the circumstances to acquire the capacity and to realise the fundamental purposes of life and remain in the State of continuous aspiration of excellence.

The constitutional democracies have evolved according to the contemporary political and social aspirations.¹ The philosophy of free will is always juxtaposed with the constraints put by the State often expressed through legal rules. From a strict consequentialist view, it is truism to say that every law is at the cost of liberty. Human beings have not imagined themselves with absolute liberty and have accepted it in a milieu of some correlative jural conception. When it comes to the liberty of an individual and his/her unfettered free will there has always been a check on the same by identifying the existence of a ‘No-Right’ in the State. This No-Right sometimes is misunderstood as lexical opposite of a Right. This No-Right permits the free exercise of liberty as well as implies a no interference zone by others. There can be two examples of actual operation of the jural concept No-Right. If X has a plate with a *Samosa* and he says “this is my *samosa* and I alone will eat it”, that means X has a right to eat it and others are under a duty not to touch it. If X says “this is my *samosa* if you want you may eat it”, then the other has a right to eat and X is under a duty not to prevent him. However, if X says “this is my *samosa* if you want you may eat it, but I do not promise not to prevent you from having it”, in this third situation neither X nor ‘you’ has a right or a duty. Both X and ‘you’ have liberty and the other is under No-Right. When a judge awards imprisonment to an accused the jailor acquires a derivative right to keep him in the jail for the duration of imprisonment. The jailor has a right to prevent him from escaping and the convict has a duty not to

¹ Andre Bételle, ‘Constitutional Morality’ (2008) *Economic & Political Weekly* 35-42.

escape. In case the attempts to escape and captured by the jailor he will be punished for violation of his duty 'not to escape'. However, when the Indian army brought a large number of Prisoners of War and put them in military custody at *Mhow*, the case of the prisoners of war is governed by the Geneva Convention, 1949, which provides that prisoners of war are under no duty to remain in the custody of the enemy. Therefore, the military jailor doesn't have a right to keep them in custody and the prisoners of war are under no duty to remain in the custody. If the prisoner of war unsuccessfully attempts to escape and is recaptured, they cannot be punished because they have not violated any duty. The military jailor has liberty to keep them incarcerated and the prisoners of war have liberty to escape both the jailor and the prisoner have corresponding jural relation of No-Right. Thus, liberty neither exists without a society nor is ever unfettered.

It is a common fallacy to think that the idea of liberty for its fluid movement does not require interference of State. It is asserted that it is not so. The State has its important place but the State is burdened by negative duty. A duty that is compelling for the State as it overlooks and preserves an individuated society. A negative duty is an antithesis of the idea of an all-powerful State. It is wrongly perceived that the State, is monstrously capable of taking away anything from the person of an individual as it is merely a grant. Right to personal liberty was and has never been a grant. The classical Lockean sense is accepted that WE never surrendered all our Rights. The most basic of those

Rights that determines us as Human is never the State's or anyone else's to take away.

On one side, individuals may face numerous opportunities, with the freedom to choose which path to follow, though the consequences—whether beneficial or harmful—are of no concern to others. On the opposite side lies the ability to make a reasoned, informed decision, highlighting the fine line between what we call negative and positive freedom. These concepts were famously introduced by Isaiah Berlin in a 1958 essay, where he coined the terms *negative* and *positive* liberty. The rationale behind these terms is that negative liberty refers to the absence of obstacles, restrictions, or interference from others, while positive liberty implies the presence of control, self-direction, or personal mastery. As Berlin framed it, negative liberty addresses the question, “What is the realm in which an individual or group should be free to act or exist without others interfering?” whereas positive liberty asks, “What or who governs the choices and actions that lead a person to pursue one path over another?”²

² ‘Two Concepts of Liberty’ was Berlin’s inaugural lecture as Chichele Professor of Political and Social Theory at Oxford University. Second and third editions were published in 1969 and 2002 respectively. For an account of the historical and philosophical background of this essay, see Ricciardi (2007). Berlin’s influences must certainly have included T. H. Green (1895) and Bernard Bosanquet (1899), who made explicit use of the distinction between positive and negative liberty and whose writings were widely studied in the Oxford of Berlin’s youth. Ricciardi also points out that the distinction is present in the work of Berlin’s Oxford contemporary John Plamenatz (1938), and that Guido de Ruggiero’s *Storia del liberalismo europeo* (1925), in which the distinction is examined at some length, was probably familiar to Berlin through its English translator, R. G. Collingwood. Another Italian

Before Berlin, John Stuart Mill, a proponent of negative liberty, compared individual development to the natural growth of a plant. Just as a plant must be allowed to flourish according to its own internal logic, so too must individuals be free to develop their own abilities. Growth and progress, Mill argued, cannot be imposed from external forces but must arise from within the person. However, some critics contend that this vision aligns more closely with the concept of positive liberty than negative liberty. They argue that positive liberty encompasses the very process of individual growth, where a person autonomously shapes and refines their desires and interests. In this sense, freedom is not simply about the absence of barriers but involves personal autonomy and self-realization. Given this, critics question whether merely removing State interference guarantees personal growth. Can there be a method that promotes positive liberty without being authoritarian?³

Against the backdrop of these concepts of liberty, this paper seeks to analyse the Indian legal system and how it has evolved with the support of the Supreme Court of India's approach. The Courts of record in our country have always understood the guarantee of the Constitution only

discussion that predates Berlin's is that of Norberto Bobbio (1955), but this work probably did not influence Berlin <<https://plato.stanford.edu/entries/liberty-positive-negative/notes.html#note-1>> accessed 22 February 2024.

³ Stanford Encyclopedia of Philosophy, 'Positive and Negative Liberty' (plato.stanford.edu, First published 27 February 2003; substantive revision 19 November 2021) <<https://plato.stanford.edu/entries/liberty-positive-negative/>> accessed 22 February 2024.

as a negative liberty that the particular obstacles or hindrance ought to be removed by the State. This gives a very narrow connotation to liberty. It is a fact that when an individual brings a matter before the Court of Law in India claiming and demonstrating an act of the State or an administrative order or administrative process and if he is able to convince the Court of the obstacles in his exercise of liberty then and only then the Court passes a speaking order directing the State to remove the said obstacles. In such circumstances can we say the choice of the person is really an exercise of liberty? Or is it driven by an existing influential system that has clouded the individual's thinking. The real unhindered self-realisation is also about having the capacity and circumstances to explore the unexplored or the unknown. These are posed choices manifested by the limitations of knowledge or lack of information. Here one of the invisible obstacles is ignorance. Or the obstacle of creating specific knowledge in targeted areas that the liberty of the individual to choose remains shrouded by ignorance. The patent and realistic way of explaining the role of the State in the individual realising unhindered exercise of liberty is to understand that it is not merely the removal of the obstacles but the capacity of the individual to discern the free choice from the posed or driven choice. The State's role becomes minimal and positive if it is directed towards capacitating the individual to truly realise the exercise of liberty and removal of hurdles brought by driven choices.

The State has the difficult task of balancing the ‘lighter version of social interest’ with ‘heavier version of individual interest’.⁴ This paper attempts to convince the reader that the ‘No-Right’ of the State can be supplemented with ‘having a Duty’ towards every individual to be capacitated to exercise their liberty guaranteed by the Fundamental Rights. It analyses specific and few Supreme Court judgments that have denied relief to a petitioner who sought to attribute a liability to the State to perform specific act for public at large so that people may realise their true capacity to exercise their fundamental right of liberty to exercise their free will. In other words, the paper may fail in convincing its reader that liberty to exercise free will towards the full self-realisation is not merely a positive Right but a negative duty of the State as well, but it will fail spectacularly.

II.

The idea of fundamental Rights as the positive Rights of the individual which the State is duty bound to facilitate for its realisation has the flaw of it being assailed and the aggrieved approaching the Court under the prerogative Writs for its restoration. Logically it is a contradictory Statement that: something exists as ‘non-derogable’ however, it is susceptible to incursion. The fact that the State and its Courts do not take it as non-derogable is drawn from the approach that the State and

⁴ In terms of utilitarian perspective, it is common to think that that social interest can easily outweigh individual interest. However, the ever-evolving individuated world asserts that individual interest is not strictly a numerical value, but a complete whole of collection of individuals whose assertion of liberty outweighs any social interest of controlling the lives of others.

Courts decide the upholding of these rights by removing the obstacles and hindrances and may react with coercion if it is derogated. In light of this ideological deficiency the attempt here is to articulate it in such a way that the Part III of the Constitution of India is seen as fundamental duties of the State towards an individual. If this is discernable and capable of being established objectively, maybe it is acceptable as enhancing the positive liberty of the individual.

In a paradoxical way, it is the negative liberty which enjoys the objective existence in the political functions exercised by the State. The manoeuvres to remove obstacles observably demonstrates the efforts of the State that enables the individual in realisation of the free exercise of her/his negative liberty. This brings a political cliché in picture. It is in line with the common intuition that they are really a liberal democracy. On the other hand, the internal aspects of liberty exist in the realm of what is truly desired. The actions towards positive liberty are not encashable in political terms by the government of the day, which makes it rather unconvincing for the State to act upon. The State take the pretext of non-availability of resources when it comes to spending money so that the individuals with limited resources may exercise their positive liberty (such as education), but they have enough resources to create non-essential facilities in favour of influential and politically powerful sections of the society (such as creation of a new legislative building though the old building was equally useable, or creation of two auditoriums in an educational institution used by powerful people).

The riveting allurements of the constitutional law lies in the affinity of the fundamental rights of an individual with the duties of the State. While fundamental Rights have typically focused on an individual's entitlements and safeguards, the idea that they mirror the fundamental duties of the State towards an individual adds a subtle layer to the conversation. It makes it, thus imperative to assay the legal authorities which have augmented to the interpretation of the Fundamental Rights with the duties attributed to the State under the Constitution of India along with the attitude of the Supreme Court of India on this Statement.

Enshrined in the Part III of the Constitution of India, Fundamental Rights acts as the nucleus of individual liberty which inter alia also protect individuals against arbitrary official acts. These rights, which range from the right to equality and freedom of speech and movement to the right to life and personal liberty, are regarded as inherent in every individual's dignity and well-being. The extent can be perceived from the inviolability of such positive rights by the authority from the fact that they constitute the basic structure of the Constitution. Granville Austin, the eminent commentator of the Constitution of India has highlighted the inclusion of such rights 'to create an equitable and inclusive society' against the backdrop of freedom struggles.⁵

⁵ Granville Austin, *Working A Democratic Constitution: A History of the Indian Experience* (Oxford University Press 1999) 38-63.

The above considerations guide us towards undertaking a review of the constitutional semantics. The said review reflects the uncertain yet essential connection between these basic rights with the adjoining obligations of the government. Article 21, for example, provides that ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’⁶ This seemingly individual-centric right suggests that the State has an underlying need to implement fair and reasonable legal systems. In his work ‘We, the People’ constitutional scholar Nani Palkhivala emphasises the interconnection of Rights and obligations, claiming that the legitimacy of basic rights is dependent on the State's willingness to protect them.⁷ What Palkhivala does not emphasise is that it is also the State’s duty to ‘provide’ which in turn ensures realisation of positive liberty by the individual. When the State wants to seek legitimacy, it is provided by (all) ‘the people’, but when article 21 is framed it gives only protection but refuses to give ‘provision’ which requires just allocation of resources. Thus, neo-individualists have a contradictory approach.

As a guarantor of the liberty of the individual, the Supreme Court of India has also spent considerable thoughts in regaling the interaction between the basic rights and obligations, albeit painfully. *Maneka Gandhi v Union of India*⁸ is a seminal decision in which the Court broadened the reach of Article 21 beyond procedural due process,

⁶ The Constitution of India, 1950 art 21.

⁷ Nani Palkhivala, *We, the People* (UBS Publishers’ Distributors Ltd. 1984).

⁸ [1978] 2 SCR 621.

recognising the right to life and personal liberty as reflecting the essence of a meaningful existence. In his concurring opinion, Justice PN Bhagwati emphasized the State's responsibility to provide not just the presence of negative liberties, but also the availability of good circumstances essential for a decent life.⁹ In following decisions, the Court has emphasized that basic rights impose a corresponding obligation on the State to aggressively preserve and fulfill these rights. The Court said in *Olga Tellis v Bombay Municipal Corporation*,¹⁰ that the right to life encompasses the right to a living, emphasizing the State's role to guarantee the socioeconomic well-being of its residents. But ultimately the substantive outcome of the case was that homeless pavement dwellers people cannot be ousted without following the principles of natural justice. The critical analysis of these decisions reflects the restricted aspect of the interpretation of the rights to recognise the positive tasks of the State.¹¹

The contours of positive liberty are assimilative of the contingencies of the needs of the society. This stands with the incorporation of fundamental duties into the Constitution of India by the 42nd Amendment in 1976, thus facilitating a substantial change in the constitutional landscape. But this 42nd Amendment conveniently fails to provide for the duties of the State towards the citizens of the country. Article 51A enumerates a list of responsibilities that people are

⁹ Ibid.

¹⁰ [1985] Supp 2 SCR 51.

¹¹ Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company, 1980).

required to fulfill, emphasizing the symbiotic link between rights and responsibilities. This link was an attempt to ensure the duty of the State to provide for circumstances of the highest realisation by the individual. Generally, most of the fundamental rights have imposed restrictions on the powers of the State in the spheres of equality and liberty. However, under Article 17 restrictions have been imposed on the individuals not to practice untouchability and a duty on the State to pass a law for the punishment of those who practice untouchability.

In *S. R. Bommai v Union of India*,¹² the Indian Supreme Court recognised the importance of basic obligations in sustaining the constitutional ethos. According to the Court, these obligations are in addition to the rights granted to individuals, and serve as a continual reminder of the delicate balance between individual liberties and community responsibilities. This judgment was accorded due applause by the eminent Legal Doyen VR Krishna Iyer for seeing the inherent relationship between rights and obligations, regarding them as two sides of the same constitutional coin.¹³

In nutshell, in the Indian constitutional framework, the link between basic rights and fundamental obligations is nuanced and dynamic. While basic rights are sometimes seen as individual entitlements, the Supreme Court of India has played an important role in recognising the

¹² [1994] 2 SCR 644, para 246.

¹³ VR Krishna Iyer, *Democracy, Equality and Freedom* (Eastern Book Company, 2003).

State's correlative obligations to individuals. Legal experts including Granville Austin, Nani Palkhivala, Upendra Baxi, Subhash Kashyap, and VR Krishna Iyer have added vital and illuminating perspectives to the discussion, emphasizing the interconnection of rights and obligations in establishing a just and inclusive society. The delicate balance between individual rights and community obligations remains a cornerstone of India's democratic culture, even as constitutional interpretation changes.

Additionally, an examination of cases in which the Supreme Court of India has been chastised for failing to safeguard the sanctity of Article 32, relegating it to the status of a *discretionary remedy*, finds situations in which the Court's commitment to defending basic rights has been called into doubt. The right to petition the Supreme Court for the enforcement of basic rights is guaranteed by Article 32 of the Indian Constitution. However, the right to petition the Supreme Court has been severally curtailed by the Supreme Court itself and the petitioners are forced to go to the High Court instead of approaching under Article 32. In most of the cases the petition under Article 32 is dismissed and the petitioner is asked to approach the High Court. This is nothing but violation of fundamental rights under Article 32 by the Supreme Court. This is done on the grounds that the Supreme Court is over worked. Can overworked be a ground for the denial of a fundamental right? There can be a simple remedy. Instead of dismissing the petition under Article 32 the petition may be transferred to the concerned High Court and if necessary, the decision of the High Court should become

effective approved by the Supreme Court. If this course is adopted the fundamental rights under Article 32 will not be frustrated. In most of the situations, the Court's discretion in accepting or rejecting Article 32 petitions has raised doubts about the uniformity and usefulness of this constitutional remedy. This effectively also affects the individual liberty and its fulfillment by the State. Nevertheless, if history ever taught us anything, it was the fact that our higher aspirational goals also stem out of mistakes of the past and finding clearly the shortcomings. In the journey of knowing and ensuring the negative aspects of liberty and the desirability of truly aspiring towards realisation of positive liberty is an endeavor that all the branches of the government have to undertake. Analysis of some of the adjudications of the Supreme Court of India in this regard does not draw a very encouraging picture.

III.

The groundwork of understanding the aspects of positive and negative liberties leads to the question, how much have we achieved the acceptance of positive liberty as a legal system. The most significant part, hopefully, played by the Supreme Court as it is considered the guardian of the Constitution and the pragmatic institution to transcend the generality of political freedom. Some of the oft quoted and academically accepted adjudications of the Supreme Court can be looked upon and how it has fallen short of its legal and social pragmatism to realise the highest.

ADM Jabalpur v Shivkant Shukla,¹⁴ (now overruled) an adjudication passed during India's only Emergency period, known as the 'Habeas Corpus case,' it was found that under a declaration of Emergency, persons did not have the right to seek the Court for enforcement of their basic rights under Article 21 through the writ of habeas corpus. In this case, the question before the Court was whether fundamental rights, particularly the right to personal liberty under Article 21 of the Indian Constitution, could be suspended during a State of emergency. The Court held that during a State of emergency, the right to personal liberty under Article 21 could be suspended. Though the dissenting opinion of H. R. Khanna, J. was a silver lining in this judgment. He opined that although fundamental right to life cannot be enforced, during emergency, but even in this national emergency the human right to life has not been eclipsed. This concept of human right finds support in Kantian concept of *a priori*.

The Court's ruling in *ADM Jabalpur* was highly criticized for failing to maintain Article 32's sanctity during a moment of crisis. Legal academics and activists contended that the Court failed to fulfill its constitutional responsibility by failing to protect basic rights when they were most threatened. The adjudications of the Supreme Court, either patently or latently, have limited the scope of judicial review during emergencies, effectively restraining the power of the judiciary to

¹⁴ [1976] Suppl SCR 172.

enforce fundamental rights through Article 32 petitions, thereby making Article 32 in essence, redundant.

The Supreme Court held that preventive detention laws could be valid if they complied with the requirements of Article 22 of the Indian Constitution, which provides safeguards against arbitrary detention. This is what has been argued that in the gradual development of upholding the liberty of individual the Court has best went on to safeguard the liberty in the negative sense. Either the adjudications suggest failure to guarantee a negative duty or acceding to it, the legal system has not ascended to the level of even making an attempt to understand the positive liberty and how it may fuel the change in social justice and the aspirations of excellence.

The Court emphasized the importance of ensuring procedural fairness and safeguards against abuse of preventive detention powers. This case reaffirmed the judiciary's role in safeguarding civil liberties and protecting individuals from arbitrary State action, particularly in the context of preventive detention. Additionally, the case basically questioned the President's authority to suspend basic rights during an emergency. The Court ruled that the President's authority to suspend rights was not immune from judicial scrutiny, although it did not overturn the clause totally.

While the Court asserted its jurisdiction to evaluate the legitimacy of Emergency provisions, opponents contend that the Court's hesitation to

strike down the clause entirely undercut the provision's strength as a remedy during emergencies. The ruling was viewed as a squandered chance to unambiguously defend basic rights. However, it can be said that these are instances that reveal the Judiciary's bare minimum attempt at upholding the significance of Article 32 as a mechanism for individuals to seek redressal for violations of their fundamental rights, thereby reinforcing the importance of judicial review in protecting civil liberties.

Further, the case of *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union of India and Ors.*,¹⁵ popularly known as 'The Privacy Judgment' rendered by the Indian Supreme Court in 2017 is considered to be a significant ruling that upheld the right to privacy as a fundamental right under the Indian Constitution. The opinion specifically highlighted the protection of privacy under Article 32, which grants citizens the ability to seek constitutional remedies. The verdict was spurred by concerns made in petitions questioning the validity of Aadhaar, India's biometric identification scheme. These issues sparked disputes regarding privacy infringement and the government's responsibility in protecting individual freedoms.

It is pertinent to know that the Court's ruling emphasized the State's obligation to safeguard individuals' privacy, which is a fundamental right, from unjustified intrusions, while also acknowledging the

¹⁵ [2018] 8 SCR 1.

importance of striking a balance between such rights and valid State concerns such as national security and public order.

The acknowledgment of such a responsibility on the shoulders of the State places an obligation on the government to establish legislation and policies that support the protection of privacy, while also considering the rights of citizens and the legitimate interests of the State. Nevertheless, it has been noted that the responsibility of the State goes beyond simply recognizing the existence of privacy rights, and should include taking aggressive steps to guarantee their enforcement and protection. Efforts are still needed to effectively implement this Court acknowledgment, requiring strong laws, institutional systems, and public campaigns. The privacy judgment underscores the interdependent connection between basic rights and the obligations of the government, underlining the government's duty to protect these rights as essential elements of a democratic society. However, the success of this legal acknowledgment of an individual's rights depends on the establishment of strong laws and institutional procedures to guarantee the efficient protection of private rights in the face of advancing technology and societal difficulties.

The popular kind of cases known in India as *Public Interest Litigation (PIL)*, have been criticized for the Court's selective treatment of petitions. In several cases, the Court has declined to intervene in matters concerning socio economic rights, considering them as concerns of policy matters better left to the executive or legislative

branches. It has attracted academic criticism that the Court's discretion in PIL matters frequently results in uneven implementation of Article 32, giving the impression that the remedy is discretionary rather than obligatory. It is often argued that this option played eagerly by the Supreme Court contradicts the objective of Article 32 as a guarantee of basic rights.

In many PIL cases, the Supreme Court's discretion in interpreting and enforcing Article 32 has been criticized.¹⁶ While the Court has definitely played an important role in protecting fundamental rights, some of its rulings have been seen as undermining the effectiveness of Article 32 as an essential and non-discretionary remedy for the protection of fundamental rights. Therefore, these judgments are not only reflective of the Supreme Court's stance on granting remedy(s) but also a portrayal of the Judiciary's understanding of the extents to which an individual's "claim for liberty" can stretch.

IV. CONCLUSION

In conclusion the question is whether the pursuit of positive liberty in the Indian legal landscape is elusive? Or it is present, but never discerned as such by the academic writers due to their myopic views.

¹⁶ *S.P. Gupta v Union of India* [1982] 2 SCR 365; *Bandhua Mukti Morcha v Union of India* [1984] 2 SCR 67.

This paper explores the intricate relationship between positive and negative liberty within the framework of the Indian Constitution. Starting by attempting to establish the foundational concept of liberty as an inherent human right, evolving from the shackles of absolute State control towards individual self-realization. However, the Indian legal system presents a complex picture, often favouring a narrow interpretation of liberty as the absence of restraint (*negative liberty*) rather than a proactive approach to empowering individuals (*positive liberty*).

The analysis of Supreme Court judgments, as provided in the preceding parts, reveals a series of missed opportunities to fully embrace positive liberty or even missed to provide an implied discussion of the same for setting the tone for future lawyers, judges and academics of our country. The infamous *ADM Jabalpur v Shivkant Shukla* (now overruled) judgement stands as a stark reminder of the judiciary's retreat from safeguarding fundamental rights during a crisis. While the recent revisiting of this case offered a glimmer of hope, the Court's hesitancy to definitively reject the original rationale left a sense of incompleteness. *Public Interest Litigation* cases further highlight the inconsistencies in the Court's approach to Article 32. For instance, the Court's reluctance to intervene in cases concerning access to basic education (a crucial element of positive liberty) contradicts the objective of Article 32 as a guarantee of fundamental rights.

The Road Ahead: Embracing the Duty to Empower

Moving forward, a shift is necessary. The Indian judiciary must recognise its role in not just protecting individuals from State overreach but also in actively facilitating the conditions for true self-realization. This necessitates viewing fundamental rights as corresponding to positive State duties. The State has a responsibility to create an environment that enables individuals to exercise their free will effectively, encompassing access to education, healthcare, and other essential resources.

The Indian legal framework, with its deep-rooted emphasis on fundamental rights, has made significant strides in protecting individual liberties. However, a more nuanced and balanced understanding of liberty—encompassing both negative and positive dimensions—is essential to aspire for a truly just society. While the judiciary has played a critical role in safeguarding against State overreach, its approach has often been reactive, focusing primarily on removing obstacles to personal freedoms rather than fostering conditions that enable citizens to thrive. The Indian judiciary has failed in one key aspect: placing adequate emphasis on the State's non-interference in certain domains of individual liberty.

To move forward, the Indian judiciary, legislature, and executive must adopt a more proactive stance, where the protection and promotion of individual freedoms are coupled with efforts to empower citizens. This requires a shift from seeing liberty merely as the absence of

interference to recognizing the State's responsibility in enabling personal development and self-realization. By ensuring access to education, healthcare, and economic opportunities, the State can help individuals exercise their freedoms meaningfully.

Ultimately, the true realization of liberty lies in the balance between protecting individuals from undue restrictions and creating an environment where they can achieve their highest potential. India's constitutional vision will only be fulfilled when this balance is achieved, leading to a more equitable and empowered society.

Recommendations:

- **Reinterpreting Article 32:** A reinterpretation of Article 32, focusing on its role as a mandatory duty of the Court rather than a discretionary power, could pave the way for a more proactive approach to enforcing positive liberty.
- **Judicial Activism for Social Justice:** The judiciary should embrace a more activist role in ensuring socio-economic rights through PILs. This requires a more balanced and consistent approach to intervention, ensuring equal access to justice for all. For instance, the Court could take a more proactive stance in PILs concerning access to quality education, particularly for underprivileged communities as the same enhances the capacity of the individual to understand and realise positive liberty.

- **Legislative and Executive Action:** The onus does not solely lie with the judiciary. The legislature and executive must also play their part by enacting progressive legislation and formulating policies that promote positive liberty. This could involve policies aimed at improving public healthcare infrastructure, creating equal opportunities for education and employment, and empowering marginalized communities.

Finally, the pursuit of positive liberty in India remains an ongoing struggle. While the Constitution provides the framework, its true realization hinges on a collaborative effort by the judiciary, legislature, and executive. A holistic approach that recognizes the State's duty to empower individuals is crucial for creating a truly just and inclusive society. By embracing a broader interpretation of Article 32, adopting a more activist approach to PILs concerning socio-economic rights, and enacting progressive legislation, India can move closer to achieving the ideal of positive liberty for all its citizens.

IV. FROM PUBLIC TO PRIVATE: EXPANDING THE SCOPE OF 'STATE' IN INDIAN CONSTITUTIONAL JURISPRUDENCE

-PRAPTI SACHAN*

Abstract

The Constitution of India, through Article 12, defines the term 'State'. After mentioning a few terms like the Government, Parliament, Legislature of the States and local authorities, Article 12 enumerates Other Authorities. There has been a great amount of confusion over-interpreting this phrase. Traditionally, this framework was understood as limited to include entities created through statutes or those under the control of the government; however, with the evolving jurisprudence and judicial opinion on this, its scope has been expanded to include agencies and instrumentalities under the purview of 'State' in specific circumstances. This chapter explores this dynamic expansion, evaluates its impact on constitutional law and governance, and analyses the constitutional rationale and practical implications of including private entities within the ambit of 'State' to enforce fundamental rights. It interrogates whether the expansion of Article 12 dilutes the distinction between State and private actions or serves as a necessary corrective in the era of privatization and corporate dominance. Additionally, the chapter considers whether this trend reinforces the transformative potential of the Indian Constitution, ensuring that private power does not escape the safeguards meant to protect individual freedoms and social justice. By contextualizing

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this expansion within the broader constitutional theory, this chapter argues that the expansion of ‘State’ strikes a delicate balance between protecting fundamental rights and recognizing the changing socio-economic landscape. Including private entities under constitutional scrutiny ultimately fosters accountability and extends the reach of constitutional governance into previously shielded private domains.

Keywords: *State, Fundamental Rights, Public Function, Privatization, Private Entities.*

I. INTRODUCTION

“The Constitution...should, wherever possible, be so construed as to apply to arbitrary application of power against individuals by centres of power.”¹

Due to the dynamic nature of society, the conflict between the rights of an individual and the ‘State’ has been quite obvious. There has been a constant struggle on the part of Statesmen to strike a balance between them.² Modern democratic States frequently use the tactic of enshrining supreme and fundamental rights of man in their Constitution and securing their inviolability through the legislative and executive branches as a means of achieving this goal. “The guarantee of

¹ KK Mathew, J, in *Sukhdev Singh v Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421.

² J S Mill, *On Liberty* (1859)

<<https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf>> accessed 21 November 2022.

fundamental rights is essentially a device whereby the autonomy of an individual is protected from encroachment by those who have power and capacity to do the same.”³ Since the possibility of encroachment has traditionally been from the State therefore the fundamental rights are those inalienable rights of individuals or unavoidable duties of the State that are intended to safeguard individual liberties and create favourable circumstances for the holistic development of a nation. They protect individuals and minority groups from arbitrary and unjust ‘State action’. But the model that granted fundamental rights against the State, which held significant powers, underwent much change in the mid-20th century due to the shift in the conception of the State.

This shift allowed private parties to shape their economic relations while providing essential public goods such as education, healthcare, transport, and commodities. The dynamic of the individual-State relationship has been transformed by the processes of globalisation and privatisation. The impact of neoliberalism has prompted a reassessment of the status and execution of fundamental rights, as well as the responsibilities of private entities, in response to worldwide changes and the corresponding growth of private influence. The Indian legal system is also subject to the aforementioned global transformation. Hence, it can be observed that the conventional notion of the State, as elucidated in Article 12⁴ of the Constitution of India, is undergoing a

³ Udai Raj Rai, ‘Reach of Fundamental rights’ (1994) 36(3) *Journal of the Indian Law Institute* <<https://www.jstor.org/stable/43952346>> accessed 21 November 2022.

⁴ The Constitution of India, 1950 art 12.

persistent transformation. The assertion and implementation of fundamental rights vis-à-vis the State is primarily motivated by the latter's exercise of power over the individuals, which confers upon it the capacity to regulate access to basic human necessities (including the right to life). Likewise, in light of changes in the concept of Statehood, in cases where non-State entities or private entities possess and exert such authority, arguably they must also be subjected to similar standards as the State. Thus, this chapter examines the cases which endorse the desirability of expanding the scope of Statehood to private entities in light of neoliberal policies of globalisation, privatisation, and divestment.

II. EMERGING CONCERNS WITH NEO-LIBERAL POLICIES

The phenomenon of Globalisation and Privatisation has led to a reduction in the prominence of the welfare state, an increase in the commodification of individuals, and a decrease in the regard for human rights and the erosion of democratic procedures.⁵ The potential privatization, either in whole or in part, of profit-generating public sector units is being considered as a means of generating funds to alleviate the government's significant debt burden. There is hardly any domain of economic progress where the participation of private enterprises is forbidden. India no longer prioritises the social ownership

⁵ VN Shukla, *Constitution of India* (MP Singh ed, 13th edn, Eastern Book Company 2013) 214.

of the commanding heights of the economy as a goal. In summary, India has moved away from the Nehruvian approach to development, despite claims to the contrary.⁶

With the growth of private entities and thereby private-public interaction and participation, the role of the State has undergone a paradigm shift. The state is now a “service facilitator” rather than a “service provider.”⁷ Gavin W. Anderson highlights the significance of neo-liberalism as a political concept in the definition of economic globalisation. Neo-liberalism accentuates the benefits of the free market and the drawbacks of large government.⁸ The Constitutional provisions pertaining to equality and distributive justice, specifically Articles 14, 15, 16, and 38, are being disregarded, resulting in a lack of adherence to social justice principles.

This phenomenon may arise due to several factors, including (i) government involvement and nexus with private enterprise; (ii) the consolidation of economic power in the hands of private corporations; (iii) the control of a vital resource or service by a private entity, necessary for the basic needs of individuals; or (iv) the undertaking of a task by a private entity that has traditionally been the sole

⁶ Udai Raj Rai (n 3).

⁷ G Bertucci and A Alberti, ‘Globalisation and the Role of the State: Challenges and Perspectives’ (2003)
<https://www.academia.edu/2087689/Globalization_and_the_Role_of_the_State_Challenges_and_Perspective> accessed 26 April 2023.

⁸ *ibid.*

responsibility of the government.⁹ The aforementioned categories serve as examples and are not comprehensive.

Contemporary observations suggest that certain marginalised groups within society are excluded from the dominant trajectory of neoliberal development strategies and planning initiatives. One significant consequence of globalisation is the gradual diminution of labourers' entitlements to minimum compensation and social welfare benefits, which has resulted in labour disputes. The disinvestment in the public sector and subsequent privatisation have had a detrimental impact on the rights of workers, as there are no legal provisions to hold private entities accountable to constitutional obligations. The current legal framework of the nation is inadequate in addressing these challenges. Despite the utilisation of public funds through public financial institutions by the private sector, affirmative action policies are absent in place for underrepresented groups within the private sector.¹⁰

The issue of displacement resulting from the establishment of Special Economic Zones and other developmental initiatives warrants consideration in this context.¹¹ The privatisation of education and medical facilities is an indication of the transfer of welfare

⁹ Kumar Kartikey, *Article 12 Meaning Scope and Emerging Judicial Trends* (Yogesh Pratap Singh ed, 1st edn, EBC 2020).

¹⁰ Sanu Rani Paul, 'The Need for Horizontal Application of Fundamental rights in India with reference to State Action Doctrine in Context of Globalisation' (2013) 2(1) Christ University Law Journal 89.

¹¹ G. Bertucci and A. Alberti (n 7).

responsibility to private entities. The evolving circumstances have raised significant concerns regarding the implementation and effectiveness of fundamental rights. These concerns are primarily rooted in the fact that the non-State actors or private entities assume a greater role such that they are in the position to perform functions that were previously performed by the State. As the role of the welfare State diminishes, these private players are more likely to infringe upon the fundamental rights of individuals.

Thus, it is clear that these non-State actors or private entities should not be allowed to violate the fundamental rights of individuals at any cost.

III. PRIVATE ENTITIES AND THE STATE UNDER ARTICLE 12

The present inquiry pertains to the potential inclusion of private entities within the purview of the term “the State” as stipulated in Article 12, and the consequent imposition of fundamental rights oversight upon them. Notably, the assurance of fundamental rights serves as a mechanism to safeguard an individual’s independence against infringement by those who possess the authority and capability to do so. Given that the State holds the governing power, it has been conventionally recognised that the potential for infringement primarily emanates from the State.¹² But under certain circumstances, the actions

¹² VN Shukla, *Constitution of India* (MP Singh ed, 13th edn, Eastern Book Company 2013) 214.

of a private entity may bear resemblance to those of a public authority, blurring the line between them.¹³ A private entity may exert control over the lives of others in significant ways. Consequently, it is logical to propose that in such situations, the private entity should adhere to the same standards as a public authority. It is appropriate to consider the private party as equivalent to the State and subject them to the regulations outlined in fundamental rights.

