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EDITORIAL NOTE

*- Dr. Saurabh Anand**

It brings me immense pleasure to present the reader with the special issue of the GNLU Law and Society Review. With its launch, we hope to bring forth issues and concerns in a manner that concern not just our laws and society, but also generate a solemn interest in the mind and instill in us, a true sense of social justice.

The GNLU Law and Society Review is the flagship publication of the Gujarat National Law University's Centre for Law and Society. The Review is available online and is open-access oriented. It is faculty led, edited by students and aims at providing a befitting analysis of the socio-legal issues at hand. The Review encourages an interdisciplinary approach to research in law, with a particular eye towards the sociological aspect of the issues. This allows the opportunity to assess the issues from a socio-legal point of view.

This idea that backs the work of the Review is a result of the Centre for Law and Society's guiding philosophy. Established in 2015, the Centre for Law and Society was founded with the view to act as the pivot for socio-legal research at Gujarat National Law University. For as long as the Centre has been in existence, one of its aim has been to promote multidisciplinary perspectives in research and to facilitate a forum for informed analysis and debate regarding socio-legal issues. This aim of the Centre is realized in the form of the Review, which values the identifying issues of contemporary importance and distilling academic rigor and expertise with the aim of providing accessible information to practitioners.

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This Special Issues sees contributions from the most esteemed academicians, persons with high recognition in Legal Studies and the Humanities and celebrates their work with the ultimate goal of informing the public at large.

Among the Articles, **Raphael Cohen Almagor** and **Mohammed S Wattad** raise the case for the protection of the Israeli-Arabs/Palestinians under the Israeli law. Their work outlines the status of the Israeli-Arabs/Palestinians in Israel and recognizes the fact of their underrepresentation. Their writing's significance is further highlighted by the passing of the Nation State Law by the Israeli Knesset. The law, they say, degrades Israel's democratic commitments and push for making Israel a better place for its minorities.

Next, **Werner Menski** brings the ideas and ideals of legal plurality and legal pluralism to be employed in the Indian context. He espouses that responsible governance in the Global South will require taking plurality and local values into consideration. He suggests that from the problems faced in the legal education process in India to those that the lawyers grapple with, the solution lies in the act of paying keen attention to ethics and local realities in the context of legal education, governance and judicial decision-making.

Moving to the Essays, **Upendra Baxi** raises the pertinent question that lingers in most legal circles. He delves into the field of legal scholarship in India and laments the recurring persistence of 'unidisciplinarity' even when there exists a pressing need to study the impacts of the decisions of the various courts in India. He quite adeptly points out the need to assess the larger consequences of the judgements of the courts rather than subscribe to the standard acontextual application and study of judgements.

Lacuna in the legislations of society is bound to have serious consequences for the governance of the people and this adage is explored at length by **Akhileshwari Reddy** in her writing on the need for a social boycott law in India. Broadly, her work addresses the social and psychological impact of social boycotts and also explicates the Rights of the Dalits in India. She points to the burgeoning incidents of hate crimes and caste-based discrimination in the country and how the Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016, which prohibits discrimination and social boycott in the name of caste, community, religion, rituals or customs, marks a welcomed change in tackling the menace of social boycott.

Following this, **Keerty Nakray** and **Arshiya Chauhan** examine the possibility of gender mainstreaming in the Indian judiciary. They explore the advancement made by the Indian Judiciary and the Judicial setup in bringing women into positions of constitutional power and attempt to reflect plurality of Indian society. In doing so, they first provide an overview of the representation of women in the Indian judiciary and then explain at length why judicial diversity matters in a multi-cultural society such as India, wherein they conclude that it may be timely that affirmative action for women be brought in this regard.

Departing from the Indian mainland, we get to the continent of Antarctica. **Armin Rosencranz**, **D. K. Kaul** and **Aditya Vora** present a case for reassessing the legal standards that govern Antarctica in light of the creeping global warming crisis. Their exploration begins from the legislations that govern the continent. Thereafter, they demarcate the issues that are faced by the region due to increase in human activities and global warming. Their writing would have remained a worrying and poignant take on the situation, save for the proposed suggestions and recommendations made by them to improve the situation concerning Antarctica through the means of International law, courts and consensus.

Belling a curtain call for Essays, we return to an analysis of justice and its progress at the grassroot level in India. **Jane Schukoske** explores United Nations Sustainable Development Goal 16 (SDG 16) and its focus on social justice. With the High-Level Political Forum set up by the United Nations to take voluntary national reviews on the progress of SDG 16 in 2019, her analysis of SDG 16's performance in India involves the approaches taken by the NITI Aayog, inputs given by Civil Society initiatives and the work done by S. M. Sehgal Foundation at grassroot level in India.

Lastly, we publish the transcript of the lecture delivered by learned Senior Advocate **Shyam Divan** at the Open House on 'The Right to Privacy and Aadhaar Scheme' organized by the GNLU Centre for Law and Society. Mr. Divan employed his vast experience on the subject and litigation surrounding the Aadhaar scheme to run us through anecdotes and concerns regarding the dawn of surveillance age in India. Mr. Divan's critical commentary on the recently adjudicated matter provided us with unparalleled understanding and knowledge on the nitty-gritties of privacy and concerns of surveillance in a democracy.

It is indeed an honor and matter of pride for the Review that it has been successful in begetting the publication of articles from such an esteemed group of academicians and practitioners. This success would not have been possible without the enthusiasm and endeavor of many.

Firstly, I express our sincere regard to Prof. (Dr.) Bimal N. Patel, Director, Gujarat National Law University, for his constant support and encouragement in bringing out this Review. In the same vein, thanks are also due to Dr. Ambati Nageshwara Rao and Mrs. Apoorva Patel, Faculty Members of the Centre, for their continued support. The Advisory Board of the Review has also been a source of guidance and inspiration for the Review and a collective gratitude is owed to them for their contribution.

Finally, my special thanks to the faculty and the student Editorial Board of the Review for making it a real possibility to bring out the Review in time and to realize the goals and objectives of the Review as well as the Centre for Law and Society.

THE LEGAL STATUS OF ISRAELI-ARABS/PALESTINIANS IN ISRAEL

- Raphael Cohen-Almagor[*] and Mohammed S. Wattad[**]

In memory of Yoseph Haim Cohen

ABSTRACT

The authors argue for accommodating the interests of the Israeli-Arabs/Palestinians. Israel should strive to safeguard equal rights and liberties for all citizens notwithstanding religion, race, ethnicity, colour, gender, class or sexual orientation, and insisting that citizens have also duties to fulfil. Israel needs to strive for equality in housing, in municipal budgets, in allocation of resources; fight against racism, bigotry and discrimination, and introduce changes to accommodate interests of Israeli-Arabs/Palestinians so that citizens would "feel at home" in their own country. It is argued that delegates of the Arab/Palestinian minority should be represented, in accordance with their size in society, in the parliament and in the government. Symbols of the state should be accommodated to give expression to all citizens of Israel. Since Israel is defined as a Jewish and democratic state, there is a responsibility to embrace all Israeli citizens. In doing so, Israel does not negate the essence of its being Jewish. Furthermore, studies of all religions that exist in Israel should be made available.

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I. INTRODUCTION

Yoseph Haim Cohen was a strange bird: a maverick who completed high school at the age of 16, who was sent by the British mandate to study abroad and upon his return was recruited to serve in the mandate public administration. He was a religious-Orthodox Jew and a very active Freemason. At the time when the Ben-Gurion belief that "we should not become yet another Arab state" was commonplace, Yoseph Haim always said that the key for the success of the Zionist venture was integration into the Middle East; that Israel should become an integral part of its surroundings rather than an "European island" that does not belong in the Middle East and hence need to be uprooted, so Israel's enemies claim.

Yoseph Haim Cohen was Raphael Cohen-Almagor's grandfather. He was a tolerant Orthodox Jew who led by example. He studied Arabic and was able to converse with Arabs in their own language fluently. He said with pride that he was among those who founded the Jewish-Arab Freemason Lodge in Acre. His words were of peace, of tolerance, of justice. He strongly believed that Israel was mistaken in not teaching Arabic in each and every school in the country. He thought that the Arabs should be treated as equal citizens, that their habits should become familiar to the Jews and that the Jewish habits should become familiar to the Arabs. Yoseph Haim spoke about the need to create bridges, to celebrate diversity, to lead the world by example as a just nation. Israel's neighbours would never accept and trust us if we mistreat the Arab minority. The key to Israel's integration into the region is the integration of Arabs as equals in Israel.

In May 2018, the Israeli population was 8,842,000.[2] The Arab-Palestinians comprise some 20.9% of the Israeli population (1,849,000).[3] Many Israeli-Arabs/Palestinians[4] have family ties to Palestinians in the West Bank and the Gaza Strip. The majority of them, some 80 percent, are Muslims. The Christian, the Druze and the Bedouin are all small minorities within the Arab-Palestinian minority. Most of the Arabs reside in the Galilee in north

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2 *Independence Day 2018: 11 times more than 1948*, YNET, https://www.ynet.co.il/articles/0,7340,L-5231925,00.html#autoplay. (last visited Aug. 16, 2018).

3 *Id.*

4 The official recognition of the national aspirations of the Arab citizens of Mandatory Palestine was set forth in the Partition Plan. See "Request for the Admission of the State of Palestine to UNESCO as a Member State," submitted to the Executive Board of the United Nations Educational, Scientific and Cultural Organization, on May 23, 1989, at p. 3, where it is asserted that the Partition Plan provided, *inter alia*, for "the establishment of an independent (Palestinian) Arab State," available at [Citation: http://unesdoc.unesco.org/images/0008/000827/082711eo.pdf. Note: In the Partition Plan the word "Palestinian" is used to describe the citizenship identity of both the Arab and the Jewish citizens of Mandatory Palestine. See United Nations General Assembly, "The Future Government of Palestine," at Sec. B, Part 1, Ch. B, art. 9, para. 2, which states: "Qualified voters for each State for this election shall be persons […] who are: (a) Palestinian citizens […]." See BARUCH KIMMERLING & JOEL S. MIGDAL, THE PALESTINIAN PEOPLE: A HISTORY 135 (Harvard University Press, 2003). In this article we use the term Israeli-Arabs/Palestinians because some identify themselves as Israeli-Arabs, some as Israeli-Palestinians, and some as Palestinian-Arabs who hold Israeli citizenship. For general reading, see ABDELAZIZ A. AYYAD, ARAB NATIONALISM AND THE PALESTINIANS, 1850-1939 (The Palestinian Academic Society for the Study of International Affairs, 1999); RASHID KHALIDI, LISA ANDERSON, MUHAMMAD MUSLIH, AND REEVA S. SIMON, EDS., THE ORIGINS OF ARAB NATIONALISM (Columbia University Press, 1991); RASHID KHALIDI, PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS (Columbia University Press, 1997); YOUSSEF M. CHOUEIRI, ARAB NATIONALISM—A HISTORY: NATION AND STATE IN THE ARAB WORLD (Blackwell, 2001); MICHAEL PROVENCE, THE GREAT SYRIAN REVOLT AND THE RISE OF ARAB NATIONALISM (University of Texas Press, 2005); Manuel Hassassian, "*Historical Dynamics Shaping Palestinian National Identity*," 8 PALESTINE-ISRAEL JOURNAL OF POLITICS, ECONOMICS AND CULTURE 1,4 and 9 (2001-2002), http://www.pij.org/details.php?id=793; Muhammad Muslih, "*Arab Politics and the Rise of Palestinian Nationalism*," 16(4) JOURNAL OF PALESTINE STUDIES 77 (1987); E.G.H. Joff'e, "*Arab Nationalism and Palestine*," 20 (2) JOURNAL OF PEACE RESEARCH 157 (1983).

Israel. Smaller numbers live in the so-called Triangle area at the centre of Israel, and in the Negev desert in the south (mostly Bedouins).

The litmus test for measuring the extent of democratization of any given society is the legal status of minorities. The more egalitarian the society, the more democratic it is. In this respect, Israel is struggling. Egalitarianism is still in the making, something that Israel should aspire to achieve. Israel has navigated between liberalism, on the one hand, and promoting its religion and nationality as a Jewish state, on the other. Israeli leaders have given precedence to Judaism and Jewishness over liberalism. While sometimes their language uttered liberal values, Israeli leaders' actions were perfectionist in essence, preferring one religion and one nation over others.

