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EDITORIAL NOTE

"Rest on laurels? I wish I could do that."
Lee Kuan Yew

This note represents an unrepeatable moment, though insignificant in the eyes of the world at large. It is the first time that an Editor-In-Chief of this Journal has ever been called upon to write a second note in their tenure. This is a responsibility which I have created, and for which I shall be cursed by my successors in the generations to come. On this occasion, it is only fitting that I give an account of my tenure.

When the Board of Editors elected me last year, the Journal had just been led by my predecessor and her Board through the most innovative year in its history. The Editorial Board of 2018-2019 had for the first time consolidated and solidified the independence of the Board by passing the Constitution of the Journal. In that tenure, we made the long overdue move to online publication. During my tenure, we built on my predecessor's work by accepting rolling submissions, creating the NLJ Blog, and publishing the journal biannually. We also made changes to the Constitution of the Journal, establishing years of service rather than year of study as the determinant of seniority. We sought to enact conditions under which expertise is respected. As of this issue, we have exhausted low-hanging fruit; all that remains is incremental progress.

The final issue of Volume 14 also comes in unprecedented times. The novel coronavirus, the first modern pandemic, threatens us all. It exposes the fragility of our institutions, the fissures of uncertainty in the peace and safety we took for granted in our privileged existences. Against that backdrop, what of legal academia? It is has become fashionable to be blasé about the role of academia in ensuring institutional accountability. It has become easy to attribute all judicial reasoning to political machination in a flawed system of unhealthy incentives. This is perhaps true. Nothing we have seen argues against it. But we offer resistance, both to systemic problems and threats to peace, in this limited form: by attempting to order our fragile microcosms and assert our control over them. We entrench the conditions under which expertise and merit are respected. We assert our truths with quiet dignity. We maintain, to quote Justice Jackson, "that the world is round, though all about [us] men of authority say it is flat." This is not much, but there is virtue in having a sense of your limitations and striving for gradual progress.

It is my utmost pleasure to present to you the 2nd Issue of the 14th Volume of the NUALS Law Journal, a document that is the result of the sustained efforts of the Board and the arduous shattering of boundaries.

On behalf of the Board of Editors,

NIKHIL D. MAHADEVA
CHIEF EDITOR

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DECRIMINALIZATION OF ADULTERY AND THE PROMISE MADE IN CONSIDERATION OF PAST ILLICIT COHABITATION IN INDIA

Yoshihide Higa*

The decriminalization of adultery in India, which took place in 2018, has the potential to cause the re-examination into an issue of contract law, i.e. the enforceability of the promise made in consideration of past illicit cohabitation. This article aims to provide beneficial preliminaries to the discussion of law regarding the issue after the Supreme Court decision in the case of Joseph Shine v. Union of India, by scrutinizing the legislative history of the Indian Contract Act, in the context of English law, as well as the development of case law. In the legislative process, the Contract Act has lost every general exception to the doctrine of consideration despite the fact that some novel measures to evade it were proposed in the original draft. Consequently, Section 2(d) and Section 25(2) of the Act have been invoked instead to enforce the promise made in consideration of past illicit cohabitation. Although, despite the uniqueness of Section 2(d) and Section 25(2), their application was restricted for some time under the influence of bargain theory, the "eclipse" by the English orthodoxy has been overcome to a great extent through a series of High Court cases, some of which have attempted to achieve a proper balance between the need to uphold sexual morality and the need to protect women's interests. This article argues that the Supreme Court decision in *Dwarampudi Nagaratnamba v. Kunuku Ramayya* entails a risk of collapsing these efforts, and that the range of the authority has been, and should be, restricted.

* Ph.D. Scholar, Delhi University. Email: yshd-higa@hotmail.co.jp

INTRODUCTION

This article focuses on a specific issue of the Indian law, i.e. the enforceability of the promise made in consideration of past cohabitation which is illicit in the sense that it is outside the purview of matrimony, for compensation in the form of allowance, maintenance, or assignment of properties. On 27th September 2018, a five-judge bench of the Supreme Court of India, in a historic case,[1] unanimously held that Section 497 of the Indian Penal Code, 1860 was unconstitutional. The apex court observed that the over 150-year-old clause, which incriminates a man having sexual relations with a married woman, treated women like "property" of their husbands. There is no doubt that the decision is important for criminal law and family law. However, it also has the potential to cause an issue of contract law to be re-examined, for it is on the ground of Section 497 that the courts of India have held that past cohabitation which is adulterous is illegal and that the promise of allowance for the cohabitation is unenforceable.[2] Under the English law, where at least formerly past cohabitation was distinguished from future cohabitation and only the promise made for the latter was held to be illegal,[3] even the illegality of the latter case has been doubted recently.[4] On the other hand, the existing precedent of the Supreme Court of India[5] adopts a reasoning which can even deny the enforceability of any promise made in consideration of past cohabitation, adulterous or not. The primary purpose of this article is to reveal the peculiarity and the problem of the Supreme Court decision by tracing the history of legislation of the Indian Contract Act, 1872[6] and the development of the relevant case law, which would be beneficial preliminaries to the discussion of law after *Joseph Shine v. Union of India*.

The specific issue of the promise made in consideration of past illicit cohabitation is taken up not merely for the practical interest. It can also be a good subject in evaluating the Contract Act in the broader context of legal history of the common law of contract for the following reasons. First of all, the case of past illicit cohabitation is one of the typical instances, the treatment of which was affected by a variation which the Contract Act underwent in the process of codification. Under English law, a promise made in consideration of past illicit cohabitation is enforceable if it is a contract by deed. The Contract Act, on the other hand, has lost every general exception to the doctrine of consideration despite the fact that some novel measures were proposed in the original draft, including what was proposed as an alternative to contract under

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[1] Joseph Shine v. Union of India, AIR 2018 SC 4898.

[2] FREDERICK POLLOCK & DINSHAW FARDUNJI MULLA, THE INDIAN CONTRACT ACT, 1872, 531 (15th ed. 2018); AVTAR SINGH, LAW OF CONTRACT AND SPECIFIC RELIEF 262 (11th ed. 2013).

[3] Beaumont v. Reeve, (1846) 8 Q.B. 483; Benyon v. Nettlefold, (1850) 3 Mac. & G. 94.

[4] JACK BEATSON ET AL., ANSON'S LAW OF CONTRACT 424-25 (30th ed. 2016); John Dwyer, *Immoral Contracts*, 93 LAW QUARTERLY REVIEW 386 (1977).

[5] Dwarampudi Nagaratnamba v. Kunuku Ramayya, AIR 1968 SC 253.

[6] The Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872 (India).

seal. Although the influence of will theory on the Contract Act has already been pointed out by some scholars,[7] they do not explain why the reform of consideration was retrenched because they overlook the debate, especially between James F. Stephen and George Campbell, in the Legislative Council of the Governor General of India. Generally, the existing studies on the legislation of the Contract Act[8] do not pay attention to the importance of the final process which took place in India during the last several months.[9] The legislation of the Act was not a mere formal transformation of English case law into a statute, but it was a more complicated process, which consequently made it theoretically inconsistent.[10]

Secondly, the subject is appropriate for the examination of some remaining part of the reform of consideration because the hardening of the requirement of consideration under the Contract Act made it inevitable for lawyers to invoke "strictly limited exceptions"[11] left in the Act, or to expand the scope of valid consideration for the sake of enforcing the promise deliberately made in consideration of past illicit cohabitation. Section 2(d) of the Act, which provides for the definition of consideration, contains an exception to the past consideration rule by way of previous request in an unqualified form in spite of the contemporary trend in English law to add restrictions on it, and has been relied on in cases of past cohabitation. Section 25(2), which has also been referred to, is interesting because it restores Lord Mansfield's doctrine of moral obligation as a good consideration in an extreme form, which has never been accepted under English law.[12] By taking up the matter of consideration and past illicit cohabitation, this article observes how the courts of India have interpreted and applied these unique provisions.

Finally, as Shivprasad Swaminathan has already pointed out in his work on the definition of consideration under the Contract Act, the interpretation of the provisions of the Act has been highly governed by English law even in cases of clauses which were apparently assumed to

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[7] D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 223, 235 (1999); WARREN SWAIN, THE LAW OF CONTRACT 1670-1870, 265-66 (2015).

[8] The legislative process of the Contract Act was partly described by those who engaged in the legislation work themselves. *See* J.F. Stephen, *Codification in India and England*, 12 FORTNIGHTLY REVIEW 644 (1872); 1 W. STOKES (ED.), THE ANGLO-INDIAN CODES 534 (1887). In the twentieth century, some studies began to narrate the procedure to some extent relying on the historical sources. *See* Frederick Pollock & Dinshah Fardunji Mulla, *Preface to* THE INDIAN CONTRACT ACT (1905) (*hereinafter*, POLLOCK & MULLA); G.C. RANKIN, BACKGROUND TO INDIAN LAW ch. 7 (1946) (*hereinafter,* RANKIN).

[9] A.C. Patra, *Historical Background of the Indian Contract Act, 1872*, 4 JOURNAL OF THE INDIAN LAW INSTITUTE 373, 393-99 (1962).

[10] Frederick Pollock correctly described the legislation process: "Not only the work of different hands, but work done from quite different points of view, has been pieced together with an incongruous effect". POLLOCK & MULLA, *supra* note 8, at iv-v.

[11] *Id*. at 124.

[12] H.S. CUNNINGHAM & H.H. SHEPHARD, THE INDIAN CONTRACT ACT 117-18 (3rd ed. 1878).

depart from English counterparts, which weakened the effect of the reform of consideration.[13] This article reinforces his argument, in part, by furnishing a good illustration. However, what is interesting is that, as far as the matter of consideration and past illicit cohabitation is concerned, the courts of India succeeded in overcoming the "eclipse" by the English orthodoxy.

I. LEGISLATION OF THE INDIAN CONTRACT ACT IN THE CONTEXT OF ENGLISH LAW

As the Indian Contract Act was legislated based on the English law of contract in those days,[14] it would be beneficial to briefly describe the contemporary English rules.[15] First of all, there was a distinction between past illicit cohabitation and future cohabitation. A promise made in consideration of future illicit cohabitation was held to be founded on an immoral consideration and void, for it was thought that otherwise it would promote sexual immorality. On the other hand, however, past illicit cohabitation was not regarded as illegal. So, even though it could not constitute a good consideration for the promise to pay an allowance to a person who had cohabited with the promisor, that was because it was just a past consideration, which meant that the promise, if made under seal, would be binding.

Since India did not adopt English rules on contract under seal, a promise made without consideration cannot be enforceable even if it is expressed in a sealed writing. However, what is to be noted is that the framers of the Contract Act intended to introduce some measures which could become alternatives to contract under seal as general exceptions to the doctrine of consideration.[16] For the purpose of this study, First Exception to Section 10 of the original draft prepared by the third Indian Law Commission in 1866 is important:[17]

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[13] Shivprasad Swaminathan, *The Great Indian Privity Trick: Hundred Years of Misunderstanding Nineteenth Century English Contract Law*, 16 OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 160 (2016); Shivprasad Swaminathan, *Eclipsed by Orthodoxy: The Vanishing Point of Consideration and the Forgotten Ingenuity of the Indian Contract Act 1872*, 12 ASIAN JOURNAL OF COMPARATIVE LAW 141 (2017) (*hereinafter,* Swaminathan).

[14] For the history of legislation of the Indian Contract Act in general, see, in addition to the work shown in *supra* note 8; C. Ilbert, *Indian Codification*, 5 L. Q. REV. 347, 349-52 (1889)(*hereinafter,* Ilbert); M.P. Jain, *The Law of Contract Before the Codification*, 14 (SPECIAL ISSUE) JOURNAL OF THE INDIAN LAW INSTITUTE 178, 199-202 (1972); M.P. JAIN, OUTLINES OF INDIAN LEGAL SYSTEM 478-79 (1952); M.C. SETALVAD, THE ROLE OF ENGLISH LAW IN INDIA 32 (1966); M.C. SETALVAD, THE COMMON LAW IN INDIA 70-72 (1960).

[15] *See* WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 178-79 (1879) (*hereinafter,* ANSON); STEPHEN MARTIN LEAKE, THE ELEMENTS OF THE LAW OF CONTRACTS 399-400 (1867); FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 243-44 (1876).

[16] *See* The Indian Contract Bill, s. 56, in *The Gazette of India*, Extraordinary, 28th March 1872. It provided for a rule of promissory estoppel. *See also* COPIES OF PAPERS SHOWING THE PRESENT POSITION OF THE

> First Exception.---A person who makes a promise, whether upon good consideration or not, is bound to perform it if the promise be expressed in writing and duly registered according to the provisions of the law for the time being in force for the registration of assurances, unless the promise is unlawful or is based on an unlawful consideration.

This unqualified exception to the requirement of consideration by registered writing was also provided for under Section 25(1) of the final bill,[18] which was prepared by the select committee presided by James F. Stephen and was submitted to the Legislative Council of the Governor General of India on 12th March 1872.[19] Although, after the resignation of the Indian Law Commissioners,[20] Stephen replaced the beginning parts of the existing bill relating to general principles of contract law including Sections 1 to 61, which had generally been based on the original draft, with new 78 sections prepared by himself,[21] it seems that he was in favour of the reform of consideration[22] as well as the will theory.[23] But on the very day when the Contract Act was passed, the final bill was revised to a great extent on the motions of George Campbell, who attended the Legislative Council as Lieutenant Governor of the Bengal Province.[24] His basic idea was represented by the following statement:[25]

> He [Campbell] should like to propose an equitable clause to the effect that, if the Court considered that the bargain was a hard and one-sided one, it should be able to mitigate the damages to any extent to which it thought fit. But he felt that if he did so, he might alarm the Council, and that they might think he proposed to do too much. Therefore, he did not attempt to go the length of that simple proposition, but he had put upon the paper a series of amendments which, without infringing the principle that a contract made must be performed, at the same time gave to the Court a certain power of mitigating the practical operation of the contract, and he had no doubt that the effect of the amendments which he proposed would go far to mitigate the severity of the law in contracts of a hard and one-sided character.

QUESTION OF A CONTRACT LAW FOR INDIA: AND, OF ALL REPORTS OF THE INDIAN LAW COMMISSIONERS ON THE SUBJECT OF CONTRACTS 63 (1868).

[17] *Id*. at 9.

[18] The Indian Contract Bill, s. 25(1), in *The Gazette of India*, Extraordinary, 28th March 1872, at 14: An agreement made without consideration is void unless "(1) it is expressed in writing and registered under the law for the time being in force for the registration of assurances".

[19] 11 INDIA IMPERIAL LEGISLATIVE COUNCIL, ABSTRACT OF THE PROCEEDINGS OF THE COUNCIL OF THE GOVERNOR-GENERAL OF INDIA: 1872 119 (1873) (*hereinafter* 'ABSTRACT').

[20] Ilbert, *supra* note 14, at 351-52.

[21] J. F. STEPHEN, MINUTES AND NOTES BY THE HON'BLE SIR JAMES FITZJAMES STEPHEN 148 (1906).

[22] He seems to have confirmed the reform of the rule that consideration must move from the promisee by replacing the words "another person" with "the promisee or any other person" for the definition of consideration. The intention of the Indian Law Commissioners was not necessarily clear. See Rankin, *supra* note 8, at 103-104.

[23] One outstanding example is section 10 of the bill, which resulted in the same section of the Indian Contract Act. The bill arranged requirements for a contract around the concept of "free consent". *See* The Indian Contract Bill, s. 10, in *The Gazette of India*, Extraordinary, 28th March 1872, at 12.

[24] *See* The Indian Councils Act, 1861, 24 & 25 Vict., c. 67, s. 9.

[25] ABSTRACT, *supra* note 19, at 350.

Thus, he proposed several amendments, which were to the effect that the requirements for the valid contract would be stricter, and that judges would be allowed to exercise broader discretion to assess the bargain in order to protect debtors from unfair terms of contract.[26] While Campbell, who had a long career in India and had an experience of a judge of the Calcutta High Court,[27] did not suppose that in India contract parties were generally standing on equal positions, and was cautious about introducing a concept of contract law based on laissez-faire principle into India,[28] Stephen, who supported "liberty of contract",[29] opposed most of the amendments. Consequently, only a few amendments were achieved, one of which was the amendment of Section 25(1), i.e. the applicability of the subsection was strictly limited, like the present one, by addition of some requirements like "natural love and affection" and "parties standing in a near relation to each other". Thus, it became quite difficult to use Section 25(1) to make a promise for past illicit cohabitation binding even though it had originally been proposed as an alternative to contract under seal.[30]

As a result, the gap made by the restriction of Section 25(1) was attempted to be filled by Section 2(d) and Section 25(2). As far as a rule of past consideration is concerned, both of these clauses depart from English law. Especially, Section 25(2) is interesting because it adopted a rule of moral obligation, which has never been approved under English law,[31] by providing that "a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor" is enforceable as a contract.[32] Section 2(d), which defines the term of consideration, is also different from the English counterpart, for it considers past action as a good consideration as long as it has been given "at the desire of the promisor". But what should be noted here is that although the clause embodied the English doctrine of *Lampleigh v. Brathwait*[33] in an unqualified form, the ambiguity and the extensive application of the exception by previous request had drawn criticism in nineteenth-century England,[34] and a series of cases[35] and literature of jurists attempted to restrict its scope. Especially, scholars who were in favour of bargain theory, like

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[26] *Id*. at 350-80.
[27] 1 C.E. BUCKLAND, BENGAL UNDER THE LIEUTENANT-GOVERNORS 482-83 (1901).
[28] ABSTRACT, *supra* note 19, at 347.
[29] *Id*. at 377.
[30] *Copies of Papers*, *supra* note 16, at 4.
[31] Eastwood v. Kenyon, (1840) 11 Ad. & E. 438.
[32] This clause was also introduced by Stephen. *See* The Indian Contract Bill, s.10, in *The Gazette of India*, Extraordinary, 28th March 1872, at 12.
[33] Lampleigh v. Brathwaite, (1616) Hobart 105.
[34] ANSON, *supra* note 15, at 85-90; FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 187 (3rd ed. 1881) (*hereinafter,* Pollock). *See* C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 112-17 (2nd ed. 1880).
[35] Roscorla v. Thomas, (1842) 3 Q.B. 234; Kaye v. Dutton, (1844) 7 M. & Cr. 807; Elderton v Emmens, (1847) 4 C.B. 479; Kennedy v. Broun, (1863) 13 C.B.N.S. 677; *In re* Casey's Patents, Steward v. Casey, [1892] 1 Ch. 104.

Frederick Pollock, stressed mutuality or the element of simultaneous exchange in restricting the exception by previous request. By the end of the century, their arguments were followed by the Court of Appeal in *Re Casey's Patents*, which held as follows:[36]

> Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered.

As Michael Lobban said, this English authority preserved "bargain elements of a contract" by acknowledging that at the time of past action "there was a prior contractual obligation whose details were fleshed out by the later promise".[37] Naturally, modern English scholars were not satisfied with the relevant provisions of the Indian Contract Act, as William Reynell Anson made the comment on Sections 25(2) and 2(d) of the Act that "[i]t is perhaps unfortunate that the framers of that Act should have so readily abandoned so satisfactory a test of the validity of simple contracts as the English doctrine of Consideration has proved itself to be".[38] Despite the uniqueness of Sections 2(d) and 25(2), as will be seen below, the influence of bargain theory was extended to the interpretation of these clauses.

II. ECLIPSE BY ENGLISH ORTHODOXY

It seems that, for a few decades since the legislation of the Indian Contract Act, the distinction between past and future cohabitation was consistently maintained by the High Courts of India.[39] But, unlike English law, the validity of a promise made in consideration of past cohabitation was not approved on the solemnity of a deed, but the courts of India achieved the same result by acknowledging a valid consideration or by applying Section 25(2).[40] For example, in *Dhiraj Kuar v. Bikramajit Singh*, where the Allahabad High Court held that the defendant had made a promise of monthly allowance to the plaintiff on account of their past cohabitation, the court stated that

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[36] *In re.* Casey's Patents, Steward v. Casey, [1892] 1 Ch. 104, 115-16. Later the requirements were further elaborated by the Judicial Committee of the Privy Council. *See* Pau On v. Lau Yiu Long, [1980] A.C. 614, 629.

[37] Michael Lobban, *Contract*, *in* 12 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 366 (William Cornish et al. eds., 2010).

[38] ANSON, *supra* note 15, at 95. *See* Pollock, *supra* note 34, at 188-89: "It [the Indian Contract Act] keeps, however, the doubtful doctrine that a consideration executed on actual request will support a subsequent express promise".

[39] The distinction had also been approved before the Contract Act was enacted. *See* Man Kuar v. Jasodha Kuar, (1877) ILR 1 All. 478.

[40] Dhiraj Kuar v. Bikramajit Singh, (1881) ILR 3 All. 787; Ningareddi v. Lakshmawa, (1901) ILR 26 Bom. 163 (Chandavarkar, J.); Lakshminarayana Reddyar v. Subhadri Ammal, (1902) 13 Mad. L.J. 7.

"[s]uch a consideration" as past cohabitation "would not be immoral, so as to render the contract '*de facto*' void",[41] although eventually they validated the promise by applying Section 25(2).

But an eclipse by English orthodoxy, as Swaminathan called it,[42] began in the early twentieth century. It was by the comments in an authoritative commentary on the Contract Act by Pollock and Mulla, which was added on *Alice Mary Hill v. William Clarke*.[43] This case itself is worth attention, for here Aikman, J. of the Allahabad High Court unlike earlier precedents held in *obiter dictum* that if "adultery, past or future, is the consideration or an indivisible part of the consideration for an agreement, this would, I hold, make it not merely an immoral but an illegal agreement, and the contract would be void".[44] This argument was founded on the fact that in India, unlike England, adultery was a criminal offence.[45] However, what is important here is that Pollock and Mulla, referring to the decision, brought forward a more generalized argument on Section 25(2) that the correctness of the precedents which had validated promises of compensation for past cohabitation "may be doubted", and that in order to support them "it must be held that cohabitation is at the time such a lawful voluntary service as to be a proper subject for compensation, which is quite another matter".[46] If this argument is solely read, the meaning would not be so different from the view advanced in *Alice Mary Hill v. William Clarke*, which distinguished past cohabitation which was adulterous and which was not. But Pollock's and Mulla's argument must be read with another comment made on Section 23 referring to the above case, *Dhiraj Kuar v. Bikramajit Singh*, i.e. "a consideration which is immoral at the time, and, therefore, would not support an immediate promise to pay for it, does not become innocent by being past".[47] Thus, according to these reasonings, a promise to compensate for past cohabitation, adulterous or not, should not be binding, for if a promise were made at the time of past service, it would not be supported by a consideration of cohabitation due to immorality. This view, which stresses the validity of contract at the time of past service, has a close affinity with English restriction against rule of previous request, which presupposes a contractual relation between parties at the time of past action based on bargain theory[48].

Although Pollock and Mulla themselves did not necessarily deny the distinction between past and future cohabitations explicitly, their view was followed and extended by the following High

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[41] Dhiraj Kuar v. Bikramajit Singh, (1881) ILR 3 All. 787, 788.
[42] Swaminathan, *supra* note 13.
[43] Alice Mary Hill v. William Clarke, (1904) 27 All. 266.
[44] *Id*. at 269.
[45] The Indian Penal Code, 1860, s. 497. Now the section has been held to be unconstitutional by the Supreme Court in *Joseph Shine v. Union of India* (Writ Petition (Criminal) No. 194 of 2017).
[46] POLLOCK & MULLA, *supra* note 2, at 127.
[47] *Id*. at 128.
[48] A similar view is expressed regarding a promise to compensate for a service rendered by the promisee during promisor's minority: "the act done must have been done for a promisor who is competent to contract at the time when the act was done" for application of Section 25(2); *Id*. at 157.

Court decisions at least for some time. What is to be noted is that even High Courts of Bombay and Madras, which had in earlier cases approved the validity of promises of compensation for past cohabitation, held that past cohabitation could not constitute a good consideration.[49] For example, in *Husseinali Casam Mahomed v. Dinbai*, the plaintiff woman filed a suit against the defendants, who were executors of the last will of a man, on a document executed by him to promise her to pay Rs. 20,000 after his death out of his estate, and the High Court of Bombay acknowledged that the promise had been made in consideration of their past cohabitation.[50] Although the claim itself was dismissed on the ground that the document was testamentary in nature and so revoked by the subsequent will, two judges of the High Court in *obiter dictum* examined the question of immorality of consideration in case of appeal to the Privy Council. Here, whereas Crump, J., like Aikman, J. in *Alice Mary Hill v. William Clarke*, argued that the connection between the plaintiff and the deceased was adulterous so as to make the consideration unlawful, Macleod, C.J., stating that adultery was not proved, invoked both of above Pollock's and Mulla's comments and held as follows:[51]

> There can be no difference whether A says to B "I will give you Rs. 1,000 a month if you live with me for a year" or "I will give you Rs. 1,200 because you have lived with me for a year". The something to be done by the promisee in the one case is the same as the something done in the other case, and if the Court thinks that the one act is immoral, it must also think the other immoral, however much it may think that the conduct of the promisor in desiring to recompense B for past service, or, assuming they have been paid for as arranged, to provide for her future maintenance, is honourable.

Thus, despite the unqualified form of Sections 2(d) and 25(2), the framework of interpretation restricting their application under the influence of English orthodoxy prevailed for a while. This is ironic because Macleod, C.J. himself attempted to discuss the case independently of English law,[52] although he highly relied on Pollock's comments.

III. OVERCOMING OF ECLIPSE AND PROTECTION OF WOMEN'S INTERESTS

Although Pollock's and Mulla's interpretation framework has not been overcome completely yet, the influence did not continue. In this respect, *Godfrey v. Musammat Parbati Paluni*,[53] decided by Patna High Court, is important. In this case the defendant, a European gentleman who was an

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[49] Kisandas Laxmandas Bairagi v. Dhondu Tukaram Narvade, AIR 1920 Bom. 142; Husseinali Casam Mahomed v. Dinbai, AIR 1924 Bom. 135; Ganapathy Chetty v. Sundararaja Pillay, AIR 1930 Mad. 239; Sabava Yellappa v. Yamanappa Sabu, AIR 1933 Bom. 209; Istak Kamu Musalman v. Ranchod Zipru Bhate, AIR 1947 Bom. 198.

[50] Husseinali Casam Mahomed v. Dinbai, AIR 1924 Bom. 135, 136.

[51] *Id*. at 138.

[52] *Id*. at 137.

[53] Godfrey v. Musammat Parbati Paluni, (1938) ILR 17 Pat. 308.

Excise Inspector, developed an attachment with the plaintiff, an Indian woman of humble position, who became his mistress. Although after some years of association he made a promise of paying Rs. 10 every month for her maintenance for the period when she remained to be "outcasted and unmarried", he refused the payment after getting married with another woman, which resulted in this suit. Here, two judges of the High Court, rejecting the argument of the defendant that the real object of the agreement was promotion of continued relation,[54] held that the promise was binding, past association being the sole consideration and valid. Especially, the following observation made by James, J. about Indian precedents is worth attention:[55]

> It appears to have been assumed in some cases that although the Indian Contract Act thus stated that past consideration should be good consideration, it was intended… to introduce a new rule from English Law, and to introduce by implication the limitations placed upon it by the English decisions. A contract of this kind, not under seal, could not be enforced in England, not for the reason that it is immoral or against public policy, but because it is required there that the past consideration should be such as would have entitled the promisee at the time of performing the past act to sue the promisor for compensation---[*Beaumont v. Reeve*[56]]; and this rule has been applied more or less in all instances in which past consideration has been recognised as sustaining a contract, so that it has been said there that an executed consideration will sustain only such a promise as the law will imply. But there is nothing in the Indian Contract Act which implies that these decisions of the English courts are to be applied in limitation of the definition given in section 2(d) of the Act.

This statement correctly points out the true nature, or the hidden theoretical foundation, of the ruling of some precedents against the validity of a consideration of past cohabitation.

Then, apart from the correctness of this observation, why did the judges of Patna High Court reject to follow the English orthodoxy? One of the factors would be the inflexible nature of Pollock's and Mulla's framework, for according to it, past cohabitation, adulterous or not, cannot constitute a valid consideration indiscriminately. As the facts of the case suggest, in *Godfrey v. Musammat Parbati Paluni*, it seems judges thought that there was a great necessity of protection of the plaintiff woman, who had lost advantages associated with the membership of her community. For example, Courtney Terrell, C.J., who regarded it "surprising" that the defendant presented a defence in this case, stressed the distinction between "an agreement to become a mistress" and "an agreement to compensate a woman afterwards for an injury done to her and for the loss which she has sustained owing to an association".[57] In approving the validity of a consideration of past association, he attached importance to "the fact that a woman has rendered service in the past whether immoral or otherwise and has suffered an injury of a kind and continues to suffer from that injury".[58] If Pollock's and Mulla's framework had been adopted, it would have been difficult

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[54] *Id*. at 310-11.
[55] *Id*. at 313-14.
[56] Beaumont v. Reeve, (1846) 8 Q.B. 483.
[57] Godfrey v. Musammat Parbati Paluni, (1938) I.L.R. 17 Pat. 308, 311.
[58] *Id*. at 313.

to properly adjust the balance between the need to uphold sexual morality and the need to protect women's interests.

Thus, from around the end of British era, High Courts of India began to reconfirm the validity of the promise to compensate for past cohabitation.[59] Among them was the Madras High Court,[60] which had once held that past cohabitation could not constitute a good consideration in *Ganapathy Chetty v. Sundararaja Pillay*.[61] For the purpose of this study, the case of *B.V. Rama Rao v. Jayamma* is especially interesting because in this case, despite the apparently adulterous relationship between the parties both of whom had their own wife and husband, an agreement made by the defendant to provide the plaintiff with monthly payment of Rs. 30 for maintenance was held to be binding.[62] In decreeing the suit, Balakrishnaiya, J. paid attention to the facts of the case, i.e. the above agreement had been executed to compensate for wrong done or dishonour brought to the plaintiff woman or her parents' house.[63] In this respect the following view presented by Allahabad High Court in *Mahtab-Un-Nissa v. Rifaqat Ullah* is also worth attention:[64]

> I would further like to point out that adultery though an offence on the part of the man is not an offence on the part of the married woman. It cannot therefore be urged that the consideration passing from her is necessarily illegal though of course it is indisputably immoral… When the agreement is that parties are to live in adulterous cohabitation in future the contract is obviously illegal, but if in order to compensate the woman for the past illicit connection, the offending party gives her some property, I would not be prepared to say that the consideration for it is illegal. The offence had already been committed. Payment of compensation for a past criminal offence cannot be deemed to be illegal, even though under certain circumstances it may be immoral.

IV. PROBLEMATIC SCHEME OF THE SUPREME COURT DECISION

So far, this article traced the history of High Court precedents about the validity of the promise to compensate for the past illicit cohabitation, and examined their basis. But a Supreme Court decision has brought confusion over the interpretation framework. The story should be started with the case of *Istak Kamu Musalman v. Ranchod Zipru Bhate*,[65] decided by the High Court of Bombay. In this case, a wealthy man, after keeping the defendant 1, a prostitute girl, as his mistress in a separate bungalow till the death of his wife, began to live with her. Thereafter, he executed multiple gift deeds to give some properties to her or her brother, the defendant 2. After

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[59] Godfrey v. Musammat Parbati Paluni, (1938) ILR 17 Pat. 308; Belo v. Parbati, (1940) ILR 1940 All. 371; B.V. Rama Rao v. Jayamma, AIR 1953 Kant. 33.

[60] N. Namberumal Chetti v. Veeraperumal Pillai, (1930) 59 MLJ 596; M. Kothandapani Mudaliar v. Dhanammal, AIR 1943 Mad. 253; Manicka Gounder v. Muniammal, AIR 1968 Mad. 392.

[61] Ganapathy Chetty v. Sundararaja Pillay, AIR 1930 Mad. 239. See *supra* note 49.

[62] B.V. Rama Rao v. Jayamma, AIR 1953 Kant. 33. But in this case the plaintiff woman had been deserted by her husband at the time of the "criminal intimacy" with the defendant.

[63] *Id*. at para. 5.

[64] Mahtab-Un-Nissa v. Rifaqat Ullah, AIR 1925 All. 474.

[65] Istak Kamu Musalman v. Ranchod Zipru Bhate, AIR 1947 Bom. 198.

he passed away without issue, the suit was brought by one of his nearest heirs for a declaration that the above gifts were void, and for recovery by partition of one third share in the properties. In the High Court, out of the above gift deeds, only the validity of the four deeds executed for the defendant 1 was discussed. Although eventually the High Court distinguished one gift deed from others and upheld the validity of the former only, the result was achieved by using a peculiar framework below:[66]

> The following propositions emerge from all this discussion: (1) An agreement or transfer of property, whose object or consideration is future illicit cohabitation, is void; (2) a gift requires no consideration and past illicit cohabitation can be a motive for a gift but not its object or consideration; and does not render the gift void, (3) under S. 2(d), Contract Act, past illicit cohabitation can be the consideration for an agreement or a transfer of property other than a gift and such an agreement or transfer is void; and (4) if such a void agreement precedes a gift and the gift is made in discharge of that agreement, then the gift also is void.

Thus, the High Court drew a line between a valid gift made by the motive of past illicit cohabitation and a gift made in discharge of a preceding agreement which was void due to an immoral consideration of past illicit cohabitation. Following this framework, the High Court made a distinction between a valid gift and other void gifts by the interpretation of the wording of each document. How can the ruling in *Istak Kamu Musalman v. Ranchod Zipru Bhate* be appraised? As far as cases of Bombay High Court are concerned, it might be taken affirmatively because the High Court has an exceptional tradition of indiscriminately disapproving the validity of consideration of past illicit cohabitation, adulterous or not, and so it would increase the flexibility of the decision, for the distinction between a simple gift and a gift preceded by an agreement highly depends on the finding of facts by judges.[67]

What is troublesome, however, is that the Supreme Court in *Dwarampudi Nagaratnamba v. Kunuku Ramayya*,[68] further extended the scheme proposed in *Istak Kamu Musalman v. Ranchod Zipru Bhate*. In this case a *karta* (manager) transferred certain properties belonging to the joint family to his concubine, the defendant, by two registered deeds without exchange of any cash or delivery of jewels. This suit was filed by his widow and sons for recovery of possession of the above properties. While the defendant contended that the agreements were supported by a valuable consideration of past cohabitation, the Supreme Court held that the transfers were actually gifts made with the motive of past cohabitation, which resulted in the consequence that the gifts were invalid due to the absence of the power of the transferor to make a gift of coparcenary properties under the Madras school of Mitakshara law. What is to be noted here is that in ruling so, the Supreme Court observed that the cohabitation had been done pursuant to an agreement between the transferor and the defendant, so that past cohabitation or past services

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[66] *Id*. at 202.
[67] *See* Saradambal Ammal v. A.M. Natesa Mudaliar, (1972) 1 MLJ 244, paras. 21 & 44.
[68] Dwarampudi Nagaratnamba v. Kunuku Ramayya, AIR 1968 SC 253.

conducted by the defendant had exhausted the force as consideration to support a subsequent promise.[69]

As far as the facts of this particular case is concerned, the finding of the Supreme Court might be approvable. However, in determining the range of the precedent of the Supreme Court, what makes things complicated is that it reinterpreted a few High Court decisions applying the above reasoning. As to *Belo v. Parbati*,[70] where the assignment of mortgagee's rights supported by a consideration of past cohabitation had been held to be valid, the Supreme Court without considering the detail of the facts of the case stated that "[p]roperly speaking, the past cohabitation was the motive and not the consideration for the assignment".[71] Furthermore, in referring to *Istak Kamu Musalman v. Ranchod Zipru Bhate* the apex court also observed that while the High Court of Bombay was right in holding that one of the four gifts was made with the motive of past cohabitation and valid, "but in holding that the promises to make the gifts under other exhibits were made in consideration of past illicit cohabitation and consequently those gifts were invalid, the Court seems to have too readily assumed that past cohabitation was the consideration for the subsequent promises".[72] It seems as if the Supreme Court considered past cohabitation in general to be unable to constitute a consideration for the subsequent promise by assuming that it was a part of mutual services.[73]

This novel interpretation framework, which was unknown to the previous Indian cases as well as English law, would be, if applied extensively, troublesome because neither Section 2(d) nor Section 25(2) could be invoked to enforce the promise of compensation for past cohabitation, adulterous or not, for, according to the above reasoning, the cohabitation would be understood to have been conducted as a part of mutual services. The compensation would be valid only to the extent that the promise is performed to constitute a gift actually made.[74] It can be said that such a rigid framework overlooks the history, in which the High Courts managed to properly adjust the balance between the need to uphold sexual morality and the need to protect women's interests. Fortunately, the theory of *Dwarampudi Nagaratnamba v. Kunuku Ramayya* does not necessarily seem to have been followed by the High Courts. In *Saradambal Ammal v. A.M. Natesa Mudaliar*,[75] the High Court of Madras stated that the Supreme Court had resolved the "considerable divergence of opinion among the Courts on the question whether past illicit

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[69] *Id*. at para. 4. *See* I.C. Saxena, *Law of Contract*, 3-4 ANNUAL SURVEY OF INDIAN LAW 165 (1967-1968), 172 (*hereinafter,* Saxena).

[70] Belo v. Parbati, ILR 1940 All. 371.

[71] Dwarampudi Nagaratnamba v. Kunuku Ramayya, AIR 1968 SC 253, para. 5.

[72] *Id*.

[73] I.C. Saxena called this proposition of the Supreme Court "mutual service theory". *See* Saxena, *supra* note 69, at 172.

[74] *See* Kamarbai v. Badrinarayan, AIR 1977 Bom. 228. The recovery of property which the plaintiff had transferred to his mistress with whom he had illicitly cohabited was rejected.

[75] Saradambal Ammal v. A.M. Natesa Mudaliar, (1972) 1 MLJ 244.

cohabitation would constitute a consideration much less a valid consideration for a transfer based upon an agreement",[76] but even here the court did not only reserve the distinction between a gift and a gift preceded by an agreement but also held that in the latter case "if the agreement relates to past cohabitation, it is not rendered invalid by mere fact of the continuance of cohabitation",[77] which presumed that past cohabitation could constitute a valid consideration for the subsequent promise. On the other hand, in *Subhashchandra v. Narbadabai*,[78] where the plaintiff who had been the mistress of a man filed a suit against his wife to enforce her right of maintenance on an agreement by which he promised that the plaintiff would be provided with maintenance during her lifetime by himself or, after his death, by his heirs., the High Court of Madhya Pradesh did not even mention *Dwarampudi Nagaratnamba v. Kunuku Ramayya* when it held that "[t]he trend of the subsequent decisions including the Division Bench decision of this Court is that a contract for which past cohabitation is the consideration, is not void, and, in my opinion, this trend must be followed".[79] Thus, it seems that the authority of the Supreme Court decision, *Dwarampudi Nagaratnamba v. Kunuku Ramayya*, has been rightly restricted to the cases of a gift actually made.[80]

CONCLUSION

So far, this article has examined the validity of a promise to compensate for past illicit cohabitation, by scrutinizing the legislative history of the Indian Contract Act, in the context of English law, as well as the development of case law. As far as the rules regarding past consideration are concerned, Section 2(d) and Section 25(2) of the Act have unqualified form, unlike English counterparts, so as to have a potential to fill the lacuna created by the absence of contract under seal as an exception to the doctrine of consideration. But at least for some time in the beginning of the twentieth century, despite the difference between the provisions of the Contract Act and the relevant rules under English contract law, the view stressing the element of simultaneous exchange under the influence of bargain theory prevailed and restricted the applicability of Section 2(d) and Section 25(2). However, such an eclipse by English orthodoxy has been overcome to a great extent through a series of High Court cases, some of which attempted to achieve a proper balance between the need to uphold sexual morality and the need to protect women's interests. Although the Supreme Court decision in *Dwarampudi*

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[76] *Id*. at para. 22.
[77] *Id*. at para. 31.
[78] Subhashchandra v. Narbadabai, AIR 1982 M.P. 236.
[79] *Id*. at para. 6.
[80] *See* Pyare Mohan v. Narayani, AIR 1982 Raj. 43. The Rajasthan High Court relied on Dwarampudi Nagaratnamba v. Kunuku Ramayya to reject the contention that the past cohabitation on account of which the gift in suit had been executed was adulterous so as to make the gift void, but only for that purpose.

Nagaratnamba v. Kunuku Ramayya entails a risk of collapsing these efforts in theory, at present the range of the authority has been rightly restricted.

Finally, this article is concluded by examining the effects of the decriminalization of adultery on the issue of the enforceability of the promise made in consideration of past illicit cohabitation. Some precedents have explicitly held that adultery, past or future, could not constitute a good consideration.[81] As has already been seen, however, the proposition was based on the ground that in India, unlike England, adultery was an offence under Section 497 of the Indian Penal Code. A few cases even attempted to achieve the compensation for a woman in adulterous relationship with the promisor, relying on the fact that under Section 497 adultery was an offence only on the part of men.[82] Now that Section 497 has been held to be unconstitutional by the Supreme Court in *Joseph Shine v. Union of India* decided on 27 September 2018, the distinction between past cohabitation which is adulterous and that is not has lost its basis. Thus, the possibility of compensation should not be denied solely on the ground that the relationship of the parties was adulterous. This proposition applies, whether the promisee is a man or a woman. Even if in the future new legislation would be enacted to recriminalize adultery as the Committee on Reforms of Criminal Justice System suggested in 2003,[83] the element of compensation for the services already rendered would need to be taken into consideration.

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[81] Alice Mary Hill v. William Clarke, (1904) 27 All. 266, 269; Husseinali Casam Mahomed v. Dinbai, AIR 1924 Bom. 135, 138; Manicka Gounder v. Muniammal, AIR 1968 Mad. 392, para. 10.

[82] Mahtab-Un-Nissa v. Rifaqat Ullah, AIR 1925 All. 474. *See* B.V. Rama Rao v. Jayamma, AIR 1953 Kar. 33.

[83] REPORT OF THE COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM 190 (2003), https://mha.gov.in/sites/default/files/criminal_justice_system.pdf. This report suggested to amend Section 497 of the Indian Penal Code to the effect that "whoever has sexual intercourse with the spouse of any other person is guilty of adultery…".

THE STRONG AND THE WEAK: LOCATING INDIA'S RESERVATION DIALOGIC IN MARK TUSHNET'S DICHOTOMY

Jonathan Rajan*

Mark Tushnet's distinction between "strong form" and "weak form" review has been influential in categorizing constitutional systems based on the strength and finality of judicial opinion. This article subjects this dichotomy to Indian constitutionalism. It examines the dichotomy using institutional exchanges on recurring constitutional questions associated with reservations in education and employment. It argues that the utilization of Tushnet's dichotomy to categorize Indian constitutionalism as either "strong form" or "weak form" of review fails to account for its peculiar features and distinct constitutional practice.

Keywords: Indian constitutionalism, Institutional Supremacy, Reservations, Strong-form review, Weak-form review.

* Student, NALSAR. Email:Ivan.Jonathan@nalsar.ac.in

INTRODUCTION

The tussle for primacy in opinions on constitutional interpretation has played out in a variety of contexts and constitutional systems. In India, the enactment of the 103rd constitutional amendment permitting the State to reserve positions for economically weaker sections and overturning the decision in *Indira Sawhney* has brought to the fore familiar issues of confronting the question of institutional supremacy in the Indian Constitution.[1]

Mark Tushnet's distinction between strong-form and weak-form of review and his prescriptive preference for the latter have triggered extensive writing on institutional supremacy within a constitutional framework.[2] Recent comparative constitutional law scholarship has engaged with what Kavanaugh terms to be "a new form of constitutionalism".[3] Stephen Gurdbaum[4] and Janet L. Hiebert[5] examined constitutional developments in three commonwealth countries of Australia, Canada, and New Zealand, terming them as 'commonwealth' and 'parliamentary' models respectively. Jeffrey Goldsworthy studied the interaction between legislature and judiciary in Canada and Britain.[6] Dixon evaluated judicial enforcement of socio-economic rights in South Africa using Tushnet's strong-weak taxonomy.[7] These scholars have recognized the prevalence of a system in which legislatures have the final say on constitutional interpretation.

Scholars have also posed significant challenges to the absolute categorization of countries in the strong-weak binary. Kavanaugh argues that the characterization of U.K. judicial review as a weak-form of review distorts our understanding of the features of United Kingdom's constitutionalism.[8] Jhaveri surveyed constitutional practice in India and Singapore to conclude that proponents of the weak-form of review have mischaracterized countries on the strong-weak continuum.[9]

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[1] K. ASHOK VARDHAN SHETTY, CAN THE TEN PER CENT QUOTA FOR ECONOMICALLY WEAKER SECTIONS SURVIVE JUDICIAL SCRUTINY? (2019).

[2] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 30-39 (Princeton University Press) (2009) (*hereinafter*, TUSHNET).

[3] Aileen Kavanagh, *What's So Weak About "Weak-form Review"? The Case of the UK Human Rights Act 1998*, 13 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1008, 1039 (2015) (*hereinafter*, Kavanugh).

[4] STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM 99 (2012) (*hereinafter*, GARDBAUM).

[5] Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69(1) MOD. L. REV. 7, 9 (2006).

[6] Jeffery Goldsworthy, *Homogenizing Constitutions*, 23(3) OXFORD JOURNAL OF LEGAL STUDIES 483, 505 (2003).

[7] Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited,* 5 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 391, 418 (2007).

[8] GARDBAUM, *supra* note 4.

[9] Swati Jhaveri, *Interrogating Dialogic Theories of Judicial Review,* 17 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 811, 835 (2019).

This article tests the application of Tushnet's dichotomy between strong and weak forms of review to Indian constitutionalism. The author will examine the dichotomy using institutional exchanges between Indian legislatures, the executive and the judiciary on the constitutionality of reservations.

Part I analyzes the distinction between strong and weak forms of review. **Part II** traces the dialogic between Indian legislatures, executive governments and the judiciary on the validity of reservation measures. **Part III** argues that classifying Indian judicial review as either weak or strong disregards contextualities and complexities of Indian constitutional practice.

I. EXAMINING THE STRONG-FORM/WEAK-FORM BINARY

Mark Tushnet distinguishes between constitutional systems based on the strength and form of their judicial review. The first group is characterized by a strong-form of review, a system in which judicial interpretations of the Constitution are final and cannot be reversed by an ordinary majority.[10] In a strong-form system of review, courts have the power to invalidate legislation and make legislative responses difficult.[11] Courts can maintain this primacy using tools such as injunctions against further enforcement of the statute, dismissals of prosecutions under the statute, and awarding damages to persons injured by the statute's operation.[12] In such a system, the reasonable interpretation of a court prevails over that of the legislature's.[13] As Kavanaugh writes, "courts have normative finality over the legislature in determination of rights".[14] In this system, however, judgments may be overturned by a) constitutional amendments requiring a special majority, b) courts repudiating their previous decision, or c) when new judges reconsider the court's previous decision.[15] Therefore, judicial primacy persists for a short period, whereas political branches of government may overturn the judgment in the long-run.[16]

Tushnet problematizes the strong-form of review. He argues that giving judges the power to implement constitutional limitations poses a threat to democratic self-governance.[17] In his conception, a strong-form of review allows courts to ride roughshod over everybody else's opinions. Tushnet's opposition to strong-form of review stems from an inclination to facilitate dialogue between the people, legislature and judiciary. He writes that expansive constitutional

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[10] TUSHNET, *supra* note 2.
[11] Kavanagh, *supra* note 3.
[12] *Id*.
[13] *Id* at p. 817.
[14] *Id* at p. 1897.
[15] *Id*.
[16] *Id*.
[17] TUSHNET, *supra* note 2 at 20.

provisions create reasonable alternate interpretations and the legislature may have a strong case to differ from the interpretation of courts.[18]

The second group is characterized by a weak-form of review, a system in which legislatures can respond to judicial decisions by ordinary legislative mechanisms.[19] Courts may assess statutes against constitutional norms but their decisions do not become unrevisable.[20] Courts do not have the final authority to interpret and enforce constitutional guarantees.[21] The legislature may reverse the judicial decision by passing an ordinary bill.

The foundational premise for a weak-form of review is the recognition of disagreements over constitutional interpretation.[22] Weak-form systems treat constitutional interpretations offered by legislatures as normatively equal to interpretations presented by courts.[23] Tushnet conceptualizes the weak-form of review as a system that reduces friction between judicial review and democratic self-governance by promoting real-time dialogue between the judiciary and the legislature while placing limits on majoritarianism.[24]

Tushnet uses difficulty and time period as indicators to distinguish between strong and weak forms of review.[25] In a system with a weak-form of judicial review, ordinary legislations, which are quicker to carry out, overturn judicial verdicts. In a system with a strong-form of review, special constitutional majorities are required, making it harder and lengthier to repudiate judgments. Tushnet frames the distinction in constitutional design and not the intensity by which courts exercise the power of judicial review.

The attempt of Tushnet has been to present a theoretical framework that could be utilized to distinguish between various constitutional systems. However, the simple dichotomy between strong form and weak form deserves closer probing. This aim of this article is to problematize the dichotomy by demonstrating the real-life practices of Indian constitutional system through the dialogic that has taken place between legislature and judiciary.

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[18] *Id*.
[19] *Id* at p. 23.
[20] Mark V. Tushnet, *New Forms of Judicial Review and the Persistence of Rights - and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 837 (2003).
[21] Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 CARDOZO L. REV. 2192, 2232 (2016).
[22] Kavanagh, *supra* note 3 at 26.
[23] *Id* at p. 36.
[24] *Id* at p. 23.
[25] *Id* at p. 1012.

II. TRACING THE DIALOGIC ON RESERVATION: LEGISLATURE, EXECUTIVE AND JUDICIARY

This part of the article attempts to trace institutional engagements between the judiciary and legislatures on the nature and scope of reservations. Legislative inconsistencies in responding to constitutional interpretations presented by the judiciary present a strong challenge to conceptualizing constitutional systems as either 'judicial primacist' or 'legislative supremacist.

A. EARLY DAYS: CHAMPAKAM AND THE FIRST CONSTITUTIONAL AMENDMENT

State of Madras v. Champakam Dorairajan[26] marks the beginning of institutional disagreements about the scope and constitutionality of reservation measures in India. In *Champakam,* the Supreme Court was required to consider the validity of a Madras Government Order (G.O.) providing for caste-based reservation in professional colleges and government service. The court invalidated the G.O. for violating Article 29(2) of the Constitution.

The Parliament responded to Champakam with the introduction of the first constitutional amendment. The first amendment inserted Article 15(4) which allowed the State to make any special provision for the advancement of socially and educationally backward classes (SEBCs) of citizens or for Scheduled Caste and Scheduled Tribes, notwithstanding violations of Article 15 and 29(2). Kannibiran writes that the first amendment nullified the judgment and contained its disruptive effects.[27] As per Tushnet's distinction, this would be indicative of a constitutional system with a strong-form of review in which judicial interpretation of constitutional provisions could only be overturned by a constitutional amendment.

B. INTERPRETING 'BACKWARD CLASSES': EXEMPLIFYING GOVERNMENTAL DEFIANCE

Article 15(4) created a new arena of contestation between the judiciary and the executive. The question in dispute was whether caste can be used to recognize socially and educationally backward classes. In *Ramkrishna Singh v. State of Mysore*[28],the Karnataka High Court was called upon to determine the validity of two orders which reserved seats for backward classes, Scheduled Castes (SC) and Scheduled Tribes (ST) in institutes of higher learning. The orders had categorized all Hindu communities except Brahmins, Kayastas and Banias; all non-Hindu

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[26] State of Madras v. Champakam Dorairajan, AIR 1951 SC 226.

[27] KALPANA KANNIBIRAN, TOOLS OF JUSTICE: NON-DISCRIMINATION AND THE INDIAN CONSTITUTION 166 (2012).

[28] Ramkrishna Singh v. State of Mysore, AIR 1960 Mys 338.

communities except Anglo-Indians and Parsis as backward classes.[29] The petitioners contended that their right against discrimination was being violated by the reservation orders.

The court ruled that *a*) orders were discriminatory against the communities excluded by the list and that *b)* the orders do not recognize communities that require protection under Article 15(4). This decision signified the need for an alternate method of identifying socially and educationally backward classes.

The Mysore state government constituted a committee headed by Dr. Nangan Gowda to identify socially and educationally backward classes. The committee utilized three benchmarks: *a)* social backwardness of castes regarding their hierarchical status; *b)* educational backwardness; and *c)* the proportion of representation in government service. This report formed the basis for the reservation order of the Mysore government challenged in *M.R. Balaji and Ors. v. State of Mysore*[30]. The order reserved 68% of the seats in professional education for socially and educationally backward classes, SC and ST communities.

Two rulings of *M.R. Balaji* are of vital importance. *First* the court held that the special provision for reservation should be limited to fifty percent of the total number of seats, and *second,* that caste cannot be made the sole or dominant test to determine 'backwardness'.

In defiance of the first ruling, the government of Tamil Nadu continued reserving seats beyond the fifty percent limit.[31] As for the second ruling, governments held out against the decision and persisted with categorizing caste groups under backward classes by seemingly using other factors such as occupation income, educational and social backwardness. *U.S.V. Balram*[32], *P. Sugar*[33], *Somshekarappa*[34] and *C.A. Rajendran*[35] are cases in which petitioners have challenged governments' classification of caste groups as 'backward classes'. For instance, the order being challenged in *C. A. Rajendran* had a list of 'socially and educationally backward classes' exclusively consisting of caste groups. State governments refused to comply with the judicial decision in *M.R. Balaji*, which at least in theory, would be a constitutional system in which the legislature could supersede judicial interpretations without constitutional amendments.

C. INDIRA SAWHNEY AND BEYOND

In 1979, the Second Backward Classes Commission ('Mandal Commission') was constituted to determine the criteria for identifying the socially and educationally backward classes. The

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[29] K.C. Vasanth Kumar v. State of Karnataka, AIR 1985 SC 1495.
[30] M.R. Balaji v. State of Mysore, AIR 1963 SC 649.
[31] P.P. Rao & Ananth Padmanabhan, *Legislative Circumvention of Judicial Restrictions on Reservations: Political Implications*, NLSIR SPECIAL ISSUE 53, 68 (2013).
[32] State of Andhra Pradesh v. U.S.V. Balram Etc., 1 SCC 660 (1972).
[33] State of Andhra Pradesh v. P. Sugar, 2 SCC 400 (1967).
[34] S Somashekarappa v. State of Karnataka, ILR (1979) 2 Kant 1496.
[35] C. A. Rajendran v. Union of India, 1 SCR 721 (1968).

committee recognized fifty-two percent of the population as socially and educationally backward and recommended a twenty-seven percent reservation for other backward classes in addition to the already existing reservation of twenty-two percent for scheduled castes and tribes.[36]

In 1990, the government decided to implement the recommendations of the Mandal Commission. The government passed the first office memorandum O.M. No. 36012/13/90-Estt (SCT) on August 13, 1990, amended by subsequent office memorandum O.M. No. 36012/13/90-Estt(SCT) on September 25, 1990 to enforce the recommendations.

Both the office memoranda were challenged in the Supreme Court. The court constituted a nine-judge bench to determine whether the recommendations of the Mandal Commission were constitutional and consequently, enforceable by the State. The court held that the recommendations were valid subject to certain restrictions.

The restrictions laid down by the court were:

i. Reserved seats to be restricted to fifty percent of the seats available;

ii. Economic backwardness alone could not be a determinative factor for reservation;

iii. Reservations should not be implemented in promotions;

iv. The number of vacancies to be filled on the basis of reservations in a year, including carried forward reservation, should not exceed fifty percent.

i. RESTRICTING THE TOTAL RESERVED TO FIFTY PERCENT

In the immediate aftermath of the decision, most governments brought their reservation policy in line with the fifty percent requirement. However, the state of Tamil Nadu refused to comply with the decision. The state assembly passed the *Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and Appointments or Posts in the Services under the State) Act,* 1993 which maintained reservation measures at 69% of the seats available. Further, Parliament protected the legislation by placing it in the ninth schedule. In 1994, the Supreme Court passed an interim order requiring Tamil Nadu to comply with the fifty percent requirement.[37] The state has been able to successfully evade the directions of the court by creating supernumerary seats.[38]

Since then, states have repeatedly tried to breach the fifty percent cap set by *Indira Sawhney*. For instance, in 2008, the Odisha government notified the *Socially and Economically Backwards Classes*

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[36] JUSTICE. B.P. MANDAL ET AL., REPORT OF THE BACKWARD CLASSES COMMISSION (1980).

[37] Banuchandar Nagarajan, *A Primer On Caste Based Reservations Vis-à-vis Tamil Nadu,* Swarajya (Jul. 24, 2019, 5:10 PM), https://swarajyamag.com/politics/a-primer-on-caste-based-reservations-vis-vis-tamil-nadu.

[38] *Id.*

(SEBC) Act, 2008 providing for a 65.75% reservation, but the Odisha High Court directed the government to limit reservation to fifty percent.[39] In 2017, the Telangana Assembly passed the *Telangana Backward Classes, Scheduled Castes, Scheduled Tribes (Reservation of Seats in Education Institutions and of Appointments or Posts in Service under the State)* Bill, 2017.[40] In 2019, the Central government flouted the fifty percent mark by granting 10 percent reservation to the economically backward. Governments have pushed ahead with their agenda of granting reservation to a larger pool of persons notwithstanding the fifty percent restriction.

ii. ECONOMIC FACTORS ALONE ARE NOT DETERMINATIVE

Legislatures and executive governments in various states have attempted to disregard the prohibition on reservations based on economic backwardness. However, High Courts across the country have either stayed or struck down statutes providing for reservations based on economic backwardness. In 2016, the Punjab and Haryana High Court stayed reservation granted to economically backward persons for admission into educational institutions.[41] In 2018, the Gujarat High Court set aside the Gujarat government's ordinance granting ten percent reservation in education and employment to economically backward classes.[42]

In 2019, the government of India introduced the 103rd constitutional amendment which provided for reservations based on economic criteria. The amendment inserted Article 15(6) and 16(6) in the constitution. Article 15(6) permits reservations for the *economically weaker sections*, and 16(6) permits it in public employment. Reservation is fixed at 10% over and above the quantum which exists currently.

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[39] PTI, *Orissa High Court: Quota in employment, education not to exceed 50 pct,* Financial Express (Jul. 20, 2008, 12:38 AM). https://www.financialexpress.com/india-news/orissa-high-court-quota-in-employment-education-not-to-exceed-50-pct/770509/.

[40] PTI, *Telangana assembly passes bill increasing quotas for STs, Muslims,* Livemint (Apr. 16, 2017, 7:59 PM) https://www.livemint.com/Politics/3AA0sIx8mhk87eosdWLulM/Telangana-assembly-passes-bill-increasing-quotas-for-STs-Mu.html.

[41] PTI, *HC stays reservation under EBC admission quota in Haryana,* Financial Express (Sept. 23, 2016). https://www.financialexpress.com/india-news/hc-stays-reservation-under-ebc-admission-quota-in-haryana/387341/.

[42] Bureau, *Gujarat High Court quashes quota for EBCs, calls it unconstitutional,* The Hindu Business Line (Aug. 04, 2016), https://www.thehindubusinessline.com/news/national/gujarat-court-quashes-quota-for-ebcs-calls-it-unconstitutional/article8942278.ece.

iii. PROMOTIONS IN RESERVATIONS AND CONSEQUENTIAL SENIORITY

The judgment in *Indira Sawhney* prohibited reservations in promotions. In response, Parliament brought in the 77th constitutional amendment inserting Article 16(4A) in the Constitution. Article 16(4A) permitted the State to make provisions for reservations in matters of promotion for Scheduled Castes and Scheduled Tribes.

In *Union of India and Ors. v. Virpal Singh Chouhan*[43] *and Ajit Singh v. State of Punjab*[44], the Supreme Court declared that Article 16(4A) does not cover consequential seniority on promotion. In other words, if (D)- as a reserved candidate is promoted before (F)- an unreserved candidate even though (F) is senior to (D), (F)'s seniority would be restored on promotion. In response to the decision, Parliament enacted the eighty-fifth constitutional amendment which amended Article 16 (4A) to maintain consequential seniority.

The constitutional validity of Article 16(4A) was challenged in *M. Nagraj v. Union of India*[45]. The Supreme Court upheld the validity of the provision but obligated governments to collect data demonstrating *inadequacy*, *backwardness*, and the impact on the overall *efficiency* of administration before enacting laws under Article 16(4A).[46]

In B.K. Pavitra v. Union of India (2017)[47], the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of the Reservation (to the Posts in the Civil Services of the State) Act, 2002 providing for consequential seniority along with reservation in promotions was challenged. The Supreme Court declared the law invalid on the grounds that the government did not collect quantifiable data for reservations in promotions for SC/ST communities mandated by the decision in M. Nagraj.

Consequently, the Karnataka government constituted the Ratna Prabha committee to submit a report on the backwardness and inadequacy of representation of Scheduled Castes and Scheduled Tribes in State Civil Service and the impact on the overall administrative efficiency of reservation. Based on the recommendations of this report, the Karnataka legislature enacted the *Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act*, 2018.

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[43] Union of India v. Virpal Singh Chouhan, JT 1995 (7) SC 231.
[44] Ajit Singh Januja v. State of Punjab, AIR 1996 SC 1189.
[45] M. Nagraj v. Union of India, AIR 2007 SC 71.
[46] Gautam Bhatia, *Reservations in Promotions and the Idea of Efficiency: B.K. Pavitra v Union of India,* INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 10, 2019), https://indconlawphil.wordpress.com/2019/05/10/reservations-in-promotions-and-the-idea-of-efficiency-b-k-pavitra-v-union-of-india/.
[47] B.K. Pavitra v. Union of India, 4 SCC 620 (2017).

The Karnataka Reservation Act of 2018 was challenged in the Supreme Court. In *B.K. Pavitra v. Union of India (2019)*[48], the court held that the state legislature had cured the problems which invalidated the 2002 Act. The Act of 2018 had followed the tests laid down in *M. Nagraj* was upheld by the court.

iv. THE NUMBER OF VACANCIES TO BE FILLED ON THE BASIS OF RESERVATIONS IN A YEAR INCLUDING CARRIED FORWARD SEATS SHOULD NOT EXCEED FIFTY PERCENT

The *Indira Sawhney* decision required that the fifty percent cap on reserved seats for Scheduled Caste and Scheduled Tribe communities include seats that have been carried forward from previous years' vacancies. The Central government sat on the decision for four years but was forced to implement it by the decision in *R.K. Sabharwal and Ors. v. State of Punjab*[49]. However, the new method of calculating seats adversely affected representation of SC and ST communities in public employment.

To repudiate the decision in *Indira Sawhney,* Parliament brought in the eighty-first constitutional amendment act which allowed the State to consider unfilled vacancies from previous years as a separate class of vacancies which would not be used to determine the ceiling of fifty percent. The review of judicial decisions beginning in Indira Sawhney and beyond indicates the absence of consistency in legislative response to judicial decisions setting constitutional benchmarks.

III. LOCATING INDIAN JUDICIAL REVIEW IN THE STRONG-WEAK CLASSIFICATION

While drafting the Indian Constitution, members of the Constituent Assembly were mindful of ensuring that the Indian judiciary is given sufficient power to strike down legislative attempts to abridge the fundamental rights guaranteed by the Constitution. Notwithstanding the judicial review, the Constitution did not prohibit legislatures from enacting legislations overriding judicial decisions. A distinguishing feature of the weak-form of review is that judicial decisions cannot displace the views of the legislature on public policy.[50] Therefore, it is rational to conceive judicial review in India as a weak-form of review, at least at the level of institutional design and form.

However, a deeper analysis of how courts have engaged with other constitutional bodies indicates that Indian judicial review is not weak in practice. Although governments are entitled

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[48] B.K. Pavitra v. Union of India, SCC OnLine SC 694 (2019).
[49] R.K. Sabharwal v. State of Punjab, AIR 1995 SC 1371.
[50] Kavanaugh, *supra* note 3.

to override provisions by enacting legislations, court rulings have been treated as binding and authoritative. For instance, the decision in *Indira Sawhney* on capping reservations to fifty percent has been respected by governments and legislatures excluding a few exceptions. The decision in *M. Nagraj* requiring states to collect data before providing for reservations in promotions has been followed by governments, an instance being the case of *B.K. Pavitra*.

Moreover, a distinctive feature of the weak-form of review is that legislatures could overturn judicial decisions with ordinary majorities.[51] But despite that, legislative responses to *Champakam*, *Indira Sawhney, Virpal* have been constitutional amendments. The Indian Parliament has not been eager to utilize ordinary legislative measures to overturn judgments. If it is in a strong-form of review that courts have "normative finality" over constitutional interpretation which can only be overturned with a special majority, Indian judicial review has a better claim to being a strong-form of review.

However, it would be superficial to classify Indian judicial review as a strong-form of review. If we conceptualize weak-form of review as a system in which judicial decisions are not binding on other organs of government and can be overturned by ordinary majorities, India may also be characterized as a system with a weak-form of judicial review. The decision of the Telangana legislature in breaching the fifty percent cap laid down in *Indira Sawhney* through ordinary legislation, the decision of the Tamil Nadu legislature in circumventing *Indira Sawhney* by enacting a law, are examples of a system with a weak-form of review. The case of the Central government persisting with including carry-forward seats to the fifty percent cap and reserving seats in promotion till 1997, four years after *Indira Sawhney* invalidated them, instantiates governments disregarding a judicial decision.

Tushnet recognizes that the strong-weak dichotomy has been severely challenged by the real-life practice of constitutional systems. Tushnet writes that a weak-form of review may be vulnerable to instabilities where it may either turn into a strong-form or review or a purely supreme legislative system.[52]

Instead of discarding the theory on strong-weak dichotomy, he proceeds to qualify the distinction. For instance, he further characterizes the Indian system as a quasi-weak form of review because the Indian Parliament relies on constitutional amendments to overturn judicial decisions.[53]

The strong-weak dichotomy does not capture the complexities and peculiarities of Indian constitutional practice. The ninth schedule is a distinct India-specific example of how governments use innovative methods to protect laws from judicial scrutiny even though

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[51] *Id.*
[52] *Id.*
[53] GARDBAUM, *supra* note 4.

legislatures have the power to override judicial decisions. The ninth schedule does not fit Tushent's theorization on the weak-form of the review because the additional protection provided by the ninth schedule would not be necessary. Conversely, it cannot locate itself in a strong-form of review because courts are given "normative finality" which can only be displaced by a constitutional amendment.

The strong-weak binary also does not account for how governments and legislatures circumvent judicial decisions while still complying with the judgment. The state of Tamil Nadu continues to provide reservation to the extent of sixty-nine percent by creating supernumerary seats in which students not admitted due to the sixty-nine percent reservation, are admitted by creating additional seats.

Finally, the basic premise of the strong-weak distinction needs serious probing. Tushnet's proposition requires the prevalence of interpretational supremacy at any given point in time. However, constitutional pre-eminence is not a sine qua non for constitutions. For instance, Upendra Baxi writes that courts in India have taken up the function of co-governing the country along with the legislature and executive.[54] The judiciary, executive and legislature may work in consonance finding it necessary to establish primacy in constitutional interpretation. An instance of this is *Nagraj*, where the Supreme Court upheld the constitutional amendment and yet laid down a test which the legislatures were required to follow before reserving positions in promotions. The state of Karnataka complied with the decision and its legislation on reserving positions in promotions was upheld by the court.

CONCLUSION

The dialogic between Indian legislatures, judiciary and executive on reservation problematizes the distinction of constitutional systems solely on the basis of the form of judicial review. Constitutional practice accounts for a substantial development of constitutional jurisprudence of a country. Seervai's work[55] on inter-state commerce and its portrayal through federal practices of India depict the insights gained from the workings of the Constitution and the importance of understanding constitutional text through practice. Tushnet, by restricting his theorization solely to the form of a constitution misses out on understanding aspects of a constitution that emerge through constitutional practice which would include the *basic structure doctrine*. Moreover, his distinction between strong and weak forms of review breaks down when tested against how legislatures responses to judicial decisions in reality. Inconsistent legislative responses to constitutional interpretations presented by the judiciary, first in the form of a constitutional

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[54] Professor Upendra Baxi, *Demosprudence and Socially Responsible/Response-able Criticism: the NJAC Decision and Beyond*, 9 NUJS L. REV. 153, 166 (2016).

[55] H.M. Seervai, *The Freedom of Trade and Commerce in the Indian Constitution: The Athiabari case and after*, 21 CAM L. REV. 53, 84 (1963).

amendment in *Champakam*, second through outright defiance by Tamil Nadu government post *M.R. Balaji* and lastly by a mix of ordinary enactments, constitutional amendments and insertions in the ninth schedule to *Indira Sawhney* unravel Tushnet's form-obsessive theory. The review of judicial decisions and inconsistent legislative response to those decisions on the question of reservation instantiates constitutional flexibility and also theoretical inability to locate the Indian constitution in the strong- weak dichotomy. Tushnet's failure to conceptualize outright defiance by an organ of government, though comes with a sense of a-constitutionality, yet it remains a part of constitutional practice.

At a higher level of theorization, the strong-weak dichotomy neglects context-specific practices of various constitutional systems. For instance, In India, the ninth schedule's additional protective role in shielding legislative enactments from judicial review demonstrate innovative mechanisms that evolve in a constitutional structure which transcend the strong-weak binary. Finally, the central premise of Tushnet's theory, which is based on the need to assign preeminence in constitutional interpretation to one organ of government ignores realities of constitutional governance that have emerged in the 21st century. The emergence of a proactive judiciary has created a model of co-governance in the Indian constitutionalism, in which the executive, legislature and the judiciary *co-rule* the country.

LEGALITY OF THE DNA TECHNOLOGY (USE AND APPLICATION) REGULATION BILL, 2019

Waleed Nazir Latoo*

One of the recent adventures of the Central Government is the introduction of the DNA Technology (Use and Application) Bill, 2019 in the Parliament. In the absence of a proper data protection system, DNA which is the storehouse of genetic information and the beholder of each and every intricate information about an individual is left vulnerable to misuse of various kinds. Since not all cases possess a compelling state interest, the bill is violative of an individual's physical, informational, familial, and spatial privacy. A summarily unerasable DNA database makes an individual susceptible to the lacuna prevalent in the Indian criminal justice system and exposes the person in question and the relatives to its misuse by the state agencies. Not distinguishing the databases of criminals and missing persons adds to the potential misuse due to non-classification, where intelligible differentia certainly exists.

Not only does the DNA Bill put in peril the fundamental rights of an individual, but it also gives the executive an increased power to impede the independence of the DNA board through the appointment of ex-officio members from various ministries and state agencies like the National Investigation Agency (NIA). Hence, it becomes important to revisit the debate on the legality of this bill and push for an advanced data protection system. At the same time, it is equally important to not convert India into a surveillance state and instead promote greater civil liberties as is the tradition in modern constitutional democracies.

* Student, NLUD. Email: Waleed.latoo18@nludelhi.ac.in

INTRODUCTION

The Union Government tabled the DNA Technology (Use and Application) Bill, 2019[1], in the *Lok Sabha* this year. The bill, as recommended by the Law Commission, is a renewed form of its earlier version i.e. The Use and Regulation of DNA-based Technology in Civil and Criminal Proceedings, Identification of Missing Persons and Human Remains Bill, 2016.[2] This bill aims to regulate the use and application of DNA technology in ascertaining the identity of a certain set of persons. These include victims, suspects and offenders in a criminal offence. At the same time, it is also applicable in establishing the identity of undertrials, missing persons and unknown deceased persons.

DNA is the storehouse of the genetic information or profile which is exclusive to an individual and forms the basis of human existence.[3] The inescapable reality of DNA is that it is the beholder of each and every intricate information about the individual. It is rightly called a "probabilistic coded future diary".[4] DNA is a storehouse of future information which includes the possibility of the occurrence of health-related issues or risks.[5] Coupled with these facts is the government's intention to set up a DNA Data Bank[6] at the national and the regional levels. This is to create a digital database which stores information about the DNA profiles of the individuals collected in the accredited DNA laboratories.[7]

Concerns are raised about its misuse which, unless prevented, may result in the disclosure of personal information. This is inclusive of the health-related data that can potentially be misused by persons having prejudicial interests. Consequently, violating the privacy of the person.

In light of this, it shall be argued in the course of this paper that the present form of the bill has failed in its attempt to balance the fundamental rights of the citizens (primarily the right to privacy and equal protection of laws) and the countervailing state interests. In addition, the appointment of certain investigating and government officials as the *ex-officio* members is an indication of a hyper-surveillance system. The distinguishing feature of this system is the

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[1] The DNA Technology (Use and Application) Regulation Bill, No. 128, Acts of Parliament, 2019 (Ind).
[2] The Use and Regulation of DNA-based Technology in Civil and Criminal Proceedings, Identification of Missing Persons and Human Remains Bill (2016).
[3] N.Y. Weeden, *DNA Profiling*, 1 EXPERT EVID. REP. 61, 66 (1989).
[4] George J. Annas, *Genetic Privacy, in* DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE 136 (David Lazer ed., 2004).
[5] N.Y. Weeden, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465,470 (1990).
[6] The DNA Technology (Use and Application) Regulation Bill, § 25, No. 128, Acts of Parliament, 2019 (Ind.).
[7] The DNA Technology (Use and Application) Regulation Bill, § 7, No. 128, Acts of Parliament, 2019 (Ind.).

predominant governmental interference in the working of the Central DNA Regulatory Board.[8] The said appointments shall compromise the independence of the board and consequently, shall have an adverse effect on the rights of the Indian citizenry.

I. FUNDAMENTAL RIGHTS AT PERIL

> "Dignity and rights of individuals cannot be based on algorithms or probabilities. Constitutional guarantees cannot be subject to the vicissitudes of technology."[9]

In its most basic sense, privacy is the non-intervention in personal space through secret surveillance and the protection of an individual's information.[10] It is popularly perceived as the "right to be left alone."[11] Privacy has been recognised as a part of the fundamental right to life[12] under Article 21 of the Constitution of India. The right to privacy also forms an integral part of the human rights regime in the world. Each person has a right to protection against "arbitrary interference with her privacy."[13]

Based on these general observations about the fundamental right to privacy, it is crucial to understand the scope and extent of the 2019 bill on DNA regulation. The future of this bill shall, to a great extent, define the understanding of citizenship in our democratic republic. It may be noted that whether a person can be subject to a DNA test has always been a source of polarising debates on individual rights and dignity.[14]

Genetic information reflects the phenotypic traits. This information is significant in terms of its content and the way in which it is put to use by individuals.[15] Genetic privacy is, hence, protection of this information from access by external sources without the informed consent of an individual. Four privacy concerns are particularly associated with genetic privacy. These include; physical or bodily privacy, informational privacy, familial or relational privacy, and spatial or locational privacy.[16] All of these have a direct bearing on the aforesaid right to be left alone.

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[8] The DNA Technology (Use and Application) Regulation Bill, § 3, No. 128, Acts of Parliament, 2019 (Ind.).

[9] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1 (India).

[10] FREE LAW DICTIONARY, https://thelawdictionary.org/privacy/ (last visited Apr. 18, 2020).

[11] Olmstead v. United States 277 U.S. 438 (1928); XKF v. BBC, (2018) E.W.H.C. 1560 (Q.B).

[12] K.S. Puttaswamy v. Union of India, (2017) 10 SCC. 1 (India).

[13] G.A. Res. 217A, at 12 (Dec. 10, 1948).

[14] Law Commission of India, *Human DNA Profiling- A Draft Bill for the Use and Regulation of DNA- Based Technology* (Jul. 26, 2017), http://lawcommissionofindia.nic.in/reports/Report271.pdf.

[15] Neil C. Manson, *What is Genetic Information, and Why is it Significant? A Contextual, Contrastive Approach, 23* JOURNAL OF APPLIED PHILOSOPHY 2,3 (2006).

[16] SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS AND CIVIL LIBERTIES 228-232 (Columbia University Press) (2011) (*hereinafter*, KRIMSKY & SIMONCELLI).

Physical privacy refers to the manner of DNA collection from the human body which may be for medical research, genetic testing or criminal investigation.[17] The collection of DNA samples is considered to be a highly intrusive process affecting a person's bodily autonomy. This is because genetic information cannot be collected without the informed consent of the person providing the sample. In the context of law enforcement, sample collection can be voluntarily, forcibly or surreptitiously; hence, the invasion into bodily autonomy and integrity. [18]

Informational privacy relates to the most intimate knowledge and medical data which a DNA possesses.[19] Our genome contains a vast amount of information about us, and links us to and distinguishes us from all other human beings in the world. Collection of DNA samples, hence, reveals such information and makes us susceptible to its potential misuse.

Familial privacy involves hereditary and ethnic information. Since DNA is inherited, it can be put to use for determining whether two individuals are related or not. Revealing an unsuspected relationship can have significant consequences for the individuals and their relatives.[20]

Spatial privacy relates to the knowledge about the location or position of an individual from where the DNA is found. What we did and where we were can be determined from a DNA sample and hence, the intrusion into our personal sphere.[21]

The Supreme Court of India has held that a DNA test of an accused in a crime can be ordered by the Court only when it is required for a just decision in the matter, is of "eminent requirement"[22] and propels "compelling state interest".[23] The right to privacy cannot be said to be an absolute right[24] and like other fundamental rights in the constitution, it may be subject to reasonable restrictions in "exceptional circumstances" and more so in the cases of surveillance which is in consonance with the statutory provisions.[25] However, any such intrusion by the state into the personal affairs of an individual is required to be tested on the touchstone of reasonableness and proportionality.[26] A DNA test should be conducted only after balancing the opposing interests of

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[17] *Id.*
[18] Krimsky & Simoncelli, *supra* note 16 at 228.
[19] HUMAN GENETICS COMMISSION, NOTHING TO HIDE, NOTHING TO FEAR? BALANCING INDIVIDUAL RIGHTS AND THE PUBLIC INTEREST IN THE GOVERNANCE AND USE OF THE NATIONAL DNA DATABASE at 45 (2009) (*hereinafter*, HUMAN GENETICS COMMISSION).
[20] KRIMSKY & SIMONCELLI, *supra* note 16 at 229.
[21] KRIMSKY & SIMONCELLI, *supra* note 16 at 232.
[22] Krishan Kumar Malik v. State of Haryana, AIR 2010 SC 2851.
[23] Anuj Garg v. Hotel Association of India, AIR 2008 SC 663.
[24] Mr. X v. Hospital Z, (1998) 8 SCC 296.
[25] Bhavesh Jyanti Lakhani v. State of Maharashtra, (2009) 9 SCC 551.
[26] District Registrar Collector, Hyderabad v. Canara Bank, AIR 2005 SC 186.

the society and the accused. Article 21, which includes the right to privacy, cannot be used as an excuse in each and every case to defeat the object of a purposeful investigation.[27]

II. THE DNA DATABASE- AN INESCAPABLE NEXUS

While Section 33 of the bill of 2019 provides that the use of DNA profile shall only be for the purpose of identification[28], it is important to not negate the potential misuse of such an important source of human information. The existence of a person's DNA data on the database, in essence, makes her a potential suspect throughout her lifetime. This is due to the fact that at any point in the investigation, inquiry or trial, a DNA sample may be compared with the other samples which are already present in the DNA database. Without the informed consent of an individual, such use is antithetical to the fundamental right against self incrimination guaranteed by the constitution of India under Article 20(3).[29] In the absence of a data protection system that would limit the discretion of an investigating officer, there are no limitations on the kind of use that a DNA sample may be subjected to in a criminal investigation.

Even the "partial match", which does not require the absolute similarity between the DNA samples of individuals[30], exposes the family members and close relatives of such persons to criminal investigation and intrusion by the state authorities.[31] This has the effect of subjecting the citizens to a surveillance system where provisions of laws may *prima facie* appear to be sufficient and padded with reasonable safeguards.[32]

There is no provision for a separate data bank for missing persons who are not related to any crime whatsoever. An inevitable consequence which follows is that such persons will always remain exposed to the vulnerabilities of the Indian criminal justice system. In the absence of any provisions for classification, they shall be precluded from the equal protection of laws.[33] One cannot deny the possibility of them being categorised as potential suspects in a uniform DNA database.

The bill does not prevent the laboratories or the investigating agencies from accessing the non-coding parts of the DNA[34] which are primarily not used for identification, and are rather subjects for medical and industrial research. The US genetic law regime has empirically proved that most

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[27] Sharda v. Dharampal, AIR 2003 SC 3450 (India).
[28] The DNA Technology (Use and Application) Regulation Bill, s. 33, No. 128, Acts of Parliament, 2019.
[29] INDIA CONST. art. 20(3).
[30] Rebecca Dresser, *Families and Forensic DNA Profiles, 41* THE HASTINGS CENTER REPORT 11,12 (2011).
[31] HUMAN GENETICS COMMISSION, *supra* note 19 at 78.
[32] EPW Engage, *What Enables the State to Disregard the Right to Privacy?* EPW (Jan. 16, 2019), https://www.epw.in/engage/article/what-enables-state-disregard-right.
[33] Budhan Chaudhary v. State of Bihar, (1955) 1 SCR 1045.
[34] Genetics Home Reference, *What is Non-Coding DNA?* https://ghr.nlm.nih.gov/primer/basics/noncodingdna (last visited Feb. 20, 2020).

states do not have protection against the dissemination of DNA samples and hence, their potential misuse.[35]

Section 20(2)(a) of the bill enables an investigating officer in the criminal case to preserve the DNA sample till the "disposal of the case or the order of the court."[36]. The U.K Human Genetics Commission's Report of 2009 found that there is no need to retain the DNA samples and not destroy them immediately. The report observed that such a sample would be of no help to track an absconder, and for someone whose whereabouts are known, it defies the logic to not call her again and collect the samples afresh.[37] Furthermore, the immediate removal of such data also prevents the access to excessive information.[38]

Therefore, two conclusions follow from the above discussion. *First,* in the absence of any compelling state interest in each and every case, the procuring of samples for DNA testing violates the fundamental right to privacy. Compelling a person to a DNA test[39] is to deny her the human agency. It goes against the grain of constitutional values and informed consent[40] as people are not mere onlookers but rather contributors to their dignity and respectful existence.[41]

Secondly, there is an urgent need to reconsider the setting up of a DNA database. This is because enough quality controls and data protection management systems have not been put into place. "Genetic information like all medical information should be protected by the legal and ethical principle of confidentiality."[42] The DNA system of identification is not infallible and there is always a possibility of human error. There are stories that are infused with "contingent judgements about the mundane meaning and significance of evidence."[43]

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[35] Randall S. March & Bruce Budowle, *Are Developments in Forensic Applications of DNA Technology Consistent with the Privacy Protections?*, *in* GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN GENETIC ERA 226 (Mark A. Rothestein ed., 1997).

[36] The DNA Technology (Use and Application) Regulation Bill, s. 20, No. 128, Acts of Parliament, 2019.

[37] HUMAN GENETICS COMMISSION, *supra* note 19, at 70.

[38] C-1311/12, Google Spain SL, Google Inc v. Agenncia Espanola de Proteccion de Datos E.C.L.I.:E.U.:C.:2014:317.

[39] The DNA Technology (Use and Application) Regulation Bill, s. 21(1), No. 128, Acts of Parliament, 2019.

[40] WMA Declaration of Helsinki-Ethical Principles for Medical Research Involving Human Subjects, art. 26, Jun., 1964.

[41] Albert Bendura, *Towards a Psychology of Human Agency*, 1 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 164 (2006).

[42] American Society of Human Genetics, *Professional Disclosure of Familial Genetic Information*, 62 AMERICAN JOURNAL OF HUMAN Genetics 474 (1998).

[43] MICHAEL LYNCH ET AL., TRUTH MACHINE: THE CONTENTIOUS HISTORY OF DNA FINGERPRINTING 23 (University of Chicago Press) (2008).

III. ADMINISTRATIVE AND EXECUTIVE INTRUSION

The DNA bill, in Sections 3 and 4 provides for the establishment of a DNA Regulatory Board[44] and the appointment of its members by the Central government.[45]. Such appointments raise pertinent questions about the independence, transparency and accountability of the board.[46] A few *ex officio* appointments point towards the administrative subjugation of transparency and disregard for privacy rights.[47] It is extremely important to note that Sections 4(d) and 4(e) provide for the appointment of a nominated member from the CBI and the NIA. It is necessary to realise the implications of such appointments. Police and other investigating agencies already operate under mistrust from the law as well as the public.[48] As citizens of a liberal democracy, we need to ask ourselves "Do we really want the police, security services and other organs of the state to have access to more aspects of our private lives?"[49]

If the government wants to introduce a legislation which is going to hit the most crucial aspects of privacy, the first thing to do is to inspire the confidence of the public. The forthgoing appointments do little to wedge the gap between citizens and the state. The accessibility of investigating agencies to such crucial data only aggravates the complexities of the criminal justice system in our country. Hence, such law ought not to be judged on any of its "sweet reasonableness" and "forensic precincts".[50]

Other appointments include *ex officio* nominations from various ministries. This again leads to the shifting of balance in favour of the executive. What is required is an independent body[51] which would balance the interests of the state and the individual. At the same time such a body shall be responsible for ensuring accountability and protection of the rights of the citizens. It may include experts in science, DNA technology, data protection etc. The distinguishing feature of such an independent body shall be the least involvement of investigation agencies and officers of various ministries who form the core of the executive wing of the state.

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[44] The DNA Technology (Use and Application) Regulation Bill, s. 3, No. 128, Acts of Parliament, 2019.
[45] The DNA Technology (Use and Application) Regulation Bill, s. 4, No. 128, Acts of Parliament, 2019.
[46] Helen Wallace, *Decoding the DNA Bill,* THE HINDU (Aug. 9, 2018), https://www.thehindu.com/opinion/op-ed/decoding-the-dna-bill/article24636395.ece.
[47] CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 80 (3rd ed. 2009)(*hereinafter,* HARLOW & RAWLINGS).
[48] COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, VOL. I at 88 (2003).
[49] HARLOW & RAWLINGS, *supra* note 46, at 80.
[50] Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 424.
[51] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1.

CONCLUSION

The absence of data protection schemes, the intrusion into genetic and bodily privacy and the huge potential for misuse pose serious questions to the legitimacy and the legality of the DNA Technology (Use and Application) Bill, 2019. Added to these issues is the lack of any substantial quality control mechanism. The denial of equal protection of laws to the missing persons on the uniform DNA database coupled with the raging issue of privacy shakes the vires of the bill. While it is beyond contention that DNA profile databases can be useful tools in cracking crime, it is equally, if not more, important to establish a comprehensive and standardised legislation regulating the collection, use and analysis of the DNA samples. This is because DNA is a source of very personal and intricate information about an individual.

What also raises doubts about the *bona fide* of the bill is the certain *ex officio* nominations to the DNA Regulatory Board. The influence of investigating teams on the policy decisions impinges upon the rights of the accused and more so on the vulnerable social groups. Such groups already face problems of inaccessibility to the legal machinery. This has also been recognised by the Hon'ble Supreme Court in many of its decisions.[52]

Hence, the government should consider reviewing its approach on DNA regulation by *firstly,* improving upon technology and quality control, and *secondly, by* working upon the clarity of the DNA Regulation Bill, so as to minimise the scope for any misuse. The adherence to rule of law is needed so as to live up to our constitutional ethos.

[52] Husssainara Khatoon v. Home Secretary, (1980) 1 SCC 98; Suk Das v. UT of Arunachal Pradesh, (1986) 2 SCC 401.

COLOURABLE INEVITABILITIES: THE CASE FOR THE PUBLIC HEALTH BILL

INTRODUCTION

2020 has been a tumultuous year for civil liberties in India. The year opened into protests erupting in all corners of the country considering the passage of the Citizenship (Amendment) Act by Parliament in December 2019. Restrictive measures were imposed in several states to gain control over the situation.[1] While there has been significant criticism of the disproportionate impact of the lockdown on some groups, few question the necessity of the measures.

This editorial does not seek to analyse the constitutionality of the lockdown or the other restrictive measures imposed by various governments in India. These issues have already been thoroughly and comprehensively discussed. Instead, we consider here how state action affects the relationship between India's increasingly assertive Central government and its State governments. Decentralized approaches like the 'Kerala model' create an opportunity for State governments to exemplify the importance of subsidiarity (the principle that issues must be handled at the most local level possible).

We must understand this proposal in light of our present context. *First*, we note the significant criticism of the feeble legal framework on which the Centre's measures rely on. These criticisms go as far as arguing that there has been an attempt by the Central government to colourably exercise jurisdiction on matters within the purview of States. *Second*, the present restrictive measures owe their enforceability to a patchwork of enactments. No single consolidated legislation exists that provides the legal backing for all the government's measures. The Epidemic Diseases Act of 1897, the only legislation that addresses widespread infectious disease, is an antiquated colonial enactment that gives the Central government power only over ships and ports. We argue that the Central government, in coordination with the States, must enact legislation that allows for a decentralized approach.

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[1] *See* Gyan Varma, Anuja, Sharan Poovanna, *Protests spread across India, Centre remains firm on CAA*, LIVE MINT (Dec. 20, 2019), https://www.livemint.com/news/india/protests-spread-across-india-centre-remains-firm-on-caa-11576782352541.html.

I. COLOURABLE EXERCISE OF POWER BY THE CENTRE?

The Central government, on March 24, issued a set of Guidelines[2] after exercising its powers under the Disaster Management Act 2005 (DM Act). These Guidelines urged State governments to contain the pandemic in their respective territories, and *"suggested"* the imposition of a blanket lockdown to ensure *"consistency in the application and implementation of various measures across the country."*[3] This is what formed the basis of the countrywide lockdown. Any contravention would attract penalties under Section 188 of the Indian Penal Code which is a broad provision to punish disobedience to an order promulgated by a public servant or Sections 269 and 270 which involve negligent or malignant acts likely to spread the infection of diseases dangerous to life.

At the outset, let us note that the scope of the DM Act is extremely ambiguous. The object of the DM Act is *"to provide for the effective management of disasters and for matters connected therewith or incidental thereto."* The definition of a disaster under Section 2(d) of the Act is as follows:

> "disaster" means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area."

We may infer that, though the definition is broad, it hardly corresponds to a pandemic. Also, Section 2(a) defines an *"affected area"* as an area or part of the country affected by a disaster. Therefore, the Act does not empower the Central Government to impose lockdowns across the country. If we were to look keenly into the drafting of the said Act, we may note that Schedule VII does not have an entry on disaster management *per se*. Therefore, legislative competence to frame the said Act was derived from Entry 23 of the Concurrent List[4] [Social Security and Social Insurance, employment and unemployment]. Indian courts have, across time, accepted some remarkably creative interpretations of the lists.[5] Even under those egregiously permissive standards, it is hardly reasonable to argue that disaster-response is a social security issue. Hence, we may note that the present scenario is a classic illustration of the doctrine of colourable legislation at play.

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[2] MINISTRY OF HOME AFFAIRS, NOTIFICATION NO 40-3/2020-DM-I (A) (Mar. 24, 2020), https://www.mha.gov.in/sites/default/files/MHA_29042020.PDF; *See also* MINISTRY OF HOME AFFAIRS, ANNEXURE TO MINISTRY OF HOME AFFAIR ORDER NO.40-3/2020 (Mar. 24, 2020), https://www.mha.gov.in/sites/default/files/PR_Consolidated%20Guideline%20of%20MHA_28032020%20%281%29_1.PDF.

[3] *Id.*

[4] Kevin James, *Covid-19 and the Need for Clear Centre – State Roles*, VIDHI CENTRE FOR LEGAL POLICY (Apr. 3, 2020), https://vidhilegalpolicy.in/2020/04/03/covid-19-and-the-need-for-clear-centre-state-roles/.

[5] *See, e.g.*, Pragya Chandrapalsingh Thakur v. State of Maharashtra, 2013 (6) ABR 1171.

Section 11 envisages the creation of a National Plan to counteract any National Disaster, in consultation with State governments.[6] Any guidelines issued thereunder must be in line with the National Plan. Thus, the National Plan is a static point of reference for the State and its instrumentalities. However, in the present case, no efforts have been made to frame a National Plan.[7] Instead, the Central government has proceeded to issue ad hoc guidelines which indicate a suspect motive to further alienate the States from the decision-making process.

At the outset, matters concerning health[8] and the maintenance of public order[9] are both entries under the State government. The Epidemic Diseases Act, 1897 solely vests powers with States to take 'special' measures and prescribe regulations during the outbreak of an epidemic disease.[10] Section 2A of the Act is a broad provision that empowers the Central government to *"take such measures"* and *"pass such regulations"* to inspect ships that arrive in or leave from India. This includes detaining individuals intending to sail, if it feels that any part of the country that is threatened with the danger of an epidemic, cannot be adequately acted upon using other laws. Therefore, the Central government does not have the authority *per se* to command States to take measures. Rather, it merely has the power to prevent the movement of vessels or persons in and out of India. The Act also remains silent about inter-State movement. However, State governments and municipalities have ordered lockdowns in their respective territories using the Centre's Guidelines. Any contravention of these orders would attract punishment under Section 3 of the Epidemics Act vis-à-vis Section 188 of the Indian Penal Code.

In other words, the Act recognises the authority of the States to administer and maintain public order and health. Apart from upholding the doctrine of separation of powers, it also promotes the principle of subsidiarity, since States are free to decide on the best course of action for their respective territories. An epidemic may not completely spread and penetrate several districts of a State and therefore, it is wise to leave the ascertainment of such risks to the wisdom of the States. Therefore, we may observe that several States framed regulations in succession under the said Act.[11]

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[6] Section 11(2), Disaster Management Act, 2005, No. 53, Acts of Parliament, 2005.

[7] *See also,* Formulate National Plan to Deal with Covid-19 Crisis: Congress to Centre, HINDUSTAN TIMES (Apr. 25, 2020), https://www.hindustantimes.com/india-news/formulate-national-plan-to-deal-with-covid-19-crisis-congress-to-centre/story-XiACbky8S1XqAsuPQqjBSN.html.

[8] INDIA CONST. entry 1 of list II, sched. VII.

[9] INDIA CONST. entry 6 of list II, sched. VII.

[10] Section 2, Epidemic Diseases Act, 1897, No.3, Acts of Parliament, 1897.

[11] *See, e.g.*, The Tamil Nadu COVID 19 Regulations, 2020, G.O. (Ms.) NO. 97 (Mar.15, 2020), https://cms.tn.gov.in/sites/default/files/go/hfw_e_97_2020.PDF. *See also* The Karnataka Epidemic Diseases (COVID – 19) Regulations, 2020, No. HFW 54 CGM 2020 (Mar. 23, 2020), https://karnataka.gov.in/storage/pdf-files/covid_rules/probhitionary_orders_circular.pdf; The Punjab Epidemic Diseases, COVID 19 Regulations, 2020 (Mar. 05, 2020),

II. THE PERILS OF COMPETITIVE FEDERALISM

Competitive federalism is a good description for the present response to the coronavirus. From the preceding paragraphs, we may note the haphazard manner by which the curfews/lockdowns were imposed throughout the country.

We may note that the provisions have merely been invoked as a means to an end. The Disaster Management Act has been invoked to allow the Centre to supersede the States. This means that the mandate of the Centre may cripple them and may force them to comply. For example, wherein the Centre has allowed for contributions to be made to the PM-CARES fund to be classified as spending on Corporate Social Responsibility (CSR), the Centre is still reluctant to allow the same exemptions to contributions made to the State Relief Funds.[12] As a result, States, with depleting coffers will increasingly rely upon the Centre to provide monetary relief. By utilising these command-and-control tactics, the Union shall continue to move further away from the beacon of cooperative federalism.

The converse is also true. The current legal mechanisms available do not offer the Centre any way to make binding orders in the State/District level or to take over the reins of healthcare completely, in the event of a health emergency. Therefore, the need of the hour is a public health law that allows for the establishment of a Centre-State relationship in line with cooperative federalism.

III. THE PUBLIC HEALTH BILL

The answer lies in the passing of the Public Health Bill. The Bill, currently a draft, primarily empowers the State governments to quarantine persons, ban and regulate the sale or supply of any substance.[13] In the current legal framework, State governments, by invoking the Epidemic Diseases Act and Section 144 of Code on Criminal Procedure, can hardly achieve the above measures. Therefore, the Bill could legitimately authorize the measures taken by the present government, instead of incentivizing the government to rely on over broad provisions.

Section 4 of the Bill defines the role of the Central government as a coordinator among the States and allows it to take the reins if necessary. Therefore, the Bill respects our Constitution's quasi-federal structure. However, it conveniently omits the allocation of monetary resources between

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http://pbhealth.gov.in/Compedium%20Final/(8)%20advisories/3.Regulation%20regarding%20COVID%2019.pdf.

[12] *See, e.g.*, Donations to CM Relief Fund Cannot Be Counted as CSR: Corporate Affairs Ministry, THE WIRE (Apr. 11, 2020), https://thewire.in/government/corporate-affairst-ministry-csr-pm-cares-cm-relief-fund.

[13] Section 3 of The Draft Public Health (Prevention, Control and Management of Epidemics, Bio-Terrorism and Disasters) Bill, 2017.

the Centre and the States. In a public health emergency, it is invidious to restrict the States' access to funding. The traditional model of the Centre being an all-pervasive entity capable of monetarily strong-arming the States is not sustainable in high-stakes situations like responses to a pandemic, where their interests must align. Regional and local governments are better equipped to handle public health emergencies and their powers to regulate forms the basis of their authority in almost all federations.

CONCLUSION

Governance across India must no longer, to use colonial terms, depend on the dictates of a monolithic power-center in Delhi. The current legal framework grants the Union specific, limited, and outdated legal bases for their measures, forcing them to colourably rely on broad provisions like Section 144 of the Code on Criminal Procedure and the Disaster Management Act. The realities of the pandemic and the necessities of the modern administrative State *require* the Union to act in situations like these. We require solutions which are based on the Indian Constitution's foundational principles and place a necessary emphasis on cooperative federalism. The challenges posed by epidemics are grave and require specific legislation. But the coronavirus is also an opportunity for governments to correct the imbalances that have developed in our federal structure.