IV. APPLICATION OF TESTS ENUNCIATED BY THE COURT TO PRIVATE ENTITIES

The Judges of the Supreme Court have articulated various tests that can be utilised to determine if private entities fall under the purview of the term “the State” and are consequently subject to limitations on fundamental rights. These tests are formulated in a manner that enables their application to private entities.

A. Entities on which powers are conferred by law

Bhargava, J, in the case of *Rajasthan SEB* case¹⁴, has contended that the term “other authorities” mentioned in Article 12 encompasses all constitutional or statutory authorities that have been bestowed with powers by law.¹⁵ The aforementioned statement suggests that a private entity could potentially be included in this observation as long as it is

¹³ *ibid.*

¹⁴ *Rajasthan SEB v Mohan Lal* AIR 1967 SC 1857.

¹⁵ *ibid* 1863.

granted legal powers, which need not necessarily be sovereign in nature as previously assumed.

B. *The Agency Instrumentality Test*

Mathew J's concurring opinion in *Sukhdev Singh v Bhagatram*¹⁶ outlines the criteria for ascertaining whether an entity constitutes an agency or instrumentality of "the State," is phrased in a manner that is sufficiently inclusive to encompass private entities within the purview of Article 12.¹⁷ According to him,

'The Constitution, therefore, should, wherever possible, be so construed as to apply to arbitrary application of power against individuals by centres of power... the corporate organisations of big business and labour are no longer private phenomena; that they are public organisms and that constitutional and common law restrictions imposed upon State agencies must be imposed upon them... The emerging principle appears to be that a public corporation being a creation of the State is subject to the constitutional limitation as the State itself.'

However, it is important to note that he explicitly refrained from expressing any stance on the relevance of these criteria to private

¹⁶ *Sukhdev Singh v Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421.

¹⁷ Kumar Kartikey (n 9).

corporations or analogous organisations. In his opinion, the Constitution must be interpreted in a manner that curbs the arbitrary exercise of power by centres of authority against individuals, to the fullest extent feasible. To meet the criteria of State action, the entity or organisation doesn't need to exert authority in the manner of issuing commands in the Austinian sense or possessing sovereign power to promulgate laws or regulations with the force of law.¹⁸

C. The Public Function Test

This forms the basis for the functional approach which adopts an individual-centric viewpoint, wherein the guaranteed rights of the individual serve as constraints on the sovereign authority of the State. This means that the entities that possess the ability to impact said rights in a manner akin to that of the State are equated with the State.

The cases of the *Airport Authority of India*¹⁹ and the *Ajay Hasia*²⁰ shifted the focus to the “nature of functions” carried out by the authority. Bhagwati, J, acknowledged that “the public nature of the function, if impregnated with governmental character or “tied or entwined with Government” or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government.”²¹

¹⁸ *Sukhdev Singh* (n 16) 452.

¹⁹ *Ramana Dayaram Shetty v International Airport Authority of India* (1979) 3 SCC 489.

²⁰ *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722.

²¹ *Ramana Dayaram Shetty* (n 19) 510.

In the case of *BCCI v Cricket Assn. of Bihar*,²² even when the Court did not call the body State under Article 12, it made it amenable to writ jurisdiction under Article 226. In doing this, the Court emphasized ‘public functions’ performed by the private body.²³

Given the circumstances, it is posited that private enterprises can be encompassed within the purview of “the State”, particularly in instances where a private enterprise is involved in carrying out activities that are essential to society and are inherently significant enough to be regarded as governmental functions.

D. Oleum Gas Leak Case

The Supreme Court of India has provided positive indications regarding the inclusion of private corporations under Article 12 in the case of *M.C. Mehta v Union of India*.²⁴ The court has examined the matter of whether a private entity that performs significant public functions can be regarded as the State. The case originated from the writ petitions instituted against *Shriram Foods and Fertilisers Ltd.* under Article 32 of the Constitution, after the occurrence of leakage of Oleum gas from one of its factories. The primary matter at hand for the Court pertained to the maintainability of a writ petition under Article 32, which alleges the infringement of rights under Article 21 of the Constitution, against a private enterprise, namely *Shriram Foods and*

²² *BCCI v Cricket Assn. of Bihar* (2015) 3 SCC 251.

²³ *ibid.* 282.

²⁴ *MC Mehta v Union of India* (1987) 1 SCC 395.

Fertilisers Ltd (hereinafter, *Shriram*). To resolve this matter, it was imperative to first determine whether *Shriram* qualified as the State under Article 12.

The Court examined the Industrial Policy Resolution, 1956 and the industries (Development and Resolution) Act, 1951. It was observed that *Shriram*, the respondent, primarily engaged in the production of fertilizers and chemicals. The government deemed this activity to be of significant public interest, and therefore, the government needed to carry out this activity.²⁵ However, *Shriram* was allowed to carry it under the government's control during the interim period. Aids like loans, land, and other facilities were also granted to it by the government. The Court determined that the respondents were involved in what can be referred to as governmental functions. Then the Court analyzed the implications of implementing the State Action doctrine, as articulated by the US Supreme Court. However, it refrained from rendering a determination regarding the potential applicability of said doctrine in India.²⁶ The Court acknowledged the applicability of the principle that State aid, control, and regulation can imbue an activity with the characteristics of State action, even in the context of India.²⁷

D.1 The Court's determination of the specific issue

The Court while deciding on the functional criteria noted,

²⁵ *MC Mehta* (n 24) 416.

²⁶ *MC Mehta* (n 24) 417.

²⁷ *ibid.*

‘ Whilst deliberating on the functional criteria, namely, that the corporation is carrying out a governmental function, the court emphasised that classification of a function as governmental should not be done on earlier day perceptions but on what the State today views as an indispensable part of its activities. ’²⁸

It further reiterated *R.D. Shetty's case*,²⁹ Mathew, J's, opinion in *Sukhdev Singh*³⁰ that;

‘ Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed by government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions. ’³¹

The Court observed that the power of the States as an economic agent, entrepreneur, and allocator of economic benefits is subject to fundamental rights limitations. Therefore, it questions why a private corporation, which is under the functional control of the State and engaged in a hazardous activity, which the State ultimately proposes to exclusively run this activity under its industrial policy, that affects

²⁸ *MC Mehta* (n 24) 412.

²⁹ *Ramana Dayaram Shetty* (n 19).

³⁰ *Sukhdev Singh v Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421.

³¹ *MC Mehta* (n 24) 412.

public health and safety and is imbued with the public interest, should not be subject to the same limitations.³² The Court noted that,

*“... constitutional guarantees ... should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. The courts should be anxious to enlarge the scope and width of the fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the fundamental rights.”*³³

The Court has stated that it broadened the scope of Article 12 with the primary objective of instilling reverence for human rights and social consciousness within the corporate framework. The objective of expansion has not been to undermine the *raison d'être* of establishing corporations but rather to promote the development of human rights jurisprudence.³⁴ The advancement of human rights jurisprudence in our nation has been achieved to a significant degree through imaginative interpretation and daring innovation. The progress of the human rights movement must continue unabated, despite the baseless

³² *ibid.*

³³ *MC Mehta* (n 24) 413.

³⁴ *MC Mehta* (n 24) 418.

concerns articulated by those who wish to maintain the current state of affairs.³⁵

The aforementioned observations of the Court serve as a distinct indication that the Court made an effort to encompass *Shriram*, within the scope of Other Authorities in the definition of the State under Article 12, in its capacity as a private entity performing governmental functions and subject to government oversight. Strangely, the Court did not provide a conclusive statement regarding whether *Shriram*, a private corporation, would fall within the ambit and scope of Article 12, citing insufficient time as the reason.

D.2 Limitations of the Court's determination of the specific issue

The Court conducted a thorough examination of the status of *Shriram* to determine whether it falls under the purview of the State as defined in Article 12. However, it did not provide any definitive statement regarding this matter. Certain authors have posited that the query of whether *Shriram* qualified as the State under Article 12 was intentionally left unresolved by the Court in order to forestall a flood of writ petitions that would endeavour to subject private enterprises to writ proceedings, alleging violations of fundamental rights.³⁶

³⁵ *ibid.*

³⁶ Kumar Kartikey (n 9).

The present scenario pertains to a case where the Court exceeded its jurisdictional limits.³⁷ The Court's decision to entertain the writ petition under Article 32 was premature as it did not first determine whether *Shriram* qualified as the State under Article 12. A judicial order lacking jurisdiction or failing to adhere to the pertinent provisions of the Constitution is *per incuriam* and not legally enforceable.³⁸

E. Union Carbide Case

Ranganath Misra, CJ, (concurring) in *Union Carbide Corpn. v Union of India*,³⁹ while dealing with the review petition regarding the propriety and fairness and the conscionability of the settlement of the claims of victims, interpreted:

‘ In M.C. Mehta case no compensation was awarded as this Court could not reach the conclusion that Shriram (the delinquent company) came within the meaning of “State” in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution. Thus what was said was essentially obiter.’⁴⁰

F. Bichhri Village Case

³⁷ Kumar Kartikey (n 9).

³⁸ *ibid.*

³⁹ *Union Carbide Corpn. v Union of India* (1991) 4 SCC 584.

⁴⁰ *ibid.* 607.

This case of *Indian Council for Enviro-Leal Action v Union of India*⁴¹ originated from a petition submitted under Article 32 before the Supreme Court, alleging that the pollution control authorities were permitting the uncontrolled persistence of environmental pollution caused by private industrial units situated in and around the Bichhri village of Udaipur district in Rajasthan. The situation is alleged to violate Article 21 of the residents of the area. The respondents argued that they were not considered as the State under Article 12 and hence were not subjected to proceedings under Article 32, citing Misra, CJ's remarks in the *Union Carbide Corpn*⁴² case.

However, the Court did not agree with the observations of Mishra, CJ, in the *Union Carbide*⁴³ case and it noted that,

*“We on our part find it difficult to say, with great respect to the learned Chief Justice, that the law declared in Oleum Gas Leak case is obiter. It does not appear to be unnecessary for the purposes of that case. Having declared the law, the Constitution Bench directed the parties and other organisations to institute actions on the basis of the law so declared.”*⁴⁴

It was further observed that the present writ petition is not primarily intended to obtain a suitable writ order or directives against the respondents. Rather, it is directed towards the Union of India, the Government of Rajasthan, and the RPCB to mandate them to fulfil their

⁴¹ *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212.

⁴² *Union Carbide Corpn.* (n 39).

⁴³ *ibid.*

⁴⁴ *Indian Council for Enviro-Legal Action* (n 41) 242.

statutory obligations as prescribed by the different legislations.⁴⁵ The basis for this petition is the contention that the failure of these entities to discharge their statutory duties is significantly impeding the right to life of the inhabitants of Bichhri village and the affected region, which is guaranteed by Article 21 of the Constitution. If the aforementioned authorities are found to have neglected their legal obligations and that their lack of action poses a threat to the right to life of the citizens of the nation or any particular group therein, it is incumbent upon this Court to intercede.⁴⁶

F.1 Limitations of the decision in the Bichhri Village Case

The decision, in this case, raises an intriguing point of similarity with *M C Mehta v Union of India*,⁴⁷ such that the Court refrained from definitively determining whether private entities meet the criteria for inclusion in the definition of the State under Article 12 of the Constitution. Despite expressing the opinion that the pronouncements made by Bhagwati, J, regarding the status of a private corporation in the case of *MC Mehta v Union of India*, were not merely obiter dicta but rather an accurate statement of the law, the outcome was still unfavourable. It is contended that in the *Bichhri Village* case, the Court endeavoured to employ the approach utilised in *MC Mehta v Union of India*, wherein a party is held accountable without rendering a verdict on a crucial issue necessary for determining the liability being imposed.

⁴⁵ *Indian Council for Enviro-Legal Action* (n 41) 238.

⁴⁶ *ibid.*

⁴⁷ *MC Mehta* (n 24).

G. SRM University Case

The education sector in India has experienced significant growth, positioning it as a key player in the global education market. Universities in India are either established through the enactment of legislation by State Legislatures or have been granted the status of a deemed university by the UGC, as per Section 3 of the UGC Act.

The case of *Dr. Janet Jeyapaul v SRM University*⁴⁸ pertains to the maintainability of a writ petition against SRM University, which is classified as a deemed university under Section 3 of the UGC Act. The petitioner submitted a writ petition alleging the unjust termination of her employment by the University. This termination of the petitioner was overturned by the single Judge of the Madras High Court. Subsequently, the University contested the ruling of the initial Judge through an appeal, and the Division Bench of the Madras High Court, upon overturning the ruling, determined that a Deemed University does not qualify as the State or an authority within the meaning of Article 12 of the Constitution. Therefore, it is not subject to the writ jurisdiction of the High Court under Article 226 of the Constitution to scrutinise the legality and accuracy of the dismissal order. The petitioner, dissatisfied with the aforementioned verdict, sought recourse with the Supreme Court.

Due to the notable legal implications at hand, the Supreme Court sought the assistance of Mr. Harish Salve as an *amicus curie* to

⁴⁸ *Dr Janet Jeyapaul v SRM University* (2015) 16 SCC 530.

facilitate a thorough understanding and resolution of the pertinent issues in the case. Based on his assistance, the Court observed,

“...while deciding the question as to whether the Writ lies under Article 226 against any person, juristic body, organization, authority etc., the test is to examine in the first instance the object and purpose for which such body/authority/organization is formed so also the activity which it undertakes to fulfil the said object/purpose...there has been a consistent view...that the approach of the Court while deciding such issue is always to test as to whether the concerned body is formed for discharging any “public function” or “public duty” and if so, whether it is actually engaged in any public function or/and performing any such duty...If the aforesaid twin test is found present in any case then such person/body/organization/authority, as the case may be, would be subjected to Writ Jurisdiction of the High Court under Article 226.”⁴⁹

The Supreme Court has overturned the ruling of the Division Bench of the High Court and has instructed the Division of the High Court to reconsider the respondent’s appeal based on the question of whether the single Judge’s decision to allow the writ petition on its merits was justified. The Court, in this case, blurred the differentiation between a

⁴⁹ *ibid* 533-534.

body that is endowed with a specific legal status under a statute and a body that is established by the statute. As per the ruling of the Supreme Court, the petition was deemed maintainable under Article 226 of the Constitution. This was because SRM University had been established to carry out a “public function” and was actively engaged in doing so. In doing so, the Court made a unique observation,

*“...being a “Deemed University”, all the provisions of the UGC Act are made applicable to Respondent 1, which inter alia provides for effective discharge of the public function, namely, education for the benefit of the public...once Respondent 1 is declared as “Deemed University” whose all functions and activities are governed by the UGC Act, alike other universities then it is an “authority” within the meaning of Article 12 of the Constitution. Lastly, once it is held to be an “authority” as provided in Article 12 then as a necessary consequence, it becomes amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.”*⁵⁰

G.1 Limitations of the findings of the Supreme Court

It is humbly submitted, the appropriate assessment for ascertaining whether a specific entity falls under the purview of Other Authority as stipulated in Article 12 involves evaluating whether it is subject to the State’s “functional, financial and administrative” control. The

⁵⁰ *ibid* 538.

determination of a body's legal status by a statute does not guarantee nor is it the sole criterion for its inclusion in Article 12. In this instance, it appears that the Supreme Court has determined that the inclusion of SRM University under the UGC Act results in its classification under Article 12, without conducting an assessment of whether the control test has been met.

The Public Function test is deemed adequate for invoking Article 226, in contrast to the more rigorous Control test stipulated under Article 12. The entirety of the argument, in this case, centres around the concept of "public function," and without any further examination of relevant legal precedents, a conclusion is drawn regarding Article 12. The rationale behind the Supreme Court's need to delve into Article 12 remains ambiguous. The reasoning of the Court has elicited apprehension regarding the prospective trajectory of legal developments in this regard.

H. Kaushal Kishore Case

The Supreme Court's Constitution bench issued a verdict in January 2023, in the matter of *Kaushal Kishor v State of Uttar Pradesh*.⁵¹ One of the issues presented before the Court pertained to the justiciability of fundamental rights enshrined in Articles 19 and 21 of the Constitution vis-à-vis non-state entities or their instrumentalities. The

⁵¹ *Kaushal Kishor v State of Uttar Pradesh* (2023) 4 SCC 1.

inquiry pertained to the scope and constraints of Article 12 of the Constitution. Remarkably, it was held by the majority of 4:1 that:

“A fundamental right under Articles 19/21 can be enforced even against persons other than the State or its instrumentalities.”⁵²

H.1 The majority opinion on the issue

The ruling of the majority, which includes Nazeer, Gavai, Bopanna, and Ramasubramanian, JJ, is based on three distinct reasons. The first being, the Supreme Court conducted a theoretical review of legal practises concerning horizontality in foreign jurisdictions, such as the United States, Ireland, South Africa, and the European Union.⁵³ A discernible pattern has been identified in international courts with regard to the implementation of legal entitlements against non-State actors. Secondly, the provisions outlined in Part III of the Constitution, pertaining to fundamental rights, are not exclusively designed to be enforceable against the State and its instrumentalities. As exemplified, the language employed in Article 17 does not pertain to the endorsement or involvement of untouchability by the State, thereby allowing for the enforcement of the right against untouchability on private entities/individuals as well.⁵⁴ Thirdly, the Supreme Court conducted a thorough analysis of its prior rulings to demonstrate that there exists a longstanding precedent of enforcing fundamental rights

⁵² *ibid* 113.

⁵³ *ibid* 92-101.

⁵⁴ *ibid* 101-105.

against private individuals.⁵⁵ With regard to Article 12, the majority viewpoint is that the test conducted pursuant to Other Authority under Article 12 has been diluted as a result of judicial rulings throughout time.⁵⁶

H.2 The dissenting opinion on the issue

In her dissent, Nagarathna, J, observed that the rights enshrined in Part III of the Constitution were intended to regulate the relationship between the State and its citizens, rather than between two private individuals or citizens. From her perspective, the reason for the definition of the State in Part III can be attributed to this particular relationship. The sole exception to this rule pertained to the implementation of the writ of *habeas corpus*, which is applicable against private individuals who have unlawfully detained or confined somebody.

The learned judge made an important observation with respect to the distinction between a fundamental right and common law right and the corresponding remedy:

‘Though the content of the fundamental right may be identical under the Constitution with the common law right, it is only the common law right that operates horizontally except when those fundamental rights have been transformed into statutory rights under specific

⁵⁵ *ibid* 105-113.

⁵⁶ *ibid* 113.

*enactments or where the horizontal operation has been expressly recognised under the Constitution.*⁵⁷

For the status of the violator of the rights, she observed:

*'Where the interference with a recognised right is by the State or any other entity recognised under Article 12, a claim for the violation of a fundamental right would lie under Articles 32 and 226 of the Constitution before this Court or before the High Court, respectively. Where interference is by an entity other than State or its instrumentalities, an action would lie under common law and to such extent, the legal scheme recognises horizontal operation of such rights.'*⁵⁸

The judge identified three concerns regarding the majority's decision: Firstly, if there exists an alternative and efficacious remedy for enforcing common law rights, which overlap with fundamental rights under Articles 19 and 21, then providing a remedy under the writ powers of the Supreme Court may be futile; Secondly, disputes regarding rights violations may involve intricate factual questions, which a Constitutional Court is not authorised to address; and Thirdly, the notion of Part III regulating the relationship between the State and its citizens, as indicated by the presence of Article 12 in Part III, is

⁵⁷ *ibid* 193.

⁵⁸ *ibid* 192.

undermined since Articles 19 and 21 are inherently designed to govern such a relationship.

H.3 The limitations of the judgment with respect to the specific issue

The majority has demonstrated a progressive approach towards the implementation of fundamental rights against private entities. Nevertheless, the Supreme Court has utilised relatively loose reasoning to reach its conclusion. It is submitted that the majority holding of the issue suffers from the following limitations.

H.3.1 Ignorance of the important precedents

The majority of individuals have selectively disregarded other rulings that have rendered contradictory decisions. For instance, the case of *PD Shamdasani v Central Bank of India Ltd.*⁵⁹ supports the argument that non-state entities cannot be held accountable under Article 21.⁶⁰ In this case, the Apex Court held that the phrase ‘procedure established by law’ as stated in Article 21, which is defined under Article 13 as a ‘law’, can only be brought into effect by the State (except for customs which may be uncodified). This interpretation precludes the possibility of non-state entities being subject to Article 21. Nonetheless, in *Kaushal Kishor* Court fails to provide any rationale for disregarding the binding precedent and not adhering to it.

⁵⁹ *PD Shamdasani v Central Bank of India Ltd* 1951 SCC 1237.

⁶⁰ *Kaushal Kishor* (n 51) 193.

Similarly, the decision in *Zoroastrian Cooperative Housing Society Limited v District Registrar*.⁶¹ This case pertains to the challenge against the bye-laws of a society located in Mumbai on the grounds of contravention of Article 19(1) of the Constitution of India. The impugned bye-laws were challenged on the basis that they allowed solely the members of the Parsi community to qualify as eligible members of the association. The Supreme Court has ruled that the challenge in question is not valid, as a cooperative society does not fall under the definition of the State as per Article 12. Therefore, the enforcement of rights such as movement, association, and trade, which are guaranteed under Article 19(1), cannot be carried out against a cooperative society through a writ under Article 32. Thus, it disapproved of the horizontal operation of fundamental rights.⁶² The verdict in *Kaushal Kishor* has however made Article 19(1) has been implemented horizontally, without taking into account the mentioned case.

H.3.2 The erroneous reliance on several precedents

This case analysed a series of cases that purportedly expanded the scope of fundamental rights to non-state actors, as determined by the majority. The text proceeds to provide a comprehensive summary of sixteen cases, encompassing those that pertained to positive obligations

⁶¹ *Zoroastrian Cooperative Housing Society Limited v District Registrar* (2005) 5 SCC 632.

⁶² *Kaushal Kishor* (n 51) 194.

such as *Vishaka v State of Rajasthan*⁶³; those that dealt with the interpretation of the term “the State” as in *Zee Telefilms*⁶⁴; those that concerned direct horizontality like *Indian Medical Association v Union of India*⁶⁵, and those that were not germane to the issue at hand, such as *Society for Unaided Private Schools for Rajasthan v Union of India*.⁶⁶ After analysing these judgments, the majority acknowledges that these decisions demonstrate the Court's application of the horizontal effect on a case-by-case basis, taking into account the violated right's nature and the violator's obligation. It is noteworthy that the decisions rendered by the Supreme Court, which emphasise the evolving nature of law by underscoring the purported judicial inclination towards the horizontal enforceability of fundamental rights, are not germane to the present case. This is because they are predicated on distinct contexts, with some involving the notion of positive obligation and others about the instrumentality of the State.

Moreover, the majority opinion draws upon the significant ruling of the Court in the case of *Justice KS Puttaswamy (Retd.) v Union of India*.⁶⁷ However, it has been noted that the majority opinion contains an unusual error, as pointed out by Nagarathna, J, in her dissent. Specifically, the majority opinion cites a paragraph from the aforementioned case that contradicts the decision reached by the

⁶³ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

⁶⁴ *Zee Telefilms Ltd v Union of India* (2005) 4 SCC 649.

⁶⁵ *Indian Medical Association v Union of India* (2011) 7 SCC 179.

⁶⁶ *Society for Unaided Private Schools for Rajasthan v Union of India* AIR 2012 SC 3445.

⁶⁷ *Justice KS Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1.

majority itself. In the case of *KS Puttaswamy*, SA Bobde, J, explicitly ruled that:

‘Fundamental rights...provide remedy against the violation of a valued interest by the “State”, as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the state.’⁶⁸

The statement explicitly indicates that common law rights possess horizontal applicability, whereas fundamental rights possess vertical applicability. But in *Kaushal Kishor*, the conclusion has been made that a fundamental right under Article 19/21 can be enforced against entities other than the State or its instrumentalities, without providing any explanation for the reasoning behind this conclusion.

H.3.3 Endorsement of “Unbounded” Direct Horizontality

It is evident that not every violation of Articles 19 and 21, as well as other constitutional provisions, may necessarily result in a constitutional remedy through writ proceedings. For instance, In the scenario where X has entered into a contractual agreement with Y and subsequently fails to remunerate Y for services provided, the appropriate legal recourse would be to pursue action against X under the purview of contract law. It would not be viable to pursue legal action against X for violating one's right to livelihood as enshrined in

⁶⁸ *ibid* 539.

Article 21.⁶⁹ Upon examining Part III of the Constitution, it becomes apparent that the Constitution explicitly designates the application of fundamental rights horizontally in instances where it is intended to do so (as evidenced by Articles 15(2), 17, 23, and 24). It can be inferred that horizontal application does not apply to other rights. The majority in *Kaushal Kishor* did not engage with this argument.

H.3.4 Total disregard of Article 12

Although the test under Article 12 is recognised (where the court commented about the changing jurisprudence concerning the scope of Article 12)⁷⁰, the majority's engagement with it is lacking in substance.

Firstly, the majority posits that judicial rulings have diluted the potency of the examination conducted pursuant to Article 12. However, this assertion is not supported by the reality. The ruling in *Ajay Hasia*⁷¹ has led to the establishment of specific criteria that a body must meet in order to be considered as the State under Article 12. This standard has been further clarified in subsequent cases, including *Pradeep Kumar Biswas*.⁷² Consequently, the examination conducted in accordance with Article 12 has become more stringent.

⁶⁹ Gautam Bhatia, 'Kaushal Kishor, Horizontal Rights, and Free Speech: Glaring Conceptual Errors' (*Indian Constitutional Law and Philosophy*, 27 January 2023) <<https://indconlawphil.wordpress.com/2023/01/27/kaushal-kishor-horizontal-rights-and-free-speech-glaring-conceptual-errors/>> accessed 30 April 2023.

⁷⁰ *Kaushal Kishor* (n 51).

⁷¹ *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722.

⁷² *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* (2002) 5 SCC 111.

Secondly, the ultimate conclusion arrived at by the majority contradicts this recognition. In the event that private entities are held accountable for upholding fundamental rights, the assessment of their eligibility for such enforcement under Article 12 would become redundant. This raises the question as to whether the extensive legal principles that the courts have established over several decades in defining the boundaries of the State under Article 12 were ultimately futile.

The conclusion drawn by the majority not only assumes the absence of a test but also disregards the entirety of Article 12. It is thus submitted that there is a clear gap of reasoning in justifying the aforementioned logical leap from the presence of a certain test to the non-existence of any test.

To date, any assertions pertaining to violations of Articles 19 and 21 have necessitated that the infringer satisfies the prerequisites outlined in Article 12. Eliminating such a condition would result in a significant increase in private disputes that would be brought before the writ courts. Apart from imposing an excessive burden on the writ courts, these private conflicts would necessitate the writ courts to settle contentious factual issues. This would represent a significant deviation from the long-standing convention of writ courts refraining from considering such inquiries.

IV. CONCLUSION

The *Zee Telefilms*⁷³ case sparked an adequate discussion in the field of constitutional law regarding whether or not private organizations can be included among the Other Authorities under Article 12 in order to carry out public functions or the functions that the State has historically and solely performed and has divested in favour of such organizations. The neoliberal culture has compelled us to reconsider the status and application of fundamental rights as well as the liabilities of private entities, given that the role of the welfare state is waning and that these private players are more likely to violate individuals' fundamental rights. As discussed above, the Supreme Court examined the propriety of expanding the scope of the traditional concept of Statehood to private entities. Notably, every inquiry concerning applying fundamental rights to private entities must first pass the test under Article 12. Since there has been no decision in definite terms by the Supreme Court in this regard, and even the case of direct horizontality in the case of *Kaushal Kishore*⁷⁴ suffers from limitations in many aspects. One of the aspects is that if private entities are held accountable for upholding fundamental rights, assessing their eligibility for such enforcement under Article 12 would become redundant. In the words of Bhagwati J, "*The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction.*"⁷⁵ As a

⁷³ *Zee Telefilms Ltd* (n 64).

⁷⁴ *Kaushal Kishor* (n 51).

⁷⁵ Bhagwati, J, in *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

result, it is critical that the view of fundamental rights as negative rights be reconsidered and affirmative duties be imposed on all centers of authority to ensure that constitutional promises are effectively and emphatically met. Private entities should be held accountable for safeguarding fundamental rights crucial to the Constitution's basic ideas. The constitutional provisions should not be taken as simply legal precepts. The makers of the clauses hoped to foster the spread of a new constitutional culture. If we exclude the rapidly expanding private sector from the purview of these rights, the growth of this constitutional culture will be limited and incomplete.

V. HOMO SACER: THE CONDITIONALITY OF HUMAN RIGHTS ON FUNDAMENTAL RIGHTS

- KAUSTUBH SONI*

Abstract:

This paper aims to explore the complex relationship between human rights, fundamental rights, and the concept of Homo Sacer, a life deemed bare of political value and stripped of legal protections. It argues that while universal human rights are an ideal, their practical implementation faces limitations. It is being examined as to how citizenship status and sovereign power can influence the entitlement to and enforcement of human rights. The notion of absolute human rights can be academically challenged, arguing that political considerations and citizenship status can influence the realisation of human and fundamental rights. The concept of Homo Sacer exposes the limitations of human rights framework, particularly in exceptional circumstances and for individuals deemed outside the political and legal system. The paper emphasizes the importance of fundamental rights enshrined in constitutions as they offer stronger legal protections compared to human rights alone. Conclusion highlights the ongoing struggle for universal human rights and the need for a nuanced understanding that considers the complexities of political realities.

Keywords: *Human rights, Fundamental rights, Homo Sacer, Citizenship, Sovereign power.*

I. INTRODUCTION

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Throughout history, humans have grappled with the complex question of human rights and whether they are inherent or a grant. Social Contract theorists like Thomas Hobbes and Jean-Jacques Rousseau have made a distinction between natural life and political life. Natural life emphasizes the fundamental aspect of simply being alive, prioritizing this over the quality of one's lifestyle. On the other hand, political life involves classifications such as citizen, non-citizen, or refugee, which influence one's status and experience. According to social contract theorists, in the state of nature there was neither State, nor society, nor law. In their conceived State of Nature, the subjects seemed to live a natural life, which they had to give up for a political life to enter into a cooperative and peaceful society regulated by law. In our contemporary world, it appears that no life can fall in the former category because any seemingly apolitical or natural life would always arise out of its active exclusion from the political system. Further, this line of thinking is the concept of Homo Sacer given by the Italian philosopher Giorgio Agamben in his book "Homo Sacer: Sovereign Power and Bare Life".¹ Translated literally as 'Sacred Man,' Homo Sacer is a life that exists outside the political State. This life of a Homo Sacer, disassociated from any political value, makes her/his killing justifiable, but such killing cannot be called murder because she/he does not have any legal right to life. Agamben in his book argues that this life is not inherently apolitical; on the contrary, it is a political decision of the state to make it so that this life remains outside of the

¹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press 1998)

political protection. This human being deprived of her right to life does not exist as a legal entity and is subject to the coercive brute power of the State. The Nazi Concentration camp² is a significant instance of the creation of Homo Sacer, which finds its most significant manifestation in the Jews who were systematically deprived of citizenship and their legal right to life under the Reich Citizenship Law³.

This raises concerns about the human rights of Jews in relation to the concept of Homo Sacer. Why does the most urgent need for human rights often coincide with their denial? Are human beings not entitled to fundamental rights simply by virtue of their humanity?

Contrary to the common understanding, entitlement to Human Rights just by virtue of being human is not a necessary reality. Every life holds a specific value within the political system, with citizens often having greater access to rights than refugees, making human rights conditional of having a legal identity like that of a citizen. Treating Human Rights as Fundamental Rights is the only way to guarantee their protection for the majority. However, with Fundamental Rights, there comes a definite distinction between those who are entitled to them and those

² Ulrich Raulff, 'An Interview with Giorgio Agamben' (2005) 5(5) German Law Journal <<https://doi.org/10.1017/S2071832200012724>> accessed 20 February 2024

³ 'The Nuremberg Race Laws', Holocaust Encyclopedia, (United States Holocaust Memorial Museum) <<https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-race-laws>> accessed 20 February 2024

who are not. This very distinction presents a significant challenge to the universal ideal of human rights.

II. HOMO SACER AS A CHALLENGE TO HUMAN RIGHTS

Agamben talks about a state of exception, a space where the law is suspended, and the sovereign exerts total control without limitations. Even the most robust Human Rights framework can be selectively disregarded when a certain group of humans are deemed outside political protection. Anyone or any institution that operates in this state of exception has sovereign power; this could even include doctors deciding to turn off life support for a comatose body or a judge sentencing someone to death. Here, we can say that Human Rights are the rights of citizens and not of stateless people beyond legal protection. The German-Jewish political philosopher Hannah Arendt stressed that political equality is not a natural Human Right but a constructed attribute of citizenship. This equality only exists within a functioning democratic political system⁴.

This state of exception is analogous to our modern-day state of emergency. The Emergency period in India from 1975 to 1977 witnessed countless major Human Rights violations like arbitrary

⁴ ‘Hannah Arendt’, Stanford Encyclopedia of Philosophy (Spring edn, 2024) <<https://plato.stanford.edu/entries/arendt/#CitiPublSphe>> accessed 20 February 2024

detention, imprisonment, slum clearance, and forced sterilisation⁵. Which would have been prohibited under normal circumstances. However, Agamben points out that this 'State of Emergency' can often become the normative operational structure for a selectively disregarded group of humans; wherein such acts violating their Human Rights not only become permissible, but it becomes legally impossible to commit crimes against them.

Agamben also used the term 'Bare Life' to refer to Homo Sacer, the life that is bare of any political qualifications or descriptors. However, the fact that creating Homo Sacer is a sovereign decision indicates its relation to politics. The life that is dehumanized still holds a particular value to it. In contrast, Homo Sacer is made to seem like it is a natural valueless life. To simplify, the active and intentional exclusion of natural life from a politically qualified life is, at the same time, its inclusion in it⁶. This blurring between political life and natural life pushes Homo Sacer into a 'State of Indistinction.' In this state of indistinction, all human rights remain suspended.

III. HUMAN RIGHTS AND FUNDAMENTAL RIGHTS

⁵ Adrija Roychowdhury, '48 years of Emergency: Here is what happened over the two years that changed India's history' *The Indian Express* (New Delhi, 25 June 2023) <<https://indianexpress.com/article/research/emergency-48-years-timeline-history-8685088/>> accessed 21 February 2024.

⁶ Jenny Edkins, 'Sovereign Power, Zones of Indistinction, and the Camp' (2000) 25(1) *Alternatives: Global, Local, Political* 3, <www.jstor.org/stable/40644981> accessed 22 February 2024.

Born with a 'tabula rasa'⁷ or a blank slate, John Locke states that every human should be endowed with a series of inalienable and universal rights. Human Rights are some basic fundamental rights and freedoms inherent to all individuals, regardless of origin or background. The Universal Declaration of Human Rights⁸ states that all human beings are born free and equal in dignity and rights. It also states that everyone has the recognition everywhere as a person before the law. But how does this help the numerous stateless Palestinians whose human rights are nowhere in sight? Where is their entitlement to legal recognition? Coming to the theory of realism⁹, essentially, it is the state that grants us rights, not a universal government, and those rights only exist and become meaningful in a particular political context when that state decides to implement them. This brings us back to the fact that the sovereign exists outside legal bounds as a stark exception to the law. Moreover, these sovereign powers, existing in a constant state of exception, can suspend Human Rights when dealing with those they have deemed to be Homo Sacer.

Recognition of the legal concept of Human Rights does not necessarily imply their concrete existence in the real world; it would no doubt help

⁷ 'Tabula rasa' (*Encyclopedia Britannica*, 23 February 2024) <<https://www.britannica.com/topic/tabula-rasa>> accessed 24 February 2024.

⁸ 'Universal Declaration of Human Rights' (United Nations) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 24 February 2024.

⁹ Duncan Bell, 'realism' (*Encyclopedia Britannica*, 23 December 2023) <<https://www.britannica.com/topic/realism-political-and-social-science>> accessed 24 February 2024.

create a better legal system; despite being well-defined, enforcing human rights at a global level remains complex. While influential, the Universal Declaration of Human Rights lacks the legal power to punish violators effectively. The contemporary understanding of Human Rights discourse is predominantly shaped by Western ideology, and relativism further weakens the universality of the concept. A relativist interpretation would define values and beliefs, and therefore, rights, as products of culture and assert that rights will vary from culture to culture. However, pure relativism has the potency to excuse major violations of basic rights as a result of cultural practices. To better illustrate, cultural relativism can justify the lack of gender equality in the Iranian regime and its differential treatment of women based on religious considerations. The right to marry and find a family is one of the most basic of Human Rights; cultural relativism would also justify the disparities in marriage laws when it comes to sexual minorities in India.

Revisiting the Social Contract, Locke built on the natural rights theory, asserting that certain rights were universal and inherently beyond any sovereign's power and that obeying the sovereign is conditional upon whether or not it is efficient in protecting our Natural Rights¹⁰. To simplify, humans created this political society with legal protection to enjoy their natural rights, but what happens when the state arbitrarily decides to deny a particular section of the population a specific right?

¹⁰ 'Social Contract' (*Encyclopedia Britannica*, 12 February 2024) <<https://www.britannica.com/topic/social-contract>> accessed 24 February 2024

What difference does fundamentally recognizing a human right in the Constitution make?

There is no dispute regarding the fact that all Fundamental Rights are Human Rights, but Human Rights given constitutional recognition are considered Fundamental Rights.¹¹ In India, human rights jurisprudence takes its most overt manifestation in the Fundamental Rights and the Directive Principles of State Policy, part III and part IV of the Indian Constitution, respectively. With essential human rights being secured for citizens, some are enforceable while others are not. In the initially existing jurisprudential model, securing certain rights and directives into the ambit of the enforceable fundamental rights was not possible. The Indian Judiciary acted as the custodian of rights in interpreting the statutes broadly, aligning interpretations with international human rights charters.

Article 21: Protection of Life and Personal Liberty

"No person shall be deprived of his life or personal liberty except according to procedure established by law".¹²

¹¹ Sarbani Guha Ghosal, 'HUMAN RIGHTS: CONCEPT AND CONTESTATION' (2010) 71 The Indian Journal of Political Science <<https://www.jstor.org/stable/42748940>> accessed 24 February 2024

¹² *The Constitution of India*, 1950, Art. 21

Article 21 can most assertively illustrate the active role of the Indian Judiciary in securing various human rights by reading them within the ambit of the fundamental right to life and personal liberty. Its journey highlights the contingency of Human Rights on Fundamental Rights like no other. This article confers on every person, citizen or non-citizen, the fundamental right to life and personal liberty.

In the case of *Francis Coralie Mullin v. U.T. of Delhi*¹³, Bhagwati J conceded that: “the magnitude and content of the components of this right would depend upon the extent of the economic development of the country” While simultaneously emphasising that- “it must, in any view of the matter, include the right to basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self”

Looking at the expansion of Article 21, the Supreme Court initially focused solely on the existence of statutory procedural rules. It changed significantly with the landmark case of *Maneka Gandhi*¹⁴. This case established the principle of ‘substantive fairness,’ meaning the legal procedure used to deprive someone of their life or personal liberty must also be fair and just, leading to a significant expansion of human rights encompassed by Article 21.

¹³ *Francis Coralie Mullin v. UT of Delhi*, AIR 1981 SC 746

¹⁴ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

Prisoner Rights: Desai J notes that conviction does not reduce someone to a non-person exposed to maltreatment at the hands of authorities, and prisoners are always entitled to procedural safeguards established by law¹⁵. A prisoner has a fundamental right to protection from his co-prisoners¹⁶. If a prisoner develops a severe mental illness post-conviction, it would be a ground for commuting the death sentence¹⁷.

Right to legal aid: A person who cannot afford legal services for certain specified reasons is entitled to legal aid funded by the state¹⁸. This right is crucial for ensuring a fair legal process and is now considered an essential part of Article 21.

Right to Marry:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.¹⁹

¹⁵ *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494

¹⁶ *Kewal Pati v. State of U.P.*, (1995) 3 SCC 600

¹⁷ *Accused X v. The State of Maharashtra*, (2019) 7 SCC 1

¹⁸ *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544

¹⁹ United Nations, 'Universal Declaration of Human Rights' <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 28 February 29, 2024

It is a well-settled fact that the Right to Marry is a basic human right and should be available to everyone. The Supreme Court, time and again, has recognised this right as a fundamental one in numerous judgements. What constitutes marriage is a topic attracting huge controversies, with many different perspectives supported and opposed across the world. If the sovereign strongly favours only one particular definition of marriage, where does the human not conforming to that particular definition go? What about their human right to choose a partner and find a family?

“21. The right to marry a person of one’s choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. Society has no role to play in determining our choice of partners.”²⁰

²⁰ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368

Furthermore, the Supreme Court, in the case of *Navtej Singh Johar*²¹, declared Section 377 of the Indian Penal Code 1860 as unconstitutional to the extent that it criminalized consensual intercourse among consenting adults. This landmark judgment recognized the rights of LGBT individuals to dignity, privacy, freedom of expression, and equality under the Indian Constitution. It was a highly progressive step of the Indian judiciary in upholding its citizens' basic fundamental and human rights. Chandrachud J concluded that the members of the LGBT community:

'Are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution (and) are entitled to the full range of constitutional rights.'

Then, contrary to the previous judgments, in the most recent case of *Supriyo v. Union of India*²², three out of five judges refused to legally recognize unions that are not heterosexual. Although the Chief Justice of India and Justice Sanjay Kishan Kaul disagreed with this decision, the majority denied that marriage is a fundamental right for people of the LGBTQIA+ community guaranteed by the Indian Constitution, denying a human right as fundamental as the right to marry. The government argued against the legal recognition of LGBTQIA+ marriages, stating that marriage is fundamentally between a man and a

²¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

²² *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, 2023 INSC 920.

woman. The government also argued that legalizing same-sex marriages would fundamentally disrupt traditional family structures and that same-sex unions would be detrimental to children's development. Again, this exemplifies, on a minute level, the sovereign suspending some specific human rights towards a specific community of citizens and also puts forth the conditional nature of human rights on constitutional recognition.

The expansive interpretation of Article 21 has significantly broadened the scope of human rights in India. It has empowered individuals to challenge unfair state actions and ensured the protection of fundamental human needs. Recognising a human right as a part III right under the constitution guarantees its protection to the masses, on the contrary, a human right loses its authority if it goes outside the ambit of fundamental rights.

IV. HUMAN RIGHTS, HOMO SACER AND THE NON-CITIZENS

Agamben suggests that modern democracies might appear different, but they still retain the power structures of totalitarian regimes and have the potential to produce dehumanised as well as bare life. These power structures take more disguised, subtle forms, and one has to learn to recognize them. When the government decides who is entitled to marry and who is not, sovereign power determines the political qualifications of different lives. The sovereign here is operating in a state of exception

where it gets to deny a particular community the right to marry without it being a violation of their human or fundamental rights.

Extending this discussion further to human rights protection available to non-citizens and the Homo Sacer, the case of Mohammad Salimullah v. Union of India²³ presents a very relevant example. The Rohingyas are a small minority community facing persecution from the Myanmar regime for over a century. They claim native ancestry to the Rakhine region in Myanmar. However, the Myanmar government considers them to be Bangladeshi refugees.

A judgment by the International Court of Justice in 2020 acknowledged the genocidal conditions that forced nearly 775,000 Rohingya people to seek refuge in neighbouring countries like Bangladesh and India. The community has been systematically disenfranchised, made stateless, and subjected to atrocious persecution²⁴. Their status in the state of Myanmar is reduced to that of the Homo Sacer, with no legal entitlements or protections of any sort.

The Universal Declaration of Human Rights States that:

²³ AIR 2021 SUPREME COURT 1789.

²⁴ Chander Uday Singh, 'Supreme Court must rethink its order on deportation of Rohingya refugees' *The Indian Express* (New Delhi 26 April 2021) <<https://indianexpress.com/article/opinion/columns/rohingya-refugees-crisis-india-supreme-court-7288913/>> accessed 28 February 2024.

Everyone has the right to seek and to enjoy in other countries asylum from persecution.²⁵

The Supreme Court of India, in the present case, rejected the petition seeking to prevent the deportation of Rohingya refugees back to Myanmar. The petitioners argued that over 6,500 Rohingya refugees were being held illegally in Jammu, with around 150-170 facing imminent deportation at a particularly vulnerable time due to the recent military coup in Myanmar.

However, the Court ultimately sided with the Indian government's stance. The government argued that the principle of non-refoulement, which prohibits forcibly returning refugees to a place where their lives are in danger, only applies to signatories of the 1951 UN Refugee Convention and its 1967 Protocol, which India has not signed. The Court also referenced a previous case from 2018 where a similar petition to prevent the deportation of seven Rohingya refugees from Assam was dismissed.

The Court held that the right not to be deported stems from the right to reside and settle in India under Article 19(1)(g), which only the citizens are entitled to, as opposed to Article 21, which is applicable to all human beings.

²⁵ United Nations, 'Universal Declaration of Human Rights' <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 28 February 29, 2024.

A noteworthy point here is the Genocide Convention of 1948, to which India is a signatory, emphasizes preventing genocide, and complicity in genocide is an international crime. In addition, as a member state of the "International Convention on the Elimination of All Forms of Racial Discrimination", we must adhere to the UN Human Rights Council's recommendations, explicitly addressing the principle of non-refoulement. These recommendations clarify that states, including India, are obligated to protect individuals from being returned to places where they face a severe risk of human rights violations like torture or degrading treatment. It is also well settled in International Law that the principle of non-refoulement is *Jus Cogens*,²⁶ and no derogation of such a norm by any state can be done. So it was not that India had no obligations under the principle of non-refoulement, this is a clear instance of various sovereign powers operating outside the boundaries of law without any consequences. Here again, we see sovereign power determining the values of particular lives based on political valuations. These states operate in a state of exception, where they at times even perform major atrocities and human rights violations without it being criminal in any sense and doing away without any liability.

V. CONCLUSION

²⁶ 'Jus Cogens' (Oxford Bibliographies 29 May 2015) <www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0124.xml> accessed 28 February 2024.

The concept of Homo Sacer has significant implications for our understanding of Human Rights. Its existence challenges the universal nature of human rights and poses significant implications about their conditionality. The mere existence of bare life outside the political realm questions the extent to which human rights are enforceable. In exceptional circumstances, such as during an emergency, even the most robust Human Rights framework can be violated, leading to concerns about their universality. It is essential to acknowledge that political valuations and citizenship condition Human Rights and treating them as Fundamental Rights is also crucial to ensure their entitlement to everyone because fundamental rights with the constitution backing them act as an assurance and carry more power than pure human rights that do not have this formal recognition.

Only recognizing the legal concept of Human Rights does not necessarily imply their concrete existence in the real world. However, the concept itself has a lot of positive outcomes for the legal system. The findings presented here call for a nuanced understanding of human rights. While the ideal of universal human rights remains crucial, practical limitations require continuous efforts to strengthen international legal frameworks, promote global accountability for human rights violations, and bridge the gap between human rights and their practical implementation. Further research could explore how other countries navigate the tension between human rights, fundamental rights, and sovereign power in the context of non-citizens and marginalized groups.

Moreover, it is essential to recognize that every life is valuable within the political system, and we must strive towards a more just and inclusive society where everyone's rights are protected. The idea of universal human rights is not without its challenges, and we must work towards a more inclusive understanding of them, recognizing that political equality is not a natural Human Right but a constructed attribute of citizenship.

The fight for human rights continues to evolve in the face of complex political realities. Recognizing the inherent value of every human life and actively seeking solutions that address the multifaceted challenges hindering the full realization of human rights remain crucial in building a more humane world.

VI. REVISITING THE INDIAN IDEA OF A SECULAR DEMOCRACY

- SIMRAN KAUR*

Abstract

The word “Secular” has been a source of controversy numerous times. However, now more than ever, the displeasure is visible. The controversy stirred when former Rajya Sabha Member of Parliament filed a plea before the Supreme Court for deletion of the word and reverting the preamble to its original form. The most popular contention is that secularism should not be forced upon citizens. Secularism has been the core principle of the Constitution of India since its inception. It has many forms that are practised differently in every country including India. This paper discusses whether secularism was the idea of the founding fathers, or it came later. What is the relationship between democracy and secularism? It also examines the contemporary events in the light of our constitutional vision and what the challenge to ‘secularism’ really means.

Keywords: *Secularism, Democracy, Constitution, Preamble, Secular*

I. INTRODUCTION

Recently a former Rajya Sabha Member of Parliament, Dr Subramanian Swamy, has questioned the basic structure of the Constitution of India and the validity of the words “secular” and “socialist” in our Constitution. As if the ruling government’s disregard

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of the constitutional principles was not enough, this belief has been taken to the apex court. The preamble represents the ideals on which this country's Constitution is based. Democracy, justice, equality, fraternity, liberty, secularism, and socialism are the guiding light for laws and policies in our country. However, some people in position do not seem to agree with the secular character of the nation. The State not only seems to endorse a particular religion, but also participates very actively in ensuring its interests. In such state-of-affairs, how does one expect impartiality, non-discrimination, and 'democracy'?

This article explores the relationship between democracy and secularism. It seeks to find answers to some very important questions: whether the framers of the Constitution wanted a secular state. What relevance does it hold? And how does its existence or lack thereof influence democracy?

II. EVOLUTION OF DEMOCRACY

The idea of democracy is almost as old as human civilization. In primitive societies, democracy existed in the form of collective governance. It was made possible due to less complex societal structures. Small tribes and communities were bound by kinship rather than territorial or political ideals, and decisions were made collectively. However, as the societies grew larger and more complex, concepts such as military, age hierarchies, organised religion, power and sovereignty

emerged.¹ Modern Democracy can be traced back to the social contract theories which propose that democracy is based on the idea that people consented to be governed in exchange for the protection of their rights and well-being. The legitimacy of a government arises from a contract among individuals to form a society.

During the Middle Ages, the church was viewed as the only means to access the truth. It controlled education and science, with theology being the most important field of study. This norm was challenged by Protestantism, which promoted the idea that everyone is equal and has a direct connection to God. They opposed the idea of a mediator, like priests, between individuals and God, granting individuals greater autonomy to form their own opinions about religion and life. The Protestant Reformation challenged the church's authority, feudalism, and vocational guilds, while the simultaneous rise of individualism, reason, and secularism contributed to the development of classical natural law philosophy². The classical natural law philosophy was based on the separation of law and religion, rules derived from human reasoning, rationality, individual rights, and a scientific approach towards human behaviour. For the first time in history, this development traced the source of law to people rather than God. The natural law philosophy developed in three phases:

¹ Edgard Bodenheimer, *Jurisprudence- The philosophy and Method of Law* (7th edn, Universal Law Publishing Co 2011).

² *ibid.*

- 1) Enlightened Absolutism: The rise of Protestantism led to liberation from medieval theology and feudalism. Thinkers like Grotius, Hobbes, and Pufendorf believed that enforcement of natural law rests on the wisdom and self-restraint of rulers.
- 2) Free Capitalism and Liberalism: During this phase, thinkers like Locke and Montesquieu emphasized the idea of separation of powers to ensure no undue encroachment of the natural rights of individuals by the government.
- 3) Popular Sovereignty and Democracy: This phase, led by Rousseau strongly believed in general will and the majority decision of people.³

III. HUGO GROTIUS (1583-1645)

Hugo Grotius, often regarded as the father of international law, was a prominent author of natural law philosophy. He believed in keeping science and religion separate. According to his theory, humans possess a natural desire for society and social life, meaning a desire for an organized system with like-minded individuals. This desire encourages peaceful coexistence within a community. He defined natural law as rational, moral dictates that would apply even if God didn't exist. Grotius identified two ways to prove natural law: logical reasoning (a

³ *ibid.*

priori) and observation of common practices (a posteriori). He emphasized basic principles of natural law like respecting others' rights, keeping promises, and compensating for harm. For Grotius, the state was a contract for mutual protection, with rulers bound by natural law but typically immune from legal accountability unless they grossly abused their power.

Grotius defined the state as "a complete association of free men, joined together for the enjoyment of rights and for their common interest." He saw it as originating from a contract, usually with power transferred to a ruler who, although bound by natural law, generally couldn't be legally challenged by subjects.

IV. THOMAS HOBBS (1588-1679)

Thomas Hobbes's understanding of human nature sharply contrasted with that of Grotius. While Grotius viewed man as social, Hobbes believed him to be selfish, malicious, brutal and aggressive. He proposed that in nature every man is a beast to another man, and there exists no right or wrong. In this state of war, everyone has the natural right to preserve his life by any means necessary against the aggression of others. According to Hobbes, the fear of death and the desire for necessary resources lead people to prefer peace over the chaotic state of nature.

Hobbes argued that people must collectively agree to form a government by surrendering their individual powers to a sovereign authority—a "Leviathan"—to ensure peace and security. The sovereign, in his view, must be absolute and omnipotent, unbound by legal constraints, to effectively maintain order among individuals. Civil laws, distinct from natural laws, are those decreed by the sovereign and define right and wrong within the state. He believed that no law could be unjust since laws are merely commands of the sovereign. However, laws could be deemed iniquitous if they deviate from the natural laws aimed at preserving peace and protecting the well-being of the people. If the sovereign fails to maintain peace or protect its citizens, then the people might have grounds to withdraw their loyalty. Despite his support for strong centralized power, Hobbes's theory incorporates elements of individualism and liberalism, with a focus on securing life, property, and happiness, although this is executed under an absolute monarch rather than through a system of checks and balances.

V. JOHN LOCKE (1632-1704)

Locke's philosophy centred around the concept of natural rights—life, liberty, and property. He argued that in the state of nature, all individuals were free and equal, governed by natural law, which taught respect for these rights. However, the state of nature also had disadvantages, such as uncertainty in protecting these rights and the risk of individuals exceeding reason when enforcing them. To avoid these issues, he proposed that people entered into a social contract to

form a government that would preserve their rights, particularly property, which he broadly defined to include life, liberty, and estate. Locke emphasized a government with limited powers, opposing absolute monarchy. He believed the government existed to protect individual rights, and if it overstepped its bounds, the people had the right to resist or even revolt. He also advocated for the separation of powers between the legislative and executive branches.

VI. MONTESQUIEU (1689-1755)

Montesquieu built on Locke's ideas but focused more on the practical structure of government. His main contribution was the theory of separation of powers, advocating that the legislative, executive, and judicial branches should be independent and balance each other to prevent abuses of power. He believed that human liberty could only be secured through a system in which powers were divided and checked. Montesquieu sought to prevent tyranny by limiting governmental authority and ensuring individual freedoms.

VII. JEAN JACQUES ROUSSEAU (1712-1778)

Rousseau's philosophy emphasized the 'general will,' a collective sovereignty that represents the community's interests. He believed that individuals should alienate their natural rights to the community rather than to specific individuals, regaining civil liberties and security through the general will in return. He argued that the general will,

always acting for the common good, should be the ultimate authority in a state, overriding individual wills. He contended that by obeying the general will, individuals are, in effect, obeying themselves, as their individual will merges with the community's collective will. While optimistic about human nature, Rousseau believed the general will would be just and rational, minimizing the risk of tyranny. He also opposed representative democracy, arguing that true freedom requires direct participation of the people in legislative decisions. Rousseau's ideas greatly influenced the French Revolution and the development of parliamentary democracy, where the will of the majority was seen as paramount.

A collective reading of the principles of democracy and social contract theories suggests that their development was driven by the need for peaceful coexistence. This evolution occurred against a backdrop of excessive religiosity and the encroachment of individual rights due to religious interference in institutional management. Consequently, the separation of religion from state affairs became paramount. Both democracy and social contract theories emphasize peaceful coexistence, ensuring individual rights and promoting participation.

Evaluating these principles in modern contexts reveals that if a state officially endorses a particular religion or demonstrates favouritism toward it, it is likely to incite pride among members of that religion and fear among followers of other faiths. This may lead to members of the favoured religion encroaching upon the rights of individuals from

different religions, which goes against the foundational ideas of democracy. When a state exhibits bias toward one religion, it creates an environment of fear among members of other faiths, thereby hindering peaceful coexistence. Additionally, policy decisions may be guided by religious beliefs or advantages for the favoured religion rather than by 'reason'. This brings us back to the pre-reason era, where divine dictates held sway over individual participation and liberty.

Such biasness may also escalate into more significant conflicts, such as riots, as people attempt to impose their beliefs on others, while those from non-favoured religions retaliate out of fear. Therefore, an unbiased authority is crucial in a multi-religious, multi-cultural society to maintain a democratic framework and emerge out of the 'state of war' described by Hobbes.

VIII. SECULARISM AND SECULARIZATION

Before we find out how and why secularism became a part of the preamble and why it was rejected initially, we need to understand what secularism means. What it means for India, the 'mother of democracy'. As per the dictionary meaning, secularism is the belief that religion should not be involved in the organisation of society, education, etc. The idea propounds that the government, politics, and state-run institutions should remain neutral towards religion, neither showing favouritism nor endorsing any particular faith. The purpose behind the ideology is to ensure harmonious co-existence and cooperation among

religions by creating an unbiased state. Justice Tarkunde defines it as, “there should not be any interference by religion in the affairs of the State and vice versa, i.e., the State also should not interfere in the affairs of religion”.⁴

‘Secularism’, in contrast to ‘secularisation’, and ‘secular’ refers only to a particular political doctrine. John Sommerville⁵ talks about secularization in a literary sense. According to him, nothing is inherently secular because of existence of religion for such a long time. Religion is a part of almost all activity humans do, as religion grew alongside humans. Secularization is the process by which certain activities are separated from religious participation or influence. It means narrowing the scope of religion by excluding activities that are not of a religious character. In other words, confining religion to God and godly affairs would literally mean secularization of that religion. There is a difference between secularization of the society and secularization of the population. The former would mean the rules under which a society operates, and the latter are the religious beliefs held by the population. Where the whole population of a society is devoid of religious habits, it can be called as secularization of that

⁴ V.M Tarkunde, “Secularism and the Indian Constitution” (1995) India International Centre Quarterly <http://www.jstor.com> assessed 21 September 2024.

⁵ C John Sommerville, “Secular Society/Religious Population: Our Tacit Rules for Using the Term ‘Secularization’” (1998) 37 *Journal for the Scientific Study of Religion* 249 <<https://doi.org/10.2307/1387524>> assessed 5 March 2024.

population. It literally means the transfer of activities from religious institutions to others without that character.

Secularisation means differentiation. Phrases like secular judges, secular laws, secular legislators are used to mean those who have no connection to any religion. It is not a reference to their personal non-religious character but reflects that they are differentiated from religion in an official capacity.

Akil Bilgami explains how secularization does not really have an impact on secularism. He says, “increase in a society of loss of personal belief in God or the decrease in church- or synagogue- or mosque-going or the surrender of traditional religious habits of dress or prohibitions against pork, may all be signs of increasing "secularisation" but they are irrelevant to the idea of secularism.”⁶ Secularization can also be observed as a natural consequence of development and growth. As education and employment levels rise, individuals often exhibit a reduced tendency to adhere to superstitions, a greater inclination to question religious dictates, and a shift towards viewing religion as a personal belief rather than a communal activity.

IX. THE IDEA OF SECULARISM

⁶ Akeel Bilgrami, “Secularism: Its Content and Context” (2014) 45 *Journal of Social Philosophy* 25 <<https://doi.org/10.1111/josp.12048>> assessed 20 March 2024.

Secularism, like any other ideology, has different meanings for different States. Every society reacts differently to different situations based on its culture, economic and political environment, and other factors. This is why every ideology is perceived differently by different societies. However, there remains some common ground that binds all the different branches of an ideology to a single trunk. It could be the desired end result or the common struggle behind the origination of that ideology. In the case of secularism, what binds all secular countries together is the need to keep religion separate from administration to ensure that it does not influence policy decisions. The question is not of horizontal separation between church and the state but of vertical segregation of state and primordial loyalties.⁷

The political ideology of secularism can be divided into two: the Western practice and Indian Secularism. Briefly, western secular beliefs are based on the principle of mutual exclusivity. Neither the state nor religion interferes in the affairs of the other. In Western practice, religion does not play a role in shaping the laws of the nation. Likewise, even if religious practices contradict principles of equality and freedom, the state can only be a silent spectator. For instance, if a religious institution forbids a woman to be a priest or excommunicates its dissenters, the state cannot do anything.⁸

⁷ Rasheeduddin Khan, *Bewildered India: Identity, Pluralism, Discord* (South Asia Books, 1994).

⁸National Council for Educational Research and Training, *Political Theory class 11* (Reprint November 2021, 2006)116.

However, the Indian model does not impose such harsh boundaries. Dr B.R. Ambedkar defined secularism as “a secular state does not mean that we shall not take into consideration the religious sentiments of the people, all that a secular State means is that this Parliament shall not be competent to impose any particular religion upon rest of the people”⁹. In India, secular character means equal protection by the state to all religions. The Indian Constitution ensures no discrimination on the grounds of religion¹⁰ and recognises religion as a fundamental right of the citizens. It also advocates against intra-religious domination. Hence, the Indian constitution bans untouchability and there are laws abolishing child marriage, ensuring the right to maintenance, etc.

Marxian Secularism- The Marxian understanding of religion and atheism is extremely anti-religion. According to Marx, humans cannot realise their true identity and self-consciousness until they stop believing in the illusion of God. Until then, they are just a non-existent object among other objects. He propagates the idea that religion is created in the mind and imagination of man, and it is imposed upon the real world of men, human activity and nature.¹¹ He also thinks that religion has a positive historical role as it is evidence that there existed distress in society and there was something wrong with human existence. It also proves that there was a protest against distress. The

⁹M.V. Pylee, *India's Constitution* (Reprint Edn., S. Chand Publication 2007) 14

¹⁰Constitution of India, 1950, art.15.

¹¹ S Khan, “Towards a Marxist Understanding of Secularism: Some Preliminary Speculations” (1987) (Vol. 22, No. 10) *Economic and Political Weekly* <<https://www.jstor.org/stable/4376759>> assessed 21 April 2024.

source of this distress is man's horrible social, economic, and political conditions.

Marx also expected these qualities in a state and society. He believed that atheism and communism are the right ways to achieve human consciousness and realise reality. Therefore, in the Marxist State, the State should try to enlighten individual and encourage atheism.¹²

American Secularism- Secularism in American Politics is considered the ideal secularism model by most democracies. The First Amendment to the US Constitution in 1991 states, "Congress shall not make laws regarding a religious establishment or prohibiting the free exercise of religion"¹³ It was a result of practical necessity. The country had abundant natural resources and a lack of labour. In those circumstances, separation of state and church was necessary to accommodate immigrants from all backgrounds to give an impetus to economic growth. Another important reason was that the early British settlers were already rebels, who did not accept the traditional hierarchies of the Roman Catholic system. The First Amendment was not intended to secularise America, but to protect against any power snatch by any national church. It, however, did not extend to States and until the late 1830s, there were state religious establishments.¹⁴

¹² *ibid.*

¹³ United States of America: Constitution, 1787, First Amendment.

¹⁴ Wilfred McClay, "Religion and Secularism: The American Experience" (Pew Research Center, 3 December

In current times, American society is characterised by a growing population of non-religious people- people who do not belong to a religious body, who do not participate in religion, who consider religion as unimportant in their lives, and who do not believe in God or the divine origins of Scriptures. However, scholars believe that this can be termed as non-religiosity rather than secularism, as the latter denoted affirmative commitment to secular beliefs and identities.¹⁵ This attitude towards religion can also be seen in government institutions.

French Secularism- The French model of secularism can be explained in one line as “keep your religion to yourself”. It is largely tilted towards atheism, where religion is treated as non-existent in public areas. It would be considered extreme by many due to practices like banning religious symbols like hijab, turban, cross, etc at schools and other public spaces. However, the French model not only advocates for freedom of religion but freedom from it.¹⁶ The French *laïcité* is a strict model of separation between the state and church, characterised by complete removal of religious values from the public sphere and their replacement with secular values such as equality, liberty, and

2007).<<https://www.pewresearch.org/religion/2007/12/03/religion-and-secularism-the-american-experience/>> assessed 25 April 2024.

¹⁵ Smidt Corwin E., Kellstedt Lyman A., Guth James L. “The Role of Religion in American Politics: Explanatory Theories and Associated Analytical and Measurement Issues.” (2009; online edn, Oxford Academic, 2010) assessed 22 March 2024.

¹⁶ 'French secularism explained' (11 November 2020), France 24 <https://www.france24.com/en/live-news/20201111-french-secularism-explained> accessed 25 April 2024.

fraternity¹⁷. It is the result of violent struggles with the church. It protects private religious beliefs, but at the same time, keeps public affairs free from religious influence.

Indonesia and Bangladesh- In countries like Indonesia and Bangladesh, secularism takes a different shape, where religion plays an important part in the policies. Indonesia is the largest Muslim-majority state in the world. According to its constitution, the state is a democratic republic and a unitary state. The constitution states that the State believes in 'One and Only God' and guarantees freedom of worship as per one's own religion to all.¹⁸ The State officially establishes the doctrine of 'Pancasila', literally meaning 5 principles. Those are belief in the one high god, humanitarianism, Indonesian unity, democracy, and social justice. Indonesian secularism is about the unity of God and submission to it. However, despite commitment to secular principles, Sharia is applied to many areas and parts of the country. Citizens are also required to keep an identity card, indicating religious affiliation to one of the 6 recognized religions. The State looks down upon atheism and questioning the status of God is a crime. Indonesian politics is deeply impacted by Islamic values and teachings.

¹⁷ Radhika Santhanam, 'Understanding laïcité: the French principle of secularism' (5 September 2023), *The Hindu* <https://www.thehindu.com/specials/text-and-context/understanding-la%C3%AFcit%C3%A9-the-french-principle-of-secularism/article67270106.ece> assessed 25 April 2024.

¹⁸ Constitution of the Republic of Indonesia 1945, art 29.

Russian Secularism- Russia follows the Marxian secularism, tilted towards atheism. Unlike the West, where secularisation is a product of individualism, Russian secularism is based on collectivism. It means the subordination of all institutions including religion to the State, which ultimately results in them becoming a part of State structure.¹⁹ Their Constitution confirms the separation of church and State.²⁰ However, there is a recent trend of desecularization. In 2020, the word ‘god’ was included in the Constitution. Church is used to further the social policy goals of the state and even to propagate the State’s war propaganda.²¹ The population itself is not very active in religious practices and church activities. The State policy in soviet times was highly anti-religious, and even restricted young people from participating in religion. However, the church was subordinate to the State and was used to further the State’s propaganda. Post-Soviet, the Russian State became less anti-religious. The current situation in Russia is two-faceted. On one hand, the church is strictly restricted from public spheres, and on the other hand, it is subordinate to the State, works according to the needs of the authorities and supports State.²²

¹⁹ Marcin Skladanowski, Cezary Smuniewski, “The Secularism of Putin’s Russia and Patriarch Kirill’s Church: The Russian Model of State–Church Relations and Its Social Reception” [2023] Religions <<https://www.mdpi.com/2077-1444/14/1/119#:~:text=According%20to%20its%20constitution%2C%20the,as%20compulsory%20on%20all%20citizens>> assessed 26 April 2024.

²⁰ Constitution of the Russian Federation (Konstitutsiya Rossiyskoy Federatsii) 2020, art 13-14.

²¹ *ibid.*

²² *ibid.*

English Secularism- In the United Kingdom, just like the French model, secularism is characterised by the separation of church and state and freedom of religion. However, the religion is not excluded from the public sphere. The monarchy, which represents the country officially follows Protestant Christianity and king is regarded as the ‘Defender of the Faith’. The coronation of the king is a religious affair. However, such acts are merely ceremonial and far from the public life. The population of England is becoming increasingly non-religious. In education, schools can be affiliated from any religion and can carry out religious teachings. Parents and students have the option to opt out of such activities.²³

The meaning of secularism is ever-changing. However, there has to be a common thread that binds all the developments to some common principles. These common principles are needed to ensure an individual’s freedom to practice the religion of his choice. In any case, secularism should not be used to rip people off their faith or oppress a particular faith.

X. THE CONSTITUTIONAL VISION BEHIND THE INDIAN MODEL OF SECULARISM

²³ Michael Kelly, “Are French and English secularist traditions that far apart?” (The Conversation, 23 December 2023) <<https://theconversation.com/are-french-and-english-secularist-traditions-that-far-apart-219358>> assessed 20 April 2024.

The Constitution of India has been inherently secular since its inception. However, in the Constituent Assembly, the proposition for inclusion of the word “secular” was rejected. The irony is noteworthy, considering many prominent figures including Nehru, Ambedkar, Patel, and Radhakrishnan were staunch supporters of secularism. To understand the constitutional vision, the important question is whether the Constitution was framed with an underlying assumption of secularism.

Well before the discussions on the Constitution of India began, during the partition of India and Pakistan, a significant number of Muslims chose to remain in India. The partition occurred along religious lines, but it did not result in the formation of a Hindu nation and a Muslim nation. Instead, it created one Islamic state (Pakistan) and one secular state (India), an ideal that encouraged many Muslims and people of other faiths to stay in India. Hasan, in his article “Adjustment and Accommodation: Indian Muslims and Partition”²⁴ writes, “There were still others who were committed to a secular and democratic polity. They were the people who were neither swept by appeals in the name of Islam nor lured by the prospect of improving their material fortunes in the promised land of plenty.” This is further reflected in personal narratives, such as Akhtar’s account of her paternal grandfather, a

²⁴ Mushirul Hasan, “Adjustment and Accommodation: Indian Muslims after Partition” (1990) (Vol. 18, No. 8/9) *Social Scientist* <<https://www.jstor.org/stable/3517342>> assessed 20 September 2024.

staunch Congress supporter with a strong commitment to Nehruvian secularism.²⁵

When a student asked Nehru to spell out what secularism meant in independent India, he answered, “*secular state is one that protects all religions, but does not favour one at the expense of others and does not itself adopt any religion as the state religion*”.²⁶ He was the philosopher of Indian secularism. In the Constituent Assembly debates, he replied to the proposal by saying, “*May I beg with all humility those gentlemen who use this word often, to consult some dictionary before they use it? It is brought in at every conceivable step and at every conceivable stage.*”²⁷

On 15 November 1948, Prof. K.T. Shah introduced an amendment to incorporate the words “secular, federal, socialist” in Clause 1 of Article 1 of the Constitution. He believed that the inclusion of the specific word was needed as the nation was still struggling with the trauma of partition and communal tensions. He was eager to avoid such internal conflicts in the future. However, his speech majorly focused on the need to incorporate the word ‘socialist’. Responding to this, Dr Ambedkar said that the policy of the State and the organization of

²⁵ Adrija Roychowdhury “Why a majority of Muslims opposed Jinnah’s idea of Partition and stayed on in India” (New Delhi, August 15, 2022) assessed 20 September 2024.

²⁶ National Council for Educational Research and Training, *Political Theory class 11*(Reprint November 2021, 2006)116.

²⁷ Constituent Assembly of India, Volume IX, 12th August 1949, *speech by Pandit Jawaharlal Nehru*.

society in its social and economic aspects should be determined by the people themselves, in accordance with the prevailing time and circumstances.²⁸ The freedom of determination here was not to choose between secularism and a non-secular state but to choose what form of it would suit the prevailing circumstances. In the same debate, S. Radhakrishnan stated “*We aim to build a unified democratic State. That is why we have provided for fundamental rights, we allow no discrimination in public employment, we say, it is a secular State*”.²⁹ Another member of the Constituent Assembly, Mr. H.V. Kamath, emphasized that while a state should not align itself with any particular religion, this does not imply that the state should be anti-religious or devoid of religion. He clarified that a secular state, in his view, is neither godless nor hostile to religion.³⁰

After the Constituent Assembly debates, two key views on secularism emerged: Gandhi's and Nehru's. Gandhi's approach was rooted in the concept of '*Sarva Dharma Sambhav*,' meaning equal respect for all religions. He believed that religion could not be separated from public life and emphasized the importance of respecting all faiths, alongside

²⁸ Jayita Mukhopadhyay ‘Ambedkar’s vision of a secular Constitution’ (The Statesman, 6 April 2018) <<https://www.thestatesman.com/opinion/ambedkars-vision-secular-constitution-1502618002.html>> accessed 28 February 2024.

²⁹ Anand Ranganathan, ‘The Great Secularism Debate’ (Newslaundry, 30 January 2015) <<https://www.newslaundry.com/2015/01/30/the-great-secularism-debate>> accessed 28 February 2024.

³⁰ M.V Pylee, *India’s Constitution* (2007, S.Chand Publication).

his own.³¹ Nehru, however, followed the principle of '*Dharma Nirpeksha*,' where religion was a private matter and should not influence public life. After independence, a new version of secularism developed, combining elements of both Gandhi's and Nehru's perspectives. Independent India embraced three main ideas:

- i. Freedom to practice any religion,
- ii. The state's neutrality towards religion,
- iii. Equal respect for all religions.

The first two reflect the Western idea of secularism, while the third is a unique feature of Indian secularism. Justice P.B. Gajendragadkar, the former Chief Justice of India, remarked that the state does not align with any specific religion but is not anti-religious or irreligious, offering equal freedom to all. He also pointed out that the omission of the word 'secular' from the Constitution was deliberate, not accidental.³²

Despite the secular beliefs held by many, the word 'secular' was ultimately left out for a simple reason. When the Constitution of India was being drafted, secularism was primarily understood in its Western context. Although Indian secularism, which takes into account India's

³¹ Arun Kumar Singh, "Myth and Reality of Secularism in India: An Analysis" (2021) (Vol XIX, No. 1) *The NEHU Journal* <Pages_from_Nehu_Journal_Vol._XIX_Jan-June_2021-6_Arun_Singh.pdf> assessed 20 September 2024.

³² Gurmukh Nihal Singh, *Land Marks in Indian Constitutional and National Development* (1952, Atma Ram & Sons).

history and its unique needs was philosophised by the founding fathers, for them, it was more of an aspiration than a reality. During that era, the social practices, in almost all religions needed State intervention to free people from religious ill-practises and caste structures. Ambedkar believed that a constitutional intervention is necessary to ensure equality and justice for those who have been denied both for centuries. Therefore, State intervention in religion was crucial and the inclusion of the word would have restricted the Constitution's powers to bring much-needed social changes such as the abolition of untouchability, and special status to Scheduled Castes and Scheduled Tribes.

The label was also avoided because the dictionary meaning did not align with the vision they had. Many legislators were confused as to what secularism was. Today the jurisprudence of the term 'secularism' and its implications in the Indian context has evolved significantly. The original interpretation, which solely emphasized the State's neutrality in religious affairs and the separation of religion from State matters, would have been insufficient and could have led to confusion and chaos in the courts during that time. However, contemporary jurisprudence has broadened the understanding of secularism to accommodate India's diverse religious landscape and constitutional aspirations.

A close examination of the Constituent Assembly debates makes it very clear that the constitutional vision has always been to establish a State free from majority influence, religious favouritism, and ensuring every individual's fundamental right to religious practice. Constitution's

Articles 14, 15, 16(1), 16(2), 25, 26, 28, 29, 30, 51A, bear witness to the fact. Ambedkar argued for the separation of religion from study and research, yet religious study and propagation were included as a fundamental right. While this may seem contradictory, the framers aimed to create a system that allows citizens the freedom to practice their faith while ensuring that no religion influences policymaking in a discriminatory manner.

The iconic judgement of *Kesavananda Bharati*³³ was delivered even before the word ‘secular’ was added to the preamble. In this judgement, the Supreme Court upheld the secular character of the Constitution. The court observed that secularism is one of the essential features of the constitution and cannot be amended. The court held, “The secular character of the State according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with.”³⁴

XI. THE 42ND AMENDMENT

The 42nd Amendment, which is still a hot topic of debate, incorporated the words “secular” and “socialist” in the preamble. The change was enacted during Prime Minister Indra Gandhi’s tenure in 1976. Even though the Constitution has always been secular, the explicit mention

³³ *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr* (1973) 4 SCC 225.

³⁴ *ibid.*

of the word did not sit right with many, especially the BJP leaders. They have many a times expressed their discontent with the amendment and often ignored that it even exists. Probably because the label does not align with their focus on appealing the majority. This discontent was visible from the very beginning when in 2015, the Information and Broadcasting Ministry's advertisement on Republic Day carried the old preamble, not containing secular, was circulated in newspapers.³⁵ And also in their gift of a copy of the Constitution with the old preamble to the MPs in the first session in the new parliament building.³⁶ Not to forget the plea by BJP leader, Dr Subramanian Swamy, challenging the inclusion of the word.

A. Judicial Interpretations

To further understand the constitutional vision, it is essential to examine the judicial understanding of the concept and perspectives of eminent jurists as Judiciary is believed to be the custodian of our Constitution. The secular character of the Constitution has undoubtedly been upheld by countless judgments. It was held to be an essential

³⁵ Arunabh Saikia, "I&B's Secular Omission", (Newslaundry, 27 January 2015) <<https://www.newslaundry.com/2015/01/27/ibs-secular-omission/>> assessed on 28 February 2024.

³⁶ Purav Thakur, "Row over 'secular' and 'socialist': How and why were the words added to the Preamble" (India Today, 20 September, 2023) <<https://www.indiatoday.in/india/story/how-and-why-were-socialist-and-secular-added-to-preamble-indira-gandhi-emergency-amendment-2438268-2023-09-20>> assessed on 28 January 2024.

feature of the Constitution in Kesavananda Bharati case³⁷. Chief Justice Sikri said that the Constitution's secular character was its essence. Justice Shelatand and Justice Grover stated that the Constitution's secular and federal nature were the main ingredients of the basic structure. Justice Jaganmohan Reddy stated that “Liberty of thought, expression, belief, faith, and worship could not be amended at any cost because they were part of the basic features of the Constitution.”³⁸

Although the term was included in the constitution only in 1976 through the 42nd constitutional amendment, it has been freely used by the judges, judicially as well as extrajudicially, while explaining the nature and character of our constitution even before 1976.³⁹ In 1974, the Supreme Court said "There is no mysticism in the secular character of the state, secularism is neither anti-God nor pro-God, it treats alike the devout, the agnostic and the atheist, it eliminates God from the matters of state and ensures that no one shall be discriminated against on the ground of religion".⁴⁰ Justice Beg had said, “*Our constitution makers certainly intended to set up a secular Democratic Republic, the building spirit of which is summed up by the objectives forth in the preamble to the constitution*”.⁴¹

³⁷ Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr (1973) 4 SCC 225.

³⁸ Arun Kumar Singh (n 31).

³⁹ Sanghamitra Padhy. “Secularism and Justice: A Review of Indian Supreme Court Judgments.” Economic and Political Weekly 39, (2004), 5027–32.

⁴⁰ Ahmedabad St. Xavier's College v State of Gujrat A.I.R. 1974 SC 1389.

⁴¹ Jiyamddin Bukhari v Mehra case A.J.R. 1975.

In the recent historic judgement in the *S.R. Bommai v Union of India*, the Supreme Court has further clarified that secularism is a fundamental law and basic structure of the Indian political system, essential for "man's excellence with material and moral prosperity and political justice".⁴² The Court ruled that the term 'secular,' added to the Preamble through the 42nd Amendment, reinforces the fundamental rights outlined in Articles 25-28. It further emphasized that the neutrality of the State would be compromised if religion is used for political purposes or if any political party leverages religion to pursue political objectives. The Court stressed that religion and politics should remain separate. While a secular state refrains from interfering in religious matters, this does not imply that the State has no role in religious affairs at all. The State can enact laws to regulate the secular aspects of religious institutions.

Indian secularism, as commonly understood, aims to find a balanced relationship between the legitimate roles of religion and the expanding functions of the state. This allows State involvement in overseeing secular aspects of religious institutions like temples and mosques to promote social welfare. This interpretation emphasizes religious tolerance and equal respect for all faiths, rather than advocating for strict separation of State and religion. It upholds freedom of religion and conscience, including for those with no religious affiliation, with limitations based on public order, health, and morality.

⁴² *S.R. Bommai v Union of India*, A.I.R. Dec 1994.

Secularism is nowhere defined in the Constitution of India. However, a contextual understanding of the judicial implications will help understand its meaning. The judiciary not only differentiates the religious from the secular but also acts as a bulwark against the encroachment of the state on the freedom of religion through its power of judicial review.⁴³ The judiciary, in its interpretation, has developed the doctrine of the essentiality of religious practices as the foundation for safeguarding the freedoms of conscience, as well as the free profession, practice, and propagation of religion, along with the freedom to manage religious affairs.

Further, in *Sardar Taheruddin Syedna Sahib v. State of Bombay*⁴⁴, the apex court held that Articles 25 & 26 serve to emphasize the secular nature of the Indian democracy, which the founding fathers considered to be the very basis of the Constitution. In *Aruna Roy case*⁴⁵, Supreme Court of India held that the essence of secularism is non-discrimination of people by the State on the basis of religious differences.

Recently in a lecture, former Supreme Court judge Justice K.M. Joseph stated, “*Secularism is absolutely indispensable in a democracy. If secularism is going to be removed by any government from the Preamble to the Constitution, under the impression that by merely removing the word ‘secularism’, you are removing the features of*

⁴³ Sanghamitra Padhy. “Secularism and Justice: A Review of Indian Supreme Court Judgments.” *Economic and Political Weekly* 39, (2004), 5027–32.

⁴⁴ *Sardar Taheruddin Syedna Sahib v. State of Bombay* AIR 1962 SC 853.

⁴⁵ *Aruna Roy case v Union of India* (2002) & SSC 368.

secularism...even if it is removed, it will sound the death knell of democracy”.⁴⁶ He explained the need to keep religion as a private affair that should not interfere in laws of the country. He further stated that secularism is a facet of equality, and both are just two faces of the same coin.

The debate on secularism and the need to balance it with religious freedom has come up before the apex court several times. The Supreme Court in *Subhash Desai v. Sharad J. Rao*⁴⁷ upheld the validity of Section 123(3) and (3A) of the Representation of the People Act which restricts candidates from making election appeals based on religion or using religion to incite enmity or hatred among different classes of Indian citizens, whether directly or indirectly through their representatives. It was held as not violating the freedom of religion under Article 25(1). It furthers the principles of democracy and secularism as the representatives should be elected based on their policies and not their religious affiliations. However, the Supreme Court has also been criticised many times for overstepping the fine line between religious freedoms and individual rights. One such instance was when ‘Hindutva’ was regarded as a cultural identity. A divergent perspective on religion emerged in three significant cases: *Dr. Ramesh Yashwant Prabhoo v. Prabhakar Kashinath Kunte*⁴⁸, *Manohar Joshi v.*

⁴⁶ ‘Removing Secularism Will Sound the Death Knell of Democracy’: Former SC Judge Justice K.M. Joseph, (The Wire, 23 February 2023) assessed on 28 February 2024.

⁴⁷ *Subhash Desai v Sharad J. Rao* (1994) Suppl. SCC (2) 446.

⁴⁸ *Dr. Ramesh Yashwant Prabhoo v Prabhakar Kashinath Kunte* (1996) 1 SCC 130.

Nitin Bhaurao Patel⁴⁹, and Prof. Ramchandra B. Kapse v. Haribansh Ramakbal Singh⁵⁰. In these rulings, the Supreme Court concluded that the term ‘Hindutva’ reflects a broader cultural identity and way of life for the Indian people, rather than being limited to followers of the Hindu religion.

However, this interpretation was criticized by former Supreme Court judge V.M. Tarkunde, who remarked that these decisions undermine the principles of secular democracy and contravene both the letter and spirit of Section 123(3) of the Representation of the People Act, 1951. He expressed hope that a larger Supreme Court bench would, in the future, revisit these rulings and rectify the significant damage caused.⁵¹ Religious freedom and secularism grant individuals the autonomy to determine for themselves what constitutes religious practice. Practices like meditation or yoga, for instance, may be seen as religious by some due to elements like the use of 'om' and other spiritual connotations, while others may view them purely as wellness practices. It is not the role of the courts to impose their interpretations on citizens. Instead, courts should protect against encroachments on religious freedom and individual liberty—whether from other religions, as in cases of forced conversions, from one’s own religion, as in instances of excommunication, or from the state itself.

⁴⁹ Manohar Joshi v Nitin Bhaurao Patel (1996) 1SCC 169.

⁵⁰ Prof. Ramchandra B. Kapse v Haribansh Ramakbal Singh (1996) 1 SCC 206.

⁵¹ V. M. Tarkunde, “Supreme Court Judgement: a blow to Secular Democracy” (February 1996) PUCL Bulletin.

XII. SECULARISM AND DEMOCRACY

Democracy encompasses more than just a government elected by the people. It is a bundle of rights like equality, freedom of thought, religion, expression, justice, liberty, etc which exist inclusive of each other. The core principle of democracy is that every individual should have the same opportunity to influence the decisions that affect people in society. However, merely providing an opportunity for participation in decision-making is insufficient, it must also be fair. For instance, consider a scenario where five individuals are asked to vote on the installation of ramps in an organization to facilitate the movement of differently-abled people, with only one of them being differently abled. Some may perceive this as a democratic decision since everyone got a vote. However, this overlooks the fact that the majority opinion is putting the minority in a disadvantageous position. In practical terms, if we were to apply this approach universally, India would never have been able to advance transgender rights. Hence, we talk about equity and not equality.

Secularism plays a major role in ensuring individual freedom and social harmony among diverse social groups. The separation of religion from government seeks to prevent policies from being influenced by religious principles, ensuring they are based on reason and benefit all citizens. For multiple religions to coexist peacefully, it is crucial that no one religion dominates another, regardless of its population. A

secular state upholds equal rights for everyone, regardless of their religious beliefs, and provides a neutral platform for conflict resolution. John Stuart Mill emphasized the importance of liberty in a democratic society.⁵² This liberty extends beyond mere speech and movement; it encompasses faith and beliefs as well. In a state where certain groups live in constant fear because of state favouritism, this liberty is sacrificed. Hence, democracy in the true sense is also sacrificed. According to Mill, individuals should be free to act however they wish, as long as their actions do not harm others.⁵³ This principle should be followed while striking a balance between individual rights and social harmony as it is the very foundation of democracy.

Democracy does not exist independently of other fundamental human rights. That is why, the EIU democracy index ranks the countries based on 5 parameters, namely, electoral process and pluralism, civil liberties, the functioning of government, political participation, and political culture.⁵⁴ Therefore, a democratic State cannot exist without being secular.

Furthermore, the principle of 'Nemo Judex In Causa Sua' holds that a judge must be impartial and unbiased while deciding any dispute.

⁵² John Stuart Mill, *On Liberty*. (Dover Publications, 2002).

⁵³ *ibid*.

⁵⁴ Rajesh Jha, 'Bangladesh moves one position up on Democracy Index' (DD News, 11 february 2022) <<https://ddnews.gov.in/international/bangladesh-moves-one-position-democracy-index#:~:text=The%20EIU%20democracy%20index%20is,political%20participation%20and%20political%20culture.>> assessed on 28 February 2024.

Applying the same principle in administration, it can be argued that the legislators must also be impartial and unbiased so that they consider the interests of all individuals, irrespective of religion. Here, the idea of a secular leader does not mean that the leader should be religion-less or an atheist. Instead, it emphasizes that those in positions of authority must respect all religions equally, make decisions objectively, and protect minorities from the majority rule to promote equity.

However, in contemporary times, the instances of the majority pushing the minority towards unfair disadvantage have increased. Swaminathan Aiyar, an economist and journalist writes, “secular India appears on its way to becoming a Hindu state”.⁵⁵ His remarks come after Prime Minister Narendra Modi inaugurated the Ram temple. This event maliciously threatened democracy, where a communal mob demolishes a historically significant minority institution, thousands of people lose their lives and two decades later the Prime Minister fulfils the wishes of the mob, encouraging oppression and theocracy. Prime Minister Modi in his inaugural address said, “the rule of Ram is reestablished”.

The reaffirmation of majority rule is pervasively evident. In recent years, major changes have been done in the history books, removing

⁵⁵ Swaminathan S. Anklesaria Aiyar, ‘India is still an officially secular nation, but maybe not for long’ (Nikkei Asia, 29 January, 2024) < <https://asia.nikkei.com/Opinion/India-is-still-an-officially-secular-nation-but-maybe-not-for-long>> assessed 28 February 2024.

part of Mughal history with Hindu mythology⁵⁶, science books now state Kanada and Bhardwaj as the discoverer of atoms and father of aviation, respectively.⁵⁷ Not only new textbooks, we now have new names for places that connote a relation to the minority; Allahabad, Faizabad, Feroz Shah Kotla Stadium, Mughalsarai Junction, are now Prayagraj, Ayodhya, Arun Jaitley Stadium, Deen Dayal Upadhyay Railway station, respectively. These are just few examples of how a government that doesn't believe in secularism disregards the interests and rights of its minorities. This not only impacts secularism but democracy, equality, pluralism, and freedom of expression.

XIII. CONCLUSION

India, before it incorporated 'secular' in its preamble, laid down 'fraternity' and 'equality' as the guiding light for the Constitution and the citizens. Secularism is just an extended version of fraternity and equality. As Justice Joseph said, "*If you treat all religions equally, that is secularism. You are fair, you do not bias or patronise.*"⁵⁸ The Constitution has inherently maintained a secular character; the addition of the word to the preamble simply reaffirms this principle. Ultimately,

⁵⁶ Snigdhendu Bhattacharya, "How RSS textbooks are reshaping Indian history and science under Modi" (Aljazeera, 19 Feb 2024) <<https://www.aljazeera.com/news/2024/2/19/how-rss-textbooks-are-reshaping-indian-history-and-science-under-modi>> assessed 29 February 2024.

⁵⁷ *ibid.*

⁵⁸ 'Removing Secularism Will Sound the Death Knell of Democracy': Former SC Judge Justice K.M. Joseph, (The Wire, 23 February 2023) assessed on 28 February 2024.

‘secularism’ is merely a label. If one truly believes in secular values, a label shouldn’t be a concern. However, it is equally important that the label is not merely symbolic; rather, both the people and the laws must genuinely uphold secular principles in their hearts and actions for the state to be a ‘secular democratic’ one in its true form.

Furthermore, it should not be a tool of the political parties to please minorities and gain votes. Achieving a secular state is more than just false promises of equality and minority pleasing. It involves inter-religion and intra-religion tolerance. It involves an unbiased administration and strict actions against discriminatory behaviour. It involves celebrating more than just Hindu festivals in schools. Secularism is as simple as ‘be and let be’. Unity is diversity is not just a slogan, it’s a constant effort by every individual and upholding it is a collective duty.⁵⁹

⁵⁹ *ibid.*

VII. BALANCING LIBERTY AND SURVEILLANCE: THE INTERSECTION OF DIGITAL MONITORING AND BAIL JURISPRUDENCE IN INDIA

- DEVANSH MALHOTRA* AND KANISHK GOYAL**

Abstract

*The integration of digital surveillance into bail practices has reshaped the criminal justice landscape and has raised critical questions about its compatibility with constitutional safeguards and international human rights. While tools such as GPS tracking and geofencing offer practical alternatives to pretrial detention, they also pose significant privacy and dignity concerns. Herbert Packer's Crime Control and Due Process models provide a theoretical lens to analyse this issue, highlighting the tension between public safety and individual rights. In India, the evolving legal framework, including the Digital Personal Data Protection Act, 2023, and judicial precedents like *KS Puttaswamy v Union of India*, emphasize proportionality, fairness, and privacy. However, inconsistencies in judicial decisions and the absence of robust regulatory mechanisms challenge the delicate balance between surveillance efficiency and rights protection. This paper explores the implications of electronic monitoring, advocates for nuanced guidelines, and proposes harmonizing digital*

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advancements with constitutional values, ensuring justice does not come at the cost of fundamental freedoms.

Keywords: *Digital Surveillance, Bail Jurisprudence, Privacy Rights, Proportionality Principle, Herbert Packer Models*

I. INTRODUCTION

The advancements in technology and their integration into criminal justice systems in the 21st century, is impacting the way bail conditions are enforced, with digital surveillance tools becoming popular and playing an increasingly prominent role to serve the purpose. Such tools, such as GPS trackers, geofencing technologies, cell site/cell tower triangulation/trilateration, and mobile applications, are designed to monitor accused who are granted bail, ensuring compliance with court-ordered bail conditions imposed on them. Such moves are projected as economically efficient and pragmatic alternatives to pre-trial incarceration of accused dispensing with the need of physical custody of accused. Concomitantly, the adoption of these technologies has raised many eyebrows amongst the legal fraternity especially about their legal, ethical, and societal implications.

Central to this discussion is the challenge of balancing the state's interest in preventing the accused from absconding and ensuring public safety, against the fundamental rights afforded to accused individuals by the legal system. Such surveillance measures, while proven beneficial in certain contexts, have a tendency to infringe upon the right to privacy, disproportionately affecting marginalized groups, including

economically disadvantaged who may lack access to necessary technology required for fulfilment of such bail conditions imposed by the courts. At times, in a country like India with diverse landscape, accused reside in remote locations having poor connectivity due to rugged geographical terrain can potentially add to woes of the accused. Furthermore, employing such techniques by the State results in overreach, with conditions that can be termed as excessively intrusive and which also lack proportionality to the offence committed or the circumstances of the accused thereby violating the rights of the accused.

This paper explores the evolving role of such new surveillance techniques in bail matters under criminal law while testing them on the touchstone of constitutional protections, criminal jurisprudence and international human rights frameworks. Further, it delves into pressing issues such as the potential misuse of surveillance data gathered, the mental toll of constant monitoring on the accused, and the absence of a clear regulatory framework to govern the use of such technologies which are being employed by the State. The paper does not seek to address or challenge the fact that the State employs surveillance without adhering to the domestic framework requiring competent authority permissions, often resorting to its illegal use to track, monitor, and apprehend alleged accused individuals but explores the evolving role of such new surveillance techniques in bail matters under criminal law, examining them against the touchstone of constitutional protections and international human rights frameworks.

Finally, the paper calls for a balanced approach: first that incorporates technology responsibly to meet legitimate state aims while respecting the enshrined safeguards to protect individual rights. Second, a robust regulatory framework, guided by the principles of equity, accountability, and proportionality, as a *sine qua non* to ensure that such surveillance techniques serve justice without eroding the fundamental freedoms.

II. JURISPRUDENTIAL RATIONALE

Herbert Packer's¹ **Crime Control** and **Due Process** models can serve as a guiding lamp in understanding the role of digital surveillance in bail matters. These models highlight the tension between ensuring public safety and upholding individual rights simultaneously, a conflict that lies at the root of using such advancements in technology to monitor individuals released on bail and awaiting trial. His Crime Control and Due Process models present different views on digital surveillance in bail matters. The Crime Control Model focuses on public safety and efficiency, seeing tools like GPS tracking as a way to ensure compliance with bail conditions and prevent re-offending. However, this approach can strip away personal dignity, invade privacy, and treat individuals as guilty before trial if applied in exclusivity. On the other hand, the Due Process Model emphasizes fairness and asks whether these surveillance measures are truly needed.

¹ Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968).

For some, especially those from disadvantaged backgrounds, meeting these requirements can feel like an unfair burden, deepening existing inequalities.

The **Crime Control Model** prioritizes efficiency and the repression of criminal behaviour, aligns closely with the goals of digital surveillance in bail cases. Electronic monitoring tools like GPS trackers and geofencing help authorities ensure that individuals adhere to bail conditions, reducing the risk of absconding and preventing the need for costly pretrial detention. As Samuel Wiseman in his work² argues, these technologies provide a cost-effective alternative to incarceration, aligning with the model's emphasis on public safety and resource efficiency.

However, the model's focus on efficiency can sometimes justify invasive surveillance measures that encroach on privacy rights. Lauryn Gouldin in his work 'Defining Flight Risk'³ critiques the tendency of judicial overreach and risk aversion by the judges in his work. Judges often impose overly restrictive surveillance measures, even for individuals who pose low risks of nonappearance, reflecting the model's tendency to prioritize control over fairness.

² Samuel R Wiseman, 'Pretrial Detention and the Right to Be Monitored' (2014) 123 *Yale Law Journal* 1344 <<https://www.jstor.org/stable/23744444>> accessed 5 January 2025.

³ Lauryn P Gouldin, 'Defining Flight Risk' (2018) 85 *University of Chicago Law Review* 677 <<https://www.jstor.org/stable/44686206>> accessed 5 January 2025.

In contrast, the **Due Process Model** emphasizes fairness, procedural safeguards, and the protection of individual rights. From this perspective, digital surveillance raises significant concerns. For example, Wiseman highlights the privacy trade-offs inherent in monitoring, arguing that these measures, while less invasive than detention, still risk ‘net-widening’, where surveillance extends beyond its intended scope.

The model also critiques the socioeconomic inequities exacerbated by digital monitoring. As highlighted in *Jail, Bail, and the Poor* published in EPW,⁴ many marginalised individuals struggle to fulfil the technological or financial requirements of such systems, effectively penalizing them for their poverty, thereby leading to criminalisation of poverty. The Due Process Model calls for tailored and proportional measures, ensuring that interventions respect individual dignity and address specific risks without overreach as in the case of Indian privacy laws.

III. TESTING THESE MOVES ON THE TOUCHSTONE OF CONSTITUTIONALITY

The evolution of privacy laws in India is a work in progress, keeping in mind the country's penchant for state surveillance as well as individual liberties. While India has consistently sought to expand its

⁴ 'Jail, Bail and the Poor' (2011) 46 *Economic and Political Weekly* 8 <<https://www.jstor.org/stable/23065533>> accessed 5 January 2024.

surveillance framework, as evidenced by the *MP Sharma*,⁵ *Kharak Singh*,⁶ and *Govind*⁷ cases, the *Puttaswamy*⁸ judgment acknowledged that such regimes infringe upon aspects of the inner realm of consciousness and decisional autonomy.

The first reflection on the privacy debate was witnessed in *M.P. Sharma v. Satish Chandra* (1954).⁹ In this case, the Supreme Court, during its examination of the constitutionality of the search and seizure provisions of the Code of Criminal Procedure¹⁰ and also touched upon the right to privacy and how it relates to Article 20(3).¹¹ It determined that the search and seizure of documents did not constitute ‘compelled testimony’ and therefore does not violate Article 20 (3).¹² The court made it clear that the government is entrusted with the responsibility of carrying out searches and seizures, without hesitation, this had no bearing on the argument that it was a breach of an individual’s right of privacy. The Court acknowledged the importance of privacy but given that the Indian Constitution has nothing analogous to the Fourth Amendment of the U.S. Constitution (prohibiting unreasonable searches and seizures) they upheld the government’s power of search and seizure.

⁵ *M.P. Sharma v Satish Chandra* AIR 1954 SC 300.

⁶ *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

⁷ *Govind v State of Madhya Pradesh* (1975) 2 SCC 148.

⁸ *KS Puttaswamy v Union of India* (2017) 10 SCC 1.

⁹ *M.P. Sharma* (n 5).

¹⁰ Code of Criminal Procedure 1898, ss 94, 96 (1).

¹¹ Constitution of India 1950, art 20 (3).

¹² *ibid.*

Eight years after the first debate on the Right to Privacy under M.P Sharma, the 6 Judge bench of the Supreme Court in *Kharak Singh v. State of Uttar Pradesh* (1962)¹³, examined the constitutionality of Regulation 236(b)¹⁴ that allowed night-time domiciliary visits to persons considered as habitual offenders. Section 12 of the U.P Police Act, 1861, gave police the power to take any action that could expedite the performance of their duties which paved the way for harassment of the victim in the form of night-time domiciliary visits, random identity checks, compulsory reporting to police stations before going anywhere and much more. The court took a step in the right direction by holding that the night time domiciliary visits were unconstitutional but limited its scope only to the night time domiciliary and deemed that the remaining provisions were not unconstitutional. Justice Subba Rao in his minority opinion argued that the entire provision was violative of Article 21 of the constitution of India because it violated the Right to Privacy. He cited two landmark cases in his opinion, namely: - *Munn v. Illinois*¹⁵ and *Wolf v. Colorado*,¹⁶ and highlighted that human existence was not akin to animal existence. Human existence means something much more than just physical survival and includes the right to live with human dignity and all that goes along with it, expressing oneself in diverse forms, freely, moving about and mixing and commingling with fellow human beings.¹⁷ This was the more

¹³ *Kharak Singh* (n 6).

¹⁴ Uttar Pradesh Police Regulations 1942, Regulation 236(b).

¹⁵ (1877) 94 US 113.

¹⁶ (1949) 338 US 25.

¹⁷ *State of Uttarakhand v Ajam* (2017) SCC Utt 695.

expansive view of privacy which seems to be a part of personal liberty as emphasized under Article 21,¹⁸ whilst at the same time taking into consideration the toll that endless privacy invasion has on the human mind.

Building on the foundation and elaborating on Justice Subba Rao's dissenting opinion, *Govind v. State of Madhya Pradesh*¹⁹ (1975) is perhaps the next most notable case in the area of law in respect towards privacy. The court in this case acknowledged the pre-existence of the right to privacy but at the same time the court warned that the right was not absolute. These regulations were, to a limited extent, upheld by a narrow reading of them but the judgement warned the state against going too far. Facts of this case were on similar lines of *Kharak Singh* and the legislation in question was Regulation 855 and 856 of the police regulations which was backed by Section 46(2) of the Police Act, 1961 which allowed irregular checks on a potential offender, tracking the offender, collecting information on him etc. Right to Privacy was given a back seat in this judgement where the court ruled in favour of the state. The court distinguished it from *Kharak Singh* by reasoning that in *Kharak Singh* merely an executive order was in question and here it is backed by a definite legislation.²⁰ They reasoned that the Right to Privacy should be restricted to executive orders only and should not transcend state interests.

¹⁸ Constitution of India, art 21.

¹⁹ *Govind* (n 7).

²⁰ *Kharak Singh* (n 6).

In 2016, in the *Modern Dental College*²¹ case, where the unaided private institutions challenged the validity of the *Niji Vyavsayik Shikshan Act*²² regulating fee and admission in private institutions, the 4-pronged test of proportionality was established.²³ For a law to be proportional, it must satisfy the following 4 prongs: - (a) the action must be sanctioned by law (b) the proposed action must be necessary in a democratic society for a legitimate aim (c) the extent of such interference must be proportionate to the need for such interference (d) There must be procedural guarantees against abuse of such interference.

Conclusively, using this test, the right of privacy was ensured with certainty to be a fundamental right by the Supreme Court in *K.S. Puttaswamy*.²⁴ In this case, all nine judges of the bench unanimously agreed that privacy is a constitutional right under articles 14, 19, and 21. The case was a historic one, as it overruled the case of *MP Sharma*²⁵ and *Kharak Singh*,²⁶ where it was held that it was not a fundamental right of every individual to be left alone because it is synonymous to the dignity bestowed to a human being. Furthermore, the *Puttaswamy* judgement also explicitly overruled the *ADM Jabalpur*²⁷ case, which marked a departure from the approach which was centred around *lex*

²¹ *Modern Dental College and Research Centre v State of Madhya Pradesh* (2009) 7 SCC 750.

²² *Madhya Pradesh Niji Vyavsayik Shikshan Sanstha (Adhiniyam)*, 2007.

²³ *ibid.*

²⁴ *KS Puttaswamy* (n 8).

²⁵ *MP Sharma* (n 5).

²⁶ *Kharak Singh* (n 6).

²⁷ *ADM Jabalpur v Shivkant Shukla* (1976) 2 SCC 52.

(*black letter law*) to one where *jus* (*rights-based approach*) takes the central stage.

The evolution of privacy jurisprudence in India underscores the gradual shift towards protecting individual rights against state surveillance. The trajectory from the early cases to the Puttaswamy judgment reflects an increasing recognition of privacy as essential to personal liberty and dignity, signalling a continued effort to balance state interests with fundamental rights. Further, we can deduce that now this approach adopted by the Supreme Court is conforming to the due process model of criminal justice administration, of Herbert Packer.²⁸

IV. HISTORY OF SURVEILLANCE, DICHOTOMY AND JUDICIAL DISCIPLINE IN FRANK VITUS

The idea of state surveillance is not new to Indian jurisprudence, aimed at preventing crimes, it has always been at crossroads with the idea of privacy and liberty because the former has a tendency to overarch and go beyond its jurisdiction. The use of developments in technology being harnessed for surveillance in the State was first challenged in the case of *PUCL v Union of India*²⁹ where the court emphasised that the right to privacy could only be violated through a procedure established by law. In this case, the Court also acknowledged the absence of procedural safeguards, which are *sine qua non* to ensure a fair and

²⁸ Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968).

²⁹ (1997) 1 SCC 301.

reasonable exercise of this authority. Since then, we have reached so far yet done so little.

In *Frank Vitus v Narcotics Control Bureau*³⁰ the Supreme Court was adjudicating an appeal against the order of the Delhi High Court regarding the bail conditions of a Nigerian national who was allegedly involved in a drugs case. The High Court, as a condition for granting bail, directed the accused to drop a PIN on Google Maps, enabling the Investigation Officer to monitor his location. The appeal contested the nature of the conditions and it was argued that it was violative of the Right to Privacy as upheld in *KS Puttaswamy*.³¹ The court invalidated the condition in regards to sharing the GOOGLE PIN but it is the reasoning given by the court and the potential dichotomy established by the several High Court judgements³² that deserve our special scrutiny.

It is evident that no bail order should impose arbitrary, fanciful, irrelevant, or unreasonable conditions, as highlighted by Hon'ble Justice J.M. Panchal in *Munish Bhasin v Union of India*.³³ Relying on the affidavit submitted by Google Inc., which confirmed that the Google PIN feature does not enable real-time tracking of the individual

³⁰ [2025] 1 SCR 184; 2025 INSC 30.

³¹ *KS Puttaswamy* (n 8).

³² *State (NCT of Delhi) v. Sanjeev Kumar Chawla* (2020) SCC OnLine Del 1970; *Hussain Abbas @ Tippu v. State of Haryana* CRM-M-1210-2023; *Anup @ Foji v. State of Haryana*, CRM-48167-2023 in CRA-D-813-2019; *Amit Thapliyal v. State & Ors.*, 2023 DHC 1595; *Sushant Kaushik v. State Bail Appln.* 3175/2023 & CrI.M.A. 25642/2023.

³³ (2018) 16 SCC 74.

using the PIN, the Court determined that the condition was ‘redundant’ and did not offer any meaningful support to the investigative agency of the NCB. It must be noted that the reason for the denial of sharing of GOOGLE PIN as a bail condition was its redundancy and not to protect the right to privacy. Ideally, the division bench should have referred this matter to a larger bench considering the indefinite position of law on the matter as highlighted in the case of *Shoma Kanti Sen*.³⁴ The judgment briefly addressed the issue of live location sharing and continuous tracking, but left several critical questions unresolved.³⁵

It is reasonable to applaud the approach of the courts upholding human right and all its attempts to prevent any curtailment on rights, but the absence of an added layer of nuance to this can be catastrophic to the very idea of bail in the first place. The primary purpose of bail is to prevent the incarceration of an individual who is yet to be convicted. Simultaneously, a bail also ensures that the individual does not take bail as a license to indulge in any other illicit and unlawful activities after being released on bail, and if he is found guilty, he could be expeditiously punished including cancellation of the bail granted.³⁶

To understand this layer, we wish to elaborate on, we need to look at the statement given by the court which said that imposing **any** bail condition that enables the Investigation Agency to track continuous movement of the accused released on bail by any means would violate

³⁴ *Shoma Kanti Sen v State of Maharashtra* (2024) 8 SCC 234.

³⁵ *State of Punjab v Devans Modern Breweries Ltd* (2004) 11 SCC 26.

³⁶ *State of Bihar v Rajballav Prasad* (2017) 2 SCC 178.

the right to privacy guaranteed under Article 21.³⁷ The use of the word ‘any’ brings in a plethora of problems that call for much deliberation. Firstly, the statement of the Honourable justice tries to over generalize a practice which is clearly not being followed in the recent judgements of the Supreme Court. Secondly, it created a dichotomy (which will be discussed at length) that has been unresolved and not been referred to a larger bench to establish a clear position of law. And finally, the statement fails to manifest itself in the actions of the court when it dismissed the conditions for redundancy and not to protect privacy.

On the face of it, the above statement of the division bench of the Supreme Court seems to remove all possibility of using live-location as a condition for bail applications. But as pointed out by Dr. A.L. Goodhart in his famous article of about the *ratio decidendi* of a case,³⁸ not everything said by a judge can be considered to be the ratio of a case. Now dealing with the issue at hand, we can see the dichotomy of the entire situation by looking at a few judgements of the Supreme Court of India. The case of *Puranmal Jat v. State of Rajasthan*³⁹ is a testament to this dichotomy. The accused, who was tried under NDPS for having 35 Kg poppy straw, in this case was denied bail by the High Court before the Supreme Court granted him bail provided that he made his location available by pairing his phone with that of the investigation officer. Similar conditions were imposed by the Supreme

³⁷ *Frank Vitus* (n 30).

³⁸ Goodhart AL, 'Determining the Ratio Decidendi of a Case' (1930) 40(2) Yale LJ 161.

³⁹ (2023) SCC OnLine SC 1418.

Court in the case of *Shoma Kanti Sen v. State of Maharashtra*⁴⁰ where the accused was charged under the UAPA for alleged Maoist links in the Bhima Koregaon case and the Court granted her bail on the condition that she could not leave Maharashtra; her GPS should be on and her mobile phone paired with the Investigation Officer's ("IO"). Ordinarily, when a two-judge bench disagrees with the opinion of another two-judge bench, judicial discipline necessitates referring the matter to a larger bench to resolve the issue and establish the authoritative legal position. The cases before us demonstrate a clear distinction between the judicial decision of the matter of electronic monitoring during bail conditions with one upholding privacy as in the case of *Frank Vitus*⁴¹ *vis-a-vis* one upholding state interest as in the case of *Shoma Kanti Sen*.⁴²

This was followed by the judgement of the Delhi High Court in *ED v. Raman Bhuraria*⁴³ where the bail conditions included sharing of active mobile number with the IO which must remain operational at all times and the sharing of live location with the IO at all times. These are two of the many instances that have been highlighted. The court addressed this by stating that the Court may have done so in a similar condition but in those cases, the Court was not called upon to decide the issue of the effect and legality of such a condition.

⁴⁰ *Shoma Kanti Sen* (n 34).

⁴¹ *Frank Vitus* (n 30).

⁴² *Shoma Kanti Sen* (n 34).

⁴³ (2023) SLP (Criminal) Diary No 23447/2023.

So, going along the lines of judicial discipline we wonder why the matter is still not referred to a larger bench of the Supreme Court to settle the position of law surrounding the surveillance using technological advancements during bail. “Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the only proper course is to refer the matter to a larger Bench.”⁴⁴ The breakdown of judicial discipline is not just a matter of internal administration but a grave constitutional matter and worrisome for the rule of law.⁴⁵

It is essential that we examine the use of GPS trackers to track the accused on bail by employing the 4 Pronged test of proportionality given in *Modern Dental College* and confirmed in *KS Puttaswamy* and *Aadhaar*.⁴⁶ The test says that law or regulation is proportional when it has a legitimate aim, there is rational nexus between impugned measures taken and the aim, the regulation is least restrictive in nature and lastly, there is a balance between the extent to which rights are infringed and the overall public benefit without having a disproportionate effect on the individual. The usage of trackers by the state for surveillance of the accused satisfies the first two prongs as the aim of the state is clearly to prevent the accused from committing any

⁴⁴ *State of Punjab v. Devans Modern Breweries Ltd* (2004) 11 SCC 26.

⁴⁵ Alok Prasanna Kumar, 'Judicial Discipline and Judicial Authority' (2024) 59(34) *Economic and Political Weekly* 15 <<https://www.epw.in/journal/2024/34/law-and-society/judicial-discipline-and-judicial-authority.html>> accessed on 3 January 2025.

⁴⁶ *Modern Dental College* (n 21); *KS Puttaswamy* (n 8).

crime or running away and employing GPS trackers serves as a suitable means of reaching that goal. The major points of contention are the latter two prongs. To check if a restriction is the least restrictive or not, we have to check whether there are other alternative measures that can serve the same purpose and reduce the restriction on individual rights. In the case of bail, there are many methods that ensure that the accused doesn't flee and maintains appropriate conduct relating to cooperating with the investigation, attendance during the trial, non-tampering of evidence including intimidation of witnesses such as: - passport seizures,⁴⁷ travel restrictions, high bail amount and surety supervision. These measures don't use 24-hour surveillance but still deter the accused and renders him almost incapable of fleeing. Furthermore, the restriction has a disproportionate impact on the right holder as it violates an individual's Right to Privacy, curbs his Freedom of Speech by making him wary of a device tracking him, puts economic hardships on him and subjects him to social stigma and disdain although his offence is yet to be proved. Thus, it fails to satisfy the test of proportionality and due process as given in *KS Puttaswamy*⁴⁸ and *Aadhaar*.

V. EXAMINING THE INTRODUCTION OF SURVEILLANCE TECHNOLOGIES THROUGH THE LENS OF CRIMINAL LAW

⁴⁷ *Shyam Sahni v Arjun Prakash* (2001) 4 SCC 71; *Ravi Bala and Ors v State of Himachal Pradesh* (2020) 7 SCC 527.

⁴⁸ *KS Puttaswamy* (n 10).

The development of criminal law has been trying to keep pace with the social and above all technological developments. Many examples are testament to this fact, such as the introduction of forensic investigative techniques during the investigation stage helps to gather impeccable evidence in cases to bring accused to the book and securing justice for the victim. In India also in the recent past, the Courts⁴⁹ have started to appreciate the value of assistance rendered by scientific advancements in the criminal justice delivery system. However, we must bear in mind the fact that use of technology lately has been limited to evidence collection and corroboration, investigation, or sparingly used for serving the summons, summoning the witnesses through email/WhatsApp and recording their statements through audio-video means,⁵⁰ to mention a few.

With respect to the enforcement aspect, the harnessing of such technological developments like GPS, google pin sharing, etc. to regulate bail conditions has been a recent trend in India. Some countries in the west have been employing such technologies for quite some time. The principle of presumption of innocence is a cornerstone of criminal jurisprudence, ensuring that an accused is considered innocent until

⁴⁹ *Dharam Deo Yadav v State of Uttar Pradesh* (2014) 5 SCC 509, [2014] 8 SCR 650, [25] (*per* K S Radhakrishnan J).

⁵⁰ Vidhi Centre for Legal Policy, *Summons in the Digital Age* (Vidhi Centre for Legal Policy, 2 November 2020) <https://vidhilegalpolicy.in/wp-content/uploads/2020/11/201102_Summons-in-the-Digital-Age.pdf> accessed 10 January 2024.

proven guilty.⁵¹ However, the increasing reliance on digital surveillance in bail jurisprudence has raised concerns about its compatibility with this fundamental right.

It is noteworthy that, since the re-enactment of major criminal laws in India, has incorporated many significant changes which are being welcomed by the legal fraternity. However, with respect to the provisions of bail which were earlier governed by the Code of Criminal Procedure, 1973 (“CrPC”) are now being governed by the *Bhartiya Nagrik Suraksha Sanhita, 2023* (“BNSS”). Section 482(3) in conjunction with Section 485(1) of the BNSS mirrors the language of Section 437(3) and Section 439(1) of the CrPC. Also, provisions relating to grant of bail to persons apprehending arrest (commonly referred as anticipatory bail) are still retained *mutatis mutandis* in the new code under Section 485 from Section 438 in CrPC. Both provisions are drafted in broad terms, granting courts significant discretion to impose conditions deemed appropriate and necessary to serve the interests of justice.

The Courts throughout India, while drawing inspiration from the Crime control model proposed by Packer, as a matter of practice provide a green signal to such conditions to control crime and use scientific techniques for criminal justice delivery. Furthermore, the broadly worded provisions like those discussed above have also shielded such

⁵¹ *Coffin v United States* (1895) 156 US 432; *Narendra Singh v. State of Madhya Pradesh* (2004) 10 SCC 699; *Suresh Thipmappa Shetty v State of Maharashtra* 2023 INSC 749.

directions from scrutiny until now. The exact phrase to be precise is “*any such condition as it considers necessary in the interests of justice*” is worded as an all-inclusive one.⁵² This provides a blanket immunity to such conditions coupled with the fact that the accused is ready to agree to any condition imposed by the court for bail, just to walk out of prison.⁵³ The reasons for the same could range from personal to social and even political.⁵⁴

It has been evident that time and again the Apex Court has reiterated that when there is ambiguity in the provisions of the statute and more than one interpretation is possible the Court must resort to the Golden Rule of interpretation.⁵⁵ Courts have a duty to adopt an interpretation that furthers the purpose of the legislation while preventing potential misuse, though the mere possibility of misuse does not impact the provision's constitutionality or interpretation.⁵⁶ As a lot of water has passed down since the *Sanjay Dutt* case, distinguishing the law laid down in *Sanjay Dutt* from the one laid down in *KS Puttaswamy*⁵⁷ the

⁵² Mokshith Bhyri, 'The Future of Bail Surveillance: Understanding the Implications of the Supreme Court's Stance on Google Pin as a Bail Condition' (CALJ, 6 October 2024) <<https://www.calj.in/post/the-future-of-bail-surveillance-understanding-the-implications-of-the-supreme-court-s-stance-on-goo>> accessed 5 January 2025.

⁵³ *Ramesh Kumar v State (NCT of Delhi)* (2023) 7 SCC 461.

⁵⁴ Prinshul Agarwal & Anubhav Singh, NUALS Law Journal, 'Bail with Strings Attached: *Frank Vitus v NCB* and the Electronically Monitored Bail in India' (NUALS Law Journal, 10 October 2024) <<https://nualslawjournal.com/2024/10/10/bail-with-strings-attached-frank-vitus-v-ncb-and-the-electronically-monitored-bail-in-india/>> accessed 10 January 2025.

⁵⁵ *Sanjay Dutt v State through CBI, Bombay (II)* (1994) 5 SCC 410; *State of Himachal Pradesh v. Nirmal Kaur and Ors.* 2022 SCC OnLine SC 1462.

⁵⁶ *Sanjay Dutt v State through CBI, Bombay (II)* (1994) 5 SCC 410 [16].

⁵⁷ *Justice K.S. Puttaswamy (Retd.) and Anr. v Union of India and Ors.* (2017) 10 SCC 1.

law or state action nowadays has to be proportionate to the harm being caused and share a reasonable nexus with the aim of the move. *KS Puttaswamy* case has since graduated the Right to Privacy to the level of Fundamental Right from a legal right has changed the position of law in Indian jurisprudence. Since the laws or moves of the states can be reviewed judicially and tested on the touchstone of constitutionality, and any move which is contravening the Fundamental Rights is liable to be declared void, unconstitutional and thereby struck down. Such surveillance moves are antithesis to the Right to Privacy as discussed in the section dealing with Constitutional aspects of such moves and hence, violative of the Fundamental Rights, thereby resorting to such moves by the law enforcement agencies across the nation should be discarded in letter and spirit.

Following this, the Apex Court has used this reasoning to interpret the above-discussed phrase, which is adopted *mutatis mutandis* into the newly enacted BNSS from CrPC, the Court in such cases held that in cases of bail such conditions which can qualify as arbitrary, capricious, irrelevant, or unreasonable cannot be imposed.⁵⁸ The right to dignity and constitutional safeguards must be upheld by ensuring bail conditions are proportionate, purpose-driven, and tailored to the specific risks of each case.⁵⁹ Even in *Gurbaksh Singh Sibbia* case⁶⁰, the

⁵⁸ *Kunal Kumar Tiwari v State of Bihar* (2018) 16 SCC 74; *Ramesh Kumar v. State (NCT of Delhi)*, (2023) 7 SCC 461; *Munish Bhasin v State (NCT of Delhi)* (2009) 4 SCC 45.

⁵⁹ *Parvez Noordin Lokhandwalla v State of Maharashtra* (2020) 10 SCC 77; *Mohammed Zubair v. State (NCT of Delhi) and Ors.* AIR 2022 SC 3649.

⁶⁰ *Gurbaksh Singh Sibbia and Ors. v State of Punjab* (1980) 2 SCC 565 [26].

Apex Court ruled that denying bail curtails personal liberty, urging courts to avoid unnecessary restrictions on Section 438 absent in its text. Overburdening it [bail] with conditions risks constitutional challenges under Article 21⁶¹, per *Maneka Gandhi*⁶². Section 438 ensures fair and reasonable procedures, safeguarding personal freedom.

VI. DIGITAL AND TECHNOLOGICAL REALITIES AND WORKING

In today's digital age, technology is increasingly becoming an integral part of the justice system, particularly in bail matters. Tools like GPS tracking and geofence warrants are often proposed as conditions for granting bail, ostensibly to ensure compliance and reduce flight risks. While these measures aim to strengthen the justice process, they raise critical questions about privacy, fairness, and proportionality in the absence of robust safeguards under India's legal framework.

GPS tracking⁶³, Google PIN tracking⁶⁴, and geofencing⁶⁵ differ significantly in their technology and application, particularly in legal and surveillance contexts. GPS tracking utilizes a satellite network to

⁶¹ The Constitution of India, art 21.

⁶² *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

⁶³ Elprocus, 'How GPS System Works' (Elprocus) <<https://www.elprocus.com/how-gps-system-works/>> accessed 10 January 2024.

⁶⁴ Intuji, 'The Tech Behind Google Maps' (Intuji) <<https://intuji.com/the-tech-behind-google-maps/>> accessed 19 January 2024.

⁶⁵ TechTarget, 'Geofencing' (TechTarget) <<https://www.techtarget.com/whatis/definition/geofencing>> accessed 10 January 2025.

provide precise and continuous real-time location data, making it a dependable tool for monitoring movements, often used as a bail condition to ensure compliance. It operates independently of internet connectivity and offers extensive coverage. Google PIN tracking, in contrast, combines GPS, Wi-Fi, and cellular networks within Google's location services framework⁶⁶, requiring the active participation of the individual to share a PIN for location verification. Its dependency on internet connectivity and situational nature makes it less reliable for continuous monitoring. Geofencing introduces a unique dimension by creating virtual geographic boundaries. It uses GPS or RFID technology⁶⁷ to trigger alerts or actions when a device enters or exits a defined area. In legal scenarios, geofencing is applied to restrict movement within specific zones, enhancing compliance with bail conditions. While GPS tracking provides broader surveillance, geofencing adds a layer of targeted monitoring, and Google PIN tracking remains limited in its utility due to its reliance on user interaction and internet availability. Together, these technologies highlight the evolving intersection of digital surveillance and legal frameworks.

The *Digital Personal Data Protection Act, 2023* (DPDP) is a landmark legislation that introduces a consent-driven approach to data collection

⁶⁶ Expert Beacon, 'How to Drop a Pin on Google Maps: The Complete Developer's Guide' (Expert Beacon) <<https://expertbeacon.com/how-to-drop-a-pin-on-google-maps-the-complete-developers-guide/>> accessed 15 January 2024.

⁶⁷ Uma Technology, 'Geofencing: What It Is and How It Works' (Uma Technology) <https://umatechnology.org/geofencing-what-it-is-and-how-it-works/> accessed 10 January 2024.

and processing. It enshrines principles such as purpose limitation, data minimization, and proportionality—pillars that hold significant relevance when digital surveillance measures are employed. For instance, GPS tracking involves continuous location monitoring, often implemented without clear consent or transparent mechanisms. This clashes with the DPDP Act's emphasis on protecting individuals' personal data and raises the spectre of misuse, overreach, and erosion of privacy.

The intersection of privacy and surveillance is not new to Indian jurisprudence. As discussed in the previous section, in *PUCL v Union of India*⁶⁸, the Supreme Court laid down essential safeguards against state surveillance in telephone tapping, emphasising that any such intrusion must be backed by procedural fairness and limited to legitimate purposes. Noting that telecom providers have a public duty, the Apex Court in *Amar Singh*⁶⁹ emphasized vigilance against fake requests. The Court ruled that while telecom service providers must promptly act on interception requests from government agencies, they are equally obligated to verify the authenticity of such requests. It reiterated that phone interception, an intrusion on the fundamental right to privacy, is permissible only in public interest through genuine, official requests following established legal procedures. The provider's failure to verify a suspicious request amounted to a breach of its public duty, highlighting the need for stricter compliance and accountability

⁶⁸ (1997) 1 SCC 301.

⁶⁹ *Amar Singh v Union of India* (2011) 7 SCC 69.

in such matters. Similarly, in the *KS Puttaswamy* judgment,⁷⁰ the court read the principles of necessity and proportionality non-negotiable in any form of state action.

While the *277th Law Commission Report (2018)*⁷¹ addressed bail reforms, it overlooked the implications of digital surveillance. However, the *Justice Srikrishna Committee Report (2018)*,⁷² which informed the DPDP Act, explicitly highlighted privacy as a cornerstone of data governance. Applying these insights to bail jurisprudence necessitates rethinking surveillance conditions to ensure they do not disproportionately infringe on individual freedoms. Simultaneously, the Parliamentary Review Panel (Report No. 247)⁷³ endorsed⁷⁴ the use of surveillance measures for undertrials, subject to their consent. In May 2023, the Home Ministry circulated the *Model Prisons and Correctional Services Act, 2023*⁷⁵ to all States and Union Territories to

⁷⁰ *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.* (2017) 10 SCC 1.

⁷¹ Law Commission of India, Report No. 277: Wrongful Prosecution (Miscarriage of Justice): Legal Remedies (August 2018) <<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081613.pdf>> accessed on 3 December 2023.

⁷² Justice Srikrishna Committee, Report of the Committee of Experts on Data Protection (2018) <<https://www.meity.gov.in>> accessed on 25 January 2024.

⁷³ Parliamentary Review Panel, Report No. 247 (Parliament of India, [2023])<https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/15/188/247_2023_11_16.pdf?source=rajyasabha> accessed on 5 January 2024.

⁷⁴ The Hindu, 'Parliamentary Panel Recommends GPS Trackers to Reduce Overcrowding in Prisons' (The Hindu, 2025)<<https://www.thehindu.com/news/national/parliamentary-panel-recommends-gps-trackers-to-reduce-overcrowding-in-prisons/article67331749.ece>> accessed on 5 January 2025.

⁷⁵ Ministry of Home Affairs, Government of India, 'Advisory on Adoption of Model Prisons and Correctional Services Act, 2023 by States and Union Territories' (10

serve as a guiding document for the States for implementation of proposed reforms. For the first time, the said Act proposed using electronic tracking devices, allowing prisoners to be granted leave on the condition that they consent to wear these devices for monitoring their movements and activities. However, it is noteworthy that Prisons is a State subject in the Constitution and the future of such a move is uncertain, considering the federal setup of the Union.

As courts increasingly grapple with integrating digital tools into legal processes, they must take a nuanced approach. Surveillance as a bail condition must be scrutinized for its necessity and tailored to minimize intrusion. Clear safeguards are essential to prevent misuse, secure data, and ensure compliance with privacy laws like the DPDP Act. Only by striking this delicate balance can we ensure that justice is not pursued at the cost of fundamental rights.

VII. ANCILLARY IMPLICATIONS

The State defends such measures by arguing that modern technology merely streamlines traditional practices, like regular reporting to investigating officers. Another justification is crime prevention, citing a rational nexus between the objective and the means adopted, even if it infringes on privacy rights. Additionally, it is argued that adopting such measures could alleviate prison overcrowding, as undertrials

make up the majority of inmates in Indian prisons.⁷⁶ By reducing the need for pretrial detention, these technologies can lessen the burden on infrastructure, addressing the chronic issue of overcrowding in the prison system. The use of technology for bail monitoring brings numerous challenges. Devices rely on batteries that may fail or discharge without fault of the accused, leading to unwarranted penalties. Optimal functionality requires clear skies and robust cellular networks, making these devices unreliable in remote or challenging terrains like the Himalayas or dense urban areas where factors such as weather, buildings, or vegetation disrupt signals. False alarms are frequent, exacerbated by inadequate training for law enforcement.⁷⁷

The case of Kevin Jones⁷⁸ in the United States, wherein the failure of a monitoring device due to a dead battery led to his arrest, underscores systemic deficiencies in the implementation of electronic monitoring systems. This incident highlights critical concerns regarding inherent biases within such practices, which disproportionately burden individuals from lower socio-economic backgrounds, further perpetuating structural inequalities. In India, where undertrials often

⁷⁶ Aniruddha Ghosal, '76% Prisoners Are Undertrials, Ratio Is Highest in Delhi, J&K' (The Indian Express, 5 May 2022) <<https://indianexpress.com/article/india/76-percent-prisoners-are-undertrials-ratio-is-highest-in-delhi-jk-7900089/>> accessed 5 June 2024.

⁷⁷ Devansh Malhotra, 'Where Privacy Takes a Detour: Navigating The Controversy Of Live Location Sharing' (LiveLaw, 12 December 2023) <<https://www.livelaw.in/articles/where-privacy-takes-a-detour-navigating-the-controversy-of-live-location-sharing-244315>> accessed 9 June 2024.

⁷⁸ ACLU, 'Jailed for a Faulty Battery and Left to Catch COVID-19' (ACLU, 11 August 2020) <<https://www.aclu.org/news/criminal-law-reform/jailed-for-a-faulty-battery-and-left-to-catch-covid-19>> accessed 10 January 2025.

belong to vulnerable groups, similar issues could deepen inequalities, impacting livelihoods and increasing stigmatization. These conditions could deter bail applications, leaving undertrials trapped in detention or driven to criminal activities for survival due to lack of financial resources.⁷⁹

Moreover, the question of cost responsibility arises. Imposing the cost of monitoring on undertrials could result in socio-economic crises, further marginalizing already disadvantaged individuals.⁸⁰ The lack of livelihood opportunities for undertrials adds another layer of complexity, making them susceptible to exploitation. Furthermore, the possibility of person changing the mobile handset or number is also unexplored, as it will be the but obvious loophole for the accused to escape the process of justice.

The denial of voting rights to undertrial prisoners in India, alongside the use of electronic surveillance for bail, raises concerns about justice and inclusion. Section 62(5) of the *Representation of the People Act, 1951* imposes a blanket ban on all prisoners, including undertrials

⁷⁹ Tim Cushing, 'Prisons Replace Ankle Bracelets with Expensive Smartphone App That Doesn't Work' (Techdirt, 1 May 2020) <<https://www.techdirt.com/2020/05/01/prisons-replace-ankle-bracelets-with-expensive-smartphone-app-that-doesnt-work/>> accessed 5 January 2024.

⁸⁰ American Civil Liberties Union, *Rethinking Electronic Monitoring: A Harm Reduction Guide* (September 2022) <<https://www.aclu.org/wp-content/uploads/legal-documents/2022-09-22-electronicmonitoring.pdf>> accessed 5 February 2024.

(whether civil or criminal), from voting, ignoring their presumption of innocence.⁸¹

Electronic surveillance tools like GPS tracking allow undertrials to remain in society under strict monitoring, yet they are excluded from participating in democracy. This dual treatment—monitoring for compliance while denying fundamental rights—contradicts the principles of justice and universal suffrage enshrined in the Constitution.⁸²

A balanced approach is essential to align bail practices with constitutionally enshrined democratic values, safeguarding voting rights for undertrials under surveillance, promoting reintegration, and ensuring technology supports public safety while protecting rights and dignity within the criminal justice system.

VIII. INTERNATIONAL OBLIGATIONS AND PERSPECTIVE

The presumption of innocence, underlined in Article 11(1) of the Universal Declaration of Human Rights⁸³ (UDHR) and Article 14(2)

⁸¹ LiveLaw, 'Voting Rights, Undertrial Prisoners: Black Robes Legal' (LiveLaw, 30 November 2021) <<https://www.livelaw.in/law-firms/law-firm-articles/-voting-rights-undertrial-prisoners-black-robos-legal-183859>> accessed 20 January 2024.

⁸² The South First, 'Negation of Voting Rights for Undertrial Prisoners: Unjust Exclusion' (The South First, 22 July 2022) <<https://thesouthfirst.com/opinion/negation-of-voting-rights-for-undertrial-prisoners-unjust-exclusion/>> accessed 10 January 2024.

⁸³ Universal Declaration of Human Rights, art 11(1).

of the International Covenant on Civil and Political Rights (ICCPR)⁸⁴, guarantees that individuals accused of offences are deemed innocent until proven guilty. Article 66 of the Rome Statute⁸⁵ reinforces this principle, emphasizing that even in cases involving grave crimes, the burden of proof lies entirely with the prosecution. Article 8 of the European Convention of Human Rights⁸⁶ also emphasizes on the principle of proportionality together with the need for a justification for the state interference into privacy.

In the United Kingdom, the statutory framework governing electronic monitoring as a bail condition is set out under Section 3 of the Bail Act⁸⁷. This provision empowers the courts to impose electronic monitoring (“EM”) only when it is evident that, without such monitoring, bail would not be granted. Furthermore, EM is generally restricted to individuals over the age of 18, displaying the intrusive nature of this measure and its impact on individual liberty as acknowledged by different courts worldwide. By ensuring that EM is used only in cases where less restrictive measures are insufficient the UK framework upholds the principle of proportionality keeping in mind that the end sought to achieve is bail and not open air incarceration.

⁸⁴ International Covenant on Civil and Political Rights, art 14(2).

⁸⁵ Rome Statute of the International Criminal Court, art 66.

⁸⁶ European Convention on Human Rights, art 8.

⁸⁷ Bail Act 1976, s 3.

The United Kingdom and New Zealand provide examples of nuanced approaches to the use of EM by employing electronic monitoring devices (“EMDs”) as a condition of bail, and serve as an example for India to follow. The idea that is weaved into both the laws is that EM should be applied sparingly, with a clear demonstration of necessity and proportionality.

Similarly, New Zealand’s legislative framework reflects a cautious approach, aligning with the principles of necessity and proportionality. Section 30A of The Bail Act 2000⁸⁸, specifies that EM bail can be granted only when less restrictive measures are inadequate to ensure the accused’s attendance at trial or to prevent interference with witnesses or re-offending. Courts in New Zealand are required to assess whether the imposition of EM aligns with the least restrictive means principle, balancing the rights of the accused with the safety of the entire community.

Malaysia offers a unique take on the EMDs. The Malaysian Legal system offers a bifurcation entailing two types of laws: - preventive and ordinary laws. The use of EMDs is majorly seen in preventive laws namely the Prevention of Crime Act 1959,⁸⁹ Security Offences (Special Measures) Act 2012,⁹⁰ Prevention of Terrorism Act, 2015 etc.⁹¹ GPS trackers and anklets are used in the USA to track the offenders on

⁸⁸ Bail Act 2000, s 30A.

⁸⁹ Prevention of Crime Act 1959.

⁹⁰ Security Offences (Special Measures) Act 2012 (Malaysia).

⁹¹ Prevention of Terrorism Act 2015 (Malaysia).

probation, undertrial and on parole. According to a report by Per Researcher's trust, the number of accused and convicted criminal offenders monitored with electronic tracking devices in the US increased 140 percent between 2005 and 2015, from approximately 53,000 to more than 125,000.⁹²

The 21st Law Commission of India has consistently advocated for the restrained use of EM, recommending its application only in cases involving serious offenses, particularly where the accused has a prior conviction for similar crimes.⁹³ The Commission has highlighted the risk of overreliance on EM, cautioning that its excessive or punitive use undermines the presumption of innocence and the rehabilitative aims of bail.

IX. BALANCING THE TWO MODELS AND SUGGESTIONS

A nuanced approach is needed to reconcile the competing demands of these models. Digital surveillance must be implemented in a way that aligns with the **Crime Control Model's** focus on public safety and efficiency while respecting the **Due Process Model's** commitment to fairness and equity.

⁹² Pew Charitable Trusts, 'Use of Electronic Offender Tracking Devices Expands Sharply' (September 2016) <<https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expands-sharply>> accessed on 7 January 2024.

⁹³ 21st Law Commission of India, *Report on the Use of Electronic Monitoring in India* (2018) Report No. 264.

Gouldin's call for more precise risk assessment tools is a step in this direction. By distinguishing between true flight risks and other forms of non-appearance, judges can impose tailored conditions that reflect the actual risks posed by each individual. Similarly, Wiseman's advocacy for proportionality under the Eighth Amendment of the US Constitution⁹⁴ ensures that monitoring measures do not become excessive or punitive.

Digital surveillance in bail matters exemplifies the tension between protecting society and preserving individual freedoms. Herbert Packer's models remind us that a balanced justice system must achieve both goals. The implementation of clear guidelines and standard operating procedures (SOPs) for such measures post-consent as is the case in employing certain invasive investigation techniques such as narco-analysis⁹⁵ could significantly enhance their efficiency and reliability. By integrating the practices of risk assessments, proportional safeguards, and equitable practices, we can ensure that digital surveillance serves as a tool for justice rather than a source of oppression. Conclusively, this balance can help build a criminal justice system that is both effective and fair, upholding the principles of liberty and safety for all.

The use of digital surveillance as a condition for bail highlights a critical intersection between advancing technology and the

⁹⁴ US Const. amend. VIII.

⁹⁵ *Selvi v State of Karnataka* (2010) 7 SCC 263.

preservation of constitutional rights. While tools like GPS tracking and geofencing promise efficiency in monitoring accused individuals, they risk infringing on privacy, dignity, and the doctrine of presumption of innocence if implemented without sufficient safeguards.

Herbert Packer's Crime Control and Due Process models underscore the dual objectives of ensuring public safety and upholding individual freedoms. India's judicial framework has recognized the primacy of proportionality and fairness, as evident in cases like *KS Puttaswamy v. Union of India*. However, inconsistencies in judicial interpretation such as conflicting stances on location-sharing requirements highlight the urgent need for a unified approach. The court should settle the dust around the controversy by referring the matter to a larger bench to pronounce a conclusive judgement while balancing the rights of the individual and state interest to uphold law and order in the society.

The *Digital Personal Data Protection Act, 2023*, while advancing privacy protections, does not adequately address the nuances of surveillance in bail matters. Similarly, the *Model Prisons and Correctional Services Act, 2023* and international frameworks, like those in the UK and New Zealand, stress the necessity and proportionality of such measures but lack comprehensive implementation strategies.

To align technological progress with constitutional values such as individual rights, privacy, due process, and the presumption of innocence, a robust regulatory framework is vital. Courts should

establish clear, fair guidelines that prioritize minimal intrusion and address socio-economic biases, ensuring surveillance serves justice rather than perpetuates inequality. By incorporating proportional safeguards, judicial oversight, and rigorous risk assessments, digital surveillance can enhance justice delivery without compromising fundamental rights. This balanced approach can reshape bail jurisprudence, fostering an efficient and equitable criminal justice system rooted in accountability and fairness.

VIII. FEASIBILITY OF BALANCING CONSTITUTIONAL AND PUBLIC MORALITY: AN ANALYSIS OF THE INDIAN LEGAL FRAMEWORK

- *DR. SANDHYA KUMARI** & *RUDRABHISHEK CHAUHAN***

- ABSTRACT:

The society is ever-evolving and we are way behind in accommodating the socio-cultural ethos, sustainable development, digital advances, anti-competition measures and related governance challenges. This requires transformative constitutionalism being imbibed in daily judicial business, imposing a responsibility on the judiciary to ensure consistent transformation in the society through interpretation of constitution and other legal provisions, while keeping the intentions of the Constituent Assembly and morality intact. The question, herein, arises whose morality; people's or constitution's? Or, rather, can there be a balance between the two? Notably, the relationship between constitutional morality and public morality is not simply opting for one or the other; rather, it is intricate. For example, while constitutional morality seeks to ensure the democratic ethos and to protect the rights of the people; public morality imposes restrictions based on societal beliefs. The dilemma requires an inquiry as to the extent to which public morality may play a role in protecting fundamental rights and interpreting the Constitution. Against this backdrop, the authors have taken up to deepen

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their understanding of these two legal constructs and identify the possibilities for balance of these types of morality within the Indian legal system. In this regard, this paper also observes how these ideas interact with each other and affect judicial rulings, through the examples of significant cases. Further, the authors have aimed to identify the ways for reconciliation between the constitutional and public morality through judicial interpretation of the Constitution. Further, they also seek insight regarding how the judiciary has managed to deal with these concerns. In this backdrop, the paper is divided in seven parts. The first being the introduction, the second part deals with the theoretical framework of these two concepts of constitutional and public morality, third part elaborates upon constitutional morality in India, wherein fourth part engages with public morality in India, fifth part highlights the conflict between constitutional morality and public morality. Further the sixth part focuses on the role of the Indian judiciary in upholding constitutional morality and public morality. Finally, the last part deals with conclusion suggesting that when the organs of legislature and the judiciary along with civil society as third party put in efforts, the balancing of public and constitutional morality maybe a possibility.

Keywords: *Constitutional values, Constitutional morality, public morality, Judicial Overreach*

I. INTRODUCTION

The constitution of any country is not a static document, rather it is a living one. It cannot stay changeless; rather, it must be attuned to changing ideas, ideologies and circumstances. Further, the legislative process is cumbersome, more so for constitutional amendment, and therefore, inappropriate to accommodate frequent changes, as it might

take a lot of time and political will to take forward the dynamic fine-tuning. Furthermore, the process might also involve the risk of affecting the basic structure of the Constitution. Consequently, the task falls upon the judicial process to adapt the law through various means of interpretation keeping the changes in consideration.¹

Evidently, the Indian judiciary has done its work, as the dynamic deciphering and interpretation of the Indian Constitution has taken Indian Jurisprudence to great heights in the last half of the century. For example, the concept of basic structure, right to life, right against exploitation, right to various freedoms have seen major overhauling, while encompassing the changes. However, treading this path has never been easy, especially while ensuring that morality has not been made the scapegoat in this transformation. The intriguing questions that build up in this instance are; whose morality is being considered, on what grounds, have the higher courts delivered justice to the aggrieved parties before them while identifying between different types of morality, such as constitutional morality or public morality?

Recently, in the case of *Supriyo v Union of India*², the Supreme Court decoded the word ‘conscience’ within the framework of right to religion, i.e., “freedom of conscience and free profession, practice and propagation of religion”. While referring to Black’s Law Dictionary it observed that conscience refers to the moral sense; the faculty of

¹ *Central Inland Water Transport v Brojonath Ganguly*, (1986) 3 SCC 156.

² *Supriyo v Union of India*, 2023 INSC 920.

judging the moral qualities of actions, or of discriminating between right and wrong; particularly applied to one's perception and judgment of the moral qualities of his own conduct, in a wider sense, also denoting similar application of the standards of morality to the acts of others. This deliberation highlights the essence of morality, emphasizing personal perspectives over societal or constitutional considerations.

Notably, constitutional morality acknowledges the ideals enshrined in the Constitution and guides the government and citizens towards reinforcing the rule of law, the protection of individual rights and democracy, while limiting governance to constitutional dictates rather than the populist views.³ Further, the contents of constitutional morality are founded on four principles emerging from the Preamble. Firstly, the need to ensure justice, social, economic and political. Secondly, the individual liberty in matters of thought, expression, belief, faith and worship. Thirdly, the equality of status and opportunity amongst all citizens. And, fourthly, the sense of fraternity amongst all citizens, assuring the dignity of human life.⁴

On the other hand, public morality is the set of moral guidelines and endorsements in society that exist among people; varying as per the

³Mahendra Pal Singh, 'Observing Constitutional Morality' (2019) 721 *SEMINAR*, <https://www.india-seminar.com/2019/721/721_mahendra_pal_singh.htm> accessed 16 September 2024.

⁴*Indian Young Lawyers Association v The State of Kerala*, (2018) 10 SCC 689.

time, place, and space. Often, public morality becomes a source for the law-making and the judicial decision-making, which must pass on the touchstone of the Constitution, as and when required. The common good of public morality is the good of a healthy moral ecology, which generates obligations in justice for all.⁵ Further, it serves two interests, one concerning community and the other character. It also supports traditions, essentially bonding a community, and promotes certain qualities requiring thoughtful cultivation, like restraining improper behaviour, as to time and space.⁶

The relationship between constitutional morality and public morality is not simply opting for one or the other; rather, it is intricate. For example, while constitutional morality seeks to ensure the democratic ethos and protect the rights of the people; public morality imposes restrictions based on societal beliefs. This relationship calls into question how much public morality should play a role in protecting fundamental rights of the people and interpreting the Constitution while balancing with constitutional morality.

In this backdrop, the paper is divided in seven parts. The first being the introduction, the second part deals with the theoretical framework of these two concepts of constitutional and public morality, third part

⁵ Robert P. George, 'The Concept of Public Morality', (2000) 45 (1) *The American Journal of Jurisprudence*, 17–31, <<https://doi.org/10.1093/ajj/45.1.17>> accessed 16 September 2024.

⁶ Harry M. Clor, "The Death of Public Morality?" (2000) 45 (1) *The American Journal of Jurisprudence*, <<https://scholarship.law.nd.edu/ajj/vol45/iss1/3>> accessed 16 September 2024.

elaborates upon constitutional morality in India, wherein fourth part engages with public morality in India, fifth part highlights the conflict between constitutional morality and public morality. Further the sixth part focuses on the role of the Indian judiciary in upholding constitutional morality and public morality. Finally, the last part deals with conclusion suggesting that when the organs of legislature and the judiciary along with civil society as third party put in efforts, the balancing of public and constitutional morality maybe a possibility.

II. THEORETICAL FRAMEWORK

The perspective within which constitutional morality and public morality are understood in the context of the Indian legal order is shaped by the basic relations of law, society, social order and the individual's entitlement.

A. Constitutional Morality: Theoretical Underpinnings

Constitutional morality is based on the upholding of the values and principles of the Constitution, which strengthens democracy. It is less to do with the form of constitution and constitutional authorities and more to do with the values of the constitution, i.e. the characteristics of constitutionalism. As firstly used by Grote, the concept was focussed

on the coexistence of freedom and self-restraint.⁷ These values and principles conform to the ideals of human rights, such as liberty, individualism, and equality before the law, further promoting an inclusive and democratic political process valuing the dignity of all individuals.⁸ Constitutional morality means adhering to the core values and principles outlined in the Constitution. It emphasizes the value of individual rights, equality, fairness, and the rule of law. They are further outlined and derived through some of the constitutional provisions, like in the Indian context, the preambulatory emphasis on justice, liberty, and equality, fairness, the rule of law and the provisions recognising the fundamental rights of the people under the Part III of the Indian Constitution.⁹ Furthermore, the key character of constitutional morality is the establishment of a political culture that acknowledges the equality of people, promoting the growth of society through healthy democratic means.¹⁰ It requires, the quality of civility, ensuring respect, restraint, patience vis-à-vis rights and concerns of other members of society.¹¹

⁷ Pratap Bhanu Mehta, 'What is Constitutional Morality?' (2010) 615 SEMINAR, <https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm> accessed 17 September 2024.

⁸ Deepak K Srivastava, 'Pearls and Pitfalls of the Doctrine of Constitutional Morality: Constitutional Morality' (2022) 61(2) Punjab University Law Review <<https://pulr.puchd.ac.in/index.php/pulr/article/view/55>> accessed on 11 September 2024.

⁹ A S Rane, 'Executive Authority on Constitutional Morality in India: A Critical Study' (2023) 34 Journal of Namibian Studies: History Politics Culture 5606.

¹⁰ Md. Zeeshan Ahmad and Showkat Ahmad Wani, 'Constitutional Morality and Authoritarianism: Percolating Constitutionalism Through Judicial Interpretation' (2023) 69(3), Indian Journal of Public Administration 624.

¹¹ Andre Beteille, 'Constitutional Morality' (2008) 43 (40) Economic and Political Weekly 35 <<http://www.jstor.org/stable/40278025>> accessed on 30 September 2024.

Constituent Assembly debates throw light on the importance of the same; wherein Dr. B.R. Ambedkar, a key figure in the Indian polity, sought out constitutional morality in the context of balancing conflicts among competing interests in society. His belief was rooted in the need to reconcile the rights of the individuals and the responsibilities of society as a whole, preventing the majoritarian sentiments from eroding the absolute principles of the Constitution.¹² In recent times, this understanding has been fortified by certain judicial interpretations; in particular, the case of *Navtej Singh Johar v Union of India*¹³, clarifying the boundaries of constitutional and popular morality. The Supreme Court stressed that the higher courts must act according to constitutional morality, especially in issues concerning fundamental rights.

B. Public Morality: Theoretical Underpinnings

Public morality is a broader set of rules about the ethics and behavioural expectations of people in a society; public morality is more or less the sum total of ethics. Public morality, while regulating the lives of the members of the society, becomes normative in nature and varies across communities, cultures, religions, and history, leading to a dynamic and sometimes contentious relationship with constitutional morality. Indeed, while public morality or collective morality may be

¹² Nakul Nayak, 'Constitutional Morality: An Indian Framework' (JGU Research Blog, February 23 2024) <<https://research.jgu.edu.in/constitutional-morality-an-indian-framework/>> accessed on 11 September 2024.

¹³ *Navtej Singh Johar v Union of India*, AIR 2018 SC 4321.

better placed to bring about change through legislative process, it may stand in opposition to the ideals of individual rights and freedoms contained in the Constitution and distort the very core of democratic and constitutional principles.¹⁴

The theoretical analysis of public morality is essential for assessing its impact on law and the endurance of legal norms. The variability of public morality, influenced by community changes, culture, time, and space, complicates the judiciary's task of determining public desires. This challenge is particularly pronounced in India's diverse and majoritarian society, where balancing adherence to constitutional ideals with public sentiment becomes increasingly cumbersome.¹⁵

C. Interplay Between Constitutional Morality and Public Morality

In the backdrop of the theoretical understanding of the concepts of constitutional and public morality, let us have a look at their interaction, which is characterized by a clash as well as a collaboration. Acceptance of constitutional morality prioritizes the rights of individuals and the principles of democracy¹⁶ while restricting the

¹⁴Rohit Sharma, 'The Public and Constitutional Morality Conundrum: A Case-Note on The Naz Foundation Judgment' (2009) 2(2) NUJSLR <<http://www.commonlii.org/in/journals/NUJSLawRw/2009/25.pdf>> accessed on 11 September 2024.

¹⁵Supra (n 8).

¹⁶Ajay Kumar, 'Two Different But Same Perspectives On Constitutional Morality' (2022) ILI <https://ili.ac.in/pdf/12._Ajay_Kumar.pdf> accessed on 1 September 2024.

state; whereas, in most instances, public morality aims at enforcing popular constraints on such rights.¹⁷ Such interplay makes it necessary for the judiciary to make decisions with regard to and as much as possible without compromising constitutional morality while considering the society's ethical standards. Hence, the consequences of the judicial actions upon society are the determinations of figurative growth, in the form of either reinforcement of public morality or fortification of constitutional morality. A balanced approach of the two, however, has been absent from the judicial pronouncements.

In this regard, it is important to study the evolution of the constitutional and public morality in India emphasizing the importance of these approaches to constitutional interpretation, shaping societal regulation. By recognizing the distinct yet interconnected nature of these moralities, legal scholars and practitioners can better navigate the complexities of Indian constitutional law.

III. CONSTITUTIONAL MORALITY IN INDIA

A. Historical Evolution of Constitutional Morality in India

The constitutional morality in India has transformed through judicial interpretations and practical enactments since November 26, 1949, the

¹⁷ Ranjita Chakraborty, 'Managing Public Morality: The Politics of Public Policy in India' (2009) *The Indian Journal of Political Science*, vol. 70, no. 4, pp. 1099–108 <<http://www.jstor.org/stable/42744022>> accessed 11 September 2024.

day the Constitution became effective for the first time. It was in the Constituent Assembly Debate discourse that B.R. Ambedkar first used the words “constitutional morality” because of his worries towards the legislature’s own commitment to the values of the Constitution. Within this understanding, he believed that constitutional morality served as a means of harmonious integration of all interests within the social mosaic so as to respect the individual and society as one.¹⁸

B. Key Constitutional Provisions Relating to Constitutional Morality

The Preamble and some provisions of the Indian Constitution, which state the principles of justice, liberty, equality, and fraternity, are the foundation of Indian constitutional morality. Despite not having a precise definition in the Constitution, the concept of “constitutional morality” is implied from the fundamental principles that form the cornerstone of a democracy.¹⁹ The Preamble and the Fundamental Rights provisions are thus important components ensuring that individual liberties are shielded from the inclinations of the majority.

C. Judicial Interpretation of Constitutional Morality

The Indian judiciary has interpreted, applied, and contributed towards the evolution of the constitutional morality principles in a few

¹⁸ Supra (n 10).

¹⁹ Supra (n 12).

landmark decisions, enough to initiate a dialogue on the same. In the case of *Manoj Narula v Union of India*²⁰ the Supreme Court asserted that the principle of constitutional morality basically puts the norms of the Constitution first, ensuring rule of law. It further required that the traditions and conventions of all the organs of the state must grow to sustain constitutional morality without any deviancy, leading to institutional integrity and constitutional restraint.

The case of *Josephine Shine v Union of India*²¹, examined constitutional morality in a matter concerning criminalisation of adultery. The Supreme Court herein abolished adultery as an offence by repealing Section 497 of the Indian Penal Code 1860. In Justice Chandrachud's opinion, the complex legal order of a nation must flow from Constitutional morality and not common morality. He further added that "in a democracy, conventionally certain rights must be available to every person for him to be able to enjoy "free, equal and dignified existence".²² He further reiterated, "Commitment towards Constitutional morality means that one has to observe the constitutional provisions such as equality before law, non-discrimination on the basis of sex and dignity." At this juncture, regarding Justice R. F. Nariman's inquiry into the significance of Section 497 of the Indian Penal Code (IPC), he clarified that this ancient law has long been misaligned with its original intention and has been now at odds with contemporary

²⁰ *Manoj Narula v Union of India*, (2014) 9 SCC 1.

²¹ *Joseph Shine v Union of India*, AIR 2018 SC 4898.

²² *ibid*.

constitutional morality. This perspective highlights a more dynamic view of constitutional morality, suggesting that it is not static but evolves with societal demands—contrary to the views expressed by other judges in the case. The Court thus considered the changing public perception while analysing the constitutionality of the given provision. The Court emphasized that when there is a conflict between the right to self-determination and social morals, the right to self-determination and privacy takes precedence. It further noted that societal morals regarding adultery have evolved over time. Furthermore, while contemplating on the constitutionality of the provision, it also tested the constitutionality of moral and societal regulation of women and their intimate lives through the law. It also observed that Section 497 perpetuated an already existing inequality; when viewed in the context of a social structure which considers the husband as the owner of the wife’s sexuality, and that the law sustained “a deeply entrenched patriarchal order”. It emphasised that substantive equality could be attained only through an overhaul of these social structures, when all visible and invisible forms of inequality, - social, cultural, economic, political or sexual - were recognised and eliminated so that a truly egalitarian existence could be pictured.²³ Thus, the judgment not only differentiated between contextual and ancient social morality but also balanced the public morality as to constitutional morality, while referring to foreign judgments.

²³ *ibid.*

In the case of *Indian Hotel and Restaurant Association v The State of Maharashtra*²⁴, the Supreme Court addressed the conflict between constitutional morality and public morality concerning the Maharashtra government's amendments to the Bombay Police Act, which prohibited dance performances in certain establishments while allowing them in hotels with three or more stars. The Court ruled that these amendments violated fundamental rights under Articles 14, 19(1)(a), 19(1)(g), and 21 of the Constitution, emphasizing that legislation must not infringe upon individual rights for the sake of public morality. The Supreme Court's decision highlighted that while the state has a role in regulating public morality, it cannot do so at the expense of constitutional protections. This ruling again underscored that morality is not static; and therefore, what may be deemed immoral at one time could evolve as moral afterwards. This perspective aligns with constitutional morality, which prioritizes individual rights over fluctuating societal norms.

Simultaneously, in the case of *Indian Young Lawyers Association v The State of Kerala*²⁵, the issue was regarding a restriction that was imposed on the right to religion on the women of 'menstruating age', i.e. those between the ages 10 and 50. As per the prohibition, these women could be restricted from entering into the Sabarimala Temple in the State of Kerala. While deciding the matter Justice R F Nariman from the

²⁴ *Indian Hotel and Restaurant Association & Anr. v The State of Maharashtra & Ors.*, Writ Petition Civil No.576 of 2016.

²⁵ *Indian Young Lawyers Association* (n 4).

Supreme Court of India quoted that; “It is constitutional morality which is the dominant ethic when it comes to a dialogue between religion and morality in the field of public law.” He further declared, “In cases of violation of the fundamental rights, the phrase “morality” in context means constitutional morality” and that the Judiciary should observe constitutional morality, ensuring respect for the Constitution. All judges, except Justice Indu Malhotra, held that "morality" in Articles 25 and 26 should not be interpreted in a "sectionalized" manner, as some may perceive it. However, in her dissenting judgment, Justice Malhotra while acknowledging that equality is a fundamental tenet of the Constitution, asserted that the freedom of faith, belief, and worship must also be safeguarded. She further stated, “Constitutional morality demands the harmonization or reconciliation of any and all such rights so that the religion of no one is erased or disrespected.”²⁶ This confrontation of views elaborates on the ambit of constitutional morality.

In 2009, Section 377 of the Indian Penal Code, 1860 faced constitutional scrutiny in the case of *Naz Foundation v Government of the NCT of Delhi*.²⁷ Justice Ajit Prakash Shah declared that “if there is any type of ‘morality’ that can pass the test of compelling state interest, it must be ‘constitutional’ morality and not public morality.” He further asserted that “popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under

²⁶ *ibid.*

²⁷ *Naz Foundation v Government of the NCT of Delhi*, 2009 (6) SCC 712.

Article 21.” According to Justice Ajit Prakash Shah, popular morality is transient, and using such flimsy notions of right and wrong to deny someone their fundamental human rights is unacceptable. He emphasized the importance of “following global trends on the issue of sexual offences,” as indicated in the 172nd Law Commission Report. Justice Shah further noted that the cases filed under Section 377 should focus on issues involving consenting adults rather than being misapplied to instances of child abuse.²⁸ Numerous incidents and reports submitted by the petitioner demonstrated how, rather than serving any legitimate public purpose, this clause was being exploited to harass and violate members of the LGBT community.

Following the ruling in *Naz Foundation v Govt. of NCT of Delhi*, the Section 377 was reinstated in *Suresh Kumar Koushal v Naz Foundation*²⁹ by the Supreme Court in 2014 based on public morality. However, in *Navtej Singh Johar v Union of India*, the Supreme Court overturned its earlier ruling and categorically repealed Section 377. In his ruling, Chief Justice Dipak Misra, while speaking for himself and Justice Khanwilkar, declared that the executive, the legislature, and the judiciary, all the organs of the state, have to stay alive to the concept of constitutional morality. He continued highlighting that societal morality subjected sexual minorities to several challenges and that it was the responsibility of the courts to guarantee that constitutional

²⁸ *ibid.*

²⁹ *Suresh Kumar Koushal v Naz Foundation*, (2014) 1 SCC 1.

morality prevailed over social morality.³⁰ In his concurring opinion, Justice R.F. Nariman said that constitutional morality serves as a “threshold against an upsurge in mob rule” and a check against the “tyranny of the majority.” According to Justice Nariman, sexual minorities had been denied fundamental rights, and it was essential for the court to ensure that these rights were upheld in accordance with the Constitution, irrespective of majority opinion. He articulated that constitutional morality is the “soul of the Constitution,” emphasizing its role in protecting individual rights against societal prejudices.³¹ These instances show the judiciary's dedication to preserving constitutional morality and its readiness to oppose social norms that violate people's rights and fundamental values.

IV. PUBLIC MORALITY IN INDIA

A. Historical Evolution of Public Morality in India

In his speech made on 13th December in 1946, Jawaharlal Nehru pointed out public morality as one of the principles that ought to govern the Constitution of India.³² He explained that after the independence of India, the country will have a government which will not only ensure fundamental rights but will also promote the ideals of public morality.

³⁰ *ibid.*

³¹ *ibid.*

³² Constitution of India, ‘13 Dec 1946 Archives - Constitution of India’ (*Constitution of India*) <<https://www.constitutionofindia.net/debates/13-dec-1946/>> accessed on 11 September 2024.

This idea was considered essential because it guarantees people's rights and freedoms not only by law but also by individual behaviour.

Nehru aspired that the Constitution will guarantee “justice, social, economic, and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association, and action, subject to law and public morality.”

This inclusion demonstrated that while individuals were entitled to express themselves and safeguard their basic liberties and human rights, these expressions must also respect the rights of others and the moral foundations of society.³³ Further, Jawaharlal Nehru's acknowledgment of public morality emphasized the balance between individual liberties and the responsibilities individuals have towards their community, aiming to cultivate a harmonious and just society as India transitioned into a sovereign republic.

Thus, the intricate interaction of social, religious, and cultural standards that developed over centuries has defined public morality in India. For example, the Hindu notion of dharma has had a tremendous impact on social norms and appropriate conduct. Likewise, the propagation of public morals in India has also benefited from the teachings of Islam, Christianity, and other religions. Further, public morality in India has

³³ *ibid.*

also been shaped by colonial authority and the nation-building process that followed.³⁴

B. Key Legal Provisions Relating to Public Morality

If not all, some legal concepts in India do deal with public morality, especially those concerning personal and social conduct. Articles 19, 25 and 26 refer to public order and morality in relation to a person's rights and responsibilities vis-a-vis civil liberties and religious freedom. In addition, provisions that attract obscenity legislation and those on marriage and family are also in alignment with cultural values. For instance, Section 377 of the Indian Penal Code, which prohibited homosexual acts among consenting adults, was defended on grounds of public morality until struck down by the Supreme Court in 2018.³⁵

C. Judicial Interpretation of Public Morality

The Indian judiciary has recognized the influence of public morality in the development of social norms and legal rules. Nevertheless, there has been a cross-cutting concern about the overall extent of public morality and how it must be understood as to the restriction of

³⁴ Aditya Rawat & Divyanshu Chaudhary, 'Competing Challenges of Public Morality to Constitutional Morality: Comparative Study of Mob Justice in Sub-Continent Countries' (2021) 5(1) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY 99.

³⁵ *Supra* (n 14).

individual rights. In the *K.A. Abbas v Union of India case*³⁶, the Supreme Court ruled that individual civil liberties may be restricted by public morality so long as there is a need and rationality for such restrictions. In a more recent decision of the Court in the case of *Joseph Shine v Union of India (2018) case*³⁷ the Court, while upholding constitutional morality, recognised contemporary public morality and dismissed the law that cautioned against adultery as a criminal offence. In the case of *S. Khushboo v Kanniammal*,³⁸ the appellant's interview in a famous magazine was termed as "against the dignity of the Tamil women" which had flagrantly affected and rather "ruined the culture and morality of the people" of Tamil Nadu. While deciding in favour of the appellant and dismissing the criminal complaints against her, the Court observed that notions of public morality are inherently subjective, and criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. It further held that morality and criminality do not coextend with each other. The Court furthermore held that if the complainants were not agreeing with the appellant, they must have published their opinion, disagreeing with her view, rather than filing these complaints in large numbers. It emphasised that non-conventional morality has to be tolerated. The Court here stated that the right to freedom of speech and expression is at a higher pedestal under the Indian Constitution.

³⁶ *K.A. Abbas v Union of India*, 1971 AIR 481.

³⁷ *Joseph Shine* (n 21).

³⁸ *S. Khushboo v Kanniammal*, (2010) 5 S.C.R. 322.

However, the Madras High Court decision, against which this appeal was filed, was entirely based on public morality. The Court while denying the quashing of numerous FIRs against appellant, commented that even if she had made averments in the interview in general terms, her statement about pre-marital sex was a “derogatory statement and propagation of immorality and indecency in social and family life.” The Court while upholding the public morality in this case, highlighted that the entire set of women in Tamil Nadu were offended by the statements”. The Court even went further to condemn her statement that while expressing her personal opinion she was not supposed “to propagate or preach her lewd ideology to the society.”

The Court in *Supriyo’s* case³⁹ clarified that the right to religion was subject to public order, morality, health, and the other provisions of Part III. The Court emphasised that the right under Article 25 is an individual right because conscience is essentially an individual attribute.

The Court in this case further highlighted that the morality referred to in this provision is constitutional morality and not public morality. It emphasised on the decided cases like Sabarimala case, wherein the Court observed that public conception of morality, sometimes turning into mob morality, may be deeply offensive to individual dignity and human rights. In this case, wherein marriage among queer persons was being sought to be legalised, the Court denied the relief. The Court’s

³⁹ *Supriyo* (n 2).

observations were, however, in favour of constitutional morality, its decisions were entirely as per the majoritarian public morality.

The Chief Justice Chandrachud, while giving dissenting opinion and highlighting the four components of constitutional morality, based on the Preamble of the Indian Constitution observed that neither of these principles were an impediment to queer persons entering into a union, rather they bolstered the proposition that queer persons also have the right to enter into such a relationship. Further, the other provisions in Part III to which the exercise of the right under Article 25 is subjected, did not limit the exercise of the right of marriage to the alternative sexualities, on the contrary, they gave rise to the right to enter into a union.

The Court also stated that the difference cannot be discriminated against simply because it exists. It also highlighted that Articles 19 and 21 protected the rights of every citizen and not some citizens. Though all relevant points were made, the responsibility to make changes and provide for queer marriages was put on the shoulders of the legislature, i.e., majoritarian government. It was highlighted even by the petitioners that the legislature, even when indicated to take steps in other cases of decriminalising consensual sex among adult partners of same sex, did not read down or partially repealed Section 377 of the Indian Penal Code, it was the judiciary which did so. These cases show the judicial endeavours in addressing the unduly requests of the public concerning their perceptions regarding public morality, the rights of the individual, and the lawful order of the society.

V. CONFLICT BETWEEN CONSTITUTIONAL MORALITY AND PUBLIC MORALITY

As discussed above, the tension between constitutional morality and public morality in India often manifests in areas where individual rights clash with societal norms and values. These differences underscore a very important dimension of the judiciary, where it is entrusted with either upholding the basic rights of individuals or taking cognizance of the realities present in any social entity.

A. Areas of Conflict

Key areas of contention involve the public understanding and individual concerns around the issues of religious freedom, health, sexuality, women's security, self-reverence, and the fight for sexual autonomy. These issues affect the right of individuals to access places of worship, public institutions, etc., invoking the interference of public morality even though it may infringe on the basic constitutional rights of equality, dignity, and liberty among individuals. Further, sensitive issues involving the rights of vulnerable groups, such as rights of sexual minorities, women's rights and the issue of individual freedoms always honour the constant tussle between constitutional and public morality.

B. Case Studies of Conflicts

Judicial efforts to deal with tension between the constitution and public morality have changed over time. For example, in *Mr. 'X' v Hospital 'Z'*,⁴⁰ the Supreme Court dealt with issues surrounding patient rights and medical ethics, while adjudicating a patient's right to privacy and autonomy in medical treatment decisions. The case revolved around a patient's request for confidentiality regarding his medical condition, which was challenged by hospital authorities citing public interest.

The Court reaffirmed that constitutional morality demands respect for individual rights, including privacy and informed consent, even when public morality might suggest otherwise. It emphasized that public interest should not override personal rights guaranteed under the Constitution. This case illustrates the judiciary's role in navigating conflicts between public expectations and constitutional protections, ensuring that individual dignity.

Later in *Naz Foundation*⁴¹, the Delhi High Court held, while making the comparison of public morality and constitutional morality, that popular morality of certain acts is not a valid justification for restricting any person's fundamental rights under Article 21. It further held that public morality is temporary and based on shifting and subjecting notions of right and wrong. It emphasises that if there was any type of morality that could pass the test of compelling state interest, it must be constitutional as it is based on constitutional values and not public

⁴⁰ *Mr. 'X' v Hospital 'Z'*, 1998 (8) SCC 296.

⁴¹ *Naz Foundation* (n 27).

morality. Afterwards, the Supreme Court's judgment in *Navtej Singh Johar v Union to India*⁴² further reinforced this distinction, reaffirming that constitutional morality should guide judicial decisions, particularly in matters affecting fundamental rights.⁴³

In order to prevent legislative action from changing the fundamental principles of the Constitution, the judiciary has also underscored that “the changes made by the Parliament to the Constitution shall not alter the basic structure of the Constitution.”⁴⁴ This doctrine, established in *Kesavananda Bharati v State of Kerala*,⁴⁵ has been used to strike down laws that infringe upon individual rights, even if they are supported by public sentiment.

However, the judiciary's strategy has not been without criticism, either. There are persons, who contend that the courts' involvement in “judicial activism” and intrusion into the legislative branch has exceeded its authority. The argument put out by critics is that the judiciary ought to practice “judicial restraint” and permit the legislature to enact laws that represent community values. The best example being the *Supriyo* case.⁴⁶

⁴² *Navtej Singh Johar* (n 13).

⁴³ **Ananya Chakravarti**, ‘Constitutional Morality in the Context of Indian Legal System’ (2020) 3(2) IJLMH<<https://ijlmh.com/constitutional-morality-in-the-context-of-indian-legal-system/>> accessed on 1 September 2024.

⁴⁴ Nakul Nayak, *Constitutional Morality: An Indian Framework* (2021) American Journal of Comparative Law (forthcoming).

⁴⁵ *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461.

⁴⁶ *Supriyo* (n 2).

VI. ROLE OF THE INDIAN JUDICIARY IN BALANCING CONSTITUTIONAL MORALITY AND PUBLIC MORALITY

It is essential to strike a balance between constitutional and public morality in order to protect individual liberties and preserve social norms. The maintenance of justice, social, economic and political, the defence of fundamental rights, assurance of fraternity and the operation of democracy all depend on this equilibrium. When it comes to striking a balance between public morality and constitutional rights, the Indian court has alternated between activism and restraint. In many instances, the judiciary till recently, adopted a proactive approach while being criticized for judicial overreach, safeguarding personal liberties and preserving fundamental constitutional values when legislative measures tend to violate them.⁴⁷

A. Judicial Activism and Restraint

When it comes to striking a balance between public morality and constitutional rights, the Indian court has alternated between activism and restraint. In many instances, the judiciary has adopted a proactive approach, intervening to safeguard personal liberties and preserve

⁴⁷ Dr. G. V. Mahesh Nath, Constitutional Morality-A Need for Consensus on the Concept (2019) <<http://dx.doi.org/10.2139/ssrn.3353874>> accessed on 1 September 2024.

fundamental constitutional values when legislative measures seem to violate them.⁴⁸ This approach is exemplified in cases such as *Navtej Singh Johar v Union of India*,⁴⁹ wherein the Supreme Court upheld constitutional morality over public morality and decriminalized consensual adult same-sex relationships.

Contritely, there have also been instances where the courts have refrained from judicial review, rather has gone for restraint, such as *Supriyo's case*⁵⁰ where the court recognized the place of public morality in the development of law.⁵¹ It went ahead with a fifty-year-old precedent, i.e. *K.A. Abbas v Union of India*,⁵² where the Supreme Court affirmed that public morality does allow curtailment of civil liberty of expression as long as it falls within reasonable restrictions. However, the scope of public morality has changed a lot in last fifty five years.

B. Challenges Faced by the Judiciary

The Indian judiciary encounters various obstacles in maintaining a balance between the public and constitutional morality. Navigating the conflict between individual rights and society values is one of the main

⁴⁸ *ibid.*

⁴⁹ *Navtej Singh Johar* (n 13).

⁵⁰ *Supriyo* (n 2).

⁵¹ Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (*SSRN Electronic Journal*, 2020).

⁵² *K.A. Abbas* (n 36).

obstacles, especially when the public opinion is vehemently against the protection of particular rights. The courts must therefore carefully consider the ramifications of their decisions on both fronts, making conclusions based on the proportionality and reasonableness standards.⁵³

The judiciary has played a proactive role in upholding constitutional morality, though this task is fraught with challenges. One significant obstacle is the potential for judicial overreach, where courts may be perceived as encroaching upon the legislative domain. Critics argue that for the government to enact laws reflective of societal values, the judiciary should exercise restraint. This raises important concerns about finding the right balance between judicial intervention and legislative authority.

Potential political pressure and public backlash against judicial rulings that defy popular opinion is another difficulty. In the case of *Khushboo v Kanniammal*,⁵⁴ the Court emphasised on the role played by media in reporting the judicial proceedings in a fair and equitable manner, as in this case the common people started questioning the way of inquiry made by the Apex Court. It is important that whether such demands are

⁵³ Indu Bharti Jain and Madhu Bala, “The Role of Indian Judiciary in Justifying the Constitutional Morality over Social Morality” (2024) 4 GLS KALP: Journal of Multidisciplinary Studies. 21
<<https://www.glskalp.in/index.php/glskalp/article/view/3>> accessed on 1 September 2024.

⁵⁴ *S. Khushboo* (n 38).

made or not, the judiciary must continue upholding its independence and integrity, making sure that decisions are grounded on constitutional principles rather than majoritarian forces.

It has upheld constitutional morality in landmark cases such as *Naz Foundation v Government of NCT of Delhi*,⁵⁵ where the Delhi High Court decriminalized same-sex relations by striking down Section 377 of the Indian Penal Code, emphasizing the need for constitutional morality to prevail over public morality. After a few year, in the case of *Manoj Narula v Union of India*,⁵⁶ the Supreme Court remarked that constant affirmance of constitutional morality was the pillar stone of good governance. Soon after, in 2018, while upholding women's right and dignity in religious practices and marriage, in *Indian Young Lawyers Association v State of Kerala*,⁵⁷ the Supreme Court ruled against the ban on women's entry into the Sabarimala temple, prioritizing constitutional values over traditional practices; and *Joseph Shine v Union of India*,⁵⁸ where the Supreme Court struck down the law criminalizing adultery, highlighting that it infringed upon women's dignity and autonomy.

On the other hand in *K.A. Abbas v Union of India*,⁵⁹ the court recognized public morals as sufficient grounds for limiting the right to

⁵⁵ *Naz Foundation* (n 27).

⁵⁶ *Manoj Narula* (n 20).

⁵⁷ *Indian Young Lawyers Association* (n 4).

⁵⁸ *Joseph Shine* (n 271).

⁵⁹ *K.A. Abbas* (n 36).

freedom of expression of the individual as long as such restrictions were reasonable and justified. As an illustration, the case of *Naz Foundation v Government of NCT of Delhi*⁶⁰ decriminalizing same-sex relationships pointed out the conflict between the public opinion and the dilemma within judiciary in the whole decriminalization process. This took almost a decade to ensure the dignity of identity, intimacy and autonomy of sexual minority in accordance with the rights that the Constitution provides to every heterosexual. In the situation of majoritarian pressure, the Supreme Court has recently went many steps back while subtly conforming with public morality, seeking majoritarian legislative action and denying the right to marry to same-sex couples in *Supriyo*,⁶¹ earlier decriminalising their sexual interactions. Thus, the courts have refrained from judicial review;⁶² while recognizing the place of majoritarian legislative process and public morality in the development of law, going back where we started in *K.A. Abbas v Union of India*.⁶³ They have posed challenges especially in a country as diverse and as multi-cultural as India, while safeguarding constitutionalism without disregarding societal norms and values.

⁶⁰ *Naz Foundation* (n 27).

⁶¹ *Supriyo* (n 2).

⁶² Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (January 2020) SSRN Electronic Journal <<https://ssrn.com/abstract=3521665> or <http://dx.doi.org/10.2139/ssrn.3521665>> accessed on 1 September 2024.

⁶³ *K.A. Abbas* (n 36).

Irrefutably, public sentiment influences judicial proceedings, where emotional responses can complicate the consideration of constitutional rights and societal ethics.⁶⁴ These factors collectively create a complex environment for achieving an effective balance between constitutional and public morality.

C. Challenges in Balancing Morality

As much as there is an active engagement by the judiciary, there are many factors that create challenges to effective balancing of government and general public morality:

- 1. Judicial Overreach:** The activist stance of the Indian judiciary has not been immune to criticism. Some contend that by indulging in “judicial overreach” and intruding upon the legislative branch, the courts have exceeded their authority. Critics argue that the legislature should be allowed to use legislation to represent public morality, as the legislature represents people. Ensuring separation of power, they seek judicial restraint, as shown by the Madras High Court in *Khushboo’s case*⁶⁵ and Supreme Court in *Supriyo v Union of India*.⁶⁶

⁶⁴ Supra (n 10).

⁶⁵ *S. Khushboo* (n 38).

⁶⁶ *Supriyo* (n 2).

Judicial activism proponents, on the other side contend that even in the face of opposing laws and societal norms, the courts must defend individual rights and preserve constitutional principles. They point to cases like *Navtej Singh Johar*⁶⁷ and *Indian Young Lawyers Association*⁶⁸ as examples of the judiciary fulfilling its role as a guardian of the Constitution.

- 2. Cultural Sensitivity:** The extending range of public morality that co-exists and differs in the diverse communities that form the society poses problem for the judges to balance even the public morality itself, leave the balancing of both public and constitutional morality. In these cases, the cultural practices of the public and beliefs on one side and conditioning of the judges on other pose problems in upholding constitutional values.

However, the judges shall neither invoke their own personal morality nor the people's religious, philosophical views or political values without restrictions.⁶⁹

- 3. Public Sentiment:** It is understandable that having the public's emotions be taken into consideration during judicial

⁶⁷ *Navtej Singh Johar* (n 13).

⁶⁸ *Indian Young Lawyers Association* (n 4).

⁶⁹ John Rawls, 'The Idea of Public Reason' in James Bohman and William Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (9780262268936, The MIT Press, 1997)

proceedings can ultimately bring some challenges to the legal system when it comes to the considerations of constitutional and societal ethics.⁷⁰

Though, the judges can refer to reasonable understanding of public conception and political values of justice and reason. Yet again, the duty of civility gets to the core where freedom and self-restraint by the people comes to the fore.⁷¹

Thus, the judiciary has to not only save itself from judicial overreach, but also from cultural sensitivity and public sentiments. It has to negotiate the complexity of a heterogeneous society in which public morality varies greatly throughout localities. The courts in this situation will have a difficult time striking a balance between upholding individual rights and honouring cultural and religious customs. Therefore, a erudite comprehension of public morals and the constitution is necessary for this delicate balancing act, as suggested by Nehru during the Constitutional Assembly debates.

Here, the legislature also plays a crucial role in the process of mitigating conflicts between constitutional and public morality. The legislature can help create a legal framework, that balances these often-competing interests, by enacting laws that address societal needs while adhering to constitutional principles. The civil society further recognizes the importance of mediated debate among the legislature,

⁷⁰ Supra (n 8).

⁷¹ Supra (n 69).

civil society, lawyers, and other legal experts. Such discussions ensure that legislation not only considers public opinion but also aligns with constitutional values. This collaborative approach fosters an environment where diverse perspectives are considered, leading to more inclusive and equitable laws. However, in many instances, the majoritarian legislature, while putting political interest above all, underreads constitutional values.

The judiciary also has to negotiate the complexity of a heterogeneous society in which public morality varies greatly throughout localities. The courts in this situation will have a difficult time striking a balance between upholding individual rights and honouring cultural and religious customs. Therefore, the Indian courts must continue to interpret the Constitution in a way that upholds its fundamental ideals and principles while making adjustments for the circumstances of a changing society.⁷² Thus, an erudite comprehension of public morals and the constitution is necessary for this delicate balancing act, as suggested by Nehru during the Constitutional Assembly debates.

D. The necessity for a more systematic approach

The challenges and opportunities in balancing constitutional and public morality underscore the need for a more systematic approach that recognizes their separateness, interrelation, and interdependence. A

⁷² Supra (n 8).

comprehensive framework should include broad-based legal principles such as proportionality, ensuring that restrictions on individual rights are necessary for achieving legitimate objectives, thereby preventing abuses of public morality; reasonableness, which requires that state actions align with constitutional values and prompts courts to evaluate public morality arguments in terms of their impact on human rights; inclusivity, which acknowledges diverse value systems and protects minority interests by involving civil society and legal professionals; and dialogue, fostering communication among the judiciary, legislature, and civil society to bridge gaps between constitutional provisions and societal norms, ultimately promoting mutual understanding and effective governance.

Accordingly, it is important to strike a balance between constitutional morality and public morality for the health of a working democracy. In this regard, the Indian judicial system has to maintain this balance as the custodian of constitutionalism and at the same time fulfil societal demands for justice and rule of law. Employing proportionality, reasonableness, inclusivity, and dialogue enables the judiciary to cope with conflicts arising from the utilization of the two sources of morality.

In this backdrop, we need to be practical to ensure the balance between the two, keeping in mind the voice of Dr. Ambedkar, who realised the core structure of India being undemocratic and therefore stated during the Constituent Assembly debates that “Constitutional morality is not

a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.”⁷³

VII. CONCLUSION

Although the Constitution of India does not define constitutional morality, it outlines the fundamental values and principles; which are justice, liberty, equality and fraternity, aiming for a fair and equitable society. Still, identifying the core of constitutional and public morality and balancing them presents several challenges despite the judiciary's active role. Further, the concern of judicial overreach turns significant, as some decisions risk encroaching on legislative functions, raising questions about the limits of judicial interference. Furthermore, cultural sensitivity complicates matters further, as diverse community values can conflict with constitutional principles, making it difficult for judges to uphold these values consistently. In this backdrop, the assessment of the tensions and a balance between constitutional and public morality in India demonstrates the importance of the courts in ensuring their place in Indian social ordering.

Notably, both the government and society have responsibilities in addressing the above issue. The legislature, by adopting laws that are coherent with the fundamental principles of the Constitution and the

⁷³ Vasant Moon(ed), *Dr. Babasaheb Ambedkar Writings and Speeches*, Volume No. 13 (2020).

values of society, may lessen tensions arising between the constitution and public ethics. Additionally, under the obligation of civility, it is the duty of civil society as well to promote constitutional morality and increase public understanding of how public morality affects individual rights.

Conclusively, the ultimate objective in this context would be developing a legal architecture that not only fosters both individual freedoms, but also conforms to the ethics of the society. This equilibrium is essential not merely for the safeguarding of the inviolable rights, but also in upholding the norm of constitutionalism in its broadest sense which appeals to every citizen. As India progresses ahead with diversity and pluralism, this quest to balance constitutionalism and decency of the public will remain a major pursuit for the judiciary forever.

IX. EXCEPTION TO THE RULE: CONSTITUTIONAL EXCEPTIONALISM IN INDIAN AND UK NATIONAL SECURITY LAW

- *KAPIL KUMAR VERMA** & *RAVI SHARMA***

Abstract

The State of Exception has emerged as a prominent area of legal discussion in light of emergencies that have emerged worldwide, which can include internal strife to external threats. The State of Exception describes a state of affairs more commonly understood as an Emergency or legality of the extraordinary. This can also be said to be something between 'public law and political fact'. The main theorist who established a framework for understanding the State of Exception is Carl Schmitt. He was trying to understand the idea of sovereignty and legality in the tumultuous years of the Weimar Constitution. The state of exception offers a critique of the failure of the liberal order. Although the State of Exception is a derivative of the Civil Law System,

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Anglo-American Common law has borrowed heavily from it when the questions are of a similar nature. After 9/11 the global war on terror also made countries like UK and India look towards a theory of legality for extra-legal authority that is considered as an anathema to liberal constitutional order. The paper looks into the theory of State of Exception in the context of India and the laws of the United Kingdom. The analysis is on the basis of practice and legal framework, as legal jurisprudence in Courts has not considered such questions from a Schmittian viewpoint.

Keywords: State of Exception, Emergency law, National Security Law, Public Law, Constitutionalism

I. INTRODUCTION

The term exceptional is used in this context to indicate a measure that deviates from normal constitutional standards and is, by virtue of that deviation, seen as inappropriate or regrettable.¹

German Political theorist Carl Schmitt argues that legal cannot be applied to chaos and needs a “homogeneous medium.” No legal norm, in Schmitt’s view, is able to govern an extreme case of emergency or an absolute state of exception.²

¹ Thomas Poole ‘Constitutional exceptionalism and the common law’ (ICON, Volume 7, Number 2) P247

² Stanford Encyclopedia of Philosophy Carl Schmidt (August 2019) < <https://plato.stanford.edu/entries/schmitt/> > last seen on 13 September 2023)

The paper describes the notions of constitutional exceptionalism in cases of national security law in common law jurisdictions in India and the United Kingdom in a framework of State of Exception. National security exceptionalism doctrine came to the forefront of discussions after the 9/11 terrorist attacks in the USA, where extraordinary measures were sanctioned in the name of national security. Drawing from the discussion on the Weimar Constitution regarding the form of authority that characterises exceptionalism, Carl Schmitt in *Political Theology* says, "Sovereign is he who decides on the exception" [*Souverdn ist, wer ilber den Ausnahmezustand entscheidet*].³ Schmitt's philosophy has argued against the liberal notions of turning the constitutional questions of politics into procedures whereby they tend to obscure the raw notion of sovereignty. The answer to which has been quite clear is that who decides the exception to ordinary circumstances is the sovereign. The term national security can convey many meanings here, and there is a difference between law and order and public order as well. For clarity, we mean national security as security of the state: "Public order in the rulings of this Court was said to comprehend disorders of less gravity than those affecting the security of State, law and order also comprehends disorders of less gravity than those affecting public order."⁴

³ JOHN P. McCORMICK 'CARL SCHMITT'S CRITIQUE OF LIBERALISM AGAINST POLITICS AS TECHNOLOGY' (1999 Cambridge University Press) 121

⁴ *Shreya Singhal v. Union Of India*, AIR 2015 SC 1523.

The paper examines the meaning of exceptionalism in modern Constitutional democracy and where it can be located in the national security laws in India and the United Kingdom. Then, the differences in their approach to exceptionalism will be examined, and an attempt will be made to ascertain the reasons in distinguishing those reasons.

II. DEFINING EXCEPTIONALISM

German theorist Carl Schmitt originally conceptualised this as *Ausnahmezustand*, which can be correlated to modern conceptions of public emergency or martial law. In his essay *On dictatorship*, he dealt with the issue of the liberal Weimar constitution and the importance of a Strong ruler and cited examples of Ancient Rome.⁵ This was brought through the Reich president's powers to declare a State of emergency under Article 48. But how Schmitt conceptualises it as the power that is not subject to the Constitution itself while the prevailing Weimar Constitution subjects the State of Exception to safeguards and supervision of Reichstag as stated, "The Reich President must, without delay, inform the Reichstag of all measures taken under Paragraph 1 or Paragraph 2 of this Article."⁶

State of exception can be understood to involve the following things

1. Suspension of Basic Rights⁷
2. Extraordinary Courts⁸
3. Fair trial requirements may be relaxed

⁵ Carl Schmitt 'Dictatorship' (2014 Polity press) 87

⁶ Weimar Constitution(1919) Article 48.

⁷ Carl Schmitt 'Dictatorship' (2014 Polity press) 182

⁸ *ibid*

4. Derogation from due process requirements

This list is only indicative, it can include many other ideas.

III. NATIONAL SECURITY LAW

Though the conception on the exact definition of National Security law may not be clear we can understand it as a framework by which each state handles threats to its government, its values, and its very existence⁹. This definition of national security law is quite wide but for the study we shall limit ourselves to laws that deal with terrorism per se as that is considered one of the primary enemies of public tranquillity and order. As discourse on the ‘War on terror’ is moving towards its evaluation especially because it led to curtailment of freedoms, as well as excesses around the globe. America also asked its allies and neutral countries to suppress anyone that might lead to any act of terror. This manifested itself in the enactment of laws that curtailed basic freedoms and natural rights such as free trial, the right to know the grounds of detention, disappearances etc. there were a multitude of emergencies in place in USA at a point that were not even informed or actively monitored by the congress.¹⁰ the idea of national security is not a conception of law but that of policy. The courts have usually wielded the executive for the definition, in the case of Secretary of State for the

⁹ Kim Lane Scheppele, 'The International Standardization of National Security Law' (2010) 4 J Nat'l Sec L & Pol'y 437

¹⁰ Daniel Skeffington 'Emergency Powers in UK (2022) < <https://consoc.org.uk/emergency-powers-in-the-united-kingdom/> > last visited on 15 November 2023.

Home Department v Rehman¹¹ court in the United Kingdom ruled “what national security means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is in the interests of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter of judicial decision. They are entrusted to the executive”¹² Thus this definitional question may be difficult to legally define but we have limited the scope of the study by limiting our scope to only anti-terror laws.

IV. NATIONAL SECURITY AND THE CONSTITUTION

The relationship between national security pertains to two questions, firstly regarding the rights of people who are subject to the respective jurisdiction as national security provides a blanket protection to executive action without adequate safeguards. This in longer tenures has a chilling effect on the public. Courts have often tried to use proportionality tests to deal with the issues of terror law and rights. The Constitution provides for safeguards as to Preventive detention, Fair trial, admissibility of Evidence, Confession, and Self-incrimination, but these are set aside while dealing with such kinds of cases. These powers are not of a temporary nature, initial emergency measures give way to their permanent entrenchment. Special police/paramilitary are employed to enforce these laws along with alteration in the division of

¹¹ Secretary of State for the Home Department v Rehman [2001] UKHL 47, [50]

¹² Paul F Scott ‘The National Security Constitution’ (2018 Hart Publishing) 5

powers with federal entities. While these conditions prevail and the applicability of these laws becomes the norms how can one think of the Constitutional protection being the norms as the application of these laws leads to widespread curtailment of liberty especially when these measures were to be temporary in nature?

V. EXCEPTION AND CONSTITUTION

The idea of dictatorship is not a sovereign dictatorship but a commissary one.¹³ The Dictator with exemplary power may be an exception to the ordinary function of the constitution and ideas that regulate ordinary functioning like separation of powers and accountability have to give way. The idea that Schmitt also puts forward is that the President is subject to the powers of the Constitution and can not change it to supersede it¹⁴. The distinction drawn between ordinary constitutional process and that of Exception is that “exceptional cases and states of exception cannot be resolved by everyday routine.”¹⁵

In modern constitutional parlance, the term exceptionalism generally refers to emergency powers, which may differ from its original conceptualization, where it refers purely to extra-constitutional powers exercised outside the context so provided by the Constitution.

VI. SCHMITT’S CONCEPTUALIZATION OF EXCEPTION

¹³ Carl Schmitt ‘Dictatorship’ (2014 Polity press) 205

¹⁴ Carl Schmitt ‘Dictatorship’ (2014 Polity press) 208

¹⁵ Carl Schmitt ‘Dictatorship’ (2014 Polity press) 219

Schmitt believed that a strong Sovereign authority could achieve national unity and that a democratic parliament was unable to do so. Therefore, his approach required limiting democratic parliament. Schmitt was alluding to the Weimar constitution's Article 48, the state of exception clause, which granted the president the power to declare the existence of threats to the republic and to take appropriate action in response. Schmitt thought this article gave the president too much power, thus he disregarded the objections as baseless. Rather, he advocated for a broad or latitudinarian interpretation that would enable the president to effectively defend the state.¹⁶ His idea of Sovereign dictatorship relied on the definition of Sovereignty, the standard definition of sovereignty is based on Bodin's observation that, in specific situations, exceptions to the general rule will always be required, and that the sovereign is the one who determines what qualifies as an exception.¹⁷

Schmitt's statement suggests that in order to avoid misunderstanding or disagreement, it would seem necessary to resort to a unified organisation with a monopoly on decision-making in all emergency situations. It would seem ideal to have such a person watchful even in ordinary times because the chances of such an occurrence are high (particularly in the Weimar setting), and because the same figure who acts on the exception must first announce that it exists. Hence,

¹⁶ Carl Schmitt 'THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS MEANING AND FAILURE OF A POLITICAL SYMBOL' (Greenwood press 1996) xi

¹⁷ Carl Schmitt 'The Crisis of Parliamentary Democracy' (MIT Press 1988) 48

normalcy and exception collapse in defiance of the fundamental tenets of classical dictatorship, and exceptional absolutism imperiously encroaches on the regular rule of law.¹⁸

VII. ROMAN DICTATOR

Much is written by Machiavelli on the position of Dictator in Rome, where he was appointed for 1 year non reappoint terms. Regular magistrates were superseded by the dictator, an absolute ruler appointed in times of crisis, in the early Roman era. The dictatorship changed as Rome grew over time. By formal edicts, the dictator started granting consuls and magistrates the authority to continue in their positions. During the Second Punic War, this established precedent turned the dictator become a *collega maior* of the consuls, a constitutional authority overlaid on the pre-existing government. To acknowledge that the realisation of a legal norm invariably depends on forms of (unregulated) discretionary action, an analysis of the problem of dictatorship is essential: To speak in abstract terms, the problem of dictatorship, which far too rarely has been systematically analysed, is the problem of the concrete exception within legal theory. This is demonstrated by Schmitt's scenario of a commissarial dictatorship. Ordinary legal standards are suspended in a commissarial dictatorship

¹⁸ JOHN P. McCORMICK 'CARL SCHMITT'S CRITIQUE OF LIBERALISM AGAINST POLITICS AS TECHNOLOGY' (1999 Cambridge University Press)

in order to achieve a concrete goal" that is vital to the upholding of the legal system.¹⁹

VIII. COMPONENTS

Schmitt's Weimar study on emergency powers makes a number of significant observations, especially in relation to the famous opening line of Political Theology that undermines the distinction between sovereign and commissarial dictatorships:

a. "liberal constitutionalism has been insufficiently attentive to the idea of political exceptions"²⁰

b. "the notion of sovereignty should be uncoupled from the institution of emergency powers in constitutions that have them; and"²¹

c. "there ought to be a constitutional distinction between who decides and who acts in emergency situations."²²

These aspects are considered as sine qua non for the idea conceptualised by Carl Schmitt in terms of dictatorship, in the state of exceptionalism.

IX. CONSTITUTIONAL LIMITATION

The idea of an emergency that can be declared by the Executive on its own account was unknown before the 20th century, such as in the United States where the power to suspend habeas corpus could only be

¹⁹ Scheuerman, William E. *'Carl Schmitt : The End of Law'* (Rowman & Littlefield 1999) 31

²⁰ Scheuerman, William E. *'Carl Schmitt : The End of Law'* (Rowman & Littlefield 1999)148

²¹ *ibid*

²² *ibid*

done by Congress. The 1919 Constitution introduced these powers to enable the security and subsistence of the State. This is essential to limit these powers to preserve the Rule of Law or Rechtsstaat.

The limitations of these powers include

1. Explicit Declaration of Emergency²³
2. The exact content of authorisations in times of emergency²⁴
3. Automatic suspension²⁵
4. Parliamentary accountability

X. CRITICISM OF LIBERALISM

Schmitt is considered one of the important critics of liberal theory, he based his idea on the premise that liberalism tries to only deduct the idea of extra-constitutional authority from any ideas one engages with. They remove the apparent power dynamics by holding text as supreme and hiding the sovereignty idea behind certain procedures. Because it obfuscates who is sovereign and must make the decision and take action at that precise moment, the separation of powers is simply an excessively mechanical architecture that invariably paralyses a state in the face of an exception²⁶ the first statement of Schmitt's Political Theology—"Sovereign is he who decides on the exception" [*Souverdn ist, wer ilber den Ausnahmezustand entscheidet*]²⁶—may be the most

²³ Carl Schmitt 'Dictatorship' (2014 Polity press) 222

²⁴ Carl Schmitt 'Dictatorship' (2014 Polity press) 223

²⁵ Ibid.

²⁶ JOHN P. McCORMICK 'CARL SCHMITT'S CRITIQUE OF LIBERALISM AGAINST POLITICS AS TECHNOLOGY' (1999 Cambridge University Press)

well-known, if not the most notorious. However, the true significance of this well-known statement is sometimes overlooked.²⁷ Liberal regimes are not only subject to emergencies due to liberalism's denial of the exception and avoidance of the discretionary activity that was previously sanctioned to cope with it, but they are also susceptible to alternatives such as the one that Schmitt eventually proposed.

XI. EXCEPTION AND EMERGENCY

Carl Schmitt in his book tries to outline certain characteristics for the state of exception like special courts, procedures, suspension of rights, etc.²⁸ The state of exception's strong ties to civil conflict, rebellion, and resistance are undoubtedly some of the factors that make it so hard to define. Civil war falls into the category of undecidability with regard to the state of exception, which is the instant response of state power to the most extreme internal disputes because it is the antithesis of normal conditions. Consequently, we have been able to see a paradoxical occurrence throughout the 20th century that can be succinctly described as a legal civil war.²⁹ Though this idea of exception has come to identify originally with existential threats but now this application has extended to preventive acts to preserve State before a threat manifests, especially after the initiation of a war on terror. While trying

²⁷ JOHN P. McCORMICK 'CARL SCHMITT'S CRITIQUE OF LIBERALISM AGAINST POLITICS AS TECHNOLOGY' (1999 Cambridge University Press) 121

²⁸ Carl Schmitt 'Dictatorship' (2014 Polity press) 182

²⁹ Giorgio Agamben, Kevin Attell 'State of Exception' (University Of Chicago Press, 2005) 2

to make a comparison of two States, UK and India it's essential to have a framework or characteristics. For this purpose, we can rely on the following characteristics being present or absent in the jurisdiction and try to identify the reasons for this idea of exceptionalism/emergency so adopted.

- a) Preventive detention
- b) Protections as to Trial
- c) Admissibility of Evidence
- d) Special police/paramilitary
- e) Alteration in division or devolution of powers

These variables are provided as essential protections by the Constitution thus these variables facilitate better inquiry.

XII. UNITED KINGDOM

The United Kingdom initially used measures commonly referred to as "emergency powers" in the 1914 Defence of the Realm Act, the 1920 Emergencies Act, and the 1939 War Powers Act. The idea of "martial law," as it was applied both domestically and in Britain's colonial possessions and was derived largely from the Crown's royal prerogatives, served as the model for these Acts.³⁰ This legacy is not by accident, emergency powers have typically been used in response to conflicts or the prospect of war throughout history. Of the ninety-four dictatorships in Republican Rome, only four were deployed in response

³⁰ Daniel Skeffington 'Emergency Powers in UK (2022) < <https://consoc.org.uk/emergency-powers-in-the-united-kingdom/> > last visited on 15 November 2023.

to uprisings; the great majority dealt specifically with the implementation of emergency measures in a wartime setting.

The Terrorism Act of 2000 establishes legislative measures, such as definitions of terrorist offences and authorities for law enforcement, to prevent terrorism. Act of 2015 to Combat Terrorism and Security enhances the government's capacity to combat terrorism by giving it more authority to impose travel bans, control orders, and aviation security-related policies. The Anti-Terrorism Crime and Security Act of 2001 was introduced by the government in the wake of the 9/11 attacks, permitting the indefinite detention of suspected foreign terrorists. After indefinite detention was replaced with control orders in 2005, people suspected of terrorism were subject to restrictions. The Terrorism Act of 2006, enacted in response to the 7/7 attacks, made statements endorsing or glorifying terrorism illegal and extended pre-charge detention to 28 days. In addition, the government stressed the deportation of foreign nationals as a counterterrorism tactic while negotiating diplomatic guarantees to guard against mistreatment. These legislative actions show the UK's changing response to terrorism, notwithstanding disagreements and court challenges.

Home Secretary exercises the set of powers for the executive to deal with the threats to national security, he exercises discretion on the basis of “(a) the scope and character of the organization's operations; (b) the particular danger it poses to the United Kingdom; (c) the particular risk it poses to British nationals living abroad; (d) the degree of the organization's presence in the country; and (e) the necessity of aiding other international community members in the worldwide war against

terrorism”.³¹ These sets of variables are upheld in the courts as well. The distinction is drawn at great lengths between a citizen and a non-citizen in U.K. law as threats that are faced usually come from outsiders or the Irish. Thus, the laws are usually inclined towards foreigners.

The argument put forward by Paul F Scott in *Counterterrorism Constitution* illustrates how the terrorist threat has changed over time, with a greater emphasis now being placed on global issues than national ones. Its evolution is shaped by the interactions between national and international regimes. The Human Rights Act adopts global standards, denouncing legislative reactions, and occasionally influences areas where domestic courts fall short.

As far as the investigative process is concerned laws expressly authorise recognised investigative powers, and increased standards from the European Convention on Human Rights—uncovered by legal challenges and whistleblowing—compel the government to divulge additional information. There's a change from a secretive to a more transparent system, even though responsibility for misuse is not immediately addressed. We are not experts on all relevant laws or practices. They can gather information on a large number of citizens; the powers are broad and not limited to a select few. Citizens' perceptions of themselves in politics are shaped by the power of the government in democracies. Investigatory laws may soon have a

³¹ Paul F Scott 'The National Security Constitution' (2018 Hart Publishing) 34

significant impact on how individuals view themselves—not just as targets but also as commodities.³²

Like other democracies, the UK struggles to strike a balance between civil liberties and human rights in the face of changing security threats. The combination of terrorists' freedom of movement within the European Union and homegrown extremism presents a significant challenge to law enforcement and intelligence services.³³ The UK has proven to have a strong legal system by enacting anti-terror laws, despite the world's legislatures responding to non-state actors and technological advancements comparatively slowly. In order to avoid alienation and extremism, it is imperative that the government consults with the Muslim community when formulating policies. Even though some laws have come under fire for violating people's rights, continuous monitoring, regular reviews, and sunset clauses serve to prevent abuses and guarantee that the necessary counterterrorism measures stay within the bounds of the law.³⁴

XIII. INDIA

There are a number of laws that give power to the government to curtail liberty in extraordinary measures. There are many laws to that effect, such as the Unlawful Activities (Prevention) Act (UAPA) and the National Security Act. The Unlawful Activities (Prevention) Act (UAPA) gives the government the authority to stop illegal activity,

³² Paul F Scott 'The National Security Constitution' (2018 Hart Publishing) 103

³³ Christian A. Honeywood 'Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights (2016 Journal of Strategic Security , Vol. 9, No. 3)

³⁴ *ibid*

including terrorism. It permits preventive detention and calls for the outlawing of terrorist organisations. The UAPA has been used in several case filings. The law has been applied to people and groups engaged in terrorist activity. The National Security Act (NSA) has the feature of permitting preventive detention in specific circumstances to stop people from acting in a way that jeopardises national security. military Forces (Special Powers) Act (AFSPA) Feature: Allows the military forces to preserve public order in "disturbed areas" by designating them with special powers. Opponents claim that it gives members of the military forces immunity. POTA gave law enforcement more authority, although it was criticised for possible abuse. Cases involving cybercrime, such as hacking and actions connected to internet terrorism, have been brought under the IT Act. *Kartar Singh v. State of Punjab*³⁵ decision emphasised the need for safeguards against misuse while upholding the constitutional validity of the Terrorist and Disruptive Activities (Prevention) Act, 1985.

The government repealed POTA in 2004 even though the Supreme Court of India upheld its constitutional validity with certain checks and balances. The article contrasts the harsh POTA regulations with the most recent Unlawful Activities (Prevention) Act (UAPA) amendment, expressing concern about the latter. We can emphasise the necessity of India's ongoing resistance to violations of human rights.³⁶ One can

³⁵ *Kartar Singh v. State of Punjab* (1994) 3 SCC 569.

³⁶ C. Raj Kumar 'Human Rights Implications of National Security Laws in India: Combating T Combating Terrorism While Perserving Civil Liberties (2005 Denver Journal of International Law & Policy Volume 33 Number 2)222

advocate for constitutional provisions to be developed in order to strike a balance between human rights advocacy and counterterrorism efforts. In order to preserve civil liberties and fight terrorism, it promotes the development of Indian law in cooperation with non-governmental and intergovernmental organisations. It is emphasised that safeguarding human rights requires stopping abuse and deterioration brought about by inappropriate government action.³⁷

In light of India's past experiences with legislation such as TADA and POTA, the article cautions against renegeing on human rights pledges in the face of terrorism. It highlights how crucial it is to defend the universal principles of human rights and fundamental freedoms in trying times and encourages meaningful discussion, disagreement, and dissent within civil and political society. This is essential to denounce terrorism, and to respond carefully to make sure that it is in line with universal human rights values because future generations will be the ones to judge these actions.³⁸

A unique understanding can also be brought from the abrogation of Article 370 by the parliament in an extra-constitutional procedural order. Some theorists have argued that it has to be looked into, not as a matter of liberal constitutional order but as a State of Exception where

³⁷ C. Raj Kumar 'Human Rights Implications of National Security Laws in India: Combating T Combating Terrorism While Perserving Civil Liberties (2005 Denver Journal of International Law & Policy Volume 33 Number 2)222

³⁸ C. Raj Kumar 'Human Rights Implications of National Security Laws in India: Combating T Combating Terrorism While Preserving Civil Liberties (2005 Denver Journal of International Law & Policy Volume 33 Number 2)222

the normal constitutional order could not be sustained³⁹. Something that is between Constitutional, legal, ‘public law and political fact’ in the words of Giorgio Agamben. Applying the Schmittian framework, one makes a case wherein there is a breakdown of trust between the State and society, futility or lack of genuine electoral participation, violence and conflict, and prolonged occurrence of mentioned factors make a case for considering Article 370 abrogation legality under the lens of Exceptionalism. In its ruling the Supreme Court ruled in the affirmative but the logics were not connected to the State of Exception. The State of exception is a dangerous vehicle in sustaining a liberal democratic constitution that works for all

XIV. CONTEMPORARY DISCOURSE

Schmitt's main argument is clear. The fundamental idea of the state falls short of achieving the level of totality necessary to maintain its political monopoly. Schmitt acknowledges that the state possesses a unique and unmatched ability to confine all political activity within its own conceptual confines. It draws a clear line between the inside and the outside. The modern state has essentially made itself the bearer of politics as the centre of decision-making and the arbitrator of the friend/enemy difference.⁴⁰

³⁹ Ankit Kaushik, ‘Constitutional Exceptionalism in Kashmir’ [2019] Verfassungsblog <<https://verfassungsblog.de/constitutional-exceptionalism-in-kashmir/>> accessed 17 March 2025.

⁴⁰ WILLIAM HOOKER ‘Carl Schmitt's International Thought Order and Orientation’ (2009 Cambridge University Press) 47

This is visible in the domains where regional, subunits or other loyalties or de-facto control emerges as a challenge to state-dominated political order. The threats that have emerged require surveillance and proactive security. Looking at one such example where the United States has many emergencies operating at a time. The issues are emerging from what he calls Partisans. Whether Schmitt was concerned about localised partisans resisting this slip towards a formless global context or whether this feedback mechanism was required was an intriguing subject. Al-Qaeda may be the exception rather than the rule in this situation, and Hezbollah in Lebanon or Shia armed organisations in Iraq would make for intriguing (though less dramatic) modern examples of Schmitt's partisan phenomena. These kinds of groupings exhibit the kind of ambitious irregularity that constantly aims to reach regularity.⁴¹ This idea is more in terms of political theory, but in terms of modern threats to state securities can be understood on the basis of such formulation. It focuses on the application of emergency powers in the German State throughout the Weimar Republic and National Socialist periods (1918–1945). He theorised in his writings about the nature of sovereignty and the role of dictatorship.”⁴²

The most recent development in the discourse of the State of exception relates to Ukraine, The Ukrainian Parliament gave President Volodymyr Zelenskyy permission to declare a state of emergency in all

⁴¹ WILLIAM HOOKER ‘Carl Schmitt's International Thought Order and Orientation’ (2009 Cambridge University Press) 188

⁴² Daniel Skeffington ‘Emergency Powers in UK (2022) < <https://consoc.org.uk/emergency-powers-in-the-united-kingdom/> > last visited on 15 November 2023.

of Ukraine on February 23, 2022. This authorization allowed the government to impose restrictions on the freedom of information and movement, prohibit large-scale gatherings, and stop strike action. After the invasion of Crimea in April 2014, Russian-backed insurgencies took control of the two occupied regions of Donetsk and Luhansk, imposing a state of emergency. The day before Russian forces invaded Ukraine in 2022 under the guise of a special military operation to de-Nazify the country, the state's emergency powers were declared.⁴³

XV. CONCLUSION

Conclusively, we may be able to reach this consensus that the legal and constitutional positions in the United Kingdom and India respectively represent the unique circumstances that the state security presented to them. At the same time, the United Kingdom was initially affected by Irish separatists and at a later point, by Al-Qaida and other anti-western threats. The same threats were not present for India, but the issues that India had to face included cross-border terrorism in Kashmir, insurgency in Punjab, or left-wing insurgency in parts of Central India. While the state capacity of the United Kingdom was larger compared to the Indian State and had to do with limited state resources spread over a wide area, the legal regimes represented that balance of state capacity and state self-preservation.

⁴³ Daniel Skeffington 'Emergency Powers in UK (2022) < <https://consoc.org.uk/emergency-powers-in-the-united-kingdom/> > last visited on 15 November 2023.

While applying the idea of exceptionalism in its original form, as propounded by Carl Schmitt, one might not be able to locate extra-constitutional authorities or the sovereign in either of the two systems, but applying the state of exception as a state of emergency while also understanding them as the use of extraordinary force is not usually available under the constitution we can locate the idea of exception and its application. It's been argued that dictatorial powers are best as short-term measures, and they should never be renewed indefinitely. However, these legislations usually start as temporary measures but become permanent over time to deal with terror situations. This also raises the equation that constitutional rights that are so sacrosanct become exceptions. Thus, a system of checks and balances is essential even in the face of exceptional circumstances. Liberalism has shown resilience to the original criticism by Carl Schmitt, while exceptional circumstances require exceptional measures, and the test that Schmitt provides to ascertain has not given way to any external sovereign to deal with national security issues. The solution of constitutionalising the externality of the State of exception appears to be the only suitable way to deal with the State of exception in a democratic order.

**X. CHANGING VIEWS ON HORIZONTAL
APPLICATION OF FUNDAMENTAL RIGHTS:
THE AFTERMATH OF THE KAUSHAL KISHORE
JUDGEMENT**

- SHAURYA CHOPRA* & DHRUV PRATAP SINGH**

Abstract

Horizontal application of fundamental rights has already been a consideration with some controversy in Indian constitutional law, traditionally circumscribed to the verticality of relationships between an individual and the State. However, the watershed judgment in Kaushal Kishor v State of Uttar Pradesh & Ors. makes a departure from this previously entrenched concept and acknowledges that Articles 19 and 21 - freedom of speech, and right to life and personal liberty, respectively, can be enforced against private actors. This paper gives an account of the evolution through history of horizontal application of rights to the reasoning of the Court in Kaushal Kishor, and juxtaposes it with the dissenting voice that cautioned against judicial overreach. The ruling's outer philosophies are interpreted throughout natural rights theory, legal positivism, and critical legal studies, mapping broader constitutional and societal implications of Kaushal Kishor. The ruling is then seen in the international dynamics looking at some evolving countries like South Africa, the USA, and the EU regarding horizontal rights stability. Finally, this paper explores the

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role of the Kaushal Kishor decision being a main leap in reworking the contours of constitutional accountability, where individual liberties and structural fidelity are in balance in times when private power seems to be taking precedence over public life.

Keywords: *Horizontal Application, Natural Rights, Fundamental Rights, Judicial Interpretation, Constitutional Balance.*

I. INTRODUCTION

The Indian Constitution is still seen as one of the important documents expressing the aspirations of the nation for justice, liberty, equality, and fraternity. Fundamental Rights included in Part III of the Constitution¹ were designed to constrain state power so that it does not violate the freedoms enjoyed by the citizens. With the changing socio-political field, marked by gigantic corporations, powerful private actors, and increasing privatization of life spheres, comes the question of whether these rights shall remain vertical or shall be extended horizontally, between private persons and entities.

The classical liberal perspective fathers the so-called 'vertical' model in that fundamental rights are only to be enforced against the State.² In that sense, it perceives the State as the chief menace to individual liberty. Such an approach then considered that private relations should be more or less regulated under the common law and the statute, instead

¹ The Constitution of India, 1950 Part III.

² Billy Christmas, 'Rights and Classical Liberalism' in RA Epstein, MR Rizzo and L Palagashvili (eds), *Routledge Handbook on Classical Liberalism* (forthcoming, Routledge 2024) <https://ssrn.com/abstract=4982164> accessed 19 February 2025.

of some constitutional mandates. But this view is increasingly being oppugned: by effects in reality and by progressive reasoning at the judicial level. As private bodies begin to take on powers comparable with, and in some instances exceeding those of the State, the clear-cut binary view of expectations from the State versus those from individuals had started to become fuzzy. The jury is still out on whether private actors that can violate individual freedoms as deeply as the State should remain free from constitutional scrutiny.

The Indian judiciary has constantly expanded the frontiers of this traditional understanding. In the landmark case of *Vishaka v State of Rajasthan*³, the Court provided guidelines to deal with workplace harassment while enforcing constitutional rights within private relationships. Similarly, in *Justice K.S. Puttaswamy v Union of India*⁴, the right to privacy was recognized as one of the essential features of personal liberty, noting that violations often result from the activity of private actors, such as technology companies.

These judgments indicated the potential for horizontal application of rights, however, did not see it fit enough to declare one categorical doctrine. This is the changeful background against which *Kaushal Kishor v State of Uttar Pradesh & Ors.*⁵ was pronounced, thereby redefining some popular discussions. In what possibly was the first time, the Supreme Court declared that fundamental rights under

³ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

⁴ *Justice K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

⁵ *Kaushal Kishor v State of Uttar Pradesh & Ors.* (2023) 4 SCC 1.

Articles 19 and 21⁶, the right to freedom of speech and the right to life and personal liberty, can be enforced against non-state actors. The majority judgment, penned down by Justice V Ramasubramanian, recognized that in contemporary society, non-state actors, comprising private individuals and corporations, could infringe fundamental rights in ways once deemed only that of the State.⁷

The shift is emblematic of the growing awareness that the Constitution will have to adapt in order to continue playing an effective role in protecting individual freedoms. Horizontal application is, of course, a considerable departure from the usual approach; it extends the protection of constitutional guarantees and their scope to include interactions between private actors. This is the blurring of the public-private divide, reimagining constitutional rights enforceability.

However, there exists a good deal of dissent surrounding this expansion: Justice B.V Nagarathna, in her dissent⁸, cautions against the horrors of judicial overreach that's in play here, to the effect that were the horizontal application to be accepted with too big a trowel, the very architecture of the Constitution and, in particular, 'State' as defined in Article 12⁹ may be rendered otiose altogether.

This scholarly endeavour sets about discussing this very transformation; tracing the evolution of horizontal rights enforcement in Indian constitutional jurisprudence, considering the reasoning in

⁶ The Constitution of India, 1950 art 19 and 21.

⁷ *Kaushal Kishor v State of Uttar Pradesh & Ors.* (2023) 4 SCC 1 (*per* V Ramasubramanian J.).

⁸ *Ibid*, (*per* B.V. Nagarathna J.).

⁹ The Constitution of India, 1950 art 12.

Kaushal Kishor, and contextualizing it within broader legal and philosophical debates. Using a blend of scholarly views and comparative constitutional frameworks, this work seeks to elicit a more nuanced understanding of how horizontal application of fundamental rights effectively redraws both the practical and theorized contours of fundamental rights within India.

II. THEORETICAL FOUNDATIONS OF FUNDAMENTAL RIGHTS

The very basis for fundamental rights under the Indian Constitution considers a thin balance of individual freedoms and state power, signifying the importance which the Constitution gives to the democratic, dignified, and just life. What spiral up into the horizontal application of fundamental rights would be clear only from the erstwhile familiar conceptual framework on the bases and nature of those rights. It is the distinction between the vertical and horizontal which is at the heart of such a transformation.

Vertical application corresponds with the classical model wherein fundamental rights are enforceable solely against the State and its instrumentalities as defined under Article 12¹⁰; this is based on the premise that those dangers posed by the State, the authorized appointer of intimidating force-represent to a much greater degree the profoundest threats to personal freedoms.

By way of distinction, the horizontal applications extend to private persons and institutions in realizing that powerful private actors,

¹⁰ Ibid.

whether they be corporations or influential individuals, are capable of degrading private liberties to a similar extent. While the Indian Constitution endorses an overwhelmingly vertical model, some parts hint at the existence of some horizontal aspects to such rights. For example, Articles 15(2), 17, 23, and 24 impose duties directly on the private. Article 15(2): There shall be no discrimination on the grounds of religion, race, caste, sex, or place of birth in any of the public places.¹¹ Article 17 abolishes 'untouchability,' enforcement of which is possible even against private individuals¹², and further is Article 23 and 24¹³, which prohibits forced labour and child labour respectively, irrespective of whether the perpetrator is a state or non-state actor.

This evolving understanding of horizontality is reflected in international frameworks. In the United States, the doctrine of 'State Action' confines the application of constitutional rights to state acts alone.¹⁴ Even so, exceptions, most notably *Shelley v Kraemer*¹⁵, acknowledged that courts enforcing private discriminatory covenants could be state action. This contrasts flagrantly with South Africa's Constitution, which expressly subscribes to horizontal application, proclaiming that rights not only bind the state, but also private persons, where applicable.

¹¹ The Constitution of India, 1950 art 15(2).

¹² *Ibid*, art 17.

¹³ *Ibid*, art 23 and 24.

¹⁴ Terri Peretti, 'Constructing the State Action Doctrine 1940–1990' 2010 **35(2)** *Law & Social Inquiry* 273.

¹⁵ *Shelley v Kraemer* (United States) 334 U.S. 1 (1948).

The European Convention on Human Rights¹⁶ (ECHR) takes a middle ground, it cannot be said to be completely horizontal but obligates member states to guarantee effective protection of rights, including regulating private conduct. The horizontal application justification philosophically draws on the contending schools of thought, theory of natural rights argues that human dignity and freedoms are construed as inalienable from private actors. Legal Positivism, on the other hand, raises a flag against effacing the public/private divide while still considering legislative will to outshine judicial intention. Meanwhile, Critical Legal Studies seeks to spotlight the power imbalances within private relationships, advocating for constitutional protections against wrongful non-state conduct.¹⁷

Thus, by placing the horizontal application of rights within the frames articulated above, it percolates through that this change is not mere judicial innovation; it is an inevitable adaptation to power relations in the present world, understood as the realisation that protection of fundamental freedoms cannot be constrained within the limits of state action. As, for instance, *Kaushal Kishor* demonstrates, the Constitution must now encircle private spheres where increasing rights violations take place.

III. EVOLUTION OF HORIZONTAL APPLICATION IN INDIAN JURISPRUDENCE

¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September, 1953) ECHR.

¹⁷ Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6(1) *Oxford Journal of Legal Studies* 1 <https://www.jstor.org/stable/764467> accessed 19 February 2025.

The path of horizontal application in Indian constitutional law has been a slow, sometimes unwilling departure from the generally accepted vertical model. Perhaps an acknowledgment of the fact that private actors can infringe individual rights just as the State does, although there is no direct evidence of this attitude by the judiciary, is worth considering. The series of decisions rendering jurisprudence leading to *Kaushal Kishor v State of Uttar Pradesh & Ors.* represents oneself as a whole milestone series; with each providing a steady output in the development of the doctrine of horizontal application.

Firstly, interpretations of Fundamental Rights were staunchly vertical; the landmark case of *A.K. Gopalan v State of Madras*¹⁸ firmly established this view whereby the very guarantee of personal liberty by Article 21 was held to be enforceable only against the State. The Court interpreted the right to life and liberty narrowly, restricting it to physical detention by state authorities. The strict compartmentalisation of State and private actors reflect the belief that, in any given interaction, the Constitution's playing role would not be a restriction on the life and liberty of individuals almost as felt then, but to protect them from coercive powers of the State, not from fellow citizens.

The closer approach wherein in *Kharak Singh v State of Uttar Pradesh*¹⁹ the Court recognized that Personal Liberty extended further than merely physical confinement represented a subtle shift in thought. Although the case still strictly conformed to the vertical mold,

¹⁸ *A.K. Gopalan v State of Madras* AIR 1950 SC 27.

¹⁹ *Kharak Singh v State of Uttar Pradesh* 1964 SCR (1) 332.

recognition of privacy as an element of liberty plants the seed of horizontal interpretations in future times. This initial expansion of the right to privacy served to broaden the general parameters of the fundamental rights.

The climax came with *R.D. Shetty v International Airport Authority*²⁰, during which the Court defined 'State' under Article 12²¹. The judgment laid down the principle that public functions, plus an insight into state control, could qualify private entities as State actors or apologists. This is where the doctrine of 'instrumentality' was birthed in India, going most farthest historically by radically breaking free from narrowing the dichotomy between the State and the individual, and instead grounded its essence firmly in the source of the authority responsible for its act, not in its form, which was how it elucidated whether constitutional obligations could potentially apply.

The other breakthrough for horizontal application of fundamental rights would come in *Vishaka v State of Rajasthan*. The Supreme Court, addressing the absence of legislative safeguards around sexual harassment of women at work, laid out some binding directions, drawing directly on rights conferred within the constitutional Articles 14, 19, and 21²². Although the case was concerned only with a state employer, the arguments of the Court at some point went much beyond the case. In establishing that the guarantee of fundamental rights is equally and cogently valid in the private employment sector, it creates

²⁰ *R.D. Shetty v International Airport Authority* (1979) 3 SCC 489.

²¹ The Constitution of India, 1950 art 12.

²² The Constitution of India, 1950 art 14, 19 and 21.

context for the guarantee of dignity and equality of women in private workplaces. This was a decisive moment, wherein the Court connected constitutional aspirations to the realities of power structures in the world, acknowledging that private employers could also violate fundamental rights. During the subsequent years, this proposition was further cemented by a series of judgments.

The Court went on: In *People's Union for Civil Liberties v Union of India*²³, stating free speech could not only be encumbered by state efforts for censorship; but equally through private monopolies of communication channels. Any monopolistic company, media or technology-based, could inhibit speech as effectively as state action. It didn't impose strict observance of rights against private actors in the judgment, all it did was make it clear about rethinking the tier level of protection accorded to constitutional rights.

The pivotal moment in the present evolution was catalysed by the landmark case of *Justice K.S. Puttaswamy v Union of India*²⁴. The Court recognized that violations of privacy mostly arise from private actors thereby acknowledging that privacy is intrinsic to Article 21 guaranteeing life and personal liberty²⁵. The judgment subtly implied the horizontal application of the theory by stating that safeguarding privacy means protecting it both from State and non-State intrusions. While this acknowledgment may very well have sealed the deal for dismantling the vertical model, the Court stopped short of announcing

²³ *People's Union for Civil Liberties v Union of India* (2003) 2 SCR 1136.

²⁴ *Justice K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

²⁵ The Constitution of India, 1950 art 21.

a horizontal doctrine in clear terms. Another very important advancement came with *Shakti Vahini v Union of India*²⁶ in which the Court would consider honour killings undertaken by private individuals and community structures.

The Court ruled that the right of choice of a partner, an aspect of personal liberty, should be protected from non-state actors by the State against private violations of constitutional rights. Thus, this ruling subtly triumphed over the horizontal application as it clearly hinted at the acknowledgment that the Constitution's sheltering covering must traverse into private domains where individuals' autonomy is threatened by societal interests. The route to Kaushal Kishor was additionally laid down by *Navtej Singh Johar v Union of India*²⁷ which decriminalized same-sex relationships. The Court asserted that all forms of social morality shall in practice yield to constitutional morality, one that projects the extended perspectives of dignity, equality, and freedom relations, no matter the source of the discrimination, be it State or individual citizens. That confirmed that fundamental rights derive from human dignity itself, not on the basis of the identity of the representer that violates the same.

The development of horizontal application in Indian jurisprudence portrays a dynamic compromise between constitutional ideals and social realities. From irreversible retreat in *A.K. Gopalan* to slow accretion in cases like *Vishaka* and *Puttaswamy*, the High Court has

²⁶ *Shakti Vahini v Union of India* AIR 2018 SC 1601.

²⁷ *Navtej Singh Johar v Union of India* 2018 INSC 790.

shown an increasing willingness to expand the palliative reach of Fundamental Rights. This metamorphosis would signify an overarching transformation in constitutional philosophy- one that now considers the substance of the rights violated more important than the identity of the violator. With the advent of a steadily ramping up private influence, the judiciary strives to project the meaning of justice, equality, and liberty in a modern, interconnected society beyond the traditional fringes of state action.

IV. KAUSHAL KISHOR v STATE OF UTTAR PRADESH & ORS: A TURNING POINT

The decision in *Kaushal Kishor v State of Uttar Pradesh & Ors.* is groundbreaking in Indian constitutional law as far as the horizontal application of fundamental rights is concerned. The Court recognized, for the first time with sufficient clarity, that certain fundamental rights, particularly Article 19 and 21, could be actively enforced against private individuals and entities.

A. Case Background and Procedural History

The controversy arose after a number of statements made by a public official purportedly infringing upon dignity and personal liberty in some individuals. The petitioners submitted that such statements, no matter how personal, bore as much public authority and therefore constituted an infringement of Article 19 and Article 21. The Constitution Bench had to answer whether these fundamental rights could be invoked against a private party-the individual making statements-or whether those rights were only enforceable against the

State. The procedural journey of the case was momentous in itself. It was first taken up before a smaller bench where it was subsequently referred to a Constitution Bench in view of its far-reaching constitutional ramifications. The Court's resolution to elevate the matter made clear its recognition that this was a case about fundamental principles of rights enforcement and about the evolving role of non-state actors in shaping public discourse.

B. The Majority Opinion

Justice V Ramasubramanian, writing for the majority, offered an elaborative, forward-looking opinion. The judgment underlyingly bared that the rigid vertical infrastructure of rights enforcement just can no longer reflect the calcified realities of modern society. He recognized that private actors, be they individuals, corporations, or digital platforms, do have the power to influence, to curtail, and even to infringe upon fundamental rights on a scale that earlier used to be exclusively ascribed to the State. The Court concluded that the supreme purpose of the Constitution is to protect human dignity as well as freedom, and protect it against any such threat whoever the author thereof be. Quoting numerous prior judgments including *Puttaswamy* and *Navtej Singh Johar*, the Court voiced that the violations against rights like privacy, dignity, and free speech could rather be traced back to the inherent worth of the individual and not who the violator is. The majority found that limiting the enforcement of Articles 19 and 21 to state actors alone would be *tertium non datur*; it would impose an artificial and thereby unjustifiable boundary rendering individuals defenceless against the kinds of abuses inflicted by private actors.

What is especially of primary importance is that the majority opinion did not consider the horizontal application of rights unqualifiedly. It acknowledged in part that having constitutional rights extend into the private disputes required a careful balancing act to avoid the realistic fallout of its imposition. The Court held that while territorial resurrection of rights is possible, a strict decisive nature of that would depend on what right was being breached and the surroundings of how that violation arose. This realistic approach allows for continued flexibility by future courts in developing a patchwork of principles and protections.

C. The Dissenting Opinion

Justice B.V Nagarathna penned a powerful dissent, which cautioned about the long-term repercussions that might emerge out of broadening the horizontal application of infringement upon constitutional rights without the sanction of legislation. She maintained that the basic structure of the Constitution, and above all the definition of ‘State’ found in Article 12, is an intended design to bring state actors under the purview of public accountability, and this blurring of the delineation line was sure to jeopardize the available framework under the Constitution, as so provided in this case.

The dissent is based on the simple fact of practical consideration, where the horizontal application of rights is persuading. The security of the law lays in the limitation of the domain within which a rightful claim to it could be possible. These doctrinal propositions guided her belief that private disputes were deservedly confined within the indubitable limits of both statutory as well as common law remedies, unless

Parliament were to give express indication of extending the ambit of the Constitution. The dissent's focus on legislative supremacy underlined the contentious theme running through the judgment: a tug-of-war between judicial innovation and fidelity to the Constitution. While the majority magnified the dynamic and progressive nature of rights and social power, the minority upheld the structural limits prescribed within the Constitution.

D. Constitutional and Jurisprudential Impact

The importance of *Kaushal Kishor* not only lies in the immediate verdict but also extends far and wide in terms of future constitutional interpretation and enforcement of rights. Recognizing the horizontal applicability of Articles 19 and 21, the Court noted that 21st-century power dynamics focus more and more on control by private actors over the platforms, spaces, and narratives necessary to exercise constitutional freedoms. One of the most pivotal areas of influence has to do with digital rights. Social media companies, online platforms, and other tech giants hold unprecedented sway over public discourse and private expression. *Kaushal Kishor* opens up the possibility to constitutionally challenge certain decisions made by private actors. For example, a decision by a social media corporation to deploy extensive censorship may be equated with state censorship in its capacity to limit free speech or personal liberty.

This is a growing trend in the world, where courts and legislatures struggle with the implications of private platforms — specifically, their protective role or the restrictions they impose on fundamental freedoms. The judgment may also influence workplace rights, housing

discrimination, and access to essential services, in which private actors tremendously influence what individuals experience in their daily lives. The recognition of horizontal rights would allow individuals to challenge acts of discrimination or violations of dignity and liberty against private entities. The judgment, however, does not answer many of the most important questions. The majority has not given any exhaustive framework on when and how horizontal application could be invoked. Future disputes will need to deal with competing rights say, between an individual's freedom of expression and another's dignity or privacy. How the courts will perform the balancing act between these rights and this task seems particularly onerous and complex in the absence of guidance from the legislature remains a muddled yet exciting proposition.

The ruling is a living constitutionalist's approach, wherein the whole document is to be interpreted to conform with current realities, but still bound within the foundational premise of upholding human dignity and liberty. On the other hand, dissents are an important reminder of the dangers of judicial excesses that flout structural limits imposed by the Constitution.

V. JURISPRUDENTIAL PERSPECTIVES

Through *Kaushal Kishor v State of Uttar Pradesh & Ors.*, the recognition of horizontal application was a turning point for Indian constitutional law. To comprehend the full scale and the possible route of this transformation, one must view the controlling judgment through

the prism of the consolidated and emerging jurisprudential schools of thought.

A. Natural Rights Theory and Human Dignity

The theory of natural rights, drawing from the works of John Locke holds that certain rights are intrinsic to human beings simply by their existence.²⁸ Life, liberty, property; they logically antedate the emergence of the State and the correspondingly do not require any sovereign to give meaning to them in order to be valid rights. The leading opinion in care essentially embodies this notion. The Court declares that the rights under Articles 19 and 21 do not emanate from the identity of the violator but are derived from human dignity; thus, it speaks in the Lockean tradition of viewing fundamental rights as being inherently vested in individuals. This characterization squares adequately with the Constitution's assertion that human dignity is an axiom above all other values in the law and is essentially transcendent of the public-private dichotomy. State or private incursions against such rights are violative of one's innate dignity.

Legal scholars such as Upendra Baxi have long advocated that dignity stands as the superior value in a rights-based approach, transcending Treasury ideals.²⁹ Baxi's notion of 'judicial empathy', the proposition that interpretation must assist the weaker section-resonates with the

²⁸ JJ Jenkins, 'Locke and Natural Rights' (1967) **42(160)** *Philosophy* **149**, 154 <https://www.jstor.org/stable/3749182> accessed 19 February 2025.

²⁹ Upendra Baxi, 'From Human Rights to the Right to be Human: Some Heresies' (1986) **13(3/4)** *India International Centre Quarterly* **185**, 200 <https://www.jstor.org/stable/23001445> accessed 19 February 2025.

majority standing.³⁰ The call for horizontal enforcement attests to the diffusive character of power in modernity, where private actors exert force comparable to the State.

On the contrary, according to critics, the theory of natural rights stirs a moral justification for horizontal application, yet there is lack of practical limitations to guide it. A totally unrestrained horizontal application will create an ever-changing and unpredictable judicial landscape. This concern was echoed by Justice Nagarathna, in her dissenting opinion, who warned the horizontal application could destabilize the legal order if not carefully bounded.

B. Legal Positivism and Structural Boundaries

While elaborating on the importance of the justification given by Justice Nagarathna, it comes into direct contrast with the natural rights theory side. Justice Nagarathna further opines that paragraph one limits horizontal applicability of fundamental rights to non-state actors intentionally through Article 12 upon which state action intends some induced actions to constitute an infringement. Therefore, by this view, allowing horizontal application is disruptive to the structure of the Constitution without the backing of statutory mechanism. The judge exposes the needed respect for separation of powers- whereby the interpretation by the judiciary cannot encroach into the role of the parliament to delimit rights and obligations. Judicial overreach on the

³⁰ Prof. Dr. Upendra Baxi, 'Judicial Empathy, Jurisprudence and Justice' (Gandhi Smriti Peace and Nonviolence Lecture, 14 August 2021) <http://www.gandhismriti.gov.in/programmes/gsds-programmes/gandhi-smriti-peace-and-nonviolence-lecture-%E2%80%98judicial-empathy> accessed 19 February 2025.

side of the positivist scholars has been warned about, denouncing that far-reaching judicial lawmaking enfeebles the democratic legitimacy.³¹ It echoes throughout the dissenting voice that private disputes should hold statutory and common law remedies, unless Parliament specifically avers horizontal application. The conflicts between the bold progressive majority on the one hand and a spirit of structural fidelity on the part of the minority thus encompass an historically enhanced debate between the natural rights theory and legal positivism: the first embracing an understanding based on the moral essence of rights, the second articulating a strict determination by the boundaries of institutions, which from now reverberates in all likelihood to future jurisprudence.

C. Critical Legal Studies and Power Dynamics

Emerging in the 1970s, the Critical Legal Studies (hereinafter referred to as 'CLS') movement challenges the perception of law as an externally operated rational system. CLS theories assert that the law, by its very nature, serves to express and fortify the equilibrium of card-structured powers.³² From here, horizontal application would be useful as an instrument in dismantling the existing disparities in power embedded within private contracts with one another in their dealings with other private actors. Thus, though not expressing CLS terminology per se, the majority opinion figuratively worked with CLS

³¹ Shunmugasundaram, R. (2007) Judicial activism and overreach in India. *Amicus Curiae*, 2007 (72) 22 [oai:sas-space.sas.ac.uk:1719](https://oai.sas-space.sas.ac.uk:1719) accessed 19 February 2025.

³² Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6(1) *Oxford Journal of Legal Studies* 1 <https://www.jstor.org/stable/764467> accessed 19 February 2025.

ideas; recognition of information that private actors — corporations instead of state-actors or social media platforms — can interact with and choke to death any individual rights. It also conveys some implicit recognition of the idea of the role of law in modulating structures of power that lie outside of the realm of state power.³³ However, it is exactly these points that CLS proponents might well oppose: the judgment did not go far enough. Even though the court realizes there is private power, it still has not offered a stout backup with which horizontal rights can be enforced. Critically, with the quest for set criteria and guidelines unabated, the ambiguity embraced by this decision over the past few years now restricts working wills and settles that the causes of action would be dependent more on judicial philosophy than stable legal doctrines.

D. Comparative Constitutional Perspectives

Apart from Kaushal Kishor, attempt to bring in a comparison with global approaches of the Constitution. One of those pieces of Constitution, from South Africa, made horizontal application an explicit requirement³⁴; rights were to bind not only the State but also private persons, wherever appropriate. It rang out loud and clear in some historic decisions, including that of *Dawood v Minister of Home Affairs*³⁵. There, the private landlords were told that arbitrary disposition of tenancy could not happen; hence, housing was a right

³³ Ibid.

³⁴ ‘Vertical and Horizontal Application’ (Constitutional Court of South Africa) <https://www.concourt.org.za/index.php/57-the-bill-of-rights/vertical-and-horizontal-application> accessed 19 February 2025.

³⁵ *Dawood v Minister of Home Affairs* (South Africa) 2000 (3) SA 936 (CC).

according to the constitutional principle of security against arbitrary dispossession within the bounds of reasonable limitation under given criteria. Thus, the reasoning was revolutionary: since on the one hand it imposes obligations on the State principally, on the other, it calls upon it to ensure an effective protection of any of the rights in the private relationships: a doctrine also termed as 'positive obligations.' Even before this particular case, a lot of judgements relied on this principle; for example, *X and Y v The Netherlands*³⁶, where the European Court of Human Rights pronounced it a breach of the right to privacy of a mentally challenged girl by the failure of the State to protect her from private sexual violation. The stricter 'state action' doctrine of the U.S. restricts the constitutional rights to conduct by the state itself. However, certain exceptions are allowed, especially when it comes to the pejorative public functions done by private bodies. Still, it will long continue being a landmark exception, with the U.S. Supreme Court ruling within *Shelley v Kraemer* wherein the enforcement by a judge of private racially-oriented demands was a state action rendering it unconstitutional.

In its embrace of the horizontal application of Kaushal Kishor, the Indian Supreme Court, likened closer to the South African and ECHR horizons, does not leave any other choice than the American doctrine. Yet, due to not having the brief support of any constitutional or legislative precept, the limits of the doctrine will stay unclear in view of scenarios yet to be determined by future courts.

³⁶ *X and Y v The Netherlands* (European Court of Human Rights) [1985] ECHR 4.

VI. CONCLUSION

The horizontal application of fundamental rights was first recognized in *Kaushal Kishor v State of Uttar Pradesh & Ors.* This marks a watershed moment in the history of the Indian constitutional law. It reflects an evolving legal landscape where the possibilities of action by private actors intersect with the exercise of personal liberties in an ever-expanding scope. The horizontal application here implies the Supreme Court is allowing Articles 19 and 21 to be enforced not only against the state but also against private actors, be they corporate entities or individuals, exercising complete control over important aspects of human lives in modern society.

This change is a conscious drift away from a narrow, vertical approach to the interpretation of constitutional rights on the one hand into a more supple, rights-imbued vision of the exercise of the guarantee of rights. Dignity, freedom of expression, and personal liberty were all recognized, by majority opinion, not as gifts from the State but as intrinsic, unalienable rights. The judgment seems to have extended the very reach of the Constitution by asserting its protective commitment to rights that had hitherto been confined to the narrow domain of the private sphere. This goes a long way in bringing *Novus* into the plank of classical constitutional philosophy with the realities of contemporary socio-political existence, which would further stranglehold the very vitality of the rights envisaged at a time when the private power increasingly well informs political structuring.

However, the findings of the judgment, too, unfold a conflict between progressive interpretation and fidelity to the Constitution. The dissent speaks of the risk of judicial activism and the upset of the finely balanced boundaries of the Constitution, while the majority opinion upholds the principle of evolving rights. Justice Nagarathna provided due caution against confusion between state action and private conduct: a very legitimate cautionary call. This, therefore, in a way, explains the point that the Constitution is designed, on the basis of Article 12, to hold the State accountable.

Expanding this architecture without any backing from the law opens a Pandora's box of questions concerning institutional balance and separation of powers. The ongoing jurisprudential contention spurred by Kaushal Kishor - realists, legal positivists, and critical legal scholars, are likely to define the doctrine henceforth. The judgment embodies broad yet undefined elements of all three: moral sanction on human dignity, structural safeguards of constitutional boundaries, and the backdrop on the power imbalances of private relationships. Such synthesis reflects somehow the complex character of contemporary constitutionalism wherein the law has to manoeuvre between personal liberties, state power, and private authority.

The judgment raises rather crucial questions, though. The majority also failed to set out a clear framework for when and how horizontal application applies, leaving it to future courts to delineate the boundaries of this doctrine. Going forward in India, the judiciary will be of crucial impetus to fine-tuning this doctrine, thus ensuring that horizontal enforcement adds to the shield of rights from the inner side

and not undermine the constitutionally provided political stability within the habitude of the Constitution.