The question of the legal status of Israel's Arab-Palestinian citizens has been challenging since Israel was established, and even prior to that. Already in Resolution 181(II) of the United Nations General Assembly (UNGA), which depicts the concept of establishing two independent democratic nation-based states in "Mandatory Palestine,"[5] *i.e.* Arab and Jewish states (Partition Plan),[6] it was anticipated that Israel will be

[5] The term "Mandatory Palestine" refers to the geographical area that was administered by the Mandate of the United Kingdom (hereinafter: *the British Mandate*), and was the area carved out of the Southern area of Great Syria under the Ottoman Empire, e.g. the territory of nowadays Jordan, Israel, as well as the West Bank and the Gaza Strip of the Palestinian Authority. See League of Nations, "Mandate for Palestine," July 24, 1922, United Nations Information System on the Question of Palestine Documents Collections, https://web.archive.org/web/20131125014738/http://unispal.un.org/UNISPAL.NSF/0/2FCA2C68106F11AB05256BCF007BF3CB.
See also ABD AL-WAHHAB AL-KAYYALI, TAREEKH FALASTIN AL-HADEETH 37 (al-Mu'assasat al-Arabiyya, 1985), and see also THE AVALON PROJECT, http://avalon.law.yale.edu/20th_century/palmanda.asp (last visited Aug. 8, 2018).
[6] United Nations General Assembly, Resolution 181, "Future Government of Palestine," November 29, 1947, United Nations Information System on the Question of Palestine Documents Collections,

established as a Jewish and Democratic state, in which an Arab-Palestinian minority will reside as full and equal citizens. Israel's 1948 Declaration of Independence[7] relies, *inter alia*, on the Partition Plan,[8] promising full and equal citizenship to the Arab-Palestinian residents of the State.[9]

However, this pledge for equal citizenship has been argued to be impossible, following the enactment of the 1994 Basic Law: Freedom of Occupation[10] and the 1992 Basic Law: Human Dignity and Liberty,[11] amended in 1994, where Israel was defined as a Jewish and democratic state.[12] Moreover, the recent legislation of Israel's 14th Basic Law: Israel as the Nation-State of the Jewish People (the Nation State Law), in 2018, has

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https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253.

7 The Declaration adopts the same terminology and merit of the Partition Plan.

8 The Declaration of Independence says: "On 29th November, 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable…Accordingly we, members of the People's Council, representatives of the Jewish Community of Eretz-Israel and of the Zionist Movement, are here assembled on the day of the termination of the British Mandate over Eretz-Israel and, by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly, hereby declare the establishment of a Jewish state in Eretz-Israel, to be known as the State of Israel."

9 The Declaration of Independence exclaims: "WE APPEAL - in the very midst of the onslaught launched against us now for months - to the Arab inhabitants of the State of Israel to preserve peace and participate in the up building of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions".

10 THE KNESSET, https://www.knesset.gov.il/laws/special/eng/basic4_eng.htm (last visited Aug. 11, 2018).

11 THE KNESSET, https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Aug. 11, 2018).

12 The Law stipulates: "The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state".

only muddied the waters, as it expressly emphasizes Israel's religious and national characteristics but omits to protect democratic values and rights, including the right to equality.[13]

This paper explains the concepts of liberal democracy and liberal-substantive democracy. Next, it sketches Israel as it was anticipated to be. Then, it asks whether Israel is a liberal-substantive democracy, arguing that Israel cannot be described as a liberal democracy, certainly not after the enactment of the Nation State Law, and that it should aspire to be one. This paper argues for accommodating the interests of the Israeli-Arabs/Palestinians, and that Israel should strive to safeguard equal rights and liberties for all citizens – notwithstanding religion, race, ethnicity, colour, gender, class or sexual orientation – as well as the collective rights of its Arab-Palestinian minority, but also insisting that citizens have also duties to fulfill.

Israel needs to strive for equality in housing, in municipal budgets, in allocation of resources; fight against racism, bigotry and discrimination, and introduce important changes to accommodate interests of Israeli-Arabs/Palestinians so that people would "feel at home" in their own country. It is argued that delegates of the Arab minority should be represented, in accordance with their size in society, in Israeli Parliament (the *Knesset*) and in the government. Studies of all religions that exist in Israel should be made available.

Israel, by its very definition as a Jewish state, follows a particular conception of the good. It prefers Judaism over other religions and often time its aspiration to be a Jewish-democracy faces inherent contradictions, where democracy withdraws under the duress of coercive Judaism. While we, as

[13] Raoul Wootliff, *Final text of Jewish nation-state law, approved by the Knesset early on July 19*, THE TIMES OF ISRAEL (July 19, 2018, 8:00 P.M.), https://www.timesofisrael.com/final-text-of-jewish-nation-state-bill-set-to-become-law/.

students of history, recognize the need for a home for the Jewish people, where Jews can decide their destiny and independently defend and promote their tradition and culture, and while we think Israel should be the home of the Jewish people, it is argued that Israel should retain its democratic character. Democracy is not merely a majority rule. Democracy is about majority rule *while respecting the rights of minorities*. Both parts of this definition are necessary, and any part in itself is not sufficient. The second part of the definition is no less important than the first. Democracy should devise mechanisms to protect itself from any form of exploiting power; it should fight against and pre-empt the formation of any form of tyranny, majority and minority alike.[14] The right of the majority should not be considered as the rightness of the majority, as quantity alone does not make things right. Any tyranny should be opposed: tyranny of numbers, of opinion, of custom, and of government rule. Every tyranny denies individuals the ability to fulfill their capacities, to establish their autonomy. Tyranny ***qua*** tyranny is an evil. Israel should provide open forums for debate and for practicing alternative conceptions of the good. This can be done by adhering to the basic liberal principles of respect for others and not harming others.

II. LIBERAL-SUBSTANTIVE DEMOCRACY

Liberal democracy is defined as a form of government in which political power belongs to the public as a whole and not merely to a single person or a particular group of people. The term 'democracy' has been used in conjunction with the terms 'monarchy' and 'aristocracy', and this trilogy has been employed to discern situations of monopoly, of oligopoly, and of polyarchy. A state is democratic, not 'if', but in so far as the great mass of the population can exercise an effective influence on the process of decision-making. Thus, democracy is a matter of degree and not a fixed concept. It is

[14] In *On Liberty* JS Mill argued that 'the tyranny of the majority' is among the "evils against which society requires to be on its guard". JOHN STUART MILL, ON LIBERTY 13 (Longman, Roberts and Green, 1869).

more useful to think in terms of a scale than to attempt to lay down conditions for democracy.

Liberalism was a product of the climate of opinion that emerged at the time of the Renaissance and the Reformation. As the political expression of the new individualism it was a political declaration of faith in the autonomy of human reason and the essential goodness of man. Both a mode of thought and a way of life, it reflected the political, social, religious, and economic aspirations of the rising commercial classes. Thus, in *The Rise of European Liberalism*, Laski argues that Liberalism has been, over the last four centuries, "the outstanding doctrine of Western Civilization".[15]

The earlier Liberalism had to deal with authoritarian government in church and state. It had to vindicate the elements of personal, civil, and economic freedom; and in so doing it took its stand on the rights of the individual and on the supposed harmony of the natural order.[16] The preservation of individual rights, and the emancipation of the individual from public control mean that all enjoy the same equal rights. No group is preferred over others. Majority decides the identity of government but it should not undermine equal rights for all. Liberalism sets the individual on a legal equality in opposition to feudalism and challenged the right of the monarch to govern except in the interests of the citizens. Thus Macpherson wrote:

Liberalism had always meant freeing the individual from the outdated restraints of old established institutions. By the time liberalism emerged as liberal democracy this became a

[15] H.J. LASKI, THE RISE OF EUROPEAN LIBERALISM: AN ESSAY IN INTERPRETATION 5 (Unwin Books, 1962); EDMUND FAWCETT, LIBERALISM: THE LIFE OF AN IDEA (Princeton University Press, 2018); DANIEL ZIBLATT, CONSERVATIVE PARTIES AND THE BIRTH OF DEMOCRACY (Cambridge University Press, 2017); and STEVEN VINCENT, BENJAMIN CONSTANT AND THE BIRTH OF FRENCH LIBERALISM (Palgrave, 2011).
[16] L.T. HOBHOUSE, LIBERALISM 54 (Oxford University Press, 1945).

claim to free all individuals equally and to free them to use and develop their human capacities fully.[17]

It is from the concept of a person as an autonomous individual, whose actions are the product of choice and purpose, that the philosophy of a free society is constructed. The liberal society makes the common good available not to a privileged class but to all, so far as the capacity of each permits the individual to share it. The end of such a society, according to this view, is to increase the capacities by which the individual can contribute to the common good.

Many defenders of liberalism argue that governments cannot use as their justification for any action the fact that one person's plan of life is more or less worthy than another's. They endorse neutrality, arguing that liberal policies should refrain from identifying essential interests with a particular conception of the good life, and shrink from the possibility that the government, which could be associated with one or more fragments of society, might impose its values on others, either by propagation or by force.[18]

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[17] C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 12 (Oxford University Press, 1977); This same argument appears also in F.A. Hayek's writing, where he says that libertarians start from the basic assumption that the comprehension of social reality, from a scientific *or* ethical point of view, necessitates an entirely individualistic orientation. See HAYEK, THE COUNTER-REVOLUTION OF SCIENCE 36-43 (Glencoe Free Press, 1955), http://www.archive.org/stream/counterrevolutio030197mbp/counterrevolutio030197mbp_djvu.txt

[18] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 33, 48-51, 271-274 (Basic Books, 1974); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11-12, 347-348 (Yale University Press, 1980); Ronald M. Dworkin, *"Why Liberals Should Believe in Equality?",* 30(1) THE NEW YORK REVIEW OF BOOKS 32, 32-34 (1983); *idem*, A MATTER OF PRINCIPLE 191-194, 205 (Clarendon Press, 1985); and JUSTICE FOR HEDGEHOGS (Belknap, 2011); WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 76-85, 95-96 (Clarendon Press, 1989), *idem* "*Liberal Individualism and Liberal Neutrality*", 99(4) ETHICS 883, 883-905 (1989); and Peter De Marneffe, "*Liberalism, Liberty, and Neutrality*",19(3) PHILOSOPHY & PUBLIC AFFAIRS 253, 253-274 (1990); *C. EDWIN BAKER,* HUMAN LIBERTY AND *FREEDOM* OF *SPEECH* (Oxford

In a democracy irreconcilable and incommensurable conceptions of the good often occur. Having diverse ideals, in light of which people lead different ways of life, is the normal condition. Furthermore, this variety is conceived to be a good thing. It is rational for members of a democratic society to want their plans to be different. For human beings have talents and abilities the totality of which is unrealizable by any one person or group of persons. We not only benefit from the complementary nature of our developed inclinations, but we take pleasure in one another's activities. Hence, citizens should be allowed to follow their conceptions of the good as far as it is socially possible, rather than being obliged to live with convictions they do not uphold. Neutrality is prescribed to ensure standoff from support for what, *prima facie*, is conceived to be valuable and moral conceptions of the good. The qualification "so far as it is socially possible" implies a place for some restrictions on citizens and organizations to maintain the framework of society, but when introduced they require some justification. Racism, hate speech, political and ideological extremism, gun violence and terrorism continue to test the parameters and boundaries of liberalism.

Liberal states allow freedom to citizens to develop their conceptions of the good. Liberals postulate that governments cannot use as their justification for any action the fact that one person's plan of life is more or less worthy than another's. In order to ensure that every person will be able to pursue her conception of the good, neutrality does not endorse any disposition which defines human good and human perfection to the exclusion of any other. It refrains from identifying essential interests with a particular conception of the good life and shrinks from the possibility that the government, which could be associated with one or more segments of

University Press, 1992); FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT (Yale University Press, 2017).

society, might impose its values and ideals on others, either by propagation or by force. The assumption is that should governments not be neutral regarding the plurality of convictions that prevail in society, then their bias could generate intolerance.[19]

Conceptually, one should note, the idea of neutrality is strongly connected with pluralism. Pluralism is commonly conceived to be an essential element of democracy, an indispensable feature for having the potential for good life. Methodologically, the idea of neutrality is placed within the broader concept of anti-perfectionism. The implementation and promotion of conceptions of the good, though worthy in themselves, are not regarded as a legitimate matter for governmental action.[20] Governments ought to acknowledge that each person has her own interest in acting according to her own convictions; that each person must enjoy autonomy and must have the freedom to hold her ideals.

