

# NALSAR STUDENT LAW REVIEW

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# NALSAR STUDENT LAW REVIEW

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2021

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## EDITORIAL

It is with great pride and satisfaction that we present Volume XV of the NALSAR Student Law Review (**NSLR**), the flagship journal of NALSAR University of Law, Hyderabad. We are grateful for the overwhelming interest that students, academicians, and practitioners have shown in writing for the NSLR this year. As a journal that strives to encourage academic scholarship amongst students, we are delighted that five of our eight pieces have been authored by students. The pieces in this issue are diverse in their focus, including articles on international law, banking and finance, constitutional law, property law, and law and linguistics.

In the first piece, *'Relinquishing a Minor's Share in Devolved Property: A Case Comment on M. Arumugam v. Ammaniammal'*, Vasu Aggarwal critiques the Supreme Court's decision to permit the relinquishment of a minor daughter's share in devolved property. The contention is two-fold. First, Aggarwal suggests that while the Court was right in treating the devolved property as a separate property, its finding that the natural guardian has the power to relinquish the minor's share is untenable. Second, even if the devolved property was coparcenary property, neither the *karta* nor the natural guardian can relinquish a minor's share. Consequently, Aggarwal argues that the rights vested in minor girls through the Hindu Minority and Guardianship Act and the 2005 amendment to the Hindu Succession Act have been read down by this judgment, thereby impeding important reforms made to the law to ensure gender justice in the inheritance regime.

In the second case comment, *'The ICC's Exercise of Jurisdiction over the Deportation of Rohingyas: Critiquing the Reading in of the Objective Territorial Doctrine in Article 12(2)(a) of the Rome Statute'*, Muskaan Wadhwa questions the decision of the Pre-Trial Chamber of the International Criminal Court which held that the deportation of the Rohingyas from Myanmar to Bangladesh falls within the jurisdiction of the court. Since Myanmar is not a party to the Rome Statute, a crime that takes place within its territory is outside the jurisdiction of the Court; however, based on a broad reading of the Rome Statute, the ICC held that since an element of the crime took place in Bangladesh, a state party, the court had jurisdiction over the crime. Wadhwa argues that although such an expansive reading of the Rome Statute may have desirable outcomes, it is legally untenable taking into account the historical background behind the Statute and the established rules of treaty interpretation. Further, Wadhwa observes that a broad reading of treaties may undermine the legitimacy of international law from the viewpoint of the Global South.

In *'Interpreting Group-Based Religious Freedoms: Sabarimala and the Movement from Definitions to Limitations'*, Aparajito Sen explores the Supreme Court of India's approach towards balancing religious freedoms with other rights, including the fundamental right to equality. Sen outlines the pitfalls associated with the Court's traditional approach of determining the 'essentiality' of the religious practice in question and/or whether the religious group claiming the right constitutes a 'denomination', rather than examining the substantive question of the permissible limits to the exercise of religious rights. Sen examines, and draws from, the opinions of Chandrachud J and Malhotra J in the 2018 Supreme Court decision in *Indian Young Lawyers Association v. The State of Kerala* to offer an interpretational alternative to the traditional approach, that grounds permissible limitations to the exercise of religious rights in an anti-exclusion principle drawn from Article 17.

Rosemary Huisman's article *'Linguistic Perspectives on Legal "Construction": The Advantages of a Social Semiotic Approach'* is located at the intersection of legal study and linguistics, and draws from Systemic Functional Linguistics to answer key questions of statutory interpretation. The article first contrasts two approaches to the theorised modelling of language and law - formal and functional. Then, Huisman draws from Systemic Functional Linguistics, a functional model that understands language and meaning in a social context, as well as various judicial reasonings, to examine how differences in interpretation of the relevance of a statute to the facts of a case arise, and how those engaged in legal discourse construct the interpretation of a statute and/or the facts of a case to achieve desired outcomes. Ultimately, Huisman finds that a Systemic Functional Linguistics approach, which considers 'language as social semiotic', enables the study of 'law as social semiotic' and the interpenetration of legal text and social context.

The credit crisis faced by the poor in India has manifested in myriad ways in the past years, and has only been worsened by the COVID-19 pandemic. Binit Agrawal, in the article titled *'Perils and Possibilities of Microfinance: Need for Regulatory Reforms in India'*, presents Microfinance Institutions as important players that can help resolve the credit crunch problem in India. The article critically analyses the current regulatory regime, identifying issues with the capping of interest rates, the non-acceptance of deposits by MFIs, the lack of data protection guidelines, the absence of sector specific regulators, and the lack of consumer protection rules as major problems that plague the current regime. Importantly, Agarwal provides concrete solutions to these problems, arguing for, amongst other things, implementing proposals like

mandatory community meetings, including MFIs within disaster response plans, and partnering with NGOs and governments to offer guidance and training to rural customers, to enhance the social impact of microfinance.

In the article *'Kashmir and the Battle for the Borders of International Law'*, Rohini Sen approaches the question of sovereign claims over Kashmir from a critical viewpoint, problematizing and questioning the very notions of statehood and territoriality, and underscoring their Westphalian roots. Tracing briefly the political history of the region juxtaposed with the process of identity formation to arrive at the present-day conflict regarding borders, Sen engages with alternative relationships with the land – those marked by subjectivity and fluidity that are incompatible with linear boundaries. The article emphasizes the dislocation and invisibilisation of the people through state-making processes, the legal imagination of citizenship, and the characterization of resistance, which have been inadequately examined under the mainstream framework of human rights and self-determination. Ultimately, she invites the reader to think beyond the state-form and territorial boundaries to reach a configuration based on the epistemologies of the land.

In *'Who is a 'Proclaimed Offender'? Putting the Interpretative Imbroglia to Rest'*, Jaideep Singh Lalli examines the long-standing conflict with respect to the interpretation of the term 'proclaimed offender', subsequent to amendments to the Code of Criminal Procedure and the Indian Penal Code in 2005. Given the significant legal consequences that one may face as a result of being declared a proclaimed offender, and the lack of attention that the interpretative uncertainty surrounding the term has received, Lalli's endeavour is an important contribution to the field of penal liability. The article contextualises the conflict by examining the law pertaining to proclaimed offenders, as well as High Court judgments that have offered conflicting opinions on the interpretation of the term, and the shortcomings therein. Lalli examines appropriate rules of statutory construction to propose an interpretation aligned with the legislative intent of the statutory provisions about proclaimed offenders.

Finally, in *'Reservation on an Economic Basis: Some Issues and Challenges'*, Arpita Sarkar contributes to the important discussion on the legitimacy of the reservation for economically weaker sections (EWS) of society introduced through the Constitution (103rd Amendment) Act, 2019. Sarkar argues that undue focus on economic backwardness in the determination of backward classes for reservation by the judiciary and the legislature reduces the importance of social backwardness, the remedy of which has historically been the underlying objective of

reservation. Sarkar examines how economic backwardness as a marker was discussed and rejected by the Constituent Assembly, and contends that the ‘creamy layer’ test, which emphasises economic criteria to determine entitlement to reservations, is a result of judicial conjecture. Drawing from historical and legal arguments, Sarkar contends that the 103rd Amendment is unconstitutional due to its incompatibility with the Constitution’s equality provisions and its failure to pass the tests laid down in *M Nagaraj v. Union of India* to assess basic structure violations.

The Editorial Board would like to thank our authors, who have made this Volume possible and helped us in our mission to contribute meaningfully to legal academic scholarship in India; our peer-reviewers, who have, despite the difficulties of last year’s pandemic, contributed their time and effort towards our editorial process; our publishing partners, the Eastern Book Company; and the Vice Chancellor, Registrar and Faculty Advisor at NALSAR University of Law for their continued support and encouragement. We hope you enjoy this issue.

**Editorial Board, 2020-2021**

**RELINQUISHING A MINOR'S SHARE IN DEVOLVED PROPERTY: A CASE COMMENT ON M.  
ARUMUGAM V. AMMANIAMMAL**

Vasu Aggarwal\*

*In order to protect minors' rights in their property, the Hindu Minority and Guardianship Act was introduced in 1956. At the same time, the Hindu Succession Act was introduced to provide inheritance rights to women. In 2005, the Hindu Succession Act was amended to give daughters rights with respect to ancestral property by making them coparceners, placing them on the same footing as sons. The combined effect of these two legislations was that a minor daughter's share in the ancestral property was protected. However, in 2020, the Supreme Court in M. Arumugam v. Ammaniammal dissolved this protection. The court allowed a minor daughter's share to be relinquished in favour of her two brothers through a release deed which was signed by her mother. This paper argues that this position is not only unsound in law, but also goes against the interests of justice.*

*First, the paper argues that the nature of property upon devolution was as a separate property, and the natural guardian was the representative of the minor. However, the representative did not have the right to sign the release deed because prior sanction was not taken from the court, which is a statutory requirement, and in any case, the relinquishment was neither for evident benefit nor legal necessity. Second, even if the property is considered to be coparcenary property, neither the Karta nor the natural guardian of the minor could have relinquished the property; the Karta can represent a minor's interest in coparcenary property to the outside world only, and the natural guardian cannot represent a minor's interest in coparcenary property at all. Thus, within the coparcenary, neither the Karta nor the natural guardian can represent the minor, because it goes against fiduciary principles.*

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\* Vasu Aggarwal is a student at National Law School of India University, Bengaluru. He would like to thank Professor (Dr.) Sarasu Esther Thomas (Professor of Law, NLSIU), Arshita Aggarwal, Mallika Sen, Ananya HS, and the editors and reviewers of the NSLR for their kind comments on previous drafts of this paper.

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## INTRODUCTION

After the death of an intestate property holder, family members of the property-holder have a right to succeed to the property. Vedic literature prescribed inheritance rights only to unmarried daughters and married daughters with no brothers.<sup>1</sup> Married daughters with brothers were not given any inheritance rights. Over time, it became a societal belief that women could inherit only in the absence of male heirs.<sup>2</sup> However, the Hindu Succession Act, 1956 (**Succession Act**) provides daughters of the deceased the same right to inherit as sons.<sup>3</sup> In 2005, the Succession Act was amended to give daughters rights with respect to ancestral property by making them coparceners, placing them on the same footing as sons. Despite statutory protection, societal beliefs still persist. To protect minors' rights over their property, the Hindu Minority and Guardianship Act, 1956 (**Guardianship Act**) imposes a mandatory requirement of sanction by the court, before the property of a minor can be mortgaged, sold, or exchanged

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<sup>1</sup> Rigveda, II, 17,7 - "Amuja, who lived her whole life at her parents' house, generally demanded and got a share of the ancestral property for inheritance".

<sup>2</sup> Prakash Chand Jain, *Women's Property Rights Under Traditional Hindu Law and The Hindu Succession Act, 1956: Some Observations*, 45(3) JOURNAL OF THE INDIAN LAW INSTITUTE 509 (2003).

<sup>3</sup> § 6, Hindu Succession Act, 1956.

among other things.<sup>4</sup> Thus, the Succession Act protects daughters' inheritance rights in ancestral property, and the Guardianship Act protects the alienation rights of minor daughters.

When society holds strong beliefs, the mere introduction of legislation contrary to these beliefs may not be enough to change them, and people find ways to evade the law. Thus, the judiciary has to ensure strict compliance with reformist legislations. To displace the strong patriarchal beliefs that resulted in minor daughters not receiving their fair share in the property of their ancestors, the Succession Act and the Guardianship Act were introduced. However, society has held on to its patriarchal beliefs, and families evade their responsibility to bestow minor daughters with their share of property. For example, the practice of 'haq tyag' (literally translated as 'sacrifice of rights') is undertaken by many women to waive their property rights in favour of their brothers in Rajasthan, Haryana and other parts of north India.<sup>5</sup> In situations where people attempt to evade the law, the judiciary must ensure that legislations are complied with and that minor daughters receive their share of the property.

However, in *M. Arumugam v. Ammaniammal* (**Arumugam**) the judiciary failed to ensure such strict compliance. In *Arumugam*, the right of a minor daughter in her intestate father's property was considered to be relinquished to her two brothers through a release deed signed by the mother on her behalf.<sup>6</sup> Allowing guardians to relinquish a minor's property raises grave concerns. Such relinquishment may dissolve all rights that the minor has in the property. This is especially detrimental for minor daughters, who are more likely to lose their property rights because of strong patriarchal beliefs. Thus, it impedes the reform that the Succession Act and Guardianship Act intended to introduce.

This paper argues that when property devolves to a minor upon the death of an intestate ancestor, the property devolves as a separate property and cannot be relinquished by the natural guardian or the Karta. In doing so, I argue that the position laid down in *Arumugam* is not legally sound. *First*, even though the court rightly held that the natural guardian has the power to represent the minor's separate property, it erred in holding that the natural guardian has the power to relinquish the minor's property; *second*, even if it is assumed that the devolved

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<sup>4</sup> § 8, Hindu Minority and Guardianship Act, 1956.

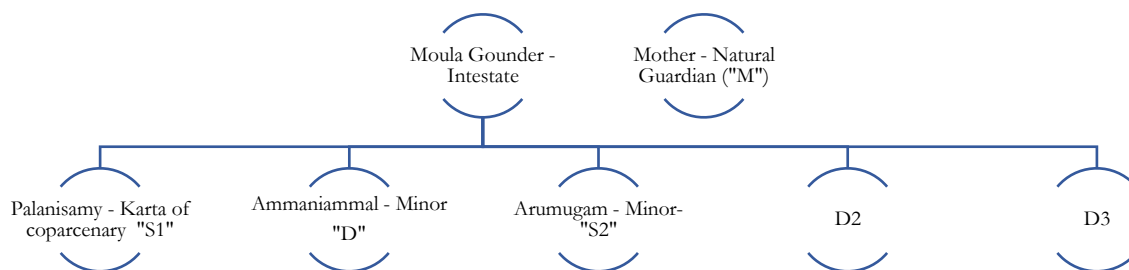
<sup>5</sup> See, Rina Chandran, *Forced By Tradition To Give Up Inheritance, Indian Women Court Property Ownership*, LIVE MINT, 3 November 2016, <https://www.livemint.com/Politics/IblyPUxBjkNJAIPYrdhSgK/Forced-by-tradition-to-give-up-inheritance-Indian-women-cou.html> (last visited 4 October 2020). I would like to thank the anonymous peer reviewer for their kind suggestion with respect to this example.

<sup>6</sup> *M. Arumugam v. Ammaniammal*, 2020 SCC OnLine SC 15.

property is a coparcenary property, neither the Karta nor the natural guardian has the power to relinquish it, due to their fiduciary duties.

# **I. THE NATURAL GUARDIAN CANNOT RELINQUISH A MINOR'S SHARE IN A SEPARATE PROPERTY**

Ammaniammal (**D**) was the daughter of an intestate who had died in 1971 leaving behind six heirs – his widow, two sons, and three daughters. Thus, the property was to devolve to the heirs of the deceased according to the Succession Act. The proviso to Section 6 of the Succession Act (prior to the amendment made in 2005) states that interest in coparcenary property devolves through succession to female relatives specified in Class 1 of the Schedule to the Succession Act.<sup>7</sup> This Schedule includes daughters of the deceased,<sup>8</sup> and thus, on application of this law, the property should devolve upon all six heirs.



However, the two sons claimed that **D**'s right in the ancestral property was relinquished through a release deed. This release deed was signed by their mother (**M**) who was the natural guardian of the minor **D** when the deed was executed. Arumugam (**S2**), the younger son of the intestate, was also a minor at the time of execution. Palanisamy (**S1**), the elder son of the intestate, was the Karta of the joint family. Two questions arise here: *first*, regarding nature of the devolved property; and *second*, regarding the powers of the representative of the minor's

<sup>7</sup> § 6, Hindu Succession Act, 1956.

<sup>8</sup> Schedule, Hindu Succession Act, 1956

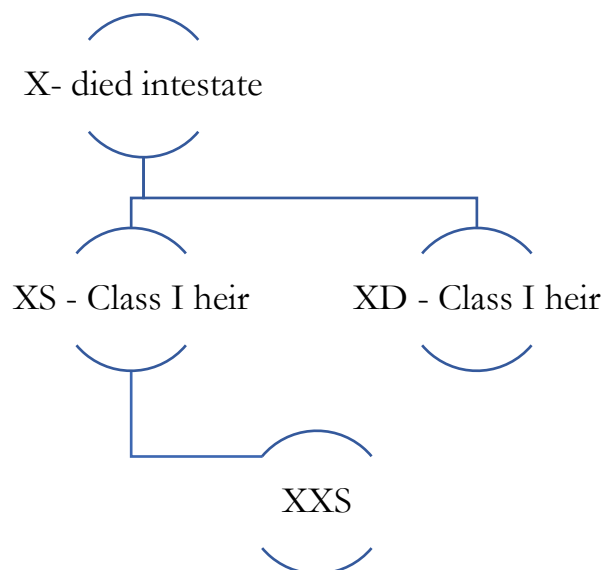


property. This paper agrees with the court that it is a separate property, but disagrees on the second question, arguing that the natural guardian cannot relinquish minor's property.

### *A. Characterization as Separate Property*

Regarding nature of the property, the Supreme Court held that post-succession, the heirs have separate shares in the property as opposed to coparcenary interests.<sup>9</sup> The Supreme Court and different high courts have previously arrived at the same conclusion that property devolves in the form of separate property, based on the adverse consequences of considering the devolved property to be coparcenary property.<sup>10</sup>

To understand the consequences, consider the following example. A property holder (X) dies intestate leaving behind a son (XS), a daughter (XD) and a son's son (XSS). In this example, the property would devolve upon the son XS and the daughter XD on application of Section 6 of the Succession Act, as both of them are Class I heirs.<sup>11</sup> However, the son's son XSS would not be eligible to inherit as he is not a Class I heir.



If the devolved property is considered to be coparcenary property, other members of XS's coparcenary, including XSS, would become entitled to share in XS's devolved-property. According to Mitakshara law, the right of the son's son can arise only at the time of the son's

<sup>9</sup> M. Arumugam v. Ammaniammal, 2020 SCC OnLine SC 15.

<sup>10</sup> Appropriate Authority (IT Deptt) v. M. Arifulla, (2002) 10 SCC 342; Commissioner of Wealth Tax, Kanpur v. Chander Sen, 1986 SCC 3 567; Additional CIT v. P.L Karuppan Chettiar, 1978 114 ITR 523 Mad; Shrivallabhdas Modani v. CIT, 1982 138 ITR 673 MP; Addl. CIT v. P.L. Karuppan Chettiar, [1978] 114 ITR 523 [FB].

<sup>11</sup> § 6, Hindu Succession Act, 1956.

son's birth,<sup>12</sup> in this case XSS's birth. However, in this scenario XSS's right arises at the time of X's death. Thus, if the property post-devolution is considered to be coparcenary property, it would violate the principles of Mitakshara law. Second, the Succession Act does not obligate the son, in this example XS, to share the property with members of his coparcenary. However, treating the devolved property as coparcenary property would obligate the son to share the devolved property with other members of his coparcenary. Thus, if the property was construed to be coparcenary property, the shares of other members of the coparcenary would act as a limitation on the son's share in the devolved property.<sup>13</sup> Therefore, even though XSS would not have been entitled to a share in X's devolved property on application of Section 6 and Section 8<sup>14</sup> of the Succession Act, considering X's devolved property to be coparcenary property, would entitle XSS to a share in XS's part of X's devolved property.

On the other hand, when the property is considered to be separate property, neither Mitakshara law nor the provisions of the Succession Act are violated. Firstly, Mitakshara law is not violated as the rights of the son's son, in this example XSS, do not arise at any time other than birth because the son's son does not get any share in the devolved property at all. Secondly, the provisions of the Succession Act are not violated, as a separate property is not shared with the coparcenary or used for the benefit of the coparcenary. Thus, it does not impose any limitation on the son's share in the property. Therefore, since the consequence of considering the devolved property to be coparcenary property is in violation of Mitakshara law and the Succession Act, devolved property should be considered to be separate property.

Prior to this case, courts had not considered the direct application of provisions regarding the nature of property.<sup>15</sup> Section 19 of the Succession Act provides that in cases where two or more heirs succeed to the property together, they take it as tenants-in-common.<sup>16</sup> This means that the property devolves as the separate property of the heirs and not as interests in the coparcenary property.<sup>17</sup> Although there is an explicit provision stating the nature of devolved property to be separate property, courts arrived at their findings through

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<sup>12</sup> Commissioner of Income Tax, U. P. v. Ram Rakshpal, Ashok Kumar, 1966 SCC OnLine All 429.

<sup>13</sup> *Id.*

<sup>14</sup> Section 8 provides the order of succession for the property of a male Hindu dying intestate. It shall devolve firstly, upon the heirs, being the relatives specified in class I of the Schedule—which includes the sons; but does not include son's son, unless the son is predeceased.

<sup>15</sup> Even though this provision was considered in Commissioner of Wealth Tax, Kanpur v. Chander Sen, 1986 SCC 3 567, it was not directly applied to arrive at the conclusion.

<sup>16</sup> § 19, Hindu Succession Act, 1956.

<sup>17</sup> Radhey Shyam Sri Krishna v. Commissioner, 1978 SCC OnLine All 80; Venkatesh Emporium v. Commissioner of Income Tax, 1981 SCC OnLine Mad 335.

consequential reasoning. Using consequences to arrive at the conclusion that devolved property must be considered separate property has caused some High Courts to reach a contrary outcome in the past.<sup>18</sup> For example, in *CIT v. Dr. Babubhai Mansukhbhai*, while noting that the scheme of Hindu law prior to the Succession Act was such that the property devolved as coparcenary property, and not separate property, it was held,

*“It is impossible to read into the words of any provision which interferes with the scheme of Hindu law as it prevailed prior to the enactment of the Hindu Succession Act. Neither Section 6 nor Section 8 nor Section 30 affect this principle of Hindu law as to in what capacity or in what character the son would enjoy the property once he received it from his father in succession”.*

As this position has been settled on the basis of the direct provision in the *Arumugam* decision, any digression can hopefully be avoided in the future. However, as is argued in the next parts, this is the only correct contribution of the judgment.

### ***B. Limited Powers of the Natural Guardian***

Regarding the second question, the Supreme Court in *Arumugam* held that the natural guardian could relinquish the minor's share in property. I argue that this conclusion is incorrect. The Hindu Minority and Guardianship Act, 1956 provides that after the father, the mother automatically becomes the natural guardian.<sup>19</sup> Thus, in *Arumugam*, M is the legal representative of both D's and S2's shares in the devolved property.

The natural guardian of the minor has limited powers in representing the minor in transactions related to the minor's estate. Section 8 of the Guardianship Act provides that the natural guardian is entitled to carry out all acts “for the realization, protection or benefit of the minor's estate”.<sup>20</sup> A two-level protection is laid down for the same.

First, the natural guardian cannot “*mortgage or charge, or transfer by sale, gift, exchange or otherwise*” the property of the minor without the prior sanction of the court.<sup>21</sup> The use of the term “otherwise” implies that it is an inclusive provision. To ascertain what may be

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<sup>18</sup> *CIT v. Dr. Babubhai Mansukhbhai*, [1977] 108 ITR 417; *Ayodhya Sah v. The Joint Director of Consolidation*, AIR 1992 Pat. 97.

<sup>19</sup> § 6, Hindu Minority and Guardianship Act, 1956; *Minor Mahema v. E.K. Lingamoorthy*, 2014 SCC OnLine Mad 8891.

<sup>20</sup> § 8(1), Hindu Minority and Guardianship Act, 1956, 1956.

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

included by the virtue of the term “otherwise”, tools of statutory interpretation may be employed. Ejusdem generis, a rule of statutory interpretation employed by Indian courts in interpreting inclusive provisions,<sup>22</sup> suggests that when there is a general term followed by specific terms, the general term must include specific terms of a similar nature. “Otherwise” is a general term in Section 8 that may be extended to include specific terms similar to “sale”, “gift” or “exchange”. “Relinquish”, which means giving up rights in the property, is of a similar nature to gifting or exchanging the property.<sup>23</sup> Thus, even though “relinquish” is not explicitly mentioned in the provision, on application of ejusdem generis, “relinquish” can be read into this provision. Before the introduction of the Guardianship Act, when statutory provisions were not applicable, courts have held that the guardian does not have the power to relinquish a minor’s right in her separate property.<sup>24</sup> Since “relinquish” can be read into Section 8 of the Guardianship Act, the natural guardian cannot relinquish the property of the minor without prior sanction from the court. Such an interpretation is also necessary in order to protect the rights of minor daughters. If such an interpretation is not adopted, it would allow the natural guardian to simply evade the application of Section 8 of the Guardianship Act. Thus, any contrary interpretation defeats the purpose of Section 8 of the Guardianship Act, which was to displace patriarchal societal beliefs discouraging the proper devolution of property to minor daughters.

Second, pursuant to Section 8(4), the court is allowed to sanction acts done only “in case of necessity or for an evident advantage to the minor”.<sup>25</sup> The role of the court is one of *parens patriae*; the court must examine all the property-related transactions of a minor to ensure that they are in the minor’s best interest. This is because minors do not have the access or means to protect themselves from disadvantageous situations. Therefore, to ensure equity, it is imperative for the courts to act as ‘parents’ of the minors to protect them. Section 8(4) lays down guidelines for the court to decide in which cases sanction to gift, exchange or, as established, relinquish the property can be granted. Relinquishing the minor’s property, which entails giving up the minor’s rights in a property without any monetary return, can neither be

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<sup>22</sup> Rajasthan SEB v. Mohan Lal, (1967) 3 SCR 377; Gaurav Aseem Avtej v. U.P.State Sugar Corporation Ltd, 2018 Indlaw SC 226.

<sup>23</sup> PARAS DIWAN, LAW OF ADOPTION, MINORITY, GUARDIANSHIP AND CUSTODY (5th edn, Lexis Nexis 2016).

<sup>24</sup> *Id.* See also Rangaswami Iyer v. Marappa, AIR 1952 Mad 30; Rama Sethi v. Ibbaba Sethi, AIR 1954 Mys 56; Binda Kuer v. Lalita Pd., AIR 1936 PC 304.

<sup>25</sup> § 8(4), Hindu Minority and Guardianship Act, 1956.

a necessity nor for the advantage of the minor.<sup>26</sup> Thus, the court could not have granted sanction to relinquish the property either.

In *Arumugam*, the Supreme Court did not consider that M could not have relinquished D's right in the devolved property without prior sanction from the court. Additionally, had there been an attempt at receiving the court's sanction, the court would have been averse to granting a sanction, because, as argued, there can be no legal necessity or evident advantage to the minor in relinquishing their property. Thus, the registered deed was voidable at the instance of minor.<sup>27</sup>

## II. NEITHER THE KARTA NOR THE NATURAL GUARDIAN CAN RELINQUISH MINOR'S INTEREST IN COPARCENARY PROPERTY

In the second part of the judgment, the Supreme Court held that even if the property was coparcenary property, the natural guardian was the correct representative. This was because the deed was in favour of the Karta, and the Karta could not have signed the deed due to a conflict of interest.<sup>28</sup> However, assuming that the property devolved is a coparcenary property,<sup>29</sup> I argue that neither the Karta nor the natural guardian can relinquish a minor's share in coparcenary property on her behalf, because neither the Karta nor the natural guardian have the legal power to do so, and such an act would be contrary to the principle of fiduciary duties.

### *A. Neither the Karta nor the Natural Guardian Have the Power to Relinquish the Minor's Share*

There is a statutory bar prohibiting a natural guardian from representing a minor in her undivided share in joint family property.<sup>30</sup> Coparcenary property is represented by the Karta. However, such representation by the Karta is limited to the outside world.<sup>31</sup> This means that the Karta is not the representative for transactions within the coparcenary. In *Arumugam*, S1 was the oldest male in the coparcenary, making him the Karta. However, since the transaction was within the members of the family, S1 could not have represented D.

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<sup>26</sup> *Rama Sethi v. Ibbaba Sethi*, AIR 1954 Mys 56; *Binda Kuer v. Lalita*, AIR 1936 PC 304.

<sup>27</sup> *Saroj v. Sunder Singh*, (2013) 15 SCC 727.

<sup>28</sup> *M. Arumugam v. Ammaniammal*, 2020 SCC OnLine SC 15.

<sup>29</sup> *CIT v. Dr. Babubhai Mansukhbhai*, [1977] 108 ITR 417; *Ayodhya Sah v. The Joint Director of Consolidation*, AIR 1992 Pat. 97; *Ammaniammal v. M. Palanisamy*, 2008 SCC OnLine Mad 532.

<sup>30</sup> § 8, Hindu Minority and Guardianship Act, 1956.

<sup>31</sup> *Ahuja v. Rameshwarlal*, AIR 1971 Raj 269; *Fathamunnisa Begum v. Rajagopalacharilu*, AIR 1977 AP 24; *DINSHAH FARDUNJI MULLA AND SATYAJEET ATUL DESAI*, MULLA HINDU LAW (21st edn. Lexis Nexis).

In any case, there are certain limits on the representative functions of a Karta.<sup>32</sup> A Karta can alienate coparcenary property in only three cases – necessity in legal terms, for the estate's benefit, and religious or charitable obligations.<sup>33</sup> If a Karta alienates the coparcenary property in any other case, especially if it is in his own interest, the Karta is obligated to reimburse the members of the coparcenary.<sup>34</sup> As argued previously in this paper, relinquishing the property, which is giving up the property without monetary return, cannot be for the legal necessity or benefit of the minor.<sup>35</sup> Relinquishing the property to the two brothers is not a religious or charitable obligation. Therefore, neither the Natural Guardian nor the Karta could have acted as the minor's representative or relinquished her share in the property.

### ***B. Fiduciary Duty of the Representative***

Since neither the natural guardian nor the Karta can represent the minor within the coparcenary, it may seem like there is a lacuna in the law. However, this is not so; the Karta and the natural guardian cannot represent the minor's interest within the family because they are bound by fiduciary principles.<sup>36</sup> Fiduciary principles assume that the representative of a property will act in a prudent manner.<sup>37</sup> Within a family, the term "prudent manner" indicates that representatives should act equally and loyally towards all members.<sup>38</sup> However, actions of representatives within a family may be guided by subconscious emotive notions, including those built by society. This is exactly what ensued with the release deed in the *Arumugam* case. Relinquishing the shares of all the daughters and the mother in favour of the two sons shows that the mother did not act equally towards all her children. These actions indicate conformity to the societal belief that women should inherit property only in the absence of male heirs. Thus, to avoid situations where societal notions affect the decisions of members within a family, neither the Karta nor the natural guardian can represent a minor within the family.

The question still remains as to who can represent a minor within the family, in case of a legal necessity. When the property is a part of a coparcenary, the interests in the property are

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<sup>32</sup> POONAM SAXENA, *THE FAMILY LAW LECTURES: FAMILY LAW II*, Ch 8 (LexisNexis Butterworths. 2004).

<sup>33</sup> *Id.*

<sup>34</sup> JOHN D. MAYNE, *A TREATISE ON HINDU LAW AND USAGE* 308 (5th edn, Higginbotham Madras).

<sup>35</sup> Rangaswami Iyer v. Marappa, AIR 1952 Mad 30; Rama Sethi v. Ibbaba Sethi, AIR 1954 Mys 56; Binda Kuer v. Lalita, AIR 1936 PC 304.

<sup>36</sup> EVAN J. CRIDDLE, PAUL B. MILLER, ROBERT H. SITKOFF, *THE OXFORD HANDBOOK OF FIDUCIARY LAW* 637 (OUP 2019).

<sup>37</sup> Elizabeth S Scott and Ben Chan, *Fiduciary Principles in Family Law*, COLUMBIA FACULTY SCHOLARSHIP (2016) [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3087&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3087&context=faculty_scholarship) (last visited 30 March 2020).

<sup>38</sup> *Id.*

not crystalized with different members of the coparcenary.<sup>39</sup> It remains as a single whole. Thus, even in case of legal necessity or evident advantage, since the share is not crystalized with the minor, the specific portion of a minor's property cannot be ascertained. Therefore, if there is a transaction concerning the coparcenary property or a part of it, the transaction is only of proportionate interests of different members and not the minor's interest specifically.<sup>40</sup>

A transaction specifically in relation to the minor's share in a coparcenary property would require the crystallization of the shares of the members of the coparcenary.<sup>41</sup> To crystalize the shares, the coparcenary must be partitioned. Once the coparcenary property is partitioned, it becomes a separate property of the minor,<sup>42</sup> in which case the statutory bar on the natural guardian's power to represent the minor is elevated, as it does not remain coparcenary property. Thus, a transaction in relation to the minor's specific interest in the coparcenary property is not possible, and upon partition, the natural guardian can represent the minor's share in the separate property. Therefore, there is no lacuna in the law.

### CONCLUSION

The property rights of minor daughters were protected by the virtue of the Succession Act and the Guardianship Act. This protection was necessary, considering the vulnerable position of minor girls in society. In *Vineeta Sharma v. Rakesh Sharma*, the Supreme Court has declared that daughters have the same right to inherit ancestral property as sons do, and the right to ask for a partition of the coparcenary property, irrespective of whether the father is alive or not.<sup>43</sup> However, this right that has been widely celebrated<sup>44</sup> has no protection as per the position of law laid down in *Arumugam*. Even though the right to inherit property was provided through the decision in *Vineeta Sharma v. Rakesh Sharma*, the same right can now be relinquished by the natural guardian.<sup>45</sup> It appears that on the one hand, the Supreme Court has tried to protect women's rights through the decision in *Vineeta Sharma v. Rakesh Sharma*, while on the other hand, it has dissolved and diluted those rights through its decision in *M.*

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<sup>39</sup> JOHN D. MAYNE, A TREATISE ON HINDU LAW AND USAGE 221 (5th edn, Higginbotham Madras).

<sup>40</sup> *Id.* at 221.

<sup>41</sup> JOHN D. MAYNE, A TREATISE ON HINDU LAW AND USAGE 249 (5th edn, Higginbotham Madras).

<sup>42</sup> *Id.* at 221.

<sup>43</sup> *Vineeta Sharma v. Rakesh Sharma*, 2020 Indlaw SC 412.

<sup>44</sup> Poornima Advani, *A Giant Step To Address Gender Injustice*, <https://www.livemint.com/opinion/online-views/a-giant-step-to-address-gender-injustice-11597478771696.html> (last visited 3 October 2020); Arshita Aggarwal, *Towards Gender Equality*, THE HINDU, 6 September 2020, <https://www.thehindu.com/opinion/open-page/towards-gender-equality/article32530848.ece> (last visited 3 October 2020).

<sup>45</sup> I would like to thank the anonymous peer reviewer for inspiring me to link this judgment with the *Vineeta Sharma v. Rakesh Sharma* judgment.

*Arumugam v. Ammaniammal*. Thus, the societal beliefs that ought to have been transformed by the law have instead transformed the law to align with them.

The nature of property that devolves upon Class I heirs upon the death of an intestate ancestor is of a separate property. While the Supreme Court's decision is correct in this regard, its conclusion with respect to the relinquishment of the minor's right is incorrect, as pursuant to Section 8 of the Guardianship Act, prior sanction of the court was not taken.

Even if the property devolved as a coparcenary property, neither the Karta nor the natural guardian can relinquish the minor's property. While a natural guardian cannot represent the minor in case of undivided interest in coparcenary property altogether, the Karta can represent the minor to the outside world only. The representation of a minor's property by the Karta within the family is against the Karta's fiduciary duties.

In addition to the legal inconsistencies examined in this paper, the Supreme Court did not consider that the natural guardian, the mother, did not represent the other minor, her son S2, in the release deed; instead, S1, the Karta, represented S2, even though it was a separate property. Since only natural guardians can represent minors in case of separate property, the deed itself was invalid.

Thus, the Supreme Court's decision on both the point discussed in this paper is incorrect. The position of law laid down by the Supreme Court in the case is bad in law and against the interests of justice.



**THE ICC’S EXERCISE OF JURISDICTION OVER THE DEPORTATION OF ROHINGYAS:  
CRITIQUING THE READING IN OF THE OBJECTIVE TERRITORIAL DOCTRINE IN ARTICLE  
12(2)(A) OF THE ROME STATUTE**

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*This article critiques the ruling of the Pre-Trial Chamber-I wherein it decided to exercise jurisdiction over the deportation of Rohingyas from Myanmar to Bangladesh. This judgment is significant because it marks the jurisdiction of the court over a crime that occurred in Myanmar, a non-state party to the Rome Statute. The Pre-Trial Chamber concluded that it had the competence to exercise jurisdiction over the cross-border deportation of Rohingyas because an element of the crime had occurred in the territory of Bangladesh, a state party. The court arrived at this conclusion by resorting to an expansive interpretation of Article 12(2)(a) of the Rome Statute by reading in the objective territorial doctrine. This article argues that although such an expansive interpretation is desirable, it is legally untenable given the present framework of the Statute. The article does this by analysing how the decision diverges from the tenets of the Rome Statute as well as the established rules of treaty interpretation. It also briefly considers the ramifications of the ruling and evaluates the decision from the perspective of the Global South.*

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## INTRODUCTION

Much has been written<sup>1</sup> lauding the Pre-Trial Chamber-I’s (PTC) decision<sup>2</sup> to exercise jurisdiction over the deportation of Rohingyas from Myanmar to Bangladesh. The decision is momentous because it endeavours to achieve accountability for mass atrocities and transnational human rights abuses.<sup>3</sup> The judgment is also remarkable because it marks the jurisdiction of the PTC over crimes occurring in the territory of a non-state party by resorting to an expansive interpretation of the court’s territorial jurisdiction. An expansive interpretation, although desirable from a policy perspective, needs to be looked at with much scrutiny because of its implications on the future operation of the Rome Statute and other international legal principles.<sup>4</sup>

In its decision, the PTC deliberated on whether the International Criminal Court (ICC) could exercise jurisdiction over the crime against humanity of deporting Rohingyas from

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<sup>1</sup> Kip Hale & Melinda Rankin, *Extending the ‘System’ of International Criminal Law? The ICC’s Decision on Jurisdiction over Alleged Deportations of Rohingya People*, 73 AJIA 22, 27 (2019); Payam Akhavan, *The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute*, 17 JICJ 325 (2019).

<sup>2</sup> Decision on the Prosecution’s Request for a Ruling on Jurisdiction under art. 19(3) of the Statute, ICC-RoC46(3)-01/18, PTC- I (Sept. 6, 2018) [**“PTC-I Jurisdiction Ruling”**].

<sup>3</sup> Caleb H. Wheeler, *Human Rights Enforcement at the Borders – ICC Jurisdiction over the Rohingya Situation*, 17 JICJ 609 (2019) [**“Wheeler”**].

<sup>4</sup> Mahnoush H. Arsanjani & W. Michael Reisman, *The Law in Action of the International Criminal Court*, 99 AJIL 385, 389 (2005) [**“Arsanjani and Reisman”**].

Myanmar, a non-state party, to Bangladesh, a state party. The PTC, adopting a wide interpretation of the territorial jurisdiction of the ICC, ruled in the affirmative. It concluded that the crime had partially taken place in the territory of a non-state party and partially in the territory of a state party.<sup>5</sup> Since an element of the crime had taken place in the territory of a state party (Bangladesh), the court had the competence to exercise jurisdiction. This judgment has far-reaching consequences on future decisions of the ICC, particularly in bringing the ISIS to justice. Despite its positive implications, the teleological interpretation of a treaty hinged strongly on state consent can be questioned.

To that end, this article scrutinizes the PTC's decision, focusing only on jurisdictional issues. The article then critiques the judgment for its divergence from the tenets of the Rome Statute and the established rules of treaty interpretation. The article concludes by briefly mulling over the practical consequences of the judgment and evaluating the decision from the perspective of the Global South.

## I. THE JURISDICTIONAL FRAMEWORK OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute recognizes four kinds of jurisdiction: subject-matter jurisdiction, jurisdiction over persons, territorial and nationality jurisdiction, and temporal jurisdiction.<sup>6</sup> The Rome Statute also entitles the ICC to exercise jurisdiction over a non-state party in cases where the situation is referred to the court by the U.N. Security Council<sup>7</sup> or when a non-state party *ad-hoc* accepts the jurisdiction of the court.<sup>8</sup>

The scope of the ICC's jurisdiction was a moot point of contention during the Rome Conference.<sup>9</sup> There were alternative proposals put forth by different states. Germany, at one end of the spectrum, proposed that the ICC should be conferred with universal jurisdiction over core crimes, much like what states possess.<sup>10</sup> The US, on the other end, insisted on the creation of a stringent jurisdictional design that would require the consent of both the state of the

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<sup>5</sup> PTC-I Jurisdiction Ruling, *supra* note 2, ¶ 73.

<sup>6</sup> Conor Donohue, The Unanswered "Question of Questions": The Jurisdictional Competence of the International Criminal Court (2016) (unpublished LL.B. thesis, Victoria University of Wellington) <https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5077/paper.pdf?sequence=1>.

<sup>7</sup> Rome Statute of the International Criminal Court, art. 13(b), Jul. 17, 1998, 2187 U.N.T.S. 90 ["**Rome Statute**"].

<sup>8</sup> Rome Statute, art. 12(3).

<sup>9</sup> David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999).

<sup>10</sup> Rep. of the Prep. Com. on the Establishment of an International Criminal Court, U.N. Doc A/AC.249/1998/DP.2 (Mar. 23, 1998) <https://www.legal-tools.org/doc/5e6109/pdf/>.

nationality of the accused and the state of the territory where the offence occurred.<sup>11</sup> The issue was so divisive that no consensus could be achieved amongst the states. Ultimately, the preconditions for the exercise of jurisdiction of the ICC, embodied in Article 12 of the Rome Statute, were adopted as a take it or leave it package on the midnight of the last day of the Conference behind closed doors.<sup>12</sup>

It is imperative to highlight the drafting history of Article 12 to show how this Article was a result of difficult compromises and long deliberations. The nature of the negotiations and the result achieved necessitate that this Article be carefully interpreted.<sup>13</sup> Since its introduction, Article 12 has remained in a nascent stage with no disputes surrounding it until the *Mbarushimana* case.<sup>14</sup> Scholarly literature interpreting the Article is also limited, with the most comprehensive research done by Dr. Michail Vagias.<sup>15</sup>

## II. SCHEME OF ARTICLE 12(2)(A) OF THE ROME STATUTE

The extant scheme of Article 12(2)(a) of the Rome Statute allows the ICC to exercise territorial jurisdiction in the event of a state party referral<sup>16</sup> or subsequent to Prosecutor's *proprio motu* initiation of investigation<sup>17</sup> in the following situations:

- (i) if the conduct in question occurs in the territory of a State party; or
- (ii) if the crime was committed on board a vessel or aircraft registered in a State party.<sup>18</sup>

In the Rohingya case, the crux of the jurisdictional dispute revolved around the interpretation of the term 'conduct in question'. As stated above, Article 12(2)(a) was adopted as a part of a last-minute package and, thus, there is not enough legislative guidance for interpreting the same. If we trace the history of Article 12(2)(a), we find that Article 12(2)(a) was represented by Article 21 of the Draft Statute of the International Criminal Court

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<sup>11</sup> CARSTEN STAHN, *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 142 (Oxford University Press, 2015).

<sup>12</sup> Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371 (2016).

<sup>13</sup> P. Saland, *International Criminal Law Principles*, in R.S. Lee (eds.), *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE. ISSUES, NEGOTIATIONS, RESULTS* 139 (Kluwer Law International, 1999) ["Saland"].

<sup>14</sup> Prosecutor v. Mbarushimana, ICC-01/04-01/10-451, Decision on the Defence Challenge to the Jurisdiction of the Court (Oct. 26, 2011).

<sup>15</sup> MICHAEL VAGIAS, *TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* 37-161 (Cambridge University Press, 2014) ["Vagias"].

<sup>16</sup> Rome Statute, art 13(a).

<sup>17</sup> Rome Statute, art. 13(c).

<sup>18</sup> Rome Statute, art. 12(2)(a).

formulated in the year 1994.<sup>19</sup> Draft Article 21 granted the ICC the power to exercise territorial jurisdiction in case the ‘act or omission’ occurred in the territory of a state party.<sup>20</sup> There was no mention of the term ‘conduct’ in the draft Article. It was only in 1998 that the term ‘conduct’ was used to replace ‘act or omission’ as part of a last-minute deal because no consensus regarding the interpretation of the term ‘omission’ could be achieved.<sup>21</sup>

Interestingly, the state parties again deliberated over the scope of territorial jurisdiction of the ICC during the Kampala Amendment negotiations on the crime of aggression in 2008.<sup>22</sup> The Working Group on the Crime of Aggression looked into the meaning of the term ‘conduct’ and considered whether the crime of aggression for the purposes of Article 12(2)(a) would also have been committed where the consequences of the crime were felt.<sup>23</sup> Different viewpoints were put forth by different delegations. There were some delegations who were of the opinion that the term ‘conduct’ was not only restricted to ‘act or omission’, but also included within its ambit the consequences of the conduct. Other delegations resisted and required an amendment to the Statute and Elements of Crime for such an interpretation. Even after reappraisal, no firm decision could be achieved.<sup>24</sup> In light of this ambiguity, the consent-based nature of the treaty, and the far-reaching consequences of the judgment, it becomes imperative to scrutinize it.

### III. PTC’S INTERPRETATION OF ARTICLE 12(2)(A) OF THE ROME STATUTE

The PTC adjudicated upon two primary questions. Firstly, the court sought to ascertain the meaning of the term ‘conduct’ in Article 12(2)(a). Secondly, it deliberated upon whether Article 12(2)(a) necessitates that the entire conduct take place in one territory.<sup>25</sup>

With respect to the first question, the PTC opted for a teleological interpretation of the term ‘conduct’ based on Article 31(1) of the Vienna Convention on the Law of Treaties

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<sup>19</sup> Int’l. L. Comm’n, Draft Statute for an International Criminal Court, Y.B. INT’L. L. COMM’N, 1994 Vol. II Part 2 (U.N. Doc. A/CN.4/SER. A/1994/Add.1) at 41.

<sup>20</sup> *Id.*

<sup>21</sup> Jean-Baptiste Maillart, *Article 12(2)(a) Rome Statute: The Missing Piece of the Jurisdictional Puzzle*, EJIL: TALK! (Aug. 7, 2014), [https://www.ejiltalk.org/article-122a-rome-statute-the-missing-piece-of-the-jurisdictional-puzzle/#:~:text=Article%2012\(2\)\(a\)%20of%20the%20Rome%20Statute%20provides,Court's%20jurisdiction%20by%20a%20declaration.](https://www.ejiltalk.org/article-122a-rome-statute-the-missing-piece-of-the-jurisdictional-puzzle/#:~:text=Article%2012(2)(a)%20of%20the%20Rome%20Statute%20provides,Court's%20jurisdiction%20by%20a%20declaration.)

<sup>22</sup> Vagias, *supra* note 15, at 81.

<sup>23</sup> ICC Assembly of States Parties, Report of the Special Working Group on the Crime of Aggression on its 7<sup>th</sup> Session, ICC ASP/7/20 ¶ 38-39 (Nov. 14, 2008).

<sup>24</sup> Vagias, *supra* note 15, at 82.

<sup>25</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, PTC- III (Nov. 14, 2019) [“PTC-III Decision”].

(VCLT).<sup>26</sup> In the absence of any explanation provided by the *travaux préparatoires*, the PTC was of the view that the term ‘conduct’ must be contextually interpreted in line with the object and purpose and Article 20 of the Rome Statute.<sup>27</sup> Under Article 20(1) and 20(3), the term ‘conduct’ is inclusive of the entire set of facts surrounding a crime<sup>28</sup> and thus also includes the consequences of the conduct. The PTC interpreted the term ‘conduct’ so broadly that it concluded that any element of the crime would be a conduct within the meaning of Article 12(2)(a).<sup>29</sup> As per the Elements of Crime, a crime is constituted of three separate elements: conduct, consequences, and circumstances.<sup>30</sup> The PTC concluded that any one of these elements occurring in a state party territory would entitle the ICC to exercise jurisdiction. The practical implication of this deduction is that if the entire culpable conduct occurs in a non-state party, but its consequences are felt in the territory of a state party, then the ICC would have jurisdiction.

For the second question, the PTC asserted that the objective territorial principle could be read into the phraseology of Article 12(2)(a) after an analysis of international legal principles and national legislations.<sup>31</sup> The objective territorial doctrine is a principle of customary international law<sup>32</sup> which stipulates that a state has jurisdiction over a crime if a constituent or an essential element of the crime occurs in the territory of a state party.<sup>33</sup> Thus, the PTC concluded, that the entire conduct need not take place in the territory of a state party. Even if a part of the crime or an element of the crime takes place in the territory of a state party, then the ICC would have jurisdiction. As per the PTC’s explanation, since the consequences of the crime of deportation – that is, the victim’s crossing the border – manifested in Bangladesh, the ICC was entitled to exercise jurisdiction by way of the objective territorial principle.

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<sup>26</sup> Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [“VCLT”].

<sup>27</sup> PTC-III Decision, *supra* note 25, ¶ 49.

<sup>28</sup> Michail Vagias, *The Territorial Jurisdiction of International Criminal Court: Certain Contested Issues*, 119 (PH. D. thesis, Bynkers Hoek Publishing).

<sup>29</sup> Wheeler, *supra* note 3, at 620.

<sup>30</sup> International Criminal Court, *Elements of Crimes*, General Introduction, ¶ 7(a), <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf> [“**Elements of Crime**”].

<sup>31</sup> PTC-I Jurisdiction Ruling, *supra* note 2, ¶ 73.

<sup>32</sup> CEDRIC RYANGAERT, *JURISDICTION IN INTERNATIONAL LAW* 34-48 (Oxford University Press, 2015); S.S. Lotus (France v. Turkey), (Ser. A) No. 10, at 23, Judgment, P.C.I.J. (Sept. 7, 1927).

<sup>33</sup> Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y. B. INT’L. L. 145, 155 (1972-1973).

#### IV. A CRITIQUE OF THE PTC'S INTERPRETATION

The determination of the PTC is remarkable because it is a step towards ending impunity and ensuring accountability for mass atrocities. Yet, the decision can be questioned for its reliance on imperfect legal foundations.

The ICC as an international court is conferred with limited and attributed jurisdiction.<sup>34</sup> The state parties intended to confer only narrow jurisdiction to the ICC, as can be seen from the principle of complementarity.<sup>35</sup> Although a plea for an expansive jurisdiction is desirable, it is untenable given the present framework of the Statute and established legal principles.

A fundamental principle of criminal law is that criminal provisions must be narrowly interpreted in favour of the accused.<sup>36</sup> This aligns with the principle of legality (*nullum crimen sine lege*) enshrined in Article 22 of the Rome Statute which calls for strict interpretation and rejects interpretation by analogy.<sup>37</sup> The term 'conduct in question' from a strict construction approach would only mean the 'act or omission' prohibited by the crime in question as opposed to the consequences of the crime.<sup>38</sup>

This interpretation is supported by three contentions. Firstly, Article 30 of the Rome Statute makes a clear distinction between the conduct and the consequence of the crime.<sup>39</sup> Secondly, the Elements of Crime stipulates that a crime is composed of three distinct elements: conduct, consequences and the circumstances.<sup>40</sup> This explicit demarcation indicates that the drafters intended to differentiate between the terms 'conduct' and 'consequence'. Moreover, Article 12 itself makes a distinction between the terms 'conduct' and 'crime' by using conduct in the context of territorial jurisdiction and crime in the context of acts committed on vessels or aircraft.<sup>41</sup> Thus, the terms 'conduct' and 'crime' are not synonymous, with the word 'conduct' denoting only the 'act or omission' underlying the crime and not the consequences of the crime.

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<sup>34</sup> Vagias, *supra* note 15, at 85.<sup>[11]</sup>

<sup>35</sup> Douglas Guilfoyle, *The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar*, 73 AJIA 2, 5 (2019) [**"Guilfoyle"**].

<sup>36</sup> Prosecutor v. Bemba, ICC-01/05-01/08, Confirmation of Charges, ¶ 369 (Jun. 15, 2009).

<sup>37</sup> WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 82 (Cambridge University Press, 2011).

<sup>38</sup> Vagias, *supra* note 15, at 82; Saland, *supra* note 13, at 205.

<sup>39</sup> Rome Statute, art. 30.

<sup>40</sup> Elements of Crime, *supra* note 30, ¶ 7(a).

<sup>41</sup> Guilfoyle, *supra* note 35.

Limitations on the expansive interpretation of the ICC's jurisdiction can further be discerned from the preamble of the Statute which emphasizes non-intervention. Thus, state sovereignty and state consent are the hallmarks of the Statute. The restricted scope of the ICC's jurisdiction is also apparent in Article 10 of the Rome Statute, which stipulates that "*nothing in this part should be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute*".<sup>42</sup> This Article applies to both the substantive part of the Statute and to provisions related to jurisdiction and admissibility.<sup>43</sup> The intent of Article 10 was to prevent the thwarting of the progressive development of international law with respect to crimes described in the Statute.<sup>44</sup> Yet, through the last phrase, the drafters intended to insulate the Rome Statute from the same progressive development. A perusal of the preamble and Article 10 clarifies that the intent of the drafting committee was to build an agreement between the state parties and give primacy to state consent.

An analysis of Article 12(2)(a) through the established rules of treaty interpretation corroborates this contention. Contemporaneity is a rule of treaty interpretation that gives primacy to the common will of the states.<sup>45</sup> It is founded on the assumption that state parties enter into a treaty based on a common understanding and agreement on the terms used in the treaty.<sup>46</sup> The terms of the treaty should, therefore, be interpreted in light of the meaning they possessed at the time of entering into an agreement.<sup>47</sup> An expansive interpretation of the treaty, beyond what was contemplated and agreed upon by the states, would be impermissible according to the rule of contemporaneity. On the other hand, the PTC in this case can be said to have resorted to an evolutive rule of treaty interpretation. The ICJ in *Dispute Regarding Navigational and Related Rights* between Costa Rica and Nicaragua had interpreted the meaning of the term 'comercio' (commerce) through an evolutive lens.<sup>48</sup> The ICJ in that case had arrived at the conclusion that general terms in a treaty are capable of evolving to give way

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<sup>42</sup> Rome Statute, art. 10.

<sup>43</sup> Arsanjani and Reisman, *supra* note 4, at 390.

<sup>44</sup> OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 645 (Beck/Hart Publishing, 2016).

<sup>45</sup> MALCOLM SHAW, INTERNATIONAL LAW 708 (Cambridge University Press, 2018).

<sup>46</sup> Epaminontas E. Triantafilou, *Contemporaneity and Evolutive Interpretation under the Vienna Convention on the Law of Treaties*, 32 ICSID REV. 138, 146 (2017) ["Triantafilou"].

<sup>47</sup> Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 B. YIL. 203 (1957).

<sup>48</sup> Triantafilou, *supra* note 46.



to developments in international law.<sup>49</sup> Thus, these general terms should be interpreted expansively to accommodate such evolution.

To interpret ‘conduct’ as inclusive of consequences of the crime would indeed be preferable in light of the developments in international law, the growing number of cross-boundary disputes, and crimes committed through the internet. However, it is important to note that Article 10 of the Rome Statute explicitly forbids such an innovative and evolutive interpretation of the Statute. The interpretation of the term ‘conduct’ in line with the principle of contemporaneity would be fundamental in the context of the Rome Statute and would encompass only the ‘act or omission’ and not the consequences of the crime.

In its haste to ensure accountability, the PTC failed to properly analyse the Statute and the internal constraints contained therein. The PTC accepted the argument put forth by the Office of the Prosecutor on that there were several international principles and national legislations that endorsed the objective territorial doctrine and thus the same could be read into the phraseology of Article 12(2)(a).<sup>50</sup> This conclusion is highly problematic. Article 21 of the Rome Statute stipulates that the court in the first instance should apply the Statute, the Elements of Crime, and the Rules of Procedure of Evidence.<sup>51</sup> A perusal of the Statute and the Elements of Crime favours a case against the reading in of the objective territorial doctrine as argued above. Moreover, the court’s reliance on national legislations as a source of the objective territorial doctrine can be called into question.<sup>52</sup> The national laws examined by the PTC explicitly endow the states with the power to exercise jurisdiction in case any element of the crime occurs in their territory.<sup>53</sup> The same is not true for the Rome Statute whose phraseology markedly differs from that in the national legislations.

## V. PRACTICAL IMPLICATIONS OF THE RULING

The judgment is lauded because it refuses to afford impunity to human rights abuses occurring in the territory of non-state parties. As an effect of this dictum, a state party is now

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<sup>49</sup> Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009, I.C.J. Rep. 213 (Jul. 13) at 242.

<sup>50</sup> PTC-I Jurisdiction Ruling, *supra* note 2, ¶ 66.

<sup>51</sup> Rome Statute, art. 21.

<sup>52</sup> Wheeler, *supra* note 3, at 625.

<sup>53</sup> Wheeler, *supra* note 3, at 626.

empowered to refer a situation to the ICC even if only the consequences of the crime are felt in its territory.

This ruling provides a segue into prosecuting the Islamic State's leadership. A parallel can be drawn between the Rohingya deportation and the crimes committed by the ISIS. Syria and Iraq, like Myanmar are non-state parties to the Rome Statute. Yet, the court relying on the Rohingya precedent will be able to establish jurisdiction, as the effects of the crimes committed by the ISIS have been felt in several state parties, including France and Afghanistan.<sup>54</sup> Thus, state parties like France could refer the ISIS situation to the ICC under Article 14 of the Rome Statute, entitling the ICC to investigate into the same.<sup>55</sup> Many scholars have also recognized the value of this precedent in empowering the ICC to exercise jurisdiction over the deportation of millions of refugees from Syria, a non-state party, to Jordan, a state party to the Statute.<sup>56</sup> Similarly, the court could rely on this precedent to establish jurisdiction over the detention of migrants by the United States along the US-Mexico border since Mexico is a state party to the Statute.

This judgment would also prove to be valuable in enabling the ICC to exercise jurisdiction over modern crimes committed through the internet, where the consequences of the crimes are felt in several states. For instance, the ICC relying on this precedent could establish jurisdiction over the crime of incitement of genocide taking place via social media websites. An essential element of the crime of incitement of genocide under Article 25(3)(e) of the Rome Statute is 'public display' or the accessibility to the statement.<sup>57</sup> Thus, even if the alleged inciting statement is posted on a social media website maintained in a non-state party, but can be accessed and viewed in a state party, the ICC would be able to exercise territorial jurisdiction.<sup>58</sup>

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<sup>54</sup> Prosecuting ISIS: Some Prospects and Challenges, 32 (unpublished LL.B. thesis, Faculty of Law, University of Oslo) [https://www.duo.uio.no/bitstream/handle/10852/70960/PIL\\_THESIS.pdf?sequence=1&isAllowed=y](https://www.duo.uio.no/bitstream/handle/10852/70960/PIL_THESIS.pdf?sequence=1&isAllowed=y).

<sup>55</sup> *Id.*

<sup>56</sup> Priya Pillai, *ICC ruling on Rohingyas can impact India as well*, HINDUSTAN TIMES (Sept. 19, 2018), <https://www.hindustantimes.com/analysis/icc-ruling-on-rohingyas-can-impact-india-as-well/story-4wPIo90MFqIcAfwgXuoXTK.html>; Caroline Sweeny, *Accountability for Syria: Is International Criminal Court Now a Realistic Option?*, 17 JICJ 1083 (2020).

<sup>57</sup> *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶ 677 (Nov. 28, 2007).

<sup>58</sup> Vagias, *supra* note 15, at 91; Michail Vagias, *The Territorial Jurisdiction of the ICC for Core Crimes Committed through the Internet*, 21 JCSL 523, 534 (2016).

Although, the above-mentioned ramifications of the judgment are desirable, they lack a firm legal footing. This judgment sets a dangerous precedent allowing for jurisdictional overreach and renders the concept of state sovereignty and state consent nugatory.

### CONCLUDING REMARKS FROM A GLOBAL SOUTH PERSPECTIVE

While Rohingyas indeed deserve justice to be done, an expansive interpretation against the tenets of the Statute poses the possibility of entrenching the inequalities against third world countries that have always surrounded international law.<sup>59</sup> The ICC has been perceived with much optimism by the international community. Unlike the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the Rome Statute was negotiated on a consensual and an egalitarian basis.<sup>60</sup> Third world countries had actively participated in these negotiations and, thus, it is in their interest that the Statute is interpreted in its true letter and spirit.

This is not the first time that the ICC has digressed from the foundations of the Rome Statute and established international principles against a third world country. A similar situation arose in *Omar Al-Bashir*<sup>61</sup> where the ICC rendered the immunities provisions obsolete and indicted Omar Al-Bashir for war crimes and crimes against humanity. Al-Bashir was the President of Sudan, a non-state party and, unlike other state parties, he had not waived off his head of state immunity by signing the Rome Statute.<sup>62</sup> The ICC nevertheless decided to deviate from established customary international law principles and exercised jurisdiction, asserting that he was bound by the same waiver clause as the other state parties.<sup>63</sup>

In its drive to hold Omar Al-Bashir accountable, the PTC, like in the present case, did not give any due to the customary principle of *pacta tertiis* embodied in Article 34 of the VCLT.<sup>64</sup> Article 34 explicitly provides that a treaty cannot create rights or impose obligations on third parties without their consent.<sup>65</sup> In indicting Omar Al-Bashir and exercising jurisdiction over the deportation of Rohingyas, the ICC can be seen as refusing to third world states the

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<sup>59</sup> Asad G. Kiyani, *Third World Approaches to International Criminal Law*, 109 AJIL UNBOUND 255 (2016).

<sup>60</sup> Antony Anghie and B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE JIL 77 (2003).

<sup>61</sup> Prosecutor v. Omar Al Bashir, ICC-02/05-01/09, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

<sup>62</sup> Asad G. Kiyani, *Al-Bashir & the ICC: The Problem of Head of State Immunity*, 12 CHINESE JIL 467 (2013).

<sup>63</sup> *Id.*

<sup>64</sup> Int'l. L. Comm'n, Draft Articles on the Law of Treaties, Y.B. INT'L. L. COMM'N, 1966 Vol. II (U.N. Doc. A/CN.4/SER. A/1966/Add.1), at 226 ¶ 2.

<sup>65</sup> VCLT, *supra* note 26, art. 34.

protections that would extend to the other more powerful states, by fracturing important rules of international law.

This judgment runs the risk of further antagonizing non-state parties and disincentivizing them from cooperating with the ICC. The alternative, although cumbersome, would have been to amend the Statute and Elements of Crime, as suggested by a few state parties in the Working Group on the Crime of Aggression.<sup>66</sup>

This article has argued that although the desire to exercise jurisdiction over the deportation of Rohingyas is understandable, the rationale of the court can be rebutted by relying on the provisions of the Rome Statute and rules of treaty interpretation. The expansive interpretation adopted by the court based on unsound legal footing runs the risk of undermining the work done by the international court and prosecutors to end impunity. Long standing rules of international criminal law and public international law should not be circumvented in the haste to achieve accountability.

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<sup>66</sup> Carlos E. Gomez, *The International Criminal Court's Decision on the Rohingya Crisis: The Need for a Critical Redefinition of Trans-Border Jurisdiction to Address Human Rights*, 50 CAL. W. INT'L L.J. 177, 203 (2019).

## INTERPRETING GROUP-BASED RELIGIOUS FREEDOMS: SABARIMALA AND THE MOVEMENT FROM DEFINITIONS TO LIMITATIONS

Aparajito Sen<sup>\*</sup>

*The question of balancing religious rights has long troubled Indian courts. The Supreme Court's approach towards dealing with such rights has (frequently) been to determine the 'essentiality' of the practice in question and/or the 'denomination' status of the religious group claiming the right. Through this approach, the Court effectively cements definitional barriers to the right itself and averts more contentious questions as to the permissible limitations to the exercise of the right. The opinions of Chandrachud J and Malhotra J in the recent decision of Indian Young Lawyers Association v. The State of Kerala ('Sabarimala') seem to move away from this definition-centric focus; while Chandrachud J advocates for an 'anti-exclusion' principle to thwart exclusionary religious practices, Malhotra J advocates for judicial deference in favour of religious freedom. In this essay, I examine the many errors and pitfalls inherent to the definition-centric approaches of determining 'denominations' and 'essential practices'. Subsequently, I use the different approaches offered in Sabarimala to explore alternative avenues of dealing with group-based religious rights. Finally, I offer an interpretational alternative which borrows from Malhotra J's approach of defining religious 'denominations' and 'essential practices' broadly, in favour of religious groups, while advocating for a broader scope of permissible limitations to these rights under Article 17, through the anti-exclusion principle offered by Chandrachud J.*

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## INTRODUCTION

In 2018, the Supreme Court of India in *Indian Young Lawyers Association v. The State of Kerala*<sup>1</sup> (hereinafter '*Sabarimala*') decided that the practice of excluding menstruating women (aged between the ages of 10 to 50) from entering the Lord Ayyappa Temple in Sabarimala was not constitutionally permissible. The three majority opinions of the Court, endorsed by four out of the five judges on the bench, agreed that: (a) the devotees of Lord Ayyappa did not form a religious 'denomination' under Article 26; and (b) the practice of excluding menstruating women was not 'essential' to the denomination.<sup>2</sup> In addition to this,

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<sup>1</sup> *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1 (hereinafter '*Sabarimala*'). The paragraph numbers referred throughout the essay refer to the paragraph numbers in the SCC copy of the judgment.

<sup>2</sup> *Id.* at ¶¶ 192-193 (Misra and Khanwilkar JJ). Although Chandrachud J and Misra J specifically suggest that the practice of excluding women is not 'essential' to the devotees of Lord Ayyappa, Nariman J does not explicitly hold this. Instead, Nariman J assumes that the practice is essential to the respondents while rejecting their status as a denomination for the purposes of Article 26.

Chandrachud J's concurrent opinion separately held that the practice was abhorrent to 'constitutional morality'<sup>3</sup> and impermissible in light of the prohibition against untouchability in Article 17.<sup>4</sup> The sole dissenter, Malhotra J, denied jurisdiction to the petitioners<sup>5</sup> and further held that the practice fell within the definition of 'essential practices' and the petitioner's claim did not fall within the express limitations to Article 26.<sup>6</sup> The Court's decision led to fervent protests in the state of Kerala, with devotees of Lord Ayyappa demanding that their religious freedom be protected.<sup>7</sup> In November 2019, the Supreme Court ordered the constitution of a larger bench to decide on questions relating to the interplay of Articles 25, 26, 14, 15 and 17.<sup>8</sup> Subsequently, a nine-judge bench was constituted which has framed the legal questions it would be answering.<sup>9</sup>

This narrative of *Sabarimala* displays the delicate nature of the issues enmeshed with balancing religious freedoms. It is clear that both religious freedoms and the constitutional promise of equality are deeply entrenched in the Constitution, and therefore balancing the two becomes a complex task, given, particularly, that the Constitution is seemingly silent as to the method of such balancing. However, this delicate problem is exacerbated by the Supreme Court's approach in dealing with such questions. The Court's traditional approach so far has been to focus on narrow and definition-centric questions regarding the 'denomination' status and 'essential practices' of the religion, instead of dealing with the question of balancing religious freedoms against permissible limitations. There are many problems with using such an approach, primarily that these tests have no basis in the text of Articles 25 or 26 of the Constitution and that courts lack sufficient expertise to deal with theological questions as to the 'essentiality' of religious practices. Ultimately, through this approach, courts side-step the more complex and controversial questions regarding the permissible limitations to religious freedoms by replacing them with an enquiry into the 'essentiality' of the practice itself.

However, in *Sabarimala* there is a unique shift in approach in the opinions of Chandrachud J and Malhotra J, who seemingly move *away* from the traditional definition-centric approach. Although both judges arrive at diametrically opposite conclusions, their

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<sup>3</sup> *Id.* at ¶ 301.

<sup>4</sup> *Id.* at ¶ 358.

<sup>5</sup> *Id.* at ¶ 447.

<sup>6</sup> *Id.* at ¶ 476.

<sup>7</sup> *Sabarimala: India's Kerala paralysed amid protests over temple entry*, BBC (Jun. 3, 2019), <https://www.bbc.com/news/world-asia-india-46744142> (Last accessed 17 May 2020).

<sup>8</sup> *Kantaru Rajeevaru v. Indian Young Lawyers Association*, (2020) 2 SCC 1.

<sup>9</sup> *Kantaru Rajeevaru v. Indian Young Lawyers Association*, (2020) 3 SCC 52.

opinions allow us to examine alternative modes of interpreting religious freedoms (specifically those in Article 26), by engaging with the question of the permissibility of limitations to religious freedoms.

Given that the nine-judge bench of the Supreme Court shall, in the near future, rethink the existing doctrinal precedents on religious freedoms, this essay encourages the Court to think beyond the contours of the ‘essential practices’ test and offers interpretational alternatives to deal with questions similar to the one raised in *Sabarimala*. Therefore, by using *Sabarimala* and its opinions as anchors, I attempt to consolidate a set of interpretational alternatives and discuss the pitfalls and opportunities of each. Ultimately, I advocate for a limited scope of review at the definition stage of review (defining ‘denomination’ of the group and ‘essentiality’ of the practice involved) when dealing with claims of religious freedoms, and focus instead on the permissibility of the ‘limitations’ imposed on the said practice.

It is important to clarify that in advocating for a thin scope of review in the definition stage, I do not endorse a deferential attitude to interpreting Article 26 altogether. Ultimately, I endorse Chandrachud J’s opinion which indicates that the anti-exclusion principle embedded into Article 17 may be employed to *limit* practices which are exclusionary in nature to the extent that they fall within the purview of Article 17. Nevertheless, the main thrust here is to highlight the need for courts to move past the definition-centric approach when dealing with religious rights, and recognize the possibility of adopting an anti-exclusion principle to limit religious freedoms.

The structure of this paper is as follows: Part I examines the nature of secularism contemplated by the drafters of the Indian Constitution and how religious freedoms fit into its broader vision and transformative ideals. Part II analyses the traditional definition-centric approach of the Court towards dealing with religious rights through an examination of the jurisprudence pertaining to religious ‘dominations’ and ‘essential practices’. Part III presents an indicative list of pitfalls of the definition-centric approach discussed in the preceding section. In Part IV, I deal with the set of interpretational alternatives offered in *Sabarimala* and discuss their feasibility. Here, I look at the traditional approach of interpretation followed in the separate opinions of Misra J and Nariman J, and the unique approaches of Chandrachud J and Malhotra J separately. Finally, I conclude by offering a doctrinal formulation for interpreting Article 26 of the Constitution, drawing on alternatives to the definition-centric



approach traditionally adopted by the Court, while also providing an avenue to limit religious freedoms through Article 17 as adopted by Chandrachud J.

## I. INDIAN SECULARISM AND THE BASIS OF RELIGIOUS FREEDOMS

The broad project undertaken by the drafters of the Constitution was to create a Constitution which would eventually realise the goals of ensuring social justice.<sup>10</sup> Focal to this *transformative* goal of social justice was the role of the individual – who, Gautam Bhatia argues, necessarily needed to be freed from existing *substantive* structural inequalities.<sup>11</sup> The constitutional goal, therefore, was not to maintain the status quo but to radically transform Indian society to accommodate and expand individual freedoms.<sup>12</sup>

Secularism in the Indian constitutional context broadly implies two things: first, it implies the religion-neutrality of the state (i.e., that the state shall not assume a religious character or discriminate between individuals on the grounds of religion)<sup>13</sup>; and second, that the Constitution affords inclusive rights to religious groups and denominations, which allows individuals to express and practice their religion while also allowing religious groups to maintain their practices.<sup>14</sup> These two implications of secularism have been deeply embedded into the fundamental rights of the Indian Constitution.

There is, however, a seeming tension between this second prong of secularism and the broader project of ‘transformation’. The drafters realised that a number of socially backward practices (which the transformative Constitution attempts to get rid of) stem from the internal religious tenets (which the Constitution simultaneously protects). This conflict brought forth several debates in the Constituent Assembly on the proper mode of balancing the two, a large part of which centred around the regulation of religious personal law.<sup>15</sup> There were some like K.M. Munshi who endorsed religion being completely relegated *solely* to the private domain

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<sup>10</sup> Sudhir Choudhury, Madhav Khosla, Pratap Bhanu Mehta, *Locating Indian constitutionalism*, in OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 1-14 (S. Choudhry, M. Khosla and P.B. Mehta eds., OUP 2016).

<sup>11</sup> Gautam Bhatia, *Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution* 5 Global constitutionalism 351, 371 (2016). See also MADHAV KHOSLA, INDIA’S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY, 111, (HUP 2020).

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

<sup>13</sup> INDIAN CONST. art 14, 15, 27. Articles 14 and 15 prohibit the state from discriminating on the grounds of religion. Article 27 prohibits the state from compelling a citizen to pay taxes which shall be used for religious purposes.

<sup>14</sup> INDIAN CONST. art 25, 26.

<sup>15</sup> Hanna Lerner, *The Indian Founding: A Comparative Perspective*, in OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 55 (S. Choudhry, M. Khosla and P.B. Mehta eds., OUP 2016).

and prohibited in the public domain.<sup>16</sup> On the other hand were those like Naziruddin Ahmad who suggested that the process of regulating religion should be gradual and phased, and expressed displeasure over the excessive intrusion of the state into matters of religion.<sup>17</sup>

To resolve this, members of the Constituent Assembly seemingly agreed to interpret the limitations to religious freedom broadly. A debate relating to the ambit of the term ‘propagate’ in draft Article 19 (today Article 25) is telling in this regard. Member Lok Nath Mishra suggested that the term ‘propagate’ in draft Article 19 be removed given its hostile connotation, as he feared that the provision may also allow religions to expand their ambit which may potentially lead to the ‘complete annihilation of Hindu culture’.<sup>18</sup> However, this suggestion was rejected by the Assembly. Mr. K. Santhanam’s rebuttal to Mr. Mishra is perhaps indicative of the Assembly’s approach:

*“Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practice and propagation. But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality and health. The full implications of this qualification are not easy to discover. Naturally, they will grow with the growing social and moral conscience of the people.”*<sup>19</sup> (emphasis supplied)

Although this expression cannot be attributed to the entirety of the Constituent Assembly (in any case, the precise scope of religious freedoms was not taken up by the Assembly in detail), it could indicate that the framers’ vision was to recognise the authority of the state to regulate matters of religion in the interest of social transformation. In this sense, the Constitution seemed to tip the balance in favour of the state’s authority to undertake social reform. This was explicit in many debates of the Assembly and seems truer to the transformative goals of social justice envisioned by the Constitution.<sup>20</sup>

However, by acknowledging religious freedoms, the Constitution also admits their significance. Moreover, it has been argued that religious presence is key to achieving the

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Constituent Assembly of India Debates (Proceedings) - Vol. VII, LOK SABHA*, <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C06121948.html> (Last accessed 17 May 2020).

<sup>19</sup> *Id.*

<sup>20</sup> Khosla, *supra* note 11, 111. The author writes ‘in the case of religion, the effort was to shift from fixed identities based on community membership to decisional ones that emerged from choices structured around democratic individualism.’

transformational goals of social justice, given that in absence of an organic and gradual process of reform, the very purpose of transformation might be defeated.<sup>21</sup>

In light of this, it can be said that the Constitution recognises a fine balance between religious freedoms and the state's authority to curtail them. To achieve this balance, the text of the Constitution points to the legitimate *limitations* of the right – which also seems consistent with the intention of the drafters to read the limitations broadly (as is evident from Mr. Santhanam's exposition extracted above). Ultimately, the Constitution seems to tip this balance in favour of the state's constitutional obligation to transform religion in the interest of social justice. However, the focus of the Constitution remains on the breadth of the *limitations to the right* and not *the narrowness of the right's ambit*.

Contrary to this, the approach of constitutional courts has been to narrow the ambit of the right itself by placing strict definitional limits on the exercise of these freedoms. This approach does not conform to the broader constitutional project, which envisions transformation by relying on valid limitations to the right. By limiting the ambit of the religious right of expression, courts avoid offering a constitutional justification to limiting religious freedoms. Moreover, such an approach potentially denies the right of religious freedom altogether by not recognising valid claims of exercise of the right.

## II. THE TRADITIONAL APPROACH OF THE COURT IN DEALING WITH RELIGIOUS FREEDOMS

Article 26 has three broad constitutive elements: (1) Is the right bearer a religious 'denomination' or 'sect' capable of bearing the rights under Article 26?; (2) Is the freedom being claimed a part of the group's *religious* affairs? (This is where the 'essential practices' doctrine is invoked); (3) Are the limitations to the freedom valid on the grounds of public order, morality or health?

In this part, I argue that over the course of a trajectory of Indian cases, the focus seems to be on the first two questions (relating to denomination and the nature of the practice in question) and not the question of the validity of the limitation.

### A. The 'Denomination' Question

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<sup>21</sup> Faizan Mustafa, Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 4 BYU L. REV 915, 922 (2017).

This first prong deals with whether the group in question is a ‘denomination’ which can be a legitimate right bearer under Article 26. The Supreme Court in *The Commissioner, Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar* (hereinafter ‘*Shirur Mutt*’) defined a ‘denomination’ as being “a religious sect or body having a *common faith and organisation* and designated by a *distinctive name*.”<sup>22</sup> (emphasis supplied) The Court in *S.P. Mittal v. Union of India* (hereinafter ‘*S.P. Mittal*’) separated this into three distinct requirements: (i) common organisation; (ii) common faith; and (iii) designation by a distinctive name.<sup>23</sup> These requirements essentially focus on the fact that the members of the religion have some commonality which justifies them being called a ‘denomination’ for the purposes of Article 26.

In *S.P. Mittal*, the Supreme Court declined granting the status of denomination to the Aurobindo ashram in Pondicherry on the grounds that the commonality in its members stemmed from a common *philosophical tradition* which could not be considered a commonality of ‘faith’.<sup>24</sup> It was later held in *Nallor Marthandam Vellalar v. Commissioner* that the cohesion between the individuals must stem from *religious commonality* and not commonalities based on caste or other secular factors.<sup>25</sup>

It is apparent that the requirements spelled out in *S.P. Mittal* have little basis in the text of Article 26, which in fact contemplates a broader inclusion of right bearers (given that the right bearer of Article 26 is a ‘denomination’ *or section thereof*).<sup>26</sup> Keeping this in mind, Chinappa J’s dissenting opinion in *S.P. Mittal* held that these three requirements were not to be read narrowly, instead a *purposive* satisfaction of the requirements should be enough to qualify a group to be a ‘denomination’.<sup>27</sup>

Despite calls for flexibility in the definition, there has been little consistency in the Court’s approach in this regard. Although the question of defining ‘denomination’ does not take the forefront in most cases, it can potentially become important in denying the Article 26 right to the group in question. This becomes evident in *Sabarimala* where the majority held

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<sup>22</sup> *The Commissioner, Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar*, 1954 SCR 1005 9 (hereinafter *Shirur Mutt*).

<sup>23</sup> *S.P. Mittal v. Union of India*, 1983 SCR (1) 729 (hereinafter ‘*S.P. Mittal*’).

<sup>24</sup> *Id.*

<sup>25</sup> *Nallor Marthandam Vellalar v. Commissioner, Hindu Religions and Charitable Endowments*, (2003) 10 SCC 712.

<sup>26</sup> INDIAN CONST. art. 26.

<sup>27</sup> *S.P. Mittal*, *supra* note 23.

that the devotees of Lord Ayyappa did not constitute a religious denomination when rejecting their claim under Article 26.<sup>28</sup>

### ***B. The ‘Essential Practices’ Test***

The second prong of Article 26 examines whether the practice being protected is validly ‘religious’ and whether the practice is ‘essential’ to the denomination in question. The textual purpose of such a review seems to be to examine whether the claim being purported to be protected under the cover of religious rights is bona fide. However, over the course of several precedents of the Supreme Court, this doctrine has been significantly broadened to include several external elements of review, altogether making it very complicated.<sup>29</sup>

The ‘essential practices’ test was first invoked by the Supreme Court in *Shirur Mutt* where the test examined the narrow question of what the religious group *subjectively* considers to be essential to it, according to its internal tenets.<sup>30</sup> Therefore, to establish that the religious practice in question is constitutionally protected (under Article 25 or 26), it emerged that the Court must: (a) examine whether the practice in question is *religious* in character (as opposed to being *secular*); and (b) look into the religious texts and tenets of the religion itself to satisfy to themselves the bona fides of the essentiality of the practice claimed to be religious.<sup>31</sup>

However, in later judgments this approach was largely whittled down. Over time, the Court infused this seemingly narrow question with a host of external elements of review. For instance, in *Durgah Committee Ajmer v. Syed Hussain Ali*, the Supreme Court developed a standard of weeding out practices of ‘superstitious’ nature from the cover of essentiality (and thereby of Article 26).<sup>32</sup> In *N Adithayan v. Travancore Devaswom Board*, the Supreme Court linked the essentiality of the religious practice claimed to its broader constitutional compliance. The Court held that a practice demanding the cover of religious freedoms must comply with the “specific mandate of the Constitution”. Here, the Court included within the specific

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<sup>28</sup> Sabarimala, *supra* note 1. This included the opinions of Misra, J (writing for himself and Khanwilkar J); Nariman, J and Chandrachud, J who in their opinions denied the temple and its devotees the status of ‘denomination’.

<sup>29</sup> Bhatia, *supra* note 11, 357-363, 364. Bhatia shows that there has been a movement in the Court’s approach from examining the ‘essentiality’ of religious practices solely from the internal standpoint of the denomination involved to an approach where the essentiality test subsumes a review of how ‘socially progressive’ the Court considers the practice to be. Resultantly, Bhatia acknowledges that ‘the Court has failed to develop a rigorous methodology for determining the content of ‘essential’ religious practices’.

<sup>30</sup> *Shirur Mutt*, *supra* note 22, ¶ 20.

<sup>31</sup> Bhatia, *supra* note 11, 361.

<sup>32</sup> *Durgah Committee Ajmer v. Syed Hussain Ali*, (1962) 1 SCR 383.

mandate of the Constitution the constitutional promises of equality and dignity while holding that essential practices must not be “opposed to public policy or social decency”.<sup>33</sup>

There is little consistency in the considerations applied by courts in determining the ‘essentiality’ of a religious practice. Nevertheless, Dhavan and Nariman consolidated these rulings to arrive at a ‘three-step test’ to determine the three constitutive elements of essential practices test: (a) whether the practice in question is *religious* as opposed to being *secular*; (b) whether the practice is *essential* to the faith of the religion; and (c) whether the practice is consistent with the reformist goals of the Constitution.<sup>34</sup>

Through the trajectory of precedents, we can see that there has been a movement towards ‘rationalisation’ in the approach of the Court (ever since *Shirur Mutt*).<sup>35</sup> In subsequent judgments, the Court attempted to rid religions of ‘superstitious’ and ‘unconstitutional’ practices by refusing to recognise their essentiality.<sup>36</sup> Bhatia terms this to be the movement of the test from an ‘essentially’ religious standard (where the Court is only examining the ‘religious’ nature of the practice - as opposed to it being ‘secular’) to an ‘essential to the religion’ standard (where the Court is examining the essentiality of the practice from an external standpoint).<sup>37</sup> As we shall see in a later stage of this essay, this movement has even seeped into parts of the majority decision in *Sabarimala*.

### III. FALLOUTS OF THE DEFINITION-CENTRIC APPROACH

I have, so far, pointed out the Supreme Court’s obsessive focus on two definitional prongs which are interpreted very narrowly while the question of permissible limitations is largely ignored. Now, I shall examine some of the major pitfalls of such a model of dealing with religious rights:

First, these tests have little basis in the text of the Constitution.<sup>38</sup> The considerations of ‘superstition’ and ‘constitutional conformity’ are entirely extraneous to Article 26. In fact, it

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<sup>33</sup> N Adithayan v. Travancore Devaswom Board, (2002) 8 SCC 106.

<sup>34</sup> Rajeev Dhavan, Fali Nariman, *The Supreme Court and Group Life*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, 256–87, 260 (BN Kirpal et al. eds., OUP 2000). as cited in Bhatia, *supra* note 11, at 355.

<sup>35</sup> See generally Ronojoy Sen, *The Indian Supreme Court and the quest for a ‘rational’ Hinduism*, 1 86 South Asian History and Culture (2009).

<sup>36</sup> See, e.g., Durgah Committee Ajmer v. Syed Hussain Ali, (1962) 1 SCR 383, N Adithayan v. Travancore Devaswom Board, (2002) 8 SCC 106.

<sup>37</sup> Bhatia, *supra* note 11, 360.

<sup>38</sup> *Id.* at 358-359, 364. Bhatia argues that the question of essentiality contemplated by the drafters of the Constitution was largely limited to the distinction between ‘religious’ and ‘secular’ elements of religious practices

can be argued that the Court's approach in defining 'denominations' narrowly goes *expressly against* the intention of the drafters. This is fairly clear from a bare reading of Article 26 which, instead of qualifying the right-holder of Article 26 to be a narrowly defined denomination, confers the right on any 'denomination or section thereof' - indicating the broad set of possible right bearers.

Second, this approach throttles the right of religious groups to self-define themselves.<sup>39</sup> This is especially true for the narrow definitions of 'denomination'. This is a particularly inappropriate approach in the Indian context where extremely unique and distinct denominations are made to fall under the broader umbrella of Hinduism (which itself is extremely fluid). Most denominations which fall under Hinduism do not have common theistic concepts or rituals - in fact, members can very well belong to different religious denominations at the same time. The fluidity is so extreme that denominations even blur the lines distinguishing the broader umbrella of Hinduism and other religions (this can be seen in the fact that devotees can cross-cut different religions to follow a particular religious leader or deity - for instance, a Hindu deity like Lord Ayyappa has devotees which include Muslims and Buddhists<sup>40</sup>). This inherent fluidity has, in fact, been acknowledged by the Supreme Court.<sup>41</sup> In light of this, it seems absurd to have strict definitional contours to the commonality of faith and organisation, where the basis of the religion itself is loosely defined. In the specific facts of *Sabarimala*, the mere fact of the devotees pledging themselves to a common spiritual figure (be that a theistic God or a spiritual leader), should ideally be enough to satisfy the requirement of 'denomination'.

Third, the elements of the test ultimately turn on an authoritative interpretation of religious texts, the interpretation of which clearly lies beyond the expertise of a secular court.<sup>42</sup> The Court often chooses to examine the essentiality of a practice according to the religious

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which was ultimately broadened to take shape in the form of the 'three-step test' formulated by Dhavan and Palkhivala. Bhatia argues that the broader formulation of the question of essentiality has no basis in the text of the Constitution.

<sup>39</sup> Jaclyn L. Neo, *Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication*, 16 International Journal of Constitutional Law, 574, 576 (2018).

<sup>40</sup> *Sabarimala*, *supra* note 1, ¶192. (Misra and Khanwilkar JJ)

<sup>41</sup> *See* Sastri Yagnapurushadji v. Muldas Brudardas Vaishya, (1966) 3 SCR 242, ¶29 (Gajendragadkar J). "When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed."

<sup>42</sup> Jaclyn Neo, *supra* note 39, 589.

tenets and texts (as suggested in *Shirur Mutt*). Such interpretations involve a multitude of theological considerations which make the use of traditional tools of legal interpretation fundamentally unfair.<sup>43</sup> Given the assumed centrality of the test, the outcome of many cases turn on an authoritative interpretation of the religion by the court. For instance, Jaclyn Neo points to instances in foreign jurisdictions where appellate courts have reversed lower court decisions solely on grounds of a disagreement over the interpretation of religious texts.<sup>44</sup> Given the Court's lack of interpretational guidance or expertise, its decisions on the essentiality of practices becomes fundamentally misguided.

Fourth, the approach of the Court appears to be inconsistent and arbitrary in application.<sup>45</sup> This is fairly apparent from the trajectory of cases relating to the essential religious practices doctrine which shows a series of alternative tests employed by the court. The test affords wide latitude to judges to manoeuvre a convenient doctrinal formulation of the 'essential practices' test. Even the synthesised 'three-step test' is extremely broad and still leaves room for significant discretion.<sup>46</sup> Without adequate anchors to guide judicial decisions in this area, there is little predictability in the decisions of the court.

Fifth, the project of defining 'essential practices' in itself seems futile. I have so far addressed how the Court's decisions on the 'essential practices' test appears inconsistent and arbitrary. In addition to this, I would also suggest that some of the arbitrariness is a product of the test itself. Firstly, a doctrinal, legal definition of 'religion' is impossible to arrive at. The Supreme Court has admitted the futility of such an exercise.<sup>47</sup> Secondly, the element of essentiality depends on a metric of judging internal religious tenets of a religion which is beyond the expertise of the court<sup>48</sup> (as has been discussed earlier). Given these reasons, a

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

<sup>44</sup> *Id.* at 585.

<sup>45</sup> See Section 3 of the essay.

<sup>46</sup> Bhatia, *supra* note 11, 364.

<sup>47</sup> *Shirur Mutt*, *supra* note 22, ¶ 17 (Mukherjea J). "The word 'religion' has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. [...] Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."

<sup>48</sup> Jaclyn Neo, *supra* note 39.



detailed and proper application of the doctrine of ‘essential practices’ is impossible to arrive at, unless the review is reconsidered altogether to give it a narrower form.

Sixth, Jaclyn Neo argues that this definition-centric approach often leads to the majority sect’s interpretation of religious tenets overriding those of the minority sects.<sup>49</sup> Given that religious doctrines are often fluid in terms of their content, interpreting a text authoritatively (as courts do) leads to the rejection of alternative interpretations of the same text by minority denominations. There may be different sects and sub-sects within a religion which rely on a common set of religious tenets which act as an overarching umbrella to categorise them into a definitional ‘religion’. However, to authoritatively decide on the ‘essential practice’ of a broader religion implies that narrower sects are robbed of their subjective interpretation.<sup>50</sup> This is more pertinent in the Indian scenario where the narrow definition of ‘denomination’ and ‘essential practices’ work hand in glove to favour interpretations of a broadly constructed religious groups (rather than allow smaller sects to exercise their subjectivity). A case in point here is Misra J’s opinion in *Sabarimala* where he holds that Lord Ayyappa’s devotees fall under the broader denomination of Hindus and subsequently suggests that the practice of excluding women from temples is inessential to Hindu temples (given the inconsistency in application of the practice amongst Hindus generally).<sup>51</sup>

#### IV. ALTERNATIVE INTERPRETATIONS OF RELIGIOUS RIGHTS THROUGH THE LENS OF THE SABARIMALA JUDGMENT

Having understood the dominant definition-centric approach of the courts and its fallouts, I shall discuss the Supreme Court’s decision in *Sabarimala* in order to excavate alternative modes of interpretation. While the opinions of Mishra J and Nariman J offer a reiteration of the traditional approach, the opinions of Chandrachud J and Malhotra J offer interesting alternatives to interpreting Article 26.

The Lord Ayyappa temple in Sabarimala of Kerala claimed to have a long-standing religious practice of excluding women aged between 10 to 50 from entering the temple. The rationale of the practice was rooted in the celibacy of the deity - Lord Ayyappa. Additionally, the devotees of the temple often undertake a 41 day ‘Vratham’ where the devotees themselves are expected to practice celibacy. The dominant rationale for the exclusion of women aged

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<sup>49</sup> *Id.* at 578.

<sup>50</sup> *Id.* at 589.

<sup>51</sup> *Sabarimala*, *supra* note 1, ¶¶ 122-123 (Misra and Khanwilkar JJ).

between 10 to 50 is to suggest that menstruating women can possibly ‘distract’ the celibate deity and other devotees who have committed themselves to undertake ‘Vratham’.

The practice was institutionalised through a notification issued by the Travancore Devaswom Board, issued under the authority of the Travancore-Cochin Hindu Religious Institutions Act, 1950. This notification was challenged before the Kerala High Court in *S. Mahendran v. Travancore Devaswom Board*, and the Court held in favour of its validity.<sup>52</sup> Later, Young India Lawyers Association (a public interest body) filed a public interest litigation application under Article 32 to challenge the validity of the notification, leading to the present case.

A unique aspect of this case was that it did not involve a conflict between the state and a religious institution. Most adjudications relating to religious freedoms in Article 26 are framed in terms of state regulation curtailing religious rights. That is, the state wishes to regulate a religion or institution which the latter resists. Uniquely, in *Sabarimala*, the state sided with the claim of the religion which was, in turn, opposed to allowing a class of individuals to enter into the temple. This shall become important in understanding Malhotra J’s opinion which advocates judicial deference in such cases. Since the notification was published under a legislation, it satisfied the requirements of being ‘law’ under Article 13.<sup>53</sup> Additionally, an argument was raised by the petitioners suggesting that the Board satisfied the requirements of being ‘state’ for the purposes of Article 12<sup>54</sup> - although this argument was not specifically addressed by the Court in much detail.

In the subsequent sub-parts of this section, I shall discuss the four different approaches adopted by the judges of the Court in resolving religious freedoms. Misra J and Nariman J largely reiterate the traditional definition-centric approach of dealing with religious freedoms. Chandrachud J offers two alternative models of interpreting Article 26 alongside other Articles of the Constitution, one of which appears to be an alternative variant of the ‘essential practices’ test while the other is a limitation-centric approach justified through Article 17. On the other hand, Malhotra J in her dissenting opinion, offers a free hand to the religious denomination in defining themselves, however, restricts the powers of courts in effectively limiting the right.

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<sup>52</sup> *S. Mahendran v. The Secretary, Travancore Devaswom Board*, AIR 1993 Ker 42.

<sup>53</sup> *Sabarimala*, *supra* note 1, ¶538 (Malhotra J).

<sup>54</sup> *Id.* at ¶ 59 (Misra and Khanwilkar JJ).

### ***A. Reiteration of the Definition-Centric Approach (Misra J and Nariman J)***

Misra J (who writes for himself and Khanwilkar J) and Nariman J write separate opinions although their approaches are similar in that they are largely definition-oriented. The decision on Article 26 was broadly grounded in two findings: (a) that the devotees of Lord Ayyappa and the temple do not constitute a ‘denomination’ for the purposes of Article 26<sup>55</sup>; and (b) that the practice of excluding women aged between 10-50 from the temple is *inessential* and therefore not protected under Article 26.<sup>56</sup>

Misra J holds that the devotees of Lord Ayyappa and the temple do not constitute a denomination. The key reason for this is that the devotees do not share “common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion”.<sup>57</sup> Therefore, he concludes that the Lord Ayyappa devotees of Sabarimala have not adequately distinguished themselves from the broader umbrella of Hinduism for them to seek their separate denominational right under Article 26.<sup>58</sup>

After having deemed the religious denomination in question to be Hinduism (and not recognising Lord Ayyappa’s devotees as a separate denomination), Misra J goes on to analyse the practice of exclusion of women on the anvil of its essentiality in *Hinduism*.<sup>59</sup> He suggests that exclusion of menstruating women is not essential to Hinduism (since there is no consistency in such a practice among Hindus) and thereby excludes the practice from the purview of the Article 26 right.<sup>60</sup> Additionally, Misra J also suggests that the practice of excluding menstruating women from a temple would be inconsistent with constitutional morality and thus would fail the ‘essential practices’ test.<sup>61</sup>

Nariman J, on the other hand, does not authoritatively rule on the essential practices test. While discussing the test, he appears to favour the standard in *Shirur Mutt* where the role of the court extends to determining the religious nature of the practice and its essentiality based

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<sup>55</sup> *Id.* at ¶144.1 (Misra and Khanwilkar JJ), ¶ 193 (Nariman J).

<sup>56</sup> *Id.* at ¶122 (Misra and Khanwilkar JJ). Nariman J does not hold that the practice of excluding women is inessential to the Lord Ayyappa devotees but nevertheless rejects their claim of being a ‘religious denomination’ *See Id.* at ¶191 (Nariman J).

<sup>57</sup> *Id.* at ¶ 144.1 (Misra and Khanwilkar JJ).

<sup>58</sup> *Id.* at ¶ 112 (Misra and Khanwilkar JJ).

<sup>59</sup> *Id.* at ¶ 112 (Misra and Khanwilkar JJ).

<sup>60</sup> *Id.* at ¶ 123 (Misra and Khanwilkar JJ).

<sup>61</sup> *Id.* at ¶ 111 (Misra and Khanwilkar JJ).

on internal tenets of the religion.<sup>62</sup> For the majority of his opinion, however, Nariman J assumes that the practice of excluding women aged between 10 and 50 from the temple is essential to the religion.<sup>63</sup>

Nariman J denies the right under Article 26 to the respondent temple on grounds that Lord Ayyappa's devotees do not constitute a separate 'denomination'.<sup>64</sup> The reason he gives for this are two-fold: (i) he notes that there is no 'common faith' between the members of the group given that the devotees of the temple cut across religions beyond Hinduism<sup>65</sup>; and (ii) he notes that the devotees do not share a 'distinct name' which would allow them to be considered a denomination.<sup>66</sup>

These approaches reflect the many hues of the traditional definition-centric model of dealing with religious rights. The concerns and fallouts of such an approach have already been mentioned and apply equally to these opinions. Misra J's opinion is most telling of the manner in which the two tests work *together* to erode subjective denominational rights. Nariman J's approach, though seemingly flexible at the stage of defining essential practices, is inflexible in conferring the respondents the status of 'denomination'.

Denying the right under Article 26 to the devotees of Lord Ayyappa on grounds of not having a 'distinct name' is odd given that the requirement has no basis in the text of Article 26 nor does it have any rational nexus to the right being protected. The additional rationale of a lack of 'commonality of faith' given that the attendees of the Temple cut across many religions is also equally flawed as: (a) the mere fact of attendance in a temple should not imply membership in the denomination; and (b) such a requirement ignores the fluidity inherent to indigenous religions in India.

***B. An Alternate Definition-Centric Approach Anchored on Constitutional Morality (Chandrachud J)***

Before dealing with the alternative rationale(s) in Chandrachud J's opinion, it is important to note that Chandrachud J's opinion also exhibits some hues of the definition-centric

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<sup>62</sup> *Id.* at ¶ 176.6 (Nariman J).

<sup>63</sup> *Id.* at ¶ 191 (Nariman J).

<sup>64</sup> *Id.* at ¶ 192 (Nariman J).

<sup>65</sup> *Id.* at ¶ 192 (Nariman J).

<sup>66</sup> *Id.* at ¶ 192 (Nariman J).

approach (in holding that the Ayyappans do not constitute a religious denomination<sup>67</sup> and that the practice of excluding menstruating women from the temple is inessential to the religion<sup>68</sup>). Interestingly, he criticises this very approach which focuses on the ‘essential practices’ test in the last section of his judgment, suggesting that courts should gradually move beyond it.<sup>69</sup> Ultimately, Chandrachud J offers two key alternative approaches: (a) an alternative reformulation of the essential practices test (which shall be discussed here); and (b) the anti-exclusion principle (which shall be discussed in the next part of this section).

Chandrachud J begins his opinion by focussing on the transformative role of the Constitution to arrive at a formulation of ‘constitutional morality’ which would include the preambular precepts of ‘justice’, ‘liberty’, ‘equality’, ‘fraternity’ (and ‘secularism’).<sup>70</sup> Interestingly, Chandrachud J uses this formulation to infuse the limitation of ‘morality’ in Article 26 (i.e. to imply ‘constitutional morality’).<sup>71</sup> However, it is important to note here that this does not mean that constitutional morality is contemplated to be an independent substantive limitation to Article 26. Instead, the aim here is to illustrate the fact that fundamental rights must be interpreted *in light of* the other rights in part III of the Constitution.

Having held ‘constitutional morality’ to be all pervasive, Chandrachud J argues that fundamental rights should be read as a ‘*cluster of rights*’ and not in isolation.<sup>72</sup> Therefore, he uses constitutional provisions relating to equality as well as the preambular precepts therein to weed out inessential practices which offend constitutional morality.<sup>73</sup> In this sense, the formulation of the essential practices is more limited. Essentially, the court can weed out religious practices from the cover of Article 26 on grounds of their non-conformity with ‘constitutional morality’ (specifically if it impairs individual human dignity).<sup>74</sup>

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<sup>67</sup> *Id.* at ¶ 319 (Chandrachud J).

<sup>68</sup> *Id.* at ¶ 292 (Chandrachud J).

<sup>69</sup> *Id.* at ¶¶ 406-415 (Chandrachud J). Chandrachud J offers a critique of the essential religious practices test in the last section of his judgment titled ‘Roadmap for the future’. Here he favorably cites Bhatia and Neo’s objections against the test and suggests that the adoption of the anti-exclusion principle to limit religious rights is the most appropriate manner or deferring to religious rights.

<sup>70</sup> *Id.* at ¶¶ 201-205, 215 (Chandrachud J).

<sup>71</sup> *Id.* at ¶¶ 214-215 (Chandrachud J).

<sup>72</sup> *Id.* at ¶ 216 (Chandrachud J).

<sup>73</sup> *Id.* at ¶ 216 (Chandrachud J).

<sup>74</sup> *Id.* at ¶ 219 (Chandrachud J). “Dignity of the individual is the unwavering premise of the fundamental rights. Autonomy nourishes dignity by allowing each individual to make critical choices for the exercise of liberty. A liberal Constitution such as ours recognises a wide range of rights to inhere in each individual. Without freedom, the individual would be bereft of her individuality. Anything that is destructive of individual dignity is anachronistic to our constitutional ethos.”

In applying this metric, Chandrachud J holds that the practice of excluding women is unconstitutional on the ground that it offends constitutional morality (being offensive to the dignity of women).<sup>75</sup> He holds, accordingly: “To exclude from worship, is to deny one of the most basic postulates of human dignity to women. *Neither can the Constitution countenance such an exclusion nor can a free society accept it under the veneer of religious beliefs.*”<sup>76</sup> (emphasis supplied)

Although this is well-meant and backed by constitutional value-based justifications, there are several problems in adopting such an approach.

First, it opens a can of worms given the ambiguity in the content of ‘constitutional morality’. Preamble precepts lack substantive content and doctrinal formulations, making them as ambiguous as the ‘essential practices’ test (if not more so). Importantly, equality rights in their doctrinal contents of Article 14 and 15 cannot (arguably) apply as limitations to Article 26 according to this formulation - as Chandrachud J himself admits, other freedoms do not *trump* religious freedoms although they must be interpreted harmoniously.<sup>77</sup> All of this gives judges significant discretion to deny religious freedoms without offering convincing reasons.

Second, Chandrachud J’s conception of ‘constitutional morality’ seems conveniently contrived for the facts of this case. Malhotra J, in her dissent, also points to this critique by suggesting that religious freedoms are also necessarily a part of constitutional morality.<sup>78</sup>

Third, this formulation is not entirely impervious to the fallouts of the definition-centric approach mentioned earlier in the essay. Chandrachud J infuses limitations into the content of Article 26 itself. This is problematic since it makes the *existence* of religious rights contingent

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<sup>75</sup> *Id.* at ¶ 301 (Chandrachud J).

<sup>76</sup> *Id.* at ¶ 219 (Chandrachud J).

<sup>77</sup> *Id.* at ¶ 216 (Chandrachud J). “But does that by itself lend credence to the theory that the right of a religious denomination to manage its affairs is a standalone right uncontrolled or unaffected by the other fundamental freedoms? The answer to this must lie in the negative. *It is one thing to say that Article 26 is not subordinate to (not “subject to”) other freedoms in Part III. But it is quite another thing to assume that Article 26 has no connect with other freedoms or that the right of religious denominations is unconcerned with them.*” (emphasis supplied) There seems to be an implicit concession here that the formulation still does fit Article 26 rights as being ‘subject to’ other fundamental rights – but only establishes their ‘connect’. If Article 26 is not subject to other fundamental rights, it would not be correct to read the doctrinal or textual connotations of the rights in part III as limitations to Article 26. Nevertheless, Chandrachud J’s judgment does in parts indicate that interests of equality do *trump* religious freedoms, as he suggests: “Where a conflict arises, the quest for human dignity, liberty and equality must prevail. These, above everything else, are matters on which the Constitution has willed that its values must reign supreme.” *Id.* at ¶ 215 (Chandrachud J). Nevertheless, the content of these trumping ‘values’ is still clouded by significant ambiguity.

<sup>78</sup> *Id.* at ¶ 481 (Malhotra J).

upon their constitutional justification. Instead, a more acceptable formulation would be as follows: *despite being a valid exercise of the right under Article 26, this claim of religious freedom can be restricted for hurting the individual dignity of women*. This formulation is better reflected in Chandrachud J's alternative route of finding limitations in Article 17 of the Constitution (as shall be discussed).

### ***C. Article 17 and Anti-Exclusion (Chandrachud J)***

Chandrachud J offers another alternative to interpreting religious freedoms, which focuses on the anti-exclusion principle in Article 17 of the Constitution. Article 17 prohibits 'untouchability in any form'.<sup>79</sup> Chandrachud J traces the history of the Constituent Assembly debates to suggest that the drafters intended to broaden the definition of 'untouchability' beyond caste-based stigmatisations.<sup>80</sup>

However, every discrimination cannot be termed 'untouchability'.<sup>81</sup> Here Chandrachud J suggests that any form of stigmatisation which leads to social exclusion and is violative of human dignity would satisfy the definitional burden of Article 17.<sup>82</sup> To further explicate this understanding of stigmatisation, he invokes the concepts of 'purity' and 'pollution', central to the definition of caste-centric untouchability, to define 'untouchability'.<sup>83</sup> He holds that disallowing menstruating women from entering temples falls within the construct of 'purity' and 'pollution' which causes women inordinate humiliation and violates their dignity.<sup>84</sup>

Importantly, this approach is impervious to definition-centric questions. The scope of review pertains to the limitations of the practice based on another constitutional provision (i.e., Article 17).<sup>85</sup> A denomination being conferred the status of 'denomination' and its practice

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<sup>79</sup> INDIAN CONST. ART. 17; 'Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law'.

<sup>80</sup> Sabarimala, *supra* note 1, ¶¶ 325-332, 344, 358 (Chandrachud J).

<sup>81</sup> Gautam Bhatia, *The Sabarimala Judgment – III: Justice Chandrachud and Radical Equality*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (Sept. 29, 2018), <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/> (last accessed 17 May 2020).

<sup>82</sup> Sabarimala, *supra* note 1, ¶ 342 (Chandrachud J).

<sup>83</sup> *Id.* at ¶ 343 (Chandrachud J).

<sup>84</sup> *Id.* at ¶ 357-8 (Chandrachud J).

<sup>85</sup> It is important to note here that Chandrachud J does not restrict the interpretation of an anti-exclusion principle solely to Article 17. He holds specifically that Article 17 "will not exhaust the guarantee against other forms of social exclusion. The guarantee against social exclusion would emanate from other provisions of Part III, including Articles 15(2) and 21." *Id.* at ¶ 357 (Chandrachud J). Surith Parthasarathy challenges this suggesting that it would be textually and doctrinally difficult to accept a formulation of an anti-exclusion principle against religious practices through Article 15. On reading the judgment, narrowly, therefore Article 17 seems to be the central expression of the anti-exclusion principle understood by the Court. *See* Surith Parthasarathy, *An Equal*

being deemed ‘essential’ would not, in any manner, affect this thread of argumentation. Therefore, it is largely impervious to the critiques to the definition-centric approach discussed in earlier sections of the essay.

There are two reasons as to why this approach is doctrinally most appropriate in dealing with this case. First, Article 17 itself trumps other provisions of the Constitution. Chandrachud J hints at this by stressing on the wording of Article 17 which prohibits untouchability ‘*in any form*’ while also reiterating the vertical and horizontal applicability of the prohibition.<sup>86</sup> It cannot be said, therefore, that Article 26 can potentially override Article 17, given that the latter was specifically created keeping in mind caste-based exclusions in religious institutions.<sup>87</sup> In light of this, it seems clear enough that Article 17 should ordinarily trump the guarantee of freedom in Article 26.

Second, such an approach is more appropriate given that the provision equally applies regardless of horizontal and vertical application. One could say that what is being challenged in *Sabarimala* is *the state’s endorsement* of the exclusion of women from the Sabarimala temple, thus making discrimination the focal point of the issue at hand. Alternatively, one can negate the role of the state’s involvement altogether and consider this to be a constitutional limitation of the group’s right to manage its affairs freely. In either case, Article 17 operates horizontally as well as vertically,<sup>88</sup> thus making it the appropriate method of regulating the actions of the religious institution (even if the state’s role is negated altogether).

Here, it is also important to briefly engage with Malhotra J’s scepticism in invoking Article 17 in this manner, given that the provision was introduced to correct a very specific form of caste-based injustice.<sup>89</sup> She points to instances in the Constituent Assembly debates where speakers had rooted their understanding of untouchability in caste-based stigmatisation.<sup>90</sup> She also favourably cites Seervai’s commentary on the provision which suggests that the definition of ‘untouchability’ in Article 17 must be found in the

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<sup>86</sup> *Sabarimala*, *supra* note 1, ¶ 322-323 (Chandrachud J).

<sup>87</sup> *Id.* at ¶ 352 (Chandrachud J).

<sup>88</sup> *Id.* at ¶ 323 (Chandrachud J); Bhatia, *supra* note 11, 371.

<sup>89</sup> *Sabarimala*, *supra* note 1, ¶ 523 (Malhotra J).

<sup>90</sup> *Id.* at ¶ 525-526 (Malhotra J).



Untouchability (Offences) Act, 1955 (which defines untouchability narrowly in terms of caste-based atrocities).<sup>91</sup>

The concern here is that the broad reading of Article 17 (beyond caste-based stigmatisation) may be unjustified considering the specific historical context in which the provision came into existence. However, this concern can be addressed.

First, Chandrachud J holds that the intention of the drafters was not to formally define the term ‘untouchability’ in Article 17 only to the extent of prohibiting caste-based atrocities. He backs this claim by showing that the many attempts to define the term to that effect were rejected by the Assembly.<sup>92</sup> Moreover, he suggests that Article 17 is worded broadly enough; by abolishing untouchability ‘*in any form*’, the drafters did not intend the provision to be read narrowly.<sup>93</sup>

Second, the justification offered by Chandrachud J is not purely textual but is also anchored to ideals central to the Constitution’s framing. Chandrachud J prefaces his judgment by discussing the transformative aspect of the Constitution which places the individual at the heart of its ideals and makes human dignity central to its vision. This he later links to the broader purpose being served by Article 17.<sup>94</sup> Therefore, Chandrachud J culls out the *broader principle* of the injustice being corrected through Article 17 from the *specific instantiation* of it in caste-based untouchability. Resultantly, Parthasarathy argues that Chandrachud J’s judgment demonstrates a ‘fidelity to the history of the framing’ of the Constitution since the interpretation is rooted in the values which form the bedrock of the constitutional framing.<sup>95</sup>

Third, if the use of an anti-exclusion principle is seen to be desirable in light of the transformative goals of the Constitution and to protect the basic inherent dignity of individuals, Article 17 offers the best route to achieving this end. Parthasarathy points out that extracting an expansive anti-exclusion principle from Article 15(2) (which Chandrachud J alternatively hints at<sup>96</sup>) might have to contend with textual difficulties – particularly, as Article 15(2) does

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<sup>91</sup> *Id.* at ¶527 (Malhotra J).

<sup>92</sup> *Id.* at ¶¶ 325-332 (Chandrachud J).

<sup>93</sup> *Id.* at ¶¶347-348 (Chandrachud J).

<sup>94</sup> *Id.* at ¶322 (Chandrachud J). “Article 17 abolished the age-old practice of “untouchability”, by forbidding its practice “in any form”. By abolishing “untouchability”, the Constitution attempts to *transform and replace the traditional and hierarchical social order.*” (emphasis supplied)

<sup>95</sup> Parthasarathy, *supra* note 85, 138.

<sup>96</sup> Sabarimala, *supra* note 1, ¶ 357 (Chandrachud J).

not specifically include places of religious worship.<sup>97</sup> He argues, therefore, that Article 17 offers a more accurate textual expression for the anti-exclusion principle.<sup>98</sup>

Therefore, I find that Chandrachud J's opinion offers a sound approach of dealing with religious freedoms through the mechanism of anti-exclusion which deftly averts the many pitfalls of a definition-centric approach while also offering a narrow avenue to limit religious practices when they impair a person's dignity.

#### ***D. Judicial Deference (Malhotra J)***

Malhotra J, in her sole dissent, holds that the Supreme Court lacks adequate jurisdiction to entertain the petition.<sup>99</sup> She holds that the petitioners claiming the 'right to worship' under Article 25 were not worshipers of Lord Ayyappa. Additionally, since public interest litigations are inappropriate means to challenge religious practices,<sup>100</sup> she holds the petition to be altogether wanting of jurisdiction. Despite having rejected the petition for lacking jurisdiction, she examines its merits.

Malhotra J prefaces her opinion by highlighting the importance of religious freedoms to the constitutional guarantee of religious plurality.<sup>101</sup> She suggests that the Constitution grants powers of self-definition to the many diverse faiths and religions in India equally, to offer them accommodation – which in itself forms a part of constitutional morality.<sup>102</sup> According to her, this self-definitional subjectivity is fundamental to the rationale underlying religious freedoms in Article 25 and 26 of the Constitution.<sup>103</sup> Having settled on the broader ethical anchor to her opinion, she goes on to determine the doctrinal aspects of Article 26.

First, Malhotra J holds that the Lord Ayyappa devotees constitute a 'denomination' for the purposes of Article 26 of the Constitution.<sup>104</sup> She holds that the three-step test of determining whether or not the body in question is a denomination should be read flexibly, holding further that the test "is not a straitjacket formula, but a working formula".<sup>105</sup> She further alludes to Chinnappa Reddy J's dissenting opinion in *S.P. Mittal* to suggest that "the judicial

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<sup>97</sup> Parthasarathy, *supra* note 85, 142.

<sup>98</sup> *Id.* at 139-140.

<sup>99</sup> Sabarimala, *supra* note 1, ¶ 447 (Malhotra J).

<sup>100</sup> *Id.* at ¶ 451.6 (Malhotra J).

<sup>101</sup> *Id.* at ¶¶ 480-481 (Malhotra J).

<sup>102</sup> *Id.* at ¶ 481 (Malhotra J).

<sup>103</sup> *Id.* at ¶ 480 (Malhotra J).

<sup>104</sup> *Id.* at ¶ 495 (Malhotra J).

<sup>105</sup> *Id.* at ¶ 493 (Malhotra J).

definition of a religious denomination laid down by this Court is, unlike a statutory definition, a mere explanation”.<sup>106</sup> Having decided in favour of a flexible approach in defining ‘religious denomination’, she holds that the Lord Ayyappa devotees successfully satisfy the definitional requirements under Article 26.<sup>107</sup>

Second, with respect to the essentiality of the practice of excluding women from the temple, Malhotra J holds that the practice falls clearly within the cover of Article 26. She holds that the scope of review with respect to religious freedoms under Article 26 includes narrow questions as to: (a) the religious nature of the practice (as opposed to it being secular); and (b) its essentiality with respect to the internal tenets of the religion.<sup>108</sup> Malhotra J examines the history of the temple and concludes that the practice of excluding women has been practiced continuously by the group and forms part of their beliefs, thus satisfying the requirement of ‘essentiality’.<sup>109</sup> Here we can see that Malhotra J has relaxed the requirements of Article 26 in favour of the religious denomination. This is a clear shift away from the definition-centric approach.

Finally, she briefly engages with the more contentious issue of limitations. She expressly rejects Chandrachud J’s broad formulation of constitutional morality<sup>110</sup> and the expansive reading of Article 17<sup>111</sup>. Most importantly, she emphasises the need for exercising judicial deference in dealing with issues of religious freedoms. She refers to Article 25(2)(b) which says: “Nothing in [Article 25] shall affect the operation of any existing law or prevent the State from making any law [...] providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus”.<sup>112</sup> This, she holds, is a clear indication that the legislature has been afforded the express authority to ‘throw open’ religious institutions to the public, which necessarily implies that the judiciary does not have that power.<sup>113</sup> Therefore, only the legislature (and not the

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<sup>106</sup> *Id.* at ¶ 494 (Malhotra J).

<sup>107</sup> *Id.* at ¶ 495 (Malhotra J).

<sup>108</sup> *Id.* at ¶ 505 (Malhotra J).

<sup>109</sup> *Id.* at ¶¶ 520-521 (Malhotra J).

<sup>110</sup> *Id.* at ¶ 481 (Malhotra J).

<sup>111</sup> *Id.* at 528 (Malhotra J).

<sup>112</sup> INDIAN CONST. art 25.

<sup>113</sup> Sabarimala, *supra* note 1, ¶ 472 (Malhotra J). “The Constitution lays emphasis on social justice and equality. It has specifically provided for social welfare and reform, and throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus through the process of legislation in Article 25(2)(b) of the Constitution. Article 25(2)(b) is an enabling provision which permits the State to redress social inequalities and injustices by framing legislation. It is, therefore, difficult to accept the contention that Article 25(2)(b) is capable of application without reference to an actual legislation. What is permitted by Article 25(2) is State-made law on the grounds specified therein, and not judicial intervention.”

judiciary) can ‘throw open’ the Lord Ayyappa temple to menstruating women in the interests of social justice.<sup>114</sup>

Although this is a very plausible interpretational alternative which also stays true to the text of the Constitution, unlimited judicial deference in favour of the legislature or state could potentially render individual dignity subservient to religious freedoms. In this sense, to leave the entirety of the question of balancing to the state can potentially cause severe injustice. Malhotra J realises this, and therefore falls short of advocating for absolute deference. She opines, instead: “It is not for the courts to determine which of these practises of a faith are to be struck down, *except if they are pernicious, oppressive, or a social evil, like Sati* (emphasis supplied).”<sup>115</sup> Therefore, Malhotra J acknowledges a thin scope of judicial review over religious practices that are ‘pernicious, oppressive, or a social evil’, which is not completely deferential to the legislature’s inaction in prohibiting discriminatory religious practices.

However, Malhotra J’s opinion does not offer clear reasons for her deference in the present case. Why is the practice of excluding menstruating women from entering a temple not ‘pernicious, oppressive, or a social evil’? The purport of this phrase is left unexplained in her opinion. Chandrachud J’s approach can be borrowed here to shed some light, to the extent that Article 17 might give specific meaning to this phrase. If an action falls foul of Article 17, then the action can be said to be ‘pernicious, oppressive, or a social evil’. This seems consistent because any form of ‘stigmatisation’ which impairs individual dignity (in the manner that Article 17 is expansively defined by Chandrachud J) shall ordinarily be considered to be ‘pernicious, oppressive, or a social evil’.

In this sense, the approaches of Malhotra J and Chandrachud J are not entirely incompatible. On the contrary, their approaches are fairly similar in that they attempt to move away from a definition-centric approach and look at a narrow scope of limitation to religious freedoms - while Malhotra J makes the scope of review extremely narrow (and significantly unclear), Chandrachud J expands it to limit exclusions under Article 17.

### CONCLUSION: AN ALTERNATIVE MODEL

Having analysed the traditional definition-centric approach of Indian courts in dealing with religious freedoms along with its pitfalls, I shall now discuss a preferred interpretational

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<sup>114</sup> *Id.* at ¶ 476 (Malhotra J).

<sup>115</sup> *Id.* at ¶ 453 (Malhotra J).

alternative in light of the alternatives examined. The model can be broken down into three parts:

First, while defining religious ‘denominations’, a fluid approach should be adopted by courts in allowing groups to be so defined under Article 26 with relative flexibility. Malhotra J suggests that the constitutive elements of this definition (common organisation, common faith and distinct name) should not be read narrowly.<sup>116</sup> The bare meaning of a denomination only demands commonality of faith, and, therefore, a liberal construction should be given to that element of the definition. The mere fact of a group of individuals *commonly* believing in a particular religious figure (be that a deity or spiritual leader) should satiate the requirements of it constituting a denomination - despite the lack of a specific unique name.

Second, the scope of review in determining the ‘essential practices’ of the denomination should be narrowed down significantly. Here, Malhotra J suggests that the court should not look beyond the internal consistency or subjective belief in the tenets of the religion.<sup>117</sup> While this is true, I would go a step further to endorse Jaclyn Neo’s formulation of the test to make the scope of this test narrower still. Neo suggests that the court should only be able to invalidate a religious practice from the cover of the right on grounds of: ‘sincerity’, ‘fraud’ or ‘ulterior motive’.<sup>118</sup> This is very similar to the US Supreme Court’s approach of weeding out ‘insincerity’ claims of free exercise.<sup>119</sup>

Third, with regard to the permissible limitations to the religious freedoms, the Court should stick true to the text of the Constitution in determining an appropriate balance. First, the legislature should have a free hand in ‘throwing open’ religious institutions (which is evident

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<sup>116</sup> *Id.* at ¶ 492 (Malhotra J). “The meaning ascribed to religious denomination by this Court in *Commr., Hindu Religious Endowments* case, and subsequent cases is not a straitjacket formula, but a working formula. It provides guidance to ascertain whether a group would fall within a religious denomination or not.”

<sup>117</sup> *Id.* at ¶ 505 (Malhotra J).

<sup>118</sup> To reiterate the objection against the Court looking into the tenets of the religion to determine the essentiality of a practice, Neo suggests that secular courts are incapable of interpreting theistic documents. Often, the Court employs legal interpretive methods to interpret religious documents and tenets. She uses this to show the absurdity of cases where the appellate courts and lower courts disagree only to the extent of their interpretations of a religious text. *See* Jaclyn Neo, *supra* note 39.

<sup>119</sup> *See* *State of Vermont v. Rocheleau*, 451 A.2d 1144 (Vt. 1982). Here the Supreme Court of Vermont was examining the religious claim of a tantric Buddhist to be able to carry marijuana. The Court considered the fact that the accused in question was found in possession of the drugs at a nightclub (where he was unlikely to be practicing his religious beliefs) to be clinching proof of his in-sincerity. This is not an impermissible inquiry (since it is clearly within the ken of the Courts to deal with it) and nor is it a movement back to the definition-centric model. It only attempts to narrowly scrutinise the genuineness of the beliefs of those claiming religious protection. *Also See* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 59 STANFORD LAW REVIEW ONLINE (2014).

from Article 25(2)(b) of the Constitution). Second, apart from the throwing open of religious institutions, the limitations of free exercise should stand true to the express limitations in Article 25 and 26 (depending upon the right being invoked). Third, and most importantly, the Court should employ Article 17 to restrict the rights in Article 26 - even if the state, either expressly or impliedly, endorses the patent discrimination in question. Nevertheless, Article 17 should be invoked cautiously. Chandrachud J carefully formulates a definition to ensure that every case of discrimination does not amount to 'untouchability'. Therefore, the Court must examine the reason behind the exclusionary practice and examine if it stigmatises and impairs the dignity of the individuals affected.

These three prongs offer an interpretational alternative which, I feel, would be useful in steering clear of the definition-centric approach of the Court, while also leaving room enough to weed out practices which are patently *exclusionary* to the point that they harm the dignity of those it excludes. This strikes a nuanced balance for the scope of judicial review, by averting the many pitfalls of the definition-centric model, while also providing the Court (and the state) some teeth to weed out patently discriminatory practices.

**LINGUISTIC PERSPECTIVES ON LEGAL “CONSTRUCTION”:  
THE ADVANTAGES OF A SOCIAL SEMIOTIC APPROACH**

*Rosemary Huisman\**

*Law is made through language, and the study of language is linguistics. Just as it is possible to distinguish between formal and functional linguistics, different approaches to the theorised modelling of language, it is also possible to distinguish between formal and functional approaches to the theorised modelling of language and law. Having described the major differences between these two approaches, the paper offers more detail on a specific functional model, that of systemic functional linguistics (SFL), in which meaning-making is understood in a social context (“language as social semiotic”). Using this model, and with reference to the writing of Twining and Miers<sup>1</sup> on “the relativity of doubt” and the “unhappy interpreter”, the paper then explores two questions of statutory interpretation: first, how can evident differences in interpretation of the relevance of a statute to the facts of a case arise? Secondly, exemplified from particular cases, how is it possible that those engaged in legal discourse construct the interpretation of the statute and/or the facts of the case to achieve the outcome they desire?*

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<sup>1</sup> WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES* (London, Weidenfeld & Nicolson, 1976; 5<sup>th</sup> ed. Cambridge, C.U.P. 2012). Twining is the Emeritus Quain Professor of Jurisprudence at University College London; Miers is Emeritus Professor of the School of Law and Politics at Cardiff University.

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### I. TWO APPROACHES TO THE STUDY OF LAW AND LANGUAGE

Law is made through language, and the study of language is linguistics. So, it is unsurprising that just as one can distinguish between formal and functional linguistics as different approaches to the theorised modelling of language, one can distinguish between formal and functional approaches to the theorised modelling of law. For an illustrative contrast, we can compare passages from two so-called handbooks, *The Oxford Handbook of Language and Law*<sup>2</sup>, published in 2012, and *The Routledge Handbook of Forensic Linguistics*<sup>3</sup>, published in 2010.

For *The Oxford Handbook of Language and Law*, the editors write that their introduction identifies “the issues that we believe can and should be addressed by the

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<sup>2</sup> THE OXFORD HANDBOOK OF LANGUAGE AND LAW 6 (Lawrence M. Solan & Peter M. Tiersma eds., Oxford, O.U.P., 2012).

<sup>3</sup> THE ROUTLEDGE HANDBOOK OF FORENSIC LINGUISTICS 1 (Malcolm Coulthard & Alison Johnson eds., Taylor & Francis Group, 2010).



cross-disciplinary study of language and law”. One issue so identified is that of “Interpreting Laws”, and under that heading, we read the following passage:

“Laws are written to be followed. The very fact that there is some doubt about their interpretation means that something has gone wrong. For the most part, understanding and describing the linguistic issues that generate legal interpretative problems is a task for linguists, psychologists and philosophers. With respect to the interpretation of statutes, the problems are largely conceptual. While all kinds of interpretative issues arise from time to time, the biggest problem is to decide whether statutory language should be construed broadly, within the outer boundaries of a word’s set of meanings, or more narrowly, to include instances of ordinary usage. This, in turn, motivates a detailed exploration of the kinds of indeterminacy that arise in statutory cases, including vagueness, ambiguity, and the use of broad language that is not vague or ambiguous, but which is not sufficiently informative either.”<sup>4</sup>

Compare, in contrast, the following passage from *The Routledge Handbook of Forensic Linguistics*, again taken from the editors’ introduction:

“When Halliday wrote ‘language is as it is because of what it has to do’ a functional theory was born, giving us a perspective of meaning-making that is grounded in social purpose and in the many varied and complex contexts in which we find ourselves. Context is dynamic and socially constructed through and by discourse – both in its linguistic and non-linguistic semiotic modes – and we know that the legal world is context-rich. [...] [In this book] leading scholars from the disciplines of linguistics, law, criminology and sociology examine the ways that language has and is being used, who is using it, how they are writing, where they are speaking, why they are interacting in that way and what is being accomplished through that interaction.”<sup>5</sup>

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *Supra* note 3.

Immediately, we can note the different interdisciplinary turn of these two approaches: the first turns to “psychologists and philosophers”, the second to “scholars in sociology”. Both mention those in linguistics, but the linguists of each are unlikely to share the same theoretical assumptions about their discipline. The “Halliday” mentioned by the Routledge Handbook is M.A.K. Halliday, associated with the development of linguistic theory now known as systemic functional linguistics (SFL). The SFL model of “language as social semiotic” – assuming an explicit concern with the social function of language – is written into the Routledge introduction, but incompatible with the Oxford Handbook orientation. To explore this incompatibility – and before focusing particularly on “language and law” – it is necessary to elaborate a little on linguistic theory more generally.

## II. LINGUISTIC THEORIES

In a brief historical account, Halliday describes two perspectives to the study of language, which he terms the “logical-philosophical” and the “ethnographic-descriptive”. “They are not really impossible to reconcile with one another,” he writes, “[b]ut from time to time in the history of linguistics they drift exaggeratedly apart [...] and this is what happened in the mid-twentieth century, leading to an almost total breakdown of communication between the two.”<sup>6</sup> Philosophical grammar tries to explain the system of language without regard to its use, to study the code in isolation from behaviour; this perspective has been dominant in the United States, most famously from the work of Noam Chomsky in the study of “competence” (the native-speaker’s knowledge of “well-formed” sentences)<sup>7</sup>. Effectively a parallel discipline of “pragmatics” had to be

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<sup>6</sup> M.A.K. HALLIDAY, *Language as Code and Language as Behaviour: a Systemic-functional Interpretation of the Nature and Ontogenesis of Dialogue*, in THE SEMIOTICS OF CULTURE AND LANGUAGE VOL.1: LANGUAGE AS SOCIAL SEMIOTIC, 4-5 (Robin Fawcett, M.A.K. Halliday, Sydney M. Lamb and Adam Makkai., eds., London, Frances Pinter, 1984).

<sup>7</sup> NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (MIT, 1965). Chomsky’s “competence” is sometimes related to Ferdinand de Saussure’s *la langue* (COURSE IN GENERAL LINGUISTICS, 1916). However, Paul Thibault argues that Saussure does not focus on code in isolation. Rather it is a misreading of Saussure’s *la langue* (language system) and *parole* (individual language activity): “the crucial factor in Saussure’s view is the role played by the language system. *Langue* is a transindividual social-semiological system. It is not a matter of external sensations or sensory inputs being ‘associated’ with ideas by internal neural activity. ... No association between concept and acoustic image can take place in the absence of a socially shared system of semiological values. That is why Saussure shifts the explanatory basis away from his starting point – the individual act – to the ‘social fact’ of *langue*”. PAUL THIBAUT, REREADING SAUSSURE 141 (London & New York, Routledge, 1997).

established to study “performance”, language in use, as, for example, in speech act theory.<sup>8</sup>

To illustrate this perspective on linguistics in an early formation, here is the opening paragraph of Chapter 2, “The Independence of Grammar”, in Chomsky’s 1957 publication, *Syntactic Structures*:

“2.1 From now on, I will consider a *language* to be a set (finite or infinite) of sentences, each finite in length and constructed out of a finite set of elements. All natural languages in their spoken or written form are languages in this sense since each natural language has a finite number of phonemes (or letters in its alphabet), and each sentence is representable as a finite sequence of these phonemes (or letters), though there are infinitely many sentences. Similarly, the set of “sentences” of some formalized system of mathematics can be considered a language. The fundamental aim in the linguistic analysis of a language L is to separate the *grammatical* sequences: which are the sentences of L from the *ungrammatical* sequences which are not sentences of L and to study the structure of the grammatical sequences. The grammar of L will thus be a device that generates all of the grammatical sequences of L and none of the ungrammatical ones.”<sup>9</sup>

Notice the verb “consider” in the opening statement – this is a theory emerging *a priori* from the theorist’s mental attention. It will favour a cognitive focus; recall that the Oxford Handbook included psychologists among those relevant to the task of understanding “legal interpretative problems”. Chomsky’s text continues:

“One way to test the adequacy of a grammar proposed for L is to determine whether or not the sequences that it generates are actually grammatical, i.e., acceptable to a native speaker, etc. We can take certain steps towards providing a behavioral criterion for grammaticalness so that this test of adequacy can be carried out. For the purposes of this discussion, however, suppose that we assume intuitive knowledge of the grammatical sentences of English and ask what sort

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<sup>8</sup> See, for example, *SPEECH ACT THEORY AND PRAGMATICS* (John Searle, F. Kiefer & M. Bierwisch eds., Boston, D. Reidel, 1980).

<sup>9</sup> NOAM CHOMSKY, *SYNTACTIC STRUCTURES* 13 (MIT, 1957).

of grammar will be able to do the job of producing these in some effective and illuminating way. We thus face a familiar task of explication of some intuitive concept – in this case, the concept “grammatical in English,” and more generally, the concept “grammatical”.<sup>10</sup>

This approach to language analysis begins with the intuition of the theorist, but the empirical testing of these intuitions will still rely on a cognitive turn: what the native speaker knows as an individual. Thus, by definition, embodied practice in the social environment may be language, but it is not “a language”. Further, as already intimated, in his later (1965) publication, *Aspects of the Theory of Syntax*, Chomsky introduces the terms competence and performance to distinguish between the native-speaker’s knowledge of “well-formed” sentences and the speaker’s use of language. It is competence which is to be the object of linguistic attention.

In contrast to the “formalist” approach just described, the “ethnographic-descriptive” perspective on the study of language tends to interpret language as a resource for practice. Whereas the philosophical perspective divorces the code of linguistics from the behaviour of pragmatics, the ethnographic perspective brings code and behaviour together in the one linguistics: code as “potential for behavior” and behavior as “an instance, an actualization” of that potential. The earlier proponents of this perspective, for the most part European, include the German-American anthropologists Franz Boas and Edward Sapir, the linguists of the Czechoslovakian Prague School, the Danish linguists Louis Hjelmslev and Hans Jørgen Uldall, and, most relevant to SFL, the anthropologist Bronislaw Malinowski, who influenced Halliday’s teacher J.R. Firth, founding linguistics professor of the University of London.<sup>11</sup>

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

<sup>11</sup> From 1919 to 1928, Firth was a Professor of English at the University of Punjab at Lahore. His later academic appointments were in London, but he obviously retained his interest in India: between 1937 and 1938 Firth held a research fellowship in India, where his studies included the languages Gujarati and Telugu.

### III. LINGUISTIC “ACTUALIZATION” IN THE LAW: LEGAL CONTEXTS AND TEXTS

In her article, “The language of the law”, Yon Maley draws up the following table of various legal contexts (here called “discourse situations”) and their associated texts.<sup>12</sup>

DISCOURSE SITUATION	DISCOURSE SITUATION	DISCOURSE SITUATION	DISCOURSE SITUATION
Sources of law; originating points of legal process	Pre-trial processes	Trial processes	Recording and law-making
legislature (legislature/subject)	police/video interview (authority/subject, witness)	court proceedings examination, cross-examination, re-ex (counsel/witness)	case reports (judge/defendant, judge/other judges)
regulations, by-laws (authority/subject)	pleadings (lawyer/lawyer)	intervention, rules and procedures (judge/counsel) (judge/official)	
precedents (judges/defendants)	consultation (lawyer/lawyer) (lawyer/client)	jury summation (judge/jury)	
wills, contracts etc. (two parties)	subpoena, jury summons (authority/subject, witness)	decision (judge/defendant)	
WRITTEN TEXTS	SPOKEN & WRITTEN TEXTS	SPOKEN TEXTS	WRITTEN TEXTS
LEGAL DISCOURSES	LEGAL DISCOURSES	LEGAL DISCOURSES	LEGAL DISCOURSES

<sup>12</sup> YON MALEY, *The language of the law* in LANGUAGE & THE LAW 16 (John Gibbons ed., London, Longman, 1994).

For this study on “linguistic perspectives on legal construction”, I will focus on texts listed in the upper left and upper right corners of the table, that is, on text originating in the legislature (the upper left) and its recorded interpretation in judicial reports (the upper right) – in short, on statutory interpretation, a topic of increasing concern in legal theory.

#### IV. STATUTORY INTERPRETATION

A statute is an Act of Parliament, a written text of law. It is drafted initially as a Bill; its text is then debated, and perhaps amended, through the parliament. Finally, when passed by a majority in both the lower and upper houses of its legislature, the agreed text becomes written law.

In the Anglo tradition, statute law developed within the historical context of the common law, typically – and the traditional reference to cite here is *Heydon’s Case* of 1584 – to remedy “a mischief”: that is, some perceived problem in the common law.

“And it was resolved by them, that for the sure and true interpretation of all statutes in general four things are to be discerned and considered:

1<sup>st</sup>. What was the common law before the making of the Act.

2<sup>nd</sup>. What was the mischief and defect for which the common law did not provide.

3<sup>rd</sup>. What remedy the Parliament hath resolved and

4<sup>th</sup>. The true reason of the remedy;

and then the office of all the Judges is always to **make such construction** as shall suppress the mischief, and advance the remedy, and to **suppress subtle inventions and evasions** for continuance of the mischief, and to **add force and life** to the cure and remedy, according to the true intent of the makers of the Act.”<sup>13</sup>

However, from the 19th century on, the balance of common law and statute law has changed dramatically. According to Felix Frankfurter, a Justice of the United States Supreme Court, speaking in 1947:

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<sup>13</sup> *Heydon’s Case* (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638.

“... even as late as 1875 more than 40% of the controversies were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero.”<sup>14</sup>

Further, in 2002, Michael Kirby, then a Justice of the High Court of Australia, but speaking in Britain, said:

“... the construction of statutes is now, probably, the single most important aspect of legal and judicial work [...] The world of common law principle is in retreat [...] Where statute speaks [...] there is no escaping the duty to give meaning to its words. That is what I, and every other judge in the countries of the world that observe the rule of law, spend most of our time doing.”<sup>15</sup>

Note that Kirby includes all jurisdictions “that observe the rule of law” in his generalisation, not only those in the common law tradition.

The interpretation of statutes provokes some anxiety; relevant comments in the context of particular cases are not hard to find as, for example, in the following principal judgment from the Supreme Court of Victoria (Australia) Court of Appeal:

“[1] As so often in the work of an appellate court, this appeal turns on **a question of statutory interpretation.** [...]”

[2] Interpreting statutory provisions requires **consideration of the legislative context** and – where relevant – the legislative history. But, as the High Court has repeatedly emphasized [...], the task of statutory interpretation begins, and ends, **with the words which Parliament has used.** For it is through the statutory text that the legislature expresses, and communicates, its intention.”<sup>16</sup>

Here legal interpretation appears to be in a bind in terms of differing linguistic theories: on the one hand, acknowledging the importance of context (the Charybdis of functionalism) and on the other, a necessary focus on the wording of the statute (the

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<sup>14</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 527 COLUMBIA L. REV. 47 (1947).

<sup>15</sup> Michael Kirby, *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts*, 24 STATUTE LAW REVIEW 95, 96-97 (2003).

<sup>16</sup> *Director of Public Prosecutions v. Walters (A Pseudonym)* (2015) 49 VR 356, at 358.

Scylla of formalism). Overall, however, the court is in no doubt that the wording of the text is primary. Its judgment continues, quoting a prior judgment:

“[3] As this court said in *Treasurer of Victoria v. Tabcorp Holdings Ltd*,<sup>17</sup> there are powerful reasons of principle for giving primacy to the statutory text. First, the separation of powers requires nothing less. Axiomatically, it is for the Parliament to legislate and for the courts to interpret. Close adherence to the text, and to the **natural and ordinary meaning of the words** used, avoids the twin dangers of a court “constructing its own idea of a desirable policy”, or making ‘some a priori assumption about its purpose’. (*emphasis added*)

Secondly, giving the text its **natural and ordinary meaning** maximises the comprehensibility and accessibility of statute law and the accountability of the legislature.” (*emphasis added*)

The phrase “natural and ordinary meaning” would be a red rag to Critical Discourse critics, such as Norman Fairclough in his work on language and power.<sup>18</sup> Critical discourse scholars strongly critique this kind of literal and decontextualized reading practice, in which the interpreter represses or is unaware of their social positioning as the interpreting subject.

In the common law, “the judge speaks”, and in the earlier quote, Justice Kirby has whimsically personified the statute, “where statute speaks”. However, the judicial demands are very different. In the common law tradition, the judge remembers previous similar cases, previous judgments – an interpretation of similarity or lack of similarity between particular sets of facts – which leads her/him by a kind of logical induction to a similar or dissimilar judgment. Tony Blackshield describes this as law as a process, evolving in time.<sup>19</sup>

In contrast, written statute law, from an idealist formalist perspective, works more by the logical reasoning of the syllogism, that is, by deduction, where the major premise, that is, the general statement, is the wording of the Act, and the minor premise is the particular circumstances of the case; the legal judgment should then inevitably follow.

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<sup>17</sup> *Treasurer of Victoria v. Tabcorp Holdings Ltd* (2014) VSCA 143.

<sup>18</sup> NORMAN FAIRCLOUGH, *LANGUAGE AND POWER* (3<sup>rd</sup> ed., London, Routledge, 2015).

<sup>19</sup> TONY BLACKSHIELD, *Judicial reasoning*, in *THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA* 373-76 (Tony Blackshield, Michael Coper & George Williams eds., 2001).



This is law as a static product, timeless in its evocation. From this formalist perspective, doubt in legal interpretation is equated with objective failure. As the Oxford Handbook put it, “Laws are written to be followed. The very fact that there is some doubt about their interpretation means that something has gone wrong.”<sup>20</sup> This comment forcibly reminds me of Michael Reddy’s critique of the “conduit metaphor” of human communication, the metaphor referring to the “common-sense” understanding of meaning going directly from speaker A to speaker B. (This is an understanding which is implicit in the talk of “natural and ordinary meaning”.) Reddy comments that, on the contrary, in human communication, what should surprise us is that it often goes right!<sup>21</sup> The corollary of Reddy’s approach is to focus not, as in the formalist approach, on what generates legal interpretive problems, but rather on what facilitates legal communication. From the functional perspective of systemic linguistic theory, this means that the written statute, if it is to be interpretable as language, must be viewed as a text within a social context. Such an approach enables one, at least, to explore: *first*, how can evident differences in interpretation of the relevance of a statute to the facts of a case arise? And *secondly*, how is it possible that those engaged in legal discourse can manipulate the interpretation of the statute and/or the facts of the case in order to achieve the outcome they desire?

## V. SYSTEMIC FUNCTIONAL LINGUISTICS (SFL) AND LEGAL INTERPRETATION

Halliday’s *Introduction to Functional Grammar* has appeared in four editions since 1985, the last two (2004 and 2014) co-authored with C.M.I.M. Matthiessen. The first chapter, now titled “The Architecture of Language”, describes five dimensions of language: structure, system, stratification, instantiation, metafunction. Two are particularly relevant to this discussion of legal interpretation: the hierarchy of stratification (abstraction) and the cline of instantiation (generalization).<sup>22</sup>

Stratification refers to the modelling of levels of language: the extra-linguistic level of context; the semantic level of meaning; the level of the lexicogrammar (the vocabulary and grammar of the wording); the expression level of both phonology (for

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<sup>20</sup> *Supra* note 2.

<sup>21</sup> MICHAEL REDDY, *The Conduit Metaphor – A Case of Frame Conflict in our Language about Language*, in METAPHOR AND THOUGHT 285-324 (Andrew Ortony ed., Cambridge, CUP, 1979).

<sup>22</sup> M.A.K. HALLIDAY AND C.M.I.M. MATTHIESSEN, INTRODUCTION TO FUNCTIONAL GRAMMAR 24-30 (Abingdon, U.K. & New York, Routledge, 4th ed. 2014). Henceforth HALLIDAY & MATTHIESSEN (2014).

speech) and graphology (for written language, as in the expression of statutes). Each level realizes that above it and is realized by that below it. Halliday has written

“Realization is probably the most difficult single concept in linguistics. It is the relationship of “meaning-&-meant” which, in semiotic systems, replaces the “cause-&-effect” relation of classical physical systems. Unlike cause, realization is not a relationship in real time. It is a two-way relationship that we can only gloss by using more than one word to describe it: to say that wordings (lexicogrammatical formations) **realize** meanings (semantic formations) means both that wordings **express** meanings and that wordings **construct** meanings.”<sup>23</sup> (*author’s emphasis*)

This is something like the comment in the Routledge Handbook that “Context is dynamic and socially constructed through and by discourse – both in its linguistic and non-linguistic semiotic modes.”<sup>24</sup> Halliday sometimes prefers the word *construe* rather than *construct*, which he glosses as “**construed** – that is, constructed in the semiotic sense”. In legal usage, “construction” is habitually used for what the judge does, as in the early quote from Kirby on “... the construction of statutes”, but just what the individual judge understands s/he is doing is exactly the question.<sup>25</sup>

Instantiation, the dimension of generality, refers to a cline of language, from maximum potential or macro perspective to specific instance or micro perspective, with intermediate positions. It operates at all levels of stratification. Moving along the dimension of instantiation allows an interpreter to admit more or less of the potential context and/or language into the interpretation of this particular instance. The following table gives a simple example relevant to a statute, with the levels of stratification on the vertical axis and three points on the cline of instantiation on the horizontal axis.

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<sup>23</sup> M.A.K. HALLIDAY, *Systemic Grammar and the Concept of a “Science of Language”* in ON LANGUAGE AND LINGUISTICS 210 (COLLECTED WORKS VOL. 3, Jonathan Webster ed., London, Continuum, 2003).

<sup>24</sup> *Supra* note 3.

<sup>25</sup> Peter M. Tiersma tries to distinguish the performative “construction” of the judge from the “interpretation” of everyday use. *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction* 73 WASH. U. L. Q. 1095 (1995).

Potential	Intermediate Potential	Instance
context of culture	intermediate context  e.g. Australian legal culture	context of situation of an Australian statute  (Hasan's 'relevant context': a semiotic construct of field, tenor and mode <sup>26</sup> )
semantic system	legal discourse	meaningful specific statute
lexicogrammatical system	legal wording	wording of specific statute
graphic system of expression	legal graphology	graphology of specific statute

The process of interpretation proceeds in terms of these two dimensions. For the reader of a written text, the stratification dimension means

- i. recognizing the graphic marks on the page as the graphic expression, the organized use, of a particular language;
- ii. understanding that expression as the wording of the text at the level of lexicogrammar;
- iii. construing the meanings of the text at the level of semantics; and finally,
- iv. construing an extra-linguistic context of situation that is, making sense of the text.

However, taking into account the dimension of instantiation, at each level the construal is understood in the potential of that level as previously experienced by the reader. One could imagine each level as a small circle of text surrounded by a larger circle of potential, the resource of the reader's previous experience. So, using the limitations of my own resources: my previous experience of Telugu does not enable me to move from graphetics to graphology; I cannot identify the organization of the script. On the other hand, in Finland, I could recognize the roman letters used for the graphic expression, but I could not construe the wording; I do not know the non-Indo-European features of

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<sup>26</sup> Later mentioned in relation to "perturbation". RUQAIYA HASAN, *The Place of Context in a Systemic Functional Model*, in CONTINUUM COMPANION TO SYSTEMIC FUNCTIONAL LINGUISTICS 178 (M.A.K. Halliday & Jonathan J. Webster eds., London, Continuum, 2009). The terms field, tenor and mode are briefly described in footnote 29.

Finnish. In Italy, my youthful Latin study means I can identify much of the wording and construe some of the meanings, but I do not really know the language. And finally, at the extra-linguistic level of context: a delightful little book by the Italian physicist Carlo Rovelli, *Seven Brief Lessons on Physics*, though I can understand all the English of its translation, leaves me still puzzled by loop quantum gravity; I lack sufficient context in the disciplinary context of physics to make complete sense of it.<sup>27</sup> Thus the accumulative potential of previous experience widens, until, at the level of context of situation, all the reader's previous experience of the language system and the context of culture potentially contributes to "making sense of the text".

The following figure illustrates the same topic, though adding a third SFL dimension – that of metafunction – to the two discussed above.<sup>28</sup> Each metafunction intersects with stratification and instantiation, so that the relation of instance and resource is co-existent for each metafunction.<sup>29</sup>

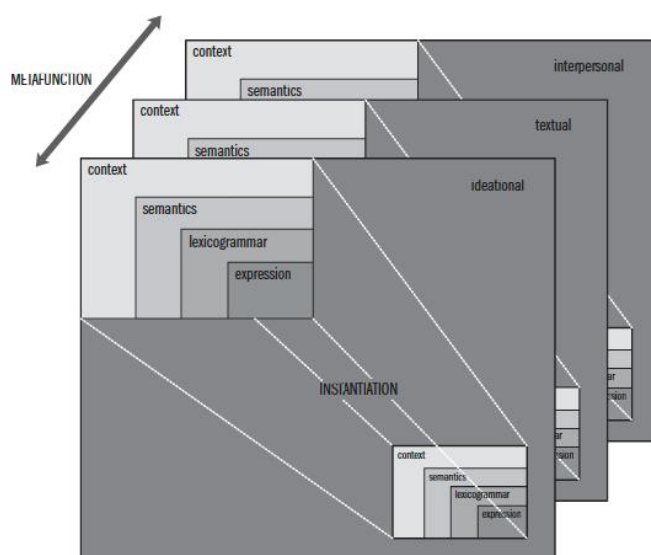


Fig. 1-12 Metafunction

<sup>27</sup> CARLO RAVELLI, *SEVEN BRIEF LESSONS ON PHYSICS* (Penguin, 2014).

<sup>28</sup> HALLIDAY & MATTHIESSEN 31 (2014).

<sup>29</sup> Halliday derives three metafunctions from the functional evolution of language: ideational meanings evolved to construe experience, interpersonal meanings evolved to enact social processes, and textual meanings evolved to produce text coherent with its environment of use. (*id.* 29). Each metafunction realizes an aspect of the context of situation: ideational metafunction and field; interpersonal metafunction and tenor; textual metafunction and mode. The study of interpersonal meaning and its realization of tenor in legal texts is of particular significance, as discussed in Rosemary Huisman, *Modality and the Law*, 5 ANNUAL REVIEW OF FUNCTIONAL LINGUISTICS 7-21 (2014).

Returning to just the intersection of the two dimensions of stratification and instantiation, we find different approaches to statutory interpretation can be plotted on the grid.

For more formalist theories, the upper level of stratification is that of semantics, construed from the wording of the text. To a greater and lesser degree, such theories may permit movement back and forth on the cline of instantiation at the semantic level, which may allow the inclusion of a more general potential of legal meanings; for example, the interpretation given to the statute in previous judgments. However, they do not include movement “upwards” into the level of context; that is, they assume that the statute ought to have a determinate legal meaning. It is not a meaning that must be adjusted for the context of the specific case.

In contrast, for those theories that do allow the upper SFL level of context, the meaning of the statute can only be fully construed in an understanding of the context of the particular case. The potential of this context – of legal culture and even more widely of general culture – is extensive. The standard Australian textbook on statutory interpretation, Pearce and Geddes, has one chapter on “Intrinsic or Grammatical Aids to Interpretation” (Chapter 4) and another chapter on “Extrinsic Aids to Interpretation” (Chapter 3).<sup>30</sup> The latter is lengthy and various but includes, for example, the use of parliamentary, executive and related materials, such as reports of law reform commissions, reports of parliamentary committees, the application of common law principles, international agreements etc. As already mentioned, legal interpretation is often referred to as “construction”. The more the potential legal and even broader social context is admitted to the construction, the broader the range of so-called “extrinsic materials” which may contribute to interpretation.

The foregoing discussion answers my first question: how can evident differences in interpretation of the relevance of a statute to the facts of a case arise? They arise because particular interpreters make more or less use of the full potential of the language dimensions of instantiation and stratification. This difference of use becomes striking in considering my second question, to which I now turn.

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<sup>30</sup> D.C. PEARCE AND R.S.GEDDES, *STATUTORY INTERPRETATION IN AUSTRALIA* (8<sup>th</sup> ed. 2014). (The 9<sup>th</sup> edition came out in late 2019 but I shall refer to the 8<sup>th</sup> edition of 2014.)

## VI. THE UNHAPPY INTERPRETER AND THE “RELATIVITY OF DOUBT”

How is it possible that those engaged in legal discourse can manipulate the interpretation of the statute and/or the facts of the case in order to achieve the outcome they desire? The Oxford Handbook begins, “Laws are written to be followed. The very fact that there is some doubt about their interpretation means that something has gone wrong.”<sup>31</sup> However, in the practical experience of actual judges interpreting actual statutes, the “biggest problem” is rarely that of doubt about their interpretation, but rather that the meaning is clear and the judge does not like it!<sup>32</sup> What, if anything, can be done?

In their book, *How to Do Things with Rules* (obviously a play on J.L. Austin’s 1955 book, *How to Do Things with Words*), the legal scholars William Twining and David Miers have an amusing take on this dilemma; they speak of the happy and unhappy interpreter and “the relativity of doubt”.<sup>33</sup> “Doubt”, they write, “is a relative matter. It is not uncommon in both legal and non-legal contexts for some participants to express doubts about the interpretation or application of a rule, while others maintain that it is clear.”<sup>34</sup> Their observation contrasts with the assumption in the Oxford Handbook that it is in the text, rather than in the interpreter, that difficulties arise. Thus, the Handbook speaks of the need for “a detailed exploration of the kinds of indeterminacy that arise in statutory cases, including vagueness, ambiguity, and the use of broad language that is not vague or ambiguous, but which is not sufficiently informative either.”<sup>35</sup> However, for Twining and Miers, from the same wording, interpreters can disagree on whether a text is indeterminate in meaning or not.

Twining and Miers go further, however. For their unhappy interpreter, “although the scope of the rule may be clear, at least on the surface, it is an obstacle to his securing the result he desires.” Two responses are possible. One, in a nineteenth century English report, is nicely formalistic:

“If the precise words used are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it

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<sup>31</sup> *Supra* note 2.

<sup>32</sup> Tony Blackshield, in conversation.

<sup>33</sup> WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES* (London, Weidenfeld & Nicolson, 1976; 5<sup>th</sup> ed. Cambridge, C.U.P. 2012).

<sup>34</sup> *Id.* 96-98.

<sup>35</sup> *Supra* note 2.

do lead, in our view of the case, to an absurdity or manifest injustice [...] [W]e assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning.”<sup>36</sup>

But, as doubt is a relative matter, the second response of the unhappy interpreter can be to encourage doubt; as Twining and Miers put it, “the unhappy interpreter may be able to pave the way for a less obvious interpretation, by creating or establishing a doubt that then needs to be resolved.” The unhappy interpreter can do this in one of two ways. First, s/he can dispute the construal of meaning and context of the situation from the statute’s wording, a movement on the dimension of stratification. Or, secondly, s/he may not dispute the construal of meaning from the wording of the text, but insist that the context of situation. the interpretative sense made in this legal instance, must take in more of the potential context. This is a movement on the dimension of instantiation.

As already intimated, these matters are centrally relevant to questions of “ambiguity” and “vagueness” in the Oxford Handbook account. In his chapter in that book, “Ambiguity and Vagueness in Legal Interpretation,” Ralf Poscher writes, “Few topics in the theory of language are as closely related to legal interpretation as the linguistic indeterminacy associated with ambiguity and vagueness.”<sup>37</sup> In a colloquial sense, Poscher points out, “both vagueness and ambiguity are employed generically to indicate indeterminacy.” They can, however, he suggests, be distinguished: “ambiguity ... is about multiple meanings; vagueness is about meaning in borderline cases” (128-29.) So, for Poscher these are two categories of indeterminacy that can be identified **in the text**.

Again we see how “the theory of language” brought to a topic pre-determines what can be said. Those who assume a formalist theory, one in which the upper level of linguistic study is semantics, discuss semantic indeterminacy “in the text” and consign the study of social context, language in use, to that other discipline: pragmatics. But to accommodate the “relativity of doubt” described by Twining and Miers, relating not only

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<sup>36</sup> *Id.* 167, quoting Chief Justice Jervis in *Abley v. Dale* (1851) 11 C. B. 378 at 391, 138 ER 519 at 525.

<sup>37</sup> Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in *THE OXFORD HANDBOOK ON LANGUAGE AND LAW* 128-44 (Lawrence M. Solan & Peter M. Tiersma eds., Oxford, O.U.P., 2011).

to differences of interpretation by different readers but also to the deliberate fostering of doubt by “unhappy interpreters”, one needs a functional theory of language in which meanings and context realize each other. There is no separate discipline of “pragmatics”.

A formalist account, in contrast, can even pit meaning and context against each other! Consider Poscher’s comments on “vagueness”:

“Pragmatic vagueness is central to legal interpretation. Law is not about semantics but about the pragmatic shaping of social relations in the broadest sense. Law’s relation to language is instrumental. The law uses linguistic expressions to establish regulations in order to achieve social goals. The instrumental role of language in law explains why the pragmatic purpose of a regulation is such a powerful argument in law. This does not imply that semantics have no import. For whoever has to interpret the law, the semantics of the expressions are the primary means of deciphering the social purpose of a regulation, but the pragmatic social purpose can override semantic conventions – even if certain forms of textualism debate the legitimacy of this ubiquitous feature of legal practice.”<sup>38</sup>

With such a formalist distinction between semantics and pragmatics, appeals to the text and appeals to extrinsic materials are represented as oppositional. Theoretical approaches that maintain this distinction cannot explain, as a functional model can, how the “unhappy interpreter”, through recontextualizing the text, can *introduce* doubt into the meaning of the text. Earlier I mentioned Ruqaiya Hasan’s concept of “relevant context” (of field, tenor and mode). Hasan contrasted this relevant context with what she called the “material situational setting”, which nonetheless could “perturb” the context, and become “relevant” under certain conditions, such as the condition of informal conversation, in which speakers may readily change topics as their attention changes.<sup>39</sup> In effect, the “unhappy interpreter” can deliberately set out to cause such perturbation. Thus, vagueness and ambiguity, however categorised, are not intrinsic attributes of the wording of the text. Rather they are a realization at the level of semantics/meaning of a

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<sup>38</sup> *Id.* 135.

<sup>39</sup> RUQAIYA HASAN, *The Place of Context in a Systemic Functional Model*, in CONTINUUM COMPANION TO SYSTEMIC FUNCTIONAL LINGUISTICS 178 (M.A.K. Halliday & Jonathan J. Webster eds., London, Continuum, 2009).



context of a situation which has been assumed as relevant by the particular interpreter of the legal text.

## VII. EXAMPLES OF “PERTURBATION” IN LEGAL CONSTRUCTION

The first way for the unhappy interpreter to try to establish doubt is by disputing “the construal- of meaning and context of the situation from the wording” of the statute, a movement on the dimension of stratification (the dimension of abstraction). The following example is from South Africa.<sup>40</sup>

Under the South African Criminal Procedure Act of 1977, a defendant wishing to challenge the voluntary nature of a confession bore the onus of proof. This situation was to be reversed in the new South African Constitution. In the transition period, an interim Constitution came into force on 27 April 1994, and it determined that in trials begun on or after that date, the new situation would apply; that is, the old provision of “reverse onus on the defendant” would no longer apply.

But in a particular case, whether the interim Constitution did apply depended on the interpretation of a transitional provision, which included:

“(8) All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed.”<sup>41</sup>

An initial problem was whether the prosecution *was* “pending” when the interim Constitution commenced on 27 April 1994, but assuming that the proceedings *were* pending “immediately before” 27 April, the second problem was what exactly was *meant* by saying that they should be “dealt with as if this Constitution had not been passed”. An apparently clear reading was that the “reverse onus” on a defendant should still apply, an interpretation which did not please the judge, Justice Mahomed:

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<sup>40</sup> The example is extracted from detailed case notes prepared by Tony Blackshield for his Comparative Constitutional Law course given at NALSAR University of Law, Hyderabad, in 2020. The case is *State v. Mhlungu*, 1995(3) SA 867.

<sup>41</sup> *Id.*

**“Mahomed J [880]:** [T]he direction that pending proceedings ‘shall be dealt with’ as if the Constitution had not been passed [...] is an unusually colloquial expression to be found in a formal statutory instrument. If the intention of the law-maker was to say that pending proceedings should be adjudicated on the basis that the Constitution in all respects should be ignored, it could have used clearer language [...] [T]he *Criminal Procedure Act* 51 of 1977 [...] [used the words] ‘they should be continued and concluded’ [...]

**[881]** ‘Deal with’ is a more protean, inherently more tentative idea [...] The phrase [...] has different nuances but one of its well recognized meanings is to ‘Take action, act, proceed (in a matter) [...] Set to work, practise’. These are perfectly appropriate expressions to confer authority on a Court or tribunal to *proceed with* or *take action* under the authority vesting in it in terms of ‘the law then in force’ [...] If the intention of the Constitution was to say that pending matters should be ‘continued and concluded’ as if the Constitution had not been passed it would have been a simple matter to say so in such a phrase of well-known usage in our statute law instead of recourse being had to something so colloquial, flabby and uncertain as ‘deal with’ [...]”

By the end of all that, the declared protean – that is diversely meaning – words “dealt with” have been rendered legally opaque rather than merely ambiguous.

The second way for the unhappy interpreter to try to establish doubt is by insisting that a wider context, more of the potential legal context, must be brought into the specific interpretation of the particular legal instance, that is, a movement on the dimension of instantiation (a dimension of generalisation). In the following three examples, the reasoning moves progressively to positions of more general potential.

The opinion of the Supreme Court of the United States in *King v. Burwell*, supported by six justices, found Obamacare – more formally the Affordable Care Act – to be legitimate. Three justices were in dissent.<sup>42</sup> The reasonings are replete with comments on statutory interpretation which illustrate its demands and the inventive

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<sup>42</sup> *King v. Burwell*, 576 US 988, 135 S. Ct. 2480 (2015).

responses of the justices. The problem arose from a lacuna in the drafting: the text of Section 36B should have mentioned both Federal and State Exchanges but its wording mentioned State Exchanges only. The following extracts show those in accord, the unhappy interpreters of its clear meaning, arguing to introduce ambiguity into its interpretation.

“It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. [...] But oftentimes the “meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.” [...] So when deciding whether the language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.” [...] Our duty, after all, is “to construe statutes, not isolated provisions.”<sup>43</sup>

and so

“These provisions suggest that the Act may not always use the phrase “established by the State” in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context.”<sup>44</sup>

and

“The Affordable Care Act contains more than a few examples of inartful drafting [...] Anyway, we “must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” [...] After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase “an Exchange established by the State under [Section 18031]” is unambiguous.”<sup>45</sup>

This double negative is a tentative way of saying “we can conclude that the phrase is ambiguous” – a bald conclusion they are moving towards with some delicacy at this stage of their reasoning!

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<sup>43</sup> *Id.* at 2489.

<sup>44</sup> *Id.* at 2490.

<sup>45</sup> *Id.* at 2492.

The Justices acknowledge they are aware of the dangers of this kind of argument but have found it “appropriate in this case”:

“Reliance on context and structure in statutory interpretation is a “subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.” For the reasons we have given, however, such reliance is appropriate in this case and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.”<sup>46</sup>

So finally, no longer tentative, they assert their reading of the text-in-context, reading the words “an exchange established by the State” to refer to “State and Federal Exchanges”:

“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.”<sup>47</sup>

Justice Scalia, in dissent, regards these reasonings as preposterous. Among his comments, he expostulates: *Pure applesauce*, (US slang: “nonsense”, “rubbish”).<sup>48</sup> Though it is an example of unwanted textual clarity rather than textual vagueness, Poscher might find this case a classic example of textual wording *versus* pragmatic purpose, and Scalia a representative of “certain forms of textualism”.<sup>49</sup>

It was noted earlier that, from an idealist formalist perspective, written statute law works more like a logical syllogism; the major premise is the wording of the Act, the minor premise is the particular circumstances of the case, and the legal judgment should

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<sup>46</sup> *Id.* at 2495-96.

<sup>47</sup> *Id.* at 2496.

<sup>48</sup> *Id.* at 2501.

<sup>49</sup> Though Scalia is not unaware of context when it suits his argument, see for example *Smith v. United States*, 508 US 223, 241-42 (1993).

inevitably follow. “Inartful drafting....”, as that in the Affordable Care Act is said to be, can undermine the pertinent application of this logic. However, another challenge to this modelling arises when the particular circumstances reveal a lacuna in the Act. This is a problem of legislation rather than drafting; in SFL terms, the legislators had not envisaged a potential context of situation. The following case exemplifies such a dilemma.

In the Australian High Court case of *Al-Kateb v. Godwin*,<sup>50</sup> The Australian Migration Act established that an illegal non-citizen could be detained until they could be deported. However, Al-Kateb was a stateless person whom no other country would agree to accept. The Act did not cover this situation. Could Al-Kateb be indefinitely detained? In a bench of seven judges, a majority of four effectively said he could be. The Australian High Court, unlike that in the USA, does not usually give one opinion of the court; each Australian justice, for both the majority and the dissent, may give her/his own reasons for judgment, or concur with a joint judgment of one or more fellow justices. Six of the seven justices wrote their own reasons. I have written one paper, and Tony Blackshield and I together another paper, on this case, examining the contrasting interpretative strategies of the different justices.<sup>51</sup> For example, Justice Hayne in the majority finds the wording of the Act “intractable” (para 241). (An illegal non-citizen must be detained until he can be deported ...). Each of the three dissenters offers a different argument: first, an intrinsic argument (of stratification), that “time” in the wording of the Act could not be construed as “timeless” (Gummow J.); secondly, an extrinsic argument (of legal potential), that relevant decisions in international law should be taken into the Australian legal context for the decision (Kirby J.); and thirdly, an extrinsic argument invoking the Australian legal culture at its most general, the opinion of then Chief Justice Gleeson that, invoking the principle of legality, any infringement of human rights must be legislated explicitly (*habeas corpus* is one such right).

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<sup>50</sup> *Al-Kateb v. Godwin* (2004) 219 CLR 562.

<sup>51</sup> Rosemary Huisman and Tony Blackshield, *Tenor in Judicial Reasoning: majority and dissenting judgments in the High Court of Australia (Al-Kateb v. Godwin, 2004)*, 9 LINGUISTICS AND THE HUMAN SCIENCES 229-48 (2014); ROSEMARY HUISMAN, *The trace of time in judicial reasoning: a case of conflicting argument in the High Court of Australia (Al-Kateb v. Godwin, 2004)*, in TIME AND TRACE 256-75 (Sabine Gross and Steve Ostovich eds., Leiden & Boston, Brill, 2016).

Subsequently, Gleeson's opinion provoked the most comment, and I quote it in part:<sup>52</sup>

**“para 19.** Where what is involved is the **interpretation** of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases. It is not new. In 1908, in this Court, O'Connor J. referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that “[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness”<sup>53</sup> (*emphasis added*).

Unlike India, with Part III of its Constitution directly concerned with “Fundamental human rights”, Australia has no Bill of Rights but Gleeson's reasoning, especially in his quoting of *Maxwell on Statutes*, asserts that Australian statute law is interpreted in the context of fundamental principles, derived presumably from the common law. It might be suggested that the desire for “irresistible clearness” of legislative production of text is subject to the same criticism as the desire to give “natural and ordinary meaning of the words used” to the judicial interpretation of text, as earlier exemplified. However, the situation is not identical; the legislature produces legal text

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<sup>52</sup> 219 CLR at 577.

<sup>53</sup> Gleeson is quoting from *Potter v. Minahan* (1908) 7 CLR 277 at 204. Gleeson's successor as Australian Chief Justice, Robert French, has pointed out that the passage in *Maxwell on Statutes* was in turn derived from the judgment of United States Chief Justice John Marshall in *United States v. Fisher*, 6 United States Reports 358, at 390 (1805).

from its legislative intention (though it may effect that intention clumsily), but the judiciary must construe any understanding of that intention from the produced text. (Justice Scalia, on the Affordable Care Act, found any such construal irrelevant.)

My final example exemplifies the elephant in the room of statutory interpretation; that is of course, the Constitution. Constitutional cases are those where the most authoritative level of the judiciary must decide whether the legislature has passed statutes that are invalid by the tenets of the relevant Constitution. The Constitution is then a kind of super-Act – where the buck stops! – but, as for an ordinary act, individual judicial reasoning may favour a formalist or a more functional perspective towards interpretation. A case of the latter kind is *Brown v. Board of Education of Topeka*, decided in 1954.<sup>54</sup> This is the famous case which desegregated schools in the United States, a social outcome which the judiciary would have known would provoke civil unrest, especially in the southern states. This is not really an example of an unhappy interpreter in the law, but rather an example of those in the law wanting to speak beyond the context of the law. The language is worth studying, for unlike the typical constitutional case in which learned judges are writing to be read by learned lawyers, its register – that is, its choices of meanings and wordings – appears to be written to communicate to a wider social audience. Although the legality of the Court's opinion rests on the 14<sup>th</sup> Amendment of the United States Constitution, the reasons, as in the short extract below, focus with “irresistible clarity” on the wider social context of the case, wider that is, than the potential legal context:

“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the

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<sup>54</sup> 347 US 483 US (1954).

opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."<sup>55</sup>

On the dimension of instantiation, this opinion moves well beyond the potential legal context to the more general context of American culture, to what is important "to our democratic society", required for the performance of "public responsibilities" and "good citizenship".

#### **VIII. CONCLUSION: THE ADVANTAGES OF A SOCIAL SEMIOTIC APPROACH TO LEGAL "CONSTRUCTION"**

This paper began with the assertion that law is made through language and the study of language is linguistics. An approach, such as that of SFL, which studies "language as social semiotic" also enables the study of "law as social semiotic". This phrase describes the interpenetration of legal text and social context – as is exemplified in the study of particular judicial reasonings – and understanding this interpenetration helps to explain the complexity of legal interpretation. On the one hand, legal interpretation is meaningful within the social context of its practice. At the same time, legal interpretation gives meaning to that social context. As quoted previously (Section I) from the *Routledge Handbook of Forensic Linguistics*, "Context is dynamic and socially constructed through and by discourse – both in its linguistic and non-linguistic semiotic modes."

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<sup>55</sup> *Id.* at 493.



**PERILS AND POSSIBILITIES OF MICROFINANCE:  
NEED FOR REGULATORY REFORMS IN INDIA**

*Binit Agrawal\**

*In the last few years, the poor in India, especially in rural areas, have been suffering from an acute credit crisis. This is a key reason behind the ongoing consumption slowdown, income stagnation, and loss of livelihood. The Covid-19 pandemic has worsened the situation by taking away livelihood in both rural and urban areas. Going ahead, one of the key players that can resolve the credit crunch problem is the microfinance industry. However, Microfinance Institutions (MFIs) themselves suffer from various operational issues due to inadequate or unsuitable regulatory provisions. The lack of proper regulations has also troubled consumers, and caused farmer suicides and political disturbances resulting in a prevailing sense of mistrust against MFIs in various parts of the country. Furthermore, questions are being raised as to how effective MFIs have been in fighting poverty. All these issues can be tackled only when there are prudent and effective regulations in place. Regulations must incorporate rules dealing with, amongst other things, data regulation, consumer protection, principal-based interest rate policy, the creation of a specialized regulatory body, and financial literacy. This will help unleash the true potential of MFIs, providing them with the necessary fuel for structured growth and extending credit and financial services to the unbanked.*

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## INTRODUCTION

*“When the poor at the bottom of the pyramid are treated as consumers, they can reap the benefits of respect, choice, and self-esteem and have an opportunity to climb out of the poverty trap.”*

— C.K. Prahalad<sup>1</sup>

Today, we have moved far away from the days when microfinance was touted as that rare poverty alleviation tool which could actually cause a crack in the cycle of poverty.<sup>2</sup> Microfinance, an integral part of Indian rural banking and financial inclusion policy, involves giving small doses of credit to the poor, who are expected to use it for productive activities and to scale up their businesses. However, in recent times, microfinance has come under intense scrutiny. This is primarily because today, microfinance is bigger than mere credit delivery. Its rapid commercialization has metamorphosed it into a galaxy of institutions<sup>3</sup> which provide a bouquet of financial services to the poor, especially those in the rural area. These services may be categorized into microcredit (which involves extending loans), micro-savings (which provide avenues to save and invest), micro-insurance (which provided means to mitigate risks),

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<sup>1</sup> C. K. PRAHLAD, THE FORTUNE AT THE BOTTOM OF THE PYRAMID 120 (2005).

<sup>2</sup> Kentaro Toyama, *Lies, Hype, and Profit: The Truth About Microfinance*, THE ATLANTIC (Jan. 28, 2011), <https://www.theatlantic.com/business/archive/2011/01/lies-hype-and-profit-the-truth-about-microfinance/70405/>.

<sup>3</sup> In India, these include Banks, Non-Bank Financial Company-Microfinance Institutions (“NBFC-MFIs”), Regional Rural Banks, Co-operative Banks and Societies, Non-Governmental Organizations, and Not for Profit Companies.

and money transfer.<sup>4</sup> Prior to such commercialization and privatization, microfinance was dominated by the public sector, NGOs, and cooperatives. Since then, multiple private companies, seeing value in microfinance, have entered the field, creating a massive fortune in the process and extending the formal financial network to a major part of the population.<sup>5</sup> The importance of Microfinance Institutions (**MFIs**) can be gauged from their widening and deepening reach across the country. In financial year 2019-20, there were over 14,275 MFI branches with over 1.16 lakh employees; 62% of these branches provided door-step credit to low-income clients.<sup>6</sup> MFIs are expected to play a key role<sup>7</sup> in over 125 of the 185 districts identified by the Reserve Bank of India (**RBI**) as India's most backward in financial accessibility<sup>8</sup>. Furthermore, the loan portfolio of MFIs is growing at the rate of over 30% and stands at Rs. 2.36 trillion as of 2020.<sup>9</sup> It is also pertinent to note that India accounts for almost a quarter of the global microfinance industry.<sup>10</sup> Furthermore, MFIs are becoming a key part of priority sector lending by banks. In the financial year 2019-20, MFIs raised a total of Rs. 357.59 billion in debt funding from banks, marking a 63% increase from the debt funding of Rs 219.67 billion in 2018.<sup>11</sup>

While MFIs have shown impressive commercial growth, in the last few years, questions have been raised as to their effectiveness and the sustainability of their business models.<sup>12</sup> In India, this debate entered the limelight due to a huge crisis that unfolded in the state of Andhra Pradesh, which had the largest concentration of microfinance customers in the country in the year 2010. This crisis was triggered by a spate of suicides linked to microfinance defaults.<sup>13</sup> At the centre of it was SKS Microfinance, a listed NBFC, which has now changed its name to

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<sup>4</sup> ERNST AND YOUNG, CHALLENGES IN MICROFINANCE 1 (2014), <https://pdf4pro.com/cdn/an-ey-perspective-5044.pdf>.

<sup>5</sup> Rajesh Chakraborty & Kaushiki Sanyal, *Microfinance and Financial Inclusion in India*, in FINANCIAL INCLUSION IN ASIA: ISSUES AND POLICY CONCERNS 209, 211 (Sasidharan Gopalan & Toomoo Kikuchi eds., 2016).

<sup>6</sup> Advait Rao Palepu, *Agents, MFIs Key To Expanding Priority Sector Lending To Low Credit Districts*, BLOOMBERG QUINT (Sept. 10, 2020), <https://www.bloombergquint.com/business/agents-mfis-key-to-expanding-priority-sector-lending-to-low-credit-districts>.

<sup>7</sup> *Id.*

<sup>8</sup> Reserve Bank of India, Master Directions – Priority Sector Lending (PSL) – Targets and Classification, RBI/FIDD/2020-21/72 (Issued on Sept. 4, 2020, updated as on Apr. 29, 2021).

<sup>9</sup> *Microfinance industry sees 31% rise in loan portfolio at Rs 2.36 lakh crore in FY20: Report*, FINANCIAL EXPRESS (Nov. 9, 2020), <https://www.financialexpress.com/industry/banking-finance/microfinance-industry-sees-31-rise-in-loan-portfolio-at-rs-2-36-lakh-crore-in-fy20-report/2124799/>.

<sup>10</sup> PWC INDIA, VISION OF MICROFINANCE IN INDIA 6 (2019).

<sup>11</sup> *Id.*, at 12.

<sup>12</sup> Navjot Sangwan, *Loan sharks are circling for poor Indian debtors failed by microfinance*, THE GUARDIAN (Oct. 29, 2018), <https://www.theguardian.com/global-development/2018/oct/29/loan-sharks-circling-poor-indian-debtors-failed-by-microfinance>.

<sup>13</sup> *Big trouble for microfinance*, THE ECONOMIST (Dec. 2, 2010), <https://www.economist.com/free-exchange/2010/12/02/big-trouble-for-microfinance>.

Bharat Financial Inclusion.<sup>14</sup> Of the 30 women who first died by suicide in Andhra Pradesh due to the pressure tactics of loan-sharks, 17 were customers of SKS.<sup>15</sup> The crisis witnessed politicking, the introduction of knee-jerk regulations, media trials, the loss of customers, an increase in default rates, and overall distrust as to the success of microfinance. However, it highlighted one important thing: microfinance, which was hitherto unregulated, must be regulated. Regulations were necessary to keep knee-jerk policies and politics at bay, safeguard consumers, prevent reckless short-term profit strategies, and provide a rules-based structure to the overall industry. Consequently, the RBI initiated a consultative process which culminated in the creation of a series of rules and regulations governing microfinance.<sup>16</sup> Since then, the regulatory structure of MFIs has changed significantly, creating many successful and impactful companies. Bandhan Bank, a fast-growing private lender, started as a microfinance institution. The trust which it was able to create with its customers, enabled the bank to transform into a full-service bank, which today continues to have over 61% exposure to microfinance.<sup>17</sup> This shattered the existing view that an MFI needs abusive tactics to maintain repayment and profitability.

Nonetheless, many areas of concern remain. MFIs have time and again requested policy-makers to frame necessary regulations.<sup>18</sup> Civil society groups too have been demanding that the corpus of rules in place must be suitably modified to ensure that focus is shifted away from commercial objectives towards the original aim of microfinance: defeating poverty.<sup>19</sup>

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<sup>14</sup> Vishwanath Nair, *SKS loses its final connection with the microfinance crisis—its name*, LIVEMINT (May 5, 2016), <https://www.livemint.com/Companies/JLuCeEZx07hS9K13F3sKnO/SKS-loses-its-final-connection-with-the-microfinance-crisis.html>.

<sup>15</sup> *Id.*

<sup>16</sup> Vijay Mahajan & T. Navin, *Microfinance in India: Lessons from the Andhra Crisis*, in MICROFINANCE 3.0: RECONCILING SUSTAINABILITY WITH SOCIAL OUTREACH AND RESPONSIBLE DELIVERY (D Kohn ed., 2013) 10-11, <https://core.ac.uk/download/pdf/81178564.pdf>.

<sup>17</sup> Nupur Anand, *The story behind India's biggest banking IPO began with rural women*, QUARTZ INDIA (Mar. 7, 2018), <https://qz.com/india/1223219/bandhan-bank-from-rural-women-to-indias-biggest-banking-ipo/>; *Bandhan Bank to gradually pare micro credit exposure: Chandra Sekhar Ghosh*, LIVEMINT (Mar. 12, 2020), <https://www.livemint.com/industry/banking/bandhan-bank-to-gradually-pare-micro-credit-exposure-chandra-sekhar-ghosh-11583991443392.html>.

<sup>18</sup> Sahib Sharma, *India's microfinance industry showing signs of overheating, again*, LIVEMINT (Jan. 30, 2017), <https://www.livemint.com/Industry/jsZV2fupinFSXnmv4xsDNL/Indias-microfinance-industry-showing-signs-of-overheating.html>; Saiba Paul, *Four major risks facing microfinance in India*, BUSINESS TODAY (Nov. 4, 2019), <https://www.businesstoday.in/opinion/columns/microfinance-in-india-four-major-risks-facing-the-sector-rbi-nbfc-sector-banking-sector/story/388372.html>.

<sup>19</sup> Bibhu Ranjan Mishra, *India needs a specialised regulatory authority for microfinance: Muhammad Yunus*, BUSINESS STANDARD (Feb. 8, 2016), [https://www.business-standard.com/article/finance/india-needs-a-specialised-regulatory-authority-for-microfinance-muhammad-yunus-116020700604\\_1.html](https://www.business-standard.com/article/finance/india-needs-a-specialised-regulatory-authority-for-microfinance-muhammad-yunus-116020700604_1.html).

With this backdrop in mind, this paper is an attempt to highlight the lacunae in the current set of regulations governing the microfinance sector, and suggest necessary changes to improve its effectiveness, both for companies and society. Part I provides an overview of the current set of regulations governing the microfinance sector. In Part II, problems with the current regulatory regime are highlighted. These include the lack of data protection guidelines, the absence of a sector-specific regulator, the absence of consumer protection rules, issues with interest rate caps and so on. In Part III, suggestions are made to bring about rules that will enhance the social impact of microfinance. These include mandating community meetings and including MFIs in disaster-contingency plans.

## I. CURRENT REGULATORY REGIME FOR MICROFINANCE IN INDIA

After the crisis in Andhra Pradesh, the RBI constituted the YH Malegam Committee, whose report forms the basis of the regime governing microfinance today.<sup>20</sup> Based on this report, the RBI introduced two important notifications. The first accorded priority sector status to MFIs. As a result, banks can lend to MFIs<sup>21</sup> under the priority lending requirement of 40%. The second notification created a new class of institutions called the NBFC-MFIs;<sup>22</sup> MFIs were given the status of Non-Banking Financial Corporations (NBFCs), and guidelines were issued for their regulation. The foremost problem that the notification addressed was that of the overleveraging of clients due to loans extended by multiple MFIs at the same time. To resolve this, borrowers have been limited to borrowing from only two MFIs at a given point in time.<sup>23</sup> Further, the total amount of debt that a borrower can take on has been capped at Rs. 1,00,000.<sup>24</sup>

The second important issue addressed by the notification was that of the high interest rates charged by MFIs. The RBI has tried to resolve this by prescribing a set of formulae to determine interest rates. The maximum interest rate which can be charged by an MFI is either 10% above the cost of its funds or the average base rate of the top five commercial banks multiplied by a factor of 2.75.<sup>25</sup> Furthermore, the interest rate can exceed 26% only when the

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<sup>20</sup> Tamal Bandopadhyaya, *Microfinance: To Hell and Back*, LIVEMINT (Oct. 19, 2015), <https://www.livemint.com/Opinion/Z3YLSgcdQxb4VygrbRW6EL/Microfinance-To-hell-and-back.html>.

<sup>21</sup> RBI Master Direction on Priority Sector Lending – Targets and Classification ¶ 11, RBI/FIDD/2016-17/33 (2016); *see also* RBI Master Direction on Priority Sector Lending – Targets and Classification ¶ 21, RBI/FIDD/2020-21/72 (2020).

<sup>22</sup> Reserve Bank of India, Master Circular- ‘Non-Banking Financial Company-Micro Finance Institutions’ (NBFC-MFIs) – Directions, RBI/2015-16/20 (Issued on July 1, 2015, updated as on Apr. 20, 2016).

<sup>23</sup> *Id.* ¶ 2(C)(b)(II)(c).

<sup>24</sup> *Id.* ¶ 1(ii)(c).

<sup>25</sup> *Id.* ¶ 2(C)(a)(ii).

differential between the minimum and maximum interest charged by the MFI is less than 4%.<sup>26</sup> Additionally, in order to maintain pricing transparency, the only factors which may be included in the final pricing of loans include the interest rate, processing fee not in excess of 1% of the gross loan amount, and insurance premium.<sup>27</sup>

The third issue which was addressed was that of the reasonableness of the process. To prevent MFIs from behaving unfair towards borrowers, several measures were introduced, including prohibiting the charging of penalties for delayed or pre-payment, prohibiting MFIs from asking for security deposits or collateral, permitting repayment periods which may vary between a weekly, fortnightly or monthly basis as per the borrower's choice, prohibiting the use of coercive methods of recovery, and requiring that the repayment period be no lesser than 24 months if the loan amount exceeds Rs. 30,000.<sup>28</sup>

The fourth issue which has been tackled is that of borrowing money for consumption smoothing as against income generation. Money borrowed for consumption smoothing – that is, taking out a loan for consumption – is very difficult to repay, and it doesn't have the desired anti-poverty impact.<sup>29</sup> As against this, when a loan is given out for income-generating activities, it directly attacks poverty, is more likely to be repaid, and improves the financial standing of the borrower. To nudge MFIs towards lending primarily for income-generating activities, the RBI has mandated that the total value of loans extended for such activities must be over 50% of the overall loans advanced.<sup>30</sup>

Finally, to ensure industry discipline, it has been mandated that all MFIs must be members of credit bureaus, and provide them with necessary data.<sup>31</sup> Credit bureaus are bodies which take data from MFIs, and provide credit ratings to borrowers and present financial reports on the health of the various MFIs.<sup>32</sup> This move created databases, where member MFIs are supposed to deposit information about their consumers and their lending activities.<sup>33</sup> This

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<sup>26</sup> *Id.* ¶ 2(C)(a)(iii).

<sup>27</sup> *Id.* ¶ 2(C)(b)(I)(a).

<sup>28</sup> *Id.* ¶ 1.

<sup>29</sup> Subhabrata Bobby Banerjee & Laurel Jackson, *Microfinance and the business of poverty reduction: Critical perspectives from rural Bangladesh*, 70 HUMAN RELATIONS 63, 73-77 (2017).

<sup>30</sup> Reserve Bank of India, Master Circular- 'Non-Banking Financial Company-Micro Finance Institutions' (NBFC-MFIs) – Directions, RBI/2015-16/20 (Issued on July 1, 2015, updated as on Apr. 20, 2016) ¶ 1(ii)(f).

<sup>31</sup> *Id.* ¶ 2(C)(b)(III).

<sup>32</sup> WORLD BANK, <https://www.worldbank.org/en/publication/gfdr/gfdr-2016/background/credit-bureau> (2016).

<sup>33</sup> Reserve Bank of India, *supra* note 30, at ¶ 2(C)(b)(III); Gharad Bryan et al., *Sharing once hidden information: Credit bureaus, MFIs, and client welfare*, IGC (Mar. 2, 2017), <https://www.theigc.org/blog/sharing-once-hidden-information-credit-bureaus-mfis-and-client-welfare/>; Bureau, *Credit bureau for MFIs launched*, THE HINDU

empowered the MFIs to access information about the financial status and indebtedness of their borrowers. As a result, MFIs could refrain from lending to consumers who are already in debt, avoiding the problem of over-lending. Such information availability was also important to ensure that the cap on borrowing by a consumer (fixed at Rs. 1,00,000) can be implemented.

Apart from these regulations, the RBI has also allowed MFIs to act as Business Correspondents for banks.<sup>34</sup> Thus, MFIs can now supply various financial products like pension, insurance, remittance, and so on, to their customers. They can use their staff to extend banking services to places which don't have bank branches. The other important measure taken by the RBI was to accord Microfinance Institutions Network (MFIN) and Sa-Dhan, the two main industry bodies, the status of Self-Regulatory Organizations.<sup>35</sup> These organizations today carry out activities like, *inter alia*, issuing code of conducts, grievance redressal, investigations, data collection and awareness-raising.<sup>36</sup>

These regulations and measures have been appreciated by the industry and have had an overall positive effect.<sup>37</sup> However, there are many gaps in the regulations, which are yet to be filled; this will be discussed in the next section.

## II. WHAT AILS THE CURRENT REGULATORY REGIME?

Even though MFIs aim to lend to the poor, the poorest of the poor continue to remain outside their fold.<sup>38</sup> A recent study found that about a fifth of the population continues to lack access to formal credit.<sup>39</sup> This is primarily because of the stringent limits placed on the interest rates that MFIs can charge. While it is desirable that some sort of limitation be imposed on

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BUSINESS LINE (Nov. 10, 2017), <https://www.thehindubusinessline.com/money-and-banking/Credit-bureau-for-MFIs-launched/article20105272.ece>.

<sup>34</sup> Reserve Bank of India, Financial Inclusion by Extension of Banking Services - Use of Business Facilitators and Correspondents, RBI/2005-06/288 (Issued on Jan. 25, 2006) ¶ 3.

<sup>35</sup> Saurabh Kumar, *Sa-Dhan gets self-regulatory organization status after MFIN*, LIVEMINT (Mar. 12, 2015), <https://www.livemint.com/Money/PcpbZpYM9ZNCgOkIw96gfN/SaDhan-gets-selfregulatory-organization-status-after-MFIN.html>.

<sup>36</sup> *Id.*; see also Bureau, *supra* note 32.

<sup>37</sup> Deepti Kc et al., *Effects of Reserve Bank of India (RBI) Regulations on Public Sector Lending for Micro Finance Institutions (MFIs)*, IFMR RESEARCH CENTRE FOR MICRO FINANCE (Oct. 2011), <https://www.findevgateway.org/paper/2011/10/effects-reserve-bank-india-rbi-regulations-public-sector-lending-microfinance>.

<sup>38</sup> C. H. Venkatachalam, *Public Sector Banking and the Unmet Expectations of Rural India*, THE HINDU CENTRE FOR PUBLIC POLICY (Dec. 15, 2017), <https://www.thehinducentre.com/the-arena/current-issues/article9998934.ece>.

<sup>39</sup> *India's banking revolution has left its villagers behind*, ECONOMIC TIMES (July 17, 2018), <https://economictimes.indiatimes.com/industry/banking/finance/banking/indias-banking-revolution-has-left-its-villagers-behind/articleshow/65019590.cms?from=mdr>.

interest rates in order to avoid exploitation, imposing a margin along with a prohibition on asking for collateral is not recommended. This is because the more distant an individual is from formal finance, the costlier it is to service her. Hence, the cost which MFIs bear in servicing the poorest of the poor tends to be higher. In such situations, apart from the cost of the fund, the cost to the MFI will also include fixed costs of making, monitoring, and servicing small loans, and variable costs due to the higher risk in lending to the poorest of the poor. The risk of lending is further accentuated by MFIs being prohibited from asking for collaterals and security deposits. In such a situation, the limited breathing space provided by the current regulatory framework pushes MFIs away from lending to the poorest sections of society. As the former governor of the RBI, Dr. Raghuram Rajan, has noted, “*you cannot limit interest rates, prohibit the taking of collateral, and still expect the borrower to have the same level of access to loans*”.<sup>40</sup> The end result is that the poorest people turn to usurious moneylenders who charge unimaginably high interest rates and employ highly exploitative practices.

A potential solution to this conundrum is to allow MFIs to differentiate between consumers who have collaterals and those who do not. The RBI should allow MFIs to charge households which do not have collateral a higher interest rate, and those with collateral a lower interest rate. While this may force some to pay a slightly higher interest rate and others to pledge their assets, it mitigates the greater evil of many being completely left out of the formal financial network. The other solution to this issue is bringing down high interest rates, without placing margins and caps, by fostering competition outside the industry. While competition within the industry is known to be high, there is insufficient competition from outside.<sup>41</sup> Informal lenders, like moneylenders, can be a source of such competition. If moneylenders were nudged towards charging lower interest rates and away from employing exploitative practices, they may create healthy competition in the market. This can be done by giving licenses to moneylenders. Upon agreeing to be regulated, moneylenders may be given access to cheaper finance from the public sector, which they can further lend to the people. While most states have laws governing moneylenders<sup>42</sup>, such statutes mandatorily require them to be regulated, as against using incentives to make it desirable for them to be regulated. Hence, these laws have failed to have any impact and require suitable changes.

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<sup>40</sup> Raghuram Rajan, *The Changing Paradigm for Financial Inclusion*, RESERVE BANK OF INDIA (July 18, 2016), [https://www.rbi.org.in/Scripts/BS\\_SpeechesView.aspx?Id=1010](https://www.rbi.org.in/Scripts/BS_SpeechesView.aspx?Id=1010).

<sup>41</sup> *Id.*

<sup>42</sup> For example, the Karnataka Money Lenders Act 1961.



The second important concern is that of the prohibition on the acceptance of deposits by NBFC-MFIs. The RBI has imposed such a blanket prohibition, as it perceives NBFC-MFIs to be unsafe for holding deposits.<sup>43</sup> This is mainly because MFIs are insufficiently regulated and their chances of continued existence are substantially lower than that of banks. However, this policy takes away from MFIs what could be an important source of funds. Reports suggest that MFIs are struggling to survive due to a lack of funding.<sup>44</sup> In such a scenario, their only options are to merge with banks or to secure Small Finance Bank (SFB) licenses. The RBI has been very conservative in awarding SFB licenses, and even when it does so, licenses largely go to payment banks, which do not have a widespread rural presence.<sup>45</sup> Thus, it would be prudent to allow MFIs to accept deposits with a set of necessary regulations to ensure the safety of such deposits.<sup>46</sup> This will also allow MFI clients to deposit money directly with MFIs, as against depositing them in banks through MFIs which act as Business Correspondents. This will reduce the additional agency costs which were imposed due to the MFIs acting as agents for the banks and charging commissions for their services.

Third, the issue of data protection, of clients as well as MFIs, has completely been ignored, even though data breaches have become commonplace. The Planning Commission noted in 2011 that exploitation of, and discrimination against, clients by using their data is a possible scenario.<sup>47</sup> It was also noted that given that MFIs are required to share their data with credit bureaus, regulations protecting their trade secrets are urgently needed. No action has been taken in respect of either issue. With respect to individuals, it must be kept in mind that multiple kinds of institutions, which include both regulated bodies like MFIs and unregulated bodies like co-operatives and NGOs, continue to provide microfinance services. In this process, they acquire significant amounts of data, most of which has been digitized today. As such, it has become very easy to breach or sell such data, violating the client's privacy. This becomes even more sensitive when one takes into account the fact that most of the consumers of microfinance are poor people in rural areas, who form an important part of political

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<sup>43</sup> Reserve Bank of India, Master Circular- 'Non-Banking Financial Company-Micro Finance Institutions' (NBFC-MFIs) – Directions, RBI/2015-16/20 (Issued on July 1, 2015, updated as on Apr. 20, 2016) ¶ 1.

<sup>44</sup> Atmadip Ray, *Microfinance institutions are struggling for survival. Here's why*, ECONOMIC TIMES (Oct. 04, 2017), <https://economictimes.indiatimes.com/industry/banking/finance/microfinance-institutions-are-struggling-for-survival-heres-why/articleshow/60931020.cms>.

<sup>45</sup> Sunny Sen, *New small finance bank licenses on the way*, MONEYCONTROL (Sept 06, 2019), <https://www.moneycontrol.com/news/business/new-small-finance-bank-licenses-on-the-way-4410851.html>.

<sup>46</sup> WORLD BANK, *India: The Regulation of Microfinance – An Analysis of Recent Proposals* (2010).

<sup>47</sup> PLANNING COMMISSION OF INDIA, A HUNDRED SMALL STEPS: REPORT OF THE COMMITTEE ON FINANCIAL SECTOR REFORMS 158 (2011).

constituencies and are easy to target.<sup>48</sup> The illegal trading of data for political reasons has become one of the biggest challenges of our times.<sup>49</sup> In 2019, a microfinance agency in Georgia exposed the records of more than 1,40,000 of its users to data theft.<sup>50</sup> Thus, it is pertinent that data protection rules protecting individuals be notified. The second issue is the protection of the data and trade secrets of MFIs. It has been found that many MFIs have failed to share adequate data with the credit bureaus as required.<sup>51</sup> This has resulted in insufficient data on the financial health of individual clients with MFIs. Consequently, unaware of whether the borrower already has loans to be serviced, MFIs end up lending to already over-leveraged borrowers. Thus, the disease of over-indebtedness continues to flourish.<sup>52</sup> The primary reason why MFIs fail to share their data with credit bureaus is the lack of trade secret and data protection provisions. Consequently, companies fear that their competitors may be able to access their sensitive data and do not share adequate data with the bureaus. To turn this around, data protection regulation for MFIs is required.

The fourth major concern today is that of consumer protection. While the RBI has introduced the Fair Practices Code<sup>53</sup> and industry bodies have adopted codes of conduct, they are yet to translate into realities.<sup>54</sup> Prohibited practices warranting criminal charges<sup>55</sup> like coercion continue unabated even after a decade since the much-publicized Andhra Pradesh crisis. MFIs have also been primarily blamed for the recent cases of farmer suicides in Maharashtra.<sup>56</sup> This is due to the lack of consumer redressal mechanisms. Even with RBI and

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<sup>48</sup> Nikita Kwatra, *When democracy fails the poor*, LIVEMINT (Oct. 7, 2020), <https://www.livemint.com/news/india/when-democracy-fails-the-poor-11602040759209.html>; Himanshu, *India's politics and the poor*, ECFR (Oct., 2020), [https://ecfr.eu/special/what\\_does\\_india\\_think//analysis/indias\\_politics\\_and\\_the\\_poor](https://ecfr.eu/special/what_does_india_think//analysis/indias_politics_and_the_poor).

<sup>49</sup> Stuart Mills, *How Data Can Win You An Election*, TOWARDS DATA SCIENCE (Aug. 4, 2019), <https://towardsdatascience.com/how-data-can-win-you-an-election-3093b0bf76ab>; David Lyon & Colin Bennett, *Data-driven elections and the key questions about voter surveillance*, THE CONVERSATION (Aug. 6, 2019), <https://theconversation.com/data-driven-elections-and-the-key-questions-about-voter-surveillance-121164>.

<sup>50</sup> *Microfinance agency exposes more than 140K user records*, GDPR (Aug. 13, 2019), <https://laptrinhx.com/microfinance-agency-exposes-more-than-140k-user-records-1478833326/>.

<sup>51</sup> Moin Qazi, *Why microfinance is an ugly word in India's villages*, DAILYO (Dec. 12, 2016), <https://www.dailyo.in/politics/mfis-microfinance-village-economy-farmer-suicides-rural-banking/story/1/14582.html>.

<sup>52</sup> *Id.*

<sup>53</sup> *Frequently Asked Questions on Non-Banking Financial Company - Micro Finance Institutions (NBFC-MFIs)*, RESERVE BANK OF INDIA (Oct. 12, 2017), [HTTPS://M.RBI.ORG.IN/SCRIPTS/FAQVIEW.ASPX?ID=102](https://m.rbi.org.in/scripts/FAQVIEW.aspx?ID=102).

<sup>54</sup> *Self - Regulatory Organization - Background*, MICROFINANCE INSTITUTIONS NETWORK, <https://mfaindia.org/our-work/self-regulation/>.

<sup>55</sup> *ICICI Bank Ltd. v. Prakash Kaur*, (2007) 2 SCC 711.

<sup>56</sup> Deeptiman Tiwary, *In 80% farmer-suicides due to debt, loans from banks, not moneylenders*, THE INDIAN EXPRESS (Jan. 05, 2017), <https://indianexpress.com/article/india/in-80-farmer-suicides-due-to-debt-loans-from-banks-not-moneylenders-4462930/>; *Save farmers from MFI indebtedness*, DECCAN HERALD (Feb. 04, 2019), <https://www.deccanherald.com/opinion/second-edit/save-farmers-mfi-indebtedness-716521.html>.

industry guidelines, consumers located in remote places with no access to consumer forums fail to benefit. The implication is that consumers have no option to seek redressal against exploitation by the MFIs. Hence, they end up dying by suicide, or seeking help from politicians. This exposes MFIs to political risks and business harms. This issue has further been complicated due to MFIs receiving eligibility to act as Business Correspondents to banks; MFIs can act as intermediaries between banks and consumers, providing financial services of various kinds. In such cases, there is a lack of clarity as to whether the bank or the MFI will be responsible for the breach of consumer rights. Consequently, it is important that regulations providing accessible redressal mechanisms to microfinance consumers and clarifying the responsibilities of Business Correspondents be introduced. A good way to go about this can be to create a Financial Redressal Agency (**FRA**) without any further delay. The FRA was first mooted by the Nachiket Mor Committee in 2013 to address the grievances of retail financial consumers.<sup>57</sup> It will act as a one-stop resolution body for consumers who are otherwise required to go to consumer forums, courts, or banking ombudsmen. Such an agency is required in order to perform the specialized practices required to cater to the needs of financial services customers. For example, an agency like the FRA will be able to deploy village dispute resolution agents, who can provide last mile redressal facilities to clients.

Finally comes the issue of creating a separate regulator for the microfinance sector. The idea of having a separate independent regulator for the microfinance sector has been mooted multiple times.<sup>58</sup> It came close to being implemented twice. First, in the Micro Finance Institutions (Development & Regulation) Bill, 2011, the National Bank for Agriculture and Rural Development (**NABARD**) was given the status of the regulator. Second, in the Micro Units Development and Refinance Agency Bill, 2015, the MUDRA Bank was to act as the sector regulator. Neither of these attempts materialized for reasons unknown, but the need for a specialized regulator for the microfinance sector continues to remain a material demand of the industry.<sup>59</sup> There are several valid reasons for this demand. Microfinance as a sector is currently governed by multiple regulators and bodies, and much has been left to self-regulation. While MFIs, banks, and Regional Rural Banks are governed by the RBI, co-operatives and

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<sup>57</sup> Asit Ranjan Mishra, *Govt plans Financial Redressal Agency to address grievances of retail consumers*, LIVEMINT (Dec. 29, 2016), <https://www.livemint.com/Industry/HCYiaJJJaVGxzLuobEnVKHK/Govt-plans-Financial-Redressal-Agency-to-address-grievances.html>.

<sup>58</sup> Aditya Alok and Nihal Joseph, *Regulating the Growing Commercialisation of Microfinance Activities in India*, 5 NUJS L. Rev. 65, 70 (2012).

<sup>59</sup> Mishra, *supra* note 19.

NGOs are governed by the respective state governments.<sup>60</sup> This has led to a lack of uniform regulation. Further, the nature of microfinance differs considerably from regular financial structures. The background of consumers, the geography where microfinance operates, the manner in which services are supplied, the social element and so on require that the regulating agency have specialized abilities. However, it has been argued that creating a new agency will be open to political vagaries and will be time-consuming.<sup>61</sup> Thus, I recommend that the RBI take a balanced approach and create within itself a department solely dedicated to microfinance. Currently, the responsibilities relating to microfinance are shared by multiple departments within the RBI, causing overlaps, confusion and inefficiency. A dedicated department within the RBI would prevent this confusion, without the need to create a new institution.

### III. ENHANCING THE SOCIAL IMPACT OF MICROFINANCE

When Grameen Bank was started in Bangladesh, its aim was not just to create financial capital but also to create social capital, both of which work in tandem. It was observed that mandating weekly meetings, where socio-liberal values of life, marriage, family, education, and sanitation were taught and discussed, increased repayment rates considerably.<sup>62</sup> In addition, regular group meetings were important, as they created peer pressure to repay, and acted as a micro-regulatory body to ensure that loans were productively used.<sup>63</sup> The current regulations in India, which focus only on the financial aspect, do not foster such healthy practices. The guidelines provide that repayment may be done weekly, fortnightly, or monthly, as per the choice of the consumer. There is no requirement as to holding and attending mandatory village meetings. Introducing such a provision could be a game-changer for the industry. These meetings, conducted periodically, could become avenues where financial and legal literacy is imparted, and discussions on the best local investment opportunities, negative consumer experiences if any, and so on, can take place. This will bring back the human touch

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<sup>60</sup> CUTS CENTRE FOR COMPETITION, INVESTMENT AND ECONOMIC REGULATION, REGULATION OF MICROFINANCE INSTITUTIONS IN INDIA 2 (2013), [http://www.cuts-ccier.org/pdf/Regulation\\_of\\_Microfinance\\_Institutions\\_in\\_India.pdf](http://www.cuts-ccier.org/pdf/Regulation_of_Microfinance_Institutions_in_India.pdf).

<sup>61</sup> Richard Rosenberg, *How should governments regulate microfinance?*, in MICROFINANCE EMRGING TRENDS AND CHALLENGES 85, 89 (Suresh Sunderesan ed., 2008).

<sup>62</sup> ALEX COUNTS, SMALL LOANS, BIG DREAMS 25 (2008).

<sup>63</sup> *Id.*

to microfinance, while ensuring that consumers have better information and lenders have higher recovery rates.<sup>64</sup>

The other important measure that can be taken by the government is including microfinance agencies within disaster response plans. Natural disasters, which often impact rural areas more than urban areas, cause heavy destruction to life and property. The people worst affected by such disasters are the poor, who lose their livestock, small businesses, work, and houses. Thus, in post-disaster situations, there is an urgent need for money amongst the poor; they need money to restart their shops and small businesses, buy necessities, and find work. However, credit in such times is scarce and costly. This is where microfinance agencies can play a role in ensuring that people have access to credit, and helping restore rural markets.<sup>65</sup> However, this is easier said than done because of the confusion and lack of facilities after disasters. In such a scenario, if microfinance agencies are included within disaster-response plans, and are given favourable access to disaster-affected areas with the support of relief agencies, it would be a lot easier for people to access credit, and work towards the quick restoration of normalcy.

MFIs too must start working on reducing their cost of borrowing and pass the benefit to people. Currently, they are almost entirely dependent on banks for their funding.<sup>66</sup> This must change with the proliferation of social impact organizations. Today, many donor organizations across the world realize the importance of access to affordable finance. These channels must be tapped into to access cheaper funds. Further, if the idea of Social Stock Exchange, which has been proposed by the government is implemented, it would allow MFIs to come up with social impact projects, which could be listed on the exchange and funds raised to provide low-cost finance to small entrepreneurs and individuals.<sup>67</sup> Apart from helping extend the network of MFIs, such moves will also help with trust-building.

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<sup>64</sup> Shayak Sarkar, *Repayment Frequency in the Law of Microfinance*, 31 YALE J. ON REG. 259, 267 (2014); Anand Sinha, *Strengthening Governance in Microfinance Institutions (MFIs) – Some Random Thoughts*, RESERVE BANK OF INDIA (Apr. 23, 2012), <https://rbidocs.rbi.org.in/rdocs/Speeches/PDFs/SMFISF270412.pdf>.

<sup>65</sup> *Bucks after the Bang: How microcredit can help poor countries after natural disasters*, THE ECONOMIST (Jan. 25, 2018), <https://www.economist.com/finance-and-economics/2018/01/25/how-microcredit-can-help-poor-countries-after-natural-disasters>.

<sup>66</sup> *Supra* note 10, at 18.

<sup>67</sup> Varsha Aithala, *Idea of Social Stock Exchanges for India*, THE INDIA FORUM (Sept. 22, 2020), [https://www.theindiaforum.in/article/social-stock-exchanges-india-sebi-s-promise#:~:text=A%20social%20stock%20exchange%20\(SSE,operations%20and%20growth%2C%20and%20reducing](https://www.theindiaforum.in/article/social-stock-exchanges-india-sebi-s-promise#:~:text=A%20social%20stock%20exchange%20(SSE,operations%20and%20growth%2C%20and%20reducing).

The Covid-19 pandemic has shown that microfinance cannot be effective on its own.<sup>68</sup> Given the lack of economic opportunities in rural areas, credit disbursed through microfinance cannot be used for productive opportunities by customers. Thus, MFIs must work with other NGOs and governments to offer guidance and training to rural customers to look for alternative economic opportunities.<sup>69</sup> These can include organic farming, sanitation infrastructure building or reforestation services.

However, in the years ahead what will matter the most is scale. One report suggests that “average all-in cost of borrowing from a small or medium-sized MFI (up to 100,000 clients) is almost 60% higher than the cost of borrowing from a very large one (defined as over 1 million clients). And very large MFIs not only offer customers a better deal, their profit margins are around 2.5 times greater than for small and medium-sized institutions.”<sup>70</sup> Given geographical and infrastructural bottlenecks, increasing scale by simply widening the number of customers may prove unsustainable. Scale must be increased by deepening the quality of customers. MFIs must focus on ensuring that their customers grow financially, become more stable, take bigger loans and pay back on time. This would require MFIs to provide capacity building and value-added services.<sup>71</sup> One Acre Fund, an MFI active in Africa, supplies its members with fertilizers, seeds, agricultural technology, and health essentials on a no-profit model to ensure that they can get the maximum value out of the money it lends them.<sup>72</sup> By doing this, One Acre Fund has not just made its members richer, but has also had positive impacts on agricultural productivity and local economy.<sup>73</sup> This has allowed the fund to scale to over a million farmers, of which 97% repay on time.<sup>74</sup>

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<sup>68</sup> Suvashree Ghosh & Shruti Srivastava, *Millions of defaults threaten microfinance's future in Covid-hit India*, BUSINESS STANDARD (Feb. 4, 2021), [https://www.business-standard.com/article/finance/millions-of-defaults-threaten-microfinance-s-future-in-covid-hit-india-121020400429\\_1.html](https://www.business-standard.com/article/finance/millions-of-defaults-threaten-microfinance-s-future-in-covid-hit-india-121020400429_1.html); For a general understanding on the limits of micro finance, see James Roth, *The Limits of Micro Credit as a Rural Development Intervention*, INSTITUTE FOR DEVELOPMENT POLICY AND MANAGEMENT (1997), <https://www.gdrc.org/icm/jimmy-roth.pdf>.

<sup>69</sup> On the importance of alternative economic opportunities for rural customers, see Panos Varangi, *Agriculture Finance & Agriculture Insurance*, WORLD BANK (Oct. 8, 2020), <https://www.worldbank.org/en/topic/financialsector/brief/agriculture-finance>.

<sup>70</sup> Greta Bull, *After the Storm: How Microfinance Can Adapt and Thrive*, FINDEV (Oct. 15, 2020), <https://www.findevgateway.org/blog/2020/10/after-storm-how-microfinance-can-adapt-and-thrive>.

<sup>71</sup> INTERNATIONAL FINANCE CORPORATION, *SCALING UP ACCESS TO FINANCE FOR AGRICULTURAL SMES POLICY REVIEW AND RECOMMENDATIONS* 53 (2011).

<sup>72</sup> *Our Model*, ONE ACRE FUND, <https://oneacrefund.org/what-we-do/our-model/>.

<sup>73</sup> Silvanus Okumu Opiyo et al., *The Shifting Effect of One Acre Fund on Agricultural Production Possibility Frontier: An Econometrics Analysis of Treatment Effect Estimation of Maize Yield in Busia County, Kenya*, 9(22) JOURNAL OF ECONOMICS AND SUSTAINABLE DEVELOPMENT 124 (2018); Joshua W. Deutschmann et al., *Can Smallholder Extension Transform African Agriculture?* (National Bureau of Economic Research, Working Paper No. 26054, Feb. 2021), [https://www.nber.org/system/files/working\\_papers/w26054/w26054.pdf](https://www.nber.org/system/files/working_papers/w26054/w26054.pdf).

<sup>74</sup> ONE ACRE FUND, *ANNUAL REPORT 2019* (2020).

## CONCLUSION

The lack of rural credit, which has been touted as one of the primary reasons behind the recent economic downturn, and rising cases of farmer suicides have brought back memories of the 2010 Andhra crisis. These dire circumstances are seen as side-effects of the rise in commercialization of microfinance without due regulations in place. Regulations are needed not only to protect clients but also to facilitate the availability of credit and enhance the societal impact of such funds. Undoubtedly, the RBI has done a lot in the past few years to create a basic framework to regulate the industry. However, as highlighted in the paper, there are a host of legal issues which remain to be addressed. There are existing issues of data privacy, consumer protection, supporting market competition, creating an independent regulator, and so on. As argued, we need a dedicated consumer dispute redressal mechanism for the financial sector. It is also proposed that an independent department within RBI be created to deal with issues relating to microfinance. Further, our regulations should take a principles-based approach to regulating interest rates as against imposing stringent quantitative standards. This will increase the availability of credit, while maintaining the economic feasibility of MFIs. Apart from this, regulators also need to pre-empt emerging issues which may arise due to the rapid digitization of the industry. Further, while access to credit is important, other factors like time, the manner, and the terms of such credit can differ greatly, thereby differently impacting the lives of people. Our regulations should nudge MFIs and other players to maximize the anti-poverty impact of their services. These changes take financial services to areas and people who do not otherwise have access, thereby improving the level of financial inclusion both qualitatively and quantitatively.

Rohini Sen<sup>\*</sup>

*Modern statehood is an act of erasure and a product of colonial boundary making. Here, law and artificial frontiers come together to create a disembodied sense of belonging through ideas of territorial sovereignty and citizenship. International law is inseparable from this territorial statehood and subsequently locates its own borders in abstract ideas of security, development and containment of territory – systematically erasing memories, polity and communities of pre-colonial forms and colonized spaces. In this strange inheritance of territorial borders, post-colonial states as mirrors of colonial ‘othering’ also assert themselves in ways where land is continually acquired and controlled at the expense of its most significant stakeholder – the people. While a conversation on statehood and borders is not new in international law, contrary to its conventional framing, I urge that these continuities suggest a different discussion from the ones we lock ourselves in. There are concerns with territoriality itself, as opposed to territorial concerns in the international law sense.*

*To do this, I engage with Kashmir as a site of legal unpacking and a challenge to modern (territorial) statehood where Kashmir becomes relevant for three reasons. First, its stale topicality renders it necessary to resist the normalization of this state of exception and violence. Second, it is one of the most complex manifestations of competing*

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<sup>#</sup> This reflection is born out of several conversations with an extended community of scholars, comrades and thinkers, both within and beyond academia. I am particularly grateful to Suraj Gogoi for sharing my imagination and enriching them with his profound scholarly observations. Without him, the notional potential of this paper would have been very different. I am thankful to my colleagues and friends – Aaliya Anjum and Mohammad Shahabuddin for their close readings, sharp insights, nuanced expertise, kindness and time. Their interventions have widened my thinking in the most capacious ways. I am very grateful to Vanessa Chishti, friend, comrade and colleague for her brilliant account of Kashmir’s history and, for continued solidarity in the academe. I am thankful to my friends in Oxford - Gautam Bhatia and Sameer Rashid Bhat for providing me with feedback, discernment, comity and resources from the heart of the empire! And finally, I am thankful to the NALSAR journal editorial team for their support, grace and immense patience.

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*identarian and relational claims, enmeshed and disguised in a limited notion of territoriality and terrain. And third, located in Kashmir is the expression of citizenship as an extension of the statehood idiom where the vision of citizens as economic agents is disrupted by the systematic refusal of Kashmiris to unquestioningly accept this mandate. A form of double 'othering' occurs where the 'unproductive', un-citizen is also a Muslim un-citizen. In this context, I find myself asking the following questions - what does/should an endorsement of the right of self-determination mean in international law for a nation which is 'stateless'?"? And where can we go from here in a way where the lay of the land is not forced into the myth of violent territoriality once again? This paper is an attempt to problematize territoriality and allow ourselves to critically imagine a relocation of Kashmiri land to where it truly belongs – in the people.*

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## INTRODUCTION

A Kashmiri acquaintance and I were walking down the streets of Delhi several months ago and as we walked, he kept looking over his shoulder every couple of minutes. “*I think I am being followed*”, he stated, and added a few moments later, “*I am not welcome in your country*”. As I looked around incredulously, I realized that he and I were navigating very different streets and realities. I, an entitled Indian citizen, was walking with a man who came from the heart of a place<sup>1</sup> that understands all too well what it means to fight for freedom, identity, dignity and borders against an institution no less powerful than the state. A cursory glance at a map of the region will reveal that Jammu and Kashmir has borne the brunt of occupation by both India and Pakistan for over seven decades. As of 2021, following the formal revocation of Article 370 of the Constitution of India,<sup>2</sup> the former Indian state is now a union territory,<sup>3</sup> and

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<sup>1</sup> Space here refers to an internal as well as an external site of contestation.

<sup>2</sup> The revocation is discussed in detail subsequently.

<sup>3</sup> *Jammu and Kashmir Reorganization Act* (2019) reconstituted the former state of Jammu and Kashmir into two union territories of Ladakh and Jammu and Kashmir.

has been under armed siege<sup>4</sup> coupled with intermittent internet blackouts and blockades. In this context, we begin apprehending the concepts of citizen, state and territory discursively.

At this juncture, it is important to offer some important heuristics and caveats before I proceed with the reflection itself. Critical legal scholarship serves a unique function of oscillating between the extra-ordinary and the mundane. If the latter allows us to observe doctrines and nuances in close proximity, the former encourages us to transcend immediate reality and imagine beyond our (theoretical) homes. In this article, I use critique as a site of imagination<sup>5</sup> to bring into line of sight three elements/strands of thinking: *First*, the limits of territoriality in sovereign statehood and the moving minority subject (sometimes citizen). *Second*, a politics of inflexibility and homogeneity through (and expected of) border and identities, and *third*, the production of knowledge about the 'other' and identity formation through colonial stationery<sup>6</sup> and cartography.

What I offer is an attempt at *problematizing* statehood beyond conventional legal readings and terms of the debate; a vantage point to contest the view that political authority, under any form or name, will inevitably turn to a form of power that has no choice but to border and control the space it inhabits and then, treat the space under its control in a territorial (literal and otherwise) way. Therefore, what this paper is not trying to do is equally important. This work is not a detailed archival account of border-making and identity formation in Kashmir, nor does it engage in great detail with liberal constitutional doctrines which formulate the idea of the citizen. Both of these postulations have been provided to indicate the beginning of an engagement with these ideas.<sup>7</sup> Finally, it does not claim to know what the alternatives to borders can look like, but I do invite my readers to imagine the possibilities and configurations with me as part of this process.

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<sup>4</sup> It must be mentioned that the armed siege of the region is decades old, however, following the revocation of Article 370, there has been a significant increase in the militarization of the region.

<sup>5</sup> I am mindful of the theoretical limits and remits of critique, but I impose no such bounds on imagination - academic or otherwise.

<sup>6</sup> For a similar discussion on Thailand, see P. SINGH, OF INTERNATIONAL LAW, SEMI-COLONIAL THAILAND AND IMPERIAL GHOSTS 46-74 (Asian Journal of International Law 2019).

<sup>7</sup> A task I hope is carried into the future as well.

First, let us take a moment to *see* Kashmir as it is before contemplating its political geography. Kashmir lies in the northern-most part of the Indian sub-continent and is the manifest marker of territorial conflict between India and Pakistan, as well as India and China.<sup>8</sup> Today, the term Kashmir denotes a large area: the Indian-administered territories of Jammu and Kashmir, and Ladakh, in the south and south east respectively; the Pakistani-administered territories of Azad Kashmir,<sup>9</sup> and Gilgit-Baltistan, in the north and northwest respectively; the Chinese-administered territories of Aksai Chin and the Trans-Karakoram in the east. It is the seat of a long-standing territorial conflict, undefined cartography and porous citizenry where a battle for identity has merged with a battle against the notion of the State. This reflection uses the broad term Kashmir but focuses on the Indian state's actions in Jammu and Kashmir where state-making and citizenship is foregrounded and unpacked against the backdrop of a heavily contested terrain.

Kashmir has been endlessly scrutinized by international legal scholars<sup>10</sup> through the lens of human rights, self-determination,<sup>11</sup> occupation<sup>12</sup> and sovereign dominion<sup>13</sup> of the three neighbouring states. Alternatively, I look at Kashmir, the abrogation of Article 370 and India's recent citizenship law, as a battleground for one of TWAIL's<sup>14</sup> oldest debates with mainstream international law: the incapacity to resolve any identarian conflict as long as we cling to our inheritance of the Westphalian sovereign state. I have divided this paper into five parts, this prelude being the first. In Part II, I set the context through a brief and limited history of the formation of the state of Kashmir and ground it in contemporary legal and temporal alignments. In Part III, I revisit the making of the post-colonial state up until its most recent neoliberal iteration, particularly in post-colonial locations. This is followed by an unpacking of colonial boundary making as what I call international law's original sin and the role of territorial

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<sup>8</sup> Territorial conflict as understood within the current paradigm of international law refers to a dispute between two sovereign states about historical claims to a territory.

<sup>9</sup> India claims this region to be a part of Jammu and Kashmir, and under Indian administration.

<sup>10</sup> See generally PARVATHI MENON, *KASHMIR CRISIS AND THE SCHIZOPHRENIA OF INTERNATIONAL LAW* (Harvard Law School 2012).

<sup>11</sup> Kalana Senaratne, *Internal Self-Determination in International Law: A Critical Third-World Perspective* 3 (2) *ASIAN JOURNAL OF INTERNATIONAL LAW* 305-339 (2013).

<sup>12</sup> FOUZIA NAZIR LONE, *HISTORICAL TITLE, SELF-DETERMINATION AND THE KASHMIR QUESTION* (Brill Nijhoff 2018).

<sup>13</sup> SYATAUW, *SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* 45-100 (Springer).

<sup>14</sup> *Third World Approaches to International Law*; <https://criticallegalthinking.com/2019/04/02/twail-coordinates/>.

encasement as the true site of power of the Westphalian (and post-colonial) state. Part IV looks at Kashmir as the wild zone of sovereignty, where the maladies and fallacies of statehood best manifest and I conclude with an urge to reimagine territorial polity as an effort to resolve identarian crisis in the region (and at large).

## I. WHO<sup>15</sup> IS KASHMIR?

### A. *The Colonial Inheritance*

An attempt to trace the historical configurations of Kashmir in limited space is nothing short of impossible. However, for the purposes of deploying a TWAILian, feminist and de-colonial gaze at territory and territoriality, it is helpful to understand where history locates Kashmir and its struggles. I will meander across two historical forms of Kashmir - colonial and post-colonial, using three interpretative instruments - land, cartography and territory. While the former (colonial) intends to denote a moment in time,<sup>16</sup> the latter (post-colonial) will act as an archive of social functions and relations that are made and unmade through these instruments. Before I move to either passage of inquiry, it is useful to note that colonial Trigonometric Surveys record pre-colonial Kashmir as an ancient, mostly inaccessible terrain which “*appears to have been a kingdom for a period that transcends the limit of legitimate history.*”<sup>17</sup> This classification alludes to a particular colonial gaze where the territory of the colonized other is immeasurable, inaccessible and to a certain extent, incomprehensible, yet, produced decisively through this colonial knowledge. This description is also significant because of the nature of the territorial diffusion it indicates and, till about A.D 1586, the region mostly remains this way. The Mughals are the first to survey and re-engineer the land, largely to facilitate the dynasty’s continued enjoyment of the place.<sup>18</sup> In 1753, it is seized by the Afghans and from them, the Sikhs wrest control in 1819, bringing it under Maharaja Ranjt Singh’s reign. Following a famine, an epidemic,

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<sup>15</sup> The personification here is intentional for two reasons: a) to relocate the idea of sovereignty in people-centric narratives and b) to unpack the relationship of the subject-citizen to the territorial state.

<sup>16</sup> History is a processual account of events rather than a linear narrative. Here, I deploy the three terms as continuous and simultaneous with distinct erasures and structural continuities than disjunctive periods that follows one after other. I borrow this from Trouillot’s conceptualization of history. See generally, TROUILLOT MICHEL-ROLPH. *SILENCING THE PAST* (Beacon Press 1995).

<sup>17</sup> This is recorded as part of ‘On the Trigonometrical Survey and Physical Configuration of the Valley of Kashmir,’ by William H. Purdon, C.E., F.R.G.S., &c., Executive Engineer, PuNjab. Read, December 12, 1859. He alludes to a report prepared by a Professor Wilson.

<sup>18</sup> *Id*; *Supra* Note 14 at 8.

an earthquake and, finally, Ranjit Singh's death in 1839, the British acquired dominion over the region.<sup>19</sup> This colonial signposting of Kashmir is important for two reasons. It marks the introduction of colonial cartography and its ramifications, and it is the beginning of the process of fractured identity formation in the region.

In the early nineteenth century, the British, having occupied most of its erstwhile colonies, turned their attention to Kashmir given its immense geopolitical significance. A gateway to central Asia, Kashmir was critical to the colonial expansion project. The British acquired Kashmir through the Treaty of Lahore<sup>20</sup> in 1846, following the annexation of Punjab as a result of their victory in the first Anglo-Sikh War (1845-46). Soon after, they handed over its immediate administration through a treaty<sup>21</sup> to Gulab Singh, the founder of the Hindu Dogra<sup>22</sup> dynasty and first ruler of the princely state of Jammu and Kashmir.<sup>23</sup> Gulab Singh was an ally and through him, the British retained significant influence over frontier politics in the region. Such was their informal authority that by 1870, they had completed a detailed Trigonometrical Survey and mapping of the region through the Survey of India<sup>24</sup> - a process that clearly required uninterrupted mobility and access. The significance of this instrument on land engineering and subsequent identity formation in the region was to be immense.<sup>25</sup> Colonial cartography is a well-documented imperial tool<sup>26</sup> with little cognizance of local realities, social functions and social relationships with the land. Not only was the Survey of India an imperialist institution,<sup>27</sup> but the very nature of British cartography

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<sup>19</sup> *Id*; See also MRIDU RAI, HINDU RULERS, MUSLIM SUBJECTS (Princeton University Press, 2004); PREM NATH BAZAZ, THE HISTORY OF STRUGGLE FOR FREEDOM IN KASHMIR (Kashmir Publishing Company, 1954).

<sup>20</sup> Signed on March 9, 1846, the treaty forced the Sikhs to cede Jammu and Kashmir to the British.

<sup>21</sup> Treaty of Amritsar of March 16, 1846, < <https://www.kashmirnetwork.com/justju/stuff/treaty.pdf> >.

<sup>22</sup> MRIDU RAI, HINDU RULERS, MUSLIM SUBJECTS (Princeton University Press, 2004).

<sup>23</sup> It is said that the British 'sold' Kashmir to Gulab Singh for 75 lakh nanak shahi rupees as an early allusion to one of defining British policies of converting land to (private) property - a move that is resented by Kashmiris to this day. MUHAMMAD IQBAL, THE JAMMU FOX 221 (Heritage Publishers, 1988).

<sup>24</sup> Supra Note 14; Memoranda on the Progress of the Trigonometrical Survey in Kashmir by Captain S.G. Mongomerie, Engineers, F.R.G.S., & c., in charge of the series.

<sup>25</sup> For similar discussions on cartography, borders and identity formation in Myanmar and Punjab, see M. Shahabuddin, *Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar*, 9 (2) ASIAN JOURNAL OF INTERNATIONAL LAW 334-358 (2019), and V. Jain, *Broken Boundaries: Border and Identity Formation in Post-Colonial Punjab*, 10(2) ASIAN JOURNAL OF INTERNATIONAL LAW 261-292 (2020).

<sup>26</sup> Graham Huggan, *De-colonizing the Map: Post-Colonialism, Post-Structuralism and the "Cartographic Connection"*, 20 A Review of International English Literature 115 (1989).

<sup>27</sup> JOHN B. HARLEY, THE NEW NATURE OF MAPS: ESSAYS IN THE HISTORY OF CARTOGRAPHY (Johns Hopkins University Press, 2001).

was premised on colonial mandates of resource extraction, revenue collection and military expansion.<sup>28</sup> None of these mandates took into account how knowledge was produced in communities and physical spaces, and more importantly, how the people of the region understood these cohesive processes.

The Dogra rule was extremely unpopular and cause for much discontent in the region<sup>29</sup> - a fact that was not unknown to the British empire.<sup>30</sup> The Dogras established a particular brand of Dogra imperialism in the state, predicated on the idea that Jammu was their home and Kashmir, a conquered country where all non-Dogra communities and classes were given the 'humble place of inferiors.'<sup>31</sup> This latitude given to the local Hindu rulers invariably disadvantaged the Muslim population, creating an explicitly religious idiom of statehood<sup>32</sup> in Kashmir. This produced two liberation struggles in the region in the early 1900s: the Indian freedom struggle against British colonization, and one waged by Kashmiri Muslims<sup>33</sup> against their Hindu rulers kept in place through the patronage of the British. The ensuing feuding led to the formation of political bodies who championed the cause of either landed Hindus or landless disenfranchised Muslims.<sup>34</sup> By the mid-1940s, Kashmir consisted of two complex camps which proved to be decisive to the fate of the region in the run up to Indian independence.

When partition of the Indian subcontinent by the British seemed inevitable, the two emergent states of India and Pakistan both staked claims to Kashmir. The Maharaja (then ruler of Kashmir) and Abdullah (a popular local political leader) stressed affinity with the formally secular<sup>35</sup> India, while the Muslim Conference in Kashmir advocated for a merger with Pakistan, a homeland for Muslims. With considerable support from

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<sup>28</sup> ABRAHAM, ITTY, *HOW INDIA BECAME TERRITORIAL: FOREIGN POLICY, DIASPORA, GEOPOLITICS* (Stanford University Press 1<sup>st</sup> ed. 2014); P. L. MADAN, *INDIAN CARTOGRAPHY: A HISTORICAL PERSPECTIVE* 51-57 (Manohar Publishers and Distributors, 1997).

<sup>29</sup> Rai, *Supra* Note 21, Chapter 5.

<sup>30</sup> Lord Hardinge, the governor-general of India at the time of the first Anglo-Sikh War, in a letter to his wife, describes Gulab Singh as "the greatest rascal of Asia" and "a cruel tyrant", stating that he was an instrumental geographical ally to gain foothold in the region. <http://hdl.handle.net/10603/33270>

<sup>31</sup> *Supra* Note 32; *Supra* Note 21, 559-564.

<sup>32</sup> *Id*; U.K. ZUTSHI, *EMERGENCE OF POLITICAL AWAKENING IN KASHMIR* 165.

<sup>33</sup> This struggle was fundamentally administrative and identarian where religion was not the dominant line of fracture. Much like Punjab, the social cohesion and fabric of the region was not communal and, these identities were broken and reformed as part of the colonial project.

<sup>34</sup> *Supra* Note 21; This fracture is equally important to understand the struggle over land acquisition and land-grabbing in post-colonial India.

<sup>35</sup> Nehruvian Indian regimes, and compromised local politicians used secularism and national security to crush Kashmiri separatism. *Id*.

the Indian National Congress party, and against the backdrop of military skirmish between these two newly formed states, Kashmir was ultimately integrated into India in 1947. While most contemporary legal discourse identifies *this* as the moment of departure to determine what should be applicable and relevant, the terms of discussing the political geography of Kashmir, at the very least, is much more complex than that.

Modern-day Kashmir is a consequential legacy of the colonial powers' imperial geopolitical strategies in the Indian subcontinent,<sup>36</sup> and yet, our conversations about its fate seem to affix itself narrowly to a very specific lexicon of international law – the legality of *uti possidetis*.<sup>37</sup> The principle states that newly formed sovereign states should retain the borders that were drawn prior to/at the time of their independence. And like all other territorial conflicts, it is undeniably relevant in any engagement with state-making processes. This is because the borders established in that moment of territorial de-colonization have become the literal line of battle between the two states. Since then, instead of effectuating a long-promised plebiscite<sup>38</sup> to allow Kashmiris to determine their preferences, India has thrown its economic, political, and military weight behind figures who assure the finality of Kashmir's integration into the mainland. Simultaneously, India has tolerated, if not actively encouraged, the suppression of organized political opposition<sup>39</sup> or popular mobilization against this ultimate goal.<sup>40</sup> Although a simplification of Kashmir's complicated history, what is relevant for the purposes of this reflection is that Kashmir rests on the ramifications of not only bitter religious antagonism left by Partition but also the poisoned seeds of the colonial project around a particular iteration of territorial polity it zealously protects.

### ***B. Lay of the Land (and Laws) and the Rise of Hindu Nationalism with(in) the Post-Colonial State***

At the heart of this formulation are the ways in which land continues to be apprehended and acquired from those who literally live of it, through continued apparitions of the colonial project. Thus, in addition to *uti possidetis*, the centrality of

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<sup>36</sup> Abraham, *Supra* Note 31 at 17-20.

<sup>37</sup> For detailed discussion on the origin and framing of *uti possidetis*, see Jain, *supra* note 28, 262-270.

<sup>38</sup> <http://unscr.com/en/resolutions/doc/47>.

<sup>39</sup> <https://catalyst-journal.com/vol3/no4/kashmir-the-long-descent>.

<sup>40</sup> The panoply of the law of sedition being applied to Jammu Kashmir from 1947 onwards and in different time periods, clearly shows a long and consistent repressive approach; Kashmir Constitutional History and Documents: Documents, Mohan Krishen Teng, Ram Krishnen Kaul Bhatt, Santosh Kaul, 1999 at 550-569.



territory to the discourse of statehood is prevalent in the design of land-grabbing, dispossession and displacement practices in the post-colonial state. Here, expansion is effectuated not just through settler colonialism by the Indian state, but also located in the increased privatization and conversion of land through developmental projects.<sup>41</sup> An unveiling of the process of ordering through borders where laws become instrumental to make/un-make such territoriality, revealing to us how the significance of Kashmir lies in the contestation between enforced strategic proximity<sup>42</sup> and lived proximity to land itself.<sup>43</sup>

On 5 August 2019, India revoked Article 370 of the Constitution taking away the autonomy accorded to Jammu and Kashmir during the formation of the Indian state.<sup>44</sup> Article 370<sup>45</sup> articulated Kashmir's special status in recognition of the power tussle, uniqueness and violence surrounding its annexation by India in 1947.<sup>46</sup> As per this provision, the region was partially immune to the powers, legislative and otherwise, of the Indian government and enjoyed a degree of autonomy over its politics and resources. The struggle for Kashmir has been long and complicated and, by 1960, the Indian government had all but reduced Article 370 to a dead letter, an exercise which Kashmiris have continued to resist fiercely at every step.<sup>47</sup> Kashmir has become a battleground to assert Indian statehood in its most instrumentalist form – the security, border and polity project.

The formal revocation of Article 370 was lethal in that it used the language of law to further a particular endgame – the full 'integration' of Kashmir into the Indian state, a long-standing goal of the Hindu far right<sup>48</sup> that was also enabled by centrist

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<sup>41</sup> PEER GHULAM NABI, *PIECES OF EARTH: THE POLITICS OF LAND-GRABBING IN KASHMIR*; The developmental projects are private as well as state led whereby ensuring control of land by state remains dispersed and accountable through purportedly public welfare projects.

<sup>42</sup> Those who claim ownership and affiliation through of colonial cartography, legal doctrines and territorial finitude.

<sup>43</sup> *Supra* Note 44 - in his work, Suhail Peer Ghulam Nabi has conducted multiple interviews with peasants, landed elites and political scientists, and, this particular observation is grounded in a culmination of their accounts.

<sup>44</sup> <https://www.aljazeera.com/news/2019/08/05/india-revokes-disputed-kashmirs-special-status-with-rush-decree/>.

<sup>45</sup> [https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/article\\_370\\_constitution\\_india.htm](https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/article_370_constitution_india.htm).

<sup>46</sup> Christopher Snedden, *The Untold Story of the People of Azad Kashmir*

<sup>47</sup> Vanessa Chishti, *Kashmir: The Long Descent*, <https://catalyst-journal.com/vol3/no4/kashmir-the-long-descent>

<http://dspace.jgu.edu.in:8080/jspui/bitstream/10739/3810/1/Kashmir%20the%20long%20descent.pdf>.

<sup>48</sup> <https://caravanmagazine.in/conflict/modi-war-dispatches-from-seething-kashmir>.

political parties since 1945. De facto reneging on Kashmir's constitutional rights had now become de jure, and it was a way for the state to become the ultimate authority on matters of autonomy and borders, leaving no room for debate or dissent. The region has been subjected to a near total communication blackout (rolled back partially as of 5 March 2020),<sup>49</sup> increasing military deployment, punitive restrictions on mobility, mass arrests and frequent night raids. More than 700,000 members of the Indian armed forces sit in total siege of the region. Yet, this legal tool merely formalizes what has been Kashmir's reality for decades – held by force and maintained in a permanent state of emergency<sup>50</sup> against the continuous effort of local peoples to seek a form of autonomy that makes the most sense to them.

These measures, along with others, coincide with the mercurial rise of Hindutva,<sup>51</sup> the most prominent form of Hindu nationalism in India, which looks to hegemonically assert the Hindu way of life. In a secular country, this poses considerable challenges. While India's political landscape has seen authoritarian moments before, the unprecedented expansion of right-wing politics has eclipsed every form of opposition and dissent. The Bharatiya Janata Party (BJP), led by Prime Minister Narendra Modi, is a harbinger of ethno-chauvinistic nationalism. BJP has close links to the Rashtriya Swayamsevak Sangh (RSS),<sup>52</sup> a longstanding Hindu nationalist paramilitary organization. In Modi's India, Muslims, particularly Kashmiri Muslims, are denied a dignified existence. Alongside the interminable lockdown in Kashmir, the Modi government's political vision, mired in brute Hindutva, is increasingly instrumentalizing law and applying this exclusionary politics to the rest of India as well.

In recent times, the Indian state has witnessed incessant communally charged violence,<sup>53</sup> primarily across north India, against a legislation that allows discrimination between citizens on the basis of religion.<sup>54</sup> The recently passed Citizenship (Amendment Act) 2019 (CAA), the proposed All India National Register of Citizens

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<sup>49</sup> <https://caravanmagazine.in/conflict/echoes-of-fascism-in-kashmir-valley>.

<sup>50</sup> <https://twailr.com/crisis-constitutionalism-permanent-emergency-and-the-amnesias-of-international-law-in-jammu-and-kashmir/>.

<sup>51</sup> <https://twailr.com/rewriting-india-the-construction-of-the-hindutva-citizen-in-the-indian-state/>.

<sup>52</sup> <https://www.npr.org/2019/05/03/706808616/the-powerful-group-shaping-the-rise-of-hindu-nationalism-in-india?t=1595165488756&t=1603154173455>.

<sup>53</sup> [https://www.washingtonpost.com/gdprconsent/?next\\_url=https%3a%2f%2fwww.washingtonpost.com%2fworld%2fasia\\_pacific%2fwhat-days-of-communal-violence-mean-for-modi-and-forindia%2f2020%2f03%2f01%2f3d649c18-5a68-11ea-8efd-0f904bdd8057\\_story.html](https://www.washingtonpost.com/gdprconsent/?next_url=https%3a%2f%2fwww.washingtonpost.com%2fworld%2fasia_pacific%2fwhat-days-of-communal-violence-mean-for-modi-and-forindia%2f2020%2f03%2f01%2f3d649c18-5a68-11ea-8efd-0f904bdd8057_story.html).

<sup>54</sup> [https://www.flipsnack.com/yesho/15-burning-questions-on-the-cao-nrc-final.html](https://www.flipsnack.com/yesho/15-burning-questions-on-the-caa-nrc-final.html).

(NRC), and the National Population Register (NPR) have catalysed what appears to be India's most potent constitutional moment since independence.<sup>55</sup> The government's position has been unrelenting,<sup>56</sup> unwilling to display any semblance of deliberative democracy and undermining every institution<sup>57</sup> that stands between the executive and absolute authoritarianism. The Supreme Court has deferred to the executive and taken a position<sup>58</sup> that appears to empower the state.<sup>59</sup> Countless corpses, displaced lives, and the destruction of predominantly Muslim property suggests that the state's extra-judicial and judicial limbs may be in tandem<sup>60</sup> during this extermination project.<sup>61</sup>

The removal of its special status has simultaneously led to the erasure of inherited protections on land and jobs in Kashmir. Despite widespread resistance, the Modi government continues to enact a series of new laws as part of its hard-lined Hindu nationalist policies, stonewalling even the possible fall-back of continued Kashmiri integration in the region.<sup>62</sup> On 19 May 2020, the Jammu and Kashmir Re-organisation (Adaptation of State Laws) Second Order, 2020, modified the applicability of domicile orders to 'all level of jobs' in the union territory. Under this, anyone residing in Jammu and Kashmir for 15 years would be able to claim a place of domicile in the occupied territory. According to the Jammu and Kashmir Civil Services (De-centralisation and Recruitment) Act, a domiciled person is any individual who has resided for a period of 15 years in the territory or has studied for a period of seven years and appeared in class 10 or 12 examinations in an educational institution located in the territory.

Prior to this, the definition of a citizen was only to be determined by Article 35A of the Constitution of Jammu and Kashmir. However, post the new legislation, a wide array of individuals can be deemed to be domiciles.<sup>63</sup> Aside from granting near

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<sup>55</sup> <https://thewire.in/politics/an-insurgent-constitutionalism-is-driving-popular-politics-in-india-today>.

<sup>56</sup> <https://timesofindia.indiatimes.com/india/bjp-unfazed-says-will-implement-cao-nrc/articleshow/72893970.cms>.

<sup>57</sup> <https://www.nytimes.com/2020/04/02/world/asia/modi-india-press-media.html>.

<sup>58</sup> <https://thewire.in/rights/supreme-court-refuses-to-intervene-on-jamia-violence-asks-petitioners-to-go-to-hc>.

<sup>59</sup> [https://main.sci.gov.in/supremecourt/2019/29796/29796\\_2019\\_2\\_1501\\_21240\\_Judgement\\_02-Mar-2020.pdf](https://main.sci.gov.in/supremecourt/2019/29796/29796_2019_2_1501_21240_Judgement_02-Mar-2020.pdf).

<sup>60</sup> <https://www.thehindu.com/opinion/op-ed/favouring-public-order-over-justice/article30551737.ece>

<sup>61</sup> <https://www.outlookindia.com/website/story/opinion-india-muslims-cao-shaheen-bagh-what-supreme-court-chooses-to-hear-what-it-doesnt/347028>.

<sup>62</sup> It is pertinent to remember that integration into India is not a desired outcome for pro-independence Kashmiris and multiple other constituents.

<sup>63</sup> These include a person registered as migrant by the relief and rehabilitation commissioner in the union territory; children of central government officials, all India services officers, officials of PSUs, an

unfettered access to land, the legislation now compels the locals to apply for the new ‘domicile certificates’ in order to qualify for permanent resident rights. In order to obtain this, they are required to produce their Permanent Resident Certificates (PRC). Not unlike the mechanism of CAA, the acquisition of the new ‘domicile certificate’ renders all other proof of being and residence, including the PRC which has been valid since 1927, worthless. Unsurprisingly, this move was met with a wave of dissent and protest.

This was followed by yet another legislative intervention on 27 October 2020, which further alters the land-owning pattern of Kashmir.<sup>64</sup> Until 1919, Indians were forbidden from buying property in the region, with the exception of ‘permanent residents’.<sup>65</sup> However, following the new laws, any Indian national is permitted to buy land and the military is allowed to directly acquire land in the region. This new legislation abolished the land reform laws of the 1950s that redistributed large patches of land to landless farmers. With this, most laws that govern local land rights have come to a decisive end, with serious consequences for the people in the region.

The move has been heavily criticized by the pro-independence or independist<sup>66</sup> parties as well as the pro-India politicians in Kashmir, who accuse the state of settler colonialism<sup>67</sup> which aims to alter the Muslim-majority demographic of the space. These laws appear to have little to no democratic bearing, much to the resentment of Kashmiri’s who are already consumed in a battle of will and demand for independence from the Indian state. The new laws also authorize the Indian army to declare any area as ‘strategic’ for operational, residential and training purposes against Kashmiri rebels

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autonomous body of the central government, officials of public sector banks, officials of statutory bodies, officials of central universities and recognised research institutes of the central government “who have served in Jammu and Kashmir for a total period of ten years or children of parents who fulfil any of the conditions in these sections”.

<sup>64</sup><https://abcnews.go.com/International/wireStory/shutdown-kashmir-protests-indias-land-laws-73939136>.

<sup>65</sup> This harks back at the state-subject law formulated by the Dogra King in 1927. After Kashmiri Pandits felt threatened by growing number of Punjabis in the Dogra administration, they demanded a state-subject law to distinguish between Mulkis and Ghair Mulkis. See, MUHAMMAD YUSUF SARAF, *KASHMIRIS FIGHT FOR FREEDOM 1977-1999* (Ferozesons,).

<sup>66</sup> Sumantra Bose uses this term to include both supporters of an independent Kashmir and those who support Kashmir’s merger with Pakistan. ; Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace*, HARVARD UNIVERSITY PRESS (2003).

<sup>67</sup> Patrick Wolfe, *Settler colonialism and the elimination of the native*, JOURNAL OF GENOCIDE RESEARCH 387-409 (2206); Impact of the new legislations are likened to those in the West Bank or Tibet, with settlers living in guarded compounds among disenfranchised locals.

– harking back to colonial curbing of dissent and resistance.<sup>68</sup> The Indian government justifies this incursion as a move towards peace and development of the contentious region.

While many parts of India remain light years away from the carnage that Kashmir has witnessed since its annexation, the meeting point of Kashmir and the new citizenship and residency legislations forces us to revisit a primary concern of TWAIL – sovereignty in its different forms in the global north and south. At this juncture, it is also important to consider that most of north-east India has had long-standing confrontations with the rest of the mainland over territory, governance and the spectre of ‘allegiance’. In addition to Kashmir, there are a cluster of states that are not only seeking autonomy<sup>69</sup> from a rigid sovereign, but are also looking to reorganize as entities that depart from a singular vision of borders and governmentality. Departure from this normative form may not always be an act of conscious resistance. However, it is indicative of a need to delve into epistemologies that allow the imagining of such communities that are not quite legacies of the Westphalian state. What may appear as symptomatic to the rise of ethno-chauvinism across the globe is perhaps a much deeper structural problem – the malady of the concept of statehood.<sup>70</sup>

## II. TWAIL, INTERNATIONAL LAW AND THE ‘FAILED’ 71 STATE

Before I embark on a TWAILian and de-colonial critique of territory, I must lay out three important caveats. The first is to emphasize that international law discourses on statehood seem to presume territorial sovereignty as a given, even when they engage with pre-colonial making of the state. It is near impossible to imagine the modern political world without prior conditions of territorial possession and control in which

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<sup>68</sup> Both the Armed Forces Special Powers Act (AFSPA) and the Indian Penal Code (IPC) contain provisions that allow arbitrary and unaccountable detention and arrest for activities that are ‘anti-national’ or ‘against the state’; AFSPA, S. 4 (1990) and I.P.C. S. 124A (1860).

<sup>69</sup> See generally, Prasenjit Biswas and Chandan Suklabaidya, *Ethnic Life-Worlds in North-East India: An Analysis*, SAGE PUBLICATIONS (2008).

<sup>70</sup> Mainstream international law grants it institutional significance and therefore, I treat it as such in my text. This can be discerned from the process of international legal reproduction and how much emphasis is placed on it by states. See generally, Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance*, CAMBRIDGE UNIVERSITY PRESS (2019).

<sup>71</sup> Eurocentric international uses the term ‘failed state’ to indicate a sovereign state whose sovereignty is now contingent, for failure to discharge its duties as a state. See generally Thürer, D. (1999). The ‘failed State’ and international law. *Revue Internationale De La Croix-Rouge/International Review of the Red Cross*, 81(836), 731-761. I use the term ‘failed’ here to indicate the failure of the territorially bounded state form itself as a sustainable concept.

the exclusionary control of sovereignty is the only politically viable model. Yet, territorial sovereignty became a universal condition when former colonies like India attained independence - compelled to define themselves in territorial terms alone.<sup>72</sup> It is only through the post-colonial states' acceptance of colonial administrative borders that territorial sovereignty gained acknowledgment, legal consequence and political significance.<sup>73</sup>

Second, is to contextualise my use of TWAIL in relation to its position on minorities and their location in the making of post-colonial states. Although TWAIL exposes the limitations of orthodox international law, it also supports the statist system wholeheartedly.<sup>74</sup> TWAIL has repeatedly demonstrated a blind spot for minorities and various other groups such as the people of Kashmir, due to its obsession with the post-colonial state. The role of minorities is central to unpacking state-making. Diverging forces operated within the political boundaries that were arbitrarily drawn by colonial powers and subsequently inherited by post-colonial states. In these nation-building projects post de-colonization, ethnic groups who were outside the state-sponsored national culture were subsumed and repressed. Subsequently, an individualist notion of human rights has become the dominant vocabulary through which the concept of 'minority' is expressed in the post-colonial state.<sup>75</sup> In salvaging the statehood project, TWAIL sets itself up for a paradox where the state-form is dismantled only to be built up again.

Following the use of existing TWAIL literature to unpack the oppressive inheritances of statehood, I move on to question the relevance of confined territory as the only form through which sovereignty can be expressed. As a TWAIL scholar, I find myself at a disciplinary turning point at this juncture. Does deviation from existing TWAIL literature make my position an 'un-TWAIL argument' or should we be open

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<sup>72</sup> It is not within the scope of this paper to discuss at length how and why post-colonial states accepted colonial boundaries and the processes leading to their eventual adaptation. For a detailed conversation on this, see generally Antony ANGHIE, "Bandung and the Origins of Third World Sovereignty" in Luis ESLAVA, Michael FAKHRI, and Vasuki NESIAH, eds., *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* CAMBRIDGE UNIVERSITY PRESS 544 (2017).

<sup>73</sup> *Ibid*, page 20-22.

<sup>74</sup> It is important to acknowledge that TWAIL operates as a spectrum and those on the other end of the reformist understanding of international law do not subscribe to this vision. However, TWAIL has not decisively proposed a departure of statism as yet, despite critiquing it consistently.

<sup>75</sup> For an in-depth analysis of why the liberal individualist approach to minority protection was counter-productive by design, see Mohammad Shahbuddin, *Ethnicity and International Law: Histories, Politics, and Practices*, CAMBRIDGE UNIVERSITY PRESS 136-64 (2016).

to the idea that TWAIL is a moving approach and can also account for minorities as an integral canvas for understanding manifestation of state power? I will leave it to the reader to decide for themselves.

Third, I intend to go beyond the framing of territorial disputes as a contestation between colonial *uti possidetis* and post-colonial self-determination principles. TWAIL has ably exposed that contrary to the colonial (in its contemporary forms) emphasis on the capacity of *uti possidetis* for settling boundary disputes among post-colonial states, it violently exacerbates such claims.<sup>76</sup> This principle undermines the legitimate right to self-determination of numerous ethnic minorities in post-colonial states and its embrace has often lead to violent ethnic conflicts instead of actually curbing violence.<sup>77</sup> In this prevalent framing, both *uti possidetis* and self-determination are understood as competing legal rules followed by an exhaustive analysis of which rule should have prevailed during the de-colonization process. I understand this framing to be limiting, in that it does not engage with the scope of negating the sovereign form of bounded statehood itself.

While *uti possidetis* is indeed a relevant colonial legal signpost, the manner in which we approach the conversation may set us free from pre-existing legal epistemological constraints as well. Thus, the questions of - a) if self-determination prevailed over *uti possidetis* would post-colonial borders have been drawn differently? and, b) if self-determination was secured in both form and substance would defined borders give way to other forms of sovereignty and porosity of territorial configurations? – are both important. However, my preoccupation is not so much with the first as it is with the second because it is the latter that helps us understand if it is possible to be anything other than a territorially bounded state. It is this theme that I try to explore through the reimagination of land, cartography, law and space. This framing is very well within the purview of a reading of law since a) it is rather odd to read law

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<sup>76</sup>See especially Jorg Fisch, *The Right to Self-Determination* (New York: Cambridge University Press, 2015), 69–81, 206–7. See, on colonial borders, Makau Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry,” *Michigan Journal of International Law* (1995): 1113–76. See, on the question of ethnicity and international law, Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge: Cambridge University Press, 2016). See generally, Itty Abraham, *supra* note 31.

<sup>77</sup> Shahabuddin, *supra* note 28 at 344 to 347; Jain, *supra* note 28.

as simple contestations of rules and doctrines when outside of courtrooms and legal office spaces<sup>78</sup> and, b) law can and must be read in more than one way.

### ***A. TWAIL and the Making of the (Post) Colonial State***

TWAIL scholarship has been systemically battling through its critique, the consequences of the Westphalian state, its transfigurations and the imperial relations and domination implemented primarily<sup>79</sup> (but not only) through the model of the state. Despite a diversity of views, TWAIL scholars are unanimous on the conclusion that sovereign statehood in the third world is a positivist and inflexible European colonial imposition through international law. Sovereignty today is a product of the colonial encounter<sup>80</sup> and is at the centre of international law's claim to universality. To participate in international law, a community must attain this form of sovereign statehood and commit to the linear trajectory of development predetermined by Western states as an inherent attribute of sovereignty. The modern state is also a Weberian state<sup>81</sup> that monopolises all legitimate use of force within its territory, eliminating any counterfactual of freedom from this singular vision of governance.

Eurocentric international law grounds the idea of sovereignty in physical territory and all that it contains and shapes. 'Being' a state is demonstrated foremost through the possession of a defined territory<sup>82</sup> while the remaining characteristics follow from the establishment of borders and the act of containment – of people, culture and movement.<sup>83</sup> Malcolm Shaw, the author of the most heavily cited textbook of mainstream international law, speaks of territory not only as “*a geographical conception relating to physical areas of the globe*”, but also that “*its centrality in law and international law in particular derives from the fact that it constitutes the tangible framework for the manifestation of power by the accepted authorities of the state in*

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<sup>78</sup> Tzouvala, *Capitalism As Civilisation: A History of International Law*, CAMBRIDGE UNIVERSITY PRESS 37-42 (2020).

<sup>79</sup> B.S. Chimni, *Third World Approaches to international Law: Manifesto*, 8 INTERNATIONAL COMMUNITY LAW REVIEW 3-27 (2006).

<sup>80</sup> Van der Molen and C. H. Alexandrowicz, *An introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th centuries)*, CLARENDON PRESS, OXFORD (1967). *Nederlands Tijdschrift Voor Internationaal Recht*, 18(2), 245-246 (1971).

<sup>81</sup> MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY*, (Harvard University Press, 1954).

<sup>82</sup> Even if borders of this territory are contested, it has no bearing on its capacity to remain a sovereign state. In fact, borders conflicts appear immanent to the idea of statehood as the possession of territory itself.

<sup>83</sup> Montevideo Convention, Article 1 provides the four criteria for statehood, two of which are intimately connected to the idea of recognition by other states.



*question. The principle whereby such a state is deemed to exercise exclusive power over its territory can be seen as a fundamental axiom of classical international law*".<sup>84</sup>

This co-production of territory and sovereignty is also suggested by Henri Lefèbvre when he notes, how "*each state claims to produce a space wherein something is accomplished—a space, even where something is brought to perfection: namely, a unified and hence homogenous society*."<sup>85</sup> Bringing 'something' to perfection is rooted in a mapping of the political onto a very particular form of spatial - nation-state onto territory - 'a physical basis' which seems to render it eternal and most importantly, inevitable.<sup>86</sup>

This construct of Westphalian, territorial statehood also has a distinctly Eurocentric and deleterious heritage. The modern-day state emerges from *ius publicum Europaeum* which provided the framework for the emergence of states and the proper code of conduct for the new nations.<sup>87</sup> As Pahuja and Eslava observe, *ius publicum Europaeum*, which morphed into the nation-state, was a product of the Enlightenment and European colonial expansion, reflecting the "*prevailing social transformations and Eurocentric cultural understandings*."<sup>88</sup> For Europe, bounded territory and statehood was the highest form of political organization of community. The state, notes Bluntschli, is "*a great body which is capable of taking up into itself the feelings and thoughts of the nation, of uttering them in laws, and realising them in acts*."<sup>89</sup> It is this ethos that marked the consolidation of the nation-state as the only accepted form of governmentality within the international legal system. Thus, with the centralization of European positivist praxis as international law, 1945 became the moment of 'capture' where all post-colonial states were trapped in the false binary<sup>90</sup> of continued territorial

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<sup>84</sup> MALCOLM SHAW, NETHERLANDS YEARBOOK OF INTERNATIONAL LAW (1983).

<sup>85</sup> HENRI LEFÈBVRE, THE PRODUCTION OF SPACE 281 (Wiley-Blackwell, 1991).

<sup>86</sup> Paul Allies quoted in Stuart Elden, "Land, Terrain, Territory," Progress in Human Geography 34, no. 6 801 (2010).

<sup>87</sup> Brett Bowden, *The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization*, 7 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW, 13-20 (2005).

<sup>88</sup> Schmitt, Carl, and G. L. Ulmen. 2003. *The nomos of the earth in the international law of the Jus Publicum Europaeum*. New York: Telos Press; Eslava, Luis and Pahuja, Sundhya, *The State and International Law: A Reading from the Global South* (April 12, 2018). *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, Forthcoming.

<sup>89</sup> JOHAN KASPAR BLUNTSCHLI, THE THEORY OF THE STATE (Kitchener, Ontario: Batoche, 2000).

<sup>90</sup> There is a prevailing tension in international law regarding the self-determining desires of the post-colonial state and what it could choose to be, if at all there was a choice. This paper does not intend to unpack that tension. See generally, *Supra* Note 28.

colonialism or opting for a process of ‘international legal reproduction’<sup>91</sup> in the form of the nation-state.

De-colonization, thus, was an act of ‘self-determination’ instead of ‘self-definition’<sup>92</sup> whereby colonies could conditionally obtain the right to govern themselves. This right, however, could only be practiced in the form of a ‘nation-state’ within pre-established colonial boundaries, over ‘highly disparate ethnic groups and incongruous geographical spaces.’<sup>93</sup> This and only this allowed the emergence and participation of the global south states in the international legal system. However, this imposition of borders and erasure of other forms of governance/existence/polity or even being , came at great cost to the inhabitants, texture and history of the lands, as I illustrate in the following segment.

Subsequently, the nation-state morphed into the modern-day developmental state – an entity on the misplaced linear trajectory of development, signposted by the global north. In order to achieve this, the post-colonial state became a commanding territorial vision, with highly centralized, nationalist and reformist institutions. Recognising their growing inequality and disadvantage, the global south pushed back against international law’s imperial legacy by proposing the New International Economic Order (NIEO) in 1972. For a brief moment, an equitable international legal restructuring seemed almost possible. The NIEO, however, was relegated to a rhetoric and soon after, in the throes of cold war and in an increasingly unequal international economic order, the idea of the Eurocentric sovereign-state was finally embraced as ‘the agent of development’, even among the post-colonial states.<sup>94</sup> This turn was significant in that it paved way for expansion that went beyond security and securitization and shifted focus to contemporary forms of extraction through the free market and the eventual neo-liberal state.

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<sup>91</sup> Rose Parfitt describes ‘International Legal Reproduction’ as international law’s role in establishing and perpetuating inequalities of wealth, power and pleasure. Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance*, CAMBRIDGE UNIVERSITY PRESS (2019).

<sup>92</sup> Eslava and Pahuja, supra note 93 at 43.

<sup>93</sup> On the loss of the right to self-definition, see GILBERT RIST, *THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH* 79 (Zed Books, 2014).

<sup>94</sup> See generally, Anghie, A. (2005). *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press..

It is in the second half of the twentieth century that the maladies of the post-colonial state came to the fore. Much like its colonial predecessor, it designed itself around ideas of homogeneity where indigeneity and local forms of governance were invisibilised in the name of a different form of nationalism.<sup>95</sup> National governments became obsessed with the extension of 'national' logics and interests over the existing spatial and human landscape of their nations. Following the colonial streak, territory was forcibly reduced to economic relations (land as private property) or strategic relations (terrain as power).<sup>96</sup> A wave of dictatorship could be seen emerging across the former colonies,<sup>97</sup> characterised by a need to control 'their' territories and populations in order to realise the nationalistic vision of this new developmental, post-colonial state. In India, this period was marked by a declaration of national emergency and extreme curtailing of rights through neo-colonial<sup>98</sup> policies of forced sterilization<sup>99</sup> et al. In contemporary India, the series of citizenship and residency laws enacted under Narendra Modi's government seems to be eerily reminiscent of this authoritarian form of territorial vanguardism, aiming to curtail and control the territory, population and the territory *through* population of the 'within and beyond'<sup>100</sup> of the Indian state. Between then and now, what remains common is the ever- morphing idea of state.

In the late 1980s, in yet another turn of events, this international commitment to assist the development of third world states was marked by a rupture and the flow of aid from the global north was replaced by interventionist criticism.<sup>101</sup> The post-colonial states were asked to account for their uneven development across geographies, gender, and ethnicities, and accused of failing their human rights obligations. Following this

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<sup>95</sup> *Supra* Note 93 at 43; *Supra* Note 28 at 14.

<sup>96</sup> Neither formulation is an accurate representation of the concept of territory. This depiction of territory is not natural nor obvious, but rather the spatial outcome of a specific set of territorializing practices through colonial cartography - ownership, distribution, mapping, bordering and control. See generally John A. Agnew and Stuart Corbridge, *Mastering Space: Hegemony, Territory and International Political Economy* (London and New York: Routledge, 1995), Chapter 4.

<sup>97</sup> See generally ODD Arne Westad, *The Global Cold War: Third World Interventions and the Making of Our Times* (Cambridge University Press, 2005).

<sup>98</sup> I cite Nkrumah here to speak of the overarching spectre and use of the term Neo-Colonialism, 239–354.

<sup>99</sup> These measures map on to two distinct patterns of the sovereign state a) biopolitics and biopower as modern modes of subjectification and governance and, b) necro-politics as sovereign decisionism on death. See M Foucault, *The Birth of Biopolitics: Lectures at the Collège De France 1978-79* (trans. G Burchell, 2008) 21-22 for a and A Mbembe 'Necropolitics' in Campbell and Sitze 161 for b.

<sup>100</sup> Given the laws inevitable double bind on the Kashmiri Muslim 'outsider' (as discussed in part IV), this distinction of within and beyond becomes relevant.

<sup>101</sup> Samir Amin, *Accumulation on a World Scale: Critique of the Theory of Underdevelopment*, N. Y. MONTHLY REVIEW PRESS (1974).

transition, the global south's lack of 'development' was completely divorced from its colonial history and it became an ahistorical, self-contained project. The impact of enforced European culturalization through statehood was transposed on to the south's 'state of nature'.<sup>102</sup> Centralized development programmes and public institutions were deemed inadequate to address these concerns. Soon, private actors and market-based approaches led to the shrinkage of the state's role in this endeavour. The Bretton Woods institutions were replaced by the Washington Consensus and from this, emerged the new developmental or the neo-liberal state.

With the arrival of the neo-liberal state, the economic reach of multinational corporations expanded significantly, creating new lines of fracture as against the north-south developmental divide. In this form of statehood and the post-colonial state, a more flexible relationship was envisioned between the public and the private sectors, with increased decentralization of state-led development. More recently still, this transmutation has found expression in and through the citizenry of the new developmental state where the individual consumer is an agent responsible for their own development. "Today", write Pahuja and Eslava, "*governments address citizens as if individuals were sovereign over their own destinies.*"<sup>103</sup> Globalization has expanded the relational forms between territory and institutional encasement beyond the conventional idea of sovereign rule and national territory.<sup>104</sup> With the emergence of transnational corporations and transnational elites, supra and sub-state actors, both public and private have significantly decentered the role of the nation state.<sup>105</sup> In each of these reconfigurations, international law remains the language of conveyance while the state remains the vessel.

Thus, in spite of such decentralization and reorientations, the Westphalian nexus between territory and sovereignty has remained. International law continues to build around the notion of territory which undergirds countless international legal doctrines.<sup>106</sup> The constitutive force of territory has been reiterated through colonial era

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<sup>102</sup> See generally, THOMAS HOBBS, THE LEVIATHAN (Project Gutenberg, 2002).

<sup>103</sup> Pahuja and Eslava, *Supra* Note 93 at 43.

<sup>104</sup> Sassen S, *Bordering Capabilities versus Borders: Implications for National Borders*, 30 MICH. JOURNAL OF INTL. LAW 567–597 at 574 (2009).

<sup>105</sup> *Id.*

<sup>106</sup> Kritsiotis D., 2009. Public International Law and Its Territorial Imperative Michigan Journal of International Law. 30(3), 547-5662009, at 547. For an account of the ongoing resilience of sovereignty as an organizing category in international law and international relations in spite of contemporary

conceptions of *terra nullius*, de-colonisation, principles of *uti possidetis* and post-colonial crystallization of self-determination. Foundational institutions and texts such as the League of Nations and the UN Charter also mirror these myths through Mandates, Trusteeship Councils and General Assembly resolutions on de-colonisation and self-determination. Territorial integrity, and through it, sovereign identity (and equality) remains foundational to the contemporary international legal order, despite increasing fragmentation.<sup>107</sup> It is within this concept of bounded territory that maladies of the Westphalian state truly rest. The new state also continues to reproduce the colonial praxis and concerns as against land and citizens. For Eurocentric international law, the state formed through de-colonization (and government) is taken to represent the entire social body. “*Class divisions, ethnic or racial discrimination, gendered oppression are all ‘absorbed’ by the state-form, which operates as the embodiment of the postcolonial*” notes Tzouvala.<sup>108</sup> Consequently, all forms of social struggle are invisibilised or mediated through the state-versus-private actors binary, reinstating the centrality of the ‘territorial’ sovereign.

With this as the context, where does one locate Kashmir in this evolving paradigm of territorial containment? In Kashmir, this artificial containment manifests simultaneously in multiple forms through the tools of terrain, development and the citizen. Following colonial cartography and bordering post 1947, Kashmir has been consistently flattened to be a territorial dispute between two states, each trying to posit land as terrain. The strand of ethnic, religious and social relations that are inherently associated with land have been completely erased. With the emergence of the neo-liberal state, this has concurrently morphed into a newer, neo-liberal settler colonialism as opposed to the more conventional state-driven settler colonialism.<sup>109</sup> This form of settler colonialism appears to be a logical continuation and a 21<sup>st</sup> century adaptation of a program, that has been ailing Kashmir (and comparably, Palestine) for most parts of

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challenges, see Aalberts T (2012) *Constructing Sovereignty Between Politics and Law*. Routledge, London.

<sup>107</sup>Kendall S., *Cartographies of the Present: ‘Contingent Sovereignty’ and Territorial Integrity*. In: Kuijer M., Werner W. (eds) *Netherlands Yearbook of International Law* (Asser Press, 2017).

<sup>108</sup><https://www.afronomicslaw.org/2020/10/26/international-law-and-de-colonisation-in-africa-60-years-later>.

<sup>109</sup> Partially comparable to Benyamin Netanyahu’s economic peace slogan where the settler colonialism is based on the interest and development plans of companies and economics. See generally, Dana, Tariq (2015). “The symbiosis between Palestinian ‘Fayyadism’ and Israeli ‘economic peace’: the political economy of capitalist peace in the context of colonisation”, *Conflict, Security & Development*, Vol. 15, issue 5, pp. 455-477.

the 20<sup>th</sup> century as well. In Kashmir's past, present and near future, one comes to see every possible account of territorial control and acquisition that could be exerted, by the state.

There are two assumptions that undercut the developmental trope advanced by the government through the newly ordained land laws in the region. First, it is not Article 35A but the lack of public investment that has deterred private industry in Kashmir. Haseeb Drabu, an economist and the former finance minister of Jammu and Kashmir observes that private investments often follow the lead of public investments.<sup>110</sup> Unlike other Indian states, where the government has created the infrastructure for the private sector to enter, public investment in Kashmir has been stagnant from 1947 to 1991 (the pre-insurgency period included).<sup>111</sup> Second, one must contextualise the uniqueness of land acquisition and dispossession in Kashmir. These are not just instances of state and/or corporate land grabbing but, the possession of occupied land in a conflict zone<sup>112</sup> - and this has immense narrative potential and significance in terms of who it really benefits and who it truly disenfranchises.<sup>113</sup>

The state's use of the economical characterization of land for further expansion as well as a reconfigured form of traditional settler colonialism is achieved by promising development through integration and assimilation of the region; a scheme where not only can the local population be displaced by new land-owners from the Indian mainland, but the people of Kashmir<sup>114</sup> can be equally co-opted into this notion of development. This developmental narrative envisions multiple public and private owned energy and resource base projects<sup>115</sup> where the state controls the land and its use through various interfaces. So, even if the region of Kashmir can be forcibly co-opted into an account of empowering progress due to the positive externalities it *may* have

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<sup>110</sup> <https://caravanmagazine.in/economy/kashmir-public-investment-private-industry>.

<sup>111</sup> One may cite insurgency as the reason for post liberalisation inertia but there is little to no explanation for state apathy prior to that moment. Even after 1991, the state's response through heavy and consistent militarization indicates an intention that is contrary to any standard formulation of development.

<sup>112</sup> Palestine is the only other documented instance and each of these cases should be studied independently and within their context of conflict of occupation as opposed to decontextualised land grabs.

<sup>113</sup> For a detailed discussion on land dispossession and displacement in Kashmir, see *Pieces of Earth*.

<sup>114</sup> When I say people of Kashmir, I refer to the landed elite and the middle class. The lower class and peasantry have consistently been dispossessed and displaced through colonial and post-colonial state forms.

<sup>115</sup> *Pieces of the Earth*, Chapter 1.

for the Kashmiri upper and middle-class,<sup>116</sup> it will be primarily economically dependent on the Indian state.<sup>117</sup> If the Indian state succeeds in this enterprise, then in the future, paradoxically, the presence of the settler may no longer be required in the settlement. However most importantly, most, if not all of these measures will continue to work towards the massive disenfranchisement of the poor, the landless and those who subsist on land holdings that are considered to be most viable for these stated-led projects *i.e.*, those who truly live of the land.

### ***B. Territory, Borders and Frontiers – International Law’s Original Sin***

Despite its fragmentation, evolution and the many moorings, international law remains rooted in its persistent original myth of the Westphalian state. The state, in turn, grounds its ordering through bordering territories – past and present.<sup>118</sup> Colonial expansion, linear boundaries and fronterization, I suggest, are international law’s *original sins*. In bringing the conversation back to state-making and territory, can we truly understand what ails the post-colonial state process. In doing this, I undertake what Foucault terms a ‘history of the present’, in which the conflicts and contingencies that unsettle the givenness of the contemporary order are uncovered through genealogical inquiries of the past.<sup>119</sup> A diagnosis of territorial boundary making opens up an archive of state-making that goes beyond positive legalism towards a (re)imagination of porous governmentality, cartography and the relationship between the inhabitant, their law and the land. In all its Biblical fanfare, the chronicle of this original sin takes us to a site where the continuities with the past manifest as the conflict of the present.<sup>120</sup>

Through the conception of territory and statehood, three critical events occurred: a) statehood became an ahistorical, foundational institution of international law, b) the post-colonial state inherited the trappings and maladies of the colonial state, and c) the ahistorical idea of statehood led to a complete decontextualization of the global south’s problems. The significance of territorial borders in the state-making

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<sup>116</sup> For these middle and upper classes, it is definitely an opportunity for investment and economic development, but it is difficult to find how the lower classes can benefit from it; Ibid.

<sup>117</sup> A comparison can be drawn with the new smart city of Rawabi in West Bank where development is synonymous with urban surveillance and neo-liberal settler colonialism.

<sup>118</sup> Kendall, *Supra* Note 112 at 57.

<sup>119</sup> Garland D, *What is a ‘History of the Present’? On Foucault’s Genealogies and Their Critical Preconditions*, 16 PUNISHMENT & SOCIETY. Punishment & Society, 365–384 (2014).

<sup>120</sup> *Supra* Note 123.

process was diffused and the state was accepted as the central, inevitable vehicle of the international legal reproduction<sup>121</sup> process. This, in turn, diverted us from a closer inspection of the impact that forced territorial borders had on communities, the corrosion of such identities, the creation of a new communal consciousness through colonial instruments in the lead up to independence and, the re-entrenchment of new (and old) fractures in post-colonial spaces.<sup>122</sup> I depart here from traditional TWAIL and post-colonial scholarship once again. My fear is that instead of carefully deconstructing the *source code of state-making*, we have misplaced our attention and energy on *how* the post-colonial state continues to reproduce the colonial mantle.

The demarcation of borders and frontier zone was at the heart of the 19<sup>th</sup> century colonial project and this was not limited to the British empire.<sup>123</sup> Early European empires were gatekeepers<sup>124</sup> in a hegemonic exercise of identity creation. Legitimacy was granted through transmutation and homogenization of other sovereign forms. States lost their porous borders and in many places, indigenous communities' unaffected communion with land was threatened by settler colonialism,<sup>125</sup> while in other places, rigid, inorganic borders replaced practices of collective ownership of land and spaces. International law refused to comprehend those who work the earth and assimilate into the socio-cultural milieu through acts of engagement. It created an *inside* and *outside* of the law through violent, arbitrary borders, removing all signs of pre-colonial peoples, community and arrangements. While the state is the legally recognized form of governance today, even the International Court of Justice has borne witness to these structures and relationships that predated the modern state.<sup>126</sup>

Contemporary historical materials, archives of official correspondence and cartography have allowed us to reconstruct the territorial dynamics at work during colonial fronterization, particularly in South Asia.<sup>127</sup> For colonial officers, territory

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<sup>121</sup> *Supra* Note 75 at 45.

<sup>122</sup> For a detailed and similar discussion on Rohingyas and the partition of Punjab, see Shahabuddin, *supra* note 28 and Jain, *supra* note 28.

<sup>123</sup> [https://www.himalmag.com/memories-of-galwan-valley-2020/?utm\\_source=NewsletterSubscribers&utm\\_campaign=47b37bec61-Newsletter+May+10\\_Survey\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_949b3d6c7a-47b37bec61-408500321](https://www.himalmag.com/memories-of-galwan-valley-2020/?utm_source=NewsletterSubscribers&utm_campaign=47b37bec61-Newsletter+May+10_Survey_COPY_01&utm_medium=email&utm_term=0_949b3d6c7a-47b37bec61-408500321).

<sup>124</sup> *Supra* Note 99 at 48.

<sup>125</sup> <https://salvage.zone/in-print/the-walls-of-the-tank-on-palestinian-resistance/>.

<sup>126</sup> <https://www.icj-cij.org/en/case/32>.

<sup>127</sup> For an interesting discussion on how post-colonial India engaged with colonial cartography, see Itty Abraham, *Supra* Note 31 at 30-33.



could only be linear, unchanging and continuous. As a result, they would record territories using terms such as ‘detached’, ‘intermixed’, and in need of ‘adjustment’. In comparison, officers from South Asia would note territorial possessions through ideas of jurisdiction determined by historical custom, conquest, claims to taxation, tribute, inheritance and so on. Land, in these regions frequently shifted hands and forms of governance, between smaller kingdoms which, in turn, were dependencies of powerful states.<sup>128</sup> Shifting hierarchies exemplified a form of territorial dynamism and there was little need to keep territories and their boundaries continuous and constant.<sup>129</sup>

Contrary to colonial imagination and discourse, the pre-colonial subject appears to have possessed a keen awareness of the political and geographical expression of their relationship to land.<sup>130</sup> The staggered polity and governmentality demanded a conception of land that was flexible and rooted in fluidity and change. The native subject was not in need of scientific maps or linear boundaries to depict the contours of the land they inhabited and worked on. They lived in a world that had its own set of rules for establishing these lines on the ground.<sup>131</sup> My invocation of the native subject here is to speak of a relational and lived proximity to land. Ordering of territory through bordering produces a “*political field that transforms the internal contours of territory, privileging some places over others and the elevation of some peoples over others*”.<sup>132</sup> In this churning, the one that has lost the most and continues to, is this relational native subject.

This is not to suggest that that pre-colonial regimes outside of Europe did not possess the capacity to deploy modern cartography to map their territories. Many Asian states (in erstwhile Indo-China) pursued cartographic projects that gave an idealised view of their respective dominions. For instance, Siam (present day Thailand) relied on French cartography in course of delimiting its boundaries from Cambodia (then a French protectorate)<sup>133</sup> and in the early 18<sup>th</sup> century, the Qing dynasty in China employed Jesuit cartographers to map the expanse of its kingdom (an idea that China

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<sup>128</sup> *Supra* Note 85 at 37.

<sup>129</sup> Wolfe, *supra* note 72 at 32; Michael, BERNARDO A., STATE-MAKING AND TERRITORY IN SOUTH ASIA: LESSONS FROM THE ANGLO-GORKHA WAR 1814–1816 (Anthem Press, 2012).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Supra* Note 31 at 28

<sup>133</sup> See generally Kendall, *Supra* Note 112.

has transposed into its modern-day territorial projects).<sup>134</sup> Rather, this is to observe that modern maps have no memory and see only structures, not people. Here, I part ways with contemporary conversations on identity making through colonial cartography and segue into a different imaginary of my own making - porous subjectivity, fluid territory and being with/of land in the most intimate ways.

Prior to the modern cartographic creation of simplified and linear geographical scaffolding that now forms the state, people in pre-colonial nomadic, agrarian and coastal societies inhabited fluid territories that were intermixed in their governmentality, lay of the land and organisational practices. For such communities, the distribution of land rested on rights and privileges of *actual* use and inhabitation as opposed to boundaries that have little to do with the ethos of the regions.<sup>135</sup> Land, and the law that allowed for its governance, were deeply connected to the people and praxis, rooted in a notion of *use, reuse and continuity of change*.<sup>136</sup> Now, it is power, that determines the ability of a state to render its territories in straight lines. Porous boundaries and non-linear lines indicates the presence of social forces and interests that the state has to account for and accommodate while making boundaries;<sup>137</sup> populations, spirits and political energies that resist linear, disconnected lines by the sheer force of their history and presence. Linear boundaries are only possible in sparsely populated or captured landscapes whose native populations have been subdued, decimated or relocated. Boundary lines, therefore, are sites of state-making that reflect the power and capacity of the colonial state to delineate and enforce them. This process was reproduced through expansion, international legal formulation and modern cartography till only the Westphalian state remained.

### III. KASHMIR AS THE BORDER OF INTERNATIONAL LAW

Statehood is an act of erasure, and a study of legitimacy of identity and belonging invariably becomes an inquiry into the state-making process in a region. Modern statehood, resting on linear colonial border making, produces three lines of

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<sup>134</sup> *Supra* Note 134 at 68.

<sup>135</sup> See generally, Wolfe, *Supra* Note 72; Irene Watson, *Buried Alive*, Law and Critique, 13 KLUWER LAW INTERNATIONAL, 253-269 (2002).

<sup>136</sup> 'Use' here is very distinct from the colonial sense of private property. It alludes to a form of socially and environmentally responsible tenancy where one is simply to look after, love and be in the land for a brief time frame.

<sup>137</sup> *Supra* Note 140.

fracture: *First*, it segregates the land and its inhabitants, wherein people who work it are dislocated, invisibilised and their relationship to the land is made contingent. *Second*, it ruptures the population by creating a dichotomy between the good/authentic and bad/errant citizen. A good citizen does not question the underlying history, conflict and erasure imposed by borders. They accept the encasement of the state as instrumental and permanent. *Third*, it erases all pre-colonial forms of governmentality and the possibility of revisiting them, rendering any form of resistance to statehood illegal and redundant. In this configuration, belonging to a state, being a state, or being under the protection of the state are the only alternatives available for any form of native/local resistance.

Kashmir is the wild zone of sovereignty, where borders, as a dysfunctional colonial inheritance, allow each of these ruptures to be prominently displayed. It becomes not just a challenge to colonial continuities of the post-colonial state, but, to the idea of modern statehood itself. Historically, Kashmir is not distinct from other colonial border disputes. There are three things that make it lethal. It is a complex multi-ethnic, multi-party conflict which has been subsumed into a singular narrative of territorial dispute between states. It is the first recorded instance in any post-colonial society where a community has been asked to repeatedly prove their allegiance and belonging after decades of independence. It is veritable proof that land, at the cost of people, has been at the centre of international law's governance. In Kashmir, we see both actual and contingent sovereignty<sup>138</sup> – where India asserts its territorial and political boundaries against the international community and yet, violates those of Kashmir, on grounds of incursion and disruption by Pakistani support to Kashmiri insurgents. Now, with the abrogation of its special status, it has moved to insidious forms of settler colonialism.

The current Indian government has attempted to justify its incursion into Kashmir as a necessary step to development as well as consolidating Indian statehood. It has repurposed its fascist machinations as a developmental narrative,<sup>139</sup> arguing that the subjugation of Kashmir will benefit economic development in Kashmir and India, even if it comes at the expense of the free choice, identities and lives of those who live

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<sup>138</sup> *Supra* Note 112 at 57.

<sup>139</sup> <https://www.forbes.com/sites/williampesek/2020/01/10/india-has-worst-economy-in-42-years-is-prime-minister-modi-watching/#6a6b2cd52a1>.

there. Again, I draw a distinction between Kashmiri elites, middle-class, landowners and the peasantry. While the entire region is subjugated under the political will of the Indian state, the sole focus on political movements bely the real impact of borders and territoriality in the region. Most public debates on Kashmir are confined to pro-independence movements, continued militarization, developmental projects (such as HEPs) by the government and subsequent resource exploitation and damage to the region. While all of these are significant, they offer an incomplete insight into the pathologies of territorial statehood. Rarely, if ever, is there an account of the cumulative impact of all these sites of fracture on the peasantry, poor landowners and labour of/on the land - in whom the true idiom of land rests. This is in keeping with the critique of TWAIL where categories of minorities are subsumed in and barely subsist within bounded territory which is currently the post-colonial state. This is an inherently masculine<sup>140</sup> and oppressive form of territorial statehood. No matter who occupies it, the ability to subjugate remains,<sup>141</sup> with variations only in the degree of inequality and exploitation. This capacity to thus exert power is deeply rooted in making impossible the pre-colonial forms of comity and community that linear boundaries have erased.

Kashmir is not only about dignity, sovereignty, and the ability of Kashmiris to choose their own fate. It points to a systemic failure in the concept of sovereign statehood that international lawyers have unsuccessfully tried to address through human rights and self-determination, TWAIL's recurrent warnings notwithstanding.<sup>142</sup> Battles for secession, national liberation, and new state formation may seem to be about the promise/threat of identity-based boundaries, but this is often a diversion from the real issue: the limitations inherent to boundary making itself. I choose to examine this failure in Kashmir's context for three reasons.

The first is its stale topicality, rendering it necessary to resist the normalization of this state of exception<sup>143</sup> and continued violence. The second is that it is one of the most complex manifestations of competing identarian and relational claims enmeshed in a certain notion of territoriality and terrain. The duration of the conflict, the

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<sup>140</sup> Ratna Kapur, *Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India*, 12 MELBOURNE JOURNAL OF INTERNATIONAL LAW 317 (2013).

<sup>141</sup> <http://opiniojuris.org/2017/01/17/asia-international-law-and-international-institutions-a-comment/>.

<sup>142</sup> Ratna, *supra* note 145 at 78; Anghie, *supra* note 99 at 48; Chimni, *supra* note 84 at 36.

<sup>143</sup> I use this as understood by Agamben in G. AGAMBEN, *STATE OF EXCEPTION* (2003).

stakeholders,<sup>144</sup> and the impasse<sup>145</sup> seem to guide us to the inevitable – Kashmir’s ‘territorial’ concerns<sup>146</sup> are unsolvable within the paradigm of modern statehood. The international community’s inaction has allowed India to finally make Kashmir an ‘internal problem’.<sup>147</sup> By inaction, I allude to the international community’s refusal to critically scrutinize the terms of debate as well - what does/should an endorsement of the right of self-determination mean in international law for a nation which is ‘stateless’? In other words, where can we go from here in a way where the lay of the land is not forced into the myth of statehood’s inevitability, once again. The reins, if one may call them so, must rest in the people who work them. The third reason is, the manifestation of this expression of statehood and boundary in a new category – the citizen.

The citizen is the legal personhood of belonging to a state, and the right of exclusion is premised on non-nationality which in turn is premised on sovereignty. If sovereignty is constructed racially, imperially and such, then its most logical conclusion is that the notion of the citizen is also premised on similar extrapolations.<sup>148</sup> It is pertinent to note that the issue of citizenship, while closely related to the question of territoriality, simultaneously relies on the liberal ideology embedded in the internal organisation of post-colonial states. Liberalism is a powerful tool to diffuse the ‘other’ (in this case, the Kashmiris as a community and within them, the Kashmiri peasantry) into individual citizens. While a keen engagement with liberal constitutionalism is integral to this conversation, for the purposes of this paper, I limit myself to territory and terrain.

Located in Kashmir is the expression of citizenship as an extension of the statehood idiom. The legal imaginary of the citizen is a product of the legal normative of the state. The power to both determine and define citizenship is a form of control exercised by the state. Sovereignty has always been used for the creation of

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<sup>144</sup> RADHA KUMAR, *PARADISE AT WAR: A POLITICAL HISTORY OF KASHMIR* (Aleph 2018).

<sup>145</sup> CHRISTOPHER SNEDDEN, *UNDERSTANDING KASHMIR AND KASHMIRIS* (Hurst Publication, 2015).

<sup>146</sup> I argue that there are concerns *with territoriality* as opposed to territorial concerns in the modern international law sense.

<sup>147</sup> UNHCR Kashmir Report, [https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport\\_8July2019.pdf](https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport_8July2019.pdf).

<sup>148</sup> I supplement this position with Arjun Appadurai’s argument that all nation-states are based on an ethnocentric core or a majoritarian core. See – A. APPADURAI, *FEAR OF SMALL NUMBERS* (Duke University Press, 2009).

‘disciplined, responsible sovereign subjects within the international legal order’.<sup>149</sup> Territorial sovereignty is a form of political technology that produces the notion of control of terrain and within it, the citizen as a disciplined, sovereign subject. The state formulates policies to promote a vision of citizens as “*economic agents with commercial initiative, economic judgment, and a duty of self-preservation*”.<sup>150</sup> Kashmiris have consistently challenged this narrative, allowing the Indian state to designate them as ‘unproductive’, ‘brainwashed’ excesses who defy the construct of the ideal citizen. This is particularly juxtaposed against the mainstream ‘ideal citizen’ who is a productive member of the community and in compliance (and consonance) with the machinations of the post-colonial state.

The new citizenship laws in India, in tandem with the land laws in Kashmir, have further qualified the formulation of the citizen that is acceptable to the Indian state. The concept of the citizen “*carries the ethical connotation of participation in the sovereignty of the state*”.<sup>151</sup> The use of documents to ‘other’ populations is an established tool of governance used by the post-colonial sovereign as well as the colonial state, particularly in South Asia.<sup>152</sup> The citizenship rules in India are setting apart new kinds of populations who are administered through colonial methods of classification and exclusion through tools of law and governmentality. These are the ‘illegal migrant’, ‘the bad Muslim’ and ‘the foreigner’ who are unable to validate themselves as Hindutva subjects through the administrative apparatus of the state.<sup>153</sup> Akin to colonial rule, all ‘populations’ are *prima facie* subjects, not citizens.<sup>154</sup> The law allows some subjects to transcend to *de jure* citizenship status as long as they are able to map onto the ethos of the state.

In the past, citizenship laws in India have been framed and amended in response to the Partition and its ensuing religious conflicts and political challenges. However, until the CAA, eligibility of citizenship has never been determined on the criterion of

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<sup>149</sup> Albert and Werner, 2011 at 2185.

<sup>150</sup> See generally, Eslava and Pahuja, *Supra* Note 93.

<sup>151</sup> PARTHA CHATTERJEE, *THE POLITICS OF THE GOVERNED*, (Columbia University Press, 2004).

<sup>152</sup> *Id.*

<sup>153</sup> TWAILR – Vasanthi Venkatesh and Fahad Ahmed < <https://twailr.com/rewriting-india-the-construction-of-the-hindutva-citizen-in-the-indian-state/>>.

<sup>154</sup> *Supra* Note 156 at 86. Chatterjee demonstrates how the modern and colonial states create identifiable, classifiable, wholly empirical ‘populations’ out of citizens. Their ‘participation’ is considered essential to legitimate state sovereignty, but they are made to inhabit only the ‘domain of theory’.

religion.<sup>155</sup> For Kashmir, this represents a form of double ‘othering’ where the ‘unproductive’, un-citizen is also a Muslim un-citizen. In 1953, Shyama Prasad Mukherjee, a pioneer Hindu right wing figure, wrote “*if the Muslims of Kashmir do not want to remain with us, let them go away, but Kashmir must and will be ours. This is a vital matter for the security of India.*” Mukherjee’s pronouncements are a haunting reflection of the population rupture created by statehood and many see the abrogation of Article 370 as a culmination of this long-standing right-wing vision.<sup>156</sup> The CAA is a state sanctioned machine to which communal Hindu Indians have condensed their collective dependence. It achieves two things – making the state and unmaking the citizen. It strengthens the sovereign power of the Indian state by showing how it can ‘bind and unbind’.<sup>157</sup> Citizenship laws, such as the CAA, produce the ‘neurotic citizen’<sup>158</sup> who bears heavily on the agency of the ‘minority citizen’<sup>159</sup> and determines the tonality of the state. In determining the characteristics of citizenship, the state tells us who belongs and who deserves to stay. Since community and border making are inherently linked through international law’s violent history, problematizing the idea of the citizen is to question statehood as well. Every new law in India that strikes at Kashmir and Muslims, exposes the unserviceable fractures of the statehood project.

### CONCLUSION

The colonial project was a vision driven by a desire to control, occupy and capture resources while disciplining populations, eroding their culture and their movements. The state was idealised as a container with clearly defined lines, marking its edges. However, the aim to secure a coherent and ordered empire was never truly realised. The forcibly imposed boundaries and the state-form never erased the complexity and fluidity that marked the underlying social life in these regions. It simply

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<sup>155</sup> Desai (2020); The CAA followed similar changes to the Passport (Entry into India) Act and the Foreigners Act. Perhaps the only notable exception is the rejection of the Permanent Settlement Bill moved by National Conference in 1980s, which sought to restore property rights to the 1947 Muslim refugees who had fled to Pakistan following the partition of Jammu. The bill was shelved by the Supreme Court stating that the refugees were now Pakistani citizens and, it was a question of sovereignty and citizenship.

<sup>156</sup> <https://www.thehindu.com/news/national/article-370-martyrdom-of-dr-mukherjee-for-complete-integration-of-jk-honoured-says-ram-madhav/article28820818.ece>. It is pertinent to note that there is a certain continuity in the approach taken by the BJP and its predecessor, the Congress in which there has been a constant erosion of the autonomy of Kashmir.

<sup>157</sup> BUTLER AND SPIVAK, WHO SINGS THE NATION STATE (2007).

<sup>158</sup> Engin F. Isin, *The Neurotic Citizen*, *Citizenship Studies*, 8:3, 217-235 (2004).

<sup>159</sup> <https://twailr.com/minorities-and-the-making-of-postcolonial-states-in-international-law/>.

hid them from view or transmuted them into modern-day boundary disputes in post-colonial states. At its moment of independence, colonial India was a smattering of territory which included a plethora of princely states whose boundaries remained intermixed and unevenly surveyed. It is here that Kashmir, as the site of projected geo-body<sup>160</sup> of the Indian nation-state, becomes an act of telling and divulgence.

Unpacking Kashmir, the impact of CAA<sup>161</sup> and the recent legislation that reorganizes land ownership on the region, urge us to a pre-colonial disposition with an anti-colonial<sup>162</sup> gaze where land was never meant to be conquered and distributed though brute force masquerading as law and legal systems. Indigenous critiques such as Irene Watson's *Buried Alive*<sup>163</sup> take us to an imagined state that decouples law and land from a position of ownership and propriety. Here, law is a device that sustains everyone's temporary allegiance to land as something much bigger than themselves. There is no territorial state-form, and making borders contingent reveals how belonging is deeply connected to state-making (and un-making). Many conflicting desires are located in the narrative of Kashmiri resistance. But at the heart of them all, there is a call for *azadi* (freedom, in the most expansive sense) through a politics devoted to long-term preservation of human life. Perhaps, this is resolved if we turn to other epistemologies of land, law and governance. In shifting focus away from disruptive, linear borders, we gently hand the process to where it has always belonged – the intimacy between lands and their people.

The battle for Kashmir is more than a battle for the line of control. In mountains uncaptured by unfinished cartography, wounds in the land become wounds in the people. The never-ending siege of Kashmir by the Indian state rests precariously on the idea of territorial statehood and therefore, is irresolvable. As long as the state demands borders and creates its 'ideal' citizens, *tehreek* (armed resistance) will continue to raise its head, nestled among the weary hopes of the people. The conversational shift to land, law and liberation becomes imminent. The problem is not so much that one cannot

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<sup>160</sup> THONGCHAI WINIKACHUL, *SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION*, (University of Hawaii Press, 1997).

<sup>161</sup> <https://theconversation.com/call-the-crime-in-kashmir-by-its-name-ongoing-genocide-120412>.

<sup>162</sup> Here, I refer to Jayan Nayar's conceptualization where anti-colonial forms the frontier against colonial (b)ordering. Post-colonial, in his understanding, is simply continuous and analogous to the colonial form of world making in which positionality is another circuit in the system.

<sup>163</sup> *Supra* Note 73.



apportion land to those who stake competing claims. The problem is the way we have conceptualized land as sovereign territory and who has rights over it. Escaping the legacies of colonialism requires much more than 'rectifying' the post-colonial state – it demands an escape from the Westphalian bounded state as a form of governance. In this context, perhaps *azadi*, the battle cry for a free Kashmir, is not just a cry for freedom from the Indian state but from the idea of statehood itself.

An attempt towards resolution of the conflict over Kashmir and its hydra-headed impact on India as a whole, may require deeper imagination than we currently permit ourselves. Colonial obsessions about boundaries and lines of control (also masculine anxieties about control of space), are reproduced in post-colonial, developmental, nation-states. A truly post-colonial (and de-colonial) moment might call for more ingenuity than “*seeking solace from imagined pasts and the anxieties of colonial and national elites*”.<sup>164</sup> In exiting and abandoning the state-form and rigid boundaries, we may finally be able to return land to its inhabitants in meaningful configurations, devoid of power and excesses.

The other side of statehood need not be a place of epistemic void. It carries possibilities and visions of porous configurations, of social organisation that are just beyond our line of sight, somewhat akin to those prior to the colonial moment. As stated at the outset, my task here was to problematize, as sincerely as possible, without attempting to offer solutions that are epistemologically unfathomable without a collective conscience. In fact, the labour of problematizing is predicated not just on an account of what constitutes problems (as distinct from symptoms), but also as a relocation of the terms - problem and solution - themselves. In performing this exercise, I am hoping that others join me and take up the task of critical imagination to contemplate different spatial configurations and ways of being that are for the moment, let us say - not states.

Thus, a detailed examination of such alternatives lies outside the scope of this paper.<sup>165</sup> While there have been many proposed suggestions from the re-drawing of artificial colonial boundaries<sup>166</sup> to the retention of *uti possidetis* with re-adjusted

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<sup>164</sup> *Supra* Note 134.

<sup>165</sup> For a discussion on possible legal alternatives to *uti possidetis*, see Jain, *Supra* Note 28 at 291-292.

<sup>166</sup> Makau Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1113 (1995).

administrative borders in order to better accommodate local interests, they are all located within the bordering and ordering frame. International law can (and has) also accommodated non-linear traditional frontiers to better actualize local practices.<sup>167</sup> While I am sympathetic to the reality, gravity and associated consequences of sovereign statehood, I am equally compelled to think beyond its epistemological limits, particularly in Palestine, Kashmir and other uniquely placed places where any process of boundary formation profoundly impacts the territories and the people it divides continuously, to this day.

Kashmir, much like Palestine,<sup>168</sup> presents an opportunity for designing and generating a new vision for the people to live together and govern themselves. This social contract that we need to be thinking about does not necessarily have to exist anywhere or in this moment — it can very well begin in a microcosm of something that can be replicated in the future elsewhere; in which local needs, narratives and social relations form the basis for economics and governance and where the broad reckoning with the colonial past and present allow integration and equity between social, racial and religious identities under a new framework of belonging. An ethical way of being and living with the land is not limited to the consciousness of the territorial nation state and possibly, not at all, if one is to go by the global paradigms of the day.

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<sup>167</sup> Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier* (36 BROOKLYN JOURNAL OF INTERNATIONAL LAW (2010)).

<sup>168</sup> <https://jewishcurrents.org/the-palestinian-cause-at-a-moment-of-transition/>.

## WHO IS A 'PROCLAIMED OFFENDER'? PUTTING THE CRPC'S INTERPRETATIVE IMBROGLIO TO REST

*Jaideep Singh Lalli\**

*Unlike many other wrangles of statutory interpretation, the clash of conflicting High Court judgments on the meaning of the term 'proclaimed offender' under India's Criminal Procedure Code has received little to no attention in the realm of academia. This paper remedies that ignorance by anatomizing the changes that the 2005 amendments to the Code (and accompanying amendments to the Indian Penal Code) have brought to the legal framework on who a 'proclaimed offender' is and what liabilities the ascription of that title entails. Highlighting how a simple act of issuing a proclamation or declaring a person as a 'proclaimed offender' can have legal consequences of staggering proportions in the domain of penal liability, the paper contextualizes the interpretative conflict by tracing how the term's usage has historically evolved within the contours of the Criminal Procedure Code. It then discusses the substance of the conflicting judgments of India's High Courts to arrive at the realization that none of the proffered opinions answer the relevant questions completely. After pointing out the severe shortcomings in the opinion of the Delhi High Court, the paper applies rules of statutory construction to propose an interpretation that comports with the legislative intent writ large in the concerned statutory provisions. The paper then concludes with the hope of the imbroglio's final determination by the Apex Court.*

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## INTRODUCTION

As a comprehensive body of procedural law for dispensing criminal justice, the Code of Criminal Procedure, 1973, (**CrPC** or **1973 Code**) has run into myriad issues, requiring judicial interpretation to put statutory ambiguities to rest. From the scope of Section 438 in *Gurbaksh Singh Sibbia v. State of Punjab*<sup>1</sup>, provisions regulating arrest in *Joginder Kumar v. State of Uttar Pradesh*<sup>2</sup> and *DK Basu v. State of West Bengal*<sup>3</sup>, the registration of a First Information Report (**FIR**) in *Lalita Kumari v. Govt of UP*<sup>4</sup> to more recent instances of factors

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<sup>1</sup> *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565.

<sup>2</sup> *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260.

<sup>3</sup> *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.

<sup>4</sup> *Lalita Kumari v. Govt. of U.P.*, (2014) 2 SCC 1.

to be taken into account while granting bail in *P Chidambaram v. Directorate of Enforcement*<sup>5</sup>, final adjudication by the Supreme Court has not only ushered in legal uniformity but has also salvaged legislative intent from being rendered otiose due to faulty construction.

One domain into which this interpretative exercise of the Apex Court has still not ventured is that of the meaning of the term ‘proclaimed offender’ under the CrPC. An anomaly arose with amendments in 2005 to the text of Section 82 of the 1973 Code, a provision that prescribes the procedure of issuing proclamations for securing the presence of absconders before a court of law.<sup>6</sup> Sections 82-86 deal with scenarios where after an arrest warrant has been issued against an accused person, there are reasons to believe that such accused is absconding or is otherwise concealing himself so that the warrant cannot be executed. In these cases, the court has the power to issue written proclamations enjoining such a person to appear before the court.<sup>7</sup> The court may even decide to attach his property and in case the accused does not appear before the court as required by the proclamation, the property would be at the disposal of the state government and can even be sold.<sup>8</sup>

Prior to 2005, a person against whom a proclamation had been issued was referred to as a ‘proclaimed person’ in some sections and as a ‘proclaimed offender’ in others.<sup>9</sup> However, by the amendment in 2005, two sub-sections (sub-sections 4 and 5) were added to Section 82, one of which stipulated, only for a specific list of offences, that if the person does not appear as required by the proclamation, then the court may make a declaration pronouncing him a ‘proclaimed offender’.<sup>10</sup> Post the amendment, petitions started surfacing, challenging the Court’s designation of an accused person as a ‘proclaimed offender’ on the ground that this designation could only be attributed if the person was accused of any of the offences mentioned in the list provided in Section 82(4), and not otherwise. Conflicting interpretations by different High Courts in response to this matter have only compounded the interpretative predicament.

One may be tempted to think of the issue as an innocuous controversy of terminology, but disabusing oneself of that notion only requires a reading of Sections 40, 41, 43 and 73 of the 1973 Code and Section 174A of the Indian Penal Code, 1860 (IPC). The dispute is not

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<sup>5</sup> *P. Chidambaram v. Directorate of Enforcement*, 2019 SCC OnLine SC 1549.

<sup>6</sup> *Vimla Ben Ajit Bhai v. Vatslaben Ashom Bhai Patel*, (2008) 4 SCC 649; *Deepak Saha v. State*, 2017 (5) RCR (CrI) 730.

<sup>7</sup> The Code of Criminal Procedure, No. 2, Acts of Parliament, 1973 (India), § 82.

<sup>8</sup> *Id.* § 83

<sup>9</sup> *Id.* §§40, 43, 73, 83, 84, 85.

<sup>10</sup> The Code of Criminal Procedure (Amendment) Act, No. 25, Acts of Parliament, 2005 (India), § 12.

of mere theoretical significance; it has practical consequences for determining the scope of powers of arrest, issuing warrants and criminal punishment. For that reason, uncovering the correct legal position is of paramount importance for upholding the rule of law and ensuring that justice is appropriately administered. In pursuit of that aim, it would be instructive to first discuss the frame of reference for the issue, i.e., CrPC provisions governing the framework for securing the accused's presence.

## **I. CONTEXTUALISING THE DISPUTE**

The precepts of fair trial ordain that for a trial to be considered as fair, it will, inter alia, have to be conducted in the presence of the accused.<sup>11</sup> Bearing this in mind, the CrPC's provisions provide several ways of ensuring the attendance of the accused in court, from coercive measures like arrest without warrants to means that tread on liberty gradually, like summons, arrest warrants, proclamation and property attachment measures. Chapter VI of the 1973 Code outlines the process of compelling the appearance of the accused.

### ***A. Summons and Warrants: The Initial Choice***

The 1973 Code envisages two ways of ensuring an accused's presence at trial: (i) issuing summons for appearance; and (ii) arrest and detention. The choice of which method deserves to be employed in a particular case is, generally speaking, at the discretion of the judicial officer tasked with handling the matter.<sup>12</sup> However, this discretion does not operate haphazardly; it is guided by the provisions of the CrPC. The CrPC categorises all criminal cases into 'summons cases' and 'warrants cases' on the basis of the seriousness of the offence, as indicated by the quantum of punishment.<sup>13</sup> This classification guides a judicial officer's decision on which of the two methods has to be adopted to secure the accused's presence in that it lays down the general rule that summons are to be issued in a summons case and an arrest-warrant has to be issued in a warrants case.<sup>14</sup> The rationale of this general rule is that in summons cases, which involve trials for less serious offences, the probability of the accused absconding or disobeying the summons would be relatively lower than in warrants cases, where the accused faces the threat of greater punishment. However, the rule isn't an absolute decree, as the CrPC confers discretion on a judicial officer to deviate from this general rule if the

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<sup>11</sup> See *H.R. Industries v. State of Kerala*, 1973 Cri LJ 262; *State v. Ananta Singh*, 1972 Cri LJ 1327.

<sup>12</sup> See *Ram Lal Narang v. State*, AIR 1979 SC 1791; *State (CBI) v. Dawood Imbrahim Kaskar*, (2000) 10 SCC 438.

<sup>13</sup> *supra* note 7, §§ 2(w), (x).

<sup>14</sup> *supra* note 7, § 204.

circumstances warrant such departure.<sup>15</sup> Additionally, an intentional omission to appear in court after a summons has been issued is a punishable offence.<sup>16</sup>

### ***B. Proclamation: Disciplining Contumacy***

As has been highlighted earlier, once a warrant of arrest has been issued and the person for whose arrest the warrant has been issued seems to be evading the warrant's execution, the court can issue a proclamation for such person asking him to appear before it at a specific time and place.<sup>17</sup> Sub-section (2) of Section 82 provides the manner in which the written proclamation is to be published, and the requirements therein are mandatory.<sup>18</sup> Sub-section (3) lays down that the issuing court's written statement is conclusive evidence of the issuance of the proclamation and the compliance of that issuance with the section's requirements. With the addition of sub-sections (4) and (5) through the 2005 Amendment, sub-section (4) now specifies that the court, after making such inquiry as it deems fit, is empowered to declare that person a 'proclaimed offender' who: (i) is accused of any of the select offences mentioned therein<sup>19</sup>; and (ii) fails to appear at the specified place & time required by the proclamation issued for him under sub-section (1).

This is relevant because a proclamation triggers two main corollaries. First, under Section 83 of the CrPC, the issuance of a proclamation under Section 82(1) allows the court to attach property belonging to the 'proclaimed person', which the court can sell in case of the accused's continued non-appearance. Second, non-appearance in response to a proclamation is an offence under Section 174A of the IPC.<sup>20</sup> This is where the Section 82(4) declaration makes a pertinent difference; a person who disobeys a proclamation under Section 82(1) is liable for punishment with imprisonment up to three years or with fine or with both (under Para 1, Section 174A of the IPC), while a person against whom a subsequent declaration under Section 82(4) has been made is liable to be punished with imprisonment up to seven years and a compulsory fine (under Para 2, Section 174A of the IPC). It must be noted that prior to the 2005 addition of Section 174A, disobeying proclamations was punished merely by simple imprisonment up to six months or fine up to a thousand rupees or both, under Section 174 of the IPC.

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<sup>15</sup> *supra* note 7, § 87.

<sup>16</sup> The Indian Penal Code, No. 45, Acts of Parliament, 1860 (India), § 174.

<sup>17</sup> *supra* note 7, §82(1); Sunil Kumar v. State, 2001 SCC OnLine Del 1020.

<sup>18</sup> Bishundayal v. Emperor, AIR 1943 Pat 366; Devendra Singh Negi v. State of U.P., 1994 Cri LJ 1783.

<sup>19</sup> Offences punishable under Indian Penal Code, 1860, §§ 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460.

<sup>20</sup> Added by the Code of Criminal Procedure (Amendment) Act, 2005, § 44(b).

### *C. Usage of the Term ‘Proclaimed Offender’: Tracing Historical Progression*

The CrPC was first concretised in 1882; subsequently, it underwent substantial overhaul only in 1898 and then in 1973 after the 41<sup>st</sup> Law Commission Report.<sup>21</sup> Before the amendment in 2005, the term ‘proclaimed offender’ found an explicit mention only in three sections of the 1973 Code<sup>22</sup> and an implicit mention in one.<sup>23</sup> Section 40(1)(b) of the 1973 Code casts a duty on village-officers and village-residents to report the presence of any person who the officer/resident knows or reasonably suspects to be a ‘proclaimed offender’ if such offender enters or passes through the village. This provision was first incorporated in India’s Criminal Procedure Code of 1882.<sup>24</sup> Since the 1882 Code only contemplated a proclamation (and not a further declaration as in the 2005 Amendment’s new sub-section 4 of Section 82 of the 1973 Code), a ‘proclaimed offender’ meant a person in respect of whom a proclamation had been issued under Section 87 of the 1882 Code (which is now Section 82 in the 1973 Code).<sup>25</sup> In 1894, a new explanatory clause was added to Section 45 of the 1882 Code (which remained Section 45 in the 1898 version of the Code, but became Section 40 in the 1973 Code) which extended the definition of ‘proclaimed offender’ to offenders in respect of whom a court in a territory where the CrPC did not apply had issued a proclamation in relation to acts which if committed within the territories to which CrPC did apply, would qualify as an offence under any of the following sections of the IPC: “302, 304, 382, 392 to 399, 402, 435, 436, 449, 450 and 457 to 460”.<sup>26</sup> With this expansion, the village-officer’s/resident’s responsibility now extended even in respect of those offenders against whom a proclamation might not have been issued under the CrPC. This was done mainly to avoid jurisdictional problems encountered during Crown prosecutions. Since the CrPC did not extend to the whole of India even after Independence, it made sense to retain this explanation in the 1973 Code.<sup>27</sup>

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<sup>21</sup> LAW COMMISSION OF INDIA, THE CODE OF CRIMINAL PROCEDURE, 1898 (41<sup>st</sup> Report 1969).

<sup>22</sup> *supra* note 7, §§ 40(1)(b), 43(1), 73(1).

<sup>23</sup> *supra* note 7, § 41(1)(c).

<sup>24</sup> The Code of Criminal Procedure, Acts of Parliament, 1882 (India), § 45.

<sup>25</sup> *Emperor v. Ram Sarup*, AIR 1938 Oudh 80; *In Re: Petition of Pandya Nayak*, (1884) 7 Mad 436.

<sup>26</sup> *supra* note 24, §45(ii); D.E. CRANENBURGH, THE NEW CODE OF CRIMINAL PROCEDURE 19 (1894) (in the 1898 version of §45 and even in §40 of the 1973 Code which is *in pari materia* with §45 of earlier versions of CrPC, the list in the explanatory clause remained the same; note that the list in this explanatory clause is different from the list in 2005 Amendment’s §82(4) of the 1973 Code because the former list does not include many sections in the latter list & vice-versa).

<sup>27</sup> *supra* note 7, §§1, 40.



Bearing this meaning of a ‘proclaimed offender’ in mind, there seems to be no doubt about the fact that before 2005, the terms ‘proclaimed person’<sup>28</sup> and ‘proclaimed offender’<sup>29</sup> referred to the same concept, i.e., a person in respect of whom a proclamation has been issued under the CrPC.<sup>30</sup> Accordingly, Section 41(1)(c) of the 1973 Code authorises the arrest without warrant of a person ‘who has been proclaimed as an offender’. Moreover, Section 43(1) legitimises the arrest of a ‘proclaimed offender’ by a private person and Section 73(1) bestows both the Chief Judicial Magistrate and a Magistrate of the First Class with the authority to issue an arrest-warrant for a ‘proclaimed offender’. Thus, Sections 40, 41, 43 and 73 confer powers on different authorities in respect of ‘proclaimed offenders’, understood as persons against whom a proclamation has been issued.

The 2005 Amendment added a new scheme to the CrPC by specifying a process according to which the issuance of a ‘subsequent declaration’ as per Section 82(4) of the CrPC designating the accused as a ‘proclaimed offender’ would make him liable for greater punishment under IPC. The bone of contention with regard to this change is two-fold: (i) does the amendment imply that no one can be referred to as a ‘proclaimed offender’ except a person accused of any of the nineteen offences listed in Section 82(4) and against whom a subsequent declaration under that provision has been made? (question one); (ii) if yes, does that mean that the term ‘proclaimed offender’ as used in four other CrPC sections<sup>31</sup> has also undergone semantic remodelling to the effect that the four sections are no longer triggered simply on the issuance of a proclamation, but that they would now require the Section 82(4) subsequent declaration to be operative? (question two). Ever since High Courts embarked on the journey of answering these questions through the adjudication of petitions challenging proclamation orders, the responses proffered have either ignored one of these questions, rendering the whole exercise futile, or have embraced fallacious interpretations of statutory history relegating the CrPC’s provisions to ineffectuality.

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<sup>28</sup> Used in the Code of Criminal Procedure, 1882, §§88-89; The Code of Criminal Procedure, 1898, §§88-89; The Code of Criminal Procedure, 1973, §§83-85.

<sup>29</sup> Used in the Code of Criminal Procedure, 1882, §§45, 59, 78; The Code of Criminal Procedure, 1898, §§45, 59, 78; The Code of Criminal Procedure, 1973, §§40, 43, 73.

<sup>30</sup> *Emperor v. Ram Sarup*, AIR 1938 Oudh 80; *In Re: Petition of Pandya Nayak*, (1884) 7 Mad 436 (the explanatory clause only expands this definition while the general meaning remains the same).

<sup>31</sup> *supra* note 7, §§ 40, 41, 43, 73.

## II. THE TALE OF DIVERGENT OPINIONS

In light of the indispensability of proclamation provisions, one would presume that most High Courts must have at some point confronted the two questions. But, an examination of case law on the point reveals that there are only two to three High Courts that have been at the forefront of analysing the debate and proposing answers, viz. the Punjab & Haryana High Court, the Rajasthan High Court, and the Delhi High Court. These High Courts have ended up locking horns in illuminating the accurate legal position with respect to both the questions.

### A. Punjab and Haryana High Court: Chronicling the Court's Intramural Contradictions

The Punjab & Haryana High Court has had a pronounced history of striking down orders declaring an absconding accused person as a 'proclaimed offender', if he has not been accused of any of the offences enlisted in Section 82(4).<sup>32</sup> In a half-page order in *Satinder Singh v. State of UT Chd.*,<sup>33</sup> Justice Permod Kohli quashed a proclamation order declaring the accused as a 'proclaimed offender' because he had not been accused of any of the offences mentioned in Section 82(4). This case was followed in two subsequent matters.<sup>34</sup>

The reasoning on which these pronouncements are predicated received detailed substantiation only in *Rahul Dutta v. State of Haryana*<sup>35</sup> and *Sanjay Sarin v. State (UT Chandigarh)*<sup>36</sup>. The court's interpretation of the CrPC in both these judgments led it to the conclusion that after the 2005 Amendment, the terms 'proclaimed person' and 'proclaimed offender' had distinct connotations inasmuch as only a person evading arrest-warrants issued in respect of the offences mentioned in Section 82(4) could be declared a 'proclaimed offender', whereas persons accused of other offences could be referred to as 'proclaimed persons' and nothing more. Evidently, the Court does not answer question two in any of these judgments, and as long as an answer to the effect of the theoretical classification between the two terms on the operation of CrPC provisions is unclear, this series of judgments does not lay

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<sup>32</sup> See *Satinder Singh v. State of U.T. Chandigarh*, 2010 SCC OnLine P&H 6551; *Sarabjit Rai v. State of Punjab*, CrI. Misc. No. M-37489 of 2010 (decided on Jan 27, 2011); *Ramji Dass v. State of Punjab*, CrI. Misc. No. M-24417 of 2010 (decided on Feb 10, 2011); *Baldev Singh v. State of Punjab*, CrI. Misc. No. M-6301 of 2011; *Balihar Dhami v. State of Punjab*, CrI. Misc. No. M-7249 of 2011 (decided on Mar 9, 2011); *Sukhwinder Singh v. State of Punjab*, CrI. Misc. No. M-18469 of 2011 (decided on Aug 23, 2011); *Likhma Ram v. State of Punjab*, CrI. Misc. No. M-36988 of 2011 (decided on Dec 7, 2011); *Jaswant Singh v. State of Punjab*, CrI. Misc. No. M-31531 of 2011 (decided on Dec 15, 2011).

<sup>33</sup> 2010 SCC OnLine P&H 6551.

<sup>34</sup> *Likhma Ram v. State of Punjab*, CrI. Misc. No. M-36988 of 2011 (decided on Dec 7, 2011); *Jaswant Singh v. State of Punjab*, CrI. Misc. No. M-31531 of 2011 (decided on Dec 15, 2011).

<sup>35</sup> 2011 SCC OnLine P&H 16868.

<sup>36</sup> 2012 SCC OnLine P&H 22817.

down the law completely. In fact, in this scenario, any judgment that only addresses ‘question one’ and does not touch ‘question two’ will have to be viewed as bad in law in so far as the lack of a response to ‘question two’ breeds obscurity in the apparent answer to question one (in the sense that the characterisation of the term ‘proclaimed offender’ that question one requires would be deficient if the implications under Sections 40, 41, 43, and 73, of a person being declared as a ‘proclaimed offender’ are not clarified, as required by question two).

This is where the sole deviating approach assumes centre stage. In the midst of a plethora of judgments advocating for one proposition, Justice MMS Bedi in *Deeksha Puri v. State of Haryana*<sup>37</sup> advanced a diametrically opposed view.<sup>38</sup> The pith of this ruling is that the 2005 Amendment has not altered the principle that the terms ‘proclaimed person’ and ‘proclaimed offender’ mean one and the same thing for the purposes of liabilities and consequences under the CrPC. The only effect it has had is in relation to Section 174A of the IPC, where a person for whom the Court issues the Section 82(4) declaration is liable for a higher degree of punishment; so, even if someone is referred to as a ‘proclaimed offender’, that would not automatically render them liable for a higher punishment under Section 174A of the IPC. This is because higher punishment is contingent on compliance with Section 82(4)’s essentials and not on the usage of one term or another. For that reason, Justice Bedi says that a proclamation order referring to a person as a ‘proclaimed offender’ cannot be called into question merely on the ground that the offence alleged to be committed by him does not fall under the list of sections given in Section 82(4). The logic to which this proposition is anchored lies in the Court’s recognition that addressing or referring to a person either as a ‘proclaimed person’ or ‘proclaimed offender’ makes no difference to liabilities and consequences under the CrPC which accrue to both classes with equal vigour (since both the terms indicate one and the same thing within the scheme of the CrPC in Justice Bedi’s opinion). Justice Bedi invokes Section 41(1)(c) as an example of this parity to say that irrespective of the title, a proclaimed person’s/offender’s arrest without warrant is permissible. The judgment does not discuss whether the same reasoning would extend to Sections 40, 43 and 73 of the 1973 Code, but it can safely be assumed that the question would have been answered in the affirmative if brought before Justice Bedi.

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<sup>37</sup> 2012 SCC OnLine P&H 20122.

<sup>38</sup> Foundations for the opinion however had previously been laid in *Rajiv v. State of Haryana*, CrI. Misc. No. M-30146 of 2011 (decided on Oct 12, 2011).

Justice Bedi's judgment was subsequently brought to the attention of a bench of coordinate strength in *Sanjay Sarin v. State (UT Chandigarh)*.<sup>39</sup> Justice Vijender Singh Malik in that case refused to follow Justice Bedi's opinion without scrutinising its ratio and instead reaffirmed the decision in *Rahul Dutta*. On the contrary, Justice Naresh Kumar Sanghi in *Puneet Sharma v. State of Punjab*<sup>40</sup> followed Justice Bedi's approach without discussing contrasting judgments. This record of the Punjab & Haryana High Court's verdict on the two questions shows that the High Court itself does not endorse or follow a uniform approach. Contradictory judgments exist, and the question is still open for deliberation.

### ***B. Delhi High Court and its Radical Postulation***

The Delhi High Court's approach to the matter is of relatively recent origin. In *Sanjay Bhandari v. State (NCT of Delhi)*<sup>41</sup>, the High Court was faced with a criminal revision petition wherein the petitioner sought to impugn the order of the trial court declaring him a 'proclaimed offender', contending that since he had not been accused of offences listed under Section 82(4) of the CrPC, such declaration was *contra legem*. The petitioner's counsel relied on a 2018 judgment of the Rajasthan High Court.<sup>42</sup> In *Rishabh Sethi v. State of Rajasthan*<sup>43</sup>, the petitioner – accused of offences under Sections 7, 12, 13(1)(d), 13(2) & 14 of the Prevention of Corruption Act, 1988 and Section 120B IPC – filed a criminal miscellaneous petition to quash the Sessions Court order declaring him as a 'proclaimed offender'. The accused-petitioner's counsel contended inter alia, that the petitioner should not have been declared as 'proclaimed offender' by the court below as none of the offences alleged against him were mentioned in sub-section (4) of Section 82 CrPC. Following the decisions of the Punjab & Haryana High Court in *Rahul Dutta*, *Satinder Singh* and *Sanjay Sarin*, Justice Deepak Maheshwari of the Rajasthan High Court accepted the argument of the accused-petitioner's counsel and held that he could at most be termed as a 'proclaimed person', and not a 'proclaimed offender'.

Per contra, the State's counsel before the Delhi High Court, contended that the term 'proclaimed offender' could rightly be employed for persons who are accused of offences other than the ones that §82(4) mentions, though consequences under the IPC may be different for such persons. To buttress this argument, the State's counsel placed heavy reliance on the

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<sup>39</sup> 2012 SCC OnLine P&H 22817.

<sup>40</sup> 2013 SCC OnLine P&H 7577.

<sup>41</sup> 2018 SCC OnLine Del 10203.

<sup>42</sup> *Rishabh Sethi v. State of Rajasthan*, S.B. CrI. Misc. No. 5767 of 2017 (decided on Mar 8, 2018).

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

Punjab & Haryana High Court's decisions in *Rajiv v. State of Haryana*<sup>44</sup> and *Deeksha Puri v. State of Haryana*<sup>45</sup>.

A single judge bench of the Delhi HC rebuffed the State's contention and held that 'proclaimed persons' and 'proclaimed offenders' have discrete spheres of operation. Explaining further, the Court asserted that 'proclaimed persons' are those against whom a proclamation has been issued under Section 82 of the CrPC; 'proclaimed offenders' on the other hand are those accused of offences mentioned in Section 82(4), and in respect of whom a subsequent declaration after the initial proclamation, ascribing them the title under the same section, has been made. The reason behind this ruling is that no provision except Section 82(4) authorises the designation of a person as a 'proclaimed offender'; since that is true, such a designation will have to be limited to the regime that Section 82(4) provides, i.e., the title shall be reserved only for individuals who fit the scenario contemplated by that section. In the considered opinion of the High Court, a declaration that attributes the title of 'proclaimed offender' to persons accused of offences not covered by the list in Section 82(4) is bad in law and liable to be set aside for its illegality.

Nonetheless, the elevation of lexical trivialities to the status of the determining feature of illegality for proclamations, was not the most radical feature of the Court's ratio decidendi. In examining the dichotomy of 'proclaimed persons' and 'proclaimed offenders', the Court held that being declared as the latter not only occasions higher liability under Section 174A of the IPC but also occasions adverse consequences under Sections 40, 41, 43 and 73 of the CrPC, saying in effect that these four sections would be triggered only when the Section 82(4) declaration is made. This means that village officers/residents would no longer have any responsibility to report in respect of a person against whom only a proclamation has been issued; police officials would no longer have the authority to effect the arrest of such a person without a warrant; private persons wouldn't be able to arrest such a person; and the Chief Judicial Magistrate or a Magistrate of the first class would cease to have the statutory power to issue an arrest-warrant against such a person if he is within their local jurisdiction. The consequence of this is that according to the Delhi High Court, the intent of the 2005 Amendment was to carve out an exemption from applicability of Sections 40, 41, 43 and 73 of the CrPC for all those accused persons against whom a proclamation has been issued but for

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<sup>44</sup> CrI. Misc. No. M-30146 of 2011 (decided on Oct 12, 2011)

<sup>45</sup> 2012 SCC OnLine P&H 20122.

offences other than the ones listed under Section 82(4). This part of the Court's pronouncement has placed imperative components of CrPC's scheme at the risk of being gutted of their content.

### III. DISINTERING THE TRUE STATUTORY PURPORT

All relevant judgments considered, the interpretative conflict still awaits final adjudication. The perusal of differing High Court decisions confirms that opinions on this criminal procedure disputation fall short of a complete account of legislative intent on the two questions that the paper started with; questions, which seek to harmonise the 2005 Amendment with the framework that existed prior. On account of this shortcoming, the issue deserves a fresh perspective.

#### *A. Harmonious and Purposive Construction to the Rescue*

In this epoch of jurisprudential development, it is accepted as axiomatic that interpreting a statutory provision requires it to be studied against the backdrop of the statute as a whole, the legal position prior to the provision's addition, the general scheme of the concerned legislation and the mischief that it seeks to remedy.<sup>46</sup> The rule of harmonious construction necessitates that the court must always harmoniously construe the provisions of a statute such that one provision is not allowed to emaciate or defeat the operation of other connected provisions.<sup>47</sup> It has been held that the principle that a piece of legislation is to be construed as a whole applies on a parity of reasoning to every part of a single section as well, meaning thereby that all parts of a section are to be read as a whole.<sup>48</sup>

Another seminal rule of statutory interpretation is the one evolved in Heydon's Case<sup>49</sup>. The ruling established that the canons of purposive construction call for a four-point enquiry to give effect to the legislature's true intent: (i) analysing the common law as it existed before the enactment in question; (ii) identifying the mischief or defect that the legal position prior to the enactment in question failed to address; (iii) viewing the remedy that the legislature developed to cure the defect or deal with the mischief; (iv) examining the true reason of the remedy. The case further saddles all judges with the responsibility of favouring a construction

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<sup>46</sup> Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, 2021 SCC OnLine SC 194.

<sup>47</sup> Canada Sugar Refining Co. v. R., 1898 AC 735; M. Pentiah v. Muddala Veeramallappa, AIR 1961 SC 1107; Gammon India Ltd. v. Union of India, (1974) 1 SCC 596; C.I.T. v. National Taj Traders, (1980) 1 SCC 370; Sultana Begum v. Prem Chand Jain, (1997) 1 SCC 373; Kailash Chand v. Mukandi Lal, (2002) 2 SCC 678; Indore Development Authority v. Shailendra, (2018) 3 SCC 412.

<sup>48</sup> Tehsildar Singh v. State of U.P., AIR 1959 SC 1012; Mohan Singhania v. Union of India, AIR 1992 SC 1.

<sup>49</sup> (1584) 76 ER 637.

that advances the purpose of the remedy. These English law doctrines have been assimilated into the body of Indian law on statutory construction.<sup>50</sup> Since the ‘proclaimed offender’ wrangle is in the nature of a conflict of statutory interpretation, the application of these principles is desirable.

### ***B. Delhi HC’s Paradigm: A Hornet’s Nest***

In view of the historical and contemporary scheme of the CrPC and how it is implemented, the Delhi High Court’s opinion and all rulings of the Punjab & Haryana High Court that are congruent with the Delhi High Court’s opinion appear inimical to the principles of purposive and harmonious construction.

According to the Delhi High Court, the legislative intent of the 2005 Amendment was to limit the meaning of the term ‘proclaimed offender’, such that village-officer/resident reporting responsibilities, the police’s power to arrest without a warrant, a private person’s power of arrest, and a Magistrate’s power to issue arrest-warrants in relation to a ‘proclaimed offender’ were restricted to the extent that these provisions only bear relevance for persons who have been declared ‘proclaimed offenders’ under Section 82(4), and not for persons against whom only a proclamation has been issued under Section 82(1). The right questions to ask in response are: Why would the legislature want to do that? What mischief would such a change remedy? What makes those nineteen offences so special as to be the only class of offences in respect of which Sections 40, 41, 43 and 73 should be triggered?

Since the 1882 and 1898 versions of the Code, Sections 40, 43 and 73 of the CrPC (which were Sections 45, 59 and 78 in those earlier versions) have existed only to facilitate obtaining information as to the commission of offences, thereby enabling the investigation of the crime, and to secure the presence of the accused person.<sup>51</sup> The term ‘proclaimed offender’ as used in these sections meant that the mere issuance of a proclamation under Section 82(1) of the CrPC (which was Section 87 in the 1882 & 1898 versions of the Code) would be sufficient for a person to be a ‘proclaimed offender’ under Sections 40, 43 and 73.<sup>52</sup> Hence, as has been highlighted earlier, prior to the 2005 Amendment, the terms ‘proclaimed person’ and

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<sup>50</sup> See *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661; *National Insurance Co. v. Baljit Kaur*, (2004) 2 SCC 1.

<sup>51</sup> *Queen Empress v. Narpat Singh*, (1901) AWN 10.

<sup>52</sup> *Emperor v. Ram Sarup*, AIR 1938 Oudh 80; *In Re: Petition of Pandya Nayak*, (1884) 7 Mad 436.

‘proclaimed offender’ meant the same thing for the operation of Sections 40, 41, 43 and 73. There is no reason why the legislature would want to effect a statutory inversion of this scheme.

Notably, even after the 2005 Amendment, procedural guidelines for the police do not reflect any distinction between ‘proclaimed persons’ and ‘proclaimed offenders’. As soon as a proclamation is issued in respect of a person, the person becomes a ‘proclaimed offender’ for the police, and the stipulations for the entry of such person’s name in the surveillance register, delivery of notices to village headmen & watchmen of all places where he/she has connections or is likely to visit etc., are to be complied with.<sup>53</sup> The police and the prosecuting agency are also required to maintain a register for such ‘proclaimed offenders’ in each district.<sup>54</sup> These lists must be periodically revised.<sup>55</sup> The idea behind such guidelines is to advance the objectives of Sections 40, 41, 43 and 73, as there is complete congruence in how such sections are operationalised. For instance, the provision for sending notices to village headmen and watchmen supplements the responsibility of village officers to give information on the whereabouts of ‘proclaimed offenders’ if they pass through their village. This only fortifies the claim that the 2005 Amendment was not enacted to jettison absconding accused persons (against whom only a proclamation under Section 82(1) of the CrPC has been issued) from the operation of Sections 40, 41, 43 and 73.

Further, an examination of the offence classification in the First Schedule of the 1973 Code, the nineteen enlisted sections under Section 82(4), and their substantive content in the IPC, indicates that all of them prescribe punishments ranging between imprisonment that may extend to seven years (the least severe punishment) and the death sentence (the most severe punishment). A simple reading of the First Schedule of the 1973 Code would reveal that these offences are not the only ones that fit this criterion of determining a crime’s seriousness. The list of nineteen sections leaves out various equally serious IPC offences that fit the punishment range; dowry death, abetment of suicide, attempt to murder, administering a stupefying drug with intent to cause hurt<sup>56</sup> and many other offences are not on the list. In such a scenario where equally serious offences have been left out of the scope of the list in Section 82(4), what would the legislature have intended to achieve by clipping the wide scope of the term ‘proclaimed offender’ with respect to Sections 40, 41, 43 and 73?

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<sup>53</sup> Punjab Police Rules, 1934, Rules 21.5, 23.24.

<sup>54</sup> *Id.* Rules 22.54, 23.20, 23.22, 23.25.

<sup>55</sup> *Id.* Rule 23.23.

<sup>56</sup> *supra* note 14, §§ 304B, 306, 307, 328.



It may be argued that many of these serious offences could be brought under the scope of Sections 41, 43 and 73, subject to other heads like ‘persons accused of non-bailable offences and evading arrest’ as in Section 73. Yet, that would still exempt many accused persons (against whom proclamations have been issued for those offences which would be left out even after the application of other heads like ‘persons accused of non-bailable offences and evading arrest’ under Section 73<sup>57</sup>) from the operation of the basic legal regime that governs the methods of facilitating the obtaining of information as to the commission of offences, enabling the investigation of the crime, and securing the presence of the accused.

Clearly, the Delhi High Court’s proposition has deleterious effects for the otherwise sound scheme of the 1973 Code. Its interpretation therefore not only defies the yardsticks of purposive interpretation but also misjudges the effect of the 2005 Amendment, because if the amendment on the one hand adds a new section to the IPC to prescribe a higher punishment for disobeying proclamations (from six months imprisonment to three to seven years as the case may be), the same amendment would not provide relaxations to those who disobey proclamations by allowing them to escape the operation of CrPC provisions (like Sections 40, 41, 43 and 73) that deal with ‘proclaimed offenders’.

### ***C. The ‘Title’ and the ‘Effect’: Dissecting the Statutory Position***

It is clear from the history of the CrPC that prior to 2005, the terms ‘proclaimed offender’ and ‘proclaimed person’ referred to the same statutory concept. However, clouds of ambiguity still loom large over the legal stance of CrPC on the question, post 2005. It would now be germane to provide answers to the two questions that the paper started with. It must first be realised that the cause of the complications surrounding question one is the misplaced attribution of importance to the title of a ‘proclaimed offender’. Designating someone as a ‘proclaimed offender’ is a toothless act unless it engenders consequences or sets off liabilities in law. That is where question two has to be factored in. Taken together, an appropriate approach to the resolution of this issue is one that sheds light on the effect of declaring someone

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<sup>57</sup> To illustrate, §325 IPC is a bailable offence that is – in terms of punishment – just as severe as many offences which made to Section 82(4)’s list. Now, a person accused of an offence under §325 IPC would still escape the operation of §73 in the Delhi High Court paradigm since he would neither be covered under the head ‘persons accused of non-bailable offences and evading arrest’, nor under the head of ‘proclaimed offender’. The latter is because issuance of a proclamation would no longer allow the Magistrate to issue an arrest-warrant if such person enters the area within his local jurisdiction, as the word ‘proclaimed offender’ would require a subsequent declaration under §82(4) of the 1973 Code, which can anyway not be issued in this case since §325 is not part of §82(4)’s list of offences.

as a ‘proclaimed offender’. This effect can be studied in the realm of procedural law and substantive criminal law separately.

### 1. Substantive Criminal Law

As stated earlier, a declaration under Section 82(4) of the CrPC, designating someone as a ‘proclaimed offender’ prompts a greater degree of punishment under Section 174A of the IPC for disobeying a proclamation. Contrarily, in case a person who is accused of an offence not enlisted in Section 82(4) is designated as a ‘proclaimed offender’, it is obvious that he would not be liable to that greater degree of punishment merely because he shares the same title. This is because a higher degree of punishment is triggered only when such designation is made in accordance with Section 82(4) and not otherwise, which implies that unless such designation has been made while he is accused of an offence which is one of the enlisted nineteen, the designation does no harm. Therefore, the ‘title’ is not material, but the nature of the declaration is. Only if the nature of the declaration is consistent with the requisites set out in Section 82(4) would a higher penalty be attracted.

### 2. Procedural Law

I suggest that the 2005 amendments were never aimed at altering the general meaning of the term ‘proclaimed offender’ for provisions like Section 40, 41, 43 and 73 of the CrPC, that apply equally to: (i) persons against whom only a proclamation has been issued under Section 82(1); and (ii) persons in respect of whom a subsequent declaration has also been made under Section 82(4). Recent judgments of the Supreme Court also reflect the same understanding by using the terms ‘absconder’ (general term for ‘proclaimed person’) and ‘proclaimed offender’ interchangeably. The Court has done this while clarifying law on CrPC that applies without discrimination to persons belonging to those terminological categories.<sup>58</sup> Another judgment of the Apex Court, *Lavesh v. State (NCT of Delhi)*<sup>59</sup>, furthers the claim that the meaning of the term in the realm of procedural law has not undergone any transmogrification. In that case, an individual accused of abetment to suicide and cruelty was addressed as an ‘absconder’ and a ‘proclaimed offender’ interchangeably throughout the

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<sup>58</sup> *State of Madhya Pradesh v. Pradeep Sharma*, (2014) 2 SCC 171 (where the Court held that if anyone is declared as an absconder/proclaimed offender, he would not be entitled to anticipatory bail).

<sup>59</sup> (2012) 8 SCC 730.

judgment. To the Delhi High Court, this would have seemed illegal because none of the offences he was accused of were covered by the list in Section 82(4) of the 1973 Code.

It must be noted finally that the 2005 Amendment was narrowly tailored to serve the specific object of instituting the safeguard of the court's inquiry before a person is made liable for a greater punishment of imprisonment up to seven years for disobeying proclamations issued in relation to the nineteen enlisted offences. It was also meant to add a new element of pressure to secure the presence of the accused in response to a proclamation; the amendment sought to increase deterrence against the offence of disobeying proclamations, with heavier or relatively lighter punishments depending upon the court's discretion in making the Section 82(4) subsequent declaration. Construing the amendment to disturb other elements of the CrPC's scheme would be antithetical to the amendment's purpose. Hence, it can be conceded that it is the proclamation that is material for CrPC provisions; a subsequent declaration under Section 82(4) of the CrPC only leads to more stringent penalties under the IPC.

There is a need, therefore, for harmoniously construing other provisions of the CrPC that deal with 'proclaimed offenders' with the provisions added by the 2005 Amendment. In my opinion, the construction that would best advance the content of all the provisions involved would be to hold: (i) that for the purposes of Sections 40, 41, 43 and 73 of the CrPC, the term 'proclaimed offender' refers to a person against whom a proclamation has been issued irrespective of whichever title has been attributed to him in the text of such proclamation or any subsequent declaration (rule [i]); (ii) that for the purpose of determining the applicability of either of the two paras of Section 174A of the IPC, the material factor is compliance with the conditions stipulated in Section 82(4) and not the otherwise hollow ascription of the title of a 'proclaimed offender' (rule [ii]).

An argument may be made against rule [i] that since the CrPC does not provide any way except Section 82(4) to declare someone as a 'proclaimed offender', professing that persons not covered by Section 82(4) should still be considered as members of the genus of 'proclaimed offenders' for the purpose of procedural provisions like Sections 40, 41, 43 & 73 is bad in law. That argument essentially ignores the fact that prior to the 2005 Amendment, there was no 'explicit' way by which a person could be declared as a 'proclaimed offender'; yet, the Code did use the term 'proclaimed offender' to refer to all persons against whom only

a proclamation had been issued.<sup>60</sup> This obviates the need for an explicit provision to reiterate what has always been an implicit part of the Code. Nevertheless, Section 40(2)(ii) as an explanatory clause hints towards the general meaning it seeks to expand, by referring to a ‘proclaimed offender’ as someone for whom a proclamation has been issued. This is the only inescapable inference of the section since there was no delineation between the terms ‘proclaimed person’ and ‘proclaimed offender’ when the section was introduced, and the fact that the same explanatory clause has been retained even after 2005 only fortifies the claim that the legislature never intended to upset the general meaning of the term ‘proclaimed offender’ for provisions like Sections 40, 41, 43 & 73. Also, the counterpoint against rule [i] is logically untenable in view of the discussion in Part III.B of this paper.

### CONCLUSION: WHAT’S IN A NAME?

In Deeksha Puri, Justice Bedi was correct in stressing that the objective of Section 82(4) of the CrPC was only to supplement the new offence added to the IPC under Section 174A and not to change the meaning of the term ‘proclaimed offender’ for other provisions of the 1973 Code. Sections 40, 41, 43 and 73 therefore become applicable on the mere issuance of a proclamation under Section 82(1) and are not contingent on a subsequent declaration under Section 82(4). Moreover, the term ascribed to a person – ‘proclaimed person’ or ‘proclaimed offender’ – makes no difference to the quantum of punishment for disobeying proclamations under Section 174A of the IPC unless the declaration of someone as a “proclaimed offender” is made in accordance with Section 82(4)’s requirements.<sup>61</sup>

Accordingly, embracing the distinction between considering all individuals for whom proclamations have been issued under the umbrella term of ‘proclaimed offenders’ for procedural aspects of the Code on one hand, and making a subsequent declaration for someone as a ‘proclaimed offender’ under Section 82(4) for higher punishment under the IPC on the other, is crucial for promoting a purposive construction of the legislature’s intent. In that regard, it cannot be gainsaid that a subsequent declaration under Section 82(4) has consequences only in the domain of the IPC; under the CrPC however, the statutory concepts

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<sup>60</sup> R.V. KELKAR, CRIMINAL PROCEDURE 41 (K.N. CHANDRASEKHARAN PILLAI, 6<sup>th</sup> ed. 2016).; P. RAMANATHA AIYAR, CODE OF CRIMINAL PROCEDURE 223 (7<sup>th</sup> ed. 2003).

<sup>61</sup> The essentials of a ‘subsequent declaration’ under §82(4), CrPC 1973 can be summarised as: (i) person must have been declared as a “proclaimed offender” by the Court after making such inquiry as it deems fit; (ii) such person is accused of any of the select offences mentioned in §82(4); and (iii) that person fails to appear at the specified place & time required by the proclamation issued in respect of him under sub-section (1).

indicated by the terms ‘proclaimed person’ and ‘proclaimed offender’ subsume under the same genus of ‘proclaimed offenders’ for provisions such as Sections 40, 41, 43 and 73. Ergo, Indian courts must refuse to quash proclamation orders that refer to a person not accused of offences listed in Section 82(4) as a ‘proclaimed offender’ merely on the ground that the term ascribed to such accused person ought to have been different; terminological inexactitude of that sort is irrelevant for legal consequences, as such accused person would not face higher punishments under Section 174A merely for being called a ‘proclaimed offender’ unless his declaration fulfils the essentials of Section 82(4) of the CrPC.

It is alarming that a statutory concern which engenders legal ramifications (penalties under the IPC and procedural responsibilities and powers under the CrPC) of such a considerable magnitude has received no attention in academic discourse. After probing the issue in its entirety, one can only hope for India’s Apex Court to take notice of the conflicting judgments rendered by the High Courts and put years of incertitude to rest by rectifying the erroneous past to usher in a just future. The exigency for the Indian Supreme Court’s interference is only amplified by the fact that the Delhi High Court’s fallacious ratio in Sanjay Bhandari case is being cited to quash proclamation orders for terminological infelicity even in 2020.<sup>62</sup>

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<sup>62</sup> Gaurav Saxena v. State, Crl. Revision No. 24/20 (ID No. 61/20) (decided on Aug 6, 2020).

Arpita Sarkar\*

*An increasing number of judicial decisions have emphasized the absence of 'really backward' people among the notified backward classes in reservation schemes. Economic backwardness is an important aspect of the determination of backward classes for reservation. However, unnecessary emphasis on this dimension may result in the delegitimization of other indicators for identifying backward classes. The constitutional amendment of 2019 which introduced reservation for economically weaker sections ('EWS') of the society further reduces the importance of social backwardness as an indicator for backward classes. This paper revisits the legal history of reservation to highlight that economic backwardness as a ground for reservation was deliberated upon and rejected by the Constituent Assembly. The paper further argues that the 'creamy layer' is a judicially developed test introduced through judicial surmises. Also, it is argued, based on historical and legal grounds, that reservation for EWS is likely to be declared unconstitutional because of its incompatibility and contradictory nature vis-a-vis the rest of the equality clauses. It may fail the width and identity tests as laid down in *M. Nagaraj v. Union of India* (2006) (hereinafter 'M. Nagaraj') to assess the violation of the basic structure through constitutional amendments.*

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## INTRODUCTION

*“The social origin of our higher judiciary and most of our senior counsel has affected the quality of the decision handed down by the courts. A critic has observed that the “gross effect of the litigation” on the policy of preferential treatment or compensatory discrimination has been to “curtail and confine it”.*<sup>1</sup>

-Madhu Limaye

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<sup>1</sup> MADHU LIMAYE, CONTEMPORARY INDIAN POLITICS, 208 (Sangam Books, 1987).

The rights to equality guaranteed under Articles 14-18 are fundamental rights. The Constitution of India provides for the reservation of seats in educational institutions aided by the state and in employment in government services, to the backward classes.<sup>2</sup> Reservation, as affirmative action is called in India, has been mired with controversies since the founding years of the Constitution.<sup>3</sup> Jurisprudence on this issue has developed since 1950 through reactions between the judiciary and legislature in the form of court decisions and constitutional amendments respectively.<sup>4</sup> The court in multiple cases in the past has declared that Article 15(4) and Article 16(4) are not instances of poverty alleviation programs.<sup>5</sup> Yet, the concept of the 'creamy layer' was introduced into judicial decisions initially through surmises which was premised on opinion without evidence. Later, the concept transformed into an established position of law.<sup>6</sup>

Initially, the 'creamy layer' test was applied for reservation of Backward Classes (BCs) only. Since 2018, two major developments in reservation jurisprudence have taken place in India. Firstly, the Supreme Court explicitly decided in *Jarnail Singh v. Lachhmi Narain Gupta (Jarnail Singh)*<sup>7</sup> that the 'creamy layer' test applies to Scheduled Castes (SCs) and Scheduled Tribes (STs) as well. Secondly, a constitutional amendment was made in January 2019 to introduce reservation for economically weaker sections of the society other than SCs, STs, and Other Backward Classes (OBCs), based on family income.<sup>8</sup> The amendment has been

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<sup>2</sup> INDIA CONST. art. 15, art. 16.

<sup>3</sup> *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226; *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217; *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

<sup>4</sup> The first amendment introducing Article 15(4) was introduced after *Champakam Dorairajan*. Article 16(4-A), 16(4-B) and the very recent Article 16(5) was introduced to undo the 9-judge bench decision in *Indra Sawhney*. Article 335(2) to undo *S. Vinod Kumar v. Union of India*, (1996) 6 SCC 580

<sup>5</sup> *Janki Prasad Parimoo v. State of J&K*, (1973) 1 SCC 420, *State of U.P. v. Pradip Tandon*, (1975) 1 SCC 267.

<sup>6</sup> *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

<sup>7</sup> *Jarnail Singh v. Lachhmi Narain Gupta*, (2018) 10 SCC 396.

<sup>8</sup> India Const. amend. 103, art. 15(6) & art. 16(6).

"Article 15 (6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making, — (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category. Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage."

Article 16(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category."



challenged before the Supreme Court in *Janhit Abhiyan v. Union of India*.<sup>9</sup> The matter is pending the consideration of the Court.

A similar constitution bench of five judges had earlier held that the SCs and STs are homogenous constitutional classes which cannot be further classified into more and less backward groups based on the individual status of members of the community.<sup>10</sup> However, from the decision in *Jarnail Singh*, one may infer that there has been a subsequent shift in the perception of the judiciary wherein reservation is construed as an individual-oriented right based dominantly on economic capacity. Identification of community through an economic lens and individual-oriented entitlement is contradictory to the visions of the drafters of the Constitution of India.

It is important therefore, to revisit our history to recall the primary characteristics of reservation as was envisioned by the constitution-makers for independent India. Although bound by the common law principle of precedence, reservation jurisprudence in India has shifted from the historical struggle of the depressed classes to addressing economic difficulties, based on massive obiter dicta in various judgments. Judicial apprehension regarding predatory availing of reservation by the economically well-off among the notified communities initially appeared in the obiters of judicial decisions and has subsequently shifted to the ratio. This paper examines, thus, whether the important constitutional principles under Articles 15 and 16 are re-written through judicial interpretations and constitutional amendments.

The paper is divided into three sections. The first section deals with the historical struggle of depressed and backward classes for reservation from the time of drafting of the Government of India Act, 1919, to the drafting of the Constitution of India, 1950, and its subsequent interpretation by the judiciary. The second section deals with the emergence of the economic criterion for identification of reserved categories by the judiciary and its culmination into the concept of the 'creamy layer' test. The third section deals with the possible erosion of the core principles behind reservation through the Constitution (One Hundred and Third Amendment) Act, 2019. The research infers that unlike the previous amendments to Articles 15 and 16 which were reactions to court decisions, the present amendment made by the parliament was not a consequence of immediate provocation caused by judicial decision(s). Rather, it is meant to entrench an office memorandum which was invalidated by the court in

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<sup>9</sup> *Janhit Abhiyan v. Union of India*, W.P. (Civil) no. 55 of 2019.

<sup>10</sup> *E.V. Chinnaiah v. State of Andhra Pradesh*, (2005) 1 SCC 394.

*Indra Sawhney v. Union of India* (**Indra Sawhney**) on the grounds of violation of Article 16(1). This amendment contradicts the salient features of reservation jurisprudence. The court may therefore be required to revert to the established position of law through non-application of the ‘creamy layer’ test on the SCs and STs as was laid down in *Indra Sawhney*. A petition to this effect is pending before the Supreme Court.<sup>11</sup> Additionally, the Court may declare reservation for economically weaker sections as unconstitutional since it may alter the identity of reservation clauses and consequently violate the basic structure of the constitution. This issue is also pending consideration before the Supreme Court.<sup>12</sup>

## I. HISTORY OF RESERVATION IN THE INDIAN CONSTITUTION

The SCs, STs and the backward classes of India have been described by the courts as the downtrodden sections of the society.<sup>13</sup> However, the downtrodden-ness of these communities has been primarily examined through an economic lens.<sup>14</sup> A careful study of the history of the Constitution building process and the Constituent Assembly Debates (**CAD**) will reveal that reservation was not meant to be a poverty alleviation program. A significant portion of the CAD has been assigned for reservation in the legislature.<sup>15</sup> It was evident from the discussion in the Constituent Assembly that reservation in legislature was meant to secure representation of the oppressed communities in governance. Therefore, it is absurd to believe that the reservation of seats in the legislature was meant for alleviation of poverty. Similarly, reservation in employment was guaranteed by the constitution keeping in mind the distribution of powers among the organs of the State.<sup>16</sup> Hence, it cannot be called a poverty alleviation scheme. The history of the Government of India Act, 1919, explores the objectives with which reservation was demanded and how the depressed classes negotiated with the Constitution building process during that time.

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<sup>11</sup> *The State of Punjab v. Davinder Singh* (2020) 8 SCC 65. A three-judge bench in this case has referred the issue to a seven judge bench to revisit the decision of *E.V. Chinnaiah v. State of Andhra Pradesh* which declared SCs and STs as homogenous constitutional classes which cannot be categorized further.

<sup>12</sup> *Janhit Abhiyan v. Union of India*, Writ Petition (C)No. 55 of 2019.

<sup>13</sup> See *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490.

<sup>14</sup> See *K.C. Vasanth Kumar v. State of Karnataka*, AIR 1985 SC 1495, *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

<sup>15</sup> Representation of the SCs and STs in the legislature was an important issue discussed at different points in time over the three years of debate in the Constituent Assembly. See, generally for example, *CONSTITUENT ASSEMBLY DEBATES*, Volume VII, November 30, 1948; *CONSTITUENT ASSEMBLY DEBATES*, Volume IX, August 25, 1949 & 14<sup>th</sup> October 1949 to mention a few.

<sup>16</sup> LIMAYE, *supra* note, 1 at 207-208.

***A. Conditions of Support Placed on Behalf of Dalits to be Governed by Majority Rule During the Drafting of Government of India Act, 1919***

The untouchables were treated as statutory minorities under the Government of India Act, 1919. The Montague Chelmsford Report which preceded the drafting of the Act of 1919 recognized that special protection should be made for the depressed classes. However, during the drafting of the Act, it could not take a conclusive stand on this issue other than providing them some token representation in the legislature.<sup>17</sup>

When the plan for drafting the Government of India Act, 1919, began, Dr. Ambedkar placed a few conditions on the fulfilment of which the depressed classes would agree to be governed by majority rule. Among these, particularly worth mentioning was the demand for the free enjoyment of equal rights under Part XI of the Government of India Act, 1919.<sup>18</sup> It was suspected, and rightly so, by Ambedkar that obstruction by orthodox Hindus is not the only obstacle for depressed classes. According to Ambedkar, there were certain practices by high caste Hindus which were far more dangerous than even violence. One such practice was social boycott. The depressed classes suffered both from a lack of social strength and economic independence against the upper-caste Hindus. Whenever depressed classes attempted to exercise their rights, they were ostracized and evicted from their property. This was followed by stalling of employment or any other village services which they were provided and also the prohibition of the use of public properties such as common-well, public paths, etc.<sup>19</sup> One may note that the demand for access to public services without discrimination was upheld ultimately through Article 15 of the Constitution of India, 1950.

But the mere guarantee of non-discrimination was not enough. Therefore, another important condition laid down by Ambedkar was the representation of depressed classes in the

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<sup>17</sup> 17 B.R. AMBEDKAR, DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES (pt. 1) 80 (photo. reprint 2014) (2003).

<sup>18</sup> AMBEDKAR, *Id* at 82 which stated “Whoever denies to any person except for reasons by law applicable to persons of all classes and regardless of any previous condition of Untouchability the full enjoyment of any of the accommodations, advantages, facilities, privileges of inns, educational institutions, roads, paths, streets, tanks, wells and other watering places, public conveyances on lands, air or water, theatres or other places of public amusement, resort or convenience whether they are dedicated to or maintained or licensed for the use of the public shall be punished with the imprisonment of either description for a term which may extend to five years and shall also be liable to fine.”

<sup>19</sup> AMBEDKAR, *supra* note 17, at 83. This apprehension also found mention in the Constituent Assembly by Muniswamy Pillai who sought notification of the SCs and STs through central government instead of local government. He claimed that at local level, the vengeance of politically dominant upper caste may lead to non-notification of communities who raise their voice against oppression and claim equal rights. See, Shri Muniswamy Pillai’s statement in the Constituent Assembly, see, CONSTITUENT ASSEMBLY DEBATES, Volume IX, September 17, 1949 1641.

public services.<sup>20</sup> He observed that the upper caste Hindus have largely monopolized the public services by abusing the law or misusing the discretion vested in them while administering the law. He recommended that recruitment in public services may not be merely regulated in the interest of depressed classes but for all other communities as well.

Ambedkar's proposal in this regard appeared like this:

*“(1) There shall be established in India in each Province a Public Service Commission to undertake the recruitment and control of the Public Services.*

*(2) No member of the Public Service Commission shall be removed except by a resolution passed by the Legislature nor shall he be appointed to any office under the Crown after his retirement.*

*(3) It shall be the duty of the Public Service Commission subject to the tests of efficiency as may be prescribed,*

*(a) to recruit the Services in such a manner as will secure due and adequate representation of all communities, and*

*(b) to regulate from time to time priority in employment in accordance with the existing extent of the representation of the various communities in any particular service concerned.”<sup>21</sup>*

While clause (2) of this condition appears in modified forms in the Constitution of India, 1950,<sup>22</sup> for recruitment and termination of civil services, clause (3) of the condition has been adopted in modified form in Article 16 and Article 335 of the Constitution of India, 1950.

There were two more conditions placed by Ambedkar which are significant to understand the objective of reservation from his perspective. Firstly, he believed that the depressed classes should not only be given special representation in public services but also have the means to redress non-implementation of this promise under the Constitution itself.<sup>23</sup>

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<sup>20</sup> AMBEDKAR, *supra* note 17, at 87-88.

<sup>21</sup> Memorandum titled “A Scheme of Political Safeguards for the Protection of the Depressed Classes in the Future Constitution of a self-governing India” from Dr. Ambedkar at the Indian Round Table Conference to the Minorities Committee 48; see *supra* note 17, at 88.

<sup>22</sup> INDIA CONSTI art. 316, art. 317.

<sup>23</sup> AMBEDKAR, *supra* note 17, at 89 reads as: “In and for each Province and in and for India it shall be the duty and obligation of the Legislature and the Executive or any other Authority established by Law to make adequate provisions for the education, sanitation, recruitment in Public Services and other matters of social and political advancement of the Depressed Classes and to do nothing that will prejudicially affect them.

(2) Where in any Province or in India the provisions of this section are violated an appeal shall lie to the Governor-General in Council from any act or decision of any Provincial Authority and to the Secretary of State from any act or decision of the Central Authority affecting the matter.

(3) In every such case where it appears to the Governor-general in Council or to the Secretary of State that the Provincial Authority or Central Authority does not take steps requisite for the sue execution of the provisions of

Secondly, Ambedkar cautioned in clear terms to not delineate depressed classes merely based on their economic conditions, although economic deprivation most often coincides with social deprivation. He claimed that the poverty of the depressed classes is largely due to social prejudice, and this is what differentiates ordinary caste labour from depressed caste labour. Although the economic deprivation of both the classes may appear similar, the social resources available to depressed class labour are extremely limited.<sup>24</sup>

Another founding father of the Dalit social movement, Jyotiba Phule had also concluded that the Brahmans could maintain their power and position of oppression by maintaining control over state power including revenue collections, taxes, and state takeover of peasant lands even during colonial rule. Therefore, one of the ways of challenging caste oppression was through the representation of oppressed castes in government positions.<sup>25</sup> Phule's opinion has been subsequently iterated by Indian socialist activist and essayist Madhu Limaye. According to Limaye, although the executive has the various ministries as its apex, the real executive powers are exercised by bureaucrats. Therefore, although reservation in the legislature is necessary, it is inadequate. To ensure substantive equality of opportunity in governance, reservation for the SCs and STs was necessary in recruitment and in promotions to government services.<sup>26</sup>

***B. Backwardness – Not Economic, but Social and Educational as per the Constituent Assembly Debates***

In the Constituent Assembly, the scope of the term 'backward' which appears in Articles 15 and 16 came up for deliberation and debate. Initially, only the term 'Scheduled Caste' was mentioned in the statutes. The term 'backward' was introduced at a national level in the draft Constitution. By this time, only some provincial statutes had attempted to define the scope of backward classes. This caused some speculation and apprehension among the members of the Assembly. The qualifier 'backward' was not only meant to identify the communities who would be eligible for reservation but the scope of this term was also meant to indicate the objectives behind reservation to be guaranteed by the Constitution. Was the term

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this Section then and in every such case, and as for only as the circumstances of each case require the Governor-General in Council or the Secretary of State acting as an appellate authority may prescribe, for such period as they may deem fit, take remedial measures for the due execution of the provisions of this section and of any of its decisions under this Section and which shall be binding upon the authority appealed against.”.

<sup>24</sup> AMBEDKAR, *supra* note 17, at 89-90.

<sup>25</sup> GAIL OMVEDT, UNDERSTANDING CASTE: FROM BUDDHA TO AMBEDKAR AND BEYOND, 26 (Orient Blackswan, New Delhi, 2011)

<sup>26</sup> *Supra* note 1, at 207.

backward to be defined from a communal perspective? Was it meant to dilute the category of SCs or was it meant to describe communities apart from, and in addition to, the SCs? This issue was discussed in the Assembly on November 30<sup>th</sup>, 1948. Harijans, who were enlisted in the list of SCs, were most definitely considered for reservation. Further, the scope of backward communities was deliberated upon since there was also consensus regarding the need for upward social mobility of the middle castes who were deprived of social and educational advancements. Mr. Aziz Ahmad Khan of the United Provinces suggested the removal of the term ‘backward’ from the Article<sup>27</sup> so that the government may from time to time provide reservation for any group which is underrepresented in public services. The qualifier ‘backward’, according to him, would mean that the government would be forced to guarantee reservation only for those communities shackled by backwardness under this Article. That is, the government would not be free in the future to consider other communities for reservation on the basis of religion or from upper-caste but less-represented groups.<sup>28</sup> This amendment was not moved. This shows that though the scope of the term ‘backward’ appeared vague, there was clarity regarding the objective behind reservation. It was not meant to ensure proportional representation of communities. The vagueness associated with the term was refuted by Shri T. Channiah from Mysore. He argued that there has never been any ambiguity with the term ‘backward classes’ in the Southern states. The term unambiguously refers to those communities which are socially and educationally backward. Economically backward communities are not included within this term.<sup>29</sup>

Regarding the objective behind the constitutional guarantee of reservation, Shri Chandrika Ram of Bihar added that besides the SCs, the backward classes comprising the middle castes also deserve to be considered for reservation. Though they are not considered untouchables, communities deprived of political rights cannot attain prosperity.<sup>30</sup> Shri Kakkan from Madras argued that the Harijans were not appointed in government services primarily

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<sup>27</sup> THE CONSTITUENT ASSEMBLY, THE DRAFT CONSTITUTION Article 10 reads as:

10(1) There shall be equality of opportunity for all citizens in matters of employment under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them. Be ineligible for any office under the State.

(3) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the service under the State.

Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”

<sup>28</sup> CONSTITUENT ASSEMBLY DEBATES, Volume VII, November 30, 1948.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

because the higher officers appointed and promoted people of their own communities.<sup>31</sup> There was strong opposition for reservation from Seth Damodar Swarup from the United Province). He claimed that the Public Service Commission was impartial and would guarantee against any discrimination. However, Shri Santanu Kumar Dass from Orissa refuted this claim stating that due to existing inequality, even the most impartial institutions cannot be impartial. Also, people from different vulnerable communities could be elected to the Constituent Assembly only because of reservation.<sup>32</sup> Ambedkar, while clarifying the objective behind reservation, claimed that the provision aims at breaking the monopoly of a few communities in public administration to provide opportunities to deprived communities. Further, according to Ambedkar, the term 'backward' guarantees a balance between the principle of equality of opportunity and special protection to deprived communities. Without the qualifier 'backward', such balance will be destroyed.<sup>33</sup>

Considering that historically, upper-caste people were employed in the public services, the administration was filled with people from only a few communities. Reservation therefore aimed at breaking this monopoly<sup>34</sup> to ensure allocation of decision-making authority among all communities including the vulnerable and depressed classes. It was not meant for the economic upliftment of people.

### *C. Interpretation of 'Backward Classes' by the Judiciary Post-1950*

The Supreme Court of India has settled the position of law on the term 'backwardness' through a series of cases.<sup>35</sup> The *Indra Sawhney* case attempted to examine different aspects of reservation to finally put to rest all possible controversies related to the issue.<sup>36</sup> This included the introduction of the 'creamy layer' test among the OBCs in employment<sup>37</sup> and in admission in higher educational institutions aided by the state.<sup>38</sup> The 'creamy layer' test excludes those

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

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

<sup>33</sup> *Id.*

<sup>34</sup> JYOTIRAO PHULE, GULAMGIRI (1873); Also see, Nandini Gooptu, *Caste and Labour: Untouchable Social Movement in Upper Uttar Pradesh in the Early Twentieth Century*, in 2 CASTE IN MODERN INDIA 110 (Sumit Sarkar and Tanika Sarkar eds, 2015).

<sup>35</sup> This question has been brought before the Supreme Court since a long time. One of the earlier cases is *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649. However, this issue has gained better shape in *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 and *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 cases in later years.

<sup>36</sup> See the majority opinion delivered by Justice B.P. Jeevan Reddy in *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

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

<sup>38</sup> *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

members from the OBC communities who have crossed the economic threshold which made them 'backward'. 'Creamy layer' is thus a judicially developed test. It is not mentioned in the constitutional text. Until the release of Mandal Commission Report, there was no consensus as to who constituted the Socially and Educationally Backward Classes (**SEBCs**) under Article 15(4) and more generally, the backward classes under Article 16(4). The failed Kaka Kalelkar Commission Report<sup>39</sup> which remained unimplemented due to the lack of a unanimous decision on the composition of backward classes also reflects the uneasiness and lack of consensus in identifying backward classes for reservation.

SCs and STs are defined in the Constitution of India.<sup>40</sup> Hence, until recently, the courts have been cautious not to interfere with the SCs and STs which were notified under Articles 341 and 342 of the Constitution by further categorization of these communities.<sup>41</sup> In *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*<sup>42</sup> as well as *State of Kerala v. N.M. Thomas (N.M Thomas)*<sup>43</sup>, the SCs and STs have been deemed as classes that stand on a substantially different footing as compared to the rest of the communities in India. Backward classes, as per the court, would comprise of those dismally depressed communities who are economically and educationally comparable with the SCs and STs. Such was the state of distinction between the SCs and STs on the one hand and other weaker sections on the other, that it was decided in *N.M. Thomas* that the classification of the SCs and the STs as special categories could be justified even under Articles 15(1) and 16(1) of the constitution, whereas, for other weaker sections, the classification has to conform with Articles 15(4) and 16(4) based on the case at hand. That no further classification of the SCs and STs is permissible<sup>44</sup> and that the 'creamy layer' test does not apply to the SCs and the STs<sup>45</sup> were also settled positions of law until the Supreme Court changed its opinion.<sup>46</sup> The 'creamy layer' test was introduced for the SC and the ST categories at promotion levels in services tacitly, through a 5 judge bench decision.<sup>47</sup> A different nomenclature in the form of three-prong tests of backwardness, inadequate representation, and efficiency of administration was used by the court. In *Jarnail*

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<sup>39</sup> BACKWARD CLASSES COMMISSION, KAKA KALELKAR COMMISSION REPORT (1955).

<sup>40</sup> INDIA CONSTI. art. 341, art. 342. Also, see Art. 366(24) and (25) for definitions of Scheduled Castes and Scheduled Tribes.

<sup>41</sup> For example, *supra* note 6, at para 803, *supra* note 38 at para 182.

<sup>42</sup> *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246.

<sup>43</sup> *Supra* note 13.

<sup>44</sup> *Supra* note 10.

<sup>45</sup> *Supra* note 6.

<sup>46</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

<sup>47</sup> *Id.*



*Singh*,<sup>48</sup> the Supreme Court struck down the backdoor application of the ‘creamy layer’ test to the SCs and STs. Instead, it held that the ‘creamy layer’ test shall be applied to the SCs and STs in the same way as it is applied to the OBCs. The blanket application of the ‘creamy layer’ test to all the reserved categories for the purposes of reservation was thus brought by the *Jarnail Singh* decision.<sup>49</sup>

## II. THE ROLE OF THE JUDICIARY IN DEVELOPING THE CRITERION OF ECONOMIC BACKWARDNESS

The judiciary has played a significant role in introducing the ‘creamy layer’ test to the Indian reservation system. The apprehensions presented by judges through obiters about misuse and the appropriation of the benefits of reservation by the economically well off among the backward classes first injected the concept of the ‘creamy layer’ into reservation discourse. Warning about the dangers of reservation, Justice V.R. Krishna Iyer in *N.M. Thomas* opined that:

“In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is three-fold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is

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<sup>48</sup> *Supra* note 7.

<sup>49</sup> For more detail on this case, see “*Jarnail Singh and Others v. Lachhmi Narrain Gupta and Others*: Supreme Court of India declares application of creamy layer test on the Scheduled Castes and Scheduled Tribes”, [52 VRU:WCL, 383-395 (2019)].

calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism.”<sup>50</sup>

Though Iyer J. clarified subsequently that only social science research and not judicial impressionism would lead one to the truth behind these apprehensions,<sup>51</sup> this suspicion sowed through *N.M. Thomas* found momentum in *K.C. Vasanth Kumar v. State of Karnataka*<sup>52</sup> in which the warnings of Iyer J. were reiterated by Chinappa Reddy J. Subsequently, the ‘creamy layer’ test was validated by the Court in the *Indra Sawhney* decision.

While classifying the poorer section of the backward classes from the non-poor backward classes for the apportionment of seats, the Court in *Indra Sawhney* intended to clarify that the poorer section among OBCs has to be determined in the context of social backwardness. The Court cautioned that there is a requirement for the equitable apportionment of seats among the poorer sections of OBCs and other OBCs.<sup>53</sup> Yet, in the same decision, the Court upheld the ‘creamy layer’ test as an economic test meant for a social purpose. The Court refrained from laying the attributes of the ‘creamy layer’ test. However, it acknowledged that both the legislature and the executive are equipped to lay down the criteria.<sup>54</sup> Through office memorandums, income and occupational positions had been laid down as criteria to exclude the ‘creamy layer’ among OBCs post-*Indra Sawhney*.<sup>55</sup>

### ***A. The Apprehension of the Judiciary Against the ‘Misuse’ of Reservation***

Courts have often apprehended that reservation schemes are usurped by the economically well off among the backward classes. This suspicion has two major consequences. Reservation has been validated by the court as an individual-oriented policy wherein the economic hardship of individual members has played an important role in convincing the court about the need for reservation.<sup>56</sup> Secondly, stigma, or the lack of it, faced by a person is evaluated based on wealth possessed by the person.<sup>57</sup> The economic assessment of this stigma gave rise to the ‘creamy layer’ test. On what basis exceeding importance is given

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<sup>50</sup> *Supra* note 13, at para 124.

<sup>51</sup> *Id.*

<sup>52</sup> AIR 1985 SC 1495.

<sup>53</sup> *Supra* note 6, at para 843.

<sup>54</sup> *Supra* note 6, at para 859.

<sup>55</sup> Office memorandum from the Ministry of Personnel, Public Grievances and Pension Department of Personnel and Training (May 27, 2013), [https://documents.doptcirculars.nic.in/D2/D02adm/36033\\_1\\_2013-Estt-Res.pdf](https://documents.doptcirculars.nic.in/D2/D02adm/36033_1_2013-Estt-Res.pdf). This Office Memorandum was struck down in *Indra Sawhney* decision.

<sup>56</sup> *Supra* note 38, at para 386.

<sup>57</sup> *Supra* note 38, at para 388.

to the economic aspects of an individual is not known. The Supreme Court has rejected the Marxist notion of class in the identification of backward classes.<sup>58</sup> At the same time, scholars argue that Nehruvians and left socialists have erroneously ignored caste. Instead, they premise class as the main site of discrimination in modern India. In doing so, the Hindu identity was taken for granted. It was believed that religion and caste identities could be ignored and subverted for economic and technological advancements.<sup>59</sup>

The reservation system is premised on the eradication of discrimination faced by a person for being a member of an oppressed community. Thus, while equality of opportunity guaranteed under Article 16(1) was perceived as an individual right by the court,<sup>60</sup> reservation is governed by Article 16(4A) based on membership in backward classes.

The Mandal Commission Report recommended the determination of backwardness dominantly based on caste.<sup>61</sup> This recommendation was confirmed in *Indra Sawhney* wherein it was held that caste can be a dominant criterion, though not the sole criterion.<sup>62</sup> Thus, a combination of caste and class led to the exclusion of the ‘creamy layer’ among backward classes. It was possible to apply the ‘creamy layer’ test to backward classes because no specific criterion was mentioned to identify this category by the Constituent Assembly at the time of framing the Constitution. The identification of backward classes was left to assessment by the local government.<sup>63</sup> The same was not the case for the SCs and STs. They are notified based on their social identities through a meticulous procedure.<sup>64</sup> In 2018, through the Constitution (One Hundred and Second Amendment) Act, the same procedure for identification of the SCs and STs, has been introduced for the identification of SEBCs in the central list for reservation.<sup>65</sup> Economic conditions of individual members of the SCs and the STs did not adversely affect their opportunity for reservation in educational institutions and public employment until recently.

A five-judge bench which was constituted to determine the correctness of the tacit introduction of the ‘creamy layer’ test on the SCs and STs in 2006, confirmed that the test

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<sup>58</sup> *Supra* note 6, at para 778.

<sup>59</sup> OMVEDT, *supra* note 25.

<sup>60</sup> *Supra* note 6, at para 814.

<sup>61</sup> B.P. MANDAL ET AL., 1 REPORT OF THE BACKWARD CLASSES COMMISSION 56 (1980)

<sup>62</sup> *Supra* note 6, at para 82.

<sup>63</sup> Constituent Assembly Debates Vol. VII, 30<sup>th</sup> November 1948.

<sup>64</sup> INDIA CONSTI. art. 341(2), art. 342(2).

<sup>65</sup> India Const. amend. 102, § 4.

applies to the SCs and STs as well.<sup>66</sup> In doing so, the Court relied upon *Indra Sawhney* for the application of the ‘creamy layer’ test to backward classes which is embedded in the general principle of equality under Article 14 and 16(1). According to the court, it is only with the exclusion of the ‘creamy layer’ that a compact class is formed which conforms to the test of homogeneity.<sup>67</sup>

### ***B. Criticism of ‘Creamy Layer’ Tests by Scholars***

After *M Nagaraj*, several scholars had expressed their disagreements regarding the application of the ‘creamy layer’ test to the SCs and STs. Economist Sukhadeo Thorat argued that the exclusion of the ‘creamy layer’ is both theoretically and empirically flawed, since discrimination is faced by both economically well-off and weaker sections among SCs because of their social identities. He also cautioned that the exclusion of the ‘creamy layer’ will lead to their under-representation and halt the ongoing progress of Dalit communities.<sup>68</sup> The accuracy of Thorat’s claim is reflected in a case filed against CISCO by California’s Department of Fair Employment and Housing<sup>69</sup> at the United States District Court, Northern State of California. This case was brought against CISCO System Incorporation for enabling two of its upper caste Hindu Indian employees to discriminate against a Dalit Indian employee in the United States. This case serves as a classic example of how economic achievements of a person from a socially oppressed community does not guarantee protection against social discrimination.

Legal scholar Kalpana Kannabiran expressed disagreement with the decision stating that “the crux of affirmative action rests on caste-based discrimination - that is, on grave social disabilities arising from caste status.” Formulation of the concept of the ‘creamy layer’ amounts to articulating acts of discrimination based on economic status alone which results in the distortion of the realities of disadvantaged castes, Dalits, and Adivasis. According to her, “the systematic denial of justice concerning atrocities is inextricably linked to the whittling down of entitlements through the arbitrary action of undefined concepts.”<sup>70</sup>

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<sup>66</sup> *Supra* note 7, at para 21.

<sup>67</sup> *Supra* note 7, at para 15.

<sup>68</sup> Sukhadeo Thorat, *Understanding Caste*, TOI (Lucknow), (Nov. 14, 2006), <https://timesofindia.indiatimes.com/edit-page/understanding-caste/articleshow/433442.cms>.

<sup>69</sup> California Department of Fair Employment and Housings, an agent of the State of California v. CISCO System and Other, <https://regmedia.co.uk/2020/07/01/cisco.pdf>.

<sup>70</sup> Kalpana Kannabiran, *Reservation and the Creamy Layer*, THE HINDU, (Oct 24, 2006), <https://www.thehindu.com/todays-paper/tp-opinion/reservation-and-the-creamy-layer/article3064833.ece>.

Yet another political economist, K.S. Chalam, cautioned against the use of economic identifier for determination of the ‘creamy layer’. According to him, there may exist two different categories based on economic criterion. Whereas the National Sample Survey data uses income or occupation for defining a class and is also used for exclusion of ‘creamy layer’ among OBCs for reservation, the Marxian concept of class is based on property and the sources of production which are not fluid categories.<sup>71</sup> The economic basis for exclusion in reservation is required to be long term stability as opposed to temporary wealth earned through the availing of reservation.<sup>72</sup> Arguably, an economic class is also defined by intellectual property as well as social capital.<sup>73</sup> Reservation, according to Chalam, is not only meant for removing backwardness based on historical inequalities but is also a step forward in resolving them.<sup>74</sup> Therefore, it is imperative to differentiate temporary financial stability earned through availing reservation in employment, from more permanent economic stability earned through property ownership and intellectual and social capital, which overpowers caste stigma and ensures economic independence even without reservation. It is also important to note that the terms mentioned in the constitution are ‘socially and educationally backward classes’ in Article 15 and ‘backward classes’ in Article 16. The clauses do not mention backward *persons*; rather, it mentions backward *classes*. Therefore, membership in a class is decisive for the purposes of reservation; but the ‘creamy layer’ test developed by the judiciary subsequently holds otherwise.

Chalam further argues that the application of the ‘creamy layer’ test amounts to double counting on an economic basis for the backward classes. According to him, the Mandal Commission had taken sufficient care and used economic as well as educational indicators to identify backward classes. At least two of the four economic indicators take into consideration the economic property base of the caste to identify backwardness. On top of this, therefore, if the government applies another economic test of the ‘creamy layer’, then it amounts to double counting as well as further marginalization of the group.<sup>75</sup>

Thus, it may be concluded that what surfaced through obiters as mere possibilities subsequently and gradually resulted in the establishment of legal principles. In the process,

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<sup>71</sup> K.S. CHALAM, *CASTE-BASED RESERVATION AND HUMAN DEVELOPMENT IN INDIA* 43 (Sage Publications, New Delhi, 2007).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> CHALAM, *supra* note 71, at 62.

<sup>75</sup> CHALAM, *supra* note 71, at 55- 56.

besides its application on flexible categories, the principle has entered into the core of the notification process adversely affecting those communities which the constitutional texts deem to be backward.

### III. CHALLENGES POSED BY THE CONSTITUTION (103<sup>RD</sup> AMENDMENT) ACT, 2019

Equal treatment for equal and unequal treatment for unequal<sup>76</sup> is an underlying principle of equality under Articles 14 to 16 of the constitution. Treatment as an equal as opposed to equality through identical treatment has guided the implementation of reservation schemes.<sup>77</sup> Article 14 mandates classification based on intelligible differentia and a rational nexus between the class and the objective of the law.<sup>78</sup> Accordingly, classification as SC, ST, and backward classes also has to pass the test of Article 14. However, EWS does not constitute a class for the purposes of intelligible differentia. It is a residual fluid category which comprises of every person who does not belong to SC, ST, and backward classes, and does not possess economic assets beyond the limit set by the government from time to time. Also, the Constitution has already acknowledged SC, ST, and backward classes as categories which are more concrete, distinct, and pass the tests of intelligible differentia and rational nexus, and which have been notified in the Constitution accordingly. Economic criterion alone neither passes the test of intelligible differentia nor the test of rational nexus as is required under Article 14 as well as Article 16(1) of the Constitution.

One common argument used by opponents to perpetual reservation is that economic mobility automatically leads to upward social mobility.<sup>79</sup> According to this theory, it is enough if reservation is implemented temporarily since reservation results in economic mobility. Reservation must therefore, cease after two or three generations because of upward social mobility achieved through public employment. However, there are various accounts which prove that such presumptions are contradictory to social reality. For example, a survey conducted on untouchability in the mid-eighties<sup>80</sup> shows that employment in government posts and economic mobility do not automatically lead to acceptance at a social level. Recently, the incident where an upper-caste employer, also a scientist in the Indian Meteorological

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<sup>76</sup> M.P. Singh (ed.), V.N. Shukla's Constitution of India 49 (12<sup>th</sup> ed., Eastern Book Company, Lucknow, 2013).

<sup>77</sup> Mahendra P. Singh, *Are Articles 15(4) and 16(4) Fundamental Rights?*, (1994) 3 SCC (Jour) 33.

<sup>78</sup> *Supra* note 76 51.

<sup>79</sup> See for example, Dipankar Gupta, *Towards Affirmative Action*, 33 India Int'l Centre Q., 150-161, (2006).

<sup>80</sup> S.S. Sharma, *Untouchability, A Myth or Reality: A Study of Interaction Between Scheduled Castes and Brahmins in a Western U.P. Village*, 35 Sociological Bulletin, 73-75, (1986).

Department, filed a complaint against her domestic help for misrepresentation of caste, shows the deep caste bias which exists among persons employed within government institutions as well.<sup>81</sup> The incident of caste based discrimination by upper caste Hindu Indian employees against their Dalit colleague in Silicon Valley in California is another example which reflects that acquisition of economic wealth cannot protect the socially marginalized against social discrimination.<sup>82</sup> Reservation is not a capacity-building project. It is a guarantee against discrimination and an acknowledgment of the perpetual discrimination faced by the socially oppressed classes. To put it bluntly, reservation is neither a crutch,<sup>83</sup> as has been lamented by the court, nor a vehicle for the reserved categories. It merely guarantees a clearer and obstacle-free path for the socially oppressed communities to walk on.

Sociologist Gail Omvedt argues that the main objective of reservation has been to remove caste-based monopoly on social resources. It is not meant to lift the depressed castes from below poverty line. The upward economic mobility of some of the individuals from depressed castes as a consequence of reservation, should be merely seen as a collateral effect.<sup>84</sup> Omvedt also cautions that breaking caste monopoly through reservation often creates unorganized and small middle-class sections within depressed castes. Instead of perceiving this phenomenon as a success of reservation, it is used by opponents to prove that it does not help in consistent upliftment.<sup>85</sup> However, the existence of such middle classes is not a negative outcome of reservation. Rather, by diluting the rigidity of class, reservation makes a bold attempt to reveal the artificiality of caste-based hierarchy. Further, breaking a thousand years of monopoly takes time and creates various intermediate situations that do not necessarily reflect the holistic outcome of reservation.

Unless reservation in employment is explicitly guaranteed, people from the socially backward communities largely remain absent from services because of presumed inefficiency and prejudice. For example, until 2008, the countrywide-known Indian Institutes of Technology did not have faculty reservation for the SCs, STs, and OBCs, though reservation

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<sup>81</sup> Vidula Sonagra & Nachiket Kulkarni, *The 'Non-Brahmin' cook from Pune and the myth of 'Caste-less' Middle Class*, 52 EPW Engage, (2017). Though one may claim that such prejudice has occurred outside the course of her employment as a government employee, within the private sphere of her life, one must not overlook the fact that unlike private sectors, decision making in government services are more distributed. The employees through their seniority become decision makers and cast the prejudice on their colleagues and junior employees.

<sup>82</sup> *Supra* note 69.

<sup>83</sup> Justice Jeevan Reddy in *supra* note 36, at para 828.

<sup>84</sup> *Caste or Economic Status? What should we base reservations on?*, EPW Engage, (2019).

<sup>85</sup> *Id.*

existed to some extent in administrative posts. This decision by the Ministry of Human Resource Development to introduce reservation in faculty posts has been opposed by the institutions, presuming that “with reservation in faculty positions [...] IITs will crumble”.<sup>86</sup>

### *A. Constitutionality of Reservation for Economically Weaker Sections*

#### **1. Contradictions in the Scope of the Term ‘Economically Weaker Sections’**

Social ostracization, educational backwardness, and historical injustice are the criteria that determine eligibility for reservation. Economically weaker sections are present among all communities. EWSs are not outcomes of social discrimination. Rather, flawed economic policies and unemployment, among other reasons, are responsible for the existence of economically weaker sections. Despite economic backwardness, the presence of upper castes in political, social and cultural spheres reveals that it is caste-based discrimination and not economic backwardness that lies at the heart of social injustice.<sup>87</sup> The fallacy of reservation for EWS through the constitutional amendment of 2019 can be understood further through an examination of the Right of Children to Free and Compulsory Education Act of 2009 (**RTE**). As per Section 2(d) of the Act, ‘child belonging to disadvantaged group’ means a child belonging to categories mentioned in Article 15(4) of the Constitution that is, SCs, STs, SEBCs or such other groups which are disadvantaged owing to social, cultural, economic, geographic, linguistic, gender or such other factors as may be specified by appropriate government through notification. Section 2(e) of the Act defines ‘child belonging to weaker section’ to include a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government by notification. Under the RTE, economically weaker sections are defined solely based on the income of the family. Based on these definitions, the children belonging to Sections 2(d) and 2(e) of the Act overlap. The definition under Section 2(e) does not explicitly exclude the economically weaker sections among the socially backward classes. This is to say that economic identity alone cannot constitute a class.

A similar example may be found in Article 46 of the Constitution.<sup>88</sup> The Constitution does not define the weaker sections of the people. Such an attempt was also given up by the

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<sup>86</sup> See for example, Hemali Chhapia, *HRD orders faculty quota, Directors Livid*, TOI, (June 28, 2008); See also, the paranoia of faculty members of IITs against reservation in Prof. M. Balakrishnan, *OBC Reservations: An IIT Faculty Member’s View*, [https://www.ee.iitb.ac.in/~hpc/.old\\_studs/hrishi\\_page/random/reservation.pdf](https://www.ee.iitb.ac.in/~hpc/.old_studs/hrishi_page/random/reservation.pdf).

<sup>87</sup> Sandeep Kumar, *Reservation that is Anti-Reservation*, 54, EPW, (2019).

<sup>88</sup> INDIA CONSTI. art. 46.



Constituent Assembly.<sup>89</sup> The Supreme Court, therefore, had applied a means test to determine EWS based on annual income in the 90s.<sup>90</sup> However, the *Indra Sawhney* case clarified that “weaker sections of people” is wider than SCs, STs, SEBCs and “backward class of citizens” and includes all sections of the society that are rendered weak due to various circumstances which may include poverty, and natural as well as physical shortcomings.<sup>91</sup> The Court did not say that economically weaker sections exclude socially backward communities.<sup>92</sup> The mandate presented before the state under Article 46 of the Constitution requires the promotion of educational and economic interests of the ‘weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes’.<sup>93</sup>

The Constitution (103<sup>rd</sup> Amendment) Act, 2019, introducing reservation for EWS<sup>94</sup> explicitly excludes SCs, STs, SEBCs, and backward classes from its clauses even though backwardness may arise out of physical disabilities and geographical isolation, etc., besides social discrimination. Therefore, when the SCs, STs, SEBCs, and backward classes are excluded, a group constituted on the basis of inadequate family income cannot be categorized as a class. They merely constitute a group which comprises of people solely disadvantaged based on economic backwardness. An economic criterion cannot be the basis of providing reservation. Articles 15(4) and 16(4) are meant to alleviate caste-based discrimination. A person born into an upper-caste family or are related to members of notified communities by marriage cannot be entitled to reservation.<sup>95</sup> Reservation under the Indian Constitution is not based on the utilitarian or distributive justice principles.<sup>96</sup> Based on records from the Constituent Assembly and through assessments by noted Indian jurists, one can safely conclude that reservation is premised on the principle of compensatory justice and is targeted only for those communities who are socially disadvantaged.<sup>97</sup>

## **2. Preference for Economically Backward Classes and Prejudice Against Socially Backward Classes**

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<sup>89</sup> *Supra* note 28. Also see *Supra* note 76, at 382.

<sup>90</sup> *Id.*

<sup>91</sup> *Supra* note 6, at para 552.

<sup>92</sup> *Supra* note 6, at para 196.

<sup>93</sup> INDIA CONSTI. art. 46.

<sup>94</sup> INDIA CONSTI. art. 15(6), art. 16(6), *inserted vide* the Constitution (One Hundred and Third Amendment) Act, 2019.

<sup>95</sup> *Supra* note 76, at 99.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* Also see Professor B. Errabbi, *Protective Discrimination: Constitutional Prescriptions and Judicial Perceptions*, Delhi Law Review Vol. 10 & 11, 1981-82, 72.

Caste-based discrimination is a collective phenomenon. Individual economic mobility does not automatically remove the stigma of caste. The Constitution (103<sup>rd</sup> Amendment) Act, 2019, reflects caste-based prejudice. For the upper caste economically weaker sections, it is presumed that but for the economic poverty, these sections of the upper caste population would have been eligible for admission in educational institutions and appointments in public services. Thus, their inclusion in reservation did not trigger debates on meritocracy in the same way as reservation for the SCs, STs, and OBCs have done. However, for the backward classes entitled to reservation, namely, the SCs, STs, SEBCs and backward classes, a member is not only required to prove membership of a community notified for reservation but also to show that they are also economically backward and do not fall within the 'creamy layer'. Further, for the socially backward classes, it took 69 years for Supreme Court to acknowledge that efficiency of administration has to be assessed in the context of social justice as opposed to a narrow interpretation of talent and success.<sup>98</sup>

The excess importance placed on economic backwardness over social backwardness amounts to delegitimizing the lived realities of the social oppressions faced by depressed classes in favour of economic disadvantages faced by forward communities. As discussed in the previous section, there was a consensus in the Constituent Assembly that the government did not have free reign to include any community in this provision as it deemed fit. Social and educational backwardness were the key components for the notification of communities under these provisions. Therefore, this amendment is a departure from the constitutional vision.

### ***B. From an Invalidated Office Memorandum to a Constitutional Amendment***

The Constitution (103<sup>rd</sup> Amendment) Act, 2019 is not a novel idea. An office memorandum challenged in *Indra Sawhney* provided for up to 10% reservation for economically weaker sections of the society who did not fall in the reserved category under Articles 15 and 16 of the Constitution.<sup>99</sup> The Court invalidated the memorandum. The bench decided that a person cannot be barred from consideration for appointment in public services solely based on property holding or income. Employment under the state is meant to serve the people. It is a secondary consideration that employment under the state also serves as a source of livelihood for those who are appointed in the posts. Therefore, according to the court, any bar created based on the economic status of a person directly violates Article 16(1) of the

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<sup>98</sup> B.K. Pavithra v. Union of India, (2019) 16 SCC 129 paras 129- 137.

<sup>99</sup> *Supra* note 6, at para 845.

Constitution.<sup>100</sup> This opinion delivered in *Indra Sawhney* also finds corroboration from eminent Indian jurists. Along with some jurists like B. Errabbi<sup>101</sup>, Mahendra P. Singh also strongly agrees that representative or distributive justice is a matter of equality and can be attained through Article 14 itself.<sup>102</sup> Reservation clauses do not guarantee distributive justice. This proposition is also a settled position of law emphasized by the Supreme Court of India in multiple cases.<sup>103</sup>

Another constitutional irregularity which arises out of The Constitution (103<sup>rd</sup> Amendment) Act, 2019, is that the new clauses (6) of Articles 15 and 16 are not coherent with the rest of the provisions of Articles 15 and 16. One may recall this issue through the statements made by Ambedkar in the Constituent Assembly. Ambedkar mentioned that with the inclusion of the term ‘backward’, a balance is struck between the first two clauses of Articles 15 and 16 with the last clauses.<sup>104</sup> This is to say, the right to equality of opportunity and the right to non-discrimination is balanced with the right to treatment as an equal.<sup>105</sup> Secondly, doubts were posed regarding the nature of the relationship between the clauses of Articles 15 and 16. Whether Articles 15(4) and 16(4) are exceptions to the fundamental rights guaranteed through clauses (1) and (2) of Articles 15 and 16 remained a matter of debate until the Supreme Court decided otherwise in *N.M. Thomas*.<sup>106</sup> Finally, in *Indra Sawhney*, it was emphasized by the Court that Article 16(4) is a facet of equality guaranteed under Article 16(1). Clause (4) does not derogate from clause (1) of Article 16. Rather, it provides positive support and content to Article 16(1).<sup>107</sup>

One must also recall on this issue the dilemma presented before the court on the issue of caste-based discrimination through reservation. Without laying out the details, it suffices to say that the court has laid down that reservation does not amount to discrimination based on caste because in the identification of backward communities, only those castes which are

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<sup>100</sup> *Supra* note 6, at para 845.

<sup>101</sup> Professor B. Errabbi, *Protective Discrimination: Constitutional Prescriptions and Judicial Perceptions*, Delhi Law Review Vol. 10 & 11, 1981-82, 72.

<sup>102</sup> *Supra* note 76, at 99.

<sup>103</sup> *Id.*

<sup>104</sup> *Supra* note 28.

<sup>105</sup> *Supra* note 76.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

socially and educationally backward, are notified.<sup>108</sup> Therefore, classification is not based on caste alone.

Neither Article 15(1) nor Article 16(2) enumerate economic condition as a ground of non-discrimination. Various other grounds such as disabilities, sexual orientations, etc. are also not enumerated in these two clauses. The reasons behind their absence are, however, different. While the later grounds were not even deliberated in the Constituent Assembly as requiring positive action under Articles 15 and 16, the former ground was deliberated and rejected by the members.<sup>109</sup>

The constitutional validity of Articles 16(4A) and 16(4B) was challenged before the Supreme Court in *Nagaraj*. While upholding the validity of these two constitutional amendments, the Court laid down two tests to determine if there is a violation of the basic structure of the constitution. The width test checks against moving beyond the scope of a provision. The identity test checks against the alteration of the characteristics of the provision.<sup>110</sup> The scope of reservation provisions has been to include all socially and educationally backward communities. Any class identified solely based on economic backwardness has been rejected by the drafters in the constitutional text and also by judges in courts of law. As for the identity test, it needs to be reiterated that reservation is not a poverty alleviation scheme. The provisions appear in the fundamental rights chapter of the Constitution to provide protection against social discrimination and eradicate social and educational backwardness. Therefore, the Constitution (103<sup>rd</sup> Amendment) Act, 2019 may not pass the identity test either. This indicates that the Constitution (103<sup>rd</sup> Amendment) Act may violate the basic structure doctrine.

Finally, *Indra Sawhney* has already declared that reservation solely on an economic basis directly violates 16(1) of the constitution. Therefore, the mere conversion of an invalidated office memorandum into a Constitutional Amendment does not cure the conflict created between Article 16(1) and 16(6) of the Constitution.

The constitutionality of the Constitution (103<sup>rd</sup> Amendment) Act, 2019 has been challenged before the Supreme Court. The decision of the Court is awaited. In a recent five judge bench decision of the Supreme Court concerning a related issue of reservation, this

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<sup>108</sup> *Supra* note 13, at para 169.

<sup>109</sup> *Supra* note 28.

<sup>110</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 para 102.

matter was raised before the court.<sup>111</sup> However, the court refrained from commenting on the issue since the matter is pending before the court.

### CONCLUSION

A constitution may be interpreted with an originalist approach or a functionalist approach. Courts should not be forced to constantly adjudicate constitutional principles with the apprehension that certain interpretations of the constitutional provisions will unsettle the majority and the socially dominant classes. The interpretation of the constitution has to be guided by the rule of law. While interpreting provisions on reservation under the Indian Constitution, the Supreme Court has often had to play the role of a negotiator between those favouring the status quo of social hierarchy and those seeking social change. In the process of maintaining peace, the court had to strike a balance between opposing demands and reach some agreements; interim injunctions on implementation of orders, imposing a 50% ceiling on reservation, and introducing the 'creamy layer' test for backward classes are some prominent examples. Though many of these decisions were taken by the court to maintain peace, they have subsequently been incorporated in jurisprudence.<sup>112</sup> There are some basic features of reservation in India which can be understood from the CAD, the constitutional text, and the decisions of courts. Among these sources, only the CAD have remained timeless and static. Both the constitutional text and the decision of courts have changed their characters over time. The changes have been slow, and the shifts have been one step at a time. However, through the introduction of the 'creamy layer' test for the SCs and STs and the introduction of reservation for EWS among the non-backward classes, the judiciary and the legislature respectively have taken risky steps which may move away from the basic constituents of reservation. While upholding the constitutional validity of the amendment introducing reservation in promotion, the court laid down the width and identity tests to assess the violation of the basic structure. These tests laid down in *Nagaraj* show that the basic characteristics of a constitutional provision cannot be stretched to such width that it loses its identity. The application of the 'creamy layer' test to the SCs and STs may appear like a mere extension of existing practice. In the same way, the introduction of reservation for economically weaker sections among non-backward classes in addition to the 50% reservation for backward classes may appear as a benign step to extend benefits to poor classes of people. However, one may find that these two

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<sup>111</sup> Jaisri Laxman Rao v. Chief Minister, Civil Appeal No. 3123 of 2020.

<sup>112</sup> Mahendra Pal Singh, *Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure*, 1 NUJS L. Rev. 194, 197-198, (2008).

alterations change the basic characteristics of reservation. The application of the ‘creamy layer’ test to the deemed socially backward classes legitimizes and prioritizes economic backwardness as the primary cause of inequality. A nine-judge bench<sup>113</sup> had cautioned against the application of the ‘creamy layer’ test on the SCs and STs which a subsequent five-judge bench has ignored. This is judicial impropriety. Regarding the latest Constitutional Amendment introducing reservation for the EWS, an office memorandum invalidated by the court on merit has been transformed into a constitutional amendment. Also, the CAD reveal that reservation on the grounds of economic backwardness has been deliberated upon by the assembly and has been rejected. Both of these developments run the risk of restoring the status quo of social hierarchy which the Constitution aimed at dismantling. Petitions seeking non-application of ‘creamy layer’ test to the SCs and STs and invalidation of the Constitutional Amendment providing reservation to EWS, are pending before the Supreme Court. These two decisions will determine the foundation on which equality jurisprudence in India shall thrive.

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<sup>113</sup> *Supra* note 6.