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EDITORIAL NOTE

We are happy to bring the second volume of our online "Journal of Comparative Constitutional Jurisprudence." The most important objective of our journal is to intellectually stimulate the younger academics, the future of legal academic education. It gives us immense encouragement that our last volume of 2025 was well received by the academicians and other legal fraternity. We emphasise that the scope of our online journal is wide enough to include other disciplines of applied social sciences, the extra vision of a lawyer.

In the volume of this year that is of 2026, we hope the published research articles shall be as well received as were those of the preceding year. The paper of **Prof. (Dr.) Vijaykumar** emphasises that the constitutional conventions are the very soul of a democratic constitution. Apart from providing definitions, and pointing out the relevance, the importance and utility as a device to better understand and interpret the constitution, the paper of Prof. Vijaykumar is a valuable addition to constitutional research.

Prof. (Dr.) Ghayur Alam points out the difficulties in answering the unanswerable question. HLA Hart, long ago, similarly confessed his inability to define 'law'. He hesitates even to define 'the law', he perhaps may define the law on some occasions for some purposes. However, Prof Ghayur Alam gives a comprehensive list of different definitions of law by various jurist, but no definition can be called comprehensive, because ‘law’ changes its colour, character and relevance with the change of society, mode of production and its politics.

Prof. (Dr.) Vinod Dixit (V.K.Dixit) attempts to dissect the anatomy of both the right-discourse and utility discourse. For the deontology of right discourse, the validity of an action depends on adherence to a set of rules, irrespective of consequences of the action. This discourse is eminently suitable to the free-market economy as it is unconcerned with social justice. On the other hand, utility is consequentialist discourse and its determining mantra is resultant happiness.

Zeenat Farooqui and Nikhat Zabi examine the relation between law and morality with reference to Hart-Fuller debate in the context of restricting free speech in U.S, U.K. and India. They are particularly concerned with the more liberalising attitude of court in assigning relatively less importance to ‘public morality’ in restricting free speech.

Vinod Dixit, commenting on a 2010 case on Hindu law of inheritance, decided by the Supreme Court, criticises the deciding Bench as they preferred a literal interpretation leading to unjust consequences. Dixit, draws certain conclusions. If there is conflict between letter of the law and justice, courts must prefer justice. In any case, property of a woman must not be allowed to be inherited by her tormentors and unfortunately that is exactly what has been done by the court in this case; the Court preferred the claim of her tormentors.

The article of **Elmar Mahmudov**, is about the definition, limitation and defence of constitutional rights in three jurisdictions, India, Azerbaijan and continental Europe (European Court of Human Rights; ECHR). The paper emphasises the participation of three nations in increased transnational mobility of constitutional right concepts.

Vyomesh Uday Warunjikar highlights the uniqueness of unified judicial system in a federal constitution and specific consequences after the Supreme Court's trendsetting precedent in Kusum Ignotes v. Union of India. The case raises questions about the territorial limits High Courts; the territorial jurisdiction of High Court may be comparable to that of the Supreme Court with reference to Article 225 and other provisions. The paper traces these developments through historical perspective.

Kartikey Mishra and Divansh Singh: Artificial Intelligence no longer is confined to scientific laboratories, it is impacting even our constitutional values. The AI algorithm is affecting our welfare schemes as well. The paper analyses the conflict between AI efficiency and constitutional value commitment. In this contextual matrix, the paper analyses algorithmic constitutionalism.

Aditya Singh Rathore writes about transformative constitutionalism. Though new enthusiasm may result in liberation trends specially in the field of gender and caste justice, it may also bring with it reversing trends in the context orthodoxy associated with majoritarian democracy.

Devansh Malhotra and Kalyani Abhyankar high-light the importance of Shiva Rao's seminal work 'India's Constitution in the Making'. The work gives us first hand information about the problems, and tensions faced by the makers of the constitution. The importance of the work lies in the fact that it is an important sourse of understanding and interpreting the constitution.

In final article Ms. Kumud examines the law of recusal as a fundamental component of natural justice, emphasising that judicial recusal is aimed at preserving public confidence in judicial impartiality. Through leading precedents, it highlights the primacy of perceived fairness in maintaining the integrity of the judiciary.

The Board would also like to thank and appreciate the efforts of the Editorial Assistants, namely Kanishk Goyal, Ayushi Kumari, and Imaanpreet Singh, who assisted in the compilation of this volume.

We, the Editorial Board, are confident that our attempt to make the volume as informative and thought-provoking as possible and will be well received by the legal fraternity. The success of the journal ultimately will depend on the readers and contributors. Our effort will be successful only if we are able to stimulate critical faculty of our younger lawyers and seekers of legal knowledge.

VOLUME II

MAY 2026

TABLE OF CONTENTS

I. Constitutional Conventions and their importance under the Indian Constitution: A Critical Analysis 9

- Prof. (Dr) V. Vijayakumar

II. What is Law: A Grand Question Without a Grand Answer 72

- Ghayur Alam

III. Right Discourse And Utility Discourse 108

- Vinod Dixit

IV. Public Morality As A Censoring Tool: The Changing Notions Of Morality In Uk, Usa And India 140

- Zeenat Farooqui and Nikhat Zabi

V. Omprakash v. Radhacharan-justice denied 173

- Vinod Dixit

VI. Transnational Constitutional Rights: Rights-Limitation, Positive Obligations, and Remedies in India, Azerbaijan, and the European Court of Human Rights 190

- Elmar Mahmudov

VII. Samudramanthan Of Article 225: Unveiling High Court's Jurisdictional Power Post Kusum Ingots 216

- Vyomesh Uday Warunjikar

VIII. Algorithmic Constitutionalism: Reimagining Constitutional Morality In An Ai-Driven India 249

- Kartikey Mishra, Divyansh Singh

IX. Transformative constitutionalism In The 21st Century: New Perspective On Equality, Liberty, And Justice 297

- Adityani Singh Rathor

X. Importance of India's Constitution in the Making as a source of understanding the Constitution 333

- Devansh Malhotra and Dr. Kalyani Abhyankar

XI. Judicial Recusal and the Imperative of Apparent Impartiality: An Analysis in light of Natural Justice, Judicial Ethics, and Indian Jurisprudence on Bias 344

- Kumud Lata Das

I. CONSTITUTIONAL CONVENTIONS AND THEIR IMPORTANCE UNDER THE INDIAN CONSTITUTION: A CRITICAL ANALYSIS

- *PROF. (DR) V. VIJAYAKUMAR*[*]

Abstract

The existence of healthy conventions has mattered in the meaningful working of a constitution, and certainly has played a significant role even in states having written Constitution. Both the Constitution and their conventions thus remain inseparable parts of a system, each helping the other to induce birth, development, maturity and change with the passage of time. This being a case in modern constitutional law domain, constitutional conventions should be playing a significant role in every constitution, written or unwritten.

Apart from providing a few definitions of constitutional conventions, their relevance even in a written constitution and the merits or advantages of constitutional conventions are discussed in brief in this paper. The specific constitutional conventions on the relations between the President and the Parliament in the context of the Constituent Assembly Debates in favour of developing such valid constitutional conventions are mentioned in this paper. Followed by this, the paper describes the constitutional conventions relating to the two Houses of Parliament and the conventions relating to the Presiding Officers and the Privileges of the Houses. The judicial

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responses to the constitutional conventions also form part of this paper.

The need for developing constitutional conventions in accordance with Article 13 (3) that provides for 'custom or usage having in the territory of India the force of law' and emphasise in the conclusion that the conventions are the very soul and spirit of law, life and democracy under the Constitution of India.

I. INTRODUCTION

Every Constitution is a political instrument articulating the what and the how, as decided by the people from time to time. In this context, democratic constitutionalism hopes to bring about a political order in which the achievement of certain social goals would be easier. As such, the rules of the political instrument are bound to be affected by the social predicament that prevails in a given society. As politics develops, the gaps between the political instrument and social aspirations are bound to increase in size as well as in complexity. In such circumstances, the Constitution generally adapts itself to bring about a viable solution to bridge the gap between politics and society.

One of the traditional as well as effective forms of adaptation of the Constitution to the social demands is the body of constitutional customs, conventions or practices. More often than not, constitutional conventions have certainly helped the development of constitutionalism from time to time. They have, in fact, helped considerably in the growth of order in every state having a written or an unwritten Constitution. The existence of healthy conventions has mattered in the meaningful working of a Constitution, and certainly has played a significant role even in states having written Constitutions. Both the Constitution and their conventions thus remain inseparable parts of a system, each helping the other to induce birth, development, maturity and change with the passage of time.

Constitution is an instrument through which the legitimization of the authority of various institutions of the state, elected or nominated takes place. With the United States of America adopting the first written constitution in 1789, many states followed the suit as they felt that it is the most convenient technique of controlling the powers of the state as and when the state powers are exercised against the larger interest of the society.

Herman Finer referred to St. John's definition of the term constitution in his book. Accordingly, 'by constitution, we mean, whenever we speak with Propriety and Exactness, that assemblage of Laws, institutions, and customs, derived from certain fixed principles of reason...that compose the general system, according to which the community hath agreed to be governed'.[1] Similarly A.V. Dicey quoted George III who defined constitution as the most perfect of human

[1] Herman Finer, *Theory and Practice of Modern Government* (Greenwood Press 1949) 116.

formations.[2] He also referred to Holland's definition that says 'constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state'.[3] There may be a written constitution, or unwritten constitution, supplemented to a greater or less extent by unwritten laws, conventions, traditions and customs. But the principle remains the same. The last word remains with the people'.[4] This approach places the constitution in the right perspective as the link between the people and their agent, the government.

These definitions tend to lead us towards not only the written constitution but unwritten portions of a constitution like the rules, conventions, customs, understandings, habits or practices as well that may regulate the conduct of various functionaries working under the constitution. They are not law in the strict sense of the term and they cannot be enforced in a court of law. At the same time these unwritten parts of the constitution certainly provide the sense of direction as well as the meanings to the written provisions of the constitution. That is why the courts in many countries have, over a period of time, started accepting the relevance of the constitutional conventions in interpreting the provisions of the constitution.

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[2] A V Dicey, *Introduction to the Study of the Law of the Constitution* (OUP 1969) 2.
[3] ibid 23.
[4] Dorothy M Pickles, *Introduction to Politics* (University Paperbacks, Methuen & Co Ltd 1967) 41.

According to Dorothy M. Pickles, 'of themselves, constitutions cannot guarantee anything. Whether they work well or badly, depends much less on the text of the constitution, on whether it is technically well or badly drawn up, than on the spirit in which it is applied by the men whose function it is to apply it'.[5] Apart from this, there are certain practices and customs that revolve around the functionaries of the government or in maintaining relationships among them. These practices and customs are called as constitutional conventions. These conventions exist predominantly in an unwritten constitution. However, they do exist in all the written constitutions as well because of the fact that all the aspects of governmental functions cannot be captured in the written provisions of a constitution. A. V. Dicey described them as constitutional conventions.

K. C. Wheare described conventions as a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution.[6] Julius Stone described constitutional conventions as the group ethical conviction which tempers power in a democracy.[7] C.F. Strong, while explaining the force behind these conventions observed that 'the force at the back of the law has always been a social force. The social force by itself, however, is merely custom. Whenever a society, however rudimentary, exists and there will develop

[5] ibid 161.
[6] K C Wheare, *Modern Constitutions* (OUP 1984) 122.
[7] Julius Stone, *Social Dimensions of Law and Justice* (Maitland Publications Pvt Ltd 1966) 624.

customary ways of carrying on social activities. A body of customs develop, forming a sort of unwritten code enforced by some pressures such as parental or religious authority, or the opinion of the community concerned. Some of these customs may be found to have such a wide application for the general welfare that some stronger pressure than mere social authority or opinion is necessary to get them universally obeyed. These customs then cease to be social and become political-in fact, laws- being enforced by a constituted government'.[8] Thus the constitutional conventions play a very important role in the working of a constitution, even if it is a written constitution. In other words, the constitutional conventions become an unwritten part of the constitution as well as a source of the constitution. The courts in India have acknowledged the importance of these constitutional conventions in many a decisions.[9]

The status and significance of constitutional conventions would make it an excellent candidate for inclusion in the list of constitutional values that go to constitute not only constitutional law, but also ‘constitutionalism’. Concepts like rule of law, separation of powers, independent judiciary among others form part of this constitutional unwritten value, called constitutionalism. This being a case in modern

[8] C F Strong, *Modern Political Constitutions* (M G Clarke & ELBS 1973) 5–6.
[9] *M S M Sharma v Sri Krishna Sinha* AIR 1959 SC 395; *Ram Jawaya Kapoor v State of Punjab* AIR 1955 SC 549; *Shamsher Singh v State of Punjab* AIR 1974 SC 2192; *U N R Rao v Indira Gandhi* AIR 1971 SC 1002; *Supreme Court Advocates-on-Record Association v Union of India* 1993 Supp SCALE 1.

constitutional law domain, constitutional conventions should be playing a significant role in every constitution, written or unwritten.

There may be many compelling reasons for the countries to have the framework of the constitution as well as the governments clearly spelt out in a single written document called the Constitution. The reasons for having a written constitution as against the unwritten constitution like the United Kingdom are many. Some of them include:

a. The written Constitution identifies the locus of the political sovereign in the state which is the people themselves;
b. The written Constitution becomes the supreme law of the land and all laws passed by the legislatures or executives should be within the framework of the Constitution;
c. In this sense, written constitutions seek to prevent the abuse of power by any of the organs of the state and facilitates the adherence to constitutional norms;
d. Written constitutions provide clarity and certainty that could be mandatorily imposed on all the power-holders in the state;
e. Written constitutions provide and protect the rights, the Fundamental Rights in India, of the people against the arbitrary exercise of power by any organ of the state;
f. Written constitutions provide the procedure to amend the parent constitution itself in an organised and specified manner to ensure that the supreme law of the land is not vulnerable to the whims and fancies of ruling governments. At the same time, it also provides

the necessary amendments to be carried out based on the needs of the society and other developments in the country;

g. The written constitutions also provide for one among the most important values of the constitutions, the separation of powers and checks and balances. Although no watertight separation of powers is possible in any country, every constitution seeks to provide the necessary framework for these concepts to be enforced in order to prevent one branch of government dominate over the other two branches and prevent authoritarian or dictatorial regimes that might challenge not only the written provisions of the constitutions but also question the political sovereignty in the state;
h. The written constitutions provide for distribution of legislative competence, if the country is federal in nature;
i. The written Constitution also limits the power of the legislature and the executive branches specifically and such limited constitutions cannot blindly follow the British conventions that have emerged over a period of time based on political and cultural developments.

The need to redefine conventions was stressed by Geoffrey Marshall in his book 'Constitutional Conventions.' According to him, there are many other constitutional relationships between governmental persons or institutions besides the conventional rules that govern the powers of the Crown. Such constitutional relationships illustrate the existence of rules of a conventional character. The following examples have been given by Geoffrey Marshall as illustrative of emerging conventions in the United Kingdom:[10]

a. relations between the Cabinet and the Prime Minister;
b. relations between the Government as a whole and the Parliament;
c. relations between the Houses of the Parliament;
d. relations between the Ministers and the Civil Service;
e. relations between the Ministers and the machinery of Justice;
f. relations between the United Kingdom and the member countries of the Commonwealth.

The important feature of this definition is that it makes conventions applicable to the legislative and judicial branches of the government as well as United Kingdom's relations with the Commonwealth countries. Another important feature of Marshall's definition is that it tries to apply conventions even to the relations between the Council of Ministers and the civil service. In other words, Marshall was trying to identify the principles of accountability applicable to the public servants generally, including the civil service, the police and the armed services. These two important features of Marshall's definition may be criticized when the same definition is applied to other countries and to their Constitutions. Yet, one important deficiency in Marshall's definition is obvious. While speaking about the relations among the three branches of government, the public servants and the

[10] Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press 1984) 4.

Commonwealth, he has failed to mention the relevance of conventions in the procedures governing each branch as well as the relations among the three branches of the government.

In a limited application, Kaul and Shakdher explained the nature and purpose of the parliamentary practices. According to them, 'parliamentary practices, procedures and conventions make for orderly and expeditious transaction of business and impart an element of stability and predictability in the course of proceedings with in the chamber. The parliamentary practices are not an arbitrary standard or a product of one mind, but the result of the considered and enlightened opinion of many which have gradually evolved over the years. They provide for an efficient and effective method of accomplishing all legitimate objectives of a legislative body. Inside the House, this body of impartial rules guarantees equal rights to all, imposes responsibilities on all, offers opportunities to all, saves the time of all and in short, serves the best interest of all'.[11]

'Constitutional conventions are those non-formal legal norms or rules of political or official behaviour among the three branches as well as the procedures governing each of the three branches of the government'. This definition is almost similar to the definition given by Professor O. Hood Phillips which states that conventions are 'the rules of political practice which are regarded as binding by those to

[11] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) xii–xiii.

whom they apply'.[12] The most striking difference between these two definitions is that while Hood Phillips makes the conventions binding the other does not. Ever since the emergence of the practice of writing down the Constitution for a country, people have tried to reduce the practices and functions of the government to writing and thus tried to arrest those usages and conventions in their respective Constitutions. But this effort has proved to be an ongoing process and has not been completed in any of the written Constitutions even today. The Indian Constitution, which is the lengthiest of written Constitutions could not bring all the practices, usages, customs or conventions into the text. In other words, it may be even said that these non-formal legal rules will continue to exist for long, as long as the Constitutions exist, and the importance attached to them will also continue to increase from time to time. This is because conventions facilitate and do not hinder the working of the Constitution and the constitutional development of a country. Thus, the conventions play a significant role in the making of a Constitution and the establishment and maintenance of societal equilibrium.

Although constitutional conventions have no legal sanction (except in certain cases where they are interpreted by the courts) there is only one type of sanction behind them. This sanction is purely political in nature and depends heavily on the public opinion which forces the political

[12] O Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (Sweet & Maxwell 1978) 108–13.

power holders (acting as public authorities) to behave in the true spirit of the Constitution. Thus, it is more a moral, not so much a legal sanction, imperative upon which the conventions depend. Similar opinion was also expressed by A.V. Dicey who had explained as to why constitutional conventions appear to bind, even though they are not laws that courts will enforce. He thought that it was public opinion which gave 'validity to the received precepts for the conduct of public life' and that these were directed to ensuring that the will of the people prevailed. He also mentioned that the conventions of the Constitution are supported and enforced by 'something' beyond, or in addition to, the public approval. He explained the phrase 'something' to mean nothing other than the force of law.[13] A.V. Dicey continued his arguments and concluded that the violation of any existing convention would bring the offender immediately into conflict with the courts and the law of the land. It is not clear from these words of Dicey as to the consequences of such a conflict or to the nature of any punishment or any action for such violation.

The conversion of the social force behind these practices of the state into political force has been very briefly, yet clearly, explained by C.F. Strong. According to him. "the force at the back of the law has always been a social force. The social force by itself, however, is merely custom. Whenever a society, however rudimentary, exists and there

[13] Geoffrey Marshall and Graeme C Moodie, *Some Problems of the Constitution* (Hutchinson & Co 1959) 29.

will develop customary ways of carrying on social activities. A body of customs develop, forming a sort of unwritten code enforced by some pressures such as parental or religious authority, or the opinion of the community concerned. Some of these customs may be found to have such a wide application for the general welfare that some stronger pressure than mere social authority or opinion is necessary to get them universally obeyed. These customs then cease to be social and become political - in fact, laws - being enforced by a constituted government."[14] The interaction between laws and conventions has been very nicely brought out by professor J. D. B. Mitchell. According to him, 'conventions cannot be regarded as less important than rules of law. Often the legal rule the less important. In relation to subject-matter, the two types of rule overlap: in form they are often not clearly distinguishable .... very many conventions are capable of being expressed with the precision of rule of law, or of being incorporated into law. Precedent is as operative in the formation of convention as it is in that of law. It cannot be said that a rule of law is necessarily more certain than a convention. It may therefore be asked whether it is right to distinguish law from convention'.[15]

Apart from these sanctions behind the conventions of the Constitution, certain advantages of those conventions make every powerholder

[14] C F Strong, *Modern Political Constitutions* (M G Clarke & ELBS 1973) 5–6.
[15] Colin R Munro, *Studies in Constitutional Law* (Butterworths 1987) 40.

adhere to these non-formal legal norms in the working of the government. Some of these advantages are that:

1. the constitutional conventions help the machinery run smoothly;
2. the constitutional conventions allow flexibility in governmental institutions;
3. the constitutional conventions provide the flesh which clothes the dry bones of the law;
4. the constitutional conventions make the legal constitution work;
5. the constitutional conventions keep in touch with the growth of ideas; and
6. the constitutional conventions are enforced not by courts, but by the weight of public opinion, which expects politicians to behave in the true spirit of the Constitution.

The frequent cry of eminent people, jurists and others for the establishment of "healthy conventions" and the very frequent violations of the established conventions in India have raised the eyebrows of many a citizens of India. The experience since 1950 in the working of the Constitution of India reveals disrespect and disregard to the nonformal legal norms, conventions, practices, or usages in spite of the written words of the constitution that seek to recognise them. These and other pronouncements make a student of constitutional law go deeply into the question of constitutional conventions in India. Hence, on the basis of the foregoing understanding, which is fundamental, of the constitutional conventions, an attempt is made in this study to highlight the importance of these constitutional conventions, their merits, their functions and their utility in the functioning of the Indian Constitution.

Mention should be made to Article 13 (3) of the Constitution of India. Article 13 (3) provides "In this article, unless the context otherwise requires, (a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, **custom or usage having in the territory of India the force of law**" (emphasis added). These phrases, custom or usage have not been assigned any specific context as to their applicability in social, cultural or political spheres. Therefore, one can confidently arrive at the conviction that the constitutional conventions, practices, usages or customs having the force of law would also be falling within the term law. Hence, these constitutional conventions not only have the ethical or moral value but have the full support of the constitutional provisions as well. It is in fact that no constitutional convention can go against any written provision of any law or any provision of the Constitution. The Indian constitution is not an exception to this rule.

II. SCOPE FOR GROWTH OF CONSTITUTIONAL CONVENTIONS UNDER THE INDIAN CONSTITUTION

A detailed analysis on the scope of convention in the Indian Constitution was attempted by Justice P. B. Mukharji. According to him, conventions have a larger and a more significant scope in an unwritten constitution than in a written Constitution. He went on to observe rightly so that Constitution of a country can never be so wholly written out in all its details as to completely exclude the growth and operation of conventions. By observing that 'no conventions can be allowed to grow which override the express provisions of the Constitution', he also attempted to identify the scope for the growth of the conventions under the Indian Constitution, summarised below:[16]

1. The number of times the President of India could be re-elected;
2. On Articles 74 and 75, as well as Articles 163 and 164, there is a good deal of scope for the growth of healthy conventions;
3. Article 78 of the Constitution;
4. The President's power to prorogue and dissolve the House under Article 85 (2);
5. Article 105 to 122, as well as Article 194 to 212, there is a large scope for the growth of conventions;
6. There is scope for conventions in the President's relationship with the State Governors;
7. Under Article 160 for the discharge of functions of the Governor in any contingency;

[16] P B Mukharji, *The Critical Problems of the Indian Constitution* (University of Bombay 1968) 152–53.

8. Use of discretionary powers by the Governor under Article 163;
9. Legislative powers of the Governor under Article 213;
10. In the choice of the Prime Minister by the President under various circumstances;
11. Convention that the Prime Minister should be a member of the House of the People;
12. Conventions about ministerial responsibility.

After enumerating the scope of conventions under the Indian Constitution, Justice P. B. Mukharji clearly observed that 'conventions in constitutional law are not mere ornaments to be worn on special occasions, or mere polite rules of good behaviour. There is an element of sanction behind the convention. No doubt the narrow view of the distinction between law and convention is that law is limited to those rules which are applied and enforced by the courts and conventions only thrive on the good sense of the people and the institutions to which they relate'.[17] He went on to observe that 'the final reason for observance of the convention lies in a smooth and harmonious working of the Constitution without jolts and knocks…conventions provide the content of the rules and practices for guidance of those who actually run the political institutions and the machinery of government and that the justification for convention lies in the desire to maintain the government'.[18]

[17] ibid 154-164.
[18] ibid 165.

He went on to support conventions by stating that 'convention demands that the different organs of the government, the executive, legislative and judicial, should mutually respect and regard the arena and functions of each. The actual words of the Constitution can teach prohibition and separation in this respect but it is convention alone that can teach co-operation between them'.[19] Unfortunately, the constitutional developments in India relating to the importance of conventions have not received the attention it demanded either by the power holders or the researchers in the field of political science and constitutional law. An attempt is made in this paper to outline the importance of constitutional conventions in India in a few specific areas and analyse the judicial decisions relating to them.

III. CONVENTIONS RELATING TO THE RELATIONS BETWEEN THE PRESIDENT AND THE PARLIAMENT

Article 79 provides that 'there shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People'. This provision very clearly indicates the combination of two different organs of the State under 'Parliament', not to make the President or either House of Parliament a weak body, but to bring in collective co-

[19] ibid 166.

operation between the two Houses of Parliament and between them and the President. When this provision is contrasted with the other provisions, it brings the nature and extent of the executive power to lime-light. For example, Article 53 says that there shall be a President of India. Again Article 79 says that there shall be a Parliament. Article 83(2) provides that the House of the People can be dissolved. Article 111 provides that the President may either assent to a Bill or withhold the assent therefrom. Article 123 provides the legislative power to the President in promulgating Ordinances. If these provisions are read independently they may not provide any specific line of argument excepting the existing one stating that the President has to always act on the advice of the Council of Ministers, as per the decision of the Supreme Court in Samsher Singh v. State of Punjab.[20]

Article 78 very clearly brings in the relationship between the President and Parliament, through the agency called the Council of Ministers, headed by the Prime Minister. This provision had not received the necessary attention or interpretation that it requires in the working of Parliament in India till the Rajiv-Zail Singh rift. Even then a proper interpretation of this provision has not been given although some healthy conventions have been established and followed in this area. For example, as a duty is cast on the Prime Minister to keep the President informed, Pandit Nehru used to meet the President once a

[20] *Shamsher Singh v State of Punjab* (1974) 2 SCC 831.

week to apprise him of administrative matters.[21] As such the Prime Minister, or under his authorisation, anyone else, can become the link between the President and the Parliament. In the second place, it also empowers the President to seek any information from the Prime Minister relating to the administration of the affairs of the State which will be really the requirement of 'aid and assistance.' In the third place, there is the most important provision that any individual Minister's decision need not be implemented by the President unless and until it is duly ???Generally, the conventions relating to the relations between Parliament and the President can be briefly described under the following paragraphs. These areas would bring out very clearly the nature of relations between Parliament and the President. To some extent there may be one or two appropriate provisions of the Constitution in these areas but only a series of conventions working along with such constitutional provisions make the Constitution functional today. These areas require some description both of the Constitution and the conventions that are put into service.

In the first place, (being part of the Parliament), the President is empowered to summon or prorogue both the Houses of Parliament and dissolve the Lok Sabha. However, there is only one condition imposed on the exercise of this power by the President in relation to the Parliament. Accordingly, Article 85(1) provides that the intervening period between any two sessions should not exceed 6 months. In the

[21] *The Hindu* (3 July 1987).

exercise of this power by the President, certain healthy conventions have been established in co-operation with the Presiding Officers of Parliament. The manner in which the dates are agreed upon and the manner in which the two Houses are being convened or prorogued must be looked into. As observed by Justice P.B. Mukharji, 'a fruitful field for healthy conventions arises in the President's power to prorogue and dissolve the House. Under Article 85(2) of the Constitution, conventions for proroguing the House or dissolving the House, the occasions for doing so and the method and manner of doing so should be subject matter of conventions. The Presidential right to address Parliament or to send messages to Parliament under Articles 86 and 87 should be developed by conventions. The Constitution recognises such right in the President. But what the conventions can do is to build up the method, manner and the occasion for the exercise of such right'.[22] This observation leads us to the conclusion that there is very little of the written rules in regulations to govern the powers of the President in summoning and proroguing the Houses and dissolving the House of Representatives. In actual practice, the summoning of Parliament is done by the President in consultation with the Speaker of the House of the People and the Chairman of the Council of States, irrespective of Article 85(1) of the Constitution. The Department of Parliamentary Affairs initiates the action in this regard and in consultation with the two Presiding Officers of the Houses of Parliament, fixes the date for

[22] P B Mukharji, *The Critical Problems of the Indian Constitution* (Bombay University 1968) 156.

the meeting of Parliament and submits the proposal for the President's approval. After the President signs the order, the matter is referred to the Parliamentary Secretariat which issues the notification, under its own name, for general information.[23]

It is not necessary to summon both the Houses simultaneously on the same date, as provided under Articles 85 of the Constitution. This is a departure from the British practice and has been clearly mentioned in that Article. The same provision also imposes a condition that six months should not intervene between any two sessions. When the two Houses are not summoned simultaneously, sessions of the Rajya Sabha usually commence one week after the commencement of the Lok Sabha. When the Lok Sabha stands dissolved, the Rajya Sabha can be summoned to transact business: for example, the Rajya Sabha was summoned to meet on February 28, 1977 for a short two-day session for seeking the approval of the House for the extension of President's rule in Tamil Nadu and Nagaland, the proclamations of which were to expire on March 10 and March 24, 1977 respectively. This was the first time that the Rajya Sabha met while the Lok Sabha stood dissolved and the election process had been set in motion[24] The sessions of the two Houses are generally held on different dates, except for the first session every year and the first session after the reconstitution of the Lok

[23] S H Belavadi, *Theory and Practice of Parliamentary Procedure in India* (N M Tripathi 1988) 49.

[24] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 156.

Sabha, when the President addresses the Members of both the Houses assembled together. This is as provided under Article 87 of the Constitution. With regard to the number of sessions of the Parliament, three sessions of the Lok Sabha are normally held in a year. However, there is no hard and fast rule in this regard and the duration of the three sessions is not uniform.[25]

Although the power to summon the House of the People is vested in the President, he exercises this function on the recommendation of the Prime Minister. This has developed well in the form of a convention. However, the procedure involved here is also elaborate. A proposal to summon the Lok Sabha is initiated by the Minister for Parliamentary Affairs, and by the Leader of the House, in case, the Prime Minister is not the Leader of the House, and submitted to the Prime Minister, after an informal consultation with the Speaker with regard to the date of commencement and the duration of the session.[26] The Prime Minister may agree with the suggestion or refer it to the Cabinet. The proposal as finally agreed to by the Prime Minister or Cabinet is formally submitted to the Speaker.[27] If the Speaker also agrees, he directs the Secretary-General to obtain the order of the President to summon the Lok Sabha on the date and time specified. In the case of a rare disagreement, the Speaker may refer the matter to the Prime Minister

[25] ibid 160.
[26] Lok Sabha Debates, 1 August 1972, col 211.
[27] Lok Sabha Debates, 20 February 1970, col 44.

for reconsideration.[28] However, it is not clear whether on reconsideration, the decision taken by the Prime Minister is binding on the Speaker or not. At the same time, so far, there has been no specific instance that has taken place to contradict this practice.

After the President has signed the order, the Secretariat notifies the dates in the Gazette Extraordinary and issues a press communique for wider publicity in the press as well as over the All India Radio and Doordarshan. The procedure for advancing or postponing the summoning of the Lok Sabha, after all the formalities have been complied with including the notification, under extraordinary circumstances, is settled. For example, after the President had summoned the Lok Sabha to meet on November 19, 1962 by his order dated September 14, 1962, published in the Gazette Extraordinary (II), the Prime Minister proposed that in view of the situation created by the Chinese aggression, the date of commencement might be advanced to November 8, 1962. The President's orders were taken again and fresh summons dated October 29, 1962, were issued to members summoning them to the Lok Sabha on November 8, 1962.[29]

A close look at this procedure reveals that at one point, the Prime Minister refers the matter to the 'Cabinet' for taking a decision to summon the House at the appropriate time, whereas, the Constitution

[28] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 160.
[29] ibid.

mandates that the Prime Minister should consult the entire Council of Ministers and not the Cabinet in particular. This practice of taking the decision by consulting only the Cabinet has been well established even against the written constitutional provisions and raises a fundamental question 'can there be a practice against any existing Constitution'? Theoretically speaking, there can be no valid practice, usage or convention that goes against an existing law. But here, from the very beginning, the practice of consulting only the Cabinet has been followed and as such it violates the very basis of the principles on which the conventions can stand.

In the matter of prorogation of the House, again, the President acts on the advice of the Prime Minister in the exercise of his powers, irrespective of Article 85(2) of the Constitution. The Prime Minister may in turn consult the Cabinet, not the entire Council of Ministers, before the advice is submitted to the President. The prorogation may take place at any time, even while the House is sitting. However, the general practice is that prorogation follows the adjournment of the sitting of the House *sine die*. There is no fixed time limit for the prorogation of the House from the date of adjourning sine die. On some occasions, the Lok Sabha was prorogued on the same day that it was adjourned *sine die*. The second and third sessions of the Second Lok Sabha, the Fifth, Seventh and the Eleventh Sessions of the Third Lok Sabha and the Second Session of the Seventh Lok Sabha were prorogued on the same day that they were adjourned *sine die*. However, the general practice followed in the time lag between the adjournment of the Lok Sabha *sine die* and its prorogation is 2-4 days or even more on a few occasions. This healthy convention has contributed to the positive and effective relations between the Parliament and the President so far.

However, during May 1994, the House of the People was adjourned to meet again on a particular date but failed to meet as scheduled. In fact, the Lok Sabha without meeting on the stipulated date was prorogued by the President. Both the Houses were not adjourned *sine die* to enable the President to exercise his constitutional powers to prorogue them. Never in the past have the two Houses been adjourned to meet again on a particular date and failed to meet as scheduled.[30] This lapse on the part of both the Presiding Officers as well as the President was raised by the opposition party which said that proroguing of Parliament was against the established conventions of parliamentary democracy.[31] Thus, the long-standing convention with regard to the procedure adopted by both the Parliament and the President had been violated. As there is no apparent serious consequence to it, such a violation of an established healthy convention has not been critically looked into. Only when such sessions were not convened, the Supreme Court in State of Punjab v. Satya Pal Dang [32] held that the Executive has the power to convene the sessions as against the orders of the Speaker.

[30] *Indian Express* (24 May 1994).
[31] *Deccan Herald* (25 May 1994).
[32] *State of Punjab v Sat Pal Dang* AIR 1969 SC 903.

According to Justice P.B. Mukharji, 'convention demands that the different organs of the government, the Executive, Legislative and Judicial, should mutually respect and regard the arena and functions of each. The actual words of the Constitution can teach prohibition and separation in this respect but it is convention alone that can teach co-operation between them. That the convention of co-operation between the different organs of the government is sorely needed in India today to give life and vitality to her Constitution and to make it creatively dynamic and purposeful, and make the administration truly responsible'.[33]

Article 111 of the Constitution speaks about the power given to the President to assent to Bills, or withhold his assent, or return the Bill to the House for reconsideration, if it is not a Money Bill, along with his recommendations. The scope of this power has also been restricted by conventions established in the exercise of this power. This provision is read with Article 74 and the President is made subject to the advice of the Council of Ministers or the Cabinet in the exercise of his power under Article 111. Except in three cases, the President has always been giving his assent to the Bills. Even among these three, in one case the President withheld his assent because his assenting would have rendered the Bill meaningless. Thus, the assent to the Patiala and East Punjab States Union Appropriation Bill, 1954, which was passed by

[33] P B Mukharji, *The Critical Problems of the Indian Constitution* (Bombay University 1968) 166.

both the Houses of Parliament, was withheld by the President, as by the time the Bill was presented to the President, he had revoked the Proclamation under which he had assumed functions of the Patiala and East Punjab States Union. This information in regard to the withholding of assent by President was conveyed to the House by the Speaker.[34]

The Constitution does not specify the time limit during which the President can keep the Bill pending with him. The Indian Post Office (Amendment) Bill, 1986, was presented on December 19,1986 to the President for assent, but till now he has neither given his assent nor sent it back for reconsideration by the Rajya Sabha.[35] President R. Venkataraman withheld his assent to the Salary, Allowances and Pension of Members of Parliament (Second Amendment) Bill, 1991, as the procedures laid down in Article 117 was not followed in that case.[36] There is stronger reason for the President to withhold assent to a Bill if any of its provisions be repugnant to any of the provisions in Part III especially, and indeed, if Articles 13(2) be read with the oath of the President/Governor, there is scope for preview of constitutionality by the President/Governor as the case may be.

Dr. Ambedkar had observed that ‘every Constitution, in so far as it relates to what we call parliamentary democracy, requires three

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[34] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 26.
[35] ibid 531.
[36] *Indian Express* (23 March 1991).

different organs of the state, the Executive, the Judiciary and the Legislature. I have not anywhere found in any Constitution a proposition saying that the Executive shall obey the Legislature, nor have I found anywhere in any Constitution a provision that the Executive shall obey the Judiciary. Nowhere is such a provision to be found. That is because it is generally understood that the provisions of the Constitution are binding upon the different organs of the state. Consequently, it is to be presumed that those who work the Constitution, those who compose the Legislature and those who compose the Executive and the judiciary know their functions, their limitations and their duties. It is therefore, to be expected that if the executive is honest in working the Constitution, then the Executive is bound to obey the Legislature without any kind of compulsory obligation being laid down in the Constitution ... Similarly, if the Executive is honest in working the Constitution, it must act in accordance with the judicial decisions given by the Supreme Court. Therefore, my submission is that this is a matter of one organ of the state acting within its own limitations and obeying the supremacy of the other organs of the State. In so far as the Constitution gives a supremacy to that is a matter of constitutional obligation which is implicit in the Constitution itself'.[37] Dr. Ambedkar also said that 'we are just commencing a big experiment in democracy'.[38] Instead of working the Constitution as expected by the framers of the

[37] Constituent Assembly Debates, vol X, 269.
[38] ibid 271.

Constitution, there has always been a tendency to strengthen the position of the Prime Minister, not only at the cost of the other two branches of the government, but also against democracy itself.

Dr. K. M. Munshi also in his book observed that the President under the Indian Constitution is ‘an independent organ of the State representing the whole Union and exercising independent powers and treated the Constitution as a composite one in which the parliamentary form of executive and a President with power and authority are combined’. According to him, this is provided to prevent a parliamentary government from becoming parliamentary anarchy and he has regarded the importation of English conventions as 'tantamount to an amendment of the Constitution. The election of the President, his oath of Office, his specific powers and his obligation to prevent Cabinet dictatorship, have been marshalled by this respected statesman in support of his view. He has climaxed his reasoning by taking the view that 'aid and advice' in Article 74, do not imply that the advice must be accepted in all cases. Shri K. Santhanam, another elder statesman, also shared this view. Even Dr. Rajendra Prasad is reported to have had second thoughts on the denudation of presidential powers.[39]

It is submitted that the presence of specific constitutional provisions, a few conventions have evolved in India during the first four decades and followed thereafter. The diminished single party rule at the centre,

[39] K M Munshi, *The President under the Indian Constitution* (Bharatiya Vidhya Bhavan 1963) 44–45.

emergence of multi-party system, political and emergency situations have all contributed to these developments. Judicial decisions seem to be certifying these practices or conventions based on British conventions, and at times even against the written provisions of the Constitution of India.

IV. CONVENTIONS RELATING TO THE TWO HOUSES OF PARLIAMENT

Some of the important sources for parliamentary procedure in India include the Constitution, Rules passed by both the Houses of Parliament, Regulations, recommendations of Business Advisory Committee, resolutions of the Houses, Directions issued by the Speaker/Chairperson/Presiding Officers, relevant laws made by the Parliament, and the conventions, practices and usages followed by both the Houses independently as well as in relation with each other.

The Constitution specifies the procedure to be followed by the Parliament in passing the money Bills and other Bills, the requirements for a joint sitting of both the House of Parliament. The details of the majority of the procedures of the Houses are laid down in the Rules of Procedure and Conduct of Business by the Lok Sabha and the Council of States, the Rules relating to Schedule X as made by the Houses, and the Houses of Parliament (Joint Sittings and communications) Rules 1952, made by the President. Some of the 'Regulations for Holding of

Elections to Committees by Means of Single Transferable Vote', and Business Advisory Committee (BAC) recommendations of a procedure for 'Regulating discussion in the House on cut-motions, Publication of Minutes of Dissent to the Reports of the Select Committees, and disposal of amendments also play and important role. Some of the laws enacted by the Parliament, like Parliamentary Proceedings (Protection of Publication) Act, 1956 and Salary, Allowances and Pension of Members of Parliament Act, 1954 etc., along with the Conventions/Practices/Usages etc., become the sources of Parliamentary Practices in India.

The main objectives secured by these conventions are: (1) Polite behaviour and good manners towards each other and especially to the opponents; (2) Orderly and dignified conduct of proceedings in the House; (3) Keeping the dignity and authority of the House; and (4) acting fairly and with a sense of justice.[40] S. L. Shakdher with reference to the role of constitutional conventions in India observed that, 'the practice and procedure of the Indian Parliament have thus been evolving all the time as much as a result of the compulsions of the developing situations as through conscious, continuous search for more adequate methods of work for the better fulfilment of its growing tasks'.[41] Justice Evatt has given a word of caution by observing that 'it would be better to rely on strict law in the new countries, since a

[40] S H Belavadi, *Theory and Practice of Parliamentary Procedure in India* (N M Tripathi 1988) 192.
[41] S L Shakdher, *Glimpses in the Working of Parliament* (Metropolitan 1977) 30.

preponderance of non-constitutional factors in determining the course of events is apt to be so heavy that the terms in favour of a convention are necessarily weak'.[42] The Presiding Officers are vested with all powers relating to the procedures, the necessary powers to enforce these conventions and canons of Parliamentary conduct have also been vested with the Presiding Officers, and the convention secures a predicable uniformity and certainty about the exercise of these vast powers.

In order that the Address delivered by the President forms part of, and is incorporated in, the proceedings of the Houses, a separate sitting of the House is held half an hour after the conclusion of the President's Address when a copy each of the Hindi and English versions of the Address duly authenticated by the President is laid on the Table by the Secretary-General. This practice was adopted for the first time in 1952 when the President addressed both the Houses of Parliament on May 16, 1952 after the first General Election under the constitution, and is being followed even today. In the absence of 'specific rules, a number of conventions have evolved. As a convention, no member leaves the Central Hall while the President is addressing. The members are requested to take their seats five minutes before the President arrives in the Central Hall, and to remain in their seats till the President leaves

[42] Rajagopala Iyengar, *Indian Parliament: A Critical Study* (University of Mysore 1972) 14.

the Hall after the conclusion of the Address.[43] Whenever this practice is violated by the members, they are reprimanded by the Speaker after the Member is given an opportunity to explain. On February 18, 1963, three members walked out when the President was delivering his Address to both the Houses of Parliament. On February 19, 1963. the speaker appointed a 15 Member Committee to investigate the conduct of these three members, which submitted its report on march 12, 1963, recommended that the three members be reprimanded for their undesirable, undignified and unbecoming conduct during the President's Address. On March 19, 1963, the House adopted the recommendation and the Speaker reprimanded the three members.[44] Similarly, the House, sitting as a Committee adopted a motion on February 28, 1968 disapproving the conduct of two members reprimanding them for their undesirable, undignified and unbecoming behaviour.[45] The speaker can appoint a Committee to go into such matters and the concerned member can be reprimanded by the Speaker based on the reports submitted by such Committees.[46] There is a general practice in the Lok Sabha to adjourn the House after the President addresses both the Houses of Parliament in the Central Hall.

[43] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 183–86.
[44] S L Shakdher, *Third Lok Sabha, 1962–1967: A Souvenir* (Lok Sabha Secretariat 1967) 38.
[45] Lok Sabha Debates, 28 February 1968, cols 467–487.
[46] Lok Sabha Debates, 2 April 1971, cols 188–223.

A convention has developed that before the business commences, the Speaker *pro tem* calls upon the members to stand in silence for two minutes to mark the solemnity of the occasion. A few days before the first sitting, the Prime Minister is informed about the practice regarding observance of silence. The Speaker *pro tem*, while calling upon the members to stand in silence, makes the following observation:

'We meet today on a solemn occasion. A new House has been constituted under the Constitution, charged with great and heavy responsibilities for the welfare of the country and our people. It is fit and proper that we all stand in silence for two minutes before we begin our proceedings'.[47]

This practice is a healthy one which reminds the members of their obligations towards the nation and the people at the very beginning of the session. For the Members who are entering the House for the first time, this also reminds them of the solemnity of the occasion, which by and large can serve to condition the behaviour of the members with sincerity and dedication in the proceedings of the House later.

With regard to the joint sitting of both the Houses of Parliament, the President in consultation with the Presiding Officers has framed certain rules based on Article 118 (3) of the Constitution. These rules do not provide all the procedures to be followed at a joint sitting of both the

[47] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 325.

Houses. Hence, reliance has be placed on some Parliamentary conventions. For example, at a joint sitting, no amendment can be proposed to the Bill other than such amendments if any, as become necessary by the delay in the passage of the Bill Only such amendments and such other amendments as relate to matters with respect to which the Houses have not agreed shall be proposed to the Bill. The decision of the person Presiding as to the admissibility of the amendments is final.[48] Although such Joint sittings have been convened only twice so far, there is much scope for the development of healthy conventions in this regard.

The 'Calling Attention Notice' is basically an Indian innovation which enables a member to draw the attention of the government to any matter of urgent public importance. The 'Short Duration Discussions' is another such practice evolved by the Indian Parliament. According to Shakdher, S. L., both these devices have helped to a considerable degree the smooth running of Parliamentary business.[49] The Procedures followed by the Committees of both the Houses of Parliament also reflect new procedures which are not found in Britain. Commenting on these developments Shri. N. Sanjiva Reddy at the emergent conference of Presiding Officers held at New Delhi on August 23, 1975, observed that ‘the Parliamentary institution like all

[48] S H Belavadi, *Theory and Practice of Parliamentary Procedure in India* (N M Tripathi 1988) 197.
[49] S L Shakdher, *Working of Indian Parliament: A Review* (Lok Sabha Secretariat 1974) 4.

human institutions, is ever in the making. While the values it symbolizes and its foundational principles may be of continuing validity, its working methods and procedures have certainly to be adapted appositely with the changing times and the immediate needs of the hour. Anyone who is a familiar with the procedures in our legislatures knows how far we have travelled from the Westminster and even our own procedures of the pre-independence days. And it is a tribute to the adaptability and innovative capacity of our legislatures that they have always measured themselves up to the needs of the situation'.[50]

When the budgets are being discussed on the floor, the Members can move motions called 'cut motions.' When the Speaker accepts it, the Members who had initiated the cut motions are permitted to speak on the motions. Such speeches on a cut motion must relate to the specific matter referred to in the cut motion and no general discussion is permissible. It is a well-established practice that cut motions cannot be moved to discuss the action of the Speaker in any matter. Likewise, cut motions relating to the Vice-President, who is also the *ex officio* Chairman of Rajya Sabha, are not admissible. Cut motions are not admissible if they are to ventilate personal grievances, or if they cast aspersions on individual government officials. Cut motions cannot be moved if there is no time for proper discussion and voting, nor can they

[50] ibid 31.

be moved by proxy. The mover of the cut motion has no right of reply to the debate on his cut motion.[51]

One among the first functions of the House after the Members are sworn in is to elect the Speaker and the Deputy Speaker. Here also, by and large, a convention has developed that the Speaker is from the majority party and the Deputy Speaker is from the opposition party.[52] Occasionally this practice has also been violated, but the spirit behind this convention is laudable and can be continued as a valid practice irrespective of the violations.

Another convention has developed in India that at least one minister of the cabinet rank should remain present in the House at all times.[53] It is also a parliamentary convention that the Minister in charge of the subject must remain in the House when the debate on that subject takes place.[54] In the Rajya Sabha, the then Deputy Chairman, Dr. Najma Heptullah pointed out that it was a convention in the House (Rajya Sabha) that any Minister could move the motion or lay papers on behalf of his colleagues.[55] Another convention, based on healthy parliamentary tradition, is that the criticism in Parliament of a government department and its working must be answered by the

[51] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 641–43.
[52] *Deccan Herald* (16 July 1991).
[53] S H Belavadi, *Theory and Practice of Parliamentary Procedure in India* (N M Tripathi 1988) 195–96.
[54] bid 176.
[55] Times of India, dated August 22, 1990.

Minister responsible for the department. The Minister must assume by convention, the responsibility and must not pass it on to the departmental officer who cannot answer the criticism either in public or from the floor of the House. No Minister would be allowed to shield himself by blaming his official.[56]

As a matter of convention, the Leader of the House is generally consulted when a motion for suspension of a Member from the service of the House is moved or a question involving a breach of privilege either of a Member or of the House or of a Committee is raised in the House.[57]

One among the significant conventions developed by the Indian Parliament and being followed is the procedure relating to 'Zero Hour'. In the words of Prof. N.S. Ranga, a former Member of the Parliament, "the Zero Hour' has come to assume parliamentary status since 1962, as such, because so many questions of great public urgency have begun to crop up, which could not be raised in accordance with the earlier parliamentary practices because the opposition parties have somehow broken their earlier patience with the set of parliamentary agenda paper, thanks to Dr. Ram Manohar Lohia's open pressures against the agenda-bound 'Order, Order', decorum etc., emanating from the Chair... The 'Zero Hour' has come to be a permanent but

[56] P B Mukharji, *The Critical Problems of the Indian Constitution* (Bombay University 1968) 164.
[57] MN Kaul and SL Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 127–30.

unacknowledged feature of our parliamentary agenda”.[58] This particular convention has brought in some amount of transparency in the working of the government.

Whenever, any leaflet or printed material is to be distributed to the Members of a House, prior permission from the Chair is always obtained. This practice of seeking prior permission from the Chair for distribution of any printed matter or leaflet within the House is followed in both the Houses of Parliament. On one occasion, when a distribution of a leaflet within the Rajya Sabha took place, the Deputy Chairman pointed to the existence of the well-established convention in the Rajya Sabha that nothing should be distributed in the House without the prior permission of the Chair. The Deputy Chairman also observed that 'I do hope every honourable Member will follow this well-established convention and whoever has done it will realise that he must never do it again. This statement brings the convention almost on par with a rule and as such, the Member concerned can also be reprimanded by the Chair, if such information is available to the Chair.[59]

In the composition and working of the Public Accounts Committee, many such healthy conventions have been established and followed from the beginning. For example, since 1954-55, seven Members of

[58] SL Shakdher (ed), *Constitution and the Parliament in India* (National Publishing House 1976) 271.
[59] 579 Parl Deb HC (13 September 1963) col 4045.

Rajya Sabha have been associated with the Public Accounts Committee, which is a healthy convention based on Rule 309 (1) of the Lok Sabha Rules.80 Rule 309 (1) itself does not speak about this practice but it has been evolved, established and followed in the parliamentary procedure. With regard to the appointment of the Chairman of this Public Accounts Committee, another healthy convention has been established and followed. The Chairman of the Public Accounts Committee is to be from the non-ruling party and generally from the opposition party. The proposal to appoint the Chairman of the Committee from the non-ruling party was proposed by Shri. V. K. Dange and was approved by the then Prime Minister Nehru.[60] The other important conventions and procedures in the working of the Public Accounts Committee have been highlighted by the former Speaker, Sardar Hukum Singh, as follows:

'I should like to refer here briefly to some of the important conventions which have grown up since the independence, in the functioning of the Public Accounts Committee:

i. The Committee functions as a single team, irrespective of party affiliations of its members;
ii. The Committee's Reports have always been unanimous;

[60] 579 Parl Deb Rajya Sabha (2 September 1958) col 1724.

iii. The Committee's Reports are not discussed in the House. The government departments are required to intimate to the Committee what action has been taken on its recommendations;

iv. All the information and documents required by the Committee, pertaining to the subject matter under discussion are made available by government departments; and

v. When the Committee comes across cases requiring a detailed examination, it usually appoints a Sub-Committee with specific terms of reference. The Sub-Committee, in the first instance submits its findings to the main Committee. This procedure serves the dual object of saving the time of the whole Committee and also facilitating a detailed scrutiny'.[61]

The recommendations of the Public Accounts Committee are treated with respect by the government and most of them are accepted and implemented. The Committee also appoints a Sub-Committee to examine the 'action taken' notes received from the Ministries/Departments and draws up separate 'action taken' reports which are subsequently adopted by the main Committee and then presented to the House. Whenever, the government deviated from this procedure, the Speaker has directed that a circular sent to all Ministries about the procedure. The Public Accounts Committee also has expressed the view that in accordance with the well-established parliamentary practice the consideration stage by the House should

[61] *Journal of Parliamentary Information* vol 12, no 1 (April 1966) 9.

arise only after the Committee has made its final recommendation after reconsideration of the government's view.[62] Again, the Speaker has explained the consequences of departing from these well-established practices and rule that any departure from these practices may be regarded as a serious breach of conventions and may even provoke a motion of censure against the government.[63]

These are some of the important practices and usages which can be termed as parliamentary conventions with regard to the procedures followed in the summoning, prorogation, dissolution, sittings, joins sittings, procedures within, and in between, the Houses of Parliament and in the Committees including the Joint Committees. By no stretch of imagination can it indicate exhaustively every parliamentary convention. These practices indicated above are only illustrative of the different parliamentary conventions. These practices or conventions exist irrespective of the Constitution as well as the Rules of Procedure as adopted by both the Houses of Parliament in India. Thus, the different provisions of the Constitution and the Rules of Procedure lay down only to certain guiding principles. Within these broad outlines, there exist a large mass of rulings, precedents and conventions which, to a large extent, supplement the written code of conduct present in the Constitution as well as the Rules of the Houses. As such, the relevance

[62] MN Kaul and SL Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 744.
[63] SL Shakdher, *Third Lok Sabha, 1962–1967: A Souvenir* (Lok Sabha Secretariat 1967) 42.

and importance of these parliamentary conventions are very clearly felt and established even in the working of written Constitutions.

As the Speaker/Chairman is the Presiding Officer, the Houses depend upon the knowledge and wisdom of the Presiding Officers to a large extent in giving effect to well established and healthy conventions. The Presiding Officers can thus be a guiding star to all the usages, practices and conventions for the Members of the House. At the same time, even the House has a positive role to play if the existing conventions are to be followed effectively, or for the establishment of new ones. The knowledge and wisdom of each and every Member in the House are necessary for the very effective utilization of the parliamentary convention because the Presiding Officers have to get the support of the entire House in the implementation of the parliamentary conventions. Unfortunately, the second element is not present in the legislative bodies today, probably because of the defects of democracy including those of party politics, more specifically the emergence of multi-party system. But when both these elements are present, unquestionable respect to the Parliamentary conventions would definitely be the result, and it would enable the legislative bodies which have the task of policy making to carry out their functions smoothly and effectively.

The role of constitutional conventions in smoothening the working of Parliamentary institutions is universally acknowledged. D.C. Jain is of the opinion that to (no) parliamentary conduct should be developed on convention and public opinion, such conventions should be deliberately established in India and followed with determination.[64] It is submitted here that certain practices and conventions have been violated time and again for no proper or valid reasons and no effort seems to have been taken by the Presiding Officers from time to time to order the House on the basis of established conventions irrespective of the fact that there is no legal sanction for violation of the same these established conventions need to be followed with conviction as they only encourage a healthy and fruitful use of parliamentary time. As the basis for the establishment of a convention is 'reason' if that particular convention is followed with conviction, then such a convention can well be equated with a written rule or regulation.

V. CONVENTIONS RELATING TO THE PRESIDING OFFICERS AND PRIVILEGES OF THE HOUSES

The term Presiding Officer is used to include the Speaker and the Deputy Speaker of Lok Sabha, the Chairman and Deputy Chairman of Rajya Sabha and any other Member of the House for the time being Presiding over the House and discharging the functions of the Speaker or the Chairman as the case may be. There is a whole lot of practices/conventions existing with reference to the selection or the

[64] DC Jain, *Parliamentary Privileges under the Indian Constitution* (Sterling Publishers Pvt Ltd 1975) 221.

removal of the Presiding Officers. The British convention that once a Speaker is always a speaker is totally inapplicable to the speaker of the Lok Sabha, a fact which amply goes to prove that the parliamentary conventions of one country need not be followed in other countries also. The political climate in India is not suitable for incorporation of the British practice *ipso facto***.** The lack of proper understanding among the different political parties with respect to the office of the Speaker, and the partisan attitude of the Presiding Officers at times, thus making the British convention largely unsuitable to the Indian Context.

With regard to the election of the Deputy Speaker, a new convention was established by the National Front Government in 1989 in having the Deputy Speaker from the single largest opposition party. This practice was also followed by the Congress (I) party when its spokesman Mr. C. P. Thakur made it clear that it would follow the precedent set by the National Front Government.[65] Based on this practice, Shri. Mallikarjuniah of the Bharatiya Janata Party, which was the single largest opposition party was elected as the Deputy Speaker. The convention that the Deputy Speaker[66] should occupy the first seat to the left of the Speaker was established in 1927, and is being followed even now.[67]

[65] *Deccan Herald* (16 July 1991).
[66] R Venkataraman, *My Presidential Years* (Indus 1994) 562.
[67] MN Kaul and SL Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 329.

One important development has taken place in the establishment of a convention, which has been time and again not only followed, but the practice has been reiterated by different Speakers. This convention is followed even in the absence of any specific rule prohibiting the adjournment motion on the day of the President's Address. On February 17, 1965, Smt. Renu Chakravarty, a Member of the Lok Sabha inquired about the notice of adjournment motion tabled by her immediately after the President's Address. The Speaker then refereed to the decision taken by the House in 1962 and ruled that the adjournment motion would be taken up the next day. While Shri. H. V. Kamath, and another Member pointed out that there was nothing in the Rules of the Lok Sabha prohibiting discussion on adjournment motions on the day of the President's Address, the Speaker observed that he himself had not relied upon any particular Rule but had referred only to the convention that had been established by the House.[68] He expressed his desire that the House would continue to respect and observe that convention.

Another important convention has been established in the discharge of his functions by the Speaker. Whenever a matter is taken up for discussion by the House in which the Speaker has direct or indirect interest, the Speaker would not preside over the House till such matter is discussed and a decision has been taken by the House. For example, on November 19, 1959, before the Andhra Pradesh and Madras

[68] SL Shakdher, *Prime Minister as a Member of Lower House: Position in Various Countries* (1966) 12(1) Journal of Parliamentary Information 50, 50–51.

(Alteration of Boundaries) Bill, 1959, was taken up for consideration, the Speaker, Ayyangar, observed. 'Before we take up the next item of business, I would like to make a brief statement. This boundary matter relates to my constituency and, therefore, I do not propose sitting here. However, just I may try to be, I do not want to create an impression that I am deciding one way or the other. I shall, therefore, ask the Deputy Speaker Sardar Hukum Singh, to take the Chair and get through this Bill'. The Speaker then vacated the Chair and did not preside over the sittings of the House while that Bill was under discussion by the House.[69] This practice is being followed by successive Presiding Officers, which goes to prove the strength of such practices in the working of the House.

The decisions taken by the Presiding Officers, both in the House of the People and the Council of States, from time to time, have a positive role to play in the development of healthy practices, and might even result in specific Rules of the Houses. The rulings of the Speaker or the Chairman as the case may be, constitute precedents by which the subsequent Presiding Officers, Members and other officers are guided. Such precedents are collected, and in course of time, formulated as Rules of Procedure or followed as conventions. Generally, the rulings of the Presiding Officer cannot be questioned except on a substantive

[69] MN Kaul and SL Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 329.

motion. Moreover, a Member who protests against the ruling of the Speaker or the Chairman commits contempt of the House as well as the contempt of the Presiding Officer. Such decisions of the Speaker are equally binding whether given in the House or on a departmental file and he is not bound to give reasons for his decisions. Again, when the Speaker's or the Chairman's power in this regard is questioned, the well-established convention of the House is referred to in this regard. A proposal to have a specific Rule to the effect that the Speaker shall not be bound to give reasons for his decision on a notice or any matter was discussed by the Rules Committee on April 26, 1966, and the Committee felt that such a Rule was not necessary as the Speaker had the inherent power not go give reasons for his decisions on notices or other matters. This was a well-established practice of the House which was understood by everybody and the Committee felt that there was no need to make a Rule in the matter. The Members cannot criticize directly or indirectly, inside or outside the House, any ruling given, opinion expressed or statement made by the Speaker.[70]

VI. JUDICIAL RESPONSE TO CONSTITUTIONAL CONVENTIONS

After the commencement of the Indian Constitution, it has been the expectation of the framers of the Constitution that India would be

[70] ibid 110 – 111.

developing healthy constitutional conventions in the light of the developments in the Indian context. However, such an expectation, by and large, has remained a dream and no constructive efforts have been taken to establish healthy conventions. In fact, constitutional conventions, practices and usages were permitted to be developed in India even against the cardinal principle thus resulting in the establishment of constitutional convention even against the written provisions of the Constitution as well as the laws made thereunder. Even the judiciary supported such a development through narrow interpretations of different provisions of the Constitution. Passing references were made by the courts in India to British Parliamentary practices and imported them to read the different provisions of the Constitution the British way. As such when the Constitution itself is Supreme, no one can, by any means of interpretation, make any one of the branches of government powerful or weak. Attempts in the recent past were made by the Courts to interpret specific provisions by imaginary British conventions without elaborating on the justification for the same.

In U. N. R. Rao v. Indira Gandhi[71], a constitution bench of the Supreme Court held that 'it was said that we must interpret Art. 75(3) according to its own terms regardless of the conventions that prevail in the United Kingdom. If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it

[71] AIR 1971 SC 1002.

must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with, a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed… Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State'.

The Supreme Court went on to observe that "in India, as in, England, the executive has to act subject to the control of the legislature; but in what way is this control exercisable by the legislature? Under article 53(1) of our Constitution, the executive power of the Union is vested in the President but under article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States-, the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part.' The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them… and is in accordance with conventions followed not only in the United Kingdom but in other countries following a similar system of responsible Government".

It is submitted that the Supreme Court interpreted the written provisions of the Constitution of India in the light of the conventions prevailing in the United Kingdom and other Commonwealth countries. However, the court has not referred to the observations of the Privy Council on the importance of written provisions of the Constitution over and above the conventions or practices in England. Two specific decisions of the Privy Council are referred to in this context.

The first one is the Privy Council decision in Attorney General for Ontario v. Attorney General of Canada, decided on 16th May 1912.[72] In this case, the judgment was delivered by Lord Chancellor Loreburn for self and on behalf of Lord Macnaugtan, Lord Atkinson, Lord Shaw and Lord Robson. Dismissing the appeal from the Canadian Supreme Court, the Privy Council held that 'In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids (emphasis added). When the text is ambiguous, for example, when the words establishing two mutually exclusive jurisdictions one wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the state itself or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the British North America Act. It certainly would not be sufficient to say that the exercise of power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and obviously,

[72] *Privy Council Appeal from the Supreme Court of Canada* [1912] AC 571.

bestowed by British North America Act. Indeed, it might ensue from the breach of almost any power.'[73]

It is equally significant to mention the second judgment of the Privy Council in Alhaji D. S. Adegbenro v. Chief S. L. Akintola[74] to propose the manner in which the provisions of the Constitution need to be interpreted. This judgment was delivered by Vicount Radcliffe for himself and on behalf of Lord Jenkins, Lord Guest, Lord Devlin and Sir Kenneth Gresson on 27th May, 1963. This case came before the Privy Council on appeal from the Federal Supreme Court of Nigeria. The Privy Council observed by referring to the words of the Constitution of the Federation of Nigeria, that '… by these words, therefore, the power of removal is at once recognized and conditioned; and since the condition of constitutional action has been reduced to the formula of these words for the purpose of written Constitution, it is their construction and nothing else that must determine the issue'. Responding to another argument that the Nigerian Constitutions are modelled on the current constitutional doctrines of the United Kingdom, the Privy Council held that '… In this state of affairs it is vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed, where the dismissal is an actual possibility: and the right of removal which is explicitly recognized in the Nigerian Constitution

[73] ibid 583.
[74] *Privy Council Appeal* No 5 of 1963.

must be interpreted accordingly to the wording of its own limitations and not to limitations which that wording does not import'. (emphasis added)

The Privy Council also referred to the observations of Lord Bryce who once said that 'the British Constitution works by a body of understandings which no writer can formulate'; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. This instrument now stands on its own right; and, while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the constitutions of Australia or the United States where federal issues are involved, it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording and never be overridden by the extraneous principles of other constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution' (emphasis added). Apart from this, it is also observed that the concept of separation of powers and checks and balances, considered by the Supreme Court as basic structure of the Indian Constitution take a big hit.

However, a detailed analysis of the constitutional conventions and practices was taken up by the Supreme Court only recently. The Court in Supreme Court Advocates on Record Association v. Union of India[75] made an earnest attempt to explain the nature and scope of constitutional conventions under the Indian Constitution. Some of the interpretations regarding constitutional conventions as looked into by the Court needs to be explained here briefly.

In the first place, the Court tried to explain the meaning, nature and scope of constitutional conventions by saying that the practices turn into conventions and create rules of binding conduct because they are not inconsistent with the provisions of the Constitution but are implicit in its provisions. The Court went on to say that the conventions have no place where the provisions are clear and explicit. However, in other areas, it is only those which have been established over a period of years that are recognised as conventions e.g., some parliamentary convention as well as the convention regarding the choosing of the Prime Minister which can be said to be well established. It would not be proper to elevate all practices into the status of convention. From this, it is possible to have the inference that only the practice coupled with good reason can result in the establishment of conventions. Again, as the conventions develop, they become valid and meaningful although they cannot be strictly enforced in a court of law. Thus, the relevance of conventions even in relation to a written Constitution has been formally accepted by the Court. The Court further held that conventions are found in all established Constitutions and have soon

[75] JT 1993 (5) SC 479; AIR 1994 SC 268.

developed even in the newest. In another context the Court said that there are two sets of principles that make the rules of constitutional law; one set of rules is contained in the written Constitution of a country and the other set is referred to as ‘conventions of the Constitution’. Conventions are a means of bringing about constitutional development without formal changes in the law.

Again, after referring to the writers like Ivor Jennings, Mill, Dicey and Anson, the Court observed that the short explanation of constitutional conventions is that they provide the flesh which clothes the dry bones of the Law; they make the legal Constitution work; they keep in touch with the growth of ideas. A Constitution does not work itself; it has to be worked by men. It is an instrument of national cooperation, and the spirit of co-operation is as necessary as the instrument. The constitutional conventions are the rules elaborated for effecting that cooperation. Also, the effects of a Constitution must change with the changing circumstances of national life. New needs demand a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs. Constitutional conventions are the rules which they elaborate. The Court also hastened to add that the written Constitution cannot provide for every eventuality. Constitutional institutions are often created by the provisions which are generally worded. Such provisions are interpreted with the help of conventions which grow with the passage of time. Conventions are vital in so far as they fill-up the gaps in the

Constitution itself, help solve problems of interpretation, and allow for the future development of the constitutional framework. Whatever the nature of the Constitution, a great deal may be left unsaid in legal rules allowing enormous discretion to the constitutional functionaries. Conventions regulate the' exercise of that discretion, a power which, juridically, if conferred upon a person or body of persons may be guided, or canalised by the operation of the conventional rule. Thus, one among the important functions of constitutional conventions is to regulate the exercise of discretion, presumably to guard against the irresponsible abuse of powers. However, there was no process by which constitutional conventions can get crystalized into law.

The Supreme Court of India, relying on the judicial interpretations of their counterparts in England, Canada and Australia, came to the concluded that the courts have recognised the existence of conventions and have relied upon them as an aid to statutory interpretation. The Court also agreed that a convention, while it is a convention, is to be distinguished from the law. But this does not mean that what was formerly a convention cannot later become law. When customary rules are recognised and enforced by courts as law, there is no reason why a convention cannot get crystallised into a law and become enforceable. For the first time the court observed that once it is established in the court of law that a particular convention exists and the constitutional functionaries are following the same as a binding precedent then there is no justification to deny such a convention the status of law. In this regard, the Supreme Court went on to observe that there is no distinction between the ‘constitutional Law’ and an established ‘constitutional convention’.

Two specific paragraphs of this judgment need to be mentioned here.

“351. It is not necessary for us to delve into this subject any more. We agree that a convention while it is a convention is to be distinguished from the law. But this does not mean that what was formerly a convention cannot later become law. When customary rules are recognised and enforced by courts as law, there is no reason why a convention cannot be crystallized into a law and become enforceable. ‘Conventions can become law also by judicial recognition’ stated K.C. Wheare in Modern Constitution (1966 Edn.). It is no doubt correct that the existence of a particular convention is to be established by evidence on the basis of historical events and expert factual submissions. But once it is established in the court of law that a particular convention exists and the constitutional functionaries are following the same as a binding precedent then there is no justification to deny such a convention the status of law.

353. We are of the view that there is no distinction between the ‘constitutional law’ and an established ‘constitutional convention’ and both are binding in the field of their operation. <u>Once it is established to the satisfaction of the Court that a particular convention exists and is</u>

operating then the convention becomes a part of the 'constitutional law' of the land and can be enforced in the like manner" (emphasis added).

Thus, a detailed analysis of the role played by the constitutional conventions even in the lengthiest written Constitution of India and equating them with the law and conferring the status of law is an important development in the sphere of constitutional law of India. Treating the constitutional conventions as a part of constitutional law that can be enforced in the like manner, is in fact, an important milestone in realizing constitutionalism in India.

VII. CONCLUSION

Among the three branches of the government in India, the legislature seems to have respected many conventions it developed over a period of time. Although there have also been violations of established conventions, still it remains as the only branch of the government that respects the constitutional conventions in comparison with the other two branches. As far as the Executive branch is concerned, it is submitted that many conventions have been followed based on the British conventions, thereby obliterating the executive branch totally from the constitutional developments in India. This has also been supported ably by the Supreme Court through its interpretative decisions. However, in the recent past the Supreme Court, in a catena of cases, emphasises the doctrine of separation of powers and checks and balances as basic structure or essential features of the Constitution of India.[76] The Supreme Court on one side acknowledges the existence of three branches of government, the Executive, Legislature and Judiciary and on the other combines the legislative branch and the executive branch, the legislative branch ultimately subsumes in itself the executive branch, thus obliterating the independent status and powers of the President and the Governors.

However, in this process, the attempt made by the Supreme Court in Supreme Court Advocates on Record Association v. Union of India[77] in analysing the importance of constitutional conventions needs to be appreciated. Along with this the attempt to treat constitutional conventions as part and parcel of the Constitution and that too on par with the written provisions would go a long way in the process of judicial interpretations in the years to come. If the Constitution is looked at as a complete document and conventions are permitted to take deep root, it would definitely remove the difficulties already caused by looking at different provisions independently.

A three-judge bench of the Supreme Court analysed the facts in detail of the practices in the nomination of members to Legislative Assembly of Puducherry in K. Lakshminarayanan v. Union of India.[78] As the practices adopted were not uniform, the court held that 'we do not find

[76] *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 225; *I. R. Coelho v. State of Tamil Nadu* (2007) 2 SCC 1.
[77] ibid.
[78] *Civil Appeal* Nos 11887 and 11888 of 2018.

any established practice or convention to the fact that names for nominations to members of the Legislative Assembly has to emanate from Chief Minister and can be made by the Central Government only after concurrence by Chief Minister'. The continuity required as one among the important facets in the convention was missing in this case and the court rightly rejected the diverse practices at different points of time.

At times, the Supreme Court, depending upon ground realities, specifically go against the British conventions. Particularly, the English convention that the Prime Minister should be a member of either House of Parliament, preferably the House of Commons was taken up for consideration in S. P. Anand v. H. D. Deve Gowda.[79] A division bench of the Supreme Court rejected the English convention outright stating that 'it is not our constitutional scheme since our Constitution clearly permits a non-member to be appointed a Chief Minister or Prime Minister for a short duration of six months'. The court went on to observe that 'even though the Prime Minister is not a member of either House of Parliament, once he is appointed he becomes answerable to the House and so also his ministers and the principle of collective responsibility governs the democratic process…we are, therefore, of the view that the British convention to which the petitioner has referred is neither in tune with our constitutional scheme nor has it been a recognised practice in out country'. The court also relied upon two of

[79] AIR 1997 SC 272.

its earlier decisions in this regard, a constitution bench decision in Har Sharan Verma v. Tribhuvan Narain Singh,[80] and Har Sharan Verma v. State of U.P.[81] Thus, the written provisions of the Constitution of India have clearly prevailed over the British convention. If this is the case, then, the question arises as to why not the written provisions of the Constitution of India in all cases allowed to prevail over the British conventions? This will enable uniformity in application of written provisions of the Constitution over the conventions, British or Indian.

The Supreme Court could have used its power as well as skills of interpretation based on Article 13 (3) that provides necessary support to 'customs or usages having the force of law' and promote and sustain the meaningful role played by constitutional conventions in India. To conclude, the observations of Justice P. B. Mukharji deserve to be summed up here on conventions. According to him 'convention is the necessary hyphen between form and substance in constitutional law…no Constitution can provide for good and responsible behaviour. It is only convention which can make that possible. But these conventions are the very soul and spirit of law, life and democracy under the Constitution'.[82]

[80] AIR 1971 SC 1331; (1971) 1 SCC 616.
[81] AIR 1985 SC 282; (1985) 2 SCC 48.
[82] PB Mukharji, *The Critical Problems of the Indian Constitution* (Bombay University 1968) 167.

II. WHAT IS LAW: A GRAND QUESTION WITHOUT A GRAND ANSWER

- *GHAYUR ALAM*[*]

Abstract

This essay attempts to identify and highlight some problems that scholars of law have been struggling with in answering the grand question: what is law? The question is neither a professional's question nor a question of law but a question about law.

The question has been described as 'persistent question' by H. L. A. Hart and as 'ancient question' by Ronald Dworkin. Both the learned scholars answer this question in their own ways but the question remains 'persistent' and 'ancient'. Tomes after tomes, articles after articles have been written to answer this question highlighting the relevance and significance of thereof. The idea shared in common by all such writings is the 'content or substance of law' (both procedural and substantive), i.e., what is and what is not part of law. This essay, however, neither attempts to identify 'is part' or 'is not part' of law nor does it seek to highlight the relevance or significance of the question.

Problem is plenty – not scarcity – of answers which are abstract, ambiguous, complex, prolix, obese, opaque, and vague. This essay, therefore, is expected to serve at least two related purposes. One, other scholars may add and modify the menu of problems. Two, ways and means can be

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worked out to solve these problems or at least to minimize them.

Keywords: *Law, Question, Scholar's Question, Professional's Question, Plenty, abstract, complex, prolix, obese, opaque, ambiguous, and vague.*

I. INTRODUCTION

This essay attempts to identify and highlight some problems scholars of law have been struggling with in answering the grand question: what is law (*hereinafter,* 'the grand question'). For purposes of convenience, this essay is divided into three parts. Part – I analyses the nature of grand question. Part – II attempts to identify and highlight some problems scholars in answering the grand question: what is law? Part – III concludes.

Part I: Nature of the Grand Question: What is law?

This grand question is about reality of law. Verb 'is' in the question though by nature seems to be transparent but the plenty of answers to the grand question establishes that the nature of verb is opaque. If the verb in the question is opaque the subject 'law' about which the question is asked also becomes opaque. This twin opacity of has been looked into from a myriad of angles. Broadly, these angles are the angles of meaning, definition, concept, theory, structure, and function.

Meaning of word is not only polysemous but also multilayered. Definitions are generally incomplete. Concepts are contested. Theories are varied. Structure is dynamic. Functions are multiple. All these problems are present in the answer to the grand question.

Grand question has been described as ‘persistent question’ by H. L. A. Hart and as ‘ancient question’ by Ronald Dworkin. Both the learned scholars answer this question in their own ways but the question remains ‘persistent’ and ‘ancient’. Tomes after tomes, articles after articles have been written to answer this question highlighting the relevance and significance of thereof. The idea shared by all such writings is the ‘content or substance of law’ (both procedural and substantive), i.e., ‘what is part of law’ and ‘what is not part of law’. This essay, however, neither attempts to identify ‘is part’ or ‘is not part’ of law nor does it seek to highlight the relevance or significance of the question.

Question is a scholar’s question.[1] A scholar is fundamentally concerned with constructing and deconstructing concepts and theories. Concepts

[1] Scholarship is relentless pursuit of truth and true knowledge with honesty in the dispassionate, objective, and fearless way. Scholar’s enterprise is different from the enterprises of student, professional, expert, and vocationist. A student is one who studies. In other words, one who does not study is not a student. Study, however, does not mean mere reading of text as is generally understood. Reading and re-reading of a text coupled with thinking with enthusiasm, intense dedication, relentless perseverance, and fervent zeal are some of the essentials of study. Studentship, therefore, is the beginning of scholarship. Scholarship is dependent on studentship. Quality of studentship determines the quality of scholarship. A professional, on the other hand, has the ability to efficiently and effectively translate the concepts and theories into practice. A professional is not bothered about the question what is law.

and theories help professionals to answer practical questions. Construction and deconstruction of concepts and theories may be *a priori, a posteriori* or both. Nonetheless scholar's enterprise is different from professional's enterprise though related with each other.

Professional's question may be easily answered in the light of the provisions of article 13 (3) of the Constitution of India (*hereinafter,* 'Constitution') which read as under:

In this article, unless the context otherwise requires, –

(a) "law" includes any Ordinance, order, bye-law, rule, regulations, custom or usage having in the territory of India the force of law;

(b) "law in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

The above definitions of "law" and "law in force" are for purposes of article 13 only. These definitions are neither general nor are they for the purposes of the whole Constitution because chapeau of article 13 (3) limits the scope of these definitions by using the expression 'in this

At best she is concerned with the question: what is/are *the* law(s) for the given fact situation. An expert is a specialist or superspecialist who knows more and more about less and less, or performs a particular task in the best manner. A vocationist is one who has acquired certain skill sets through apprenticeship or training.

article'. Both the definitions in clauses (a) and (b) are inclusive and not exhaustive as they employ the connector 'includes'. None of these clauses employ the term 'Act' or 'Code' but they are implicit in these definitions. Absence of explicit mention of these terms cannot be described as *casus omissus.* Therefore, there are three constituents of 'law' and 'law in force' namely: (i) form of law, (ii) in the territory of India, and (iii) having the force of law or not previously repealed. Clause (a) of article 13 (3) recognizes 7[2] forms of law. Clause (b) of article 13 (3) recognizes only one form of law, i.e., law passed or made before the commencement of this Constitution, i.e., Act or Code – which raises the number of forms from 7 to 9. Had the words 'or after' after the word 'before' what is implicit would have been explicit. These definitions do not recognize 'amendment' as a form of law but the inclusive nature thereof does include 'amendment' increasing the number of forms to 10. It must be noted that clause (4) of article 13 excludes 'amendment' to the Constitution from the purview of article 13 but amendment in general nonetheless is a form of law. In addition to definitions under article 13 (3) definitions which are applicable to article 13 only, article 366 (10) defines "existing law" for the purposes the whole Constitution as follows:

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[2] (i) Ordinance, (ii) Order, (iii) Bye-law, (iv) Rule, (v) Regulations, (vi) Custom, (vii) Usage. None of the forms by and in itself constitute 'law'. Each of them becomes 'law' if it is having in the territory of India the force of law.

"[E]xisting law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation.

The above given definition in a sense is exhaustive because it employs the connector 'means'. Article 366 (10) recognizes only 6 forms of law and does not include custom and usage. Act, Code, and Amendment seem to be implicit in the above definition for the same reason for which they are implicit in article 13 (3). Clause (b) of article 13 (3) and article 366 (10) relate to law passed or made before the commencement of the Constitution of India. Clause (a) of article 13 – though limited in scope and application – is the only clause in the Constitution of India unlimited in time and hence covers law passed or made both before and after the commencement of the Constitution of India. In addition to the definitions of these expressions in the Constitution, the General Clauses Act, 1897 (10 of 1897) also provides an insight into the meaning of law and related terminologies. Section 3 (29) this Act defines "Indian law" as follows:

"Indian law" shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution, had the force of law in Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United

Kingdom or any Order in Council, rule or other instrument made under such Act.

The General Clauses Act, 1897 explicitly mentions ‘Act’ and also provides definitions of: “Central Act” under s. 3 (7), “enactment” under s. 3 (19), “Provincial Act” under s. 3 (46), “Regulation” under s. 3 (50), “rule” under s. 3 (51).

Both the text of the Constitution and the provisions of the General Clauses Act identify three elements of law, namely: (i) forms of law, (ii) force of law, and (iii) in the territory of India. These three elements together constitute the whole of law.

A professional, therefore, has to see if the above identified three constituents concur together or not. If they do, professional’s question is answered. Law practice whether transactional or litigation are generally ‘within’ and about only these three constituents of law. Rarely the validity of these constituents challenged in a *lis.* Therefore, the grand question is not a professional’s question.

Word ‘law’ – like bulk of the English words – is polysemous. Hence, it signifies several meanings. Not only the word ‘law’ is commonly known but it is also known that this word signifies a thing called law, i.e., something called ‘law’ exists. Knowledge of existence of a thing, however, does not necessarily mean that one who knows the existence thereof also knows the meaning thereof. Knowing the meaning necessarily entails knowing the thing ‘as such’ or knowing it ‘as it is’.

Knowing 'it as such' means knowing it without any bias, without any prejudice, without any favor, without any fear, without any value preference, without any liking or disliking. Object of knowledge must be detached and separate from the subject that seeks to know it. This type of knowledge is often described as 'scientific knowledge' and 'positivist knowledge', i.e., as posited by human beings. Only facts (phenomenon) can be known scientifically. Facts are constant. Law is dynamic and evolving. Law as it exists today can be known scientifically. Can the law of tomorrow or in the morrow be known scientifically? The idea of existence has been beautifully and poignantly captured by Urdu poet Mirza Ghalib's in the following words, "*Duboya mujhko hone ne, na hota main to kya hota"* [My existence made me drown beneath, if I didn't exist then what would have happened?][3]. The last stanza of couplet, "*Hui Muddat ke Ghalib Mar gaya, par yaad aata hai, wo har baat be kehna ki yuon hota to kya hota*" ["Eon's past "Ghalib" had died but still he lingers in memory because he used to ask had it been the case then what would have happened][4] highlights scholar's quandary.

As the grand question is persistent and ancient, therefore, law is both known and unknown. Hence, not completely and fully known. Unknown of law may be known with the help of some known. The grand question goes to the very root of law and seeks to discover the

[3] *Beauty and Tragedy* <https://beautyntragedy.wordpress.com> accessed 10 June 2020.
[4] ibid.

nature of law which is both static and dynamic at once, both certain and flexible simultaneously, and both absolute and relative at the same time. Simultaneous coexistence of conflicting values is part and parcel of genetic material of common law. At common law, rules and exceptions were born together as twins. Therefore, the grand question what is law raises following questions at the least:

1. Is law a fact?
2. Is law an idea?
3. Is a law a concept?
4. Is law an idea derived from sense perception or experience?
5. Is law independent of sense perception or experience?
6. Is law based on certain value judgments?
7. Is law based on morality?
8. Is law separate from but related to morality?
9. Is law based on theism, deism, agnosticisms, atheism, or secularism?
10. Is law an instrument of justice or of injustice or is it both?
11. Is law a cause of justice or of injustice or is it both?

12. Is law a handmaid of power?

13. Is law an instrument of State?

14. Is law a liberating force or an exploitative force or is it both?

15. Is law a shield or a sword or it is both?

16. Is law egalitarian or non-egalitarian or it is both?

17. Is fairness or unfairness a constituent of law?

18. Is rationality or reasonableness the guiding principle of law?

19. Is non-arbitrariness or arbitrariness a constituent of law?

20. Is law a legitimizing instrument?

21. Is law a means or an end or is it both?

22. Is law a form or a substance or is it both?

23. Is a law a rule or rule is a law?

24. Is law ontological, deontological, teleological, utilitarian, majoritarian, authoritarian, or authoritative?

25. Is law a social institution or an institution different from society?

No grand theory is available to provide even the least plausible and convincing answers to the above asked questions. Although Kelsen's

Pure Theory of Law sought to answer the grand question with the help of the idea of *grundnorm* yet it is confined only to the form of law – hierarchy of norms 'ought' syllogistically arranged – irrespective of the content or substance of law. Kelsen's 'is' is 'ought' and every kind of law – good, bad, ugly, or beautiful – may fit Kelsen's model if it is logically derived from "international customary norms ought to be obeyed" or "constitution ought to be obeyed". 'Law and …' movements[5], on the other hand, has been producing explanations from their predefined positions.

The questions therefore are: what is reality? What constitutes reality? How is it constituted? Who constitutes it? How does it matter? Law is a lived reality. A reality both absolute and immutable. We live by law every moment – both consciously and subconsciously. There are laws of nature. There are laws of men and women. There are laws of laws. We can neither escape law nor can we ignore it. This reality, however, is a multilayered one. Genetic material of this reality is a surprising mix of facts and fictions. Facts are real, but how fictions can be real? Fiction

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[5] The ellipsis may fill up with any of the following word(s): Economy, Society, Sociology, Literature, Language, Politics, Political Economy, Culture, Religion, Deconstruction, Postmodernism, Critical Studies, Poverty, Liberty, Justice, Welfare, Science, Reality, Philosophy, Rationality, Technology, Management, History, Anthropology, or the name of any other discipline or idea. 'Law and . . .' movement is an interdisciplinary and transdisciplinary movement in legal scholarship. Chief examples of this movement are 'Law and Economics', 'Economic Analysis and Law', 'Law and Language', 'Law and Literature, 'Law and Philosophy, 'Law and Logic', 'Law and History', 'Law and Political Science', 'Law and Society', 'Sociology of Law', 'Law After Society', 'Law and Phycology', 'Law and Behavioural Sciences, 'Law and Science', 'Law and Technology', and so on so forth.

is a ‘real thing’ in law and are as necessary (sometimes more necessary) as hard facts. This mix of facts and fictions may be misleading at times, if difference between the two is not noticed. For example, the solemn resolve that “WE THE PEOPLE” took and recorded the same in the Preamble to the Constitution is a legal fiction. It is not a fact. Reasonable man is not a real man. It is a creation of legal fiction. A person may not be a human being and a human being may not be person. Person may be a company or a corporation. Can we work without these legal fictions? The answer is an emphatic ‘NO’. Legal fiction is a necessity and is not a luxury in or of law. Legal fiction, therefore, is part and parcel of the genetic material of law.

The way law is enforced or implemented, or the way people orient their behavior towards law, or how legal actors behave towards law are perceptible by senses but none of these factual situations answer the grand question. These situations may either show adherence or otherwise to the idea of law. Idea is a conceived. Conception of an idea may be based on observation and experience or may be independent of observation and experience.

‘Is’ of the grand question is directly connected with politics and is largely State centric – ideally law should be society centric. Politics determines the quality of Constitution. Constitution determines the kind of State. Different Constitutions lay down different models[6] of State. The Constitution of India describes 'India' as Sovereign Secular Socialist Democratic Republic. These are five constitutional features together constitute one India without any punctuation. Constitution of India is supreme human law in India. Human law is separate from and above the human being. Human beings make law for themselves at least in theory. Once the law is found or made by humans, it acquires a separate existence. Maker is not the made. Even those who directly or indirectly make law cannot claim immunity from the law on the ground that they are the makers of the law. The legislators and the judges are as much under the law as are those who do not participate in the law making.

However, State centric approach neglects laws in the primitive society and tribal society. This neglect cannot produce complete answer to the grand question. Further, answer to the grand question varies with the varying ideology of States and society. Furthermore, within the same politico-legal system the reality about and of law is different in the understanding of a poor man, a rich man, police man, an official, an institution, a legislator, a judge, a law teacher, a law student, a woman, an illiterate, a literate, or any other individual. Reality of law varies with the varying privilege or power or immunity different types of

[6] Communist States, Socialist States, Capitalist States, Republic States, Democratic States, Theocratic States, Bureaucratic States, Aristocratic States, Monarchy, a Nation without State, a State without Nation have different and conflicting constituents of law.

people enjoy or do not enjoy within the legal system according to their legal status. Decades ago, I was taking Sociology of Law class and for purposes the class discussion I requested some administrative staff to come to the class for few minutes. They acceded to my request. When they entered the classroom in a state of surprise and bewildered. I requested them to take a seat and asked them in Hindi: What this university is about? They all said, "*Yahan Qanoon ki padhai hoti hai* (Law is being taught here)." When I asked them "*Qanoon kya hai* (what is law? They used the words, "police", "thana," "adalat," "patwari," and "jail". This was understanding of law. Their understanding was closer to professional's understanding but bound to be different from the scholar's understanding.

Scholar's understanding is recorded in jurisprudence literature which records as many answers to the grand question as is the number of Schools of jurisprudence. Within the same school of jurisprudence, there are different flavors. Plenty within and beyond plenty. Origin of scholar's understanding of the grand question at common law may be traced with in work of Sir William Blackstone (1723-80) who was appointed as the First Vinerian Professor of English Law in the later fifties of eighteenth century. English law based on common law was not recognized as a discipline by any university of England or elsewhere in the world. Even in England, civil (Roman) law and cannon law were taught as university subjects. Inns of Courts provided instructions for law practice by way of apprenticeship. Apprenticeship is not scholarship. Apprentices do not ask scholar's questions. First scholar and expositor of common law, Sir William Blackstone wrote Commentaries on the Laws of England. Although before Blackstone others have written about English law, but his Commentaries was that of scholar of law and many historians consider it as the first comprehensive work on English law.

Second English scholar, Sir Jeremy Bentham (1748-1832) described common law as "Demon of Chicane" and "dog law" and advocated the theory of legislation-architecture. He tried to limit and censor common law and supplant it by legislation. He wrote many books on law and legislation and explained difference between censorial (ought) jurisprudence and expository (is) jurisprudence. The latter type was concerned with the grand question.

Third English scholar, John Austin (1790-1859) used scientific method to answer the grand question. When he was appointed as a Professor of Law, the time of scientism (known and knowable by humans) and positivism (posited by humans) had come. These two 'isms' together brought humans at the center of knowledge creation. Before the birth of these two ideas, humans were considered as interpreters of knowledge at best and not creators of new knowldge. These isms together elevated the status of humans from interpreter to creator. Human beings came to be recognized as the author and creator of scientific knowledge – knowledge posited by humans rather than by divinity and/or superstition. Science delivered technology. Technology delivered Industrial Revolution. Industrial Revolution created an alternative to agricultural employment in the form of industrial employment. Working population got an opportunity to choose. Ability to make free economic choices brought about other types of freedom. Industrial employment required knowledgeable and skilled labor force. Knowledge and skill development required educational infrastructure. Scientism and positivism did not only produce new knowledge but also provided bread to hungry. Science became too popular in masses and became the mantra of progress and development. Mantra of science charmed not only the working class but also attracted connoisseurs and intelligentsia. Adam Smith (1723-90) and Auguste Comte (1798-1857) developed arguments to prove that their respective discipline of Economics and Sociology is a science. Austin saw the opportunity and lapped it. He too developed the argument to prove that law is science. Opposition from social scientists against law as discipline was looming large during his tenure. Austin had to establish English law as a discipline and meet the opposition of social scientists who were of the opinion that law lacks intellectual rigor. Hence, does not rise to the dignity of a discipline. Therefore, law is not worthy of being included in the university curricula. Austin did what he could. He asked the grand question: what is law? A grand question wanted a grand answer. The only place from where the grand answer can come was science.

Austin located the source of law in the sovereign of an independent political society. He described law as rules. Rules attaching sanctions to a legal wrong. Austin had to locate the sovereign as the determinate body of person or persons, for, the idea of 'determinacy' was necessary to prove that law is science. Science is about facts. It can know phenomena as perceptible to senses. So, Austin had to prove that law is fact. Therefore, it can be known scientifically. Therefore, law is a science. Therefore, law has intellectual rigor. Therefore, law qualifies as a discipline. Therefore, law is eligible to be recognized as a university subject. Austin pleaded well and won the case. Since law became a university subject in the nineteenth century England, attempts were made by "insiders" to understand the reality of law from "within," i.e., to understand and explain law as a discipline having her own intellectual rigor. Christopher Columbus Langdell was appointed as the First Dean of Harvard Law School in 1870. He developed another argument to prove that law is a science. Langdell argued that law library is the laboratory for students and teachers of law. Cases (Law Reports) are like specimens and instruments. He introduced case method of law learning at Harvard Law School.

Historical school of jurisprudence was contemporaneous to legal positivism. Savigny of Germany was of the view that law is found and not made and it grows or changes with society like its language or culture. Another historian from England, Sir Henry Sumner Maine introduced the idea of historical jurisprudence to common law tradition tried to demonstrate that society and law hitherto has moved from status to contract. Somehow the historical school of thought could not become as popular as positive school. Perhaps, law is made rather than being found. Even if found, it is found in books and not in the society. It is observance or non-observance of law that is found in society. It does not follow that custom or usage do not play any role whatsoever in the present time.

Both positivists and historical movements shared a common method. They rejected theological, philosophical, metaphysical explanations. These methods also rejected superstition and reason in equal measure as a method to answer the grand question.

By the end of nineteenth century, it was firmly established that law is a science. Nineteenth century may be described as a century witnessing predominance of science and 'pure discipline'. It was also a century of fact-based approach captured by the dicta "I believe it, when I see it" in contradistinction to value-based approach captured by the dicta "I see it, when I believe it". Prominent and preeminent mantra was "If science can know it, it is knowable. If science cannot know it, it is hardly worthy of attention." In times of deepfake the formula of "I believe it, when I see it" is raising serious concerns and issues.

Seed of interdisciplinary[7] study of law was sown by Justice Oliver Wendell Holmes in his path breaking article *The Path of Law* published

[7] Idea of relating, supplementing, and sometimes attacking and demolishing one discipline with other disciplines, therefore, is the defining method of contemporary scholarship in all the disciplines. Now most of the Nobel Prizes are given for works involving interdisciplinary studies. The very idea of interdisciplinary is post-

in 1897 by the Harvard Law Review wherein he predicted that next century is going to be the century of economics and therefore law students should read economics and relate it with law.

With the beginning of second half of twentieth century an era of interdisciplinarity in general and in legal scholarship in particular was set in motion. Scholars started identifying linkages between and among disciplines to better understand their own discipline. As scientism influenced law, legal education, and legal research in the nineteenth century, the interdisciplinarity influenced law, legal education, and legal research in the second half of twentieth century.

Beginning of the twentieth century may be described, *inter alia,* as the beginning of the end of British Empire. Which was about to create an imperial-vacancy. The United States of America (USA) started trying to fill the vacancy. Before the beginning of the World War – I, USA was a country in heavy debts. After this War USA became an economic power and lender to rest of the world. During that period, Roscoe

disciplinary. Idea of discipline is a relatively recent idea. Early knowledge seekers did not approach knowledge in compartments and departments. For example, Aristotle wrote almost on law, medicine, logic, politics, justice, and so on and so forth. Idea of division of labor gave birth to idea of specialization. Scientism gave birth to the idea of discipline and specialization. For around two and half century the idea of "specialization" influenced the attention of scholars. With the beginning of the latter half of the twentieth century "super-specializations" into less and less came into prominence. About orthopedics it is often said that she/he specializes only in left knee and nothing else including right knee. For the treatment of right knee consult the orthopedic specializing in right knee. Modern day scholarship ranges and varies from "super-specialty" to "specialty" to "interdisciplinary" to "trans-disciplinary" and in some cases "counter-disciplinary." These shifts in the market place of ideas have influenced and is influencing legal scholarship.

Pound was appointed as fourth Dean of Harvard Law School in 1916. His work contributed to the Sociological School of Jurisprudence. Concept of “social engineering” through law became another focus of legal scholars. Focus of legal scholarship shifted from ‘source of law’ (law comes from sovereign or is found in the society or comes from nature) to ‘functions of law’. This shift marked a shift from the ‘nature of thing’ to the ‘functions of thing’. Law became ‘means’ to ‘an end’. End of law was generally described as justice. It was argued that reality of law can be known by focusing on “law in action.” However, the phrase law in action is misleading because law is neither sentient nor autonomous and automatic. Law requires human agency to act. Law can never act or be in action on its own. In other words, law does not act because it cannot act. It is the officials charged with the responsibility to implement law who act, badly act, or do not act at all. So, only actions of officials of law became the focus of attention. This approach sought to understand the concept and theories in the light of practice, malpractice, or non-practice of officials of law. Question is: can concepts and theories be measured or judged with the help of practice? Or, practice can be measured or judged in the light of concepts and theories? There is no doubt that practice does inform concept and theory which may be modified. But if practice becomes the standard, then standard in the form of concept and theory ceases to be standard.

A branch of Sociological Jurisprudence known as Realist School of thought came into existence. Realist combined psychological and sociological methods to understand and explain “what a judge actually does”, “what a judge had in the breakfast may have an effect on his legal behavior”, or “if the judge had a fight with the spouse, it will have bearing on her/his judgment” and so on so forth. Focus of this strand was “what a judge does” and not “a judge says”. According to this view, law is what a judge does. In contrast to the view of Bentham, according to this view, law is primarily made by judges and not by legislature. Every legal actor other than a judge plays a subservient role. Law made by legislature at best is probable law and what a judge does – not what she says – is really the law. Both Sociological Jurisprudence and Legal Realism were popularized by US scholars.

Came the second half of the twentieth century and it witnessed three major scholarly movements in law, namely legal positivism, natural law theory, and interdisciplinarity. There were movements within each of these movements. Two articles published in Harvard Law Review in 1958 by two legal giants brought the grand question once again to the center stage of legal scholarship. World War – II was over. Nazi regime and British Empire had fallen. Nuremberg Trials and Tokyo Trial were over. Cold War between US and Soviet Union was at its peak. US had become a superpower. Shift in economic and political powers reflected in the scholarly power. H. L. A. Hart, a British legal scholar, was inspired by linguistics method championed by Ludwig Wittgenstein.

Hart recognized the concept of law in the union of primary and secondary rules. Hart was critically inspired by the work of John Austin and tried to construct the concept of law by reproducing the characteristics of law and posited that law and morality are separate but related concepts. Building on the works of Austin and Wittgenstein, Hart explained relationship of law and morality with the help of "being obliged" and "having an obligation". Former according to him is exemplified by gunman's situation of your purse or your life. The latter expression signifying the idea of law having a relationship with morals.

H L A Hart published an article in Harvard Law Review in 1958 – *a US publication* (emphasis supplied). Hart argued that law and morality are separate but related – a positivist argument. Lon L Fuller, a US legal scholar, published a response to the article of Hart in the same volume of same Law Review and argued that law cannot be separated from morality – natural law argument. These arguments in these two articles are generally referred to as "Hart-Fuller Debate".[8] Fuller in his response (article) developed eight formal principles of legality popularly known as desiderata. Four years ago, Fuller has published an article in 1954 in the Journal of Legal Education wherein he demonstrated that as "means" and "forms" of law are neglected by legal

[8] Hart-Fuller Debate was general in nature. There was another debate in England between Hart and Lord Patrick Devlin. This debate was also about law and morality. But this debate was about private-public space and individual liberty and choices vis-à-vis social cohesion.

scholars hence there is a need to focus on “means” and “forms” of law. For this type of study, he coined the term ‘eunomics’.

Ronald Dworkin argued that law is a department of morality. Dworkin, therefore, gave primacy to morality over law unlike Hart who described the relationship between the two as distinct but related. Dworkin championed interpretative jurisprudence and emphasized social purpose of law.[9] Dworkin also emphasized the primacy of theory over pragmatism in a response to Judge Posner. Dworkin also distinguished standards, principles and rules. To Dworkin the idea that law is a union of rules, was not central. Rather he focused on ‘principles’ to minimize and avoid the limitation or absence of rules.

The “Law and . . .” movement particularly in the United States of America attempted to understand and question the reality of law from the perspective of “outsider”. Methods of other disciplines were employed by scholars to understand the reality of law. Over a period of time a number of “Law and . . .” approaches recognized many disciplines within a discipline with which “Law” was attempted to be connected with. For example, there are many variations of Law and Society movement. One variation is Sociology of Law. Other variation is Socio-Legal Studies. Third variation is Jurisprudential Sociology. It may be noted that this “Law and...” movement also described as

[9] *Riggs v Palmer* 115 N.Y. 506 (1889).

interdisciplinary movement, trans-disciplinary movement, or as counter-disciplinary movement.

The proposition that "law exists" is a categorical and absolute proposition. Since law exists, it can be known. If it can be known, it must be knowable. If it is knowable, it can be understood. If it can be understood, it can be explained. It is pertinent to emphasize at this juncture that reality is always independent of knowledge thereof. Reality may be known, less known, or unknown but it is there and wants to be known. Law if completely known and understood – from all the angles, from inside, from outside, and from all the sides – constitutes the reality of law.

Reality should ideally be discovered. But in reality, reality is manufactured either by theoretical wisdom or by practical wisdom or by both. A concept or a theory may work or it may not work. What if a concept or theory does not work? Whether a concept or theory which does not work should be worthy of our attention? For example, the concepts or theories of law that we discuss in our classrooms – assuming that the concepts and theories are fully and properly understood in the class – whether we also discuss the relevance thereof that they have in the street, or in the neighborhood, or on a high way, or in the court rooms. The professionals generally denigrate concepts and theories as bookish at worst and as academic at best. In judicial parlance, 'academic view' is an epithet used to reject an argument. Courts often leaves a question undecided by labelling the question as ‘academic’, ‘conceptual’ or ‘theoretical’. This disenchantment of towards concept and theory demonstrates that concepts and theories of law hardly work in the real world. If that be the case then legal profession is not a profession at all. At best it is a vocation, or apprenticeship, or masonry.

Story of seven blind men each touching the different parts of body of elephant and each understanding and describing the elephant in his own way cannot explain the problem in understanding the reality of law for the simple reason that law is not an elephant nor elephant is law. Elephant is tangible. Law is not tangible. Hence it cannot be touched either by blind men or by sighted men. At best, idea of law is elephantine. But idea cannot be touched. The problem of understanding its reality is also elephantine and not asinine. The elephantine metaphor can explain individual experiences or encounters not with law but with officials of law. Individual experiences or individual’s experiences do not constitute reality of law. As law is an idea, it must be conceived and constructed. Concept of law comprises of values. Therefore, understanding of values is essential for understanding law. But values may blind us.

Scholars have been making attempts to know and describe the reality of law with the help of arguments. All sorts of arguments have been used: ontological, deontological, cosmological, design, teleological, scientific, utilitarian, structural, functional, modern, postmodern, deconstruction and what not.

Despite the fact that there are plenty of answers to the grand question, there is no grand answer to the grand question. The question is why no answer has been able to rise to the dignity or status of grand answer. Following seeks to identify some of the problems which are coming in the way of answers to the grand questions.

Part – II: Some Problems in Answering the Grand Question: What is Law?

Needless to state that identification of the problem is the first necessary condition towards the solution of the problem. As stated above, the main problem in answering the question is plenty of answers. Question remains the same. Answers are many and varied and they also evolving with time. In the following paragraphs, an attempt has been made to highlight some of the problems that exist in answering the grand question.

Scholars from Indian, Egypt, Greek, Rome, England, Germany, France, Americas, Arabs, Scandinavia; and other places tried to do answer the grand question. But nobody could produce a grand answer to the grand question. As noted above, there are many Schools of Jurisprudence and Legal Theory: Natural Law School, Positive School, Analytical School, Sociological School, Historical School, Realist

School, Law and . . . Schools, Postmodern Schools including Critical Legal Study Schools. However, they could produce varying and differing answers only. These Schools gave birth to variations within the schools. There is a difference between and within every school of thought. They produced and are producing different answers. Answer to the grand question is lost in the plenty of answers. The basic problem in answering the grand question is not the absence or scarcity of answers. Rather it is the presence of plenty of answers. The plenty is so overcrowded that the identity is lost. A related problem is that the answers also vary from time to time, from place to place, from system to system and from ideology to ideology. The challenge is to combine and integrate these varied answers in such a way which can produce a grand answer to the grand question. The question therefore is: whether such a combination or integration of all varied answers possible?

Conceptualization of a concept requires clarity, lucidity, integration of all the elements that constitute the said. Concept of law. Similarly, construction of a theory of law or any concept thereof requires generality and completeness in such a way that the said theory could subsume every conceivable situation. In other words, a concept or a theory should not neglect any characteristics, any function, any element, any point of connection between and among elements of law. Constructing a grand concept or a grand theory of law is more than Herculean. Can we have a grand concept and grand theory of law which can fully and completely explain each and every aspect of law both in part and in whole at once. Existence of such a concept and such a theory, however, is present by absence. Such an absence is not a monopoly of law. No secular discipline including Physics – generally considered to be the most perfect science of all sciences – lacks a grand theory. Stephen William Hawking during his life decided to abandon the idea of developing the grand theory of physics. It does not follow from here that we should also abandon the enterprise of developing the grand theory about law. For whatever has not been achieved so far does not necessarily mean that it cannot or can never be achieved. Possibility of achieving the objective of developing a grand theory of law must take into account the known reality of law. Some of known reality of law are described as follows.

Firstly, reality of law is largely (though not solely and exclusively) defined by the law itself. Law itself tells what it is. In law a word means what the law chooses it to mean. Law may make different and conflicting choices as the meaning of a legal term. Every Statute states the objects and reasons of it. It has a definition clause. It creates a mechanism of realizing its objects. If there is a disconnect between the mechanism and the object or the object itself seems to be unfair and unreasonable the courts resolve the issue with interpretation-construction devices by adversarial method in the common law system. The adversarial method in its course produces at least two versions of reality of law. Finally, the judge determines the reality of law on the basis of her ideology and the arguments of the lawyers (adversaries).

Reality of law whether determined by the Statute or declared by the court is a reality for the time being in force.

Secondly, law is considered to be dynamic. This view neglects the fact that law is also constant for the time being till it is in force. Further, it is a fundamental principle of law that every constitutional provision and every statutory provision is presumed to be valid. This presumption is a strong presumption (though rebuttable) and one who challenges the validity thereof has a heavy burden to establish the invalidity thereof. Further, adherence to precedent is the rule and overruling is an exception. Both these principles of presumption of validity or adherence to precedent establish that for all practical purposes law is constant. Dynamism of law is an exception. Both these features together accommodate the demand of certainty in law as matter of rule and flexibility in law as matter of exception. This idea is integral to the idea of common law that at common law rules and exceptions are born together as twins.

Thirdly, subject of the grand question is law made by humans for humans. Hence, reality of law is man-made, therefor, artificial. Genetic material of artificial law comprises facts, human experience, fiction, and norms. To a non-lawyer it may be hard to accept how legal fiction can be real. Nevertheless, legal fiction is a reality of law. Lord Halsbury in *Salomon v Salomon* declared a company to be a 'real thing'. It is a real thing only in the eyes of law. A company exists only in the legal world not in the physical world. Reality of law is institutionally determined. The institution of legislature makes the law. The institution of judiciary declares what the law is. In other words, courts determine the reality of law. Scholars discover the reality of law in the light legislation, precedent, and social practices.

Fourthly, 'is' of law generally comprises of 'ought'. Where an 'is' is 'is' the 'is' (fact) thereof may not be self-evident. For example, if the thing under consideration is tangible, non-human and nonliving, e.g., a chair, a table, a cup, or a pen; an image gets formed in our brain and we recognize such things with the given names. In other cultures, these things may have other names. Wherever, the same name is used to identify the same thing, the thing referred to by that name is understood by the participants. But if we ask: what is the reality of chair? Understanding explain the reality of chair does not remain that easy for there are several types of chairs meant for different purposes. Whether arm rest is an essence of a chair? Or only backrest, seat, and leg(s) are essential parts of a chair. The problem gets heightened when "ought" – an intangible – is to be described as "is". Law as such is 'ought' and an intangible. Brain is incapable of forming an image of intangible. Tangible is perceptible through senses. Intangible is not perceptible but can be conceived. Text of law is perceptible. But text of law is not law. After perception and conception, description may begin. Description is expression of conception and/or perception.

Fifthly, law is prescriptive. Answer to the grand question, however, is descriptive. Description of reality of law is multidimensional, multifaceted, and multilayered. This multi-ness of the reality of law exists at least for three reasons. One, it is a product of the multiple and varied vantage point and focus that each describer chooses to describe the reality of law with. If the describer focuses on the "nature" or "features" the description will of the intrinsic quality of law. If the describer focuses on the "results" or "consequences" the description will of realization of objectives of law. If the describer focuses on the "structure" or "functions" the description will of the working of law. If the describer focuses on "actors" or "participants" the description will of actors' role orientation, or role expectation, or role behavior (or role performance). These descriptions will vary according to the vantage point the describer has chosen to focus. Two, reality of law may vary from individual to individual: philosophers, jurists, judges, lawyers, other legal actors and officials, laymen, and criminals may have different notions of reality about the same law. Even two lawyers or two judges, those who are trained in law, may have different realities of the same law. Three, reality of law per se may be inchoate in the absence of the realities of society, justice, power, morality, and ideology for reality of law is fundamentally and inseparably related with these.

The above given paragraphs make out a case that reality of law or 'is' of law is problematic by and in itself. Problematic nature of the reality of law comes in the way of the grand answer to the grand question for following reasons.

One, problem of meaning is an ancient, persistent, perennial and global problem particularly in legal discourse. Problem of meaning of statutory provisions and other legal instruments are decided by the Courts with the help of interpretation-construction processes. However, in some landmark cases the real problem of meaning begins after decision of the Court. Courts are expected to clarify the meaning of statutory provisions while deciding cases. However, some landmark decisions of the Supreme Court of India demonstrate otherwise.

Two, problem of answering the grand question exists at different levels: conceptual level, definitional level, drafting level, level of judgment writing, level of notification of law, level of implementation of law, level of enforcement of law, level of relief granted or not granted as per law, level of behavior of: citizens, witnesses, experts, public servants, politicians, legislators, judges, and other legal actors.

Three, problem of plenty of answers is exacerbated by the abstract language used by the scholars. Scholars generally write for scholars. They rarely write for students or beginners. Abstract writings assume existence of knowledge of prior literature on the part of the reader which is generally not the case with at least undergraduate law students. Abstract writings necessarily give birth to the problems of ambiguity and vagueness. Words derive their meanings from people, i.e., the sense or senses people use a particular word. People at the same place or at different places use the same word in different senses. Some of such meanings get recorded in dictionaries. It is known that words are polysemous. Any dictionary of any language has several entries of meaning of a word. At the dictionary level, the problem is that dictionaries do not tell which of the dictionary meanings a word has in any given text or context. At best dictionary meanings may be only be used to begin with. Then comes the text in which a word is used. Other words in the text may help find the meaning of the word in question provided the meaning of other words in the text are not ambiguous, vague, or contested. So far as text of a constitution or statute is concerned, every definition/interpretation clause thereof has the caveat "unless the context otherwise requires". Even if the context does not require otherwise, even then the same word may have different meanings in the same statute. This method is generally described as intrinsic or internal aids of meaning, i.e., context within the text. The context of the text may be without or outside the text. This method is generally described as extrinsic or external aids to meaning. Ambiguity presents the problem of two or more meanings at the core. Whereas, vagueness presents the problem of inclusion or exclusion generally at the level of penumbra and fringes. This is how both ambiguity and vagueness come in the way of clear meaning. Further, the answers to the grand question are couched in difficult language and their structures are complex, prolix, and obese. It would have been better had legal scholars should have first stated the answer to the grand question and then developed the said answer. In the alternative, they could have summarized the answer to the grand question in the conclusion. But they do neither. They write big and obese tomes or articles and leave it to the wisdom of readers to cull out the answer to the grand question on their own by reading their writings.

Four, the largeness and opacity of answers make the answers opaque. One may easily miss the tree in the dense forest. In addition to academic writings, there are judicial writings, too many statutes, too many rules and regulations, too many bye laws, too many orders, too many notifications, too many customs, and too many precedents. Neither a lawman nor a layman can claim to know all the laws for the time being in force. The obesity is not merely a problem of numbers. Law is obese at least four dimensional: number, size, repetition and conflict. There are too many laws dealing with the similar subject matters.[10] Operating in different fields in theory at least. Sometimes they are overlapping and even conflicting. Both obesity and opacity are problematic. Be it the obesity of human body or that of the legal system. Obesity is a fertile mother of many diseases. Opacity does not allow one to see at all or at the least block a clear view.

Part – III: Conclusion

There are problems in answering the grand question. Problems are of different types and of different layers. However, there seems to be a way out. The way out is that if we know the purpose of knowing before

[10] Statutes relating to labour and environment are leading examples.

trying to know, the problem of knowing may be solved to a great extent. For example, if the object of knowing is a rose, the same rose will smell the same to everyone having the ability to perceive smell. But the reality of the rose for: a botanist, a physicist, a chemist, a pharmacist, a druggist, a gardener, a florist, a microbiologist, a biochemist, a biotechnologist, a nanotechnologist, a geneticist, an historian, a poet, or a lover will be different, for, each of them have a purpose different from one another. A poet may describe his love as a rose. A jilted lover may hate roses, for, roses remind him of bad memories. Same seems to be true about the grand question.

I conclude this essay with a personal story. During my school days, I asked my father about something – a thing I do not remember now. My father responded by saying, "*Sawal aisa ho, jis par na phir jawab chaley*" (Question (demand) is such which must be accepted without any demur). I responded by saying, "*Ki agar aisa ho ki jawab aisa ho, jis par na phir sawal chaley"* (What if the answer is such which must not raise any further question). With this, the dialogue between the father and the son concluded. I felt triumphant. Neither my father nor I realized then that though I appeared to disagree with my father but in reality, I was in agreement with him because my opening words were "what if". I also asked a question in response to an answer. Now I think that my father was right. Had my father been asked the grand question what is law. He would have responded by saying, "*Sawal aisa **hai**, jis par na **kuch** jawab chaley".*

The question is: whether or not is it possible to find denominators common to all the answers? I leave this question with the readers and rest my case, if there is one, for the time being.

III. RIGHT DISCOURSE AND UTILITY DISCOURSE

- *VINOD DIXIT*[*]

Abstract

Modern states distribute burdens and benefits through right discourse; however, in some exceptional cases, they temper right discourse with utility discourse. Right discourse has been conceptualised and ideologised by Immanuel Kant. The validity of an action depends on adherence to a set of rules without reference to surrounding antecedents on a priori basis. On the other hand, utility discourse, in the common law world, has been conceptualised by Jeremy Bentham and succeeding Utilitarians. Utility discourse is consequentialist and is concerned with happiness of the majority. Both right and utility discourses lead to unjust and even monstrous results. However, in a capitalist society, benefits and burdens are distributed through right discourse, but in the interest of equity, and social harmony, in exceptional cases rights are tempered or trumped with utility considerations. The trumping may be done by the legislature or judiciary. Some of such Indian cases have been discussed in this paper.

One of the most important functions of a modern state is to distribute benefits and burdens and advantages and disadvantages among the people and institutions through the only language it speaks, law. There are two methods to do so, through right discourse or through utility

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discourse. Benefits and burdens are distributed through right discourse adhering to a set of rules on which depends the validity of action irrespective of what happens before and after the action. On the other hand, utility is concerned with causes and consequences. In what follows, we shall discuss the anatomy of both the discourses

Immanuel Kant, an eminent German philosopher, has laid out a philosophy, called deontology[1], i.e., the ethical theory stating that the morality of an action is based on adherence to a set of rules or duties rather than on the consequences of the action. It is also called absolute liberalism, preferring right over good (utility). Right is based on the idea, if an interest has been recognised as a binding claim, which one can assert that something is right, independent of the social or other consequence of the right. On the other hand, it is distinguished from hedonism or utility. Hedonism is based on experience of what happened before and after the action, unlike 'right', which is based on adherence to a set of rules (its foundation is logic). It must be borne in mind that Kant contrasted logic from Humean (David Hume's) insistence on superiority of experience over logic. For Kant morality prioritise adherence to a set of rules, whereas for Benthamites it is the consequence of the action. It is interesting to note that almost entire capitalist world primarily relies on right discourse to distribute benefits and burdens in order to justify the existence of economically and

[1] Wayne Morrison, *Jurisprudence: From Greeks to Post-Modernism* (London 2000) 131.

socially stratified society. However, in some cases in the interest of maintaining a semblance of equality to satisfy the poor, entrenched rights are tempered with utility. The Indian legal system, in the common law tradition, which we follow, gives primacy to the right discourse. In this paper we propose to analyse the anatomy of both the discourses, their intellectual foundations, including relative applicability and limitations of experience and logic. Towards achieving this end, we shall discuss Immanuel Kant, David Hume, Jeremy Bentham, John Stuart Mill, Henry Sidgwick and some of the Indian laws and judicial decisions

Deontology (logic) and utility and Humean experience are, to an extent, responsible for the great divide between legal theories, based on experience and logic. Legal positivists, textualists, constructionists, such as Austin, Hart and judges of the Supreme Court of India in fifties and even today in some of the cases, predominantly relied on logic irrespective of the consequences. Whereas those who relied on utility, such as Justice Homes, justice Cardozo, Lon Fuller, Karl Llewellyn included experience in their arguments.

Kant was indebted to David Hume for interrupting his dogmatic slumber. To Hume, relations of ideas, philosophy is in danger of moving in tautological circles, and empirical studies offer real knowledge. On the contrary Kant was of the view that trying to gain every knowledge through experience is similar to the attempt of a person standing before a mirror with closed eyes and saying he wants to see how he looked while asleep[2]. (135) (1983).

Kant, unlike Hume, was trained to believe in the efficacy of 'reason.' According to him, empiricism is based on non-rational foundations. There are many things that could be understood only through reason. Our duties, men's relations with nature and men's communal life cannot be understood through experience. Morality (duties) are not capable of being comprehended if reason is discarded. Kant proceeded to analyse pure, a priori reason without empirical content. He kept both morality and philosophy out of the reach of empiricism, thus, the key to pure knowledge is only a priori reason, uncontaminated by a posteriori surroundings.

Kant defined modern man as self-defining rather than a being, whose goals are fixed by external surroundings. These goals can be achieved only through pure reason and not through feelings, sentiments or by socially or naturally fixed ends. Self-realisation consists in using a priori reason. Reason by trial and error progress from one kind of insight to another. Unlike Hume, Kant prefers pure reason rather than acquiring knowledge through social interaction. For Kant, Hume's ship, without a pilot moves adrift on the mercy of currents (external factors): whereas Kant's ship is under the control of a pilot (pure reason), who with self-assertion steers the ship safely. Critical

[2] Wayne Morrison, *Jurisprudence: From Greeks to Post-Modernism* (London 2000) 135.

rationality of a free-willing individual, is the appropriate means of acquiring pure knowledge. Distinguishing between ‘a priori’ and ‘a posteriori’, Kant admits that man cannot see world in purity, but bring about certain ways of perceiving and presupposition to make knowledge possible. Man does not work instinctively, but progresses from one kind of insight to another. (it is quite possible that from this observation of Kant, Frederic Hegel may have developed ‘logical dialectics’). For Hume source of knowledge is social interaction whereas for Kant it is pure reason, uncontaminated by social surroundings.

But the important question is how pure knowledge is to be obtained? It is through rationality inherent in our moral belief system. We start from our ‘pre-supposed’ concept of morality. This understanding is ‘a priori.’ The posteriori is supplied by senses and what enables us to understand the experience is by mind.

Kant asks the question, if our moral duty can be ascertained only through feelings. If we treat others as capable of making promises, then they are responsible for the fulfilment of the promises; if they are capable of making choices, they are responsible of the consequences of the choices; they are responsible for all their actions. If man is morally autonomous being; his autonomy cannot be compromised by external factors; his autonomy is not result of cause and effect: his autonomy can be determined through ‘a priori’.

Kant concedes Hume's empiricism correct in many ways. Individual is hemmed on all sides by the physical world. He interacts with others in the physical world in obedience to principle of causality. According to Kant, man lives in two realities; first, in so far as he belongs to the sensible world, he is under the law of nature; secondly, he belongs to intelligible world, not under the law of nature, he is grounded in reason and not empiricism.

Kant defends a priori. In criminal law, when we take into consideration factors such as heredity, social environment, battered woman syndrome, grave and sudden provocation, or abysmal poverty, we suggest we are not responsible for our action, our criminal actions were inevitable. If the concept of inevitability extended to the hilt, criminal law will become redundant. No one is responsible for one's actions, only one's circumstances are.

Kant says that theoretically, as sociologists and psychologist maintain, experience (circumstances) is responsible for the actions of man, but when legislature makes the law, it holds individual responsible for his actions (and attributes responsibility to experience, that is circumstances, only to a limited extent, it may be added). This is a quandary which is solved by Kant; this is another causality of 'freedom'. Why does our morality, unlike sociology and psychology, impute responsibility to the actor (offender), the action is imputed to his intelligible character, that is his reason was wholly free, notwithstanding empirical conditions (we may put a rider, that with certain mitigating circumstances)? Man operates in both empirical and moral realms. If there is empirical causality, there is also a moral causality, which appeals to intelligible rationale or ‘a priori’ character, essential to the operation of morality (law; that is standard of behaviour). As a matter of fact, Kant distinguishes between determinism of empirical factors and ‘a priori’ freedom of choice. Morality (law) is based on ‘a priori’ freedom of choice and not on deterministic empirical considerations. The conflict between ‘a priori’ and ‘a posteriori’ in law is exemplified by Austin’s analytical positivism (F N) and justice Home’s empiricism, (FN) for Justice Oliver Homes experience is a very important conditioning factor; he famously said life of law is experience not logic (FN). On the other hand, Austin’s positivism is based on reason. For Austin, while applying law, considerations of justice, social circumstances are irrelevant factors.

Human freedom is built into the rules of intelligible. The essential requirement of morality (law) is also built into structure of rationality. Hence moral requirements are ‘a priori’ and must be acknowledged by all rational beings (universal moral rules). But he also insists that only valid rules of morality are those which are acceptable to all. Universally acceptable are those which pass the test of critical rationality.

When an offence (violation of a moral precept), to which condemnation is attached, is not phenomena bound (not related to ‘a posteriori’ external world), but the activity (the moral precept) is intelligible (a priori), the external (social-psychological) do not change the character of the moral rule. Nature's phenomena will not make evil deed a non-evil. Kant places emphasis on will (autonomy of the self). Unlike Humean assertion of subjecting reason to passion, he asserts rational man is part of the rational world. Moral law can exist only as an act of will. However, what he attributes to Hume is debatable.

What gives a man his humanity is reason? Reason is ingrained in him because of his humanity. He accepts morality because it is part of himself, not because of some external forces. One who justifies his moral wrongs abandons his rationality. Essence of man is beyond the trap of his empirical contingency. Man is of two domains-the empirical and moral but genuinely he is apart from the empirical world. Without transcendental principle moral life is impossible. However, his attempt to universalise morality is, to say the least, debatable.

Right and Good: - people know from sensus communis (sensus communis is something more than common sense; it is knowledge judgement and is universal: people know full well in practice what is right and what is wrong). For Kant modernity lies in universalism. Man's rational nature gives him self-direction. Man has a 'realm of ends,' which either has a price or dignity. End which has a price can be replaced but that has dignity is irreplaceable. Dignity has no price or equivalent, therefore cannot be replaced. Certain ends have intrinsic worth, that is dignity. We call it Right, and is irreplaceable. Right does not have a price and must be protected against all odds. That is why the 'right discourse' requires enforcement of a legally protected right even if it creates hardship to the majority of people. That which relates to man's inclination and need, it is good and has a price; but something which has an end in itself, does not have a relative substitute and has an intrinsic worth, that is 'right'. It does not have a price but dignity. For Kant, morality has intrinsic worth and dignity and an end in itself. Skill and diligence have a price but fidelity and benevolence have intrinsic worth they have no price. Deontological ends have intrinsic worth, and are not assessed on the basis of consequences.

David Hume[3], the Scottish philosopher, unlike Kant, preferred to rely on a posteriori, the worldly experience as the basis of modernity. For him the existence of any thing can be proved from its cause and effect, founded only on experience. He systematically attempted to destroy deontological (inherent rightfulness of an action is more important than its consequences) theory of natural law (natural law of post Christian Europe) ontology. He was opposed to deontological reasoning, without any empirical groundings, of religious interpretation of natural law. However, Humean reason was guided by sentiments and passion, reducing man to principle of cause and effect. Banning transcendental, he accepts only reason governed by experience and tradition. He also differed from Hobbes, who in social compact, placed individual in place of God and social order was

[3] Wayne Morrison, *Jurisprudence: From Greeks to Post-Modernism* (London 2000) 103–30.

regulated by the commands of a 'sovereign'. Grotius, Hobbes and other social compact theorists replaced Godly natural law with secular natural law. The most important contribution of social contract theories was to place 'individual' at the centre stage of social order, preparing a ground for 'individuation' and modernity.

Hume discards all deontological, religious and metaphysical reasoning; but important is what will replace it. The solution lies in finding the truth in 'common life', the common life operates in a 'tradition'; importance given to tradition means that switch over to modernity will not be revolutionary. The present can be understood only in the context of the past. In practice it means that Humean reasoning operates in mysterious common life guided by tradition. 'common life is not certainly 'sensus communis' of Kant. It is not, as sensus communis is universal inherent knowledge of what is right and what is wrong. Hume's common life is neither inherent knowledge nor universal; it is based on tradition and experience.

The riddle of common life based on experience and tradition cannot be solved without understanding the truth and the 'self'. Hume cannot rely on pure reason. He finds the solution in common life based on experience and tradition. Rules of social order are to be comprehended on the basis of experience and tradition. But what is the place of the 'self' in the traditional society? Is it individual or part of the group and society or both and what is the relation between the 'self' and traditional society? To decipher the position of the 'self', Hume attempts to reconstruct methodological individualism and social holism. He takes individual as the basic unit of social interaction. They all are autonomous, different from each other. The important question is how to relate the individual with the social whole (society)? Ancient and mediaeval societies treated individual as inseparable part of the group. Coparcenary of Hindus and Roman patria potestas are some of the examples. Modernisation began with the creation of the individual. Even after the evolution of individual, they could not remain isolated and unconnected islands; they must be connected to the society (Parikh, FN). Kant related them through sensus communis, Social compact theorist through a voluntary compact resulting in creation of a state and the legal positivist through law created by a sovereign or a written constitution or an evolutionary sovereign system and Hume through common life.

A constitutional 'ought' creates rules of social interaction as without them there would be chaos. However, the real problem of a constitutional system lies in the difference between imposed and consensual constitution. Most of the societies are majoritarian societies or some are more equal than others. Rousseau[4] attempted to solve the problem through 'general will', Locke through limited government and Marx through socialism. Hume's tradition carries the burden of the past, that is, exclusion complete or partial from common life of certain

[4] Edgar Bodenheimer, *Jurisprudence: Philosophy and Method of the Law* (Harvard University Press 1962).

sections consisting of slaves, the property less, the women, people belonging to certain religion, race or caste. In a traditional society autonomous people with free will may feel constrained.

knowledge of ideas and knowledge of facts: Hume rejects dependence on deontological reason alone but accepts reason based on the foundations of experience in a tradition. Without existence based on experience, self cannot be understood. He distinguishes between knowledge of ideas and knowledge of facts. The former depicts the relation between concepts. The foundations of these concepts are necessarily true, such as, a man who kills another person is a murderer, but these concepts do not tell us anything new. Knowledge of facts are statements about things as they actually are. However, the problem lies in relation between observation and statements of facts. Quite often our observation may be partial which, though does not give us full knowledge, may be considered to be full and complete. If we observe that lizards, we have seen, are non-poisonous, it may be incomplete statement of facts. We cannot catch 'self' through observation, as several perceptions successively make their appearance. Then, how to catch the 'self'.

Hume, to destroy the validity of 'reason' as a tool to advancement of knowledge, relies on the test of scepticism. The opponents of an argument use a counter argument to destroy the argument. As both cannot be correct, he did not accept the authority of 'reason' as a tool of advancement of knowledge. Instead, it is experience and observation, which are to be used safely. Hume tries to catch pass, re-pass and glide away, and mingle in infinite varieties of postures and situations." (page 111). He concludes that experience and observation is not a secure ground to understand 'self'. Unlike, Locke and Hobbs, who find modernity in nature, instead of God and in consciousness of the individual (pages 112-113), Hume cannot do so; he does not find modernity either in mind which causes confusion (scepticism) nor in rationality but in experience and tradition (which represent our intellectual struggle through generations). Only safe course is to live like others in common life, that is natural operation of institutions; that is the foundationalism of modernity.

We must return to the narrative of modernity; self cannot meaningfully exist in isolation, it can realise itself in the context of tradition and experience in continuity of social existence. Reason does play a role but is secondary to experience and tradition (cumulative experience). Hume finds all rules of justice and fair play in tradition. However, our traditional experience is a mix of good and bad. Bad is represented by torture, exploitation, dehumanisation (the slaves, the poor, the women and in India of the Dalits), whereas good by benevolence and kindness.

Though Hume does not directly talk of utility, our experience may lead it to good. However, tradition creates difficulty, as tradition is contaminated with past practices of injustice (such as inhuman subordination of women and exploitation of Dalits), which in the then society were considered normal. In spite of the mixed legacy of tradition on which Hume relies, his rejection of deontological position and dependence on experience gave a philosophical advantage to Utilitarians.

Bentham: Deontological reasoning of Kant is juxtaposed with Bentham's consequentialist approach. Bentham tries to assess cost and benefit of 'right' with reference to good/happiness. Kant's right cannot be measured quantitatively but only qualitatively because it has an intrinsic value. Bentham on the basis of consequential pleasure/pain assesses the worth of a right. If the right does not produce happiness, it can be dispensed with. However sometimes Bentham's hedonism leads to 'moral monstrosity' and runs counter to the idea of a right.

However, an English philosopher, Henry Sidgwick, inspired by Kant gave a twist to utilitarianism, developed the concept of 'universal hedonism', which reconciles the conflict between the happiness of self and that of others. The essence of Sidgwick's universal hedonism consists in achieving happiness of most of the people but it is different from egoistic hedonism in as much as in latter's case the emphasis is on promotion of self, whereas in the former the happiness is for all the people. It is also different from intuitionist hedonism as the choice of seeking happiness is objective and not subjective. (Sidgwick-the Methods of Ethics first in 1874; 6th edition 1901)

In making value choices, he makes distinction between egoism, intuitionalism and universalism. Intuitionalism refers to straightforward declaring some acts as right or wrong. Egoism means that self-selection of choices from personal interests. Universalism refers to happiness for all on objective consideration.

Utilitarianism, often, runs up against a number of situations which are monstrous. In a hypothetical situation, there are six critically ill patients in a hospital, awaiting organ transplant such as heart, kidney and liver, but the hospital has run out of the organs. Without transplant all of them will die. There is another healthy patient in the hospital, who has come for routine check-up. Doctors, in order to save the lives of six, use the healthy patient as the supplier of organ; the healthy patient is killed to save the lives of the six (Benthamite utilitarianism: greatest happiness of greatest number). Is it not a monstrous utility? There can be a real example as well. The atomic bombing of Nagasaki and Hiroshima was justified by Allied forces for greater good. Had these cities not bombed, Japanese would not have surrendered and in prolongation of war many more people would have suffered. Bombing was done to avoid greater pain. This is a case of monstrous utilitarian morality. RRR

Benthamite Utilitarians justify punishment only if it produces best consequences. In a city, a member of Y community is alleged to have raped a woman of X community. A lynch mob is preparing to kill indiscriminately the members of Y community. The superintendent of police, the Judge and the Jailor, honest and well-meaning persons, in order to prevent lynching of hundreds of innocent members of Y community, arrested an innocent person of Y community condemned to death in a mock trial and immediately executed and thus, prevented the lynch mob from committing massacre. An innocent person is sacrificed (punished) for the best consequences. However, J.S. Mill and Sidgwick provide a better alternative hedonism. Mill fixes a benchmark below which the happiness of a minority (Y) cannot be lowered, whereas Sidgwick prefers happiness of all, even if it is not the greatest. Most of the people will say utilitarianism is wrong under these circumstances. A Kantian will philosophically say the right to life has intrinsic value; no amount of consequential good will trump the right.

For the utilitarian punishment means deliberate inflicting of pain in the hope that either the punishment will reform the subject or deter potential criminals from committing crime; they look to the consequences of punishment. But a Kantian would assert that the punishment is just reward of his act/violation of rule of morality/law, irrespective of consequences. Utilitarian looks to the future but the Kantian to the past. Utilitarians are not in favour of law that are ineffective, that is the laws that do not serve to prevent crime, unlike the Kantians who believe in just reward to the wrong doers. The utilitarian rules out ex-post facto laws, laws that are improperly promulgated and the punishment of infants, persons of unsound mind, the persons who are physically compelled to do the wrong. But the futuristic justification is not acceptable to the Kantian. The only reason to punish a wrong doer is that he has done a wrong. The wrong is not substitutable by any other consideration, it does not have a price (exchange value), that is punishment, the just reward, is deserved irrespective of consequences. The Kantians approve retribution theory, look to what the wrong-doer has done in the past. For his act he must get his deserts. Kant's rationalist deontological argument rejects Cesare Beccaria's (On Crimes and Punishment, published in 1764 C E) (FN) futuristic hedonistic argument. The victim of the wrong-doer has a right, which has an intrinsic value, therefore, the wrong-doer must receive his desert, irrespective of social consequences. Wrong-doer is punished because he has entered into the autonomy of the victim. Individual's autonomy, has dignity, and is not substitutable, therefore the wrong-doer must receive his reward. Individual's autonomy, having an intrinsic value, cannot be manipulated to serve some other social purpose such as preventing crime in future. Only the consideration of retribution can determine the punishment to be awarded to the criminal.

However, a priori of Kant is different from utility of Bentham's greatest happiness of greatest number, that of J.S. Mill's insistence on a benchmark of the happiness of the minority from which benchmark the happiness of minority cannot be lowered and that of Sidgwick's universal hedonism as they all are futuristic. Kant's a priori is related to intrinsic dignity of man, which does not have a price and therefore, not substitutable. Nothing can compromise the primacy of rights.

As the concept of right is a priori, it has certain unique characteristics, which according to *Lord Bhikhu Parikh* [its Marxist Critique] are as follows: - The Modern Conception of Right and

1. Right is a claim, that is its enjoyment does not depend on charity and kindness of others, but is a claim rightfully acquired which others must respect.
2. Right holder has a title which enables him to show it whenever his right is challenged.
3. The right is recognised by a territorial recognised legal authority and the holder can point to a law which confers the right. Non-statutory customs, conventions in order to acquire the force of a legal right must be recognised by a statutory law. However, in the opinion of the author of this paper, the only exception to the concept that validity of a right emanates from a territorial legal authority and its law, seems to be human right discourse which originates from Kantian a priori intrinsic right concept. A human is human because of intrinsic right.
4. Having a right means that one can do anything with the right in conformity with the condition of its grant. If I have a right over a chair, then subject to the condition of the grant of the right, I can sit over the chair, I can sell it, I can destroy it or can do anything with it. If X borrows a sum of money from Y, Y can

insist on repayment of the sum even if the need for money of X is far greater than that of Y.

5. Having a right does not only mean that the holder of right can do anything, subject to conditions of grant, with the right, but also can exclude others from having access to it, irrespective of relative need of them. If X owns a house consisting of 100 bed rooms but lives alone in the house, he can legally exclude poor people sleeping on pavements in chilly cold weather, from entering in the house. Relatively higher and consequential need is irrelevant.
6. Right also imposes burden and hardship on others. Minimally it requires others not to interfere with the right of others. On the other level they have to contribute financially to create and protect the right. They have to contribute financially for the maintenance of state apparatus to protect the rights. The burden is distributed unevenly. Greater burden is imposed on people with scant resources. Most important is the fact that the disproportionate distribution of rights adversely effect the pride and dignity of the poor. A poor man, whose son cannot get medical treatment for want of money, is naturally tempted to the surplus resources of a rich man, but sanctity and inviolability of rich man's right require the poor man to control his temptation. Uneven distribution of rights adversely effects the pride and dignity of the poor.

Utility, the main characteristic of a welfare state partially tries to restore the pride of the deprived. It either redefine rights or to an extent trump the rights, which are treated inviolable rights of the privileged by the right-discourse.

Modern libertarian states treat liberty as the highest value; for *John Rawls,(FN)* though welfare is the right of the deprived, liberty has a lexical priority, not to speak of *Robert Nozick* for whom liberty alone is a relevant consideration. Libertarian state naturally creates a highly stratified right-domain. Even in the most prosperous of capitalist society there are pavement dwellers living in abysmal poverty.

In most o the capitalist democratic societies, benefits and burdens are distributed by the state through ‘right discourse.’ Indian political system also follows this model. But everywhere in the world, particularly in the systems that follow welfarism, to a varying and limited extent ‘utility discourse’ model is allowed to make inroads in the ‘right discourse’. This is done to mitigate the rigour and injustice done by right discourse. We, in this paper, shall discuss the complex interaction between right and utility discourses, but shall confine only to Indian legal system. Our inquiry, relating to use of mixed discourse is confined only to Indian Legal System.

Use of utility discourse to mitigate injustice may not only be done at legislative level but at judicial level also. There are several examples when utility discourse was used by Indian legislatures to undo injustice, wholly or partially, caused by law, based on right discourse. Debt slavery or bonded labour system was based on contractual relations. If a valid law of contract creates rights, these rights, in terms of right discourse deontology, are sacrosanct and must be implemented, even at the cost of inconvenience to others. Bonded labour system was based on contractual relationship between the creditor and debtor. As the debtor, in such cases, an abysmally poor, was not able to provide security for the repayment of the debt, he pledged his personal service to the creditor against starvation wages. For example. X, a debtor promises to the creditor Y that for a debt of five thousand rupees, X will provide his personal service, from six morning to eight in the evening, and food twice a day and a pair of loin cloth and vest every six months, to Y against twenty rupees per month till the satisfaction of the debt, the interest being twenty rupees per month, with the result that the debt will never be satisfied but keep on increasing. This system resulted in perpetual indebtedness of the debtors who more often than not, were Dalits and landless labour. In 1976 Mrs. Indira Gandhi, the then Prime Minister got a law passed by the Parliament, *the Bonded Labour System (Abolition) Act 1976*, which provided that

"An Act to provide for abolition of bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of the people and for matters connected therewith and incidental thereto." [the preamble]

The system was based on the inability of the debtor to obtain debt on fair and reasonable terms from banks and financial institutions and therefore, they, under duress, were forced to accept any terms of contract. In other words, it was a form of standard contract, the terms of which were dictated by one of the parties alone. The terms of the contract were accepted under duress or acceptance was forced. Under the Act the creditor was forced not to enforce the terms of the contract. Enforcement of the terms of the contract as well as the realisation of the principal and interest became punishable. The Act provides that the bonded labour system has been abolished; no person shall make any advance in pursuance of the bonded labour system contract and force any person to render any bonded labour or forced labour *(section 4)*. After the commencement of the Act, liability to pay debt under the bonded labour system is extinguished (sections 6-9). Any attempt which perpetuates, implement and enforces the bonded labour system is punishable (sections 16-20 and 23).

The provisions of the Act trump a vested right under the Contract Act in pursuance of utility considerations. Has it been done on Benthamite considerations, that is for the happiness of larger number of debtors at the cost of happiness of a few creditors? Or to undo injustice to the poverty-stricken helpless landless labour whose unfortunate condition was exploited by the greedy creditors? Or to implement Mill's insistence on a benchmark of happiness for a minority (debtors though not a minority numerically but a minority in power structure). Or in consideration of Sidgwick's insistence on happiness of all. Perhaps the parliament passed the law on twin consideration of happiness of greater number and mitigation of exploitation of the poor.

But the legislature deviates from right discourse only in exceptional cases. Right discourse is the rule, utility an exception. If X, the creditor, an exceptionally rich person insists on realising his debt, though the realisation would make X insignificantly richer and the debtors Y and Z respectively would be prevented from meeting his terminally ill wife's medical expenses and continuing with the higher education of his son, the claim of X will be preferred over the claims of Y and Z. Despite the disadvantage caused to Y and Z, all the resources of the legal system would be used to assist X in realisation of his debt. The twin considerations of happiness of greater number and injustice would not persuade the legislature or the judiciary to provide relief to Y and Z. under Indian law or under any other capitalistic system poverty is not allowed to trump or modify rights except in extremely rare circumstances.

The Bonded Labour (Abolition) Act was passed to undo the practice of bonded labour, which resulted in enslaving a number of landless-labour in rural India. But the Indian legislatures have given relief to many even when the consequence was not enslavement. However, we shall discuss only three of them, namely, the Madhya Pradesh

Scheduled Tribe Debt Relief Regulation 1962, the Maharashtra Debt Relief Act 1975 and the Uttar Pradesh Debt Relief Act 1977.

The M. P. Scheduled Tribe Debt Relief Regulation 1962 extends to all scheduled areas in Madhya Pradesh. (section 1). The Regulation extends to all members of any scheduled tribe in Madhya Pradesh, declared as such under Article 342 of the Indian Constitution (section 2). However, the Regulations do not apply to a loan given by a bank or to any due tax (section 4). All cases, including pending cases in civil courts, involving loan given to a member of the tribes in scheduled areas shall be decided by Debt Relief Courts (DR Courts) and jurisdiction of civil courts is barred (sections 3 and 5). Every debtor, within sixty days of establishment of the Debt Relief Courts, shall apply in the prescribed format to these courts (section 6). Neither of the parties is allowed to engage an advocate (section10). The D.R. Court shall reopen the transactions with back dates and shall calculate rate of interest as given in the first schedule (section 13, first schedule: 4.5% for secured loan and 6% for unsecured loan, if more interest already has been paid in earlier transactions, it shall be adjusted towards the satisfaction of the principle). The D.R. Court shall also fix the instalment to be paid by the debtor (section 14). In case of mortgage of land, no land shall be allowed to be transferred to a non-tribal person.

The M.P. Regulations 1962 do not extinguish debts, unlike in case of the Bonded Labour (System) Act, but on equitable consideration, reduce the rate of interest and provide a reasonable schedule for repayment of the loan. In the case of the tribal people living in a scheduled area, the D.R. Court is allowed to interfere with the rights of the creditor. However, if such a debt exists in favour of debtor who lives in non-scheduled area, or if a non-tribal debtor lives in a scheduled area, the Act would not apply. In other words, the state under the Act will reduce the rate of interest and modify the schedule of payment in favour of the tribal debtor living in a scheduled area. The state on utility considerations, will interfere with the 'vested 'right' of the creditor. It amounts to saying that to a person, not covered under the provisions of the Regulation, the state will use all its resources to enforce the rights of the creditor even if the debtor will not be able to give medical treatment to his terminally ill wife or will not be able to educate his meritorious daughter because the resources of the debtor, are diverted for repayment of the loan, even if the creditor is stingingly rich.

Perhaps the legislature wants to protect the tribal people in the scheduled areas as they are accustomed to a different mode of assignment of property rights. Most of the tribes still live in semi-communal mode of assignment of property rights. That means exclusivity of use of property rights, has not yet been fully internalised by the tribes. To an extent and only to an extent, property rights are communal in the cultural milieu of the isolated tribes. The culture of assignment of property rights in isolated tribes and urban capitalistic culture is different.

In different societies, property rights are assigned differently. Assignment of property is not merely a legal question, it is rather a political and cultural question. Different political dispensations assign property rights differently. In the United States property rights are sacrosanct. They are extension of the personality of an individual; to deprive a person of his property is to deprive him of his liberty and attack his personality. In erstwhile soviet socialist society, property beyond a certain limit was a means of exploitation. The Marxist jurists made a distinction between personal property, the property essential for the personal use of the individual and property for the use of society rather than an individual: the latter category of property, if appropriated by an individual is a means of exploitation (*Karl Renner FN*).

In early, as well as in later colonial period in India to a lesser extent, a number of properties were communal. In Indian villages, wells, ponds, water bodies and pasture lands were communal. Not only property was communal, social behaviour was also cooperative and multiplex as communal property exits only in cooperative environment. The process of individuation had yet to begin. In the absence of an evolved market, people were dependent on each other, unlike in present day society where they are dependent on impersonal one-time bilateral market.

U.P. Debt Relief Act 1977 gives relief from indebtedness to agricultural landless labourers, rural artisans, marginal farmers, small farmers and urban workers. The scheme is aimed at replacing distribution of benefits and burdens through utility rather than through rights discourse. Legally vested rights of a few creditors have been partially sacrificed in favour of many debtors of certain categories namely agricultural landless labourers, rural artisans, marginal farmers, small farmers and urban workers. But relief given to them and tempering with the right-discourse varies from category to category. However, the vested rights relating to debt (taxes cess and fee) due to central or state government or to a government company, Life Insurance Corporation of India, a banking company, Agriculture Refinancing and Development Corporation, the U.P. State the Agro-Industrial Corporation, the Agricultural Finance Corporation, are not trumped under the Act. Under this Act, unlike in Bonded System (Abolition) Act, indebtedness has not been extinguished but only scaled down, keeping in view the economic and social status of the debtor. For different categories, the quantum of relief is different. The centrality of the Act of the U.P. Debt Relief Act and that of the Bonded Labour (Abolition) Act is the same, that is tempering with the legally vested right on consideration of utility discourse is central to both the laws.

The Maharashtra Debt Relief Act 1975 does both, extinguish the liability to pay the debts in certain cases and diminish the liability in other cases. The Act "provides relief from indebtedness to certain farmers, rural artisans, rural labourers and workers". The Act has a sunset clause. The Act will remain in force from 22nd August 1975 to

21st August 1989. As the Maharashtra government realised that non-institutional creditors are charging usurious rates of interest from poor debtors, the Act was passed to give relief to them. Section 4 provides that the debt of a worker, a marginal farmer, a rural artisan and a rural-labourers, the market value of whose immovable property does not exceed Rs. twenty thousand, shall be extinguished. however, as per section 14, if the market value of the immovable property of the debtor is more than Rs. twenty thousand but does not exceed Rs. forty thousand, the debt shall not extinguish but shall be scaled down.

In certain cases, even religious and customary rules recognised by courts as binding, curtailed the vested rights. In order to give relief to the debtors, the classical Hindu law provides the rule of damdupat and Muslim law the rule of Riba. The rule of Damdupat is a branch of the Hindu Law of debts. The application of the said rule requires that the debtor must be a Hindu. According to this rule the amount of interest recoverable at any one time cannot exceed the principle. That means the interest cannot be accumulated to such an extent that it exceeds the principle. However, the amount of total interest can exceed the principle if it is realised in several transactions with the condition that the amount at any one transaction must not be more than the principle. Damdupat is also does not meet the test of a Kantian 'right' in as much as it trumps the right on futuristic considerations; damdupat operates to avoid consequential harm to the borrowers.

Riba is an Islamic rule that prohibits charging of interest for a loan. Riba also operates to avoid consequential and futuristic charging of interest, for it is not related to profit or loss to the borrower. In place of riba, Islamic law prefers Murabaha, which is cost plus financing system in which the ownership of the property remains with the financer till the amount of the sum given to the debtor plus cost (profit) is not paid to the financer in instalments.

Vested rights may be trumped by the Judiciary as well. In some cases, the discretion to trump vested rights is given by the legislature and at others acquired by the Judiciary itself. The Usurious Loan Act 1918 (it has been amended by various states and its latest update was in 2019), is one of the cases where this power to the judiciary has been conferred by the legislature. The Act instead of scaling down the liability to pay loans, gives the power of scaling down the interest to the courts, if in the opinion of the court the rate of interest is excessive, or if the transaction is substantially unfair but the court cannot re-open the agreement and cannot create new obligations.

Another such case is the culpable homicide not amounting to murder. The accused has deprived the victim of his right to life under grave and sudden provocation. The sentence is reduced because the provocation caused by the victim, an event prior to the deprivation of right to life of the victim, is taken into consideration. In case of culpable homicide caused by the accused under battered woman syndrome, a circumstance, independent of culpable homicide, is used by a Bench of

Madhya Pradesh High Court to reduce the sentence of an accused of murder because murder was committed under 'battered woman syndrome' (though the term battered woman syndrome has not been used by the judge). In *Gyarsi Bai v. State*, [1953 CRILJ 588]. The observations of Dixit J. are significant.

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". [V. K. Dixit (ed.) Vinod Dixit: Determinism and Freedom of Choice in Criminal Law: Battered Woman Syndrome, V.K.Dixit (ed.) 2025 1 JCCJ (online) 31.] Perhaps the Judge was referring to a state of mind which is neither 'unsound' nor 'sound'. 'Grave and sudden' provocation is also such a state of mind which stands between 'sound' and 'unsound', but legally it (grave and sudden provocation), for entitlement of relief, 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,' but whether it also is a characteristic of 'battered woman syndrome,' is uncertain. The Judge further recommended "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," [V. K. Dixit (ed.) Vinod Dixit: Determinism and Freedom of Choice in Criminal Law: Battered Woman Syndrome, V.K.Dixit (ed.) 2025 1 JCCJ (online) 31.]

Further in case of punishment the legislature gives discretion to the judge to award imprisonment or fine for any term of imprisonment or amount of fine subject to maximum provided, taking into consideration the antecedents of the parties and attending circumstances, that is, the events happening before or after the actus reus. The events happening before or after the actus reus are a posteriori and not a priori, running counter to Kantian definition of 'right'.

These are some of the many cases, where utility considerations were used to temper with the Kantian concept of right by the legislatures or the judiciary, it is neither possible nor necessary to discuss all of them. It may safely be concluded that in a capitalist society, necessarily benefits and burden are distributed through 'right discourse', primarily because all libertarian societies are economically highly stratified, without which stratification the very basis of capitalism would collapse. It also is incumbent ideologically to do so in a libertarian society as the highest value is liberty and equality either has lexically lower value or only has a marginal value. The natural tendency of liberty is to create a stratified and class divided society. However, in every libertarian system, even in one envisaged by Robert Nozick, equality cannot be totally dispensed with. For the smooth functioning of the political system, some egalitarian measures have to be taken for those left behind in the cut-throat competitive society. Right discourse is the main tool to distribute benefits and burdens, but utility is a balm for those left behind or have qualities not rewarded by market economy.

IV. PUBLIC MORALITY AS A CENSORING TOOL: THE CHANGING NOTIONS OF MORALITY IN UK, USA AND INDIA

- *ZEENAT FAROOQUI*[*] *AND NIKHAT ZABI*[*]

Abstract

The renowned 1950's debate between British and American legal philosophers H.L.A. Hart and Lon L. Fuller and symbolized a foundational clash between natural law theory and legal positivism. Hart, a leading positivist, argued that law and morality are not inherently connected, although they may intersect at times. He acknowledged that societal morals influence legal development, but he viewed such connections as coincidental rather than essential. Earlier positivists like Bentham and Austin shared similar views, recognizing that legal systems and moral standards often influence each other, yet still maintained that law's legitimacy lies in its procedural structure rather than its moral grounding. In contrast, Fuller, a proponent of natural law theory, asserted that legal systems are inherently rooted in morality. He believed that laws emerge from evolving societal values and mores, and that these moral foundations are essential for creating a harmonious and functioning social order. To explore how these philosophical frameworks manifest in practice, one can examine the use of public morality as a justification for

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censoring free speech. Issues of "decency and morality" have historically played a significant role in restricting expression. However, across jurisdictions such as the United Kingdom, the United States, and India, courts have gradually shifted toward a more restrained and nuanced application of these limitations. Obscenity laws in these countries have undergone important transformations, increasingly reflecting libertarian values.

***Keywords**: morality, decency, social order, censorship, paternalism*

"*I disapprove of what you say, but I will defend to the death your right to say it*".

Plato (The Republic)

VIII. INTRODUCTION

Issues of "decency and morality" have historically played a significant role in restricting expression. Social customs, norms, rules, and mores all stem from the broader concept of morality—a notion that courts and policymakers around the world continue to wrestle with. Determining what is moral or immoral often remains clouded in legal ambiguity. However, it is widely acknowledged that as society evolves, so too do its moral standards and social taboos, often shifting in both form and substance over time. Freedom of speech is a constitutional cornerstone of liberal democracies and is universally acknowledged in international human rights frameworks.[1] Broadly speaking, it encompasses the rights to conscience, thought, and choice, and culminates in the ability to express oneself without facing undue restrictions like censorship. Censorship, in contrast, refers to the act of placing limits either directly or indirectly, and by the government or other entities on the exercise of this right[2]. While libertarians often view censorship as a direct infringement on individual liberty, Communitarian theorists argue that it can serve as a *necessary constraint*—a means of limiting certain rights to protect the broader rights and well-being of the community. However, across jurisdictions such as the United Kingdom, the United States, and India, courts have gradually shifted toward a more restrained and nuanced application of these limitations. Obscenity laws in these countries have undergone important transformations, increasingly reflecting libertarian values. This research undertakes an evolutionary examination of morality, using the legal treatment of obscenity as a focal point. Through a comparative analysis of obscenity laws across different jurisdictions, the study aims to illustrate how moral perceptions have transformed alongside broader societal changes.

[1] United Nations General Assembly, *Universal Declaration of Human Rights*, UNGA Res 217 A (III) (10 December 1948); *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[2] Bryan A Garner (ed), *Black's Law Dictionary* (11th edn, Thomson Reuters 2019).

India's ranking on the Index of Moral Freedom has shown a decline over recent years. In 2022, India was placed at the *74th position out of 160 countries*, with a performance score of 49.3%. This marked a 2.1% drop from its 2020 score[3]. India's decline is attributed to factors such as increasing restrictions on religious freedom, limitations on sexual rights, and constraints on freedom of expression. In comparison, countries like Portugal have seen significant improvements in their moral freedom scores during the same period. Recent controversy ignited in India Got Latent[4] highlights the ongoing tension in India between freedom of expression and societal norms. While digital platforms have democratized content creation, they have also raised questions about the boundaries of acceptable speech and the role of government and institutions in regulating online content. This incident serves as a case study in the challenges of balancing creative expression with cultural sensitivities in the digital age.

The Researchers intend to address the issue of censorship which is imposed on the content creators and artist in the justification of decency and public morality resulting in imposition of an indefinite deferral merely on grounds of public sentiments and ideology based on conjectures. Such censorship many a times override the Constitutional rights to exercise freedom of speech and expression and stands incongruous to the present day.

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[3] *World Index of Moral Freedom* (Foundation for the Advancement of Liberty, 2024) para 3.12.
[4] *Ranveer Gautam Allahbadia v Union of India* WP (Crl) No 85/25 (X) (2025).

The research methodology opted for this study is '*Empirical*' in nature. A systematic survey and observation from the primary data collection has been done with review and references of journals, articles and publications from the secondary sources. The researchers have employed an analytical approach to evaluate the contemporary legal scenario as provided in primary and secondary data.

The present research is limited to the existing legal framework of the United States of America, United Kingdom and India. Further owing lack of resources the empirical research has not been done through physical interview.

IX. THE JURISPRUDENTIAL DILEMMA OF LAW AND MORALITY

The debate over whether the moral majority can impose its views on society is not new. This issue was notably explored in the 1960s by figures like Lord Devlin, H.L.A. Hart, and Ronald Dworkin. At that time, concerns were raised over the perceived decline in sexual morality, leading the government to establish a committee to review whether laws regarding homosexuality and prostitution should be amended. The debate intensified after the committee, known as the

Wolfenden Committee, submitted its report advocating the legalization of prostitution and homosexuality. The purpose of the report was[5]

"to preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others especially the vulnerable, that is the young, weak in body or mind, inexperienced or those in a state of physical, official or economic dependence. The law should not intervene in the private lives of citizens or seek to enforce any particular pattern or behaviour further than necessary to carry out the above purposes".

John Stuart Mill's Harm Principle- The committee argued that certain matters should be left to individual moral judgment, a reasoning that closely aligns with John Stuart Mill's harm principle. According to this principle, as long as individual actions do not harm others, people should be free to make their own choices. The report sparked significant debate, with many influential thinkers taking opposing positions. Lord Devlin, for example, rejected the report's conclusions. He argued that society shares a common morality—an agreement on basic concepts of good and evil—that is essential for maintaining social cohesion.

[5] Catherine Elliott and Frances Quinn, *Law and Morals* (11th edn, Pearson Education Ltd 2018).

Lord Devlin's Common Morality- According to Devlin, the law has the right to uphold this common morality. He believed that practices which provoke societal disgust should be prohibited, asserting that society has the right to eliminate such practices. Furthermore, Devlin contended that the law should set a minimum standard of morality, which, in his view, should be relatively high. According to Devlin, the widespread availability of pornographic material could undermine the traditional concept of marriage and family, or alter the understanding of sex and relationships in a way that could harm society. In his view, society has the right to intervene and prevent these changes through legislation.

Ronald Dworkin -also critiqued Lord Devlin's notion of moral convictions, which Devlin defined as a form of disgust that could lead to intolerance. Dworkin distinguished between true moral convictions and mere tastes, prejudices, or flawed rationalizations based on incorrect facts or unverified beliefs. He argued that the grounds Devlin used for restricting actions or expressions were unjustifiable because they often stemmed from misguided or superficial beliefs rather than genuine moral reasoning[6] *"...the principles of democracy we follow do not call for the enforcement of the consensus (against homosexuality), for the belief that prejudices, personal aversions and rationalizations*

[6] Ronald Dworkin, *Taking Rights Seriously* (1st supp, 4th edn, Bloomsbury Publishing Plc 2005).

do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality…"

The argument of both Hart and Dworkin lays emphasis over the fact that moral conviction entails that a very high level of public morality is necessary, but at the same time, even the highest level of morality cannot play rough shots towards the entrenched rights.

Lon Fuller and H.L.A. Hart: debate

The arguments between Herbert Hart and Lon Fuller were essentially stored in the legal system's own vaults. Although he did not argue that morality and the law are diametrically opposed or unrelated, positivist Hart held that morality and the law are not always related. Hart did not dispute that the mores of the society in which a legal system was being developed do have an impact on the formation of that system, citing the two scholars' equality of "the law as it is" and "the law as it ought to be.

Hart's preferred method did not rule out the possibility of integrating moral values into the law. This idea is particularly relevant in constitutional law, where moral values often influence the interpretation of legal provisions. for instance, Bentham believed that the state constitution might limit the legislature's authority and that moral principles could produce the substance of the aforementioned constitutional limitations. At the same time, Hart found himself in a difficult situation. First of all, a law does not cease to exist if it transgresses moral principles. However, this does not imply that a rule that is morally just turns into a law. In keeping with the viewpoint of American authors, Hart restated that the evolution of jurisprudence showed that this body of law is essentially what actually exists; even though it may not be perfect, it is not the law that ought to be rather what it is. Complicated legal disputes, upon the view of Hart, have to be adjudicated by the principles of legal interpretation – practically, this is what precedent law is for, and the moral factors are surely to be considered.

Fuller presented an entirely different viewpoint based on the notion of natural law, which upholds and respects the legal system's foundation in age-developing mores. As a result, the law is portrayed as a tool for controlling human behaviour in order to produce a harmonious social order. Fuller further stated that the fundamental principles that form the basis of laws are more likely to be a breed of morality rather than law, and that their effectiveness stems from a widespread belief that these norms are important and correct.[7]

However, he asserted that these "fundamental rules" are implemented as regular legal principles during the regular operation of the legal system. Fuller did not imply that Hart's use of the term "intersection" to illustrate the blending of morality and the law was appropriate. So,

[7] Anatoliy A Lytvynenko, *The Hart-Fuller Debate on Law and Morality within the Prism of Legal Foundation of Right to Privacy in its Earlier Jurisprudential Interpretations* (2021) *LIAP* 157, 172.

Fuller seemed to derive the foundation of the legal system as a mirror of some wholly-accepted rules, which were later not once codified, developed and expounded in jurisprudence.

Generally speaking, the argument between Hart and Fuller is a conflict between understanding what law is and how it is constructed (in this case, we may use a number of auxiliary questions, such as ***"what ought to be the law,"*** *"when is the law deemed to be legitimate (from the moral side of view)?" or "is such a thing as morality known to old civil law?")*, how is law and morality related. They both stood for quite different ideologies; one supported American positivism, while the other supported naturalism.[8]

X. COMPARATIVE ANALYSIS OF OBSCENITY JURISPRUDENCE IN U.K., U.S.A. AND INDIA

A. United Kingdom

The historical accounts of U.K. shows that since ancient and medieval ages, offences like '*sedition*', '*blasphemy*' and '*heresy*' were used in order to ban circulation and publication of immoral and indecent materials. Development of printing press and other technology rapidly transported such books from across the globe to England. However, obscenity was not recognised as an offence in English law. Hence, the

[8] Steven Shavell, *Law versus Morality as Regulators of Conduct* (2002) ALER 227, 272.

court were not able to hold liable for any punishment on such grounds.[9] For the first time in 1724, Edmund Curll a bookseller, was convicted for obscenity for publication of a book entitled "*The Nun in her Smock*".[10] Later on, in 1802, William Willberforce established the society for Suppression of Vice after Royal proclamation by King George III in 1787 which was titled as 'The proclamation for the discouragement of Vice' to promote 'public morality'. Due to this there were demands for a specific legislation to criminalise obscenity, resulting in the Obscene Publication Act, 1857 which criminalized '*obscene libel*', still it was ineffective in fulfilment of its purpose.

In 1868, the landmark case of ***Regina v Hicklin***[11] came up and Lord Cockburn, C.J., gave the definition of obscenity and since then it was followed across the globe. Facts of this case involved redistribution and publication of pamphlet titled '*The Confessional Unmasked: Shewing the Depravity of the Romanish Priesthood, the Iniquity of the Confessional, and the Questions Put to Females in Confession'* by Henry Scott.[12] The famous test known as Hicklin's test was evolved which was *"whether the tendency of the matter is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands publication of this sort may fall."*[13] Due to its pure

[9] Patrick J Kearney, *A History of Erotic Literature* (first published 1982, Macmillan) 268.
[10] ibid.
[11] (1868) LR 3 QB 360.
[12] Dany Lacombe, *Blue Politics: Pornography and the Law in the Age of Feminism* (2nd edn, University of Toronto Press 1994).
[13] Ibid.

subjective nature it received lot of criticism from various academicians and judiciary across the world. As per the test the contextual reading will be irrelevant, even an isolated part will be sufficient to make liable for obscenity also in terms of the audience the test is of the most vulnerable person which will also include a highly impressionable adolescent rather than a reasonable mind person. Hence, it can be observed that the threshold kept for this is quite low so it will be very easy to make any expressional freedom a target of this test and hold accountable for obscenity. Due to this test in history so many good content literatures were banned and burnt to ashes.[14]

Close to a century later, when *R v Martin Secker and Warburg Ltd* [15] came, then a shift in obscenity laws took place, the judiciary then adopted a liberal perspective and stated that the present attitude on the 'sex and context' has to be used for determining obscenity even with the application of Hicklin's test. This resulted in framing of a liberal law and a slight change in the societal perspective on obscenity which

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[14] Some notable examples are:
1. *Radclyffe Hall*'s work *The Well of Loneliness* examines the life and challenges of a woman coping with her lesbian identity and social rejection. The book was controversial in the UK shortly after it was published in 1928. Authorities concluded that the work could corrupt vulnerable readers based on the Regina v. Hicklin principle. Consequently, British courts ruled that the book was obscene and mandated that it not be publis hed or distributed in the UK.
2. Under the rigorous obscenity standard evolved from Regina v. Hicklin, *D. H. Lawrence's Lady Chatterley's Lover* was banned in the US, UK, and other nations due to its explicit sexual descriptions and language.
3. *James Joyce's Ulysses* was outlawed in both the United States and the United Kingdom due to sections that discussed sexuality being deemed offensive under the stringent Regina v. Hicklin standard.
[15] (1954) 2 All ER 683.

was *Obscene Publications Act, 1959.* Its preamble states three objectives of the Act- "*to amend the law relating to the publication of obscene matter", "protection of literature" and the need to "strengthen the law concerning pornography.*"[16] For the very first time Obscene Article was defined in this Act as *"effect or . . . the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."* As per this sections' interpretation it can be observed that contextual interpretation of obscenity will be considered in this law, that is a dominant effect of the entire work will be considered. Also, the audience in this legislation is changed to *'likely audience'* instead of *'most vulnerable person'* which means that what will be obscene and what will not, will be the opinion of the likely reader and not any person. In *R v Penguin*, this legislation was applied for the very first time, in this publication of the book 'Lady Chatterley's Lover' by DH Lawrence was seen. The Court gave a progressive interpretation from 1959 Act, and held that the book is not obscene in terms of artistic and dominant effect of the work.

Later, Obscene Publications Act, 1964 came up, where 1959 Act criminalised only 'Publication' of the work, the new legislation made *"possession, ownership or control of an obscene article for publication*

[16] The Obscene Publications Act, 1959.

for gain" an offence.[17] Basically, this legislation entered into the private spheres of the audience. In another landmark judgment of *R v Anderson*[18], known as the *Oz trial*, it dealt with an issue where a group of students edited a magazine, where some materials had some sexual references. The Court held while acquitting the editors, that magazine contains severable content, the fact that some items were innocuous does not prevent others to be outside the ambit of obscenity.

In *R v Calder & Boyars Ltd*[19] there was this movie '*Last Exit to Brooklyn'*, where life details in Brooklyn were shown which included drugs, homosexuality and a lot of violence. The court held the movie to be outside the ambit of obscene content as the effect was to detract the audience and create a shock among them. To be obscene the effect of work should cause an aversion among the minds of the audience. During this trend apart from written work, various visual forms of media which had a larger impact on the audience came under the focus and hence television was included in 1959 Act by the Broadcasting Act, 1990.[20]

Film Censorship in UK is considered to be strictest among other forms of media, due to the larger impact on the minds of the viewers. Here,

[17] The Obscene Publications Act, 1964
[18] (1971) 3 All ER 1152
[19] [1969] 1 QB 151.
[20] Dhawal Shankar Srivastava and Zubair Ahmed Khan, *Censorship: A Moral Dilemma or an Immoral Siege on Freedom of Speech* (2022) 5 Shimla Law Review 143, 160.

Censorship happens at three level which are Director Public Prosecution, British Board of Film Classification and Local Authorities. The British Board Film Classifications. An independent and non-government body has framed guidelines for regulation of cinema. Regarding this in landmark judgment of *R v Video Appeals Committee of BBFC*[21] it was held that from adults' rights to watch some kind of videos owing to risk of the same to be inappropriate for under aged public.

In case of electronic communications, only 'grossly' offensive communication using public network is penalised as per section 127 of the Communications Act, 2003, hence a liberal perspective is seen for determination of decency along with this age-old Theatre Act, 1843 was repealed. Along with this, Children were given protection under Protection of Children Act, 1978 and the Sexual Offences Act, 2003, which penalised indecency and child pornography. A significant development took place through Criminal Justice and Immigration Act, 2008 which dealt with different forms of pornography.

Above trajectory shows the evolution of the jurisprudence of the obscenity in United Kingdom, the changes can be seen from that of a *conservative perspective of decency and morality to a liberal aspect.* If seeing the contemporary legislations and judicial precedent it can be observed that universally unaccepted expressions like paedophilia,

[21] [2000] EMLR 850.

necrophilia, self-destructive sexual assault, bestiality, etc are criminalised, other than that other forms of sexual content are subject to regulation rather than prohibition.

B. United States Of America

The United States presents a distinct legal approach due to its federal system, where both the federal government and individual states maintain their own laws on matters such as obscenity. The First Amendment, which protects the right to freedom of expression, is frequently invoked in defence of materials challenged as obscene.[22] Over time, a substantial body of case law and legislation has contributed to the development of a notably liberal legal framework regarding obscenity.

The historical development of obscenity laws in the United States has been both complex and fascinating. During the American Civil War (1861–1865), the stringent *Comstock Law* was enacted to restrict soldiers' access to obscene and pornographic materials.[23] Up until 1934, U.S. courts largely adhered to the *Hicklin* standard, which judged obscenity based on isolated passages and their potential impact on vulnerable individuals.[24] However, a significant shift occurred in 1934

[22] ibid 4.
[23] cf Weiler (n 5) 225, 240.
[24] Paul and Murray L Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship* (1957) 106(2) University of Pennsylvania Law Review 214.

with the controversy surrounding James Joyce's novel *Ulysses*[25]. For the first time, the courts moved away from the *Hicklin* approach and adopted a more nuanced standard. They held *that obscenity should be assessed by considering the effect of the work as a whole, and from the viewpoint of an individual with average sexual sensibilities.* In this case, the court defined obscenity as acts that would lead to the stirring of the *"sex impulses or to lead[s] to sexually impure and lustful thoughts*".

The Hicklin test was ultimately discarded in the United States in the landmark case of ***Butler v. Michigan***[26]. In this case, the U.S. Supreme Court struck down a provision of the Michigan Penal Code that sought to ban any material deemed likely to corrupt minors or youth. The Court, taking a pragmatic stance, criticized this overly broad restriction, famously remarking that the law adopted a "*burn the house to roast the pig*" approach. It emphasized that such sweeping censorship was unjustified, as it denied adults access to materials that were not obscene, simply because they might be inappropriate for children.

In 1957, the U.S. Supreme Court, in a landmark decision, fully rejected the *Hicklin* Test and established a new standard for determining obscenity. This came through the case famously known as ***Roth v.***

[25] *United States v One Book called Ulysses* [1934] 72 F 2. 3d 705.
[26] [1957] 1 L Ed 2d 412

United States[27]. The criteria laid out in the majority opinion delivered by Justice William J. Brennan became known as the ***Roth Test***. The test held that: "*Obscenity is not within the area of constitutionally protected speech or press. The material in question must be judged as a whole, and it must be found to appeal to the prurient interest, according to the average person applying contemporary community standards*."

This marked a significant shift in American obscenity jurisprudence, as it emphasized evaluating the work in its entirety and introduced the notion of community standards as a benchmark, moving away from the overly restrictive and fragment-based approach of *Hicklin*. It was also laid down in this case that "*sex and obscenity are not synonymous*" and mere portrayal of sex does not constitute an offence of obscenity unless the above test is satisfied. The conjunctive test of obscenity was laid down in the most significant decision in the trajectory, ***Miller v California***[28] in 1973 which involved an obscene mailing campaign. The three prongs to constitute obscenity as laid down in the **Miller test** are –

"1. *Whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest*?

[27] [1957] 354 US 476
[28] [1973] 413 U.S. 15

2. *Whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law?*

3. *Whether the work taken as a whole lacks serious literary, artistic, political or scientific value?"*

In the *Miller v. California* decision, the U.S. Supreme Court critiqued and ultimately rejected the interpretation of *"contemporary community standards*" as previously articulated in the *Memoirs v. Massachusetts* (*Fanny Hill*) case. The Court clarified that these standards should not be understood as uniform or national in nature. Instead, the *Miller* Court held that obscenity must be evaluated based on local or state-level community standards, recognizing that what may be deemed offensive in one region—such as Maine—may not necessarily be considered so in another, like Las Vegas. This shift underscored the importance of regional diversity in moral and cultural perceptions when applying obscenity laws. Since the *Miller* decision, *the American judiciary has gradually adopted a more liberal stance toward obscenity, allowing for broader freedoms of expression within certain boundaries*. However, despite this increasingly open-minded approach to adult obscenity, the United States maintains a stringent and uncompromising position when it comes to child pornography. Courts have consistently upheld strict prohibitions in this area, emphasizing the state's compelling interest in protecting minors from exploitation and harm.

C. India

Since the British era, Indian Penal Code, 1860) consisted the provision regarding Obscenity as an offence under section 292, now the same is incorporated in Bhartiya Nagrik Sanhita, 2023. According to it, 'obscene' is defined as *"if it is lascivious or appeals to the prurient interest or its effect, or the effect of any of its items, is if taken as a whole, such as to deprave and corrupt persons who are likely, having regard to all relevant circumstances to read, see, or hear the matter contained or embodied in it."*[29] Also, the publication, distribution, circulation, advertisement, sale and even possession of obscene material constitutes an offence.

India got its first famous case on obscenity in 1965, ***Ranjit D. Udeshi v State of Maharashtra***[30] which was primarily decided on the basis of Hicklin test. Udeshi was prosecuted under section 292 of the IPC for selling an allegedly obscene novel 'Lady Chatterley's Lover' by DH Lawrence. He argued that section 292 violated his rights to freedom of speech and expression guaranteed under Article 19(1)(a) of Indian Constitution. Even after the opinion of a renowned writer and art critic Mr. Mulk Raj Anand in his testimony, that *"the novel was a classic work of considerable literary merit and not obscene"*[31], Udeshi was found guilty by trial court, this verdict was upheld by Bombay High

[29] The Indian Penal Code 1860, s.292.
[30] [1965] 1 SCR 65.
[31] ibid.

Court and Supreme Court upheld the same in appeal. Apart from constitutional validity of the provision, a holistic and contextual reading will not make the book obscene.

Also, determination of standard should not be the vulnerable and immature teenage class instead of a reasonable man. High court countered by stating the book failed to satisfy the Hicklin's test as its principle will be applicable in India as well. Supreme Court interpreted 'obscene' term as "*offensive to modesty or decency; lewd, filthy and repulsive"* and also it should be seen that the material "*appeals to the carnal side of human nature, or having that tendency*." It was also held that the knowledge of the seller is irrelevant in such cases. The apex court held that where art and obscenity are intermingled, the artistic merit and social purpose of the work should be seen and nudity and sex should not be considered obscene. Also, the court confirmed the standard of the vulnerable and not the reasonable man or an audience alike. On the basis of this reasoning section 292 IPC was held to be constitutional.

In *Chandrakant Kalyandas Kadodkar v State of Maharashtra*[32] where 'shama' an alleged obscene short story was published; Court held the variation of morality and decency from one country to another and disregard to Udeshi judgment declared *the standard for determination*

[32] (1969) 2 SCC 687.

of obscenity should be observed from that of an average person instead of an ordinary or hypersensitive person.

In *K.A Abbas v Union of India,*[33] a documentary 'A tale of four cities' was concerned, somewhere in the middle the infamous red-light areas of Bombay was shown. Due to this scene, the documentary was denied 'U' (universal) censorship certificate and given the 'A' (Adults Only) certificate. The Court ruled against the petitioner and held cinema is a medium where it reaches larger public and have deeper influence among the public and hence some prior restraint is required. The Supreme Court can be seen putting more emphasis on the efficacy of the medium of communication, than the individual's autonomous right to use reason and come to a decision by himself rather than being persuaded to do so.

Moreover, the Court puts stress on the purpose of pre-censorship in Cinema to maintain the "values and standards of society". It is respectfully submitted that this is a highly subjective construction of societal values, because values and standards are highly transient elements, and require the vehicle of expression through debates and arguments to even undergo significant alterations. Thus, a superimposed embodiment of societal values by means of state-sanctioned prior restraints based on archaic notions of rights and

[33] (1970) 2 SCC 780.

wrongs would be essentially counter-productive to this process of societal transformation.[34]

In *Samaresh Bose v Amal Mitra*[35] the court *differentiated between obscenity and vulgarity*. It was about publication of a local Bengali novel 'Prajapati' which was published in Sharodiya Desh, a wide circulated magazine. The story revolved around a local goon and it consisted 'unconventional words' along with slangs and sexual references. The Court in this case observed that this novel can be considered vulgar but not obscene, marking a significant departure from Hicklin and Ranjit Udeshi so far, *as the judge considers the writer's intention and the ultimate effect on the readers. Acknowledging 'likely audience test' while replacing the 'the most vulnerable person' formula.* This case marks a swift transition of the jurisprudence of obscenity from the archaic Hicklin's to a contemporary change on Roth- Miller interpretation.

In 1996, fate of 'Bandit Queen' was decided in *Bobby Art International v Om Pal Singh Hoon*[36] the film was based on Phoolan devi, it contained scenes of gang rape and nudity. However, even though these scenes were manifestly displayed the Court did not consider it obscene. *It interpreted in real sense and stated the essence and purpose of the*

[34] Pratap Bhanu Mehta, *What is Constitutional Morality* (2010) 615 *Seminar* 615 <https://www.indiaseminar.com/2010/615/615_pratap_bhanu_mehta.html> accessed 12 April 2025.
[35] (1985) 4 SCC 289.
[36] [1996] 4 SCC 1.

scenes to sense abhorrence towards casteist and subjugation and held that these scenes do not incite any lascivious thoughts in mind of the audience, rather the film brings out the horrific and harsh reality of Phoolan Devi. In light of such observation the court observed that such aversion can be a defence to obscenity. The apex Court also observed while emphasizing the point in the film that the enforced 'naked parade' of Phoolan Devi was integral and central part of the whole film.

In *Ajay Goswami v Union of India*,[37] petitioner went to Court against content of newspaper which is not exactly obscene as per law, but still to provide for the prurient interest of minors. He argued that frequent sex related news, advertisement and photographs in newspapers need to be regulated. There should be clear demarcation in the paper to separate the unsuitable content on discretion basis. *The Court observed that a blanket ban on such publications will unreasonably fetter on the free working of the press which will also go against the democracy, rather insisted on the* ***'responsible reading'*** *of the public.* This judgment was landmark in media law and regulation as it helps the petition non maintainable as it would deprive the adults of the information, they are lawfully entitled to under the ambit of decency permitted in our legal system. Along with dismissing the petition court gave suggestions for robust and powerful functioning of the body Press council of India Act, 1978.

[37] [2007] 1 SCC 143.

Another landmark judgment of Supreme Court, *Aveek Sarkar v State of West Bengal*[38] marks a substantial advancement in India's comprehension of obscenity and the connection between morality and the law. The dispute started when an Indian magazine replicated a German magazine shot of tennis champion Boris Becker standing naked with his fiancée, Barbara Feltus. According to Section 292 of the Indian Penal Code, a complaint was filed claiming that the publication was obscene. The Supreme Court stressed that a work must be evaluated in its entirety and in its appropriate context rather than by isolating certain parts while ruling that the photograph was not obscene. By doing this, the Court deviated from the strict criteria established in Regina v. Hicklin, which permitted content to be condemned if any portion of it had the potential to corrupt vulnerable minds. Rather, acknowledging that cultural views on morality and decency change over time, the Court adopted the community standards test.

The Court further noted that rather than appealing to prurient impulses, the photograph carried a social message because it was published in the context of an article discussing racial prejudice. The ruling reflects a more general idea that the law should be construed in light of modern societal norms and the constitutional protection of freedom of expression under Article 19(1)(a) of the Indian Constitution rather than enforcing antiquated or too strict moral standards. Thus, in a

[38] [2014] 4 SCC 257.

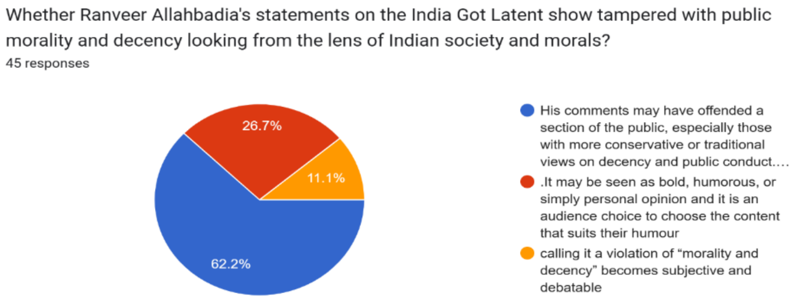
contemporary democratic society, the case emphasises the necessity of striking a balance between individual liberty and societal morality.

With this judgment it is crystal clear that Indian Judiciary has rejected the Hicklin test which considers obscenity through the impact on mind of a vulnerable teenager for an isolated image or sentence. However, Aveek Sarkar judgment was also criticised as it applied only one side of the Roth test, which Fanny and Miller in US has already superseded, also these two landmark judgments were not referred, making the test of obscenity still problematic and vague for future.

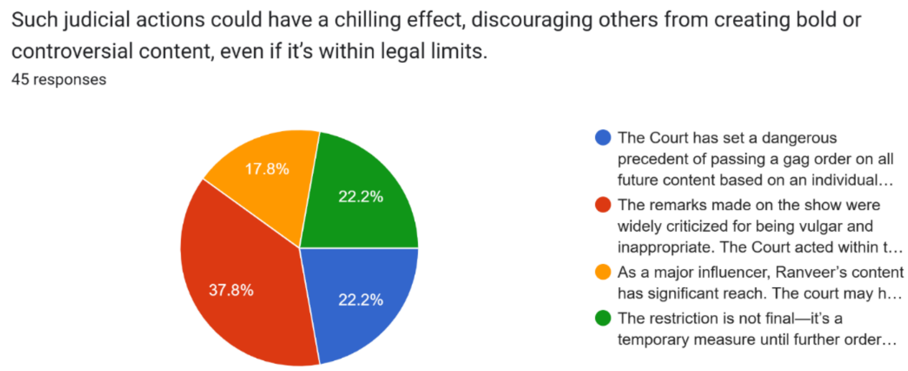
XI. MORALITY THROUGH LENS OF PUBLIC OPINION

The researchers have conducted a survey seeking opinions from the public regarding the recent controversy ignited by the statement of the youtuber Ranveer Allahabadia in 'India Got Latent' show. The statement was 'Would you rather watch your parents have s** everyday for the rest of your life or join in once and stop it forever.' The survey received responses from people belonging from both legal as well as non-legal background. Mostly aged between 18-24 and few from 25-40 slot.

To the proposition, ***whether the statement tempered public morality and decency in context of Indian society?*** The majority (62.2%) hold the view point that it has offended the conservative and traditional views on decency and public conduct. However, a significant (26.7%) have seen it as bold, humorous or simply individual choice as to the content, highlighting the perception that morality is highly subjective and depend largely on individual or cultural standard which has been supported by the researchers.



The matter is pending before Hon'ble Supreme Court; however, the researchers have sought the opinion as to ***whether the court's decision to order pre-censorship on his content be seen as undermining freedom of speech and expression?*** There is no clear majority opinion however, two significant yet opposite opinions have been received wherein, 37.8% agreed the content being vulgar and inappropriate and thus justifies court's order as reasonable restriction in line of article 19(2). However, 22.2% strongly disagree the order as it could be a dangerous precedent on all future content that has offended some group of people.



Lastly, the researchers have found that a significant portion, 53.3% have found that the current legislations dealing with the issue in hand are sufficient enough. The researchers have concluded from the overall responses reflects attention between evolving societal norms and traditional views on public decency, specially among younger and non-law respondents.

XII. CONCLUSION

D. A. Inherent Problem In Obscenity Regulation

The concept of obscenity is highly subjective

Obscenity varies greatly across cultures and contexts. One of the most common justifications for censorship is the belief that harmful literature can negatively influence the psychological development of individuals—especially children and adolescents, who are considered more vulnerable to moral corruption. This reasoning assumes that human nature is susceptible to corrupting influences, and thus, such forces must be regulated. Literature, much like painting or other forms of art, is a reflection of the creator's inner world. A writer expresses their thoughts, and a painter translates their mental imagery onto a canvas—both shaped by personal experiences. In essence, art is an outpouring of imagination informed by lived reality.

Experience, when expressed through literature, is inherently neutral—it is neither moral nor immoral, but rather *amoral*. Whether a piece is later celebrated for its literary merit or dismissed as lacking value is a matter of subjective judgment. However, because a literary piece is fundamentally an expression, the criteria used to assess it should not be rooted in ethical or social judgments, but rather in aesthetic standards. From the earliest stages of civilization, the relationship between law and morality has been deeply intertwined. As a result, lawmakers have historically been inclined to treat depictions of religion with great sensitivity, often deeming it immoral to portray religious subjects in a negative light

What constitutes public morality?

A key question that arises is: what constitutes public morality, and can it be defined in concrete terms? How do we determine that Indian public morality is against homosexuality? Can this be objectively established? By labelling something as part of public morality, we implicitly assume that society, culture, or a community is a unified whole. However, the problem with defining public morality is that it is often vague, inconsistent, and indeterminate. A historical examination of this concept shows that dominant voices have shaped public morality, and it is nearly impossible for all members of society to agree on any particular aspect of public policy.

For example, the Hicklin test, used by the court in the case of *Ranjit Udeshi*, was based on the premise that individuals need protection from corruption or moral depravity. This test is partly in line with John Stuart Mill's harm principle, which emphasizes that the law can intervene when harm is caused to others. However, the Hicklin test also reflects two additional legal theories: legal paternalism and legal moralism. Legal paternalism justifies law as a means to prevent individuals from harming themselves. Examples of this include laws against smoking or regulations requiring seat belts while driving. It assumes that, in certain situations, the state knows what's best for its citizens.

On the other hand, legal moralism prohibits actions based on their perceived immorality, regardless of whether harm is caused to others. This concept conflicts with the principle of liberal neutrality, which suggests that the state should remain neutral in matters of personal morality. The *Ranjit Udeshi* case can be seen as an example of legal paternalism. Here, the court argued that it needed to protect vulnerable individuals from the perceived corrupting influence of certain materials, aiming to shield them from moral depravity.

The reluctance for acceptance

Thus, it seems that what is today readily acceptable in fact becomes unacceptable when put on paper. Blood and guts are tolerated by society, except when combined with sexual love; great profit is made from sex through advertising, e.g., the women's underwear that is advertised so far beyond its market that we are daily surrounded by the feminine figure tightly constrained in a bra and panties; homosexuality is the favourite subject of many a "clean" joke; and, generally, our society produces a great deal that, if properly identified, would be called more perverse than it cares to think about.[39] All of these are permitted, and yet society seeks to remove the normal thoughts and desires of one sex for the other. The problem is being further distorted by the enactment of laws calculated to suppress sexual thoughts, for in effect, by so doing, our society is diminishing the healthy and accentuating the sick.

XIII. THE WAY FORWARD

If society continues to suppress that which is calculated to arouse sexual feelings and desires to all but those who are willing to break the law, then it can have no complaint if the result is the cessation of artistic

[39] William T Goldberg, *Two Nations, One Web: Comparative Legal Approaches to Pornographic Obscenity by the United States and United Kingdom* (2010) 90 Boston University Law Review 2121.

quality in this country. If, as many believe, something must be done to suppress this intangible thing called "obscenity," it is believed that such suppression cannot be adequately achieved through the legislature or the courts, but must be achieved through self-censorship. It is firmly believed that the American people have the ability to recognize "smut" and to reject it without the help of the public censor. As the majority in the Smith case admitted, "*any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.*." Since this is true, is it not a very good reason for leaving dosed, as to the "obscene," the doors barring federal and state intrusion into the area of constitutionally protected free speech and press. [40]

One of jurisprudence's main concerns for a long time has been the connection between morality and the law. Modern constitutional democracies are gradually realising that morality and law cannot be fully equated, despite the fact that early legal systems frequently drew substantially from existing moral standards. While moral convictions in society are varied, dynamic, and frequently disputed, the law must be governed by objective, predictable regulations. However, morality still has an impact on how laws are created and interpreted, especially when it comes to matters of public decency, obscenity, and individual rights.

[40] *Smith v. California* [1959] 361 U.S. 147

The gradual shift from strict moral paternalism to a more contextualised and balanced approach is demonstrated by judicial developments. Previous norms, like those outlined in Regina v. Hicklin, represented a legal framework that aimed to impose stringent moral protection by restricting speech thought to have the potential to corrupt impressionable minds. However, the shortcomings of this strategy have been acknowledged by modern law. The Supreme Court stressed in Aveek Sarkar v. State of West Bengal that utterance must be evaluated in the context of its entirety and in accordance with changing societal norms rather than discrete moral assessments.

As a result, the contemporary legal approach reflects a crucial jurisprudential realisation: although morality and the law are inextricably linked, the law must also protect individual liberty and freedom of speech. Therefore, upholding a moral balance between society ideals and constitutional liberties is the difficulty facing legal systems

V. OMPRAKASH V. RADHACHARAN-JUSTICE DENIED

- *VINOD DIXIT**

Abstract

This case comment is a critical appraisal of Om Prakash v. Radhacharan, a case decided by a bench of the Supreme Court in 2009. We are of the opinion that the judgement has disappointed those who cherish the cause of woman-empowerment. A widow, turned out by the in-laws immediately after widowhood, was supported, educated and made capable of lucrative employment by her mother. The woman having earned considerable property, died intestate. The property was claimed by heirs of her mother and of her in-laws. In accordance with the literal interpretation of the provisions of the Hindu Succession Act, the Court decided in favour of the in-laws, who not only violated their legal duty under the provisions of section 19 of the Hindu Adoption and Maintenance Act, to maintain the daughter in laws, but were her tormentor. If a murderer cannot inherit the property of the victim, why should a tormentor be allowed to inherit the property of the tormented? Not only the Court decided in favour of the in-laws but also dismissed the issues of equity as emotional and sentimental issues, of no consequence. Can the judgement be called 'per incuriam' because it is decided without referring to section 19 of the Hindu Adoption and Maintenance Act? Had the Court applied the maxim, 'no

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> *one can be allowed to take advantage his own wrongs', or the doctrine of promissory estoppel, the result could have been different*

Is it not strange that we are commenting on *Omprakash v. Radhacharan,* AIR (2009) SC (Suppl) 2060, in 2026 on a case decided by the Supreme Court in 2009? It is so because this case, unfortunately has been decided from the point of view of patriarchal legal eco-system. To the best of our knowledge, no one has commented on this case from the point of view of women's empowerment. Therefore, even at this late stage, we have decided to comment on it.

Narayani Devi married Dindayal Sharma in 1955 but after 3 months of marriage she became widow. Immediately after widowhood she was driven out of her matrimonial home, thereby acting contrary to their religious and legal duty under the Hindu Adoption and Maintenance Act 1956, though the case is absolutely silent about the provisions of this Act. She was taken care of by her mother, Ramkishori. She was educated by her natal family; she was employed and died intestate in 1996. She left considerable amount of money and real estate after her death. Ramkishori applied for succession certificate under section 372 of Succession Act. But her in-laws contested on the grounds that her property was self-acquired and under section 15 and 16 of the Hindu Succession Act, the relatives of her husband are preferred to her relatives in her natal family. In this case Omprakash represents Ramkishori and Radhacharan the in-laws.

The Respondent, Radhacharan claimed the property of Narayani Devi on the basis of provisions of sections 15 and 16 of the Hindu Succession Act 1955. Section 15 provides that in what order property of a female dying intestate shall devolve. Section 16 provides that in clause (1) and (2) of section 15, the heirs of a preceding entry shall be preferred over the succeeding entry. Section 15 provides the property of a female Hindu dying intestate shall devolve upon the husband and children and in their absence upon the heirs of the husband. On the other hand, section 15 (2) provides the rules for devolution of inherited property, inherited from the natal family and from matrimonial family. Radhacharan, the son of Dindayal Sharma's sister, claimed the property of Narayani Devi as her property was neither inherited from her natal family nor did she made a will and it was self-acquired.

On the other hand, Omprakash, the brother of Narayani Devi claimed the property, under section 15 (2) (a) as the family of the husband turned her out immediately after widowhood and did not make any contribution in her education and employment. Section 15 (2) (a) provides that in case of property inherited by a female Hindu from her natal family, the property shall be inherited by the heirs of the father in the absence of children. The argument was that the self-acquired property should be treated as the property inherited from the natal family as Narayani was able to earn property with help of monetary and emotional support of the natal family. On this ground the Appellant claimed the application of section 15 (2) of the Hindu Succession Act rather than that of section 15 (1).

However, the Bench preferred to decide by the strict letter of the law. Literal interpretation was preferred over purposive interpretation. The following arguments were given in favour of literal interpretation.

1. The self-acquired property is absolute property of a Hindu female under section 15 (1), therefore, section 15 (2) would not apply as claimed by the Appellant.
2. The Bench admits that it is a 'hard' case because Narayani never visited her in-laws during her widowed life and all support came from her natal family. The Bench, however, avoids saying that it was unjust situation and it is wrong to allow her tormentors to inherit her property. Rather the Court observed that simply because a case is hard, it does not allow the Court to apply some different rules; that is impermissible.
3. The Court observed that simply because of 'sentiments and sympathy' 'alone' unambiguous rules cannot be denied application. In support Court cited HSIDC v. Hari Om Enterprises (2009) 16 SCC 208. The Supreme Court observed that though the Court applied the doctrine of proportionality yet the Court cautioned that 'only' on grounds of sentiments or sympathy no order should be passed. In Subba B. Nair v. state of Kerala, (2008) 7 SCC 2010 and Ganga Devi v. District Judge Nainital, (2008) 7 SCC 770, the Supreme Court observed that

no order should be passed ‘only’ on grounds of sympathy or sentiments. In the latter case the Court further observed that ‘stricto sensu’ equity has no application.

4. The Bench observed that the applicable provision for women dying intestate would be section 15 (1). 15 (2) cannot apply to a woman dying intestate when her property is self-acquired and hence, absolute property. There is no prohibition for a woman to make a will of her self-acquired property. The spheres of clause (1) and (2) of section 15 are different. Clause (1) applies to a woman dying intestate and clause (2) (a) to the property inherited by a woman from her father or mother. Thus, 15 (1) covers all property of a woman dying instate and 15 (2) (a) the property inherited by her from father or mother. According to section 16, in case of application of section 15, succeeding entry will operate only in the absence of heirs in preceding entry. In the absence of a husband or children, the property of a woman dying intestate will be inherited by the heirs of the husband. Therefore, the property of Narayani will be inherited by Radhacharan and not by Omprakash.

Reading of this case makes it clear that the Bench decided to obey the command of law to the hilt. It is a clearly stated position of the positivists that the letter of the law must be accepted even if it leads to undesirable consequences. Obedience of law is good provided it is intelligent obedience, not mechanical. If a mistress, knowing not what the maid is doing at the particular moment, yelled at her, "drop everything at your hand and come running to me", does it mean the maid who at the particular moment was giving bath to the infant of the mistress in a bath tub, should drop the baby in the bath tub and attend the mistress?

A perusal of the judgement makes the following points clear: -

1. The statutory provision is set out in a patriarchal legal eco-system.
2. The Court was not prepared to deviate from this eco-system.
3. The Court admitted that it is a hard case.
4. But the 'hard' case is hard, the Bench thought, only for reasons of sympathy or sentiment. The sympathy or sentiment is devoid of legal logic or reason. Therefore, patriarchal legal eco-system of the statute does not require any interference.
5. The sentiment or sympathy in favour of the Appellant is devoid of any consideration of equity ('justice'), therefore, no purposive re-interpretation of section 15 is required. The Court specifically observed that Appellant's case depends only on considerations of sympathy and sentiments but not on 'equity.' And even if it is on equity, equity alone, cannot persuade the Court from deviating from the statutory provisions.
6. Therefore, it can be observed that literal interpretation is not literal but it is aimed at perpetuating the legislative preference for patriarchal eco-system. The literal interpretation displays

legislative patriarchal preference, which was found satisfactory by the Bench. The Bench went a step further than the legislature in as much as it ignored the duty to maintain the daughter in law, imposed under the Hindu Adoption and Maintenance Act 1956. We are certain that literal interpretation is also purposive interpretation. A court has alternatives of application of literal rule, golden rule and mischief rule; why does the court prefer literal rule? It is because, for the court's preferred value system compels the court to apply literal rule.

7. The fact that Narayani was turned out of her matrimonial home (in violation of a legally imposed duty), was only a matter of sympathy or sentiment for the Court and 'only' for sympathy or sentiments the Court is not required to interfere in the statutory provision. Afore stated factual situation being of no consequence, hence, general statutory rule should be applied according to its plain grammatical meaning.

The author of this paper considers the case a step backward in the movement of woman's empowerment. In the context of our liberal constitution, 'equality' provisions are enshrined in Articles 14,15 and 16. Article 14, a generic provision prohibits any arbitrary discrimination. Articles 15 and 16 prohibit discrimination on grounds of 'sex'. Article 16 (3) specifically provides that the state can make special provisions for advancement of women and children. Then five years after the Constitution was promulgated, when Hindu Succession

Act was passed by the Parliament, why did the Parliament pass the Hindu succession Act in patriarchal settings? Perhaps the people were willing to accept constitutional equality in general terms. But when it comes to specific equality in the sphere of family, the legislature did not deviate from patriarchal preference. Social reforms can take place only progressively. It is inconceivable that homosexuality and adultery could have been decriminalised in 1950's but it is possible for the judiciary to do so in 21st century. If gross injustice has been done to women in 1955 under Section 15 of the Hindu Succession Act, there is no reason to perpetuate it in 2009. There is no reason to treat our 'girls' 'paraya dhan' (property of the family of the husband).

No one expects the Court to amend the Hindu Succession Act 1955, but a situation of injustice can at least be corrected particularly in the changed context of 21st century. In the emerging industrial Indian society, women need to be liberated and bondage of patriarchy must be loosened. Even in the context of the Hindu Succession Act there are reasons which compel us to re-interpret the provisions of sections 15 and 16 of the Hindu Succession Act. Statutory provisions are enacted by the legislature. Enactments are futuristic. General provisions of statutory law control the situations that are likely to arise in future. It is impossible for a legislature to fore-see all the situations that may arise in future. It is for the courts to re-interpret the law when an unforeseen situation arises, if literal and ordinary grammatical interpretation of law leads to an unjust solution. A number of rules of interpretation, the legal maxims and rules of equity may be found useful to cope with such a situation. However, in the present case the Court did not attempt to use any alternative rules of interpretations or maxims of equity. This was because the Court was convinced that no injustice was done. Though the case is ‘hard’ that may arouse ‘sympathy’ or ‘sentiments’, but the sentiments and sympathy are devoid of any consideration of equity or justice. Perhaps it was merely sentimental fuss. In other words, adherence to patriarchal set up of the Hindu Succeession Act was prioritised. We do not understand as to why it was a hard case if no issue of equity or justice was involved.

However, we find it impossible to agree with the opinion of the Court. In the context of constitutional morality of equality between sexes, she as much belongs to her natal family as to her matrimonial home. She does not cease to be the daughter of her parents or the sister of her brother. Only her children, if any are more important than her other relatives, natal or matrimonial. It must be understood that all relations are reciprocal; if they involve duties, they also create rights. The Maintenance and Welfare of Parents and Senior Citizens Act 2007 imposes a duty on children to maintain their parents in their old age when they are not able to look after themselves. The law is backed by a social morality, which is in conformity with the constitutional morality and relations of reciprocity. If the parents can help children in taking their first steps, the children must help the parents taking their last steps. This moral principle is based on reciprocity. If parents deliberately abandon their child after birth and throw it into a dustbin, have they any right to be maintained by such child in old age? If we want to put parents in law in the position of parents, it can be done only on the basis of reciprocity. The parents in law are under a moral duty to help the daughter in law when she is in need of their assistance.

Narayani Devi, when immediately after widowhood needed the help of her parents in law, instead of helping her they turned her out; they did not behave like parents in law, they became tormentors. They ceased to be their parents in law: they became her tormentors. If a murderer cannot inherit the property of the victim, why should a tormentor inherit the property of the tormented. Section 19 of the Hindu Adoptions and Maintenance Act 1956 is an important provision in this regard. Clause (1) of the section provides, "A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained, after the death of her husband, by her father-in-law." Narayani's husband's family instead of fulfilling the obligation under section 19 of the Hindu Adoptions and Maintenance Act, turned her out. We can also say the parents in law, when they turned Narayani out of her matrimonial home, they in effect said they no longer were parents in law and hence, rule of promissory stopple should apply to them. The Divisional Bench of the Supreme Court, enforced the rights given to the matrimonial family of Narayani, but failed to take cognisance of the duty imposed on the parents in law under the Hindu

Adoption and Maintenance act. The Court treated rights and duties as unrelated to each other.

The Court has categorically stated that, sentiments alone cannot affect statutory rights, but the Court failed to take into consideration deliberate violation of statutory obligation towards Narayani by her matrimonial family. The Court refused to apply the maxim of equity, ‘he who comes to the Court must come with clean hands’. Respondents hands are unclean. It is a well-established practice of common law, if statutory provisions create a situation of ‘injustice’ legal maxims are applied. We propose to discuss two important cases, American and Indian, where the Court refused to enforce strict statutory provisions as they created a situation of injustice.

Riggs v. Palmer, 115 N.Y. 506 (1889), a probate case, is a case decided by New York state Court of Appeal. Mrs. Riggs and Mrs. Preston sought to invalidate the will of their father, Francis Palmer, who testated in 1880. The will of Francis Palmer gave small legacies to plaintiff daughters, Riggs and Preston, and the bulk to grandson, Elmer Palmer, a minor defendant, represented by his mother. The grandson, fearing that the grandfather may change the will, murdered him by poison, the crime was proved. But Elmer Palmer argued that will must be enforced on ground that if a will is validly made it must be enforced, (in the absence of any rule prohibiting a murderer from inheriting the property of the victim). The majority refused enforce the rule, ‘if a will is validly made it must be enforced', on ground of the maxim of equity, that 'no one can be allowed to take advantage of one's own wrongs'.

The whole equity jurisdiction came into existence, in the context of newly emerging mercantile society, when the rigid unchanging classical English law could not respond to the needs of the mercantile society and created many situation of injustice. Equity jurisdiction was invoked by chancery to correct the shortcomings of classical law. Maxims of equity played a major role in developing the mercantile friendly law in United Kingdom. The basic purpose of equity and maxims is to tone down the harmful effect of statutory law.

Indian jurisdiction has also used many devises to tone down the unjust effect of statutory law in many cases. We would confine to cases relating to woman-empowerment. One of the important cases is *Miss X v. Principal Secretary Health and Family Welfare (*2022 SCC online SC 1321). A major woman of Manipur, residing in Delhi, in consensual relationship with a man discovered on June 2022 that she has pregnancy of 22 weeks. With a degree of B.A. in the absence of a source of living she would not be able to raise the child. Her parents are kisans, would not be able to support her. She moved a petition before the High Court of Delhi, praying (a) permission to terminate her pregnancy through a registered medical practitioner (b) restrain the Respondent from taking any coercive action against her or the medical practitioner. (c) include unmarried women within the ambit of Rule 3 B of the Medical Termination of Pregnancy Rules 2003 (as amended on 21.10.2021). The High Court restricted itself to issuing notice only to prayer (c) and in effect rejected prayers (b) and (c). on grounds that being major unmarried woman, not a victim of rape, she cannot terminate pregnancy of more than 20 weeks.

Under section 3 of the Medical Termination of Pregnancy Act a pregnancy can be terminated by a registered medical practitioner if the pregnancy does not exceed 20 weeks on the failure of any device used by the woman or her husband (in 2021 the word ‘husband has been substituted by ‘partner’ that is after 21.10.21 the facility is applicable also to unmarried women) to limit the number of children and it shall be presumed that the termination of pregnancy is necessary to avoid anguish which causes grave injury to her mental health.

The second provision is applicable to women with pregnancy of more than 20 weeks but not exceeding 24 weeks, the list of women eligible to get pregnancy terminated, in accordance with Rule 3B of Medical Termination of Pregnancy Rules 2003 are (a) survivors of rape sexual assault or incest; (b) minors; (c) change of marital status during ongoing pregnancy (widowhood and divorce); (d) women with disabilities and mentally ill women including mental retardation. It is strange that there is mismatch between section 3 (2) (a) and 3 (2) (b) in as much as in the former case of pregnancy up to 20 weeks eligible woman may be married or unmarried but in the latter case woman needing termination up to 24 weeks, in case she is major, mentally sound and living in consensual relations must be married (the controlling words are ‘change in marital status) if such a woman is unmarried she cannot take the advantage of termination of pregnancy. Because of the provisions of rule 3 B, the High Court refused to grant her permission to terminate pregnancy.

The Supreme Court, on the other hand observed that the High Court has taken a restrictive view of Rule 3B (c) which provides that a major, sane and married woman can get pregnancy up to 24 weeks, terminated in case of change in marital status; widowhood or divorce are given in parenthesis. The Supreme Court observed that widowhood or divorce should not be treated as exhaustive of the category of ‘change in marital status’: the category should be interpreted in its entire context and in harmony with the overall scheme of the Act. The scheme of the Act intended to include unmarried women, that is why for termination of pregnancy up to 20 weeks, the amendment of the Act in 2021 changed the phrase from ‘a woman and her husband’ to ‘a woman and her partner.’ The amendment recognises a woman’s reproductive choice, bodily integrity and autonomy. The Supreme Court observed that in view of this context there is no reason to deny termination of pregnancy of 24 weeks to an unmarried woman. Appellant’s partner deserted her on knowing her pregnancy, she was not employed and her family was not in a position to support her raise a child. Pregnant woman’s actual or foreseeable environment should be taken into consideration. The substance of the case is that in the interest of empowerment, autonomy, bodily integrity of a woman and justice, ‘change in marital status’ was interpreted as change in status and environment.

But in case of Narayani, Sinha J. refused to treat ‘change in status’ (her widowhood and consequent ouster from her matrimonial home) of no consequence. He treated the claim of the tormentors (her in laws who turned her out of matrimonial home on widowhood) as just claim in accordance with literal interpretation and that of her rescuers (her natal family who stood up with her and made her capable of earning livelihood) as sentimental (fuss) sympathy devoid of any just cause.

In all cases of woman’s-empowerment, the substance consists in restoration of her ‘dignity.’ In case of Miss X, the Court restored her ‘dignity’ and respected her bodily integrity. There is another case, *Suchita Srivastava v. Chandigarh Administration* [(2009) 9 SCC 1]. The case relates to a female major inmate of under developed mind of a state government institution. A number of males of the institution has sexual intercourse with her, consequently she became pregnant. That criminal action was taken against the accused is another matter. The Psychologist certified her mental age only 9 years and that she does not understand that it is morally wrong to have sexual relations with multiple persons simultaneously; it was also stated that she is extremely happy that she will have a baby. The Chandigarh Administration moved the Punjab & Haryana High Court seeking permission to terminate her pregnancy, which was granted by the Court on ground that she is incapable of performing the duties of a mother.

However, a good Samaritan Suchita Srivastava moved the Supreme against the decision of the High Court. The Supreme Court per Chandrachud J., invoking Article 21, observed that reproductive autonomy is a dimension of Article 21. It is interesting to note that the text of Article 21 does not mention any thing about reproductive autonomy; this dimension has to be inferred. Has the Court interpreted Article 21 literally, reproductive autonomy could not have been its dimension? In interest of woman's empowerment, bodily integrity, autonomy and reproductive choice, Article 21 was interpreted to include reproductive autonomy, not for sentimental reasons or on grounds of sympathy but for doing justice to her. The Court ordered she has a right to become a mother, and it is the duty of the Administration to provide appropriate support in raising the child.

If we try to understand the position of Sinha, J. through Kantian imperatives, we may find a rational explanation of his positivist position. Kant's position is, whatever the life form-pattern of the phenomenal world, which constitutes a person's sociological or psychological position, these do not affect the evil of his deed. A wrong is not converted into non-wrong on account of his activities which precedes it, nor can it be dissolved by what comes afterwards. (Morrison, Wayne: from the Greeks to post-modernism, Cavendish Publishing, London, 2000, pages 140-141) A wrong is wrong, irrespective of what comes before or after it. Right and wrong must be a priori acknowledged by all rational beings. Rules of morality are universal if they had the imperative of a priori. To apply in the present case, Sinha, J., may mean a rule is a binding rule irrespective of what its attendant circumstances may be. A right of inheritance is an inviolable right even if the bearer of the right has not fulfilled his/her duty imposed by the Hindu Adoptions and Maintenance Act. Rights of inheritance are not connected to the duty to maintain the son's widow. Both exist a priori independent of each other. On the contrary in Riggs v. Palmer, the court refused to treat duty not to kill the grandfather and right to inherit his property as unconnected.

However, the author of this paper is of the view that, though the Kantian deontological position on 'right' is the accepted rule to distribute benefits and burdens, but the deontological position cannot be allowed to be treated as inviolable, particularly when, deontological concept of 'right' creates an unjust situation. It must be remembered that our courts are courts of justice not of merely those of law.

VI. TRANSNATIONAL CONSTITUTIONAL RIGHTS: RIGHTS-LIMITATION, POSITIVE OBLIGATIONS, AND REMEDIES IN INDIA, AZERBAIJAN, AND THE EUROPEAN COURT OF HUMAN RIGHTS

- *ELMAR MAHMUDOV*[*]

Abstract

The article has been written about the definition, limitation, and defense of constitutional rights in three jurisdictions of influence (India, Azerbaijan, and the European Court of Human Rights (ECHR). It emphasizes the particularism of specific nations as well as the increased transnational mobility of constitutional concepts.

The dialogue takes place in three dimensions that repeat: First are rights limitation models: India is pursuing its model of reasonable plus proportionality (particularly in socio-economic and equality cases) and the ECHR model of Necessity in a democratic society, which, besides being followed, has also in Azerbaijan been changeable to a stronger emphasis on proportionality/legality in its domestic courts, and finds its reflection in its new 1995 Constitution.

These systems are doctrinally different, but they are growing closer in that they demand justification on the basis of evidence and limitations. Second, positive duties:

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Indian courts are becoming increasingly responsive to the ECHR approach that governments bear a positive and proactive responsibility to protect individuals against harm, especially in areas relating to the need to protect the environment, gender equality, and the health of the population.

The Constitutional Court of Azerbaijan has also reinforced the relevance of the state obligations in protecting universal rights for the individual, with significant mention of equality, right to fair trial, and protection of social rights, demonstrating the potential of constitutional review to empower individual and collective rights.

Third, remedial approaches: India commonly seeks to pursue broad-based structural remedies, such as continued writ of mandamus and monitoring compliance; the ECHR balances individual redress with pilot cases to resolve systemic flaws; and Azerbaijan, in particular, has built a practice of remedies within the context of constitutional review, legislative guidance, and declaratory judgments that helps move local law closer to international and human rights norms.

The article ends with the conclusion that in spite of the differing constitutional histories, courts in these traditions do tend to converge when granted a method of adjudication of rights based on the provision of reasons, proportionality justification, and context-sensitive remedies. It ends with five steps of practical adjudication:

(1) define the right and its reach; (2) demand public justifications and evidence of curtailment; (3) apply the minimally intrusive level; (4) align the remedy with the misconduct; and (5) revise those outcomes periodically to make sure that the need to protect is still there.

Keywords: *Azerbaijan, Constitution, ECHR, India, Courts.*

I. INTRODUCTION

Constitutional rights are construed in narrow sense in the modern democratic systems. In addition to limiting the power of the people, they gradually make the state obligated to defend dignity, equality, and participation. Even though, as we have seen, each constitutional tradition has its own more or less doctrinaire foundations, depending on local texts, history, and institutional culture, the rights judgment of modern practice is more of a transnational discourse. Courts embrace analytical tools, cite one another, and apply international human rights standards as part of their own substantive legal systems.[1]

In this paper, the discussion is placed within the framework of the definition of rights, restriction and redress in three settings in India, Azerbaijan and the European Court of Human Rights (ECHR). In state systems a variety of legal traditions such as these jurisdictions play a role in modern constitutional practice. As in the case of *Olga Tellis v Bombay Municipal Corporation*, the culture of the normative protection of socio-economic rights and equality by the litigation of the rights enshrined in a broad charter of rights in Part III of its

[1] Anne-Marie Slaughter, *A New World Order* (Princeton UP 2004), ch 2.

Constitution, India has come to develop a strong culture of litigation, a culture of rights protection in common law courts. [2] Azerbaijan, under its 1995 Constitution, has continued to entrench principles of proportionality, legality, and equality, and simultaneously has equated its jurisprudence with European human-rights principles.[3] The ECHR, in its turn, adopts a supranational view: its assessment based on the European Convention on Human Rights utilizes the criterion of whether an interference is necessary in a democratic society, the first criterion to be formulated in the case of Handyside v United Kingdom.[4]

The analysis centers on three recurrent dimensions. It first considers the models underpinning the restriction of rights and compares the combined reasonableness and proportionality principle used by India with the necessity test of the European Convention on Human Rights and the developing use of proportionality analysis in the Azerbaijani constitutional system. Second, it deals with positive obligations, in which an abundant jurisprudence has been elaborated by ECHR, and in which obligations have been extended similarly by India with its activist Supreme Court, and Azerbaijan with its sense of the importance of the state in issues of equality, social protection and due process of law. Third, it discusses remedies, observing that India often enforces structural solutions in order to achieve a result, the ECHR relies on individual relief and pilot judgments, and Azerbaijan moves

[2] *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180.
[3] Constitution of the Republic of Azerbaijan 1995, arts 24–71.
[4] *Handyside v United Kingdom* (1976) 1 EHRR 737.

constitutional review and legislation in line with the international standards.

The article attempts to provide a practical and limited account of how the systems address constraints, obligations, and determinations. The systems are influenced by different historical paths and institutional functions, but they come together concerning common devotion: evidence-based justification, the least-restrictive means, and the articulate rationale. The article then concludes by suggesting a brief checklist of rights adjudication that summarizes these comparative lessons in a coherent model to be used by comparative constitutional researchers and theorists of rights adjudication.

XIV. RIGHTS-LIMITATION FRAMEWORKS

A. India: from reasonableness to proportionality

Part III of the Constitution of India gives a broad list of fundamental rights. Simultaneously, most of these rights are limited to a reasonable restriction. Article 19, as an example, provides the freedom of speech, association, and movement, but the state is allowed to restrict it in the name of public order, morality, or the sovereignty and integrity of

India.[5] In other words, the Constitution itself provides that they may be restricted on a solid enough basis by the government, but that they must be reasonable.

The Supreme Court also explained in the case of State of Madras v V.G. Row that the reasonableness test requires consideration of the need to balance the worth of the fundamental rights against the demands of social control and population welfare.[6] This means that the Court stated that restrictions do not stand on the mere fact that they are desired by the legislature; they have to be fair, balanced, and reasonable in connection with the constitutional values.

This test of reasonableness, over many decades, was open to the discretion of judges in some cases. Nonetheless, in Modern Dental College v State of Madhya Pradesh the Court officially approved of a structured proportionality test.[7] In other words, it is anticipated that the judges will consider the following steps: whether the law aims to accomplish a legitimate conclusion, whether this conclusion is proper, whether there exist less restrictive means, and whether the balance is sensible.

This was strengthened in Justice K.S. Puttaswamy v Union of India [8], which established the right to privacy as an essential one. In other

[5] Constitution of India 1950, art 19.
[6] *State of Madras v V.G. Row* AIR 1952 SC 196.
[7] *Modern Dental College v State of Madhya Pradesh* (2016) 7 SCC 353.
[8] *Justice K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

words, the Court concluded that the principle of proportionality must always rule the procedure regarding the intrusion into the right to privacy or the right to equality: the government should explain that any particular restriction is not just legitimate but also needed and not excessive.

B. Azerbaijan: constitutional proportionality and legality

In the Constitution of the Republic of Azerbaijan enacted in 1995, there is a wide-ranging list of rights and freedoms (Articles 24-71).[9] The meaning of article 71 is that no more rights should be limited than is required to protect the rights of other human beings, societal order, or national security. In other words, even the Constitution itself demands that any restrictions should be legal, and should seek a legitimate end-- not any end of the policy of government.

In its original application, the Constitutional Court insisted on legality: the restrictions must be based obviously on the law; in other words, the government may not restrain rights by adjudication or executive power; it must make a law.[10]

In 2002, proportionality would be applied more directly by the Court. By 2002, the Court was going to use proportionality more directly. It considered restrictions on the freedom to assemble such that peaceful gatherings needed prior authorisation in Decision No. 7 (2005), The

[9] Constitution of the Republic of Azerbaijan 1995, arts 24–71.
[10] Constitutional Court of Azerbaijan, Decision No 3 (1998).

Court ruled such restrictions were disproportionate, as the legislature had not demonstrated that less restrictive alternatives, such as a simple notification procedure would be insufficient.[11] Put simply, the Court required the government to explain why it selected such a heavy restriction rather than a light one.

The Court later used proportionality in relation to equality and social rights, as in Case No. 12 (2014), where state actions had to observe human dignity without undermining legitimate goals such as economic reform.[12] Basically, although in this act, the government is acting for the common good, the bottom or basic dignity and equality of the people must never be compromised.

These examples show that Azerbaijan incorporated the idea of proportionality in its constitution. The Constitutional Court will often refer to European human rights law, balancing local experience with Strasbourg standards.[13] In other words, Azerbaijan demonstrates that a much younger constitutional order can imitate and implement foreign values, but at the same time be tied to one's own constitutional document.

C. The necessity in a democratic society of the European Court of Human Rights.

[11] Constitutional Court of Azerbaijan, Decision No 7 (2005).
[12] Constitutional Court of Azerbaijan, Decision No 12 (2014).
[13] ibid, referring to ECHR standards.

European Convention on Human Rights permits the states to limit some rights e.g., expression, assembly, or private life as long as the limitation is prescribed by the law, has a legitimate purpose, and is necessary in a democratic society.[14] Similarly, it means that governments may restrict rights in the Convention, but the restriction must be justified by law, and it must have a purpose and must actually need to belong to the vocation of a democratic society.

In a case of Handyside v United Kingdom [15], the Court upheld the idea that the freedom of expression protects both the opinions that are safe and even popular, but also the opinions that may be offensive, shocking or even disturbing. In other words, the state cannot ban speech merely because it offends feeling: it must establish that there is a sufficient reason why the speech should be suppressed in the name of democracy.

In Sunday Time v United Kingdom [16] it was noted by the Court that because laws which restrict the rights are limited, they must be precise and available. In other words, citizens must be able to foresee what is allowed and that which must be forbidden, and unclear or arbitrary prohibitions are unacceptable.

Lingens v Austria[17] held that any limitation on speech in political content must be interpreted in a limited fashion. That is, the

[14] European Convention on Human Rights 1950, arts 8–11.
[15] *Handyside v United Kingdom* (1976) 1 EHRR 737.
[16] *Sunday Times v United Kingdom (No 1)* (1979) 2 EHRR 245.
[17] *Lingens v Austria* (1986) 8 EHRR 407.

government has a very narrow margin of appreciation when it comes to the press and political debate, since it is the centrality of open criticism in democracy.

This jurisprudence explains how Strasbourg has formulated a test of proportionality, within the frame of the necessity language, but tailored the strength of the review to the right and the circumstances.

D. Comparative insights

India, Azerbaijan, the ECHR are mentioned right next to each other: there is diversity and variety.: There exists diversity and convergence. India has been transformed into a wider system of reasonableness to a more detailed proportionality regime; Azerbaijan has incorporated proportionality and legality by its Constitutional Court, and the ECHR has applied proportionality by use of the term necessity in democratic society. These paths are varied in history and institutional location, but share a common constitutional language.

Some general themes emerge:

1. Public justification. The three systems all demand that the state should justify why a restriction is required. That is to say that authority does not justify a rights-limiting measure by itself, but must be justified by reasons available to citizens and courts. Analytically this transforms the constitutional adjudication into a culture of justification: governments are not at liberty to do but must engage in persuasion.

2. Evidence and necessity. In every jurisdiction, courts currently require evidence that the restrictions respond to a problem that actually exists. India needs to prove connections between restriction and end, Azerbaijan seeks to know whether other less restrictive alternatives existed, and the ECHR seeks a pressing social need. Put another way, constitutional review is becoming more evidence-based, less abstract judicial balancing and more fact-specific review. This is why rights adjudication is more like a scientific reasoning: hypotheses need to be checked upon real world data.

3. Least restrictive means. The essential concept that rights are limited to the extent necessary is reiterated systems-wide. That is, governments cannot afford the most convenient or coercive solution; they need to be in the course that weighs least on rights and yet attain their objective. Analytically, this principle drives the states to innovativeness and carefulness in designing policies, and in law-making it imposes efficiency, in addition to legitimacy.

What are these convergences telling us? First, proportionality is not simply a doctrine inherent to law, but a form of government, a mode of how states justify action. Second, convergence posits that proportionality is functioning as an intermediary between the legal cultures: the activist judiciary in India, Azerbaijan constitutionalism in the making, and even the supranational influence of the ECtHR is all converging around the same justificatory ideals. Finally, the non-mechanicalistic view of proportionality is shown in how more care is taken over matters of political speech than over wider matters of discretion over morality. Instead, it is an adaptable grammar that gives courts the opportunity to modify common principles to local customs.

That is, even though there are disparate texts and histories, these jurisdictions are converging on a global constitutional lesson where rights may be restricted, but only when governments give explicit, reasonable, and evidence-based reasons demonstrating that the restriction is indeed necessary and closely focused.

XV. POSITIVE OBLIGATIONS

Constitutional rights are no longer thought of solely as negative liberties -- protections against state action. Increasingly, courts also consider them as sources of positive obligations, or the view, that the state should actively protect persons against risks from private actors or structural risk. India, Azerbaijan and the European Court of Human Rights (ECtHR) all reflect this trend in different ways.

A. India: public interest litigation and affirmative duties

India has been one of the first countries to extend constitutional rights to the socio-economic arena through public interest litigation (PIL). The Supreme Court has read its interpretation of Article 21 of the

Constitution ("no person shall be deprived of his life or personal liberty except according to procedure established by law") as a portal for recognition of broad state obligations.

The case of Olga Tellis v Bombay Municipal Corporation[18] was when the court ruled that right to life would not be limited to just survival of the body, but also included the right to livelihood and this would be the duty of the state to help and not to evict pavement dwellers without a means of living because right to life would be meaningless without livelihood. The absence of a law on workplace sexual harassment gave rise to Vishaka v State of Rajasthan[19], where the Court imposed on employers and state authorities the obligation to actively pro-create a safe work environment for women, recognising that equality and dignity require actions rather than non-interference.

Environmental cases have also proved to be of immense importance. In M.C. Mehta v Union of India ('Oleum Gas Leak case', 1987)[20], the Court laid down an "absolute liability" rule on industries dealing with dangerous substances, mandating positive steps to avoid harm, the Court held that the state and industry have a positive obligation to protect citizens against environmental and health hazards, not wait for harm to occur.

[18] *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180.
[19] *Vishaka v State of Rajasthan* AIR 1997 SC 3011.
[20] *M.C. Mehta v Union of India* AIR 1987 SC 965 (Oleum Gas Leak).

Through these cases, India shows how the courts have been able to turn fundamental rights into instruments for affirmative action by the State in areas such as livelihood, gender equality and environmental protection.

B. Azerbaijan: constitutional recognition of duties to protect

Azerbaijan's Constitution of 1995 is a comprehensive list of rights, yet it also ties the rights to the obligations of the state. Article 24 confirms that human rights and freedoms are "supreme values" and that the state has the responsibility to "guarantee and protect them"[21], in other words that the Constitution explicitly imposes upon the state the obligation to act as guarantor, and not simply as non-interferer.

The Constitutional Court has built this up in its jurisprudence. For instance, in Decision No. 12[22] it stated that the state must protect equality and the right to social security; that is, it held that the achievement of equality cannot only involve the prohibition of discrimination, but that it involves the adoption of policies that ensure the effective recognition of the rights of vulnerable groups.

Similarly, where fair trial rights are at issue, the Court has called for adequate legal aid and for judicial independence in state institutions: in other words, justice is not accomplished by proclaiming rights - the

[21] Constitution of the Republic of Azerbaijan 1995, art 24.
[22] Constitutional Court of Azerbaijan, Decision No 12 (2014) (on equality and social rights).

state must construct systems and institutions that make those rights material.

By defining these obligations within its constitutional interpretation, Azerbaijan has come closer to the European standards and has simultaneously reinforced its own constitutional identity.

C. The European Court of Human Rights: developed positive-obligation doctrine

The ECHR has been a leader, in terms of expressing positive obligations. Case law demonstrates that states have not only to refrain from violating rights, but also to take reasonable measures to protect individuals against danger from others.

In Osman v United Kingdom[23] the Court stated that the police owed a duty to take operational steps to save life where there was a "real and immediate" risk known to the authorities, in other words, if there was a state of knowledge of a person's life being at risk then the state cannot sit by, but must act to prevent the harm.

In Opuz v Turkey[24], the Court concluded that Turkey was in breach of Articles 2 and 3 by failing to protect a woman from domestic violence that ultimately culminated in her murder: In other words, protecting women from gender-based violence is not optional - it is a legal obligation of the state parties under the Convention.

[23] *Osman v United Kingdom* (1998) 29 EHRR 245.
[24] *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009).

In Lopez Ostra v Spain[25], the Court held that the failure to take steps to prevent massive environmental pollution was a violation of Article 8 (private and family life) of the European Convention on the grounds that a healthy environment free from hazardous pollution was basic to personal dignity and should be regulated and acted upon by the state.

These cases demonstrate how the ECtHR has developed a jurisprudence on state obligation to protect against harm - in areas ranging from policing to domestic violence to environmental regulation.

D. Comparative insights

We may observe, over the three jurisdictions, one and the same movement from negative to affirmative constitutionalism. Although context differs, the trend remains the same, that rights are no longer being considered as mere protective shields but as such that are accompanied by duties by the state to guarantee meaningful enjoyment.

India is a case in point of how PIL is capable of using judicial creativity to turn traditional civil liberties into a platform for the manifestation of urgent socio-economic rights. By extending Article 21 to include livelihood, health and clean environment, the Supreme Court has shown how a text originally couched in classical liberal terms can become the constitutional vehicle for social change.

[25] *López Ostra v Spain* (1994) 20 EHRR 277.

Azerbaijan provides a lesson for how a relatively young constitutional system can enshrine positive obligations at the very core of constitutional adjudication. Through rights integrated with well-defined obligations to uphold them in its Constitution and by reference to European case studies, the Constitutional Court comes to place on itself a role of mediator between its own constitutional identity and both internal and external standards of human rights.

The ECHR is an example of how a supranational tribunal can condense general principles (duties to protect life, prevent gender-based violence and ensure a healthy environment) and then export them into national legal systems. The Strasbourg jurisprudence is a source of both advice and pressure, pushing states to operationalise the positive obligations in the form of legislation and policy reform.

Despite these divergences, there are clearly important convergences:

1. Action over and against inactivity: The concept of rights is beginning to be conceived as action and not lack of action, non-interference.
2. State obligation: it is the hope of the courts that governments should establish legal systems and regimes and enforcement that will avoid injury and safeguard dignity.
3. Give attention to vulnerability: Vulnerability can be the heart of positive-obligation jurisprudence, and especially

concern the poor, women and minority, and those who are vulnerable to violence or other environmental hazards.

4. Two-level dialogue: Strasbourg is the standard employed in dialogue between the national courts of India and Azerbaijan; Strasbourg has attempted to justify its decisions with reference to the constitutional traditions of the member states.

In other words, today constitutional rights mean a lot more than 'leave me alone'. They demand of governments the social, legal, and institutional conditions in which dignity, equality, and freedom can be realized in practice. This turn to affirmative constitutionalism represents one of the most important trends in comparative rights adjudication.

XVI. REMEDIES

The issue of remedy is central even in cases where the courts recognize the infringement of rights. Remedies not only decide whether a judgment is a relief to the individual but also whether rights are actually being protected in practice. Indeed, the remedial policies of the Indian, Azerbaijan, and European Court of Human Rights (ECHR) vary, representing their institutional framework and political contexts.

A. India: structural remedies and judicial supervision

The Supreme Court of India is associated with an approach to designing new solutions, particularly in the area of litigation in the interests of society. More and more traditional solutions like vetoing a bill are perceived as not good enough when structural problems entail.

The Court established, in Vineet Narain v Union of India [26] the terms of a continuing mandamus, allowing the case to remain open, with dictated directions over time to ensure it was observing its directions on anti-corruption investigations. That is, rather than issue a one-time judgment the Court behaved as a continuous supervisor, ensuring that reforms were carried out.

It has also been used in environmental cases. The Court gave long-lasting directions in the area of pollution and vehicle pollution as well as industrial safety in the series of M.C. Mehta v Union of India cases. [27] That is, the Court only did not proclaim rights but vigorously to control the adherence and press within a step-by-step approach government organization to attain environmental conservation.

These solutions reflect the practical nature of the Court: executive inaction or laxity in protection of rights has led to judicial intervention, in the form of supervisory, supplementary, and structural orders.

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[26] *Vineet Narain v Union of India* (1998) 1 SCC 226.
[27] *M.C. Mehta v Union of India* (1988) 1 SCC 471 (and subsequent orders).

B. Azerbaijan: declaratory judgments and legislative guidance

The Constitutional Court of Azerbaijan, under the 1995 Constitution, is critical in ensuring that the law is applied within the Constitution and the international standards of human rights. Its remedies are not in the same style as India, but they aim at the same goal, of being effective.

The Court mostly passes declaratory judgments which declare a provision or a law unconstitutional. For example, in Decision No. 6[28] it invalidated the provisions limiting property rights on the basis that the legislature had failed to show why alternative less restrictive methods would be insufficient. Stated differently, the Court stated: until Parliament rewrites the law in a more proportionate and balanced manner, it is invalid.

Far beyond the invalidation, the court gives interpretive guidance of appeals from courts. In Decision No. 4[29], it clarified the way fair trial rights in the Constitution were to be interpreted in the light of Article 6 of the European Convention on Human Rights. To put it another way, the Court does not merely strike down laws but educates legislature and lower courts about the rights and how they should be applied in a consistent manner with European norms.

This makes the Constitutional Court a protector of the text and a translator into international norms.

[28] Constitutional Court of Azerbaijan, Decision No 6 (2002).
[29] Constitutional Court of Azerbaijan, Decision No 4 (2011).

C. The European Court of Human Rights: individual and structural remedies

The ECHR is an international court whose decisions are binding to states. Article 41 of the Convention establishes its remedial powers through the award of just satisfaction to the victims of the violation of rights. This can be in practice in monetary terms.

The Court has, however, also created structural remedies in the pilot-judgment procedure. In the case of Broniowski v Poland[30], the Court had to deal with thousands of complaints of the same kind as concerned the restitution of the property. It rendered a pilot judgment that Poland was obliged to take general steps to remedy the structural problem, as well as provide individual compensation to the applicant. That is, the Court said: it is not the problem of a single person, Poland needs to correct the situation and not compel thousands of other people to appeal to the court.

In the case of Ananyev v Russia[31], the Court applied the pilot-judgment procedure to deal with inhuman terms of detainments. That is, the Court demanded that Russia not only had to pay the individual applicants' compensation, but also reformed its overall system of detention.

[30] *Broniowski v Poland* App no 31443/96 (ECtHR, 22 June 2004).
[31] *Ananyev v Russia* App nos 42525/07 and 60800/08 (ECtHR, 10 January 2012).

Judgment execution in the ECHR is managed by the Committee of Ministers of the Council of Europe. This produces a kind of two-tier remedial regime: judicial statements and political oversight of adherence. That is to say, Strasbourg remedies are a mixture of personal and systemic pressure on a regime to ensure that rights protection is both personal and structural.

D. Comparative insights

The three jurisdictions placed side by side show not only varying remedial preferences but also varying judicial self-images.

In India, judiciary is viewed as a proactive manager in the implementation of rights. Indian Supreme Court sees itself as not merely as an umpire, but there are occasions when it sees itself as acting as a custodian of a continuing reform, particularly in the areas of environment, corruption and social rights.

Azerbaijan adheres to a dialogic style, making declaratory verdicts and interpretative recommendations, but no orders. This is in addition to its constitution design and its proximity to the European legal space. Put another way, the Azerbaijani Constitutional Court presents itself as a teacher and interpreter: it dictates to the legislature and lower courts on how to bring practice into line with constitutional and Convention standards, but leaves them to undertake the practical corrections.

ECHR is both individual and systemic. The striking feature of its pilot-judgment process in particular is that the Court renders justice to the applicant and at the same time communicates to the state that it has to remedy the structural issue at a larger scope. Stated differently, Strasbourg resolutions are two-tiered: the court not only eliminates a case but also tries to avoid the occurrence of hundreds of like cases in the future.

However, despite these differences, one similarity is that the remedies must be effective. The different courts do this differently because they stipulate that rights are not abstract and imaginary but are real and viable. This is the traditional Strasbourg formula that rights should be not theoretical and illusionary, but practical and effective[32]. And, to express it another way, there can be nothing thing which can be called rights, that is not recreated; constitutional justice is precisely put to the test whether the judiciary may give a remedy that will secure the safeguarding of the citizens, and which will leave the allocation of the powers among the systems established to themselves.

Therefore, remedies do not exist as the last chapter of litigation because they represent a constitutional dialogue by action. They identify the extent to which courts are ready to influence the creation of governance, the way they see themselves in relation to the political institutions and the interpretation of international standards into domestic practice.

[32] *Airey v Ireland* (1979) 2 EHRR 305, para 24.

XVII. CONCLUSION

The adjudication of comparative constitutional rights is diverse, but convergent. This dynamic is especially well illustrated by India, the European Court of Human Rights (ECHR) and Azerbaijan. Each has a different constitutional context: India as a massive federal democracy with the tradition of public interest litigation, Azerbaijan as a young constitutional system, reconciling its practice with European models, and the ECHR as a supranational court, to which it seeks to create a common language of rights, throughout Europe. These differences notwithstanding, the three systems have a common rising interest in structured justification, positive obligations, and available remedies.

There are three important insights in the comparative analysis. First, the rights limitation frameworks are converging on proportionality. The development of India into reasonableness towards proportionality, the introduction of proportionality and tests of legality in Azerbaijan and the necessary in a democratic society standard at the ECHR all require evidence-based justification and tight focus. Second, positive obligations are today components of systemic constitutional identity. In India, in PIL cases on livelihood, equality and environment, in Azerbaijan in constitutional jurisprudence of equality and fair trial, or in Strasbourg, in a strong case law on life, dignity and private life, the message is the same: rights need enforcement as well as moderation. Third, remedial methods vary in the form, but they all have the goal of being effective. The structural orders in India, the declaratory judgments with interpretative direction of Azerbaijan, and pilot judgments in Strasbourg all demonstrate context-sensitive attempts to render the rights protection practical and enforceable.

Combined, these experiences indicate that constitutional systems are not converging toward uniformity but rather towards a common way of justification: governments need to justify and demonstrate why limits are necessary; courts must make rights practical; and remedies need to be institutionalised.

In order to pack this in, the paper suggests a brief five-step checklist that can be used by comparative constitutional scholars in assessing the rights adjudication process:

- Determine the right and scope.
- Any limitation must have public reasons and evidence required.
- Take the least restraining course possible.
- Match the solution and the offense committed-individual or systemic.
- Periodically review the results of the review to maintain protection.

Such a checklist never wipes out constitutional diversity but condenses general lessons. It gives the researcher a systematic guide to comprehend the ways in which courts of various systems justify constraints, introduce commitments, and fashion remedies, thus contributing to the discipline of comparative constitutional law.

VII. *SAMUDRAMANTHAN* OF ARTICLE 225: UNVEILING HIGH COURT'S JURISDICTIONAL POWER POST KUSUM INGOTS

- *VYOMESH UDAY WARUNJIKAR*[*]

Abstract

The Indian judicial system balances constitutional governance through the Supreme Court and the High Courts. Despite a unified structure, the jurisdiction of High Court remains debated. This paper examines their binding authority, tracing their evolution from the colonial era to post-independence. A key focus is Kusum Ingots & Alloys Ltd. v. Union of India, where the Supreme Court's interpretation reshaped High Courts' jurisdictional reach.

The study explores how various High Courts have applied or extended this principle, raising questions about their territorial limits. By analysing historical precedents, legislative changes and judicial pronouncements, this research evaluates whether High Courts, in practice, wield authority comparable to the Supreme Court. It highlights their evolving role in maintaining constitutional balance and ensuring accessible justice.

Keywords: *High Court jurisdiction, Article 226, Precedent Value, Kusum Ingots, Evolution of High Courts, Supreme Court v. High Court*

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I. INTRODUCTION

The Republic of India has a three-fold structure to which rule of law is the basic norm[1]. The legislature makes the laws which control the Council of Ministers and thereafter the Executive carries on administration within the Constitutional limits. The judiciary resolves disputes, upholds people's rights and restrains the misuse of power by the other two branches of government.

Bharat upon its independence from the British Raj in 1947, transformed from a centralised unitary state into a federal union. This union, comprising the central government and its constituent states (Provincial States), is governed by a parliamentary-federal constitution that precisely delineates the institutions, powers, and responsibilities of both tiers of government. It is incontestable that India's judicial system is unitary, even though it is questionable if its political system is federal with unitary aspects or unitary with federal elements.

We have in India a single, integrated court system with the Supreme Court functioning as the last appellate court.[2] The same judicial system

[1] *His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala* AIR 1973 SC 1461.
[2] Sukumar Dam, *Judiciary in India* (1964) 25 Indian Journal of Political Science 276, 276.

interprets both the union as well as state laws. The judicial roles and functions of union and state courts are not separated.[3] The Indian judicial hierarchy is structured with the Supreme Court reigning at the apex (being the last court of appeal), followed by the High Courts, which stand on an equal footing across various states. Beneath them are the District Courts, serving as the principal courts of original jurisdiction at the district level. Further below, at the Taluka (Tehsil) level, lie the civil and criminal courts, which exercise jurisdiction over local disputes and offences, forming the grassroots of the judicial system.

The Indian judiciary operates as a unified system, where all levels of courts are bound by the legal precedents set by the Hon'ble Supreme Court, yet retain administrative discretion within the states, allowing the high courts and subordinate courts to function independently in matters of governance and administration. The authors of the Constitution of India have brought about a compromise between the extremes of judicial supremacy and legislative supremacy obtaining in the United States of America (USA) and United Kingdom (UK) respectively. Thus, a balance has been struck between full judicial review and full legislative control[4].

[3] AG Noorani, 'The Indian Judiciary Under The Constitution' (1976) 9 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 335, 336.
[4] Dam (n 2) 278.

Article 226 and 32 may indeed be termed as the two symbols of this great democratic republic which the Indian people have given to themselves. Destroy these two and you will destroy the precious confidence of a free people[5]. Considering they are the only courts with the power to decide cases with constitutional implications, the Supreme Court and the High Courts can rightly be regarded as 'Constitutional Courts'. As the highest appellate court, the Supreme Court has the final say on any matter pertaining to the interpretation of the law and the Constitution, although in terms of jurisdiction, the Supreme Court and the High courts have equal authority to decide intergovernmental issues. The Supreme Court, the highest authority and ultimate arbiter, produces a lesser quantity of judgements than the high courts[6].

Since the landmark judgment of *Kesavananda Bharati*[7], which established the judicial theory that the basic framework of the Constitution cannot be changed, the Supreme Court has greatly expanded the scope of its judicial review. It is no longer confined to overseeing legislative and executive actions, the Court now exercises authority over constitutional amendments as well. The Supreme Court is now perhaps the most powerful constitutional court in the world owing to this extraordinary expansion of its authority, to an extent

[5] SM Sikri*, Does Article 226 Of The Constitution Need Any Amendment?* (1958) 1 Indian Law Institute 77.
[6] Manish Tewari and Rekha Saxena, *'The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism'* in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017).
[7] *Kesavananda Bharati* (n 1).

wherein it becomes an altruistic example of a sovereign body in pragmatic sense.

However, one of the biggest criticisms of the Supreme Court of India can be highlighted with a renowned statement of Sir James Charles Mathew, Judge, Court of Appeal, 'Justice is open to all - like the Grill-Room of the Ritz Hotel'. The Ritz hotel, a renowned symbol of luxury in the United Kingdom, is famous for its high security, strict dress codes, lavish and expensive lifestyle. Sir Mathew through this quote highlighted the hindrance in the path of access to justice, wherein many people stand in the way to achieve it, like police, lawyers, judges and the cost is very high. It certainly is expensive for a common man who could barely make the ends meet. It can further be co-related by analysing Indian jurisprudence that all the Constitution Bench judgements in India deciding a crucial point of law were filed and fought till the end by high-powered, influential people barring few, since litigation in the Supreme Court is not pocket friendly. Indeed, it is evident from the objective of Article 226 that it has been incorporated into the Constitution with the express purpose of broadening the scope of constitutional remedies and to overcome this problem of slow and expensive remedy under Article 32[8].

In contemplating the jurisdictional scope of High Courts, particularly post-Kusum Ingots case, it becomes imperative to undertake a

[8] D. D Basu, *Commentary on Constitution of India* (9th edn, LexisNexis 2018) vol 10, 10416.

Samudramanthan, a metaphorical churning of legal principles to unveil the true extent of their power. *Samudramanthan*, derived from ancient Indian scriptures such as the *Mahabharata* and the *Vishnu Purana*, describes the cosmic struggle between the Gods and the Demons. Stripped of their power due to a curse, the Gods sought Lord Vishnu's guidance, who devised the legendary Churning of the Ocean of Milk. Using mount *Mandara* as the churning rod and *Vasuki*, the divine serpent, as the rope, both celestial and demonic forces engaged in a strenuous process that eventually yielded fourteen treasures, including the elixir of immortality, *Amrit*[9].

This ancient event finds a striking parallel in the evolution of High Court jurisdiction under Article 225 of the Constitution of India. A closer examination of the historical development of the High Courts' jurisdiction reveals diverse and sometimes divergent trajectories, akin to the mythological churning of the ocean. Just as that monumental event produced varied, unforeseen circumstances, the judicial understanding of High Court powers has unfolded through competing interpretations , at times restrictive, at times expansive. However, critical questions remain, what is the true precedent value of High Court judgements? How binding is their authority? Can High Courts exercise sufficient power to achieve complete justice? And, in practice, do all High Courts stand on an equal footing?

[9] VR Patil, '*Samudra Manthan: Story of Hindu Mythology in Present Perspective*' (2018).

This paper undertakes an exhaustive examination of these questions, navigating through historical, doctrinal and comparative perspectives. It aims to uncover the hidden dimensions of High Court jurisdiction, assessing the precedential weight of their pronouncements, exploring exceptions to the general principles and analysing their implications on the broader legal landscape. Ultimately, this structured discourse will culminate in a comprehensive conclusion that synthesizes these diverse elements, providing a better understanding of the evolving jurisdictional contours of High Courts in India, right from its emergence.

II. FROM CROWN COURTS TO CONFUSION - WHERE HIGH COURTS GO HIGH AND SOMETIMES HIGHER

To understand the journey of Crown Courts of India to 'High Courts of India', analysis of the history of Indian Judiciary is quintessential. The British had authority over the administration of justice in India for the last few centuries, therefore it seems to be a natural starting point. The administration of justice in British India can be traced back to the reign of James I. In 1622, he granted a charter to the East India Company, giving them the authority to enforce discipline and punish English settlers for any misconduct, using martial law or other means. However, it was Charles II who laid the foundation for British Crown legislation in India. Through the Royal Charter of 1661, he officially granted the authority to introduce and implement British laws in the region[10].

Thereafter, for more speedy, better and effectual administration, a Royal Charter was granted by the King George I in 1726 to establish Mayor Courts in Calcutta, Bombay and Madras. The first Mayor Court was established in 1728[11] in Calcutta and then subsequently in other presidency towns. This introduced Indian Judiciary to its first 'Court of Record'. However, initially the Mayor Courts till the Royal Charter of 1753 was introduced, were only limited to people working in the factories within the territorial jurisdiction of the three towns. The amendment brought through the Royal Charter of 1753, included the power to adjudicate the *lis* between natives and non-natives with their prior consent.

To overcome the defects of the Mayor Courts, Royal Charter of 1773, Regulating Act of 1773 (aka East India Company Act, 1773) was brought, wherein Section 13 gave the power to the British Crown to establish Supreme Court of Judicature at Fort Williams in Calcutta in 1774, Madras-Patnam in 1801, and Bombay on the Island of Bombay in 1823. All three Supreme Courts were established with identical

[10] William Morley, *The Administration of Justice in British India: Its Past History and Present State, Comprising an Account of the Laws Peculiar to India* (Williams and Norgate, London 1858), 5.

[11] *'History | City Sessions Court, Calcutta | India'* https://citysessions.dcourts.gov.in/about-department/history/ accessed 21 February 2026.

jurisdiction, powers, and limitations. Under Section 13 of the enactment, they were granted extensive authority to oversee civil, criminal, admiralty, and ecclesiastical matters without restriction. An appeal from all the Supreme Courts lied with her Majesty in Council. However, it was challenging to define the exact powers and jurisdictions of the Supreme Courts in India, given by various statutes and charters, although, the Supreme Courts were empowered to go beyond the local limits of presidency towns. Therefore, to overthrow this problem, the British Crown came with the Indian High Courts Act, 1861, redefining each Indian Supreme Court's authority and jurisdiction by abolishing them and the *Sudder Courts*, by bringing into force the High Courts in their place.

The Indian High Courts Act of 1861, primarily functioned as an enabling legislation, while it was the Letters Patent that formally established the Presidency High Courts. A significant milestone was the issuance of the Letters Patent for the Calcutta High Court in 1862, which led to the establishment of the first High Court of Judicature at Bengal. Notably, Section 13 of the Letters Patent endowed the High Court with Extraordinary Original Jurisdiction, allowing it to adjudicate the *lis* beyond its ordinary territorial jurisdiction, either with the agreement of the parties or for the purposes of justice. Interestingly, this provision bears a conceptual resemblance to Article 142 of the Indian Constitution, which empowers the Supreme Court to go beyond statutory confines to ensure complete justice. Sir Charles Wood, the then Secretary of State for India, in his correspondence with Lord James Bruce, 8th Earl of Elgin and Governor General of India, referred to the High Courts as the 'Chief Court of Justice in India'. The British Crown's initial vision for these courts was to establish them as the highest judicial authorities in the country.

The first crucial development in Indian Judiciary was bringing into operation, a Federal Court of India as an appellate court for all the High Courts instead of the Privy Council. Furthermore, an appeal from the federal court lies to the Privy Council, which was later abolished when the Constitution was enforced. This Federal Court was transitioned into the Supreme Court of India on 26 January 1950, when the Constitution of India was enforced.

When we talk about the jurisdiction of High Courts in India, Article 225 of the Constitution states that they will retain the same jurisdiction as they had immediately before the Constitution came into effect. Now, the legislation discussing the jurisdiction of the high courts before the Constitution was the Government of India Act, 1935. However, Article 223 of the 1935 Act has somewhat a similar provision, and therefore it takes us back to the Government of India Act, 1915. This incessant loop doesn't stop here, Article 106 of the 1915 Act, again has a similar provision which eventually takes us to the appropriate Letters Patent and then ultimately to the Regulating Act of 1773.

The comparative historical analysis summarises the powers of High Courts in India and its evolution from 1726 with the establishment of Mayor Court to the omnipotent High Court that we see today. It can be deduced that the high courts were habituated to be the apex court within their jurisdiction. The Letters Patent and Section 8 of the Indian High Courts Act, 1861, states that the records, documents and the jurisprudence of the Supreme Courts established under the 1773 Act will be continued by the High Courts who are replacing them. Hence, the High Courts currently going beyond their territorial jurisdiction and deciding the law of the land is not a new practice for them. It can also be said that they derive this controversial power from the said provisions as explained above.

However, there appears to be a contradictory discussion, that Article 395 repealed all the enactments which are either amending or supplementing the Government of India Act, 1935. Therefore, the whole argument becomes infructuous making the Constitution, a sole authority holder and power-definer for High Courts in India. Although, Article 372 provides for continuation of those provisions. It is only through an express reference within a particular provision to its continued operation that it shall be preserved from the mighty force of the repealing article. Now, when we peruse Article 225, there appears to be an express provision for the continuation of the existing laws. Hence, this discussion fails to see the light of the day.

The Comparative historical analysis of both Supreme Court and High Court suggests that Supreme Court of India was established on 1 October 1937, as Federal Court of India seated at New Delhi, when the Government of India Act, 1935, was enforced. However, the first High Court was established in Calcutta in 1728, as the Mayor Court under the Royal Charter of 1726.

This was all about the history, however, to extrapolate the altruistic jurisdiction of a High Court, it is pertinent to determine the powers of the High Courts.

III. HIGH COURT & ITS POWERS

Chief Justice S. M. Sikri, while explaining the importance of a high court gracefully put it as, 'Remove Art. 226 and you will see a gradual deterioration in the legal standards of administration'[12]. Article 226 is influenced by the traditional approach of the law in England. The Constitution of India maintains a *status quo* in respect of jurisdiction and authority of High Court. They have a long and respected history, existing well before the Constitution came into effect, as stated in the previous chapter. They were not newly formed by the Constitution but had already been established and functioning. The authority and scope of a High Court is determined by the Indian High Courts Act of 1861,

[12] Sikri (n 5).

along with all laws passed up until the enforcement of the Constitution of India, 1950. Article 225 ensures and retains the power and jurisdiction they previously held, while Article 226 grants them expanded authority to issue writs, powers that were not available to them before[13].

Dr Ambedkar, Chairman of the Drafting Committee, the principal architect of the Constitution, referred to Article 32 as '…It is the very Soul of the Constitution and the very Heart of it…'[14] during the debates in the Constituent Assembly. However, for many Indians, particularly those without the financial resources for approaching the Supreme Court, the High Courts represent to be 'Supreme' for access to justice. Both, Article 32 and Article 226 are a part of the basic structure of the Constitution[15], however, a plain reading of both the Articles will show that the power to grant relief by the High Court is broader than that of the Supreme Court under Article 32. Furthermore, the right to approach the Apex Court is confined to the violation of fundamental rights. The High Court has wider jurisdiction because the aggrieved can allege violation of not only fundamental rights but also any legal rights or expectations[16].

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[13] *National Sewing Thread Co Ltd v James Chadwick & Bros Ltd* (1953) 1 SCC 794.
[14] *Constituent Assembly Debates,* vol VII, 953.
[15] *L Chandrakumar v Union of India* (1997) 3 SCC 261.
[16] *India's Constitution Origin and Evolution*, vol 7, 255.

Justice, Patanjali Shastri, in *Election Commission of India v. Saka Venkata Rao*[17], held that the seat of the government or authority that a writ is intended to be issued against must be situated within the High Court of the State, or the High Court's territorial jurisdiction, and literally interpreted Article 226, thereby limiting the jurisdiction of the High Courts in India. Furthermore, Justice B. P. Sinha speaking for the majority in *Khajoor Singh v. Union of India*[18], opined that any inconvenience that might be caused by this interpretation could be remedied only by an appropriate constitutional amendment to Article 226. The following example will elucidate the scenario in a better way - if the validity of a parliamentary law is challenged or is being read down, then the jurisdictional high court would be High Court of Delhi (High Court of Punjab and Haryana before the establishment of High Court of Delhi), citing the seat of Central Government. The parliament to resolve this issue brought the 15th Constitutional Amendment[19]. The amendment expanded the High Court's territorial jurisdiction, enabling them to issue writs to authorities or governments outside of their jurisdiction as long as the cause of action originates entirely or in part within their jurisdiction.

It may be inferred that, as articulated in Article 227, the drafters of the Constitution envisaged the High Court as an exercising overarching supervisory authority over all trial courts and subordinate judicial

[17] *Election Commission of India v Saka Venkata Rao* 1953 AIR 210.
[18] *Khajoor Singh v Union of India* (1961) 2 SCR 828.
[19] Constitution (Fifteenth Amendment) Act 1963.

bodies. However, historical practice diverged from this intention. Before the commencement of the Constitution, High Courts never had unfettered supervisory powers. Previously, the power was limited to reviewing decisions of lower courts that were not subject to appeal or revision. However, this restriction was not carried over into Article 227 of the Constitution of India, giving it broader and more dynamic authority. In this regard, Article 227 provides an unprecedented scope[20]. A comparison shows that the power of High Courts under Article 227 are similar to those of the Supreme Court under Article 141, though they remain within the High Court's specific jurisdiction.

For many years, there has been an extensive debate concerning the potential abuse of the supervisory authority vested under Article 227, where litigants have employed this power to circumvent the requisite exhaustion of appellate or revisional remedies. To address and mitigate such misuse, Parliament enacted an amendment to the provision, thereby constraining the High Court's supervisory jurisdiction to be exercised in conjunction with its appellate jurisdiction. The said amendment was brought through the 42nd Amendment[21], which also happens to be one of the most criticised amendments to the constitution. The Amendment, although ostensibly driven by political motivations, arguably served a practical function by curbing the potential misuse of the High Court's supervisory powers. Regrettably,

[20] *Surya Dev Rai v Ram Chander Rai* (2003) 6 SCC 675.
[21] Constitution (Forty-second Amendment) Act 1976.

this provision was repealed by the 44th Constitutional Amendment[22], in a move perceived as politically motivated to reverse the controversial changes enacted by the 42nd Amendment during the infamous Emergency period in India.

IV. PRECEDENT VALUE OF A HIGH COURT'S JUDICIAL PRONOUNCEMENT

The Hon'ble Supreme Court has consistently ruled that a decision made by one High Court does not serve as a binding precedent for another. However, such rulings may carry persuasive value, influencing decisions without holding mandatory authority[23]. The application of *Stare Decisis* doctrine to other high courts is limited to distinct benches within the same high court and cannot be extended beyond that point. As per Article 227, the law established by the highest court in a state is binding on all authorities and tribunals under its jurisdiction[24]. Additionally, a Single Judge of a High Court is required to follow previous rulings by another Single Judge or a Division Bench of the same High Court. However, if the judge believes that the earlier

[22] Constitution (Forty-Fourth Amendment) Act 1979.
[23] *Valliama Champaka Pillai v Sivathanu Pillai & Ors* (1979) 4 SCC 429, para 21.
[24] *East India Commercial Co Ltd v Collector of Customs* 1962 AIR 1893, para 19.

decision is incorrect, the matter should be referred to the Chief Justice, who may form a larger bench to reconsider the issue[25].

Thereafter, if there are conflicting decisions of various High Courts, then the later decision is to be preferred if it has taken into consideration all the jurisprudence on that issue. The Bombay High Court in *Commissioner of Income Tax v. Thana Electricity Supply Ltd.*[26], has summarised all the jurisprudence on the precedent value of a High Court's judgements. The Bombay high court judgement, has been unanimously affirmed, cited and relied upon in numerous pronouncements by the Supreme Court as well as various other High Courts. In summation, the abovementioned judgement affirms that a High Court serves as the paramount adjudicatory authority within its respective territorial jurisdiction, subordinate only to the Supreme Court.

In conclusion, a High Court's ruling does not hold legal authority over other High Courts, though it may serve as a persuasive reference. This means that while another High Court may consider it, there is no obligation to follow it. The same principle applies to High Court judgements that declare a law void. The Law Commission of India in

[25] *Mahadeolal Kanodia v Administrator-General of West Bengal* 1960 AIR 936, para 19.
[26] *Commissioner of Income Tax v Thana Electricity Supply Ltd* [1993] SCC OnLine Bom 591.

its report[27] recommended that if a High Court encounters an issue related to a central law on which another High Court has already ruled but holds a differing opinion, it may refer the matter to the Supreme Court along with its own reasoned perspective.

V. EXCEPTION TO THE GENERAL RULE

This has been the standpoint of the Apex Court which has been upheld by the judiciary and reaffirmed in several pronouncements. It was uncontroversial until April 2004, at which point the Supreme Court pronounced its contentious ruling in *Kusum Ingots & Alloys Ltd. v. Union of India & Anr.*[28], wherein it opined that a decision of the High Court declaring a parliamentary statute to be unconstitutional will be the law of the land as under Article 141 and it will have a bearing across India's whole territory. This expanded the High Court's jurisdiction and granted it unrestricted authority on par with the Supreme Court with respect to the constitutionality of the statute. The relevant para is as follows:

> '22. The Court must have the requisite territorial jurisdiction. An order passed on a writ petition questioning the constitutionality of a parliamentary Act, whether

[27] Law Commission of India, *136th Report: Conflicts in High Court Decisions on Central Laws - How to Foreclose and How to Resolve* (1990).

[28] *Kusum Ingots & Alloys Ltd v Union of India & Anr* (2004) 6 SCC 254.

> interim or final keeping in view the provisions contained in clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.'

The genesis of the aforementioned principle can be traced to a judicial pronouncement by the Nagpur Bench of the Bombay High Court approximately twenty-six years prior to *Kusum Ingots*[29]. In the case of *Commissioner of Income Tax, Vidarbha v. Smt. Godavari Devi Saraf*[30], the Bombay high court established this principle, thereby affirming and binding itself to a previous judgement of Madras High Court in *A. M Salt Maricar*[31], declaring section 140A(3) of the Income Tax Act, 1961, as non est from the book of law. The relevant para is read as follows:

> '9. ……………. Until a contrary decision is given by any other competent High Court, which is binding on a tribunal in the state of Bombay, it has to proceed on the footing that the law declared by High the Court, though of another state, is the final law of the land.'

[29] ibid.

[30] *Commissioner of Income Tax, Vidarbha v Smt Godavari Devi Saraf* [1977] SCC OnLine Bom 215.

[31] *A M Salt Maricar v Income Tax Officer* [1972] SCC OnLine Mad 236.

Interestingly, Supreme Court in *Kusum Ingots*[32] does not make any reference to this case of Bombay high court.

VI. THE CLOG OF KUSUM INGOTS ERA

Kusum Ingots[33] has sparked extensive debate regarding the nature and binding authority of certain judicial observations, particularly the controversial paragraph deemed by some as *obiter dicta*. The jurisprudence suggests that *obiter dicta* of the Supreme court is binding on all high courts[34], whereas some judgements opine that *obiter dicta* is not supposed to bind all lower courts *verbatim*, due to its subjective nature[35]. Thereafter, some stated that for a *dictum* in a judgement to be binding, it must at least be one of the questions raised before the bench[36]. However, the precedent value of high court's order binding throughout India has never been raised by any party during the course of arguments and deliberations in the Supreme Court. Thereafter, another debate deduced that it is a casual observation of the bench which is not binding at all[37]. The discourse continues to intensify as one explores the subject matter further; however, such considerations

[32] *Kusum Ingots* (n 28).
[33] ibid.
[34] *Municipal Committee, Amritsar v Hazara Singh* 1975 AIR 1083.
[35] *State of Orissa v Sudhansu Sekhar Misra* (1968) 2 SCR 154.
[36] *Prakash Amichand Shah v State of Gujarat* (1986) 1 SCC 581.
[37] *Gerard v Worth of Paris* [1936] 2 All ER 905 (CA); *MCD v Gurnam Kaur* (1989) 1 SCC 101.

are extraneous and outside the scope of this research paper. It is obvious that not everything can be examined in a paper this length, thus certain boundaries will need to be self-imposed for avoidance of deviation from the issue at hand.

VII. THE ENDURING IMPACT OF KUSUM INGOTS

After the pronouncement of *Kusum Ingots*[38], various High Courts started quoting it while applying another High Court's decision on the constitutionality of a statute. This complex issue was presented to the Madras High Court in the year 2010 in *Textile Technical Tradesmen Association & Ors. v. Union of India & Ors.*[39], wherein the validity of Section 17A of the Industrial Disputes Act, 1947[40], was an issue, since the Andhra Pradesh High Court in *Telugunadu Workcharged Employees State Federation, Nalgonda District Unit v. Government of India*[41], had already struck down the provision in the year 1997. The Madras High Court, placing substantial reliance on the precedent established in *Kusum Ingots*[42], declared that the contested provision has

[38] *Kusum Ingots* (n 28).
[39] *Textile Technical Tradesmen Association v. Union of India, 2010 SCC OnLine Mad 6515*.
[40] Industrial Disputes Act 1947.
[41] Telugunadu Work-charged Employees State Federation v. Government of India, 1997 SCC OnLine AP 313.
[42] *Kusum Ingots* (n 28).

been effectively nullified following the Andhra Pradesh High Court's adjudication, rendering it *non est*.

Thereafter, the constitutionality of Section 10A of the Indian Divorce Act, 1869[43], was in question before the Karnataka High Court in *Shiv Kumar v. Union of India*[44], wherein. Justice Nagarathna bound herself to a Kerala High Court's Division Bench judgement, *Saumya Ann Thomas v. Union of India*[45], in which the impugned provision was read down in a different manner. A heavy reliance was placed on *Kusum Ingots*[46] to make the Kerala high court's judgement binding across India.

Furthermore, Madras High Court in *Dr. T. Rajakumari v. Government of Tamil Nadu*[47], while deciding the constitutionality of Section 2(p) of the Pre-Conception and Prenatal Diagnostic Technique Act, 1994[48] (PC & PNDT), again cited *Kusum Ingots*[49] and made itself bound by the law laid down by the Delhi High Court in *Indian Radiological and Imaging Association v. Union of India*[50], which declared the impugned provision to be unconstitutional. Justice Sanjay Kishan Kaul, explicitly

[43] Indian Divorce Act 1869.
[44] *Shiv Kumar v Union of India* [2014] SCC OnLine 10121.
[45] *Saumya Ann Thomas v Union of India* (2010) 1 KLT 869.
[46] *Kusum Ingots* (n 28).
[47] *Dr T Rajakumari v Government of Tamil Nadu* AIR 2016 MADRAS 177.
[48] Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994.
[49] *Kusum Ingots* (n 28).
[50] *Indian Radiological and Imaging Association v Union of India* [2016] SCC OnLine 950.

stated that since during the pendency of *Dr. T. Rajakumari's*[51] case, the Supreme Court has not stayed the Delhi High Court order, therefore it is a binding precedent. Unfortunately, the Delhi High Court order was stayed later in 2018 by the Supreme Court in *Union of India v. Indian Radiological and Imaging Association*[52], thereby opening the gateway for further arguments in *Dr. T Rajakumari's*[53] case.

Hereafter, the Calcutta High Court, dealt with similar issue in the case of *Partha Protim Datta v. Union of India*[54], wherein a notification issued by the Ministry of Environment, Forest and Climate Change, Government of India was challenged. According to Justice Dipankar Datta, the Calcutta High Court will be bound by the Gujarat High Court's and Karnataka High Court's orders deferring the implementation of the impugned notification because of the legal precedent established in *Kusum Ingots*[55].

Similarly, the Orissa High Court in *Susanta Kumar Tripathy v. Union of India*[56], made itself bound by a previous decision of Madras High Court in *Chennai City Auto Ootunargal Sangam v. Union of India*[57], which struck down notifications imposing additional fee for renewal of

[51] *Dr T Rajakumari* (n 47).
[52] *Union of India v Indian Radiological and Imaging Association* (2018) 5 SCC 773.
[53] *Dr T Rajakumari* (n 47).
[54] *Partha Protim Datta v Union of India* [2016] SCC OnLine 8511.
[55] *Kusum Ingots* (n 28).
[56] *Susanta Kumar Tripathy v Union of India* [2019] SCC OnLine 81.
[57] *Chennai City Auto Ootunargal Sangam v Union of India* (2017) 3 LJ 769.

fitness certificate issued under Central Motor Vehicle Rules, 1989[58]. Again, the court heavily relied on *Kusum Ingots*[59].

Recently, Madras High Court in *V. Sundararaj v. Registrar General, High Court of Judicature, Madras*[60], reiterated the same when the Bombay High Court in *Vijaykumar Dighe v. Union of India*[61], declared Rules 3(2)(b), 4(2)(c) and 6(9) of the Consumer Protection Rules, 2020[62], as unconstitutional. Madras High Court opined that the impugned rules were deleted from the statute book by the Nagpur Bench of the Bombay High Court, therefore the impugned rules are *non-est*. Furthermore, the Supreme Court upheld the Bombay High Court judgement in *Secretary Ministry of Consumer Affairs v. Mahindra Limaye*[63], thereby fortifying the legal stance in *Vijaykumar Dighe's*[64] case further.

Lastly, the Supreme Court also acknowledged the principle laid down in *Kusum Ingots*[65] in *All India Jamiatul Quresh Action Committee v.*

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[58] Central Motor Vehicles Rules 1989.
[59] *Kusum Ingots* (n 28).
[60] *V Sundararaj v Registrar General, High Court of Judicature, Madras* 2023 243 AIR.
[61] *Vijaykumar Dighe v Union of India* [2021] SCC OnLine 2933.
[62] Consumer Protection (Qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of president and members of the state commission and district commission) Rules 2020.
[63] *Secretary Ministry of Consumer Affairs v Mahindra Limaye* [2023] SCC Online 231.
[64] *Vijaykumar Dighe* (n 61).
[65] *Kusum Ingots* (n 28).

Union of India[66], wherein the then Additional Solicitor General of India, P. S. Narsimha, made a statement on behalf of the Union of India which was recorded and acknowledged by the Supreme Court. The recorded statement is read as follows:

> '1. ……………. We understand the position to be that the interim order shall apply across the whole country.'[67]

The interim order in the cited quotation was passed by the Madras High Court in *S. Selvagomathy v. Union of India*[68], it granted an interim relief of stay of the Rules 22(b)(iii) and Rule 22(e) of the Prevention of Cruelty to Animals Rules, 2017[69], as *ultra vires* the principal Act. The aforementioned order's observation demonstrates that even the Supreme Court is in consonance with the *obiter dicta* made in Para 22 of *Kusum Ingots*[70] that interim or final orders in writ petitions contesting the constitutional validity of Central Legislations apply nationwide. As a result, one must question if the Supreme Court has given the stamp of approval to the *Obiter Dictum* of *Kusum Ingots*[71].

[66] *All India Jamiatul Quresh Action Committee v Union of India* WP (C) No 422 of 2017 Order dt. 11/07/2017.
[67] ibid.
[68] *S Selvagomathy v Union of India* [2017] SCC OnLine 2350.
[69] Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rules 2017.
[70] *Kusum Ingots* (n 28).
[71] ibid.

VIII. DEBATES ON THE PRINCIPLE OF KUSUM INGOTS

There have been numerous debates and discussions questioning or supplementing the principle laid down in para 22 of *Kusum Ingots*[72], which can be summarised and explained herein below:

1. Misinterpretation of Kusum Ingots
2. Amendments to Article 226
3. Conjunctive Reading of Articles 226 and 13
4. Judicial Activism
5. Caution Against Misapplication

A. Misinterpretation of Kusum Ingots:

One discussion arose wherein it was contended that various high courts started misinterpreting para 22 of *Kusum Ingots*[73] and thereby applied the principle to executive actions, and general interpretations of any provision. This misinterpretation gave the high courts unlimited power, making them the 'High Courts of India'. Although, a different interpretation of para 22 was laid down by a Maharashtra Real Estate Appellate Tribunal, Mumbai, in *Sriram Krishnan v. CCI Projects*[74]. The Appellate Tribunal concluded that *Kusum Ingots* arises out of an issue regarding cause of action and

[72] ibid.
[73] ibid.
[74] *Sriram Krishnan v CCI Projects* Appeal No AT006000000021150 (Maharashtra Real Estate Appellate Tribunal).

territorial jurisdiction to entertain a writ petition challenging the constitutional validity of a parliamentary legislation, therefore it will not apply to any other matter unless the validity of a central enactment is questioned. Thereafter, the Delhi High Court gave a similar interpretation of *kusum ingots* affirming the interpretation in *Sachin Waze v. Union of India*[75], and dismissed the writ petition for lack of territorial jurisdiction.

B. Amendments to Article 226:

A different perspective in favour of Kusum Ingots is about the amendments to Article 226, more particularly 15th and 42nd amendment. As explained earlier, 15th Amendment was brought to resolve an issue in the 1960's, however, in today's context, the same Amendment has created a problem since it enlarged the jurisdiction of High Courts in India, thereby making them 'High Court of India'[76]. Now, if we look at the controversial 42nd Amendment with pragmatic lens, then we can come to a conclusion that it solved this whole issue by usurping the High Court's power to declare a parliamentary legislation to be constitutionally invalid. The 42nd amendment brought Article 226A, which took away the abovementioned power and brought Article 131A, thereby granting the Supreme Court sole authority to determine whether central enactments

[75] *Sachin Waze v Union of India* [2022] SCC OnLine 3287.
[76] Shraddha Kulhari and Sujoy Chatterjee, 'The Emergence of a 'High Court of India': Separating the Myth from the Substance' 3 Journal of Indian Law Society 320.

are constitutional. This would have never led to the current issue of the High Court possessing powers equivalent to those of the Supreme Court, with respect to territorial jurisdiction. However, these troubleshooting provisions, were put to an end by the 43rd Amendment[77], by repealing the provisions. This may be one of the underlying reasons for Parliament's repeated inability to fulfil its objectives, primarily due to political obstructions.

C. Conjunctive Reading of Articles 226 and 13:

A new angle discussing the power of the High Court declaring the constitutional validity of the Central enactment is with respect to the High Court emanating its abovementioned power from not only Article 226 but also Article 13. If we read the last line of Article 226(1) 'for any other purpose' and Art 13 conjunctively, then we can conclude that the High Court can declare any law to be invalid if it is violating any of the rights in Part III of the Constitution, irrespective of its territorial jurisdiction. Article 13(2) does not encompass a territorial limitation and High Court being a court of record and a constitutional court like the Supreme Court, it does not require any explicit power to declare any law *ultra vires* the fundamental rights[78].

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[77] Constitution (Forty-third Amendment) Act 1977.

[78] Shivprasad Swaminathan, *Schrodinger's Constitutional Cat: Limits of the High Court's Declaration of Unconstitutionality* (2013) 25 National Law School of India Review 103.

D. Judicial Activism:

A separate claim about the interpretation of *Kusum Ingots* is that the Supreme Court under Article 142 has done complete justice by giving the High Courts the requisite power so as to put an end to the issue of affordability in the Supreme Court, as mentioned earlier. Furthermore, it can also be said that the Supreme Court is putting Article 32(3) into operation so as to achieve the objective of making litigation inexpensive. It may be asserted that the Supreme Court is making a mountain out of a molehill. However, this can only be achieved through a constitutional amendment, although under the garb of Judicial Activism, the judiciary has been taking matters into their hands time and again.

E. Caution Against Misapplication:

Another line of reasoning laid down by the Calcutta High Court before deciding the earlier mentioned *Partha Protim Datta*[79] in the timeline, was the case of *Durgapur Steel Town Cable TV Operator's Association v. Union of India*[80], which not only dissented but also questioned the principle of *Kusum Ingots*. Justice Dipankar Datta issued a cautionary note against other High Courts indiscriminately applying para 22 of *Kusum Ingots*. He further highlighted that the Sikkim High

[79] *Partha Protim Datta* (n 54).
[80] *Durgapur Steel Town Cable TV Operator's Association v Union of India* [2016] SCC OnLine 3025.

Court's *status quo* order in *All Sikkim Cable Operators Association v. Union of India*[81], based on the unique circumstances of the writ petition, should not have been used by other High Courts to assume that the *status quo* against the Central Government's notification extended nationwide.

IX. CONCLUSION

The concept of *Samudramanthan*, an ancient Indian event where gods and demons together churned the ocean to obtain the ultimate elixir of immortality, *Amruta,* serves as an apt metaphor for the pursuit undertaken in this paper. In the same way that the churning of the ocean brought forth fourteen elements before revealing the priced elixir, the examination of the jurisdictional powers of the High Courts similarly necessitates delving into a vast and intricate chain of legislative layers that span centuries. Each law traces back to a prior one, creating a complex, interconnected framework. This relentless effort to sift through and interpret these layers of legislation reflects the mythical churning process, as it seeks to reveal the true scope and essence of the High Court's powers.

In Summation, it can be said that the High Court existed before the promulgation of the Constitution and the establishment of the Supreme

[81] *All Sikkim Cable Operators Association v Union of India* [2016] SCC OnLine 27.

Court or the federal court under Government of India Act, 1935, it follows that the precedential authority of a High Court's judgement is substantially akin to that of the Supreme Court. As per the previous historical comparative analysis, it can be said that this rationale supports the whys and wherefores of Para 22 of *Kusum Ingots*[82]. The main objective of a central law is to ensure uniform application across the whole territory of India, and this concept of uniformity has been upheld by *Kusum Ingots*.

Recently in 2023, the Division bench of the Hon'ble Supreme Court, presided over a Special Leave Petition which was seeking a relief to make a case in the Patna High Court to be time-bound. However, the Supreme Court division bench dismissed the petition citing the autonomy of the High Court making it an independent body and also opined that 'the High Court is also a Constitutional Court and is not subordinate to the Supreme Court'[83]. Both the constitutional courts wield analogous powers, including the doctrine of precedent enshrined under Article 141, and the authority to transcend statutory provisions when necessary to secure complete justice, as delineated in Article 142. These judicial prerogatives empower them to not only maintain and reinforce legal principles, but also to address the complexities of equitable resolution, thereby ensuring that justice is administered in a manner that is both comprehensive and nuanced.

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[82] *Kusum Ingots* (n 28).
[83] *Shankar Kumar Jha v State of Bihar* [2023] Live Law 114.

The appointment and removal of judges highlight the concurrent authority of the Supreme Court and High Courts. Judges for both courts are appointed by the President in consultation with the Chief Justice of India. In the case of High Court judges, the Governor of the respective state and the Chief Justice of the High Court are also consulted. The removal of judges from either court is solely at the President's discretion, based on an order passed by both Houses of Parliament. This order must be supported by a majority of the total membership of each House and by at least a two-thirds majority of those present and voting. Such a request must be made during the session on the grounds of proven misconduct or incapacity.

Furthermore, the Supreme Court has time and again upheld the independent status of the High Courts as an institution. High Courts are autonomous bodies in the Indian Judiciary. The Supreme Court in *Mahesh Chandra Gupta v. Union of India*[84], upheld this principle and opined that 'Supreme Court Collegium does not sit in appeal over the High Court Collegium'. The High Court is empowered to make its own rules and procedure and is not bound by Supreme Court for that matter. Thereafter, recently in September 2024, Supreme Court in *Chirag Bhanu Singh v. High Court of Himachal Pradesh*[85], asked the Himachal Pradesh High Court Collegium to reconsider the names for elevation of

[84] *Mahesh Chandra Gupta v Union of India* (2009) 8 SCC 273.
[85] *Chirag Bhanu Singh v High Court of Himachal Pradesh* [2024] SCC OnLine 2418.

judges to the High Court keeping in mind that the Supreme Court does not sit in an appellate jurisdiction over High Courts in India.

To conclude, it can be said that the High Courts not only have a wider scope but also are equal to the Supreme Court with respect to their powers. This gives rise to two pivotal questions. First, can a judgement delivered by one High Court be cited and relied upon as precedent in another High Court, considering its similar jurisdictional powers as to the Supreme Court? Second, who holds the authority to amend the jurisdictional powers of the High Courts if the Indian judiciary continues to operate within the framework of colonial era principles established under British rule? Would such an amendment, in theory, still necessitate approval from the British Parliament?

It can be asserted and interpreted that the full bench of CJI Khare, Justice Sinha and Justice Kapadia have given effect to the archaic powers of the High Court by imbedding it into para 22 of the *Kusum Ingots'* judgement, manifesting equal powers of both the constitutional courts. Although, the way of functioning of both, the Supreme Court and High Courts and all the subordinate courts in India is identical. India in its true sense follows 'Unified Judiciary in Federal India' and upholds the altruistic commitment to legal consistency and justice across the nation.

VIII. ALGORITHMIC CONSTITUTIONALISM: REIMAGINING CONSTITUTIONAL MORALITY IN AN AI-DRIVEN INDIA

- *KARTIKEY MISHRA**, *DIVYANSH SINGH***

Abstract

Artificial intelligence (AI) is no longer confined to laboratories or private corporations; it is steadily shaping how states identify citizens, deliver welfare, police communities, and make administrative choices. In India, these algorithmic systems are woven into the very machinery of governance, raising questions that go to the heart of constitutional law.

The Indian Constitution is not a value-neutral charter but one animated by ideals of dignity, equality, liberty, justice, and what the Supreme Court has repeatedly described as constitutional morality. Hence, the increasing deployment of AI in governance has generated a pressing constitutional question: can algorithmic systems adhere to the values of constitutional morality that underpin the Constitution itself? The tension between efficiency promised by AI and the moral commitments of the Constitution requires careful theoretical and doctrinal analysis.

This paper situates India within the emerging field of algorithmic constitutionalism, which proposes that

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constitutional values must be embedded into technological and institutional architectures. It argues that AI systems, by themselves, cannot embody constitutional morality: they are socio-technical artefacts shaped by data, code, and institutional choices, often amplifying existing inequalities. Instead, the responsibility lies with constitutional frameworks to channel, restrain, and oversee algorithmic governance. This article advances three contributions.

First, it reconceptualises constitutional morality for the algorithmic age, drawing on Indian jurisprudence from Kesavananda Bharati to K. S. Puttaswamy, and highlighting its transformative potential. Second, it analyses contemporary challenges posed by algorithmic systems to privacy, equality, and accountability in India, drawing comparative lessons from the European Union's Artificial Intelligence Act and case studies such as the COMPAS recidivism tool in the United States. Third, it proposes an India-specific framework of algorithmic constitutionalism, combining statutory duties of transparency and auditability with institutional oversight and judicial review.

By engaging constitutional morality with algorithmic governance, the paper seeks to contribute to a Global South perspective on digital constitutionalism. India, with its transformative constitutional ethos and rapidly expanding digital state, provides a unique site to reimagine the relationship between code and constitution.

Keywords: *Algorithmic Constitutionalism, Constitutional Morality, State, AI, Global South.*

I. INTRODUCTION

"Constitutional law plays a critical role in addressing the challenges of the algorithmic society. New technologies have always challenged, if not disrupted, the social, economic, legal, and, to a certain extent, ideological status quo."[1]

Artificial intelligence (AI) is no longer a distant promise; it is now embedded in the everyday functions of the Indian state and society. In 2025, the executive introduced AI-powered facial recognition to record student attendance across 430 government junior colleges in Telangana, covering more than 63,000 students.[2] The judiciary, through the Kerala High Court, issued a policy on the use of AI tools in the district judiciary, restricting them to administrative tasks and mandating transparency, fairness, and accountability.[3] The finance sector saw regulatory momentum: the Reserve Bank of India's expert committee recommended a *Framework for Responsible and Ethical Enablement of Artificial Intelligence (FREEAI)*, emphasising risk

[1] Oreste Pollicino and Giovanni De Gregorio, 'Constitutional Law in the Algorithmic Society' in Oreste Pollicino and Giovanni De Gregorio (eds), *Constitutional Challenges in the Algorithmic Society* (CUP 2021) 5.
[2] Yashaswini Sri, 'Telangana Introduces AI-Powered Facial Recognition System for Student Attendance in Government Junior Colleges' (*Times of India,* 24 August 2025) https://timesofindia.indiatimes.com/city/hyderabad/telangana-introduces-ai-powered-facial-recognition-system-for-student-attendance-in-telangana-govt-junior-colleges/articleshow/123476626.cms accessed 20 September 2025.
[3] Amaal Sheikh, 'Kerala High Court Issues Policy on Use of AI for judiciary work: What does it say? Why is it significant?' *Indian Express*, 25 July 2025 https://indianexpress.com/article/explained/explained-global/kerala-hc-policy-ai-10149077/lite/ accessed 20 September 2025.

management, explainability, and auditability.[4] Simultaneously, industry reports suggest that generative AI will account for nearly 43 per cent of India's AI spending by 2025, while governance, risk, and compliance mechanisms remain limited.[5] The stakes are immediate and visible: algorithmic systems are advancing more rapidly than constitutional safeguards.

Pollicino and De Gregorio argue that the **rise of the algorithmic society disrupts not only legal doctrines but also the traditional distribution of power**.[6] Constitutions were historically designed to **limit public power** and safeguard individuals against state overreach.[7] Yet the emergence of digital private powers corporations with vast capacities of data collection, mining, and algorithmic profiling has blurred these boundaries. Predictive analytics and behavioural manipulation now create risks to liberty and equality that judicial

[4] Ashwin Manikandan, 'India Cenbank Committee Recommends AI Framework for Finance Sector' *Reuters*, (13 August 2025) https://www.reuters.com/sustainability/boards-policy-regulation/india-cenbank-committee-recommends-ai-framework-finance-sector-2025-08-13/ accessed 21 September 2025.

[5] ETCIO, 'Lenovo Study: Generative AI to Drive 43% of AI Spend in India by 2025' *Economic Times CIO* (27 August 2025) https://cio.economictimes.indiatimes.com/news/next-gen-technologies/lenovo-study-genai-to-drive-43-of-ai-spend-in-india-by-2025/120686351 accessed 21 September 2025.

[6] Oreste Pollicino and De Gregorio (n 1) 5–7.

[7] Wil Waluchow and Dimitrios Kyritsis, 'Constitutionalism', *The Stanford Encyclopedia of Philosophy* (Summer edn, 2023) https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=constitutionalism accessed 26 February 2026, also see Ngoc Son Bui, 'Discursive Constitutionalism' (2023) 23(2) Chicago Journal of International Law 342.

review, as conceived in the bureaucratic state, cannot adequately capture.[8] Doctrines developed in the pre-digital age may fail to prevent rights violations that unfold invisibly and in real time. This compels either the extension of constitutional norms to powerful private actors or the rethinking of state duties to regulate the digital complex.

The idea of *Algorithmic Constitutionalism*, introduced by Oren Perez and Nurit Wimer, offers one path forward.[9] They argue that constitutional values must be encoded into algorithmic architectures themselves, through layered meta-code, algorithmic meta-reasoning, and avenues for deliberative correction.[10] In India, this resonates with the doctrine of *constitutional morality*, rooted in Ambedkar's vision and consolidated by the Supreme Court, which requires fidelity to dignity, equality, and justice as the animating spirit of governance.[11] Indian constitutional jurisprudence illustrates this trajectory. In *Kesavananda Bharati v State of Kerala*, the Supreme Court preserved the "basic structure" doctrine to prevent constitutional amendments from dismantling fundamental values.[12] In *Navtej Singh Johar v Union of India*, constitutional morality underpinned the decriminalisation of same-sex relations, and thereby watering down a Colonial era law

[8] Oreste Pollicino and De Gregorio (n 1) 8–10.
[9] Oren Perez and Nurit Wimer, 'Algorithmic Constitutionalism' (2023) 30(2) Indiana Journal of Global Legal Studies 81-113.
[10] ibid.
[11] *Constituent Assembly Debates,* Vol. VII (25 November 1949), also see *Indian Young Lawyers Association v State of Kerala* (2018) 9 SCC 1
[12] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

which reflected Victorian morality.[13] Further, in *Justice K. S. Puttaswamy v Union of India*, informational privacy was recognised as intrinsic to liberty and dignity, laying the groundwork for evaluating algorithmic intrusions.[14] Systems such as Aadhaar have shown both the efficiency of digital welfare delivery and the perils of exclusion, especially where biometric authentication fails.[15]

The Indian state itself acknowledges these stakes. In 2025, the Principal Scientific Advisor, Ajay Sood, stated that the government "understands AI-induced social risks" and aims to deploy AI for public benefit in areas such as health and education.[16] Under the *Safe & Trusted AI* pillar of the IndiaAI Mission, four responsible AI solutions are to be deployed via the AIKosha portal, signalling institutional steps to embed accountability into governance infrastructures.[17] Yet as Pollicino underscores, algorithmic governance involves a paradigmatic shift: public power is no longer the sole threat to constitutional rights, and

[13] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.
[14] *Justice K. S. Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1.
[15] *K. S. Puttaswamy v Union of India* (2018) 1 SCC 809; Reetika Khera, 'Aadhaar Failures: A Constitutional Perspective' (2019) 54(5) *EPW* 14.
[16] IndiaAI, 'Indian Government Understands AI-Induced Social Risks and Also Not Being "Overtly Possessive": India's Scientific Advisor' (*IndiaAI.gov.in,* 13 December 2023) https://indiaai.gov.in/article/indian-government-understands-ai-induced-social-risks-and-also-not-being-overtly-possessive-india-s-scientific-advisor accessed 21 September 2025.
[17] Annapurna Roy, 'Four of IndiaAI's Responsible AI Solutions to Go Live on AIKosha from September' (*Economic Times*, 4 June 2025) https://economictimes.indiatimes.com/tech/artificial-intelligence/four-of-indiaais-responsible-ai-solutions-to-go-live-on-aikosha-from-september/articleshow/121601280.cms accessed 21 September 2025.

doctrines must evolve to address private digital power as well.[18] Comparative experiences reinforce this imperative. The European Union's AI Act (2024) subjects high-risk AI systems to stringent transparency, oversight, and human-in-the-loop requirements.[19] In the United States, the COMPAS recidivism algorithm illustrates the dangers of opaque systems reproducing systemic bias, undermining equality before the law.[20] These examples demonstrate how algorithmic governance, without safeguards, risks undermining democracy, liberty, and dignity.

This paper advances three propositions. First, algorithmic systems, by themselves, cannot embody constitutional morality: they are artefacts shaped by data, design, and institutional choices, often opaque and trained on biased data that reproduces social inequality, operate at scale and speed that can amplify harms. Secondly, constitutional morality offers a normative compass for evaluating AI governance in India, but it must be operationalised through statutory mandates, institutional oversight, and enforceable procedural safeguards. Thirdly, India is uniquely positioned to propose a Global South model of *algorithmic*

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[18] Oreste Pollicino and De Gregorio (n 1) 12–15.
[19] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence [2024] OJ L 202.
[20] Julia Angwin et. al., 'Machine Bias' (*ProPublica*, 23 May 2016) https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing accessed 28 September 2025.

constitutionalism, blending comparative regulatory insights with its transformative constitutional ethos.

Therefore, the discussion proceeds in four parts. Part I revisits constitutional morality in Indian jurisprudence and situates it within the conceptual framework of algorithmic constitutionalism. Part II analyses how algorithmic governance in India challenges privacy, equality, and accountability. Part III explores institutional implications for separation of powers and judicial review. Part IV proposes legal, procedural, and institutional safeguards for embedding constitutional morality in AI governance. The conclusion reflects on India's potential contribution to global debates on digital constitutionalism.

II. CONSTITUTIONAL MORALITY IN INDIAN JURISPRUDENCE

The idea of *constitutional morality* occupies a central place in India's constitutional discourse, both as a doctrinal tool and as a normative compass guiding the Constitutional courts since the inception of the Republic. Though its precise contours have shifted over time, constitutional morality has consistently given courts a principles yardstick when explicit rules are lacking, serving as a benchmark for aligning governance with the transformative aspirations of the Constitution. In the context of an emerging algorithmic society, revisiting this doctrine is critical: the same principles that checked parliamentary majorities and executive discretion must now be tested against algorithmic systems and digital powers.

A. Origins: Ambedkar and the Constituent Assembly Debates

The phrase "*constitutional morality*" was first popularised in India by Dr. B. R. Ambedkar during the Constituent Assembly Debates. On 25 November 1949, Ambedkar explained that constitutional morality is not a natural sentiment but "*has to be cultivated*," requiring a commitment to the values underlying the Constitution rather than merely its text.[21] Drawing from George Grote's history of Greece, Ambedkar envisioned constitutional morality as a collective discipline that limits both rulers and citizens within constitutional bounds.[22] He further quoted –

> *"By constitutional morality, Grote meant... a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the*

[21] Constituent Assembly Debates (n 10).
[22] George Grote, *A History of Greece*, vol 2 (John Murray 1846) cited in Constituent Assembly Debates (n 10).

> *bitterness of party contest that the forms of constitution wall not be less sacred in the eyes of his opponents than his own."*[23]

For Ambedkar, constitutional morality was the foundation for India's transition from hierarchical, caste-dominated traditions to a constitutional democracy grounded in liberty, equality, and fraternity.[24] This emphasis on transformative fidelity, that governance must serve constitutional values even in the face of social or political pressures, provides a doctrinal anchor for addressing today's algorithmic challenges. Just as Ambedkar warned against majoritarianism, constitutional morality can restrain the unaccountable and opaque logic of algorithms.

B. Judicial Engagement and Doctrinal Consolidation

In the decades following independence, constitutional morality did not feature prominently in judicial vocabulary. The courts relied more heavily on textual interpretation, doctrines of reasonableness, and proportionality. It was only in landmark cases of the 1970s and 1990s that the doctrine began to emerge implicitly. In *Kesavananda Bharati v State of Kerala*, the Supreme Court introduced the "*basic structure*" doctrine, holding that Parliament's power to amend the Constitution did not extend to destroying its fundamental features.[25] Though the

[23] ibid.
[24] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1966) 75–80.
[25] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

phrase "*constitutional morality*" was not used, the reasoning reflected its essence i.e., constitutional change must remain faithful to deeper commitments of democracy, equality, and rule of law. Similarly, in *S R Bommai v Union of India*, the Court limited arbitrary use of Article 356 (President's Rule), grounding its judgment in principles of secularism and federalism.[26] These decisions highlighted that constitutional values restrain even democratically legitimate institutions.

It was only more recently that constitutional morality has attained salience in recent Indian jurisprudence with the Supreme Court invoking the doctrine more visibly and explicitly. In *Government of NCT Delhi v Union of India*, Justice Chandrachud described constitutional morality as ensuring "*the pursuit of justice, liberty, equality and fraternity*," and as preventing "*a situation where one or a few persons capture constitutional power.*"[27] Justice Dipak Misra further observed that, constitutional morality is not an abstract or externally imposed standard, but one that is organically embedded within the Constitution's norms and underlying conscience. He drew a sharp distinction between generosity and justness to illustrate this idea: an act of generosity, however well-intentioned, carries within it a hierarchical quality, a sense of condescension, and therefore falls short of the constitutional idea. Justness, by contrast, operates without

[26] *S R Bommai v Union of India* (1994) 3 SCC 1.
[27] *Government of NCT Delhi v Union of India* (2018) 8 SCC 501.

condescension, as a normative entitlement. Constitutional morality, thus, demands that state action be tested against the standard of constitutional justness rather than against any subjective or benevolent impulse of the actor. [28]

This formulation tied constitutional morality to participatory governance and accountability. In *Navtej Singh Johar v Union of India* (2018), which decriminalised same-sex relations, the Court grounded its reasoning in constitutional morality rather than public morality. Justice Misra once again distinguished constitutional morality from majoritarian prejudice, holding that –

> *"Constitutional morality requires that this Court must act as a counter-majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe."*[29]

In *Indian Young Lawyers Association v State of* Kerala (2018), dealing with prohibition of women's entry into the temple on grounds of public morality, Justice Misra held the restrictions that it must be constitutional morality and not social morality that could serve the purpose of term 'morality under article 25 and 26 of the Constitution.[30] Similarly, in *Joseph Shine v Union of India* (2019), which struck down

[28] ibid.
[29] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.
[30] *Indian Young Lawyers Association v State of Kerala* [2018] SCC OnLine SC 1690.

Section 497 of the Indian Penal Code, decriminalising adultery, the Court used constitutional morality to advance gender equality and personal autonomy.[31] Justice Nariman observed that:

> *"Our Constitution is a repository of rights, a celebration of myriad freedoms and liberties. It envisages the creation of a society where the 'ideals of equality, dignity and freedom' triumph over entrenched prejudices and injustices. The creation of a just, egalitarian society is a process. It often involves the questioning and obliteration of parochial social mores which are antithetical to constitutional morality."*[32]

In the *Puttaswamy* judgments, constitutional morality underpinned the recognition of privacy as intrinsic to dignity, liberty and autonomy. It thus, "provided doctrinal foundations for later invocations of constitutional morality".[33] In the 2017 decision affirming privacy as a fundamental right, the Court framed informational self-determination as essential to human dignity.[34] In the 2018 Aadhaar judgment, constitutional morality was invoked to balance welfare imperatives against exclusion and surveillance risks.[35] These cases demonstrate

[31] *Joseph Shine v Union of India* (2019) 3 SCC 39.
[32] ibid.
[33] Sumit Pradhan, 'Constitutional Morality vs. Social Morality: Evolving Jurisprudence in Contemporary India' (2024) 4(4) JLRJS 2049, 2050.
[34] *Justice K S Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1.
[35] *K S Puttaswamy v Union of India* (2019) 1 SCC 1.

how the doctrine has evolved into a flexible standard for adjudicating rights in the digital age.

C. Scholarly Perspectives on Constitutional Morality

Scholars have interpreted constitutional morality as both a restraint on state power and a transformative principle guiding social change. Gautam Bhatia argues that it represents a "*commitment to the higher principles of justice*" beyond majoritarian preferences.[36] Madhav Khosla situates it within India's unique experiment of embedding a constitutional culture in a deeply hierarchical society.[37] Upendra Baxi frames it as a "*jurisprudence of human dignity,*" positioning it against authoritarian or exclusionary tendencies.[38] This scholarly discourse underscores two features: first, constitutional morality is **counter-majoritarian**, restraining both elected governments and popular prejudices; second, it is **transformative**, demanding fidelity to the emancipatory ideals of the Constitution. These dimensions are directly relevant when algorithms threaten to entrench historical biases or enable unaccountable decision-making.

III. CONSTITUTIONAL MORALITY AND THE ALGORITHMIC SOCIETY

[36] Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019) 215–20.
[37] Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press 2020) 141–50.
[38] Upendra Baxi, *The Indian Constitution: Contemporary Texts and Contexts* (OUP 2013) 97.

The relevance of constitutional morality becomes sharper when placed within the context of the algorithmic society. As Pollicino and De Gregorio note, new technologies such as data mining, algorithmic analysis, and predictive profiling disrupt the traditional balance of constitutional law.[1] Constitutions were historically designed to limit governmental power and protect individuals against the excesses of the state.[2] In India, this has ranged from restraining parliamentary majorities (*Kesavananda Bharati case*), curbing arbitrary executive action (*S R Bommai case*), and protecting minorities against social prejudice (*Navtej Singh Johar case*). Yet, in the digital age, power no longer resides solely in public institutions. Private actors, multinational technology corporations, platform intermediaries, and AI service providers exercise forms of control over behaviour, speech, and access to resources that rival the reach of the state.

Algorithmic governance presents unique challenges. They are not neutral instruments, rather, social technologies that reconfigure decision making and public action. Peeters and Schuilenburg clarify that algorithmic governance replaces human-legible judgement with data driven classification producing systematic effects through automation.[39] The core concern is that opacity bundled with diffusion of authority can erode doctrinal safeguards which constitutional morality protects. Automated decision-making can thus, exclude

[39] Rik Peeters and Marc Schuilenburg, 'The algorithmic society An introduction', in Rik Peeters and Marc Schuilenburg (eds), *The Algorithmic Society* (Routledge 2021) 1-15.

individuals from welfare benefits, deny access to employment, or subject citizens to surveillance without transparency or meaningful recourse.[40] The risks often materialise invisibly and at scale, leaving judicial review to intervene only after harm is widespread or irreversible.[41] In this sense, doctrines conceived in the bureaucratic state, where state actions could be reviewed through constitutional or administrative law are ill-suited to the diffuse and fast-moving harms of algorithmic systems. Constitutional morality, therefore, must evolve to address this paradigmatic shift. It performs two essential functions in the algorithmic society:

A. **Normative Compass** — Constitutional morality provides the substantive values like dignity, liberty, equality, and fraternity that must anchor the governance of artificial intelligence. As the Supreme Court affirmed in *Puttaswamy case*, dignity lies at the heart of constitutional rights.[42] Applying this reasoning, technologies such as facial recognition or predictive policing cannot be justified merely on grounds of efficiency; they must be assessed against their impact on privacy, non-discrimination, and autonomy. Scholars such as Sandra Wachter and Brent Mittelstadt have shown how algorithmic systems often generate

[40] Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (St Martin's Press 2018) 39–70.
[41] Pollicino and De Gregorio (n 1) 12.
[42] *Justice K.S. Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1.

inferences that are opaque, unverifiable, and discriminatory, raising serious concerns about accountability.[43]

B. **Transformative Principle** — Constitutional morality also imposes a duty on the state to extend protections beyond the realm of public power. If private platforms or algorithms systematically manipulate behaviour, reinforce stereotypes, or exclude vulnerable groups, constitutional morality requires state intervention to regulate such actors. This reflects the doctrine's transformative character: it is not only a restraint on state authority but a principle demanding that governance adapt to safeguard democracy in new contexts.[44]

This reorientation has important consequences. It suggests that constitutional morality cannot remain a doctrine confined to judicial pronouncements. Rather, it must inform legislative choices, regulatory design, and executive policy. Comparative experience supports this view: the European Union's AI Act of 2024 subjects high-risk systems to obligations of transparency, human oversight, and accountability, embodying a constitutionalist approach to digital governance.[45] Similarly, scholarship on digital constitutionalism has emphasised the need to reimagine constitutional law so that it confronts both state and

[43] Sandra Wachter and Brent Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) 2019 *Columbia Business Law Review* 494, 498–505.
[44] Baxi (n 37).
[45] Regulation (EU) 2024/1689 (n 19).

private power in the algorithmic society.[46] Its effectiveness will depend on translating its normative compass into institutional capacities that can cope with the magnitude and opacity of algorithms.

In India, where constitutional morality has historically served as a counter-majoritarian principle and a shield for minorities, its extension to algorithmic governance appears not only logical but necessary. Just as it once protected individuals against exclusionary laws and majoritarian prejudice, it must now be reimagined to discipline the invisible architectures of algorithmic power. This evolution will determine whether constitutional values of dignity, liberty, and equality can survive in an AI-driven democracy.

IV. ALGORITHMIC GOVERNANCE AND THE CHALLENGE TO CONSTITUTIONAL VALUES

The constitutional project in India has always been animated by the promise of liberty, equality, dignity, and fraternity. Yet, the rise of algorithmic governance presents new challenges to these values, as highlighted in Part II. Artificial intelligence systems are increasingly being deployed across governance, finance, welfare, and even judicial administration, often with little public debate and inadequate

[46] Cary Coglianese and Orly Lobel, 'Algorithmic Administration as Constitutional Governance' in Oreste Pollicino and Giovanni De Gregorio (eds), *Constitutional Challenges in the Algorithmic Society* (CUP 2022) 55–78.

safeguards. While these technologies are framed as tools for efficiency and innovation, they also risk entrenching systemic biases, amplifying surveillance, and undermining democratic accountability.

A. Privacy and Surveillance

The right to privacy, affirmed in *Puttaswamy (Privacy)* as intrinsic to liberty and dignity,[47] is one of the most immediate casualties of algorithmic governance. As mentioned in the introductory part of the paper, in 2025, the Government of Telangana rolled out an AI-powered facial recognition system to record student attendance across 430 government junior colleges, covering more than 63,000 students.[48] While ostensibly designed to streamline attendance, such systems enable constant surveillance and raise questions about informed consent, proportionality, and data security. The risks are not abstract. Research has demonstrated that facial recognition technologies often perform poorly for women and darker-skinned individuals, reproducing discriminatory patterns of exclusion.[49] In India, where biometric authentication has already led to welfare exclusions under Aadhaar,[50] extending surveillance through opaque AI systems intensifies concerns of disproportionate harm to the marginalised.

[47] *Justice K S Puttaswamy (Retd) (n34)*[119]
[48] Sri (n 2).
[49] Joy Buolamwini and Timnit Gebru, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' (2018) 81 *Proceedings of Machine Learning Research* 1.
[50] Khera (n 15).

Comparative experience illustrates similar risks: in the United States, wrongful arrests based on faulty facial recognition systems have disproportionately affected Black citizens.[51]

B. Equality and Non-Discrimination

Algorithmic systems also threaten the constitutional guarantee of equality. AI models trained on historical data often replicate social biases, particularly those embedded in caste, class, and gender hierarchies. Virginia Eubanks' study of welfare automation in the United States illustrates how automated eligibility systems disproportionately penalise the poor.[52] Amazon's discontinued experiment with AI recruiting tools systematically downgraded resumes containing the word "women's"[53] due to its reliance on historical hiring data. In India, reports of biometric failures leading to denial of food subsidies under the Public Distribution System demonstrate similar vulnerabilities.[54]

Moreover, algorithmic bias has been documented in recruitment tools, lending algorithms, and predictive policing.[55] The Supreme Court has

[51] Kashmir Hill, 'Wrongfully Accused by an Algorithm' *The New York Times* (24 June 2020) https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html accessed 24 September 2025.
[52] Eubanks (n 40)39–70.
[53] Dr. Subholaxmi Mukherjee, 'Algorithic Bias and Discrimination: Legal Accountability of AI Systems' (2025) 13 IJIRMPS 1, 2.
[54] Khera (n 15).
[55] Solon Barocas and Andrew Selbst, 'Big Data's Disparate Impact' (2016) 104(3) California Law Review 671.

long recognised substantive equality as requiring attention to structural disadvantage, as in *Navtej Johar* and *Shayara Bano*.[56] Algorithmic systems, if unregulated, threaten to hardwire structural inequalities into governance, undermining the Constitution's vision of social justice.

C. Dignity and Autonomy

Dignity, described in *Puttaswamy* as the *"core of the fundamental rights guaranteed in Part III,"* is also at risk. Automated decision-making often denies individuals meaningful participation in decisions that affect their lives. Whether it is an opaque credit-scoring system, a welfare eligibility algorithm, or a content moderation model, the absence of explanation or appeal erodes personal autonomy. Wachter and Mittelstadt have termed this the *"black box problem"* where individuals cannot understand or contest the logic behind algorithmic decisions.[57]

In India, Aadhaar-linked systems have illustrated how automated processes can reduce citizens to data points, stripping away the relational and human dimensions of governance.[58] This clashes with Ambedkar's vision of constitutional morality, which foregrounds the dignity of the individual as the foundation of democracy.

[56] *Shayara Bano v Union of India* (2017) 9 SCC 1
[57] Sandra Wachter (n 43).
[58] *K S Puttaswamy* (n 34).

D. Accountability and Democratic Oversight

Finally, algorithmic governance raises profound questions of accountability. Unlike traditional administrative action, where reasons must be recorded and decisions can be judicially reviewed, algorithmic decisions are often inscrutable. This opacity threatens the rule of law, which requires decisions to be reasoned, reviewable, and open to scrutiny.[59]

Indian institutions are beginning to respond. The Kerala High Court's 2025 policy on AI tools in the district judiciary permitted their use only in administrative functions, explicitly prohibiting reliance on AI for adjudication.[60] Similarly, the Reserve Bank of India's expert committee proposed a *Framework for Responsible and Ethical Enablement of Artificial Intelligence (FREEAI)* in financial services, focusing on explainability, auditability, and risk management.[61] At the national level, the IndiaAI Mission has announced the deployment of responsible AI solutions under the *Safe & Trusted AI* pillar.[62] These initiatives, however, remain fragmented and lack a coherent constitutional framework. Comparative experience suggests the importance of statutory safeguards. The European Union's AI Act of 2024 subjects "*high-risk*" systems to stringent requirements of

[59] Paul Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021) 27–32.
[60] Amaal Sheikh (n 3).
[61] Ashwin Manikandan (n 4).
[62] Annapurna Roy (n 17).

transparency, human oversight, and rights of redress.[63] In the United States, the controversy around the COMPAS recidivism algorithm, which ProPublica revealed to be racially biased and opaque, highlights the dangers of unregulated algorithmic decision-making in the justice system.[64] These examples underscore that without systemic safeguards, algorithmic governance risks undermining constitutional principles.

Algorithmic governance is not value-neutral; it encodes choices, biases, and trade-offs that directly implicate constitutional rights. In India, where constitutional morality has historically served to protect minorities, limit state power, and uphold dignity, its application to AI governance is both urgent and necessary. The challenge lies not in resisting technological change, but in ensuring that such change is disciplined by constitutional values.

E. Why Pre-Digital Constitutional Doctrines Fall Short in The Algorithmic Age

Constitutional doctrines are not abstract inventions. They are responses to the forms of power that exist at the time of their creation. Most of India's foundational doctrines on procedural fairness, equality, and the scope of judicial review were shaped in an era when state power

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[63] Regulation (EU) 2024/1689 (n 18).
[64] Julia Angwin (n 20).

operated through visible, traceable, and human-authored acts: a detention order signed by an officer, a statute enacted by Parliament, a decision recorded in a file. The algorithmic society has disrupted this basic architecture. Power today is increasingly exercised by automated systems whose classifications are generated by data rather than deliberation, whose harms accumulate invisibly and at speed, and whose logic is often inaccessible even to the institutions that deploy them. Against this backdrop, three major areas of constitutional doctrine reveal a structural gap: the Article 14 framework on procedural fairness and equality, the writ jurisdiction under Articles 32 and 226 as it applies to private actors, and a cluster of other doctrines that are rendered equally ineffective by the opacity and diffusion of algorithmic power.

Article 14 has long performed two related but distinct functions: it demands procedural fairness in individual decision-making, and it prohibits arbitrary or irrational classification in the exercise of state power. Neither function translates comfortably to algorithmic governance. On the procedural side, the Supreme Court in *Maneka Gandhi v Union of India* transformed Article 21 into a guarantee of fair process, requiring that any procedure depriving a person of life or liberty must be just, fair, and reasonable.[65] Implicit in that requirement is the idea that there is an identifiable decision-maker who can receive representations, record reasons, and be held accountable for the

[65] *Maneka Gandhi v Union of India* [1978] 1 SCC 248.

outcome. Algorithmic decision-making dissolves this requirement. When an automated welfare-eligibility system flags a beneficiary as a duplicate entry or denies a food subsidy on the basis of a biometric mismatch, there is no officer who has applied her mind, no reasons that appear in a speaking order, and no record that a court can meaningfully scrutinise. The harm is real, but the procedural architecture of *Maneka Gandhi* has nothing to act upon. This is precisely what occurred in the Jharkhand Public Distribution System exclusion episodes, where Aadhaar-linked de-duplication algorithms rendered hundreds of genuine beneficiaries invisible to the system, without any notice, any hearing, or any intelligible explanation.[66]

The equality limb of Article 14 fares no better. Since *State of West Bengal v Anwar Ali Sarkar* onwards, the intelligible differentia test has asked whether a classification has a rational nexus to the object of the law.[67]

The test presupposes a classification that can be named, a purpose that can be stated, and a nexus between the two that a court can evaluate. Algorithmic classification operates differently. A machine-learning model does not declare its categories in advance; it discovers statistical correlations in historical training data and generates outputs whose

[66] Jean Drèze and others, *Aadhaar and Food Security in Jharkhand: Pain Without Gain?* (2017) 52 EPW 50; also see Reetika Khera (ed), *Dissent on Aadhaar: Big Data Meets Big Brother* (Orient BlackSwan 2019).
[67] *State of West Bengal v Anwar Ali Sarkar* [1952] SCR 284.

internal logic is often opaque even to its developers. The classification is emergent rather than enacted. When a credit-scoring or hiring algorithm in India systematically disadvantages applicants from particular castes, districts, or occupational backgrounds, not because of any articulated legislative purpose but because of proxies embedded in historical data, the intelligible differentia test is at a loss. There is no differentia that can be stated, and therefore no nexus that can be assessed. The concern is not merely theoretical. In January 2026, Vijender Singh Chauhan, an Associate Professor at the University of Delhi, publicly observed that ChatGPT's training data had been produced predominantly by upper-caste and privileged sections of society, raising the question of whether the model could deliver social justice at all.[68] His observation points to a genuine constitutional concern: when AI systems trained on socially skewed data are deployed in consequential domains such as public employment, welfare, or education, they may reproduce structural caste hierarchies in ways that no equality doctrine calibrated to deliberate legislative acts can address.

The second structural failure lies in judicial review's dependence on state action. Constitutional remedies under Articles 32 and 226 have historically been confined to actions by the 'State' as defined under

[68] Vijender Singh Chauhan (Associate Professor, University of Delhi), quoted in Rintu Bhattacharya, 'UPSC educator Vijender Chauhan claims ChatGPT favours Upper-Caste' (Opindia, 19 January 2026) https://www.opindia.com accessed 20 February 2026. The empirical basis for such concerns is independently corroborated in Rhiannon Williams and Pratheek Rebala, 'OpenAI is huge in India. Its models are steeped in caste bias' (MIT Technology Review, 1 October 2025) https://www.technologyreview.com accessed 20 February 2026.

Article 12, a concept that courts expanded over decades from statutory bodies and government companies to entities subject to deep and pervasive state control, as in *Pradeep Kumar Biswas v Indian Institute of Chemical Biology*[69] Yet this expansion, however imaginative, was always designed to capture entities that derive their authority or resources from the state. It was not designed for the configuration of power that now dominates the digital landscape: private technology corporations and platform intermediaries that exercise sweeping control over access to employment, credit, information, and public discourse, without any meaningful connection to state authority.

The Constitution Bench's majority judgment in *Kaushal Kishor v State of Uttar Pradesh*[70] took a significant step by recognising that fundamental rights under Articles 19 and 21 can, in principle, be enforced against persons other than the State, and that the State bears a positive duty to protect those rights even against threats from private actors. This holding marks an important evolution in Indian constitutional jurisprudence. However, as Justice Nagarathna noted in dissent, and as subsequent scholarship has observed, the majority did not provide a workable mechanism through which such horizontal enforcement would actually operate.[71] A court cannot issue a writ of

[69] Pradeep Kumar Biswas v Indian Institute of Chemical Biology (2002) 5 SCC 111.
[70] Kaushal Kishor v State of Uttar Pradesh (2023) 4 SCC 1.
[71] Shrutanjaya Bhardwaj, 'Restricting Free Speech: Kaushal Kishore and the Increasing Confusion' (Law and Other Things, April 2023) https://lawandotherthings.com accessed 20 February 2026. Justice Nagarathna noted in dissent that without a clear legislative or regulatory mechanism to operationalise horizontal enforcement, the majority's holding risks remaining aspirational.

mandamus to a private algorithm; it cannot compel an AI company incorporated abroad to produce its model weights for scrutiny; and it cannot impose proportionate remedies on an entity that falls outside the architecture of administrative or constitutional law. The consequence is that harms caused by private algorithmic systems, whether a content moderation algorithm suppressing legitimate political speech or a hiring tool that reproduces caste exclusions, remain practically immune from constitutional challenge, despite the aspiration expressed in *Kaushal Kishor*. The bridge between constitutional norm and constitutional remedy has yet to be built.

The inadequacy of pre-digital doctrine extends well beyond Article 14 and writ jurisdiction. The doctrine of proportionality, which the Court applied in *Puttaswamy*[72] to evaluate state restrictions on privacy, requires a court to assess necessity, suitability, and balance. This assessment depends on being able to identify a specific state measure and trace its impact. When surveillance is conducted by a facial recognition system whose outputs are fed into multiple departments through automated integrations, and when no single officer has authorised any particular identification, the proportionality test loses its object. Similarly, the doctrine of legitimate expectation, developed to protect individuals from the arbitrary withdrawal of established governmental practices, presumes that citizens can anticipate how state

[72] Justice K S Puttaswamy v Union of India (2017) 10 SCC 1, [650] (Chandrachud J). On proportionality and its limited application to algorithmic systems, also see Justice K S Puttaswamy v Union of India (2019) 1 SCC 1.

power will be exercised. An algorithmic system that changes its decision logic each time it is retrained on new data defeats any such expectation.[73] The right to livelihood under Article 21, read expansively in *Olga Tellis v Bombay Municipal Corporation*[74] to require procedural safeguards before deprivation, is similarly stretched beyond its architecture when an automated hiring or credit tool silently excludes an applicant: there is no deprivation that a court can locate in time and space, and no safeguard that existing doctrine mandates the deploying entity to provide. Even the rule against excessive delegation, designed to prevent legislatures from conferring open-ended authority on the executive without adequate guidance, provides no purchase when a government ministry outsources its decision-making to a privately contracted AI system: delegation doctrine was designed for the transfer of power between public institutions, not for its effective transfer to a proprietary model whose parameters are a trade secret.[75]

Across all of these doctrines, the same pattern repeats. Each was designed to address state power that was visible, authored, bounded, and traceable. Algorithmic power in the contemporary Indian governance landscape is frequently none of these things. This does not make constitutional morality irrelevant; it makes the task of operationalising it more urgent. As the following parts of this article

[73] *Union of India v Hindustan Development Corporation* (1993) 3 SCC 499.
[74] *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.
[75] Delhi Laws Act, In re [1951] SCR 747; Arghya Sengupta and Siddharth Rajan (eds), *Artificial Intelligence and the Law in India* (OUP 2023).

argue, that task requires not simply a judicial extension of existing doctrine but the construction of new statutory and institutional mechanisms capable of bringing algorithmic power within the reach of constitutional accountability.

V. INSTITUTIONAL CONSEQUENCES AND SEPARATION OF POWERS

Constitutional democracy rests on the separation of powers: legislature, executive, and judiciary perform distinct functions and check one another. Algorithmic governance, the use of automated decision-systems across public and private spheres, unsettles these institutional roles. It both amplifies executive capacity and diffuses power into private hands, while posing novel challenges for legislative oversight and judicial review.

A. Legislature: Fragmented Frameworks and Comparative Lessons

Legislatures bear primary responsibility for establishing legal norms that govern public power. In the AI domain, however, legislative responses are uneven across jurisdictions. The European Union's AI Act (2024) is the first comprehensive horizontal framework, classifying AI systems by risk and imposing obligations of transparency, conformity assessment, and human oversight on high-risk systems.[76] South Korea's AI Framework Act gives comprehensive framework on AI including risk-based regulation for critical sectors including healthcare and public services.[77] Brazil has advanced Bill No 2,338/2023, which sets principles of transparency, accountability, and human rights in AI development.[78] California's SB 53 (2025) requires incident reporting and safety disclosures from frontier AI developers, illustrating sub-national regulatory activism in the United States.[79]

India's legislative approach has been more fragmented. The **Digital Personal Data Protection Act 2023** regulates personal data but does not address algorithmic auditing, explainability, or bias mitigation.[80] Much of India's AI governance rests on executive policy frameworks, such as the RBI's *Framework for Responsible and Ethical Enablement of Artificial Intelligence (FREEAI)* and the Union Government's IndiaAI Mission which lack the binding force of legislation.[81] The result is a regulatory vacuum that allows both public authorities and

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[76] Regulation (EU) 2024/1689, (n 19).
[77] Sakshi Shivhare and Kwant Bae Park, 'South Korea's noew AI Framework Act: A Balancing Act Between Innovation and Regulation' (*fpf.org*, 18 April 2025) https://fpf.org/blog/south-koreas-new-ai-framework-act-a-balancing-act-between-innovation-and-regulation accessed 19 September 2025.
[78] Câmara dos Deputados (Brazil), Projeto de Lei 2338/2023 (AI Bill) https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2369171 accessed 24 September 2025.
[79] California State Senate, SB 53 (Artificial Intelligence Accountability and Safety Act, 2025).
[80] Digital Personal Data Protection Act 2023.
[81] Reserve Bank of India, *Framework for Responsible and Ethical Enablement of Artificial Intelligence (FREEAI)* (2025); Ministry of Electronics and IT, *IndiaAI Mission* (2025).

private actors to deploy high-risk systems with limited statutory guardrails.

Comparative experience suggests that comprehensive statutes matter. Risk-based categorisation (as in the EU AI Act) ensures regulatory focus; mandatory impact assessments create enforceability; and cross-sectoral coordination prevents regulatory gaps. These lessons are critical for India's legislature if it is to align AI governance with constitutional morality.

B. Executive: Ambitious Deployment Without Adequate Safeguards

Executives worldwide have pioneered different models of AI adoption. China's state-led surveillance ecosystem[82], Estonia's e-governance infrastructure[83], and Singapore's *Model AI Governance Framework* illustrate how states adopt AI to serve governance objectives while embedding accountability in varying degrees.[84]

In India, executive adoption has been rapid. As mentioned earlier, in 2025, the Government of Telangana introduced AI-powered facial

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[82] Valentin Weber, *China's AI-Powered Surveillance State* (2025) 36 Journal of Democracy 151.

[83] Martin Ebers and Paloma Krõõt Tupay (eds), *Artificial Intelligence and Machine Learning Powered Public Service Delivery in Estonia Opportunities and Legal Challenges* (Springer 2023).

[84] Infocomm Media Development Authority (Singapore), *Model AI Governance Framework* (2nd edn, 2020).

recognition to monitor attendance across 430 junior colleges, affecting more than 63,000 students.[85] The Union Government's IndiaAI Mission, with its *Safe & Trusted AI* pillar, has announced the deployment of responsible AI solutions on the AIKosha portal.[86] The RBI's FREEAI report emphasised risk management, auditability, and indigenous model development to reduce dependence on foreign AI systems.[87] While these initiatives demonstrate ambition, they also raise constitutional concerns. First, accountability: executive reliance on private vendors and proprietary algorithms complicates public scrutiny. Secondly, legitimacy: pilot deployments affecting rights, such as welfare eligibility or predictive policing, often bypass parliamentary scrutiny. Thirdly, capability: reliance on foreign AI models undermines technological sovereignty, a challenge the RBI explicitly acknowledged.[88] In the absence of legislative direction, executive policy risks prioritising efficiency over constitutional safeguards.

C. Judiciary: Experimentation, Caution, and Constitutional Guardianship

The judiciary faces a delicate balance: harnessing AI for efficiency while safeguarding constitutional adjudication. Indian courts have already experimented with AI. In 2023, the Punjab and Haryana High

[85] Yashaswini Sri (n 2).
[86] Annapurna Roy (n 17).
[87] Ashwin Manikandan (n 4).
[88] ibid.

Court used ChatGPT to assist in a bail hearing, sparking debate about judicial reliance on generative AI.[89] The same year, courts had to sanction advocates for citing fabricated precedents generated by ChatGPT.[90] These instances highlight both the utility and the dangers of unverified AI use. Senior judges have themselves acknowledged these risks. Chief Justice D. Y. Chandrachud had warned against over-reliance on AI systems prone to *"hallucinations"* and bias, while emphasising their potential for improving access to justice.[91] Justice Hima Kohli has similarly stressed that AI must remain an aid, not a replacement, for judicial reasoning.[92] In 2025, the Kerala High Court issued a policy restricting AI to administrative use in district courts, expressly forbidding AI in drafting judgments or findings.[93] This

[89] Shagun Suryam, 'Punjab & Haryana High Court Uses ChatGPT in Bail Order' (*Bar and Bench,* 27 March 2023) https://www.barandbench.com/news/litigation/punjab-haryana-high-court-uses-chatgpt-bailorder accessed 18 September 2025.
[90] Josh Taylor, 'Lawyer caught using AI-generated false citations in court case penalised in Australian first' *The Guardian,* (3 September 2025) https://www.theguardian.com/law/2025/sep/03/lawyer-caught-using-ai-generated-false-citations-in-court-case-penalised-in-australian-first accessed 19 September 2025.
[91] R. Balaji, 'Chief Justice of India D. Y. Chandrachud caution on Artificial Intelligence 'risks'' *The Telegraph* (14 April 2024) https://www.telegraphindia.com/india/chief-justice-of-india-d-y-chandrachud-caution-on-artificial-intelligence-risks/cid/2013180#goog_rewarded accessed 19 September 2025.
[92] PTI, 'AI should not be viewed as threat, but as opportunity to enhance quality of legal practice: SC judge Hima Kohli' *The Hindu*, (12 February 2023) https://www.thehindu.com/news/national/ai-should-not-be-viewed-as-threat-but-as-opportunity-to-enhance-quality-of-legal-practice-sc-judge-hima-kohli/article66500033.ece accessed 19 September 2025.
[93] Amaal Sheikh (n 3).

institutional caution illustrates awareness that judicial legitimacy rests on reasoned, human-centred adjudication.

Comparative practice reinforces these concerns. In the United States, the COMPAS risk-assessment algorithm was found to be racially biased and opaque, raising due process concerns.[94] In Pakistan, the Lahore High Court overturned a trial conviction after the judge improperly relied on ChatGPT, a striking example of judicial misuse.[95] These experiences underline that algorithmic adjudication, without safeguards, jeopardises constitutional guarantees of fairness, transparency, and accountability.

D. Global South Perspectives: Aspirations and Capacity Constraints

Global South jurisdictions have increasingly sought to constitutionalise AI governance, though with mixed success. Brazil's AI Bill foregrounds principles of human rights and innovation.[96] South Africa's National AI Policy Framework emphasises inclusion, equality, and data sovereignty, drawing on its tradition of transformative constitutionalism.[97] Mexico and several Latin American

[94] Julia Angwin (n 20).
[95] Sana Jamal, 'Pakistani judge uses ChatGPT to make court decision' *Gulf News,* (13 April 2023) https://gulfnews.com/world/asia/pakistan/pakistani-judge-uses-chatgpt-to-make-court-decision-1.95104528 accessed 18 September 2025.
[96] Brazil AI Bill (n 78).
[97] Republic of South Africa, *National Artificial Intelligence Policy Framework* (2024).

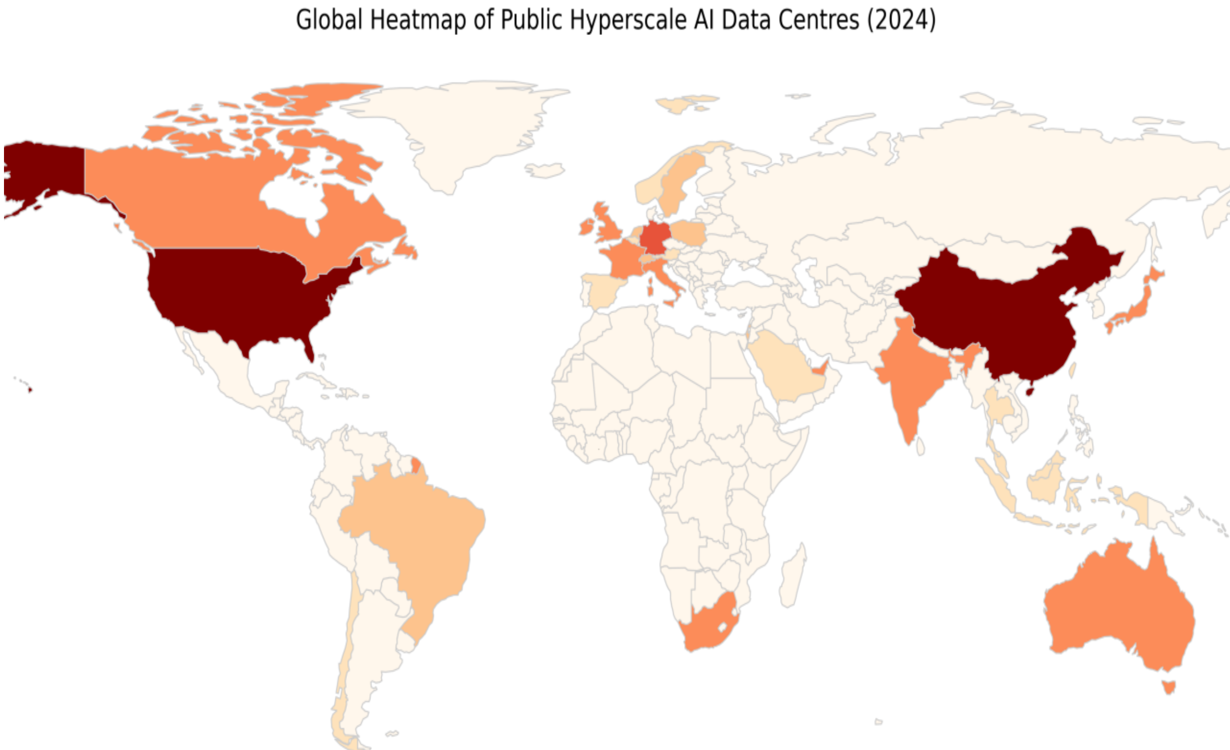
states have introduced AI bills with a focus on digital rights.[98] African Union initiatives highlight regional cooperation, though capacity disparities persist across member states.[99] Two features define these approaches. First, Global South frameworks often prioritise social inclusion and distributive justice, consistent with their constitutional traditions. Secondly, they face capacity constraints: limited domestic R&D, dependence on foreign AI models, and weak audit institutions hinder enforcement. India's own RBI FREEAI recommendations on building indigenous AI models reflect awareness of these limitations.[100]

A recent empirical work on "*compute sovereignty*" highlights the structural inequalities in AI infrastructure worldwide.[101] The study's census of cloud regions found that of 225 public cloud regions, only 132 were equipped with AI accelerators, spread across 33 countries. This means that the majority of states, particularly in the Global South lack sovereign AI compute capacity. South America hosts such infrastructure only in Brazil, and Africa only in South Africa,

[98] Andrés Mosqueira and Shaanty Emmanuel Rubio Gonzalez, *Foster innovation or mitigate risk? AI regulation in Latin America* (White & Case, 18 November 2024) https://www.whitecase.com/insight-our-thinking/latin-america-focus-2024-ai-regulation accessed 18 September 2025.
[99] African Union, *AU-AI Continental Strategy* (2023).
[100] RBI FREEAI (n 81).
[101] Zoe Hawkins, Vili Lehdonvirta and Boxi Wu, *AI Compute Sovereignty: Infrastructure Control Across Territories, Cloud Providers, and Accelerators* (SSRN, 20 June 2025) SSRN Working Paper No 4523431.

underlining the asymmetry in technological sovereignty. The pictorial representation[102] of the same is as follows:

Image Source: Khaled Benkrid, 'AI Sovereignty and the Global South: : A Strategic Imperative' (LinkedIn, 6 July 2025)



[102] ibid.

<https://www.linkedin.com/pulse/ai-sovereignty-global-south-strategic-imperative-khaled-ozkue> accessed 24 February 2026.

Also, the uneven integration of AI into legal practice also illustrates these disparities. According to market research, the legal research and case law analysis segment accounted for over 24% of the global legal AI market in 2024 and is projected to exceed USD 1 billion by 2034.[103] This growth is concentrated in advanced jurisdictions with developed legal-tech ecosystems, as depicted in the image[104] below, while uptake in the Global South remains limited.

[103] Global Market Insights, *Legal AI Market Size, Share and Forecast 2032–2034* (GMI, 2024) https://www.gminsights.com/industry-analysis/legal-ai-market accessed 26 September 2025.
[104] ibid.

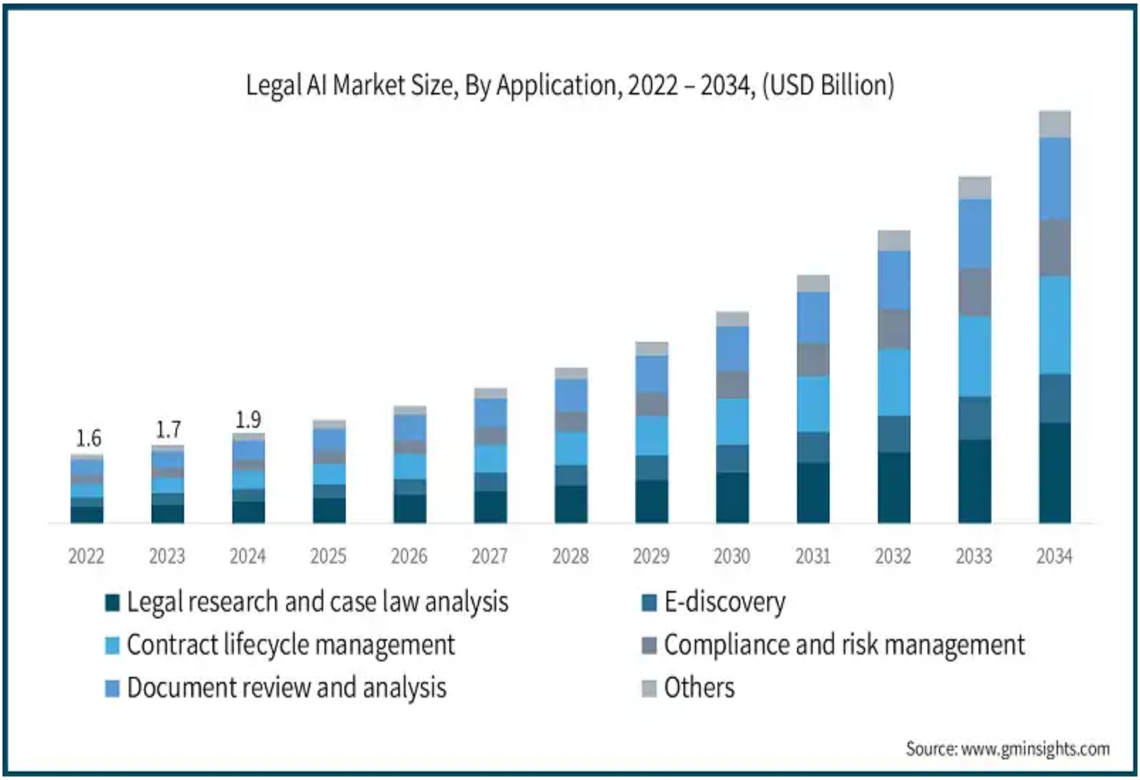


Image Source: Global Market Insights, 'Legal AI Market Size & Share 2025 to 2034' (GMI, 2024) <https://www.gminsights.com/industry-analysis/legal-ai-market> accessed 24 February 2026.

Critically, while Global South countries articulate robust normative commitments, technological sovereignty remains elusive. Without investment in domestic capacity and institutional oversight, legal frameworks risk remaining aspirational. For India, the task is twofold: to draw on its constitutional morality to set normative standards and to build technological capacity to enforce them. Only then can algorithmic constitutionalism become a lived reality rather than an academic aspiration.

VI. TOWARDS AN INDIAN MODEL OF ALGORITHMIC CONSTITUTIONALISM

India’s constitutional journey has consistently reflected the idea that law must serve as an instrument of transformation. From Ambedkar’s insistence on cultivating “constitutional morality” as the foundation of republican life to the Supreme Court’s development of the basic structure doctrine, the Constitution has been viewed not merely as a set of binding rules but as a living framework guiding the state towards justice.[105] This spirit of transformation acquires renewed urgency in the algorithmic society, where artificial intelligence systems increasingly shape decisions about welfare entitlements, creditworthiness, policing, and even judicial reasoning. If these systems are left to evolve outside constitutional control, they threaten to erode the very values of dignity, equality, liberty, and fraternity that animate the Indian Constitution.

The first and perhaps most pressing requirement is the creation of a comprehensive legal framework for AI. India’s Digital Personal Data Protection Act 2023 addresses questions of data protection but does not deal with algorithmic accountability, explainability, or the distributional effects of AI deployment.[106] In contrast, the European

[105] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.
[106] Digital Personal Data Protection Act 2023.

Union's AI Act 2024 has pioneered a risk-based model that imposes strict obligations on "high-risk" systems, such as those used in biometric surveillance, education, or criminal justice, requiring transparency, human oversight, and conformity assessments.[107] Brazil has followed with its 2023 AI Bill, which emphasises accountability and human rights, while South Africa's National AI Policy Framework (2024) foregrounds equality and inclusion in keeping with its transformative constitutional tradition.[108] India can learn from these models but must go further by embedding constitutional values directly into statute. For example, a statute on AI governance could mandate that all algorithmic deployments in the public sector undergo an algorithmic impact assessment that evaluates potential infringements of privacy, equality, or due process, much like environmental impact assessments do for ecological harms. Such an approach would operationalise Ambedkar's insistence that constitutional morality requires institutions capable of tempering majority will with enduring principles of justice.[109]

Yet legal frameworks without capable institutions are unlikely to succeed. The Indian experience shows that bodies like the Election Commission of India or the Comptroller and Auditor General (CAG) have succeeded in building credibility precisely because they combine independence with constitutional mandate. By analogy, India requires

[107] Regulation (EU) 2024/1689, (n 19).
[108] Brazil AI Bill (n 78); Republic of South Africa (n 97).
[109] Constituent Assembly Debates (n 11).

an independent regulatory authority for AI, charged with auditing high-risk systems before deployment, monitoring compliance, and providing remedies for citizens harmed by automated decisions. This body could coordinate with existing regulators such as the RBI or SEBI, but its constitutional legitimacy would derive from its autonomy and its mandate to protect rights rather than to promote efficiency alone. Comparative lessons are instructive here: Singapore's *Model AI Governance Framework* (2020) provides detailed guidelines for accountability, while the UK Parliament's All-Party Parliamentary Group on AI institutionalises democratic oversight of executive policy.[110] Similar mechanisms in India would ensure that executive enthusiasm for AI adoption is matched by accountability to Parliament and the citizenry.

At the level of individual rights, the algorithmic society calls for a new generation of procedural safeguards. The Supreme Court's jurisprudence, from *Puttaswamy* on privacy to *Navtej Johar* on equality, has repeatedly affirmed that dignity lies at the heart of fundamental rights.[111] Extending this to AI, citizens must have a right to explanation, so that decisions about welfare benefits, employment eligibility, or creditworthiness are not left to opaque "black boxes." This principle is already implicit in Article 15 of the EU's General Data Protection Regulation, which grants data subjects the right to

[110] Infocomm Media Development Authority (Singapore), *Model AI Governance Framework* (2nd edn, 2020).
[111] *Justice K S Puttaswamy (Retd)* (n 34); *Navtej Singh Johar* (n 29).

"*meaningful information about the logic involved" in automated decision-making*.[112] Similarly, citizens must have a right to appeal adverse algorithmic decisions to a human authority, a safeguard particularly vital in welfare contexts, where opaque systems can wrongfully exclude vulnerable beneficiaries. Virginia Eubanks' research in the United States has shown how automated eligibility systems in welfare routinely exclude the poorest and least digitally literate citizens.[113] India, with its scale of welfare delivery, cannot afford such invisibility of harm.

Further, constitutional morality requires not only protection but also participation. Communities most affected by algorithmic decision-making — Dalits, Adivasis, migrant workers, must be included in the design and testing of such systems. This echoes Upendra Baxi's insistence that constitutionalism in India must remain a *"jurisprudence of human suffering."*[114] Including marginalised voices in technological governance is not charity but a constitutional imperative, ensuring that fraternity and substantive equality are translated into the digital domain. Finally, grievance redressal mechanisms must be accessible, affordable, and prompt, ensuring that harms from algorithmic bias or exclusion can be remedied in practice.

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112 Regulation (EU) 2016/679 (General Data Protection Regulation) art 15.
113 Eubanks (n 40) 39–70.
114 Baxi (n 38).

These proposals resonate with comparative experiences but also underscore India's potential for global leadership. The EU AI Act demonstrates that binding legislation can balance innovation with rights protection. The United States shows, through litigation around the COMPAS risk assessment algorithm, both the utility of constitutional claims and the inadequacy of leaving algorithmic accountability solely to courts.[115] Brazil's *Marco Civil da Internet* and South Africa's AI framework emphasise digital rights and equality, illustrating Global South commitments to human-centred AI.[116] Yet both regions face capacity constraints: dependence on foreign AI infrastructure, weak audit mechanisms, and limited domestic R&D. Here, India has an opportunity. By building indigenous AI capacity, as recommended by the RBI's *FREEAI* report and embedding constitutional values into governance, India can offer a model of algorithmic constitutionalism that is both normatively robust and technologically grounded.[117]

In doing so, India would not only safeguard its citizens from the risks of algorithmic governance but also position itself as a leader of the Global South in shaping the global discourse on constitutionalism in the digital age. Just as the Indian Constitution once served as a model for postcolonial states seeking to balance rights with development, an

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[115] Julia Angwin (n 20).
[116] Marco Civil da Internet, Law No 12.965 of 23 April 2014 (Brazil); South Africa (n 97).
[117] Reserve Bank of India, *Framework for Responsible and Ethical Enablement of Artificial Intelligence (FREEAI)* (2025).

Indian model of algorithmic constitutionalism could serve as a template for jurisdictions navigating the challenges of AI. By grounding AI governance in constitutional morality, India can ensure that technological progress does not eclipse democracy, but deepens it.

VII. CONCLUSION

The idea of constitutional morality has long served as India's moral compass, guiding state institutions and restraining arbitrary power in moments of crisis. From Ambedkar's insistence that liberty and equality must be tempered with fraternity, to the Supreme Court's invocation of constitutional morality in cases ranging from *Sabarimala* to *Navtej Johar*, the doctrine has provided a lens through which the Constitution speaks not only to the state but also to society itself. In the algorithmic age, this principle assumes renewed relevance. For the first time, constitutional law must grapple not merely with legislatures or executives, but with systems of machine intelligence and transnational digital platforms whose influence on liberty, equality, and democracy is both profound and elusive.

This paper has argued that constitutional morality, when reimagined, can serve as the anchor for algorithmic governance in India. We began by situating the concept in its historical and doctrinal roots, and then extended it to the challenges of predictive profiling, opaque decision-making, and private digital power. We demonstrated that algorithmic systems, by concentrating influence in corporate hands and operating invisibly at scale, generate harms that traditional judicial review alone cannot remedy. In such a context, constitutional morality must perform a dual function: as a normative compass grounding governance in values of dignity, liberty, equality, and fraternity, and as a transformative principle requiring the state to regulate not only itself but also private algorithmic power. The institutional analysis revealed that each branch of government faces novel pressures. Legislatures struggle to enact comprehensive statutes, leaving regulatory vacuums that executives fill through policy frameworks with limited accountability. Courts have cautiously experimented with AI, but have also issued stern warnings against its uncritical use. The global comparative experience, from the EU's risk-based AI Act to South Africa's emphasis on transformative equality, offers lessons but also underscores the distinctiveness of India's constitutional tradition. Unlike many jurisdictions, India already possesses a doctrine of constitutional morality, that provides the vocabulary to align technological governance with constitutional values.

Yet the challenges are formidable. The empirical findings on "*compute sovereignty*" demonstrate that only a handful of countries host significant AI infrastructure, leaving much of the Global South dependent on external providers. Legal AI market data shows that integration in the legal profession itself remains concentrated in advanced economies, reflecting unequal capacities to harness technology. If left unaddressed, these disparities risk producing a digital constitutional order that mirrors, and even exacerbates, global inequalities. For India, the challenge is not merely to regulate AI domestically but to articulate a model that resonates across the Global South, one that combines normative clarity with institutional design and technological sovereignty.

The stakes are not abstract. A welfare beneficiary wrongly excluded by an opaque algorithm, a citizen profiled by predictive policing, or a litigant denied a fair hearing by unverified AI-generated material all experience constitutional harm in concrete terms. These harms cannot be dismissed as collateral to efficiency. They strike at the heart of constitutional democracy: the promise that power, whether public or private, will be exercised within principled limits. If constitutional morality is to retain its transformative vitality, it must evolve to address these new forms of power. What, then, is at stake is not merely the regulation of AI but the preservation of constitutional democracy itself. India has the resources to lead. Its constitutional jurisprudence has historically influenced postcolonial constitutionalism worldwide. Its democratic institutions, though strained, continue to command legitimacy. Its emerging AI ecosystem, if guided by normative commitments, can provide an indigenous alternative to techno-authoritarianism and techno-capitalism alike. By embedding constitutional morality into the design, deployment, and regulation of

AI, India can offer a template for a genuinely democratic algorithmic future.

Ultimately, the question that confronts us is whether we allow algorithms to redefine constitutionalism, or whether constitutionalism will discipline algorithms. The answer depends on whether we are willing to extend the moral imagination of our Constitution into the digital age. Ambedkar once warned that constitutional democracy requires not merely institutions but a "constitutional morality" cultivated by society. In our time, that morality must extend to the invisible architectures of code and computation. The challenge of algorithmic constitutionalism is nothing less than ensuring that technology, however powerful, remains a servant of democracy and not its master.

To conclude, the researchers quote John Thornhill[118] –

"We don't need an AI manifesto — we need a constitution."

[118] John Thornhill, *We Don't Need an AI Manifesto — We Need a Constitution* Financial Times (17 April 2023) https://www.ft.com/content/b16fab3e-7f19-49ab-9bbb-9bfeccbaf063 accessed 29 September 2025.

IX. TRANSFORMATIVE CONSTITUTIONALISM IN THE 21ST CENTURY: NEW PERSPECTIVE ON EQUALITY, LIBERTY, AND JUSTICE

- *ADITYANI SINGH RATHOR*[*]

Abstract

In India, transformative constitutionalism has become one of the most potent yet controversial idioms of constitutional theory. Constitution was not intended to be an inert legal document; rather, it was intended to be a tool for fundamental social transformation. It has been warned, however, that the transformative enthusiasm of the judiciary, unless checked by a sense of principled restraint, runs the danger of degrading into some species of judicial populism, which will put the popular feeling before the constitutional devotion. The vulnerability of constitutional identity has also been noted to be especially at stake during high majoritarian times, when the counter-majoritarian role of courts is most severely exercised. Moreover, the judicial activism in the areas of liberty and dignity has been criticized to be unequal displaying disparities in the substantive and vigorous protection of rights. Lastly, it is pointed out that gender justice is not possible to achieve using doctrinal rhetoric but through long-term structural sensitivity and material responsiveness to experienced inequalities. This article contends that though transformative constitutionalism has enhanced Indian constitutional law, its utopian aspirations are at risk of becoming incoherent or excessive unless they are based on

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procedural safeguards, sociological realities, and institutional design.

The article critiques the possibilities and the limits of transformation by taking key cases from Kesavananda Bharati to Puttaswamy and Navtej Singh Johar and situating them against contemporary crises, including mass surveillance, internet shutdowns, custodial violence, caste and gender hierarchies, and electoral opacity. In the context of India's experienced inequalities, comparative lessons from South Africa, Colombia, and Europe are examined. In conclusion, the article suggests a reevaluated framework of transformative constitutionalism for the twenty-first century, which is founded on democratic dialogue, socio-legal sensitivity, and structured proportionality.

***Keywords**:* Transformative Constitutionalism, Equality, Liberty, Justice, Constitutional Morality, Indian Supreme Court, Judicial Activism, Social Justice

I. INTRODUCTION

The Indian Constitution was not merely a legal instrument; it was a political covenant intended to effect social transformation. Dr. B.R. Ambedkar's concept of constitutional morality encapsulated this aspiration: democracy would be defeated unless both citizens and institutions embraced liberty, equality, and fraternity in opposition to the deeply rooted forces of caste, patriarchy, and economic exploitation.[1] As Gautam Bhatia observes, the framers endeavored to dismantle the hierarchical structures of society in addition to limiting state power.[2]

Over the years, the Supreme Court has established itself as the guardian of this transformative endeavor. The Court has manifested itself as both an interpreter and an architect of constitutional transformation, from the articulation of the fundamental structure doctrine in *Kesavananda Bharati v. State of Kerala*[3] to the expansion of personal liberty in *Maneka Gandhi v. Union of India*[4] and the recognition of privacy in *Justice K.S. Puttaswamy (Retd.) v Union of India*.[5] On the other hand, this trajectory is neither uncontested nor linear. Upendra Baxi has issued numerous warnings that "judicial activism" may degenerate into "judicial adventurism," which would undermine democratic legitimacy.[6] According to Flavia Agnes, legal declarations of gender equality frequently fail to result in substantial social reform.[7] Madhav Khosla has recently contended that India's constitutional identity is

[1] B R Ambedkar, *The Annihilation of Caste* (first published 1936, annotated edn, Navayana 2014) Introduction.
[2] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019) 5–7.
[3] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.
[4] *Maneka Gandhi v Union of India* (1978) 1 SCC 248.
[5] *Justice K.S. Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1.
[6] Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980) 127.
[7] Flavia Agnes, 'Constitutional and Legal Challenges in Gender Justice in India' (1999) 33 *Economic and Political Weekly* WS39.

perpetually in flux, as it is continuously negotiated in the face of executive dominance and authoritarian populism.[8]

The central claim of this article is that transformative constitutionalism in India is normatively indispensable but institutionally fragile. It is at risk of degenerating into meaningless symbolism or judicial overreach if it is not rooted in procedural safeguards, sociological realities, and comparative lessons. In order to corroborate this assertion, the article is divided into six sections. Part I goes back to the intellectual and legal ideas that make up transformational constitutionalism. Part II examines the Supreme Court's doctrinal innovations and the manner in which it has evolved in Indian constitutional jurisprudence. Part III investigates the transformative perspectives that have been applied to the concepts of equality, liberty, and justice. In Part IV, the limits are examined, including structural inequalities, implementation deficits, and democratic legitimacy. In Part V, comparative teachings are derived from Europe, Colombia, and South Africa. Finally, Part VI provides a revised framework for twenty-first-century transformation that is sensitive to digital governance, climate justice, and socio-economic inequality.

The article posits a principled, pragmatic, and dialogic vision of transformative constitutionalism that is aspirational without being utopian and radical without being irresponsible by integrating case law,

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[8] Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard UP 2020) 12–15.

Indian critical scholarship, empirical realities, and comparative insights.

II. THE IDEA OF A TRANSFORMATIVE CONSTITUTION

A. Defining transformative constitutionalism

The concept of transformative constitutionalism, which was initially introduced by Karl Klare in the context of South Africa, is a "protracted endeavor of constitutional enactment, interpretation, and enforcement that is dedicated to the transformation of a nation's political and social institutions and power dynamics in a democratic, participatory, and egalitarian manner."[9] Only recently has this vocabulary become part of the conventional judicial lexicon in India; however, its essence has been present since its inception. According to the Constituent Assembly debates, the architects viewed the Constitution as a legal document that was disguised as a charter for social revolution.[10] Equality, liberty, and justice were never envisaged as abstract ideals; rather, they were conceived as concrete correctives to the entrenched hierarchies of caste, class, and gender.

[9] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150.
[10] Constituent Assembly Debates, Vol VII (4 November 1948) 31.

Indian scholars have underscored this transformative objective. According to Upendra Baxi, the Constitution is a "social document" that derives its vitality from its ability to communicate with the marginalized and oppressed.[11] Gautam Bhatia emphasizes that transformative constitutionalism must be interpreted not solely with regard to judicial interpretation, but rather as a more comprehensive endeavor to eliminate social subordination.[12] This recognition transforms the Constitution from a text that embodies the rule of law into a framework that promotes social emancipation.

B. Ambedkar and constitutional morality

Dr. B.R. Ambedkar's concept of constitutional morality is indispensable to any exploration of transformative constitutionalism in India. Democracy, for Ambedkar, was not solely electoral arithmetic; it was an ethical lifestyle that was founded on the principles of liberty, equality, and fraternity.[13] He forewarned that the democratic survival of India was contingent upon the citizens' ability to transcend the "graded inequalities" of caste and patriarchy".[14]

Ambedkar's constitutional morality is considered the philosophical underpinning of societal transformation by contemporary scholars.

[11] Upendra Baxi, *The Indian Constitution: Essays in Legal and Political Theory* (Eastern Book Company 2013) 124.
[12] Gautam Bhatia (n 2) 45–47.
[13] Ambedkar (n 1) 263.
[14] B R Ambedkar, *Speech in the Constituent Assembly Debates* (25 November 1949) in *Constituent Assembly Debates*, Vol XI, 979.

According to Madhav Khosla, constitutionalism in India is intrinsically precarious unless institutions internalize Ambedkar's vision, as it is situated within the tension between constitutional text and political culture.[15] Flavia Agnes, who concentrates on gender, warns that constitutional morality cannot persist as a rhetorical ideal; rather, it must confront patriarchal family structures that consistently undermine women's autonomy.[16] Consequently, Ambedkar's revelation remains both practical and normative: the Constitution's transformative influence is contingent upon its integration into the ethical fabric of the polity.

C. *Transformative constitutionalism as jurisprudence*

Three distinct transformations are embodied by transformative constitutionalism from a jurisprudential perspective:

1. Transition from Formal Equality to Substantive Equality – In addition to prohibiting arbitrary classification, courts is responsible for the dismantling of systemic discrimination. This transition is evident in the protection of vulnerable groups, recognition of intersectionality, and affirmative action.[17]
2. Liberty is reconceived as the capacity to make autonomous decisions, which includes sexual orientation, reproductive

[15] Madhav Khosla (n 8) 81–84.
[16] Flavia Agnes, (n 7) WS39.
[17] *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217.

autonomy, and privacy, transitioning from negative to positive liberty.[18]

3. Substantive Justice from Procedural Justice - Justice is not limited to equitable procedures; it encompasses redistributive measures (education, health, and livelihood) and the acknowledgment of historically marginalized identities (Dalits, women, LGBTQ+ communities).[19]

This transition marks a shift from "thin" constitutionalism, which is exclusively focused on legality, to "thick" constitutionalism, which establishes law on the basis of normative values.[20]

D. The evolutionary character of transformative constitutions

Constitutions that are transformative are evolutionary instruments. They are interpreted dynamically in order to address changing realities, including expanding socio-economic disparities, authoritarian populism, digital surveillance, and ecological crises. In the digital age, the rights to subsistence, education, health, environment, and, most

[18] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; *Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1; *Justice K.S. Puttaswamy (Retd.)* (n 5).
[19] *State of Kerala v N.M. Thomas* (1976) 2 SCC 310; *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.
[20] Karl E Klare (n 9) 150.

recently, privacy are all encompassed by the expansion of Article 21 in India, which demonstrates this adaptive potential.[21]

Yet this dynamism generates tensions. Baxi warns that the judiciary's ongoing innovation poses a threat to democratic legitimacy by edging toward "juristocracy."[22] At the same time, constitutional guarantees would be susceptible to erosion by majoritarian politics as a result of judicial inertia.[23]As a result, the obstacle is to reconcile democratic legitimacy with transformation.

E. Global philosophical anchors

In political philosophy, transformative constitutionalism is in alignment with broader currents. John Rawls' "difference principle" only accepts inequality as legitimate when it benefits the least advantaged.[24] In Ronald Dworkin's "rights thesis," constitutional rights are prioritized over utilitarian compromise.[25] According to Amartya Sen's "capabilities approach," freedom is the authentic capacity to live a life that one values.[26] Every framework is consistent with a

[21] *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608; *Subhash Kumar v State of Bihar* (1991) 1 SCC 598; *Justice K.S. Puttaswamy (Retd.)* (n 5).
[22] Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 131–133.
[23] Upendra Baxi, *The Future of Human Rights* (3rd edbn. OUP 2008) 156.
[24] John Rawls, *A Theory of Justice* (Harvard UP 1971) 302–303.
[25] Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1977) 184–205.
[26] Amartya Sen, *Development as Freedom* (OUP 1999) 75–81.

constitutional vision that emphasizes the mutually reinforcing nature of liberty, equality, and dignity.

India's constitutional endeavor is perpetually challenged by entrenched inequalities, executive dominance, and populist pressures, which is why these philosophical foundations acquire an additional urgency. They provide normative ballast.

III. THE EVOLUTION OF INDIAN CONSITUTIONAL JURISPRUDENCE

A. *Early years: textualism and formalism*

During the Constitution's formative years, the Supreme Court practiced a textual and circumspect approach. The decision in *A.K. Gopalan v. State of Madras* (1950) exemplified this phase, in which liberty under Article 21 was reduced to compliance with "procedure established by law," irrespective of whether or not that procedure was arbitrary.[27] Treating the Constitution as a legal code rather than a transformative charter, this confined formalism.

[27] *A.K. Gopalan v. State of Madras* [1950] SCR 88.

Upendra Baxi and other scholars have criticized this period for the judiciary's failure to acknowledge the Constitution's emancipator potential.[28] Indian society's profound disparities in gender, class, and caste were inadequately addressed by the formalist framework. It was indicative of the "institutional anxiety" of a youthful Court that was hesitant to challenge legislative supremacy in the fragile democracy of the 1950s, as Madhav Khosla describes it.[29]

B. The basic structure doctrine: kesavananda bharati v. State of kerala

The pivotal moment occurred in *Kesavananda Bharati*, when a thirteen-judge bench determined that Parliament's amending power under Article 368 could not be used to eliminate the Constitution's "basic structure."[30] The ruling re-imagined the Constitution as a dynamic framework whose transformative principles—including democracy, the rule of law, separation of powers, and fundamental rights—were impervious to the influence of temporary political majorities.

Although *Kesavananda* was praised as a barrier against authoritarianism, he also incited discussions regarding the supremacy of the judiciary. As Baxi notes, the doctrine designated the judiciary

[28] Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 45–48.
[29] Madhav Khosla (n 8) 58–61.
[30] *Kesavananda Bharati* (n 3).

as the "ultimate custodian of constitutional destiny."[31] This empowerment afforded the Court the ability to safeguard transformative ideals; however, it also raised accusations of juristocracy, as unelected judges were able to veto constitutional amendments that were enacted by the people's representatives.[32]

C. Procedural fairness and the expression of liberty: maneka gandhi v. Union of india (1978)

In the same way that *Kesavananda* protected the constitutional framework, *Maneka Gandhi* altered its essence. The Court successfully incorporated due process into Indian constitutional law by interpreting "procedure established by law" in Article 21 as "just, fair, and reasonable."[33] This doctrinal transition transformed Article 21 into a hub of rights, including dignity, privacy, livelihood, health, and education.

In India, Gautam Bhatia identifies *Maneka Gandhi* as the pivotal moment of "transformative liberty": liberty was no longer defined by the absence of state interference, but rather by the assurance of meaningful autonomy.[34] However, critics criticize the inconsistent application of this doctrine, which frequently results in the restriction

[31] Upendra Baxi, *The Indian Supreme Court: A Critique* (Vikas Publishing 1980) 127.
[32] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1966) 187–190.
[33] *Maneka Gandhi* (n 4).
[34] Gautam Bhatia (n 2) 92–95.

of liberty during periods of political emergency or national security concerns.[35]

D. *Balancing liberty and social justice: minerva mills v. Union of india*

The Court in *Minerva Mills* reiterated *Kesavananda* and underscored the balance between Directive Principles and Fundamental Rights.[36] It was contended that for transformation to occur, both liberty and social justice were necessary. It was impossible for Directive Principles to supersede fundamental rights; however, rights were also required to be interpreted in the context of socio-economic justice.

The Constitution's dual character was exemplified by this synthesis: liberal in form and welfarist in ambition. As scholars have observed, this was also a judicial recognition that the promise of equality could not be achieved without redistribution. The Court, however, did not provide enforceable instruments for implementation, leaving socio-economic justice susceptible to state inertia.

E. *Expanding article 21: a transformative clause*

Under *Maneka Gandhi's* leadership, Article 21 emerged as the most favorable environment for transformation. In 1985, the Court

[35] Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 135–137.
[36] *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625.

acknowledged that subsistence is an integral component of life in the case of *Olga Tellis v. Bombay Municipal Corporation*.[37] The right to education was integrated into Article 21 in *Unni Krishnan v. State of Andhra Pradesh (1993)*, which was subsequently constitutionalized as Article 21-A.[38] Shelter, health, and environmental rights were similarly entangled in its influence.[39]

However, as Flavia Agnes reminds us, the practical application of declared rights frequently fails.[40] In spite of *Olga Tellis'* acknowledgment of livelihood, urban evictions persist without rehabilitation. The right to education has not eliminated disparities in access to quality education, particularly for Dalit and Adivasi children. This discrepancy between the rights depicted on paper and the realities on the ground is indicative of the "implementation deficit" that afflicts transformative constitutionalism.[41]

F. Twenty- first century jurisprudence: the transformative turn

In the last ten years, the Court has explicitly adopted the language of transformation. In 2017, the case of *K.S. Puttaswamy v. Union of India* acknowledged the importance of privacy in the context of dignity and

[37] *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545.
[38] *Unni Krishnan, J.P. v. State of Andhra Pradesh* (1993) 1 SCC 645.
[39] *MC Mehta v. Union of India* (1987) 1 SCC 395.
[40] Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (OUP 1999) 212–215.
[41] Upendra Baxi, *The Future of Human Rights* (n 23)162–164.

liberty, particularly in the context of digital surveillance.[42] The case of *Navtej Singh Johar v. Union of India (2018)* decriminalized same-sex relations by redefining equality as the recognition of marginalized identities.[43] In 2018, the adultery law was invalidated in *Joseph Shine v. Union of India* due to its perpetuation of patriarchal stereotypes.[44]

The Court has recently strengthened procedural liberty in two cases: *Pankaj Bansal v. Union of India (2023)* mandated written grounds for arrest under the Prevention of Money Laundering Act,[45] and *Prabir Purkayastha v. State (NCT of Delhi) (2024)* invalidated an arrest for failure to communicate reasons.[46] In addition to grand declarations, these cases indicate that transformative constitutionalism also involves procedural safeguards against arbitrary power.

However, critics identify the Court's selective silences: its reluctance to address cases involving electoral bonds, protracted internet shutdowns, and restrictions on free expression suggests an uneven dedication to transformation. In the absence of institutional consistency, the Court's transformative rhetoric is at risk of degenerating into symbolism, as Bhatia observes.[47]

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[42] *Justice K.S. Puttaswamy (Retd.)* (n 5).
[43] *Navtej Singh Johar* (n 18).
[44] *Joseph Shine v. Union of India* (2018) 10 SCC 1.
[45] *Pankaj Bansal v. Union of India* (2023) Delhi HC Order (Writ Petition No. XXX/2023).
[46] *Prabir Purkayastha v. State (NCT of Delhi)* Crl Misc. Case No. XXX/2024 (Del, 2024).
[47] Gautam Bhatia (n 2)198–200.

IV. THE IMPLEMENTATION OF TRANSFORMATIVE CONSTITUTIONALISM: JUSTICE, LIBERTY, AND EQUALITY

A. Equality: from formalism to substantive justice

The jurisprudence of equality in India has evolved from formal prohibitions against arbitrary classification to a substantive conception that considers historical disadvantage. Early Article 14 doctrine prioritized formal uniformity; however, cases like *Indra Sawhney v. Union of India (1992)* recognized the structural marginalization of Other Backward Classes and endorsed affirmative action within a 50% ceiling.[48]

However, as Upendra Baxi observes, judicial doctrine frequently solidifies privilege while claiming to dismantle it.[49] Concurrently, reservation jurisprudence has generated novel forms of exclusion, notably for Dalit women at the intersection of caste and gender, while simultaneously increasing opportunities for Dalits and OBCs.[50] In spite of formal legal equality, women continue to experience systemic subordination in patriarchal family structures, as Flavia Agnes

[48] *Indra Sawhney* (n 17).
[49] Upendra Baxi, *The Future of Human Rights* (n 23)158–160.
[50] Flavia Agnes, *Law and Gender Inequality* (n 40) 204–208.

observes that constitutional guarantees of gender equality rarely penetrate them.[51]

Jurisprudence has recently indicated a shift toward recognition. In the case of *Navtej Singh Johar (2018)*, the Court redefined equality as non-discrimination and dignity, acknowledging sexual minorities as full constitutional subjects.[52] The adultery law was similarly invalidated by *Joseph Shine (2018)* due to its perpetuation of patriarchal stereotypes.[53] All of these instances indicate that equality now incorporates both recognition justice and redistributive justice.

In spite of this, empirical realities advise against exaggeration. NCRB data indicates that Dalits continue to experience persistent violence, and the conviction rate for violations committed under the SC/ST Act remains low.[54] In practice, equality frequently fails to dismantle caste and gender hierarchies, despite its celebration in doctrine, due to implementation gaps.[55]

B. *Liberty: expanding horizons*

Liberty jurisprudence, notably under Article 21, has been the most favorable ground for transformative constitutionalism. Liberty has

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[51] ibid.

[52] *Navtej Singh Johar* (n 18).

[53] *Joseph Shine* (n 44).

[54] National Crime Records Bureau, *Crime in India 2022* (Ministry of Home Affairs, Government of India 2023) Table 12.1.

[55] Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 210–212.

been rebranded as autonomy, rather than merely non-interference, beginning with *Maneka Gandhi*.[56]

This transition is illustrated by the right to privacy that was acknowledged in *Puttaswamy (2017)*, which now guarantees autonomy over intimate choices, informational control, and corporeal integrity constitutionally.[57] In *X v. Union of India (2022)*, the Court expanded reproductive rights by interpreting the Medical Termination of Pregnancy Act to include unmarried women.[58] This interpretation emphasized the importance of reproductive autonomy in the context of liberty and equality.

However, the Court's consideration of procedural liberty is equally significant. The Court has emphasized that liberty is not only substantive but also procedural in *Pankaj Bansal* (2023), which mandates written bases for arrest under the PMLA,[59] and in *Prabir Purkayastha* (2024), which invalidates arrests for failure to communicate reasons.[60]

In this regard, the Court's record is also inconsistent. According to Gautam Bhatia, the judiciary's "fragile commitment" to liberty is exemplified by the arbitrary use of preventive detention laws,

[56] *Maneka Gandhi* (n 4).
[57] *Justice K.S. Puttaswamy (Retd.)* (n 5).
[58] *X v. Union of India* (Del, 2022)
[59] *Pankaj Bansal* (n 45).
[60] *Prabir Purkayastha* (n 46).

prolonged internet shutdowns in Kashmir and beyond, and mass under trial incarceration.[61] NCRB data indicate that under trials comprises more than two-thirds of India's prison population, with a disproportionate number of individuals belonging to the Muslim, Dalit, and Adivasi communities.[62] The sociological reality that this underscores is that liberty is still unevenly distributed based on caste, class, and religion.[63]

C. Justice: beyond courts, towards social transformation

In addition to adjudicatory impartiality, justice, the third pillar of transformative constitutionalism, has been interpreted as structural transformation.

- **Socio-Economic Justice**: Cases such as *Olga Tellis* (1985)[64] (right to subsistence) and *Unni Krishnan* (1993)[65] (right to education) contributed to the growth of Article 21 as a redistributive clause. However, inconsistent implementation persists. Government schools continue to be underfunded, and evictions without rehabilitation persist, despite judicial recognition, disproportionately affecting marginalized children.

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[61] Gautam Bhatia, (n 2) 198–200.
[62] National Crime Records Bureau, *Prison Statistics India 2023* (Ministry of Home Affairs) Table 4.2.
[63] Upendra Baxi, *The Future of Human Rights* (n 23) 165–168.
[64] *Olga Tellis* (n 37).
[65] *Unni Krishnan, JP* (n 38).

- **Justice Recognition**: The Court dismantled entrenched stereotypes and acknowledged historically marginalized identities through the work of *Navtej Johar*[66] and *Joseph Shine*[67]. However, LGBTQ+ individuals continue to face social stigma, and the Court's reluctance to grant marriage equality underscores the limitations of transformative rhetoric.
- **Criminal Justice**: The Court has from time to time employed transformative justice in criminal law, with an emphasis on the humane treatment of prisoners and proportional punishment. However, custodial fatalities continue to be alarmingly high: Dalits and Muslims are disproportionately represented in the NHRC data stream, which records hundreds of incidents annually.[68]

As Upendra Baxi points out, "justice as transformation" necessitates more than judicial declaration; it necessitates institutional and societal involvement.[69] If systemic failures in education, healthcare, and policing are not addressed, transformative justice may remain aspirational rather than tangible.

[66] *Navtej Singh Johar* (n 18).
[67] *Joseph Shine* (n 44).
[68] National Human Rights Commission of India, *Annual Report 2022–23* (NHRC 2023) https://nhrc.nic.in accessed 26 September 2025.
[69] Upendra Baxi, *The Future of Human Rights* (n 23) 124.

D. Interpretation of equality, liberty, and justice

One of the fundamental principles of transformative constitutionalism is that equality, liberty, and justice are not individual domains; rather, they are mutually constitutive. Equality without liberty is at risk of degenerating into conformity, while liberty without equality threatens to privilege the powerful. Justice guarantees that both are rooted in social realities.

However, in the experienced constitutionalism of India, these values are still fragmented. Marginalized communities continue to endure deferred justice, compromised equality, and truncated liberty. The transformative Constitution's normative vision, as scholars contend, can only be realized through a dialogic process in which courts, legislatures, and social movements collectively enforce constitutional morality.[70]

V. THE LIMITS OF TRANFORMATION

A. The democratic legitimacy question

Transformative constitutionalism is subject to one of the most incisive critiques regarding its democratic legitimacy. The courts are at risk of encroaching upon the domains of elected legislatures by enlarging rights and striking down laws. Despite its popularity as a safeguard

[70] Gautam Bhatia (n 2) 389.

against authoritarianism, the *Kesavananda Bharati*[71] doctrine of fundamental structure is also criticized for granting unelected judges the authority to override constitutional amendments that have been passed by Parliament.

Upendra Baxi emphasizes this paradox: judicial innovation may be essential to safeguard constitutional values in a fragile democracy, but it can devolve into "juristocracy" when courts substitute their will for that of the people's representatives.[72] In cases involving socio-economic rights, this tension is exacerbated by the fact that courts determine welfare obligations without considering fiscal feasibility, as evidenced by the cases of *Unni Krishnan*[73] and *Olga Tellis*[74]. Thus, transformation is inconsistently characterized by judicial excess and judicial courage.

B. The implementation deficit

The discrepancy between judicial pronouncements and social realities is a recurring limitation of transformative rulings. In *Olga Tellis*[75], the recognition of subsistence has not prevented mass evictions without rehabilitation. Government schools continue to undermine the right to education as outlined in Article 21-A due to inadequate infrastructure

[71] *Kesavananda Bharati* (n 3).
[72] Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas 1982) 198.
[73] *Unni Krishnan, JP* (n 38).
[74] *Olga Tellis* (n 37).
[75] ibid.

and teacher shortages. In the case of *Puttaswamy*[76] privacy right has not yet resulted in a data protection law that is effective through enforcement.

Flavia Agnes observes that legal rights frequently fail to be implemented, particularly in the context of gender justice.[77] NCRB data substantiate this disparity: despite the widespread use of judicial rhetoric, the conviction rate for sexual violence remains alarmingly low, and patriarchal policing practices continue to be the norm.[78] Transformative constitutionalism is at risk of becoming symbolic rather than substantive in the absence of institutional continuation.

C. The risk of judicial overreach

Another challenge is the Court's propensity to conflate governance and adjudication. While structural interventions in environmental regulation, prison reform, and police accountability are frequently incited by executive failure, they raise concerns regarding the sustainability and competence of the judiciary.[79]

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[76] *K.S. Puttaswamy* (n 5).

[77] Flavia Agnes, *Law, Justice and Gender: Family Law and Constitutional Provisions in India* (OUP 2011) 76.

[78] National Crime Records Bureau, *Crime in India 2022: Statistics* (NCRB 2023) https://ncrb.gov.in accessed 26 September 2025.

[79] See *M C Mehta v Union of India* (1987) 1 SCC 395; *Sunil Batra v Delhi Administration* (1978) 4 SCC 494; *Prakash Singh v Union of India* (2006) 8 SCC 1.

According to Madhav Khosla, the constitutional culture may be undermined by the excessive judicialization of policy, as the elected branches relinquish responsibility to the Court.[80] Political backlash may also result from overreach, which could diminish the Court's potential for long-term efficacy. Consequently, the obstacle is not to abdicate transformation, but rather to regulate it by employing principled reasoning and demonstrating respect for institutional responsibilities.

D. Populism and executive dominance

In the twenty-first century, the resilience of transformative constitutionalism has been put to the test by the emergence of populist majorities and executive centralization. In the presence of entrenched political power, the limits of transformation are suggested by judicial timidity in cases involving electoral alliances, protracted internet shutdowns, and restrictions on dissent.[81]

According to Gautam Bhatia, constitutional transformation demands judicial independence in order to endure.[82] However, in situations where executive dominance is asserted, transformative rulings are either delayed or diminished. Populist rhetoric frequently delegitimizes transformative judgments as elitist or "anti-people," particularly in

[80] Madhav Khosla (n 8)188.
[81] *Anuradha Bhasin v Union of India* (2020) 3 SCC 637.
[82] Gautam Bhatia, *Transformative Constitutionalism: Exploring the Idea and Its Limits* (2019) 9 Indian Journal of Constitutional Law 39, 57.

cases involving dissent, minority protections, or LGBTQ+ rights. The judiciary is consequently compelled to choose between accusations of elitism if it resists and irrelevance if it defers.

E. Structural inequalities and social resistance

Legal change is frequently resisted by deeply ingrained social structures, despite the Court's transformative approach. In spite of *Navtej Johar*[83], LGBTQ+ individuals continue to experience discrimination in the areas of employment, housing, and healthcare, with marriage equality still not being recognized. Despite the efforts of *Shayara Bano v Union of India* (2017)[84] and *Joseph Shine*[85], patriarchal norms retain their influence over family life. Dalits continue to endure caste violence in spite of decades of protective legislation and affirmative action.[86]

According to Baxi, the hierarchies that are perpetuated by culture and social practice cannot be dismantled solely by law.[87] Transformative constitutionalism is at risk of becoming aspirational rhetoric, rendering it unable to penetrate the experienced realities of marginalized communities, in the absence of parallel political, economic, and social reform.

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[83] *Navtej Singh Johar* (n 18).
[84] *Shayara Bano v Union of India* (2017) 9 SCC 1.
[85] *Joseph Shine* (n 44)
[86] NCRB, *Crime in India 2022: Statistics* (n 78).
[87] Upendra Baxi, *The Future of Human Rights* (n 23) 221.

F. Doctrinal vagueness and uncertainty

Transformative constitutionalism is ultimately plagued by doctrinal indeterminacy. While normatively abundant, concepts such as constitutional morality, liberty, and dignity frequently lack distinct boundaries. Judges are enabled to innovate by this flexibility, but it also allows for unpredictable and contradictory results.[88]

Navtej Johar[89], for instance, praised constitutional morality; however, it was deemed excessively vague in other contexts. In the absence of doctrinal discipline, Madhav Khosla warns that transformative reasoning may become an instrument of convenience, thereby undermining the stability of constitutional jurisprudence.[90]

G. The central tension

Transformation's paradox is thus evident. Its effectiveness is derived from the ability of courts to revitalize constitutional principles in the event that legislatures experience difficulties. Its deficiencies are primarily related to coherence, enforceability, and legitimacy. Transformational constitutionalism is susceptible to an oscillation between irrelevance and utopianism if it is not founded on principled reasoning, institutional dialogue, and sociological awareness. In the

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[88] Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard UP 2010) 145.
[89] *Navtej Singh Johar* (n 18).
[90] Madhav Khosla (n 8) 202.

twenty-first century, the challenge is not whether or not to pursue transformation; rather, it is how to do so responsibly.[91]

VI. COMPARATIVE PERSPECTIVES: DOCTRINAL TOOLS AND INSTITUTIONAL DESIGNS

A. South africa: transformative ambition with reasonableness review

In terms of transformative constitutionalism, South Africa continues to demonstrate the paradigmatic model. Socio-economic rights were explicitly enshrined in the 1996 Constitution, and the Constitutional Court enforced them through the "reasonableness" doctrine.[92] The Court in *Government of the Republic of South Africa v Grootboom*[93] and *Minister of Health v Treatment Action Campaign*[94] mandated that the state implement progressive, inclusive, and coherent policies, without specifying specific policy outcomes.

This approach provides a middle ground for India. There is no need for courts to assume the role of policymaker in order to demand transparency, participation, and minimum standards. Judicial enforcement and democratic legitimacy can be reconciled through reasonableness review, as Madhav Khosla notes, preventing the

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[91] Upendra Baxi, *The Indian Supreme Court and Politics* (n 6)119.
[92] Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (CUP 2000) 72.
[93] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
[94] *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC).

transformation from degenerating into judicial usurpation of governance.[95]

B. Colombia: tutela and rights enforcement

In Colombia, the tutela mechanism has revolutionized the enforcement of constitutional rights by enabling individuals to seek swift judicial protection.[96] Systemic reform, particularly in the areas of health and housing, has been initiated by the Colombian Court through individual claims.[97]

Marginalized groups' ability to enforce their rights could be enhanced by a tutela-like mechanism in India, where access to justice remains disparate. But Upendra Baxi warns that the judicialization of policy should not supplant legislative responsibility or overpower the courts.[98] Lessons from Colombia indicate that expedited remedies must be meticulously filtered to prevent institutional excess, while still offering a route to redress in the event that administrative remedies are unsuccessful.

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[95] Madhav Khosla, (n 8) 211.
[96] Manuel José Cepeda Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 Washington University Global Studies Law Review 529, 543.
[97] Rodrigo Uprimny, 'The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006) 127.
[98] Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 143.

C. Europe: proportionality and margin of appreciation

European constitutional jurisprudence is founded on the principles of structured proportionality and the "margin of appreciation."[99] A rigorous framework is established by proportionality, which mandates that state action must be proportionate, necessary, appropriate, and pursue a legitimate objective.[100] In cases where context is relevant, the margin of appreciation implies that democratic decision-making is to be respected.[101]

Despite the explicit application of proportionality in *Puttaswamy* (2017)[102] in India, its use is still episodic. A more consistent application could confront the issue of doctrinal vagueness in transformative reasoning. A transparent justification is required by proportionality, as Gautam Bhatia observes, in order to discipline judicial discretion.[103] It has the potential to preserve both democratic space and judicial innovation when combined with a contextual margin of appreciation.

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[99] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73, 75.
[100] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 66–69.
[101] *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48.
[102] *Justice K.S. Puttaswamy (Retd.)* (n 5).
[103] Gautam Bhatia, *The Transformative Constitution* (n 2) 311.

D. United States: procedural emphasis and institutional restraint

U.S. constitutionalism, in contrast to South Africa or Colombia, primarily prioritizes procedural guarantees and civil liberties, avoiding socio-economic rights.[104] Courts enforce rights primarily through due process and constraints on state authority, while political branches are responsible for redistribution.[105]

The American example emphasizes the enduring significance of procedural justice in India, including the right to a fair trial, protections against arbitrary arrest, and transparency in governance.[106] In a system where under trial incarceration and custodial violence are still prevalent, the practical effect of bolstering procedural rights may be more transformative than the implementation of expansive but weakly enforced socio-economic declarations.

E. Latin America: expansive remedies and judicial activism

In sectors such as health and education, courts throughout Latin America have implemented activist remedies, including structural reforms and budget reallocations.[107] Although marginalized groups

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[104] Cass R Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (Basic Books 2004) 24–28.
[105] Laurence H Tribe, *American Constitutional Law* (2nd edn, Foundation Press 1988) 1339–1342.
[106] Malavika Prasad, 'Due Process and Fair Trial in India: Lessons from U.S. Constitutionalism' (2019) 6 *Indian Journal of Constitutional Law* 101, 107.
[107] Rodrigo Uprimny (n 97) 127.

have been empowered, this has also led to accusations of judicial overreach and implementation failures.[108]

For India, the Latin American lesson is evident: institutional capacity and legislative cooperation must be commensurate with daring judicial mandates. A collaborative institutional design is necessary to sustain transformation, as Baxi cautions, as it cannot be achieved through judicial fiat alone.[109]

F. Commonwealth models: dialogue and incrementalism

The United Kingdom and Canada, which are Commonwealth jurisdictions, provide dialogue-based models. In Canada, courts frequently issue "suspended declarations of invalidity," which provide legislatures with an opportunity to respond with remedial statutes.[110] UK courts, in accordance with the Human Rights Act, issue declarations of incompatibility, but Parliament is ultimately responsible for reform.[111]

Additionally, these models prioritize institutional dialogue over unilateral judicial imposition. These mechanisms could mitigate

[108] David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 189, 192–195.
[109] Upendra Baxi, *The Future of Human Rights* (n 23) 148.
[110] Kent Roach, *Constitutional Remedies in Canada* (2nd edn, Canada Law Book 2013) 9–11.
[111] Human Rights Act 1998 (UK), s 4; see also *A v Secretary of State for the Home Department* [2005] 2 AC 68.

accusations of juristocracy in India by cultivating a collaborative constitutional culture. Khosla suggests that dialogic remedies may enhance legitimacy by assuring that transformative judgments are ingrained in democratic processes.[112]

G. Comparative synthesis: toward a hybrid model

The comparative experience reveals both opportunities and hazards. The Commonwealth exemplifies the value of dialogic remedies, while South Africa demonstrates the promise of reasonableness review.[113] Europe offers doctrinal discipline through proportionality, Colombia demonstrates participatory enforcement,[114] Latin America cautions against the perils of judicial overreach, and Colombia demonstrates participant enforcement.

The solution for India is a hybrid institutional toolkit:

1. Reasonability Securing transparency, inclusion, and minimum fundamental obligations—a socio-economic rights review.
2. Structured Proportionality for civil-political rights-delivering predictability and doctrinal clarity.
3. Dialogic Remedies-participatory procedures and suspended declarations that fortify democratic legitimacy.

[112] Madhav Khosla, *The Indian Constitution* (OUP 2012) 146–149.
[113] *Grootboom* (n 93); *Treatment Action Campaign* (n 94)
[114] Manuel José Cepeda Espinosa, (n 96) 534–536.

4. Procedure Guarantees-substantive rights are founded on robust safeguards against arbitrary arrest, detention, and surveillance.
5. Participatory Implementation-required consultation with concerned communities to ensure that transformation is grounded in their lived experiences.

Transformative constitutionalism is not institutional excess nor judicial utopia, as this comparative synthesis affirmed. With the appropriate design, it is possible to harmonize aspiration with practicality, ambition with legitimacy.

VII. TOWARDS A 21ST CENTURY TRANAFORMATIVE CONSITUTION

The aspiration of transformative constitutionalism cannot be merely rhetorical; it must be rooted in sociological awareness and institutional design.[115] The obstacle is to preserve its radical moral perspective-of justice, equality, and liberty-without succumbing to symbolic declarations or judicial excess.[116]

In the twenty-first century, it is imperative to undergo three recalibrations:

[115] Karl Klare, (n 9) 150–152.
[116] Upendra Baxi, *The Future of Human Rights* (n 23) 138–142.

1. **Doctrinal Discipline**: Structured proportionality must be used to determine civil-political rights, thereby guaranteeing predictability and transparent reasoning.[117] In order to enforce socio-economic rights, it is necessary to conduct a reasonableness evaluation that demands inclusive and progressive state action, while also respecting democratic accountability.[118]
2. **Procedural Safeguards**: The process of transformation commences with the mundane-protection against arbitrary arrest, protection for digital privacy, access to legal assistance, and transparent governance.[119] Robust procedural rights frequently result in the most enduring transformations, as evidenced by the U.S. experience.[120]
3. **Dialogic Remedies**: Rather than unilateral impositions, courts must express judgments as invitations to democratic dialogue. Institutional practice can be transformed through suspended declarations, participatory consultations, and supervision bodies, which can mitigate accusations of juristocracy.[121]

Although these recalibrations are informed by comparative lessons, they are firmly grounded in the experienced inequalities of caste,

[117] *Justice K.S. Puttaswamy (Retd)* (n 5) [310] (Chandrachud J).
[118] *Grootboom* 2001 (n 93); *Treatment Action Campaign* (n 94).
[119] *D.K. Basu v State of West Bengal* (1997) 1 SCC 416; *Selvi v State of Karnataka* (2010) 7 SCC 263.
[120] *Miranda v Arizona* 384 US 436 (1966); also see Laurence Tribe (n 105) 777–782.
[121] Kent Roach (n 110) 19–23; Madhav Khosla (n 112) 146–148.

gender, class, and religion that are present in India.[122] In the absence of consideration for these structural realities, transformative constitutionalism is at risk of remaining an elitist project that is disconnected from the lives of the individuals it purports to empower.[123]

VIII. CONCLUSION

The Indian Constitution was intended to be a transformative document, a charter of emancipation in opposition to centuries of hierarchy.[124] Throughout the seventy-five years that have passed, the Supreme Court has endeavored to realize this vision by broadening its horizons-occasionally with boldness, sometimes with reluctance.[125] However, as Upendra Baxi cautions, judicial populism that lacks democratic foundation can undermine legitimacy.[126] Flavia Agnes underscores that proclamations of equality are unreliable in the absence of social transformation,[127] and Madhav Khosla underscores that constitutional identity itself is susceptible to populist pressures.[128]

In this article, it has been contended that transformative constitutionalism is institutionally fragile but normatively essential. Its

[122] Marc Galanter, 'The Aborted Restoration of "Indigenous" Law in India' (1968) 14 *Comparative Studies in Society and History* 53, 58–60.
[123] Flavia Agnes, *Law and Gender Inequality* (n 40) 215–219.
[124] Granville Austin (n 32) 50–55.
[125] *Kesavananda* (n 3); *Maneka Gandhi* (n 4).
[126] Upendra Baxi (n 23) 138–142.
[127] Flavia Agnes, *Law and Gender Inequality* (n 40) 215–219.
[128] Madhav Khosla (n 8) 183–186.

future is to be found in the recalibration of ambition, rather than the abandonment of it. This can be achieved through doctrinal clarity, procedural safeguards, and dialogic remedies that engage legislatures, tribunals, and communities.[129] The transition from courtroom rhetoric to lived constitutional actuality of equality, liberty, and justice can only occur at that point.

In the twenty-first century, the transformative Constitution must be both radical and restrained. It must be radical in its refusal to compromise on dignity, equality, and liberty,[130] and restrained in its commitment to institutional humility and democratic dialogue within the institution.[131] The constitutional promise of India can be sustained solely by this equilibrium-not as a utopia, but as a perpetual endeavor of emancipation.[132]

[129] Kent Roach (n 110) 19–23; also see Madhav Khosla, *The Indian Constitution* (n 112) 146–148.
[130] *Navtej Singh Johar* (n 18) [562] (Chandrachud J); *Joseph Shine* (n 44).
[131] *S.R. Bommai v Union of India* (1994) 3 SCC 1; Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019) 72–75.
[132] Karl Klare (n 9) 150–152.

X. IMPORTANCE OF INDIA'S CONSTITUTION IN THE MAKING AS A SOURCE OF UNDERSTANDING THE CONSTITUTION

- *DEVANSH MALHOTRA[*] AND DR. KALYANI ABHYANKAR[**]*

Abstract

This article provides a critical analysis of the substantive contribution made by B. Shiva Rao's book, India's Constitution in the Making, to document the historical, political and intellectual underpinnings of the Constitution of India. The article focuses on Rao's reconstruction of the deliberative process of the Constituent Assembly especially in relation to fundamental rights; liberty; preventive detention; and the Article 21 & 22 procedural safeguards. Rao has extensively used archival records, committee minutes, and correspondence between constitutional framers to piece together a unique participant-observer account of how the Constitution was created, as well as the competing philosophical perspectives of the Constitution that influenced the final product. The review goes on to further explore Rao's coverage of the work of Sir B.N. Rau and Dr. B.R. Ambedkar, and the ways in which the technical process of drafting a Constitution and the transformative vision for creating a new society converged to actually produce the Indian Constitution. In addition to commending the documentary, methodological, and jurisprudential values of Rao's work, the review also critiques its limited discussion of the socio-economic realities and post-colonial realities of how constitutional

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rights operate. Ultimately, it is the position of the review that Rao's contribution represents one of the most important constitutional resource materials for thought about the philosophical commitments of the framers of the Constitution regarding liberty, due process, constitutional morality and democracy in India.

***Keywords**:* Transformative Constitutionalism, Equality, Liberty, Justice, Constitutional Morality, Indian Supreme Court, Judicial Activism, Social Justice

I. INTRODUCTION: THE BOOK AND ITS AUTHOR

B. Shiva Rao's work India's Constitution in the Making is among the most authoritative and important text on the making of the Indian Constitution and the constitutional history of India. Rao is one of independent India's leading constitutional commentator and historians and was a participant observer of the process of making and framing the Constitution. This work provides a painstaking account of the historical, political, and intellectual foundations of the Indian Constitution. Rao had access not only to the process of the Constituent Assembly, but also the drafting minutes, the official correspondence and personal notes of many of the framers of the Constitution; this access provides the book with a unique authenticity and scholarly significance. More generally, while many works of constitutional commentary look to *post-facto* judicial interpretations and opinions, Rao's work is a rarity in the form of an original source-based intellectual reconstruction, of the debates and philosophic choices of the framers of the Indian Republic.

II. CENTRAL OBJECTIVES AND SCOPE OF THE WORK

The primary focus of the book is to detail the historical development of the Indian Constitution, starting with the political discussions preceding independence, and concluding with the line-by-line debates of the Constituent Assembly. Rao details the different influences that shaped this process, including colonial (and therefore hierarchical) approaches to administration, nationalist constitutional thought, comparative constitutional experiences in other parts of the world, and the evolution of human rights norms on the international stage. The book serves more than just a narrative purpose; it also provides a rationale for why the framers favoured a constitutional democracy of rights in which liberty, equality, and procedural fairness suddenly acquired a much stronger footing.

The book situates the framing of the Constitution in its socio-political context, the pressures of repression during colonial rule, the important debate for civil liberties, and the risk of reviving authoritarianism. The historical framing gives contemporary scholars a framework to understand how liberty and human rights were conceived by the generation of framers engaged in faming the Constitution and in deliberation with one another.

III. STRUCTURE AND KEY THEMES

Rao divides the study into thematic sections related to:

1. The historical context of Indian constitutionalism, which includes the Indian constitutional experiments prior to 1935.
2. The Cabinet Mission Plan and discussions and negotiations which led to the meetings of the Assembly.
3. The internal processes of the Constituent Assembly, including committee arrangements, subcommittees, and the drafting process.
4. The article-by-article process of development, involving review of debates, proposals to amendment the draft, dissents, and role of concepts.
5. The leadership contributions of those such as B.N. Rau, Dr. B.R. Ambedkar, K.M. Munshi, Alladi Krishnaswamy Ayyar and others.

One of the most important sections concerns the process in drafting Fundamental Rights, due process, preventive detention, and criminal procedure; all these directly relate to modern bail and liberty jurisprudence.

IV. RECONSTRUCTION OF LIBERTY, DUE PROCESS, AND PERSONAL FREEDOM

Rao's treatment of Article 21 (the right to life and personal liberty), Article 22 (arrest and detention), and the discussions regarding 'due process of law' *versus* 'procedure established by law' are some of the greatest benefits of the text. Rao thoughtfully outlines and quotes extensively from the Drafting Committee, and from correspondence, B.N. Rau had with members of the committee, and is able to capture the challenges the framers faced in balancing the structure of individual rights with the interests of the state in governance and security. In Rao's painstaking detailing of the debate concerning liberty, he describes:

- A profound distrust of executive action stemming from colonial times.
- A understanding that liberty lies at the heart of democracy.
- A fear of judicial overreach stemming from the American 'due process' doctrine.
- A willingness to have procedural safeguards in place to protect against arbitrary detention.

Rao makes it clear that framers did not intend to impose personal liberty to serve the urgency of legislative clerical expediency. Liberty was intended to be honoured as a fundamental value, with strong judicial protections.

V. THE ROLE OF B.N. RAU AND DRAFTING METHODOLOGY

One of the richest elements of Rao's work is his examination of the Indigenous intellectual role of Sir B.N. Rau, the Constitutional Adviser. Rao studies Rau's memoranda on fundamental rights, including consultations with international constitutional authorities (including Justice Felix Frankfurter) and a preference for a hybrid or mixed constitutional model. Rao's emphasis on the intentionality behind having:

- Personal liberty as inalienable.
- Broad procedural provisions scrapped over structural guarantees.
- State conduct would occur subject to ideally independent judicial oversight.

VI. CONSTITUENT ASSEMBLY DEBATES AS ANALYSED BY RAO

Rao provides a detailed summary and context for the Constituent Assembly Debates (CAD), with a particular emphasis on the following issues:

- Preventive detention
- Safeguards in criminal justice
- Rights against arbitrary arrests
- The balance between liberty and public order
- Equality before law (Article 14)

- Vulnerable communities’ safeguards

Rao emphasises that many members (including Ambedkar, Kriplani, and K.T. Shah) said repeatedly that liberty cannot be sacrificed for administrative convenience. Rao’s reconstruction clearly indicates the intellectual obligations that the Supreme Court must consider in balancing restrictions on Fundamental rights of citizens.

VII. STRENGTHS OF THE BOOK

Rao has gained unprecedented access to information such as internal notes, draft texts, deliberations by the Assembly and private correspondence between many of the original framers. Therefore, Rao’s book, ‘India's Constitution in The Making’ serves not only as a history book, but also contains documentary evidence about the Constitution; rao’s work is based on archival material as well. Whereas previous books have relied on memories and ideologies to interpret what happened, Rao uses documentary evidence to present a picture of how the Constitution was created, and he gives insight into the intellectual effort that went into creating the Indian Constitution. A major strength of the book is Rao’s approach to providing viewers with a balanced view of the process and not allowing himself or his readers to be swayed by the ideology of any particular group of individuals involved in this major historical event, nor does he try to sanitise the processes that were involved in creating the Constitution. Instead, Rao highlights all of the many layers of issues that were present in the Assembly when its members were making their decisions on how to draft the Constitution, such as the many disagreements between members of the Assembly, withdrawn proposals by the Assembly members, the changes that occurred in the constitutional philosophies during the deliberations of the Assembly and all of the unresolved tensions that were present when the final text was produced. With this kind of methodological honesty on the part of the author, the reader can learn to understand not only how the Constitution was created, but also how it developed over time as a result of competing views on such issues as the State's powers, individual liberties, governance and social justice. Rao's excellent scholarship provides a complete record of all debates, amendments, dissenting opinions, recommendations from committees, and more, making it an essential resource for researchers studying Indian Constitutional Law from a doctrinal, historical, and jurisprudential standpoint. Additionally, the detailed mapping of ideological currents, including liberal individualism, communal concerns about social welfare,cand socialist commitments to egalitarian transformation, creates a broad intellectual context for understanding how India's constitution developed its identity. Consequently, India's Constitution in the Making not only serves as a historical account but also offers a constitutional compass for evaluating present-day tensions between state security objectives and the protection of individual liberty.

The making of the Indian Constitution was a collaborative endeavour characterised by the distinct but complementary contributions of Sir B.N. Rau and Dr. B.R. Ambedkar. Dr. Rajendra Prasad famously summarized this relationship by noting that while Rau "visualised the plan and laid its foundation," Ambedkar was the "skilful pilot" who steered the document through its final stages. Sir B.N. Rau, as the Constitutional Adviser, provided the necessary technical and scholarly framework. In October 1947, he produced a comprehensive working draft comprising 243 articles and 13 schedules, which served as the "rough draft" for the assembly. This draft was the culmination of extensive global research, during which Rau consulted international jurists like Justice Felix Frankfurter and Judge Learned Hand. These interactions led to pivotal recommendations, such as removing the "due process" clause to prevent judicial overreach and modelling India's Directive Principles of State Policy on Article 45 of the Irish Constitution. Rau's role was primarily that of intellectually bureaucratic and preparatory, establishing a legal structure without a direct political mandate. Dr. Ambedkar, as Chairman of the Drafting Committee, transformed this technical framework into a living political and moral charter. Over 141 days of intense labour, he led the committee in refining Rau's draft to prioritise social and economic justice. Ambedkar infused the document with a transformative vision, ensuring it addressed the needs of marginalised groups through Fundamental Rights and affirmative action provisions. His role was both practical and ideological; he was the primary defender of every clause on the floor of the Constituent Assembly, building political consensus among diverse and often conflicting groups during the volatile period following Partition. While some modern perspectives attempt to elevate Rau's technical authorship to diminish Ambedkar's leadership, Ambedkar himself explicitly acknowledged Rau's contributions as a vital starting point. He credited Rau for the preliminary draft while emphasizing that the Drafting Committee made major revisions to imbue the text with moral force. Ultimately, the Constitution represents a synthesis of Rau's international legal erudition and Ambedkar's commitment to democratic social reform, creating a robust framework that has governed Indian Republic for over seventy years.

VIII. CRITIQUES AND LIMITATIONS

The work is primarily descriptive therefore requires interpretation by later scholarship in order to supplement its findings. The work does not adequately outline empirical context since the socio-economic impact of constitutional rights is not considered as part of empirical context; the work does not adequately include a discussion of the connection between the criminal justice safeguards provided in the constitutional text and their application in the post-colonial enforcement environment as it exists today. Nonetheless, this work provides an essential foundation for furthering the field of constitutional studies.

IX. CONCLUSION

B. Shiva Rao's India's Constitution in the Making is one of the most authoritative scholarly works for appreciating the philosophical and structural foundations of the Indian Constitution. Its richness of context and documentation makes it indispensable for research involving these topics in the contexts of liberty, due process of law, and the guarantees of criminal procedure. India's Constitution in the Making is not just a historical curio; it is a living resource for understanding how India's constitutional DNA encodes liberty, due process, and fair procedure. Drawing on the original commitments of the framers to liberty, Rao's writing supports a normative critique of statutory regimes that routinely violate personal liberty and restrict personal freedom. For this reason, the book is an important academic resource for anyone interested in reconciling penal law with constitutional morality, apart from many other issues concerning, equality, liberty and upliftment of the week.

XI. JUDICIAL RECUSAL AND THE IMPERATIVE OF APPARENT IMPARTIALITY: AN ANALYSIS IN LIGHT OF NATURAL JUSTICE, JUDICIAL ETHICS, AND INDIAN JURISPRUDENCE ON BIAS

- *KUMUD LATA DAS**

Abstract

The article critiques the possibilities and the limits of transformation by taking key cases from Kesavananda Bharati to Puttaswamy and Navtej Singh Johar and situating them against contemporary crises, including mass surveillance, internet shutdowns, custodial violence, caste and gender hierarchies, and electoral opacity. In the context of India's experienced inequalities, comparative lessons from South Africa, Colombia, and Europe are examined. In conclusion, the article suggests a reevaluated framework of transformative constitutionalism for the twenty-first century, which is founded on democratic dialogue, socio-legal sensitivity, and structured proportionality. The doctrine of recusal occupies a vital place in the administration of justice by safeguarding public confidence in the impartiality and integrity of the judiciary. Rooted in the fundamental principle of natural justice that no person should be a judge in their own cause (nemo judex in causa sua), the law of recusal seeks to eliminate both actual bias and the reasonable apprehension of bias. This article examines the conceptual foundations, jurisprudential evolution, and practical application of recusal through a critical analysis of leading Indian and

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English judicial precedents, including Dimes v Grand Junction Canal, Ranjit Thakur v Union of India, Manak Lal v Dr Prem Chand Singhvi, and Ashok Kumar Yadav v State of Haryana. It argues that recusal is primarily litigant-centric and aimed at preserving the appearance of fairness rather than questioning judicial integrity. The article further explores the doctrine of necessity, the discretionary nature of recusal, and its significance in maintaining judicial legitimacy, institutional credibility, and the rule of law in a constitutional democracy.

***Keywords**:* Judicial Recusal, Natural Justice, Judicial Impartiality, Reasonable Apprehension of Bias, Judicial Ethics and Accountability

I. INTRODUCTION

The essence of law of recusal consists in protecting the image of impartiality of the judge and judiciary the law of recusal is litigant's perception oriented. It does not mean tha the judge who recuses is a person of doubtful integrity. In every case where there is slightest conflict of interest, the judge should recuse; the recusal enhances his image rather than lowering it.

We shall begin to discuss the law of recusal with an old English case. William Dimes v. Proprietors of Grand Junction Canal Company[1], the case was decided by the Lord Vice-Chancellor of Equity jurisdiction, but on appeal it was ratified by the Lord Chancellor Cottenham, which

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[1] 10 E.R. 301, (1852)

was a statutory requirement. Later the Appellant Dimes came to know that Lord Chancellor Cottenham had shares in the Defendant Company. The jurisdiction of the Vice-Chancellor, though, he was subordinate to the Lord Chancellor, was an independent jurisdiction and as such his judgement was not vitiated by the conflicting interest of the Chancellor. The Court was also convinced that the ratification by the Lord Chancellor in appeal was not influenced due to his conflicting financial interest in the respondent company but to preserve the sanctity of the maxim ‘no one can be a judge in his own cause’, the ratification by the Lord Chancellor was quashed by the House of Lords. The Lord Chancellor was perfectly impartial in ratifying the judgement of the Vice-Chancellor; the Lord Chancellor did not allow his pecuniary interest to adversely affect his discretion, his ratification was quashed to uphold the principle that a judge must not only be impartial but should appear to be impartial. The ratification was quashed but was substituted by the same decision.

II. JURISPRUDENTIAL FOUNDATIONS OF THE LAW OF RECUSSAL

At the relevant time, there were two adjudicatory systems in Britain, law courts consisting of county courts, the High Court, the Court of Appeal and the House of Lords and the courts of chancery. Law courts decided cases according to law and the chancery according to the conscience of the King. The Chancellor was the keeper of Royal

Conscience. Certain principles of law emerge from the case, and are under discussion.

1. Law of recusal is a rule of natural justice; it is derived from the rule that 'no one can be a judge in his own cause'.
2. The law of recusal is not judges' integrity centric but litigant's perception centric. The case makes it clear that that the integrity of neither the Vice-Chancellor was questioned nor that of the Chancellor.
3. The House of Lords quashed the decision of the Chancellor not because he (the Chancellor) was biased but because he must appear to the litigant impartial. Had the Lord Chancellor been partial it would have been a case of misconduct. The Judge, should not to do anything which casts a doubt in the perception of ordinary people that the judge is not impartial. The crown, the judge figuratively wears, is not made of diamonds and gold but of thorns. It imposes a heavy responsibility to maintain his image. Responsibility is far more important than the power the judge wields over the parties to the dispute. Every judge should always keep a copy of Munshi Premchand's short story 'Panch Parmeshwar' to continuously remind him of his duties of impartiality. An ideal judge is not a very social person, he selectively relates himself with others. He avoids, relating himself to politically, ideologically loaded institutions and persons and hesitates to relate with business interests. Not

because he can be corrupted but because he does not want to compromise his image of impartiality.

III. GROUNDS FOR JUDICIAL RECUSAL

There are many grounds, in the presence of which a litigant may have reasonable apprehension on the impartiality of the judge, notwithstanding the fact that the judge may actually be not adversely influenced by the factors, which created suspicion in the mind of the party to the dispute. However, unfounded suspicion will not require the judge to recuse. Law of recusal does not allow a litigant to do Bench shopping. But it is to be emphasised again and again that in most of the cases, the factors which create reasonable apprehension in the mind of the litigant may not influence the judge not to be impartial. The law of recusal is litigant centric; the law operates from the reasonable point of view of the litigant. It satisfies the litigant without casting an adverse influence over the judge and casting doubt over his integrity.

There are many grounds for recusal by a judge, such as interest in the subject matter of the dispute, pecuniary or otherwise, personal relations, friendly or adverse with one of the parties, legal representation of the interest of one of the parties in earlier legal dispute, judging the parties in an earlier case (the ground becomes stronger if in a number of earlier cases the judge has always decided against the party, specially where the earlier case did not require decision on merit, opinion on merit has been expressed against the party), fiduciary relationship between the party and the judge, or where the party was in a position to influence the judgement of the judge on moral or any other ground. However, the enumerated grounds are not and cannot be exhaustive.

There is an interesting and illuminating real life example of recusal by a judge. The case relates to the Admission Officer, a Professor of Law of the faculty of law of an Indian University. As the High Court has its seat in the city where the University had its office, it was relatively easier for admission seeking students to have access to the High Court, if they have any grievance. Every year, a number of students moved the High Court for one reason or the other, and in some cases the Court would order the University to admit the students. it was routine, no personal interest of the Admission Officer was involved. In a particular case, the judge recused, though, the recusal was not asked by any of the parties. It was later found that the daughter of the judge was a student of 3rd year LL.B. but why did he recused voluntarily without such a request by any of the parties?

1. No request for recusal was demanded by the parties.
2. The University Officer knew that even if an adverse decision is given it would not have any impact on the daughter of the judge
3. The judge knew that his judgement would not be biased because of his daughter and her academic prospect shall remain unaffected

Then, why did the judge recuse? To avoid a remote possibility that in the event his decision goes against the admission seeker, he might think he lost the case because of judge's interest in his daughter. Such a belief would have lowered the prestige of judiciary. The judge recused to negate any doubt in the mind of the admission seeker that the judge is not fair because of conflicting interest of his daughter.

IV. THE INDIAN APPROACH TO RECUSAL

There is no specific statutory law regulates the law of recusal. It is discretionary with the court. But the discretion is not unfettered. The governing rider is to maintain the impartial and honest and blameless image of the judicial system, even if it is a self-regulatory rule. There are a limited number of precedents that explain and elaborate the law of recusal.

Ranjit Thakur v. Union of India[2], is a case on law of recusal. The Appellant was serving the signals regiment. He was awarded 28 days imprisonment under the Army Act for giving a representation without following the prescribed procedure, through his Commanding Officer, the Respondent no. 4. While he was serving the sentence, he refused to have his food in disobedience of the orders of his superiors. Therefore, under the Army Act. He was in a summary trial by the court martial, consisting of the Respondent No. 4 and others, sentenced to one-year

[2] 1987 INSC 285; AIR 1987 SC 2683

imprisonment in civil jail, which he served out. His representation to the confirming authority was rejected. His writ petition was rejected by the High. His appeal to the Supreme Court was heard under Article 136 of the Constitution. The Supreme Court held that the Respondent no. 4 was 'corum non judice' (before one who is not a judge) on several grounds. The sentence of one-year imprisonment was held to be disproportionate, as it was merely an case expression of resentment. The Commanding officer should not have been a part of the Summary Court Martial, because he awarded 28 days imprisonment in earlier disciplinary case as in the mind of the Appellant an impression of bias was created. The disproportionate award of one-year imprisonment actually was a proof of bias. The Court quashed the order of Summary Court Martial and ordered that the Appellant be reinstated with all monetary benefits. The ratio of the case is law of recusal is not judge oriented but litigant centric. It is the mind of the litigant. Likelihood of perception of bias, even without actual bias, in the mind of the litigant is the ratio of the case.

Manak Lal v. Dr. Prem Chand Singhvi[3]. Dr. premchand made a complaint of misconduct against Manak Lal, an advocate in the High Court. The Chief Justice appointed a tribunal, headed by C, a senior advocate. The tribunal gave a verdict against Manak Lal for removal of his name from the rolls. Manak Lal contended that the constitution of

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[3] AIR 1957 SC 425

the tribunal was improper as earlier C appeared for Prem Chand in a trial, out of which this complaint of professional misconduct arose. It was held that the tribunal suffered from serious infirmity as for acting judicially or quasi-judicially, the judge should act impartially, without any bias. He must not appear to be biased. It is not sufficient to say that actually the judge acted impartially. To the litigant he must not appear to be biased, even if he is not biased. As Manak Chand, an advocate knew that C had earlier represented him, he remained silent. He disclosed the fact only when the case was decided against him. Objection to the constitution of the tribunal is waived. The name of Manak Chand shall be removed from the rolls.

P.K.Ghosh v. J.G. Rajput[4]. (1995) 6 SCC 744. The Respondent J.G. Rajput, an employee of the Municipal Corporation, was dismissed by the Municipal corporation. He in a case was represented by the advocate, B.J.Sethna, who was later appointed a judge of High Court of Gujrat. J.B.Sthna J., was a part of the Bench, which heard the case of the Respondent. Despite the objection of the Municipal Corporation, he did not recuse. The Supreme Court did not approve the conduct of Justice Sethna on the principle that even if a judge is impartial he must recuse if there appear to be a conflict of interest to the litigant.

[4] (1995) 6 SCC 744

State of U.P. v. Mohd. Nooh[5] AIR 1958 SC 86. In a departmental inquiry, headed by a superintendent of police against the Respondent, a head constable, the S.P., himself became a witness, recorded his evidence before a deputy superintendent, and then conducted inquiry and found the Respondent guilty on the basis of his own evidence. The Supreme Court, held that the S.P. who became a witness and judge has become disqualified to act as head of the inquiry. The ratio of the case is simple. The inquiry officer should not only be impartial but also appear to be impartial. That is also the guiding principle of the law of recusal. If to a litigant, the judge appears to be impartial on reasonable ground, he should not decide.

Ashok Kumar Yadav v. state of Haryana[6], AIR 1987 SC 454, is a case on doctrine of necessity and recusal. In a civil service examination, for viva voce, three members of the public service commission constituted the selection committee. Three of the candidates were related to two of the members of the selection committee. In the viva voce, the member, who was related to the candidate did not participate in the viva voce of his related candidate but for the viva of all other candidates. The Supreme Court held that as a prudent practice the member, whose relative is a candidate for vice voce should decline to be a member of the selection committee, but an exception is be created in this case as

[5] 1958 AIR SC 86

[6] 1987 AIR SC 454

the substitute of the two members, holding the constitutional position could not be found. Therefore, it was sufficient to withdraw from the selection committee at the time of interview of the related candidates. There was also no evidence of actual partiality on the part of two members of the selection committee. The Court also observed that the law of recusal is not based on actual bias or lack of impartiality on the part of officer performing quasi-judicial or judicial functions but recusal is necessary to dispel the reasonable apprehension of lack of impartiality to the litigant or the candidates in the viva voce.

V. CONCLUSION

It must be emphasised the recusal sought by the litigant or the recusal is self-sought by the judge is not a reflection on the integrity of the judge. It is rather a safeguard to protect the reputation of the judge and the judiciary. A judge must immediately recuse whenever, the litigant reasonably perceives conflict of interest. Or when the judge thinks that the litigant may perceive conflict of interest. A judge should avoid proving that he/she is not influenced by the reasons which appear to the litigant as ground of biased decision by the judge. A situation of conflict between the judge and the litigant as to whether the judge should recuse, more often than not adversely affect the reputation of the judiciary.