Two underpinning liberal foundations: Respect for Others, and Not Harming Others

In every democracy, certain norms and moral codes must be shared by all people despite their cultural differences; hence the range of norms that society can respect has limitations. The most basic norms democracy has to secure are, in our opinion, respecting others as human beings (under the Kantian Respect for Others Argument), and not to inflicting harm upon others (under the Millian Harm Principle). Having explained these two principles elsewhere, we present them here without much elaboration.[21]

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[19] R. COHEN-ALMAGOR, THE BOUNDARIES OF LIBERTY AND TOLERANCE (University Press of Florida, 1994), and THE SCOPE OF TOLERANCE: STUDIES ON THE COSTS OF FREE EXPRESSION AND FREEDOM OF THE PRESS (Routledge, 2006).

[20] JOSEPH RAZ, THE MORALITY OF FREEDOM 110 (Clarendon Press, 1986); For an elaborated discussion, see R. Cohen-Almagor, *Between Neutrality and Perfectionism*, 7(2) THE CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 217, 217-236 (1994).

[21] The Harm Principle is explained in R. Cohen-Almagor, *Harm Principle, Offence Principle, and the Skokie Affair*, 41(3) POLITICAL STUDIES 453, 453-470 (1993); and in "*JS Mill's*

The Respect for Others Argument is founded on the assertions that we ought to respect others as autonomous human beings who exercise self-determination to live according to their own life plans, and that we respect people as self-developing beings who are able to develop their inherent faculties as they choose (that is, to develop capabilities people wish to develop, not every capability that they are blessed with). At the same time, we insist on the requirement of mutuality. We ought to show respect for those who respect others.

The boundaries of tolerance are determined by the qualification of not harming others, which is added to the Respect for Others Argument. Under the Harm Principle, restrictions on liberty may be prescribed when there are clear threats of immediate violence against some individuals or groups.[22] The same idea was pronounced in a different phrase by a Jewish sage, Rabbi Hillel, who said: "What is hateful to you do not do unto your fellow people".[23]

The upholding of the Respect for Others Argument and the Harm Principle safeguards the rights of those who might find themselves in a disadvantageous position in society, such as women; ethnic, religious,

Boundaries of Freedom of Expression: A Critique", 92(362) PHILOSOPHY 565*,* 565-596 (2017): 565-596. For a discussion of the Respect for Others Argument, see R. Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, chaps. 3, 7, 8 and *Confronting the Internet's Dark Side: Moral and Social Responsibility on the Free Highway* (Cambridge University Press and Woodrow Wilson Center Press, 2015).

[22] To quote Mill, the end for which "mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection". Power can be rightfully exercised over any member of society, against her will, is to prevent harm to others. Cf. J.S. MILL, ON LIBERTY, IN UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 72-73, 114, 138 (J.M. Dent, 1948);, and R. Cohen-Almagor, *Between Autonomy and State Regulation: J.S. Mill's Elastic Paternalism*, 87(4) PHILOSOPHY 557, 557-582 (2012).

[23] Babylonian Talmud, Sabbath 31a.

national and cultural minorities; homosexuals, and others. While Kant spoke of unqualified, imperative moral duties, Mill's philosophy is consequentialist in nature. Together the Kantian and Millian arguments make a forceful plea for moral, responsible conduct: Always perceive others as ends in themselves rather than means to something, show respect for others, and avoid harming others. Ronald Dworkin suggests that the concept of dignity needs to be associated with the responsibilities each person must take for her own life. Dignity requires owning up to what one has done.[24] Liberal democracies accept these notions of respecting people, not harming others, and the dignity of the person as the foundations of governance. On the other hand, theocracy denies the background rights and moral values of liberal democracy. Theocracy also has a conception of justice but the understanding of justice is very different from the liberal concept of justice.

Formal and Substantive Democracies

Within the concept of liberal democracy, it is possible to distinguish between formal and substantive democracies. Formal democracy is only interested in the opinion of the majority and seeks to enforce the majority's decisions, whether they are good or bad; whereas substantive democracy respects the opinion of the majority, yet simultaneously guarantees that minorities (weakened groups) are protected, particularly in circumstances where the majority misuses its power to abuse these minorities. Formal democracy acts in accordance with the rule of the legislature, no matter how right, decent, just, and fair the legislature might be; whenever the legislature says "the law is..." it becomes a binding law. We perceive this as a bad dogma where abuse of power is visible. We view

[24] Dworkin asserts that people who blame others or society at large for their own mistakes, or who absolve themselves of any responsibility for their conduct by blaming genetic determinism lack dignity. "The buck stops here," says Dworkin, is an important piece of ethical wisdom, *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 210-211 (Belkanp, 2011).

substantive democracy as scrutinizing the legislature's actions for their compatibility with the fundamental principles of fairness, reason, justice, and good. This is a healthy and desirable democracy, where political power is always limited, supervised, and scrutinized.

The distinction between formal and substantive democracy is represented by meaning of the Rule of Law, which is binding not because it has been enacted in a proper formal procedure by a duly elected legislature, but because it is just and proper (*Recht* in German, *droit* in French, and *derecho* in Spanish).[25] In this context, the rule of law deals with the aspiration for governmental actions to comply with certain fundamental requirements, which are intended to guarantee the internal morality of the law.

This was exactly what captured Plato's mind in offering *The Republic*,[26] *i.e* the challenge of providing a true definition of justice; for him, democracy is the rule of Law, namely, the rule of good and justice.

III. ISRAEL: VISION

The Partition Plan is a significant official international document that recognizes Jewishness as a national identity, distinct from the concept of Judaism as a religious identity. It reflects what was envisioned by the 1917 "Balfour Declaration" as the establishment of "a national home for the Jewish people."[27] Such recognition is a prerequisite to granting the right to self-determination to any nation.[28]

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[25] LOUIS HENKIN, THE AGE OF RIGHTS (Columbia University Press, 1990). We do not refer to the concept of law in its narrow sense, i.e., *Gesetz* in German, *loi* in French, and *ley* in Spanish.

[26] PLATO, THE REPUBLIC, trans. Sir Henry Desmond Lee (Penguin Classics, 2003).

[27] ISRAEL MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20balfour%20declaration.aspx. (last visited August 8, 2018). This is a letter issued by the Foreign Secretary of

The idea of establishing a nation-based state is already anchored in the constitutive document that legally justifies the establishment of Israel as a Jewish state. But what is the meaning of a "Jewish state"? This is not an easy question, as Israel's Jewish national identity might be confused with the concept of Judaism as a religious identity.

As far as a democratic regime is concerned, the Partition Plan stipulates that a nation-based state must apply a substantive democratic regime[29] to provide legal protections for a very wide range of rights – civil, political, social, and economic rights[30] – as well as collective rights. The Partition

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the United Kingdom, Arthur James Balfour, to the leader of the British Jewish community, Baron Walter Rothschild, for transmission to the Federation of Great Britain and Ireland.

See the Montevideo Convention on the Rights and Duties of States, December 26, 1933, art. 1, which provides: "[T]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; : *WWII*), this principle has been accepted by the international community as the principle of self-determination. See the UN Charter, Cha. 1, art. 1, para. 2. For criticism on these criteria, see JEFFREY L. DUNOFF, STEVEN R. RATNER, AND DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A POLICY-ORIENTED APPROACH 109-111 (Law and Business, 2002).

[29] United Nations General Assembly, "Future Government of Palestine," Sec. C, Ch. 2, art. 6.

[30] Note: Israel has not succeeded to adopt a full written constitution as mandated by the Partition Plan. Ibid., Sec. B, Part 1, Ch. B, art. 9, para. 1. Eventually, by means of a political compromise, Israel has adopted a series of incomplete Basic Laws intended, once enacted, to compose the constitution for Israel. Whereas the *Knesset* has never decided when such a project will be completed, thus establishing the full and final constitution, the contemporary Basic Laws that deal with human rights, severely fail to include a straightforward constitutional protection for very basic human rights, otherwise included in the Partition Plan, e.g. freedom of expression and the right to equality. On the normative constitutional status of the basic laws, see Suzie Navot, *The Constitution of Israel: A Contextual Analysis* (Oxford: Hart Publishing, 2014), 4-12; Mohammed S. Wattad, "Israel's Laws on Referendum—A Tale of Unconstitutional Legal Structure", FLORIDA JOURNAL OF INTERNATIONAL LAW 27, no. 2 (2015): 213, 221-226. See also Civil Appeal 6821/93 *United Mizrachi Bank Ltd. et al.* v. *Migdal Cooperative Village et al.*, 49(4) P.D. 221 (decided on November 11, 1995),

Plan acknowledges thus the conceptual distinction between formal and substantive democracies and adopts the latter one.

While arguing against formal democracy, Plato reasoned that those who belong to the majority are concerned only with their own immediate pleasure and gratification, and therefore a democracy that relies on the rule of the majority cannot produce good human beings. [31] This idea was incorporated into the Partition Plan, with respect to the remaining Arab minority in the new emerging Jewish state, thus including a special chapter that guarantees not only the equal constitutional protection of their individual rights, but in particular their collective rights, including linguistic, educational, and religious rights as a national indigenous minority.[32]

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http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/United%20Mizrachi%20Bank%20v.%20Migdal%20Cooperative%20Village_0.pdf [This is deemed as a touchstone case in the constitutional legal history of Israel, where the normative status of Israel's basic laws was discussed, as well as the Court's power on judicial review].

[31] PLATO, THE REPUBLIC, trans. SIR HENRY DESMOND LEE (Penguin Classics, 2003); T.Z. LAVINE, FROM SOCRATES TO SARTRE: THE PHILOSOPHY QUEST 20 (Bantam Books, 1984).

[32] Underlying this recognition is another implicit acknowledgment, that which concerns deeming these minorities to be indigenous people of Mandatory Palestine—regardless of the question of who was first and who constituted a majority or a minority at different points of time. The idea is that indigenous citizens are more privileged in this regards, as compared with immigrant citizens. Whereas the latter decided to migrate from their homeland to another country, they are expected to accept the civil and national identity of the absorbing state; this is not the case for indigenous people. See and compare WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (Clarendon Press, 1995); WILL KYMLICKA AND RAPHAEL COHEN-ALMAGOR, "*Ethnocultural Minorities in Liberal Democracies*", in MARIA BAGHRAMIAN AND ATTRACTA INGRAM (eds.), PLURALISM: THE PHILOSOPHY AND POLITICS OF DIVERSITY 228-250 (Routledge, 2000); Ilan Saban & Mohammad Amara, "*The Status of Arabic in Israel: Reflections on the Power to Produce Social Change*", 36 ISRAEL LAW REVIEW 5, 5 (2002); Hassan Jabareen, "*Yesraeliyot 'Ha-Tsofa Pni Ha-ateed' shel Ha-Araveem Lefi Zman Yehudi-Tseyoni, Be-Merchav Bli Zman Falasteni,*" [The Future of Arab Citizens in Israel: Jewish-Zionist in a

This is how the Partition Plan envisioned welcoming Israel to the international community. First, it must be a nation-based state, namely, a Jewish state. Second, it has to be a constitutional democratic state. And third, a proper balance has to be established between Israel's Jewish identity and democracy, which reflects the particular circumstances of Mandatory Palestine and the expectations that its national indigenous minorities would become full legal citizens of the other nation state, *i.e.* an Arab minority in the Jewish state and a Jewish minority in the Arab state.[33]

The Partition Plan was never adopted by the United Nations Security Council; therefore, it remains an unbinding resolution of the UN General Assembly. The Resolution was accepted by the Jewish Agency for Palestine, delighted to receive an official international recognition of the right of the Jewish nation for self-determination. However, the Plan was rejected by the Arab states' leaders and governments.

After the Holocaust, the goal was to found a safe haven for Jews all over the world so as to avoid the possibility of another horrific experience of that nature. Indeed, the United Nations acknowledged this goal. This

Place with Palestinian Memory] 6 MISHPATE U-MEMSHAL [LAW AND GOVERNMENT] 53, 53 (2001); Amal Jamal, "*On the Morality of Arab Collective Rights in Israel*," 12 ADALAH'S NEWSLETTER 1, 1 (2005), http://www.adalah.org/uploads/oldfiles/newsletter/eng/apr05/ar2.pdf; opinion by Chief Justice Aharon Barak in Adalah and Association for Civil Rights in Israel v. Tel Aviv Municipality and Others Original Petition to the High Court of Justice, HCJ 4112/99; 56(5) PD 393 (2002), International Human Rights Law, http://internationalhumanrightslaw.net/wp-content/uploads/2012/01/Adala-v-Tel-Aviv-2002-EXCERPT.pdf.

[33] AL-KAYYALI, TAREEKH FALASTIN AL-HADEETH 284; BENNY MORRIS, 1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR 66-67, 72-73, 75 (Yale University Press, 2008); SAMI HADAWI, BITTER HARVEST: A MODERN HISTORY OF PALESTINE 76 (Olive Branch Press, 1989); United Nations, "*The Plan of Partition and end of the British Mandate*," chap. 2 in THE QUESTION OF PALESTINE AND THE UNITED NATIONS, brochure DPI/2517/Rev. 1, http://www.un.org/Depts/dpi/palestine/ch2.pdf.

creation, however, based on a specific conception of the good, discriminates against the Israeli-Arabs/Palestinians. Israel acknowledges the problematic aspects involved in the introduction of this perfectionist element in its framework of ruling. To assure an equal status for the Arab minority, the Declaration of Independence holds that Israel will foster the development of the country for the benefit of all its inhabitants; that it will be based on the foundations of liberty, justice and peace; that it will uphold complete equality of social and political rights to all of its citizens irrespective of religion, race or sex, and that it will guarantee freedom of religion, conscience, language, education and culture.[34]

Israel's first Prime Minister, David Ben-Gurion, wrote to the French President, Charles de *Gaulle, that "the Arabs who reside in Eretz (Land of) Israel enjoy all the rights that residents in any democratic country enjoy, and a Jewish state is possible only as a democratic country".*[35] *Ben-Gurion quoted from Leviticus 19:* "If a stranger sojourn with thee in your land, ye shall not do him wrong. The stranger that sojourneth with you shall be unto you as the home-born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt".[36] Ben-Gurion pledged to President de Gaulle that the Jewish people is and will remain committed to the ideals of peace, human fraternity, justice and truth "as ordered by our preachers".[37]

Ben-Gurion said it was the Arab natural and just right to settle in the land of their forefathers and to live their lives in it. He saw no contradiction between the Jewish return to Zion and the Arab presence in Israel; thus he regarded social-Zionism as a just movement. In 1928 Ben-Gurion

[34] ISRAEL'S MINISTRY OF FOREIGN AFFAIRS, http://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx (last visited August 15, 2018).
[35] David Ben-Gurion, *Letter to De Gaulle, December 6, 1967*, 2 THE RESTORED STATE OF ISRAEL 842 (Tel Aviv: Am Oved, 1975).
[36] *Leviticus 19: 33-34*.
[37] *Supra note* 35 at 851.

declared: "In accordance with my moral belief we do not have the right to deprive a single Arab child, even if our reward resulting from this deprivation would be the fulfillment of all our wishes".[38]

Ze'ev Jabotinsky, founder of the Betar (Brith Joseph Trumpeldor) movement and leader of revisionist Zionism that forebear the Likud party, argued in *The Iron Wall* that his attitude to Arabs was determined by two principles: "First of all, I consider it utterly impossible to eject the Arabs from Palestine. There will always be *two* nations in Palestine."[39] And secondly, he believed in equality of rights for all nationalities living in the same State. Jabotinsky declared: "I am prepared to take an oath binding ourselves and our descendants that we shall never do anything contrary to the principle of equal rights, and that we shall never try to eject anyone. This seems to me a fairly peaceful credo."[40]

The abovementioned Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty anchored the Declaration of establishment of the State of Israel as the document that sets forth the values of Israel. This has been aptly thought of as:

[…] a dramatic change in the status of the Declaration of Independence: It is no longer a mere source of interpretation, but has become an independent source of human rights.[41]

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[38] Quoted in SHABTAI TEVETH, BEN GURION AND THE PALESTINIAN ARABS 258 (Schocken, 1985).
[39] Ze'ev (Vladimir) Jabotinsky, *The Iron Wall,* JEWISH VIRTUAL LIBRARY (November 4, 1923, 8:50 P.M.), http://www.jewishvirtuallibrary.org/jsource/Zionism/ironwall.html.
[40] *Id.* See also Arye Naor, *Minorities in Israel and the Liberal Utopia of Jabotinsky*, 3 IDENTITIES 146, 146-153 (2013).
[41] See dissenting opinion by Justice Shlomo Levin, in Clal Insurance Co. Ltd. v. Minister of Finance, HCJ 726/94, 48(5) PD 441 (1994), 465. However, note that the legal status of the Declaration of Independence has remained by majority voices of the Court's justices the document that expresses the credo of Israel as a Jewish and democratic state. In the absence of a complete constitution, the Declaration is relevant "as a document that can bridge the divides in Israeli society." See Navot, *The Constitution of Israel*, at 17; Clal

IV. FROM VISION TO REALITY? IS ISRAEL A LIBERAL-SUBSTANTIVE DEMOCRACY?

In *The Law of Peoples,* John Rawls drew a distinction between liberal and illiberal societies. Liberal societies are pluralistic and peaceful; they are governed by reasonable people who protect basic human rights. These rights include providing a certain minimum to means of subsistence, security, liberty, personal property as well as to formal equality and self-respect as expressed by the rules of natural justice.[42] Liberal peoples are reasonable and rational. Their conduct, laws and policies are guided by a sense of political justice.[43] In contrast, nonliberal societies fail to treat their people as truly free and equal. They adopt norms based on compulsion and coercion. Authoritarian societies aggressively fight to undermine political opponents while liberal societies encourage pluralism of ideas and provide avenues to empower opposition. Theocracy attempts to provide strict answers to all questions and concerns whereas liberal societies have no qualms to present questions with no definite answers, to challenge common truisms, to present competing ideas, to admit human infallibility and celebrate heresy.

Israel is defined as a "Jewish and Democratic State." We believe that Israel should remain a Jewish and democratic state, as was originally anticipated

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Insurance Co. Ltd. v. Minister of Finance (the majority opinion). This was also the Court's position prior to the enactment of the above-mentioned basic laws and the inclusion of the Declaration and the values of Israel in the provisions of these basic laws. See Ziv v. Gubernick, HCJ 10/48, 1 PD 85 (1948), 89; Rogozinsky v. State of Israel, CA 450/70, 26(1) PD 129 (1971); Navot, *The Constitution of Israel*,13. (Citation: ISRAEL CONST. art. 13).

[42] JOHN RAWLS, THE LAW OF PEOPLES Chapter 2 (Harvard University Press, 2002). For further discussion, see Richard Rorty, *Justice as a Larger Loyalty*, 4 ETHICAL PERSPECTIVES 139, 139-151 (1997).

[43] JOHN RAWLS, THE LAW OF PEOPLES 25 (Harvard University Press, 2002).

by the international community, and as was promised in the Declaration of Independence as well as in Israel's Basic Laws. It should be noted that the Declaration does not include the phrase "Jewish and democratic state" and that it also omits the word "democracy." However, as correctly held by the Supreme Court of Israel, a plausible interpretation of the Declaration leaves no doubt as to the democratic nature of Israel.[44] Yet Israel must strike a proper balance between its Jewish identity and its democratic nature. This will be possible only if Israel acknowledges that democracy and Jewishness (and/or Judaism) are not values in themselves but rather means to achieve other idealistic values. Both can bring about destructive consequences if abused by a governmental power, and both can establish constructive hopes, if adhered to substantively.

We believe that Israel should express its Jewishness through the right to return,[45] the observance of official Jewish holidays, and sanctioning Hebrew as the official state language.[46] The right of return for Jews, being part of the Jewish nation as such, is the golden key granted to them in order to enter the Israeli home. As a Jewish state, Israel is the homeland of the Jewish nation, thus entitling all its members a special key to enter the

[44] Kol Ha'am Co., Ltd. v. Minister of the Interior, HCJ 73/53 and HCJ 87/53; 7(2) PD 871 (1953), 876-878.

[45] ISRAEL MINISTRY OF FOREIGN AFFAIRS, http://mfa.gov.il/MFA/MFA-Archive/2001/Pages/The%20Law%20of%20Return-%201950.aspx (last visited, Aug 8, 2018).

[46] On the legal status of both the Arab and the Hebrew languages in Israel, see Article 82 of "The Palestine Order in Council," United Nations Information System on the Question of Palestine Documents Collections, https://unispal.un.org/DPA/DPR/unispal.nsf/0/C7AAE196F41AA055052565F50054E656. See also Meital Pinto, *On the Intrinsic Value of Arabic in Israel - Challenging Kymlicka on Language Rights*, 20(1) CANADIAN JOURNAL OF LAW & JURISPRUDENCE 143, 143-172 (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=99550; opinion by Chief Justice Aharon Barak, in Adalah and Association for Civil Rights in Israel v. Tel Aviv Municipality and Others.

house. However, within that house, every legal citizen, whether a Jew or not, must be treated fairly and equitably.[47]

We believe that Israel should promote principles of substantive democracy by lending itself to liberal values. Recalling the distinction between formal and substantive democracies, it is notable that especially during recent years, there have been several governmental official voices that perceive democracy as nothing but a means to fulfill the needs and the wishes of the electoral majority, notwithstanding how immoral they might be. This is a wrong and dangerous approach. Unlike its politicians, the Israeli judiciary, represented by the Supreme Court, has played an important role in advancing and protecting the values of a substantive democracy, and in protecting the rights and liberties of minorities against any possible abuse of power by the democratically elected majority.[48]

Israel is a Jewish-ethnic democracy.[49] The framework of governance is democratic, but its underpinning concepts give precedence to Judaism over the Respect for Others Principle, and the Harm Principle. Consequently, Israel adopts illiberal policies and practices that are discriminatory in nature, preferring Jews over others.

[47] Consider Opinion by Chief Justice Aharon Barak, in *Qa'adan et al. v. Israel Lands Administration et al.*, HCJ 6698/05, 54(1) PD 258 (2000), at the end of para. 31.

[48] Consider JOHN H. ELY, DEMOCRACY AND DISTRUST (Harvard University Press, 1980). See also opposing opinions of Chief Justice Aharon Barak and Justice Asher Grunis, in *The Movement for Quality Government in Israel et al. v. The Knesset et al.,* HCJ 6427/02, 61(1) PD 619 (2006).

[49] Sammy Smooha, "*The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*", 8(4) NATIONS AND NATIONALISM 475, 475-503 (2002), *idem*, "*Types of Democracy and Modes of Conflict-management in Ethnically Divided Societies*", 8(4) NATIONS AND NATIONALISM 423, 423-431 (2002), and "*Israel70 The Global Enigma*", FATHOM (July 2018), http://fathomjournal.org/israel70-the-global-enigma/

V. SYMBOLS

Symbols are important in the life of a nation. As the only Jewish country in the world, we can expect Israel's symbols to be Jewish. At the same time, significant Arab/Palestinian minority resides and therefore some accommodation needs to be made with regard to them so that they would feel part of the country. As said, democracy is majority rule while safeguarding the rights of minorities. Therefore, a compromise is in place. Here is a proposal that we hope will provoke and promote debate. Through means of deliberative democracy, we hope that a suitable compromise will be found. Thus, this proposal should be perceived as a starting point, not as an ironclad proposal.

A few words on deliberative democracy - This mechanism directly involves citizens in the decision-making processes on matters of public concern. It requires the setting of public reason institutions by which knowledge is exchanged and ideas crystallized via mechanisms of deliberation and critical reflections. People present their cases in persuasive ways, trying to bring others to accept their proposals. Processes of deliberation take place through an exchange of information among parties who introduce and critically test proposals. Deliberations are free of any coercion and all parties are substantially and formally equal, enjoying equal standing, equal ability, and equal opportunity to table proposals, offer compromises, suggest solutions, support some motions and criticize others. Each participant has an equal voice in the process and tries to find reasons that are persuasive to all so as to promote the common good.[50]

[50] JOSHUA COHEN, "DELIBERATION AND DEMOCRATIC LEGITIMACY," in ALAN HAMLIN AND PHILIP PETTIT (eds.), THE GOOD POLITY 22-23 (Blackwell, 1989); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS 304-308* (Polity, 1998). See also ANDRÉ BÄCHTIGER AND JOHN S. DRYZEK *et al* (eds.), THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY (Oxford University Press, 2018).

Our proposal:

The national emblem of the State of Israel includes a Menorah, flanked by two olive branches. In antiquity, the most commonly used symbol of Judaism was the menorah, the seven-branched candelabrum that stood in the Holy Temple in Jerusalem before it was destroyed by the Romans in 70 C.E. The Menorah was adopted as the emblem of Israel by the decision of The Provisional Council of State on 11 Shevat 5709 in the Hebrew calendar (February 10, 1949). This emblem will remain intact.

The Israeli flag is composed of blue stripes and a Star of David (Magen David). The blue stripes are intended to symbolize the stripes on a tallit, the traditional Jewish prayer shawl. The Magen David is a widely acknowledged symbol of the Jewish people and of Judaism. One of the earliest uses of the Star of David as a symbol of Jewish identity was in 1354, when Charles IV King of Bohemia granted the Jews of Prague the right to bear a red flag depicting the Star of David and Solomon's Seal (a Star of David within a circle). After Jews were emancipated following the French Revolution, many of their communities selected the Star of David as their emblem.[51] *It should be noted that the six-pointed star is not uniquely a Jewish symbol. It was a common symbol in* Islamic and Western occultism.[52] *Muslims know the hexagram as the* **Seal of Solomon**— *both Solomon and David were prophets, and both are mentioned in the Quran. The hexagram appears in Islamic artifacts and* decorations on mosques and other buildings *worldwide.* The Seal of Solomon was used by Muslims from India to Spain to adorn and

[51] Ronen Shnidman, "*The Star of David: More Than Just a Symbol of the Jewish People or Nazi Persecution*", HAARETZ (August 17, 2018, 8:07 P.M.), https://www.haaretz.com/world-news/europe/the-star-of-david-isn-t-just-jewish-1.5323219.

[52] DHWTY, "*The Significance of the Sacred Seal of Solomon and its Symbols*", ANCIENT ORIGINS (August 23, 2018, 6;30 P.M.), https://www.ancient-origins.net/artifacts-other-artifacts/significance-sacred-seal-solomon-and-its-symbols-005401.

decorate the bottom of drinking vessels and coins issued by various dynasties.[53] The flag will also remain intact.

We suggest amending **the anthem**. Israel's Arab-Palestinian citizens have been criticized for refusing to sing the words of the Israeli anthem. The argument has been that they must do so because they are citizens of the state of Israel. But then the anthem should relate to them and be meaningful to them. However, the anthem speaks of "the Jewish spirit yearning deep in the heart".[54] Presently, the Israeli anthem appeals solely to the Hebrew hearts. It explicitly ignores the multicultural and multinational character of the state. We should learn from the lessons of other democracies that were bold enough to change their respective anthems in order to represent all factions of their populations (most notably South Africa, the "rainbow" nation, after 1994). Israel need not necessarily adopt a different anthem. It may simply change a few words, mentioned above: instead of "Zion" to speak of "Israel" or "our land"; instead of a "Jew" to speak of a "person" or "citizen". Such accommodations are steps in the right direction towards a more democratic society.

Being Israeli does not necessarily mean being a Jew. In 70 years, the state of Israel has successfully developed its own culture, social life and political characteristics.[55] Israel has its own sociopolitical identity, and as such this is what the Flag and the Anthem must express. Admittedly, we are not suggesting that the anthem should speak of the Palestinian spirit, but rather of the Israeli spirit. There is no reason why the Arab-Palestinian citizens of Israel should sing about the Jewish spirit. In reading the anthem's words, the spirit of every citizen must be yearning deep in the heart. Israeli anthem speaks of the Jewish "2,000-year-old hope of being a

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[53] Khalid, "*Symbolism: Star of David or Solomon's Seal*", BAHEYELDIN DYNASTY (August 22, 2018, 5:40 P.M.), https://baheyeldin.com/culture/star-of-david-solomons-seal.html.

[54] Quoted from the Israeli anthem "*Hatikva*" ("The Hope").

[55] For interesting reading on the cultural developments in the state of Israel, *see* AMOS OZ, A TALE OF LOVE AND DARKNESS (Harcourt, 2005).

free nation on our land."[56] However, this hope has come true already, and if there should be any hope now, it should be that of peace, prosperity, and a true democracy. This shall be the hope (*Hatikva*) for the future generations of the Israeli state.

In this context let us mention that Canada, like Israel, struggles with national problems, for it embraces two nations; namely, the English and the French nations. Since French has become an official language, equal in status to English, the Canadian Anthem was officially translated into French, in the following manner:

Ô Canada! Terre de nos aïeux, Ton front est ceint de fleurons glorieux! Car ton bras sait porter l'épée, Il sait porter la croix! Ton histoire est une épopée des plus brillants exploits. Et ta valeur, de foi trempée, Protégera nos foyers et nos droits; Protégera nos foyers et nos droits.

[O Canada! Land of our forefathers Thy brow is wreathed with a glorious garland of flowers. As in thy arm ready to wield the sword, So also is it ready to carry the cross. Thy history is an epic of the most brilliant exploits. Thy valour steeped in faith Will protect our homes and our rights Will protect our homes and our rights.]

The Canadian anthem in the French version speaks of "So also is it ready to carry the cross."[57] Many Canadian Jews argue against the French version of the anthem. They contend that the anthem must express their Canadian citizenship. Similarly, Israeli-Palestinians may rightly object to an anthem that fails to embrace all Israeli citizens.

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[56] Quoted from the Israeli anthem.

[57] The English version of the Canadian Anthem does not speak of the "cross": "O Canada! Our home and native land! True patriot love in all thy sons command. With glowing hearts we see thee rise, The True North strong and free! From far and wide, O Canada, we stand on guard for thee. God keep our land glorious and free! O Canada, we stand on guard for thee. O Canada, we stand on guard for thee."

Israel has no official **national motto** and here is an opportunity to introduce something new that reflects Israel of today, a motto that celebrates the mosaic of Israeli cultures, that celebrates diversity and pluralism, and that would unite all citizens around one unifying slogan with which all could identify. The motto should preferably be selected from pertinent Arab proverbs, along the lines marked above regarding the beauty of pluralism and the need to create bridges and emphasize unity. United we stand. United is our strength. Any of the following values -- peace, tolerance, power, freedom, truth, justice, charity and righteousness -- may also be accentuated. For instance: "Do not turn away a poor man…even if all you can give is half a date. If you love the poor and bring them near you". Al-Tirmidhi, Hadith 1376.

VI. DISCRIMINATION NOT APARTHEID

Israel has been accused to resemble the notorious South African apartheid regime. The resettlement of some Arab citizens from Jerusalem to the West Bank is deemed reminiscent of the Group Areas Act of the apartheid regime. The separate roads in the West Bank for Jews and others for Palestinians resemble aspects of the apartheid transport arrangements.[58]

Critics of Israel should clearly distinguish between the Israeli occupation of the West Bank, where Palestinians are plainly not equal to Israelis who reside there and where Palestinians are routinely subjected to oppressive regulations of the occupation,[59] and the rest of Israel. In our opinion, as far as the case of Israel's Arab-Palestinian citizens is concerned, the Apartheid Argument does not stand. The Israel Supreme Court has played a very significant role in giving substantive meaning to various rights granted to

[58] Lord Steel of Aikwood, "*Israel: Arab Citizens*," 741 (84) HOUSE OF LORDS OFFICIAL REPORT, HANSARD 1208, 1208 (2012).

[59] R. Cohen-Almagor, *"Fifty Years of Israeli Occupation*", E-INTERNATIONAL RELATIONS (August 14, 2018, 5:30 P.M.), http://www.e-ir.info/2017/10/14/fifty-years-of-israeli-occupation/.

the Arab minority, including the right to vote, the right to establish political parties, freedom of expression, religious autonomy, and separate educational systems. This should not be understood as a trivial process, nor should it be perceived as self-evident.

While we do not claim that Israeli-Palestinians always receive equal treatment and enjoy *de facto* the same rights and liberties as Israeli-Jews, Israeli-Palestinians do not live under anything that resembles the South-African apartheid. Discrimination is one thing and apartheid is another. The situation is problematic as is and there is no need to exaggerate its severity. Those who claim that Israel is an apartheid state know very little about Israel and South Africa. Israel is a multicultural country. Multiculturalism is challenging. It sometimes brings about schisms and leads to discrimination against minorities, also of the kinds based on age, gender,[60] and/or sexual orientation. However, various forms of discriminatory conduct have been scrutinized by the Supreme Court.[61] While discrimination still exists, and the government surely can and should do more in closing the gaps, acts of discrimination are not been legitimized. Those who bluntly practice policies of discrimination are penalized and reprimanded by the courts.

Israeli-Arabs/Palestinians enjoy progress and higher standard of living under Israeli sovereignty. Consider, for instance, health and education. Mortality rates among Israeli-Arabs/Palestinians have fallen by over two-thirds since the establishment of Israel, while life expectancy has increased 30 years, reaching 78.5 (women 80.7, men 76.3) in 2009. Infant-mortality

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[60] R. Cohen-Almagor, *"Discrimination against Jewish Women in Halacha (Jewish Law) and in Israel"*, 45 (2) BRITISH JOURNAL OF MIDDLE EASTERN STUDIES 290, 290-310 (2018).

[61] See for example: HCJ (High Court of Justice) 4541/04 *Miller* v. *Minister of Defense et al.*, 49 P.D. 94 (decided on November 8, 1995) [the Court held in favor of gender equality between men and women in the military context, in particular regarding aviation courses. The Court added that the budgetary and planning considerations did not justify a general policy of rejecting all women from aviation courses].

rates have similarly been significantly reduced from 56 per 1,000 live births in 1950 to 6.5 in 2008. As for education, adult illiteracy rates among Israeli-Arabs/Palestinians dropped from 57.2% (79% among women) to 7.7% (11.7% among women). In 1961, less than half of Arab children attended school, with only 9% acquiring secondary or higher education. By 1999, 97% of Arab children attended schools. Fifty years ago, a mere 4% of Arab teachers held academic degrees; by 1999, the figure had vaulted to 47%.[62]

One of the Supreme Court justices is an Arab,[63] and there are many other Arabs in lower courts. Arab nationals hold distinguished governmental positions, including in the Prime Minister's Chambers.[64] Israeli-Arabs/Palestinians have their own political parties; they have their own seats in Parliament; they have their own political newspapers;[65] they have their own voice. Israel has been implementing a policy of affirmative action towards the Arab population in the public service.[66]

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[62] Efraim Karsh, *Israel's Arabs: Deprived or Radicalized?,* ISRAEL AFFAIRS 1, 1-19 (2013), http://www.meforum.org/3423/israel-arabs-deprived-radicalized.

[63] Justice George Karra. Prior to him Justice Saleem Gubran served at the Court; there he was promoted, based on seniority, to the position of Deputy President of the Court.

[64] For instance, MK Majalli Whbee served as Deputy Minister in the Prime Minister's Office, Deputy Minister of Education, Culture, and Sport, and Deputy Minister of Foreign Affairs. Other Israeli Arabs held, and hold, other parliamentary positions in the Israeli Knesset, as well as sensitive governmental positions. For instance, MK Mjalli Whbee served as Deputy Speaker of the *Knesset*. He served as well, as Member of the Foreign Affairs & Defense Committee. MK Mohammad Barakeh served as Deputy Speaker of the Knesset. *Note*: MK stands for "Member of the Knesset."

[65] Among other leading Arab newspapers in Israel, these are: *Al-Senarah*; *Kol El-Arab*; *Al-Etihad*; and *Panorama*.

[66] *See* article 15A of *Hok Shirot Ha-Mdina (Minoyeem)* ("The State Service (Appointments)") of 1959. *See also*: HCJ (High Court of Justice) 6427/02. *The Movement for Quality Government in Israel et al.* v. *The Knesset et al.* (not published yet) (decided on May 11, 2006); HCJ (High Court of Justice) 11163/03 *The National Committee for the Heads of the Arab Local Authorities in Israel et al.* v. *The Prime Minister of the State of Israel* (not published yet) (decided on February 27, 2006); HCJ (High Court of Justice) 6924/98 *The Association for Civil Rights in Israel* v. *The Israeli Government*, 58(5) P.D. 15 (decided on July 9, 2001).

The Supreme Court gave Mr. Mohammed Bakri, an Arab movie producer, the constitutional protection to screen his movie "Jenin Jenin," which accuses Israeli soldiers of crimes against humanity during their military activity in the Palestinian city Jenin, following a bloody terrorist attack on Israeli civilians.[67] The Court entitled Mr. Adel Qaadan, an Israeli-Arab/Palestinian, to buy a piece of land in a Jewish communal settlement, deciding that a policy that calls for segregation is unconstitutional.[68] The Supreme Court has scrutinized the route of the security fence between Israel and the Palestinian Authority, at times ordering rerouting of the fence.[69] The Court also granted constitutional protection to Israeli-

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[67] *See* HCJ (High Court of Justice) 316/03 *Bakri et al.* v. *Israel Film Council et al.*, 58(1) P.D. 249 (decided on November 11, 2003) [After IDF (Israeli Defense Force) operations against the terror infrastructure in Jenin (a Palestinian city) in April 2002 ("Operation Defensive Wall"), Mohammed Bakri filmed the responses of local Palestinians and edited them into the film "Jenin, Jenin." After advance screenings, both domestically and abroad, and in anticipation of the film's domestic commercial screening, Bakri requested the approval of the Israel Film Council. The Council denied its approval. Bakri claimed that this decision violated fundamental constitutional rights and Israeli administrative law. The Court held that that freedom of speech constitutes one of the fundamental principles of a democratic society. The Court decided that, under the circumstances, the decision of the Israel Film Council unlawfully infringed the constitutional rights of the petitioners].

[68] *See* the *Qa'adan* case, mentioned above [The Court held that the state of Israel may not discriminate Israeli Arabs against Israeli Jews in allocating lands for settlement, even when these lands were initially allocated by the Jewish Agency].

[69] See for example: HCJ (High Court of Justice) 7957/04 *Zaharan, et al.* v. *The Prime Minister of Israel, et al.* (not published yet) (decided on September 15, 2005) [The Court accepted a petition by several Palestinians, who approached the Court contending the illegality of the security fence (or, the "separation fence"). The Court held that regarding the particular part of the fence, upon which the petition was submitted, the fence was constructed illegally, since the state of Israel did not adhere to the less coercive means available within the proportionality test. However, the Court did not accept the International Court of Justice decision on the illegality of the security fence as a matter of principle, holding that the state of Israel has a right to construct the fence on Israeli territory, thus protecting its security against the terrorist attacks with which it struggles in a daily basis]. *See and compare*: Advisory Opinion of the International Court of Justice at The Hague: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (International Court of Justice, July 9, 2004), 43 IL M 1009 (2004). *See also*: HCJ (High Court of Justice) 2056/04 *Beit Sourik Village Council* v. *The Government of Israel,* 58(5) P.D. 807 (decided on June 30, 204).

Arabs/Palestinians who aspired to become members of parliament, even when their political proposals voiced stern criticism of the state of Israel, including the expression of grave doubts regarding its basic legitimacy. All attempts by Jewish-Zionist political parties to deprive these Israeli-Arabs/Palestinians of their right to be elected to parliament were met with the Supreme Court's objection.[70] The State of Israel also established three Inquiry Commissions regarding the relationship between the State and Arab nationals, being citizens of Israel or of neighboring countries.[71]

However, the picture is not one of all roses; there are many gaps to bridge. In many cases, Israel discriminates against its Arab citizens. Around 50 percent of the Israeli-Arabs/Palestinians population lives in poverty. The poverty rate among Arab families has significantly increased since the 1990s, rising from 35 percent in 1990 to 45 percent in 2002.[72] Arabs have generally held the low-wage jobs in Israeli economy. On average, Arab men earn 60 percent of the national average wage, while Arab women earn 70 percent of the average wage.[73]

The Bedouins, who comprise 12% of the Palestinian-Arab citizens of Israel, are particularly discriminated. Between 1968 and 1989, half of the Bedouin population was transferred into townships in the north-east part of the Negev desert. The rest remained in unrecognized villages built by

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[70] The Central Election Commission for the 16th Knesset v. MP Ahmad Tibi and MP Azmi Besharah, 57(4) P.D. 1

[71] (1) *Kahan Commission* of 1982 (investigating the alleged massacre committed against Arab Lebanese in times of war, by Israeli military forces, in the Lebanese villages of *Sabra* and *Shatila*); (2) *Shamgar Commission* of 1995 (investigating the massacre committed by a Jewish Israeli terrorist against innocent Arab Muslims during their religious pray); and (3) *Or Commission* of 2000 (investigating the reasons for and the consequences of the death of 13 Israeli Arabs, allegedly killed by Israeli policemen, during a violent protest of Israeli Arabs against a prominent politician, Ariel Sharon, upon his provocative visit to the Temple Mount.

[72] ILAN PELEG AND DOV WAXMAN, ISRAEL'S PALESTINIANS 35 (Cambridge University Press, 2011).

[73] *Id.* at p. 36-37.

the Bedouins for their own welfare and needs, with no basic utilities, such as electricity or water. Now, more than half of the Bedouins, about 90,000 of 170,000 people, are deprived of their ancestral lands, living in what the Israeli government terms "illegally constructed villages", still without public utilities or basic services.[74] In 2011, the government approved the Prawer Plan for the mass expulsion of the Bedouin community in the Negev. The plan speaks of force displacement of some 70,000 Bedouin citizens of Israel, and the destruction of 35 unrecognized, illegal villages.[75] More than 1,000 homes were demolished in 2011 and dozens more in 2012.[76] More recently, Israeli authorities designated the Umm al-Hiran village for demolition, expelling its community and build a Jewish settlement in its place.[77] In July 2018, protests broke out at the Bedouin village Khan al-Ahmar in the West Bank against Israeli plans to demolish the village. Khan al-Ahmar was built without Israeli permits, which Palestinians say are impossible to obtain.[78]

Arab citizens are discriminated in having access to land, in land planning, in rural and urban development, and in housing provisions. Arabs own only 2.5 percent of Israel's lands and they lack the ability of acquiring the majority of Israeli land. While over 1,000 Jewish settlements have been established since 1948, the Arab community has remained in almost standstill.[79] The lack of town plans and planning permissions for

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[74] Lord Bishop of Exeter right reverend Prelate, "*Israel: Arab Citizens*," 741(84) HOUSE OF LORDS OFFICIAL REPORT, HANSARD 1203, 1203 (2012).
[75] Baroness Uddin, "*Israel: Arab Citizens*," 741(84) HOUSE OF LORDS OFFICIAL REPORT, HANSARD 1222, 1222 (2012).
[76] *Ibid.*
[77] Kamel Hawwash, *"Bedouins' endless suffering in Israel"*, THE ARAB WEEKLY (August 25, 2018, 7:54 P.M.), https://thearabweekly.com/bedouins-endless-suffering-israel.
[78] Ali Sawafta, *"Protests erupt at Bedouin village Israel plans to demolish"*, REUTERS (August 4, 2018, 7:40 P.M.), https://uk.reuters.com/article/uk-israel-palestinians-bedouin/protests-erupt-at-bedouin-village-israel-plans-to-demolish-idUKKBN1JU1RB.
[79] KAIS NASSER, SEVERE HOUSING DISTRESS AND DESTRUCTION OF ARAB HOMES: OBSTACLES AND RECOMMENDATIONS FOR CHANGE 85-86 (Arab Center for Law and Policy, 2012).

Palestinian towns is one of the main causes of inequality and of the failure of the Palestinian citizens to fulfill their economic potential.[80] As Israeli governments refused to issue building plans for Arab communities, Arabs took the initiative and established new villages that are not recognized by Israeli law. Some 36 Bedouin settlements in the Negev are unrecognized and consequently some 45,000 structures are at risk of demolition.[81] Arab municipalities are not allocated comparable funding granted to Jewish municipalities.[82]

Consequently, the majority of Israeli-Arabs/Palestinians do not feel that they are fully integrated into Israel because it is a Jewish state due to continued discrimination in many spheres of life. According to the 2012 Democracy Index, 27.7% of the Israeli-Arabs/Palestinians greatly feel a sense of belonging to the State of Israel, while 38.2% feel somewhat a sense of belonging and 33.5% hardly feel this way.[83] In 2015, only a third of respondents (32.4%) felt that they were part of the State and its problems.[84]

An important distinction has to be made between formal citizenship and full citizenship. Israeli Jews can be said to enjoy full citizenship: they enjoy equal respect as individuals, and they are entitled to equal treatment by law and in its administration. The situation is different with regard to the Israeli-Arabs/Palestinians, the Bedouin and the Druze. Although they are formally considered to enjoy liberties equally with the Jewish community, in practice they do not share and enjoy the same rights and liberties.

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80 Baroness Warsi, *Israel: Arab Citizens*, 741(84) HOUSE OF LORDS OFFICIAL REPORT, HANSARD 1232, 1232 (2012).

81 *Supra* note 79 at 84.

82 Ilan Peleg and Dov Waxman, *Israel's Palestinians*, p. 43; R. Cohen-Almagor, *Israeli Democracy and the Rights of Its Palestinian Citizens*, 45 RAGION PRATICA 351, 351-368 (2015).

83 TAMAR HERMANN ET AL., THE ISRAELI DEMOCRACY INDEX 201*2* 74 (The Israel Democracy Institute, 2012).

84 TAMAR HERMANN ET AL., THE ISRAELI DEMOCRACY INDEX 2015 27(The Israel Democracy Institute, 2015).

VII. THE RIGHTS & DUTIES OF CITIZENSHIP

Citizenship entails many benefits. Citizens enjoy political and social rights. They are entitled to basic social security and to basic health privileges. However, the existing state of affairs in which large sectors of the population do not fulfill their civic duties is unacceptable and unfair to those who share the burden. People should not only take from the state. They should also invest in it and contribute to it. Israel cannot afford having such exemption phenomenon. It cannot afford it when Arabs are concerned, and it cannot afford it when ultra-religious Jews are concerned. Both sectors are growing, and both pose challenges to the idea of full citizenship.

At present, large sectors, mainly the ultra-orthodox, do not pay taxes, do not serve in the army, do not work; yet, they receive state support allowing them to study. Resources should be distributed equally to all sectors. Every citizen is expected to pay in accordance with his/her abilities. As long as the state deems it necessary to oblige its young citizens to serve in the army, all healthy people should take part and give a shoulder in carrying the security burden. This is true for all citizens without exception. Israel has exempted its Arab citizen from army service. This exemption, however, is a double-edge sword. It serves as a pretense for discrimination. The argument being made that Arabs do not serve in the army, do not carry the same duties and obligations as Jews; therefore, they should not enjoy the same rights and privileges. It is in Arab interest to silence this line of argumentation. Citizens who have a problem in serving the army for religious, moral or national reasons, and citizens who refuse to serve in order to avoid a situation by which they might confront their Palestinian brothers on the enemy side should commit themselves to do national (or civil) service for the required period of time (presently three years for men; a little under two years for women) in their own communities, or in other communities, working to better the conditions of their own group.

Palestinian-Arabs should do national (civil) service if this is their wish in their own neighborhoods. They could volunteer to work in charity, welfare and relief organizations, the fire brigades, medical service, etc. Conscientious objectors could contribute to Israel in various ways other than serving in the army. All should take part in this important societal duty.

CONCLUSION: LOOKING AHEAD

Presently, discrimination against Israeli-Arabs/Palestinians is prevalent in many spheres of life, including land allocation, housing, municipality budgets, employment, education, urban development and basic civil rights. There is unhealthy discrepancy between official statements which are not backed by deeds. The Declaration of Independence is a remarkable document but on the grounds we do not find equality between Jews and Palestinians, and the latter do not enjoy the same rights and liberties. The symbols of the Jewish state ignore its minorities.

Delegates of the Arab minority should be represented, in accordance with their size in society, in the *Knesset* and in the government.[85] To date, there has been only one Arab minister: Raleb Majadele who was appointed Minister without portfolio in 2007 and a few months later became Minister of Culture, Sport and Science. Majadele served in this role for two years until 2009. No other Palestinian ever served in the Israeli government. This should be corrected. At the same time, Israel would like to see from all its citizens, without exception, a real and strong commitment to the state, to peace, and to the struggle against terror.

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[85] JS Mill wrote in his *Autobiography*: "Minorities, so long as they remain minorities, are, and ought to be outvoted; but under arrangements which enable any assemblage of voters, amounting to a certain number, to place in the legislature a representative of its own choice, minorities cannot be suppressed". https://www.earlymoderntexts.com/assets/pdfs/mill1873e.pdf.

At the time of writing (July 19, 2018), the *Knesset* passed the Nation State Law which, in effect, gives Jewish values supremacy over Israel's democratic commitments and jeopardizes Israel as a democratic state, as a Jewish state. This law degrades Israel's moral legitimacy. The Law **anchors the state's menorah emblem, Jerusalem as Israel's capital,** "Hatikvah" as **t**he state anthem.[86] The Hebrew calendar is the official calendar of the state and alongside it is the Gregorian calendar to be used as the official calendar. The Sabbath and the festivals of Israel are the established days of rest in the state; Non-Jews have a right to maintain days of rest on their Sabbaths and festivals.87 The controversial parts are the following:

1 — Basic principles

C. The right to exercise national self-determination in the State of Israel is unique to the Jewish people.88

The word "unique" should be uniquely used, when it is of absolute necessity. This phrase ignores the non-Jewish minorities in Israel. Unfortunately, there is a need to repeat time and again: Democracy is about majority rule while respecting the rights of minorities.

3 — The capital of the state

Jerusalem, complete and united, is the capital of Israel.89

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[86] Raoul Wootliff, *Final text of Jewish nation-state law, approved by the Knesset early on July 19*, THE TIMES OF ISRAEL (August 19, 2018, 4:30 P.M.), https://www.timesofisrael.com/final-text-of-jewish-nation-state-bill-set-to-become-law/.
[87] *Id.*
[88] *Supra* note 85.
[89] *Id.*

We would have no problem if the wording was: Jerusalem is the capital of Israel.

4 — Language

A. The state's language is Hebrew.

B. The Arabic language has a special status in the state; Regulating the use of Arabic in state institutions or by them will be set in law.

C. This clause does not harm the status given to the Arabic language before this law came into effect.[90]

Of course it does. With this law, **Arabic has been demoted in importance from official language to a "special status".[91]** Arabic should be taught at every primary and high school together with English. Language is a key factor in creating bridges between people – Israeli Jews and Israeli-Arabs/Palestinians, and between Jews and Arabs in general. Here we should also note that Judaic studies should be available in every primary and high school. They should be made compulsory for two or three years and then optional. Studies of other religions that exist in Israel should also be made available. Sign posts should be written in Hebrew and in Arabic. Key sign posts should be written also in English (as now is the case) for many millions of tourists who hopefully one day will make Israel a "must see" in their travels.

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[90] *Id.*

[91] Arguably contrary to Article 82 of *Dvar Ha-Melikh Be-Moa'tsato* ("King's Order-in-Council") (originally published in 1922, as the Palestinian Order-in-Council, upon establishing the British Mandate on Mandatory Palestine, on August 10, 1922), which declares Arabic as an official language in Israel. https://en.wikisource.org/wiki/Palestine_Order-in-Council.

The Nation State Law also contains a clause that legally sanctions segregated communities in Israel, enabling discrimination against various groups, including non-Jews. **Section** 7 — Jewish settlement states: "A. The state views the development of Jewish settlement as a national value and will act to encourage and promote its establishment and consolidation".[92] Development of Jewish settlements is fine. Development of Jewish settlements in the occupied territories is not.

The Nation State Law runs counter the spirit of Judaism, of Zionism, of socialism and of revisionism. It contradicts the Declaration of Independence as well as the 1994 Basic Law: Freedom of Occupation[93] and the 1992 Basic Law: Human Dignity and Liberty.[94] Israel should not opt to adopt blatantly racist laws such as this unsettling Law. The forefathers of Zionism: Herzl, Ben-Gurion, Weizmann, Jabotinsky and others are rolling in their graves.

Israeli leaders should decide whether they wish Israel to be "Utopia"[95] or "Dystopia."[96] An *utopia* reflects a desire to create a community or society that possesses highly desirable or (nearly) perfect qualities for its citizens.[97] Dystopia represents the concept of "Not a Good Place," a society that is undesirable or frightening where its citizens experience great suffering or

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92 *Supra* note 86.

93 THE KNESSET, https://www.knesset.gov.il/laws/special/eng/basic4_eng.htm (last visited Aug. 11 , 2018).

94 THE KNESSET, https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Aug. 11, 2018).

95 The term and the concept are borrowed from THOMAS MORE, UTOPIA, trans. PAUL TURNER (Penguin Books, 1984).

96 It is believed that one of the early uses of this word was made by John Stuart Mill in one of his parliamentary speeches. See JOHN S. MILL, 1 PUBLIC AND PARLIAMENTARY SPEECHES, ed. JOHN M. ROBSON AND BRUCE L. KINZER (University of Toronto Press, 1988).

97 OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/utopia (last visited Aug. 17, 2018).

injustice.[98] Israeli leaders seem to like asking: "Magic mirror on the wall, who is the fairest one of all in the Middle East?,"[99] to which their magic mirror always responds: "You are the fairest one in the Middle East."[100] But a country that aspires to compete with Western enlightened democracies cannot afford being compared only with the Middle East;[101] and a country that perceives itself a "villa in the jungle"[102] must aspire to be compared with other "villas" in the world.

This paper is written from a Zionist and liberal viewpoint. We endorse the Zionist belief regarding the need for a home for the Jewish people in Israel. We endorse egalitarian democracy. Israel struggles to maintain Jewish democracy, presently giving precedence to Judaism over democracy. We argue that the reverse should be the case. We acknowledge and protest against the discrimination of Arabs/Palestinians while we oppose the attempt to characterize Israel as an apartheid state. We think any form of tyranny, minority and majority alike, is repugnant. The decision of one to discriminate against the other due to her religion is awful. The decision of many to discriminate against the minority just because they can make the situation equally terrible, and cruder. This is bullying. We believe that Israel should develop and promote mechanisms for the self-realization of all individuals, notwithstanding their religion, race, ethnicity, colour, gender, class or sexual orientation. These mechanisms, which include compromise, open debate, mutual respect and

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98 OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/dystopia (last visited Aug. 17, 2018).

99 The quote is borrowed from the nineteenth century German fairy tale "Snow White," published in 1812 by the Brothers Grimm. Citation: GRIMM BROTHERS, SNOW WHITE (1812).

100 *Id.*

101 Former Prime Minister Ehud Barak said that Israel is "a villa in the jungle." See Uri Avnery, "*Barak: Israel a Villa in the Jungle*," ARAB NEWS (August 17, 2018, 7:30 P.M.), http://www.arabnews.com/node/222588.

102 *Id.*

democratic deliberation, should be aptly employed on all state levels: Symbolic, declarative, governmental and practical.

Israel should strive to become a better place for its minorities, a state where all citizens feel a sense of belonging, perceiving Israel as a home. Israel should keep and promote its democratic character, otherwise it will slide to be like any other theocracy. Let us recall the holy scripture, where The LORD said to Israel:

> "I have a greater task for you, my servant.
> Not only will you restore to greatness
> the people of Israel who have survived,
> but I will also make you a light to the nations—
> so that all the world may be saved."[103]

[103] ISAIAH 49, https://www.biblegateway.com/passage/?search=Isaiah+49&version=GNT (last visited August 8, 2018).

ETHICAL STATES & RESPONSIBLE GOVERNANCE IN THE GLOBAL AGE OF PLURAL LAWS

- Werner Menski[*]

ABSTRACT

In the wider context of globalisation, legal plurality as a fact, and legal pluralism as an increasingly prominent methodological tool to make sense of ubiquitous legal conflicts, this article focuses on India. Since traditional methods of Eurocentric secular approaches to legal analysis have by now become inadequate for global use, it explores efforts to analyse what ethical forms of responsible governance in the Global South may look like, and how this relates to justice. It is argued that these challenges require responsible forms of governance, with careful incorporation of a plurality of diverse and local values. This complex scenario implies, then, that future legal education in India and elsewhere in the Global South needs to be invigorated through more recognition of the input of ethics and values, and consideration of local law-related factors to suit global Southern conditions and people's needs. These mainly culture-specific elements, as building blocks in the bricolage of postmodern nation states and their structures of governance, appear to play an important role that 'black letter' lawyers presently struggle to identify, make sense of and accept. As responsible governance in the age of globalisation can neither be achieved through 'benevolent' dictatorship, nor simple foreign transplants, nor through adoption of international norms, more focused attention to ethics and local legal realities in legal education processes, governance and judicial decision-making seems therefore a sensible way forward.

Keywords: comparative law, ethics, globalisation, governance, legal pluralism, local values, plurilateralism

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I. INTRODUCTION: STRUGGLES OVER LAW, GLOBALISATION AND JUSTICE

Also in retirement, I remain inspired by my students' often rights-based questions, and by prolific scholarly role models, especially Professors Masaji Chiba (1919-2009), J.D.M. Derrett (1922-2012), Franz von Benda-Beckmann (1941-2013), Patrick Glenn (1940-2014) and Gordon Woodman (1937-2017). The continuing activist engagements of Upendra Baxi and William Twining as eminent global scholars provide further inspiration.

Much of my own published work, over many years,[1] has been focused on the important, increasing role of personal law systems throughout the world for constructing viable regulatory orders of the future, mainly with reference to India,[2] but also for ethnic minorities in the Global North. In increasingly globalised conditions, assessment of such plurilegal arrangements remains dominated by political and academic structures that privilege the modern secular worldviews and epistemologies of the Global North, while often dismissing Global Southern legal orders as deficient in civilisation, rights consciousness and adherence to supposedly global norms of justice and of 'good governance'. However, these aggressively uniformising globalising trends, as especially Twining's work has brought out clearly for lawyers,[3] have not only generated convergences, but also created protest reactions and many new divergences, including a renewed

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[1] WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (2nd ed. Cambridge University Press 2006) [hereinafter "MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT"].

[2] WERNER MENSKI, MODERN INDIAN FAMILY LAW (Richmond: Curzon Press 2000) [hereinafter "MENSKI, MODERN INDIAN FAMILY LAW"].

[3] WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY (Butterworths London 2000); WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE (Cambridge University Press 2009) [hereinafter "TWINING, GENERAL JURISPRUDENCE"].

focus on ethics and values. Similarly, Baxi's writing on human rights, in particular, has observed that human rights are not the gift of the West to the rest of the world.[4] Indeed, while being concerned to curtail human suffering, he has sagely emphasised that in our state-centric world, '[t]he hope lies in the construction of visions of an "ethical" state'.[5] This would presumably imply notions of responsible forms of governance that minimise human suffering. The intriguing core issue would then become what kind of 'ethics' one ought to imagine being involved.

While Baxi has not been inclined to talk about religion, Twining takes the position that 'the "naturalistic turn" in jurisprudence, which emphasises the continuity of conceptual and empirical enquiries, is to be welcomed in its moderate forms, but not in extreme versions that suggest that there is no place for conceptual analysis'.[6] I have been calling a spade a spade and have projected ethics and values as contested core components of legal orders, resulting in multiple conflicts of law and religion. I also observed that after 9/11, 'religion' made a dramatic comeback in global theorising on law and governance.[7] By 2018, we seem to appreciate much more that justice has everywhere multi-vocal local as well as global dimensions, including ethical and religious connotations, which are often impossible to separate from culture. Such discourses connect closely to concepts of justice, something that cannot just be decreed or provided by an Austinian lawmaker, let alone produced by international conventions or declarations. Justice has intensely negotiated, subjective and often highly personal dimensions. It is volatile, brutally instantaneous, if things go wrong, and it

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[4] UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 6 (Oxford University Press 2002) [hereinafter "BAXI, THE FUTURE OF HUMAN RIGHTS 2002"]; UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (3rd ed. Oxford University Press 2008) [hereinafter "BAXI, THE FUTURE OF HUMAN RIGHTS 2008"].

[5] BAXI, THE FUTURE OF HUMAN RIGHTS 2002, *supra* note 4, at 9.

[6] TWINING, GENERAL JURISPRUDENCE, *supra* note 3, at 19.

[7] WERNER MENSKI, *Jürgen Habermas: Post-conflict Reconstruction, Non-hegemonic Modernity, Discourse about Spaces and the Role of Religion*, *in* MODERN SOCIAL THINKERS 180-98 (Pradip Basu ed., Kolkata: Setu Prakashani 2012).

is always in the making. This poses never-ending challenges, constituting the law-related processes that have to be worked on, negotiated and balanced, all the time, as we learn from the writings of a prominent non-lawyer, who has warned that it is not enough to strive for perfect rules, if one wants to achieve justice, but one has to manage competing expectations in their respective social and ethical contexts.[8]

Resulting from such realisations, struggling with what to call such manifestations of plurilateralism, plurilegality or simply legal pluralism, I developed the worryingly complex, frustratingly elusive, highly volatile yet nimbly powerful model of law as a kite, a subtle structure that risks crashing all the time, even resulting from the slightest wrong move.[9] When one of the elements of an intrinsically plural structure breaks down, the whole entity becomes defunct, like a human body subjected to some organ failure, or a car engine that suffers some debilitating little fault leading to malfunction.

This kite structure is a crucial modification of the earlier triangular model of law, built on Chiba's socio-legal, plurality-conscious theorising.[10] At the top, one needs to imagine corner 1, representing various forms of traditional natural law, ethics and values, including religion, hidden within

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[8] AMARTYA SEN, THE IDEA OF JUSTICE (Penguin London 2009) [hereinafter "SEN, JUSTICE"]; Werner Menski, *Justice, Epistemic Violence in South Asian Studies and the Nebulous Entity of Caste*, 36(3) SOUTH ASIA RESEARCH 321 (2016) [hereinafter "Menski, *Justice, Epistemic Violence in South Asian Studies and the Nebulous Entity of Caste*"].

[9] WERNER MENSKI, *Law as a Kite: Managing Legal Pluralism in the Context of Islamic Finance, in* ISLAMIC FINANCE IN EUROPE. TOWARDS A PLURAL FINANCIAL SYSTEM 15-31 (Valentino Cattelan ed., Cheltenham: Edward Elgar 2013); WERNER MENSKI, *Remembering and Applying Legal Pluralism: Law as Kite Flying, in* CONCEPTS OF LAW: COMPARATIVE, JURISPRUDENTIAL, AND SOCIAL SCIENCE PERSPECTIVES 91-108 (Séan Patrick Donlan & Lukas Heckendorn Urscheler eds., Farnham: Ashgate 2014); WERNER MENSKI, *Introduction: Conflicts over Justice and Hybrid Social Actors as Legal Agents, in* NORMATIVE PLURALISM AND HUMAN RIGHTS: HYBRID SOCIAL NORMATIVITIES IN CONFLICT 1-36 (Kyriaki Topidi ed., London and New York: Routledge 2018).

[10] MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT, *supra* note 1, at 119-128, 612.

Chiba's broad terminology of 'legal postulates'. This is deeply philosophical and psychological. On the right side, corner 2 signifies various hybrid social normativities as well as economic sustainability. Corner 3 on the left represents the various familiar forms and manifestations of state law and politics. Corner 4 at the bottom now highlights, as a separate yet connected element, the globalising forces of the new natural law of human rights and international law/international relations, which were also encompassed in Chiba's 'legal postulates'. This highly dynamic image of a kite that moves in the air needs to be constantly balanced by legal actors of all kinds, ideally to avoid the chaos of crashing. This kind of kite flying is not like fun on the beach. Rather, it involves the serious business of ethically sound, responsible governance, hence an arduous responsibility. Application of legal pluralism as a navigating skill, as it turns out on at least two levels or layers of legal plurality, is therefore an essential precondition for success in proper balancing of responsibilities by all law-related stakeholders. The core argument here is, and I speak from solid experience and do not just preach about this, that such navigating skills can be taught through plurality-conscious legal education, which then becomes of necessity interdisciplinary and cannot ignore plurilateralism.

Less vividly perhaps, but with no lesser urgency, highly esteemed academic colleagues argue that the overall global picture contains a strong message of complexity,[11] while others write in detail about various forms of 'mixities'.[12] All of this identifies law as a plurilateral 'plurality of pluralities' (POP), as I have begun to call it, despite the risk, mockingly pointed out earlier by another prominent legal scholar, that if one perceives everything as law-related, this wipes out any boundaries of what is 'law' and what is

[11] TWINING, GENERAL JURISPRUDENCE, *supra* note 3, at 14.
[12] E. ÖRÜCÜ, SUE FARRAN & S.P. DONLAN, A STUDY OF MIXED LEGAL SYSTEMS: ENDANGERED, ENTRENCHED OR BLENDED (Ashgate: Farnham 2014).

not 'law'.[13] However, there is actually increasing scholarly agreement now that law is fuzzy. Indeed, there is simply no global agreement on what is meant by 'law'.[14]

There has consequently been increasing scholarly agreement that contentions about universality of law are actually unproductive, leading to sterile debates.[15] I reiterate here that it is not helpful to determine whether something is 'law' or not, since a more productive question would be what kind of law the observer or analyst is confronted with. Whether one likes the type of law that one sees is of course an entirely different question. Simply to deny a voice or recognition to what one does not like risks precariousness and constitutes, in my view, epistemic violence. As law inevitably connects to all aspects of life, at times it has to assert ethical and power-related positions that some, or even many, common people and analysts will find uncomfortable, maybe even intolerable. Overall, in efforts to understand law as a globally present phenomenon, all stakeholders – which means basically all humans and their various law-related structures - need to be aware, therefore, that this deeply confusing super-diverse entity loosely called 'law' cannot be pressed into one globally uniform pattern. Indeed, it is a truism that law is everywhere situation-specific and connected to culture, thus manifests in myriad ways. Any talk of 'general jurisprudence', therefore, as Twining's major study brings out forcefully,[16] must account for such local diversities and even individual specificities. Evidently, each of these may have huge impacts in the day-to-day operation of any legal processes, both in terms of political and legal action and in relation to legal education.

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[13] B.Z. Tamanaha, *The Folly of the "Social Scientific" Concept of Legal Pluralism*, 20 J. L. & SOCIETY 192, 192-217 (1993).

[14] MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT, *supra* note 1, at 32; B.Z. TAMANAHA, *Law, in* 4 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 17-23 (Stanley N. Katz ed., New York: Oxford University Press 2009).

[15] BAXI, THE FUTURE OF HUMAN RIGHTS 2008, *supra* note 4, at 10, 12.

[16] TWINING, GENERAL JURISPRUDENCE, *supra* note 3.

II. PARTICULAR CHALLENGES FOR THE GLOBAL SOUTH

Law and legal scholarship in its modern dominant Eurocentric manifestations has, however, become excessively state-centric and has sought to avoid engagement in law's involvement with ethics and values. Such kind of legal theorising has become particularly insufficient for including everything that goes on in the Global South, where evidently most of humanity lives. Most damagingly, such monist approaches do not lead to justice-conscious local forms of law, but end up in oppressive regimes relying on power structures that often lack democratic credentials, despite claims to the contrary.

Of course, governance these days remains closely connected to power, even of the tempting Austinian type, as the *tamasha*-like antics of President Trump vividly confirm. But responsible, ethically sound governance has always been something more complex. In the current age of democratic basic structures, unidirectional top-down governance quickly turns into despotic abuse of power and/or generates multiple perceptions of grave risks for violation of basic standards, especially if various checks and balances are disabled. How all of this relates to the concept of justice becomes, then, another crucial question, about which one learns, as noted, much from the profound work of Professor Amartya Sen.[17]

It is thus not by coincidence that an important recent collection of articles on conflict resolution reiterates the well-known point that the ubiquitous presence of normative pluralism requires intense public interaction, for which many terms have been coined and employed.[18] Various conditions that put social normativities in conflict, everywhere in the world, and at all

[17] SEN, JUSTICE, *supra* note 8.
[18] KYRIAKI TOPIDI, NORMATIVE PLURALISM AND HUMAN RIGHTS: HYBRID SOCIAL NORMATIVITIES IN CONFLICT (London and New York: Routledge 2018) [hereinafter "TOPIDI, NORMATIVE PLURALISM AND HUMAN RIGHTS"].

times, demand constant agility in intense processes of negotiation, conversation or interaction. In short, ethically sound, responsible involvement by all concerned stakeholders is required, ready to grant at least minimal space for interaction with any given 'other', even an 'other' that may be hated and despised. Any bilateral agreement of two powerful contracting parties or stakeholders that choose to ignore the concerns and interests of others are thus risking serious violations of justice.

This multitude of 'others' is today often a representative of the Global South, individuals, families, or whole communities who may have moved to the Global North some time ago, but would often find that their 'traditional' social normativities, ethics and values are denied formal legal recognition in such new legal environments. Even while writing this article, another urgent request for an expert report to tackle this kind of non-recognition issue landed on my desk. Much of my earliest published work was directly concerned with such sub-surface conflicts of laws, based on detailed fieldwork, case analysis and increasing involvement as a kind of 'native assessor' before courts in the Global North.[19] The global predicament identified here, namely that we know collectively far too little about such different legal conditionalities in other jurisdictions, because of their semi-hidden nature and their location in the fuzzy boundary areas of formal laws, is undoubtedly better known by now.[20] But Eurocentric and even racist presuppositions constantly find new ways to assert themselves. The global dismissal of non-European values and 'otherness' in Europe's supposedly post-racist legal environment is sharply identified when a team of Portuguese researchers finds that '[t]he boundary between Europeanness and non-Europeanness draws a line between the presumed

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[19] WERNER MENSKI, *Legal Pluralism in the Hindu Marriage, in* HINDUISM IN GREAT BRITAIN: THE PERPETUATION OF RELIGION IN AN ALIEN CULTURAL MILIEU 180-200 (R. Burghart ed., London: Tavistock 1987); Werner Menski, *English Family Law and Ethnic Laws in Britain*, 1 KERALA LAW TIMES 56, 56-66 (1988).

[20] WERNER MENSKI, *Beyond Europe, in* COMPARATIVE LAW: A HANDBOOK 189-216 (E. Örücü & D. Nelken eds., Hart Publishing 2007) [hereinafter "Menski, Beyond Europe"].

"democratic and tolerant values" of the majority and the presumed "problematic characteristics" of the minoritized other'.[21]

Therefore, careful scrutiny of certain dogmatic positions like the rather simplistic perspective that personal laws are 'problematic', while the ideologically preferred general law seems unproblematic,[22] remains a matter of scholarly agility. In India, a highly composite nation made up of so many different 'others' that one often does not know or cannot agree on what is 'mainstream' or 'normal', especially when viewed from myriad local perspectives, multiple problems in understanding how Indian law and society work together are evident in abundance. This often causes serious conflicts, all over the world, as Indians have moved to all corners of the globe, often taking their personal laws with them. Globalised scholarship currently blames this diversity for causing trouble, rather than taking responsibility for finding ethically sound solutions that put avoidance of human suffering above strict adherence to the letter of any state law.

Given my special interest in Gujarat, mainly due to family connections since 1979, an article in 2011 highlights how the deeply contested nature of various globally present conceptualisations of law leads to deliberate misrepresentations of how Indian local laws function. Indeed, the refusal to grant legal validity to people's actions often has devastating implications for such cases and the people involved.[23] Similarly, due to my long-standing connection with the *Kerala Law Times*, since 1982, I examined the

[21] S.R. Maeso & M. Araújo, *The Semantics of (Anti) Racism in the Governance of Non-Europeanness: An Introduction*, 51(1) PATTERNS OF PREJUDICE 1, 1-8 (2017).
[22] FARRAH AHMED, RELIGIOUS FREEDOM UNDER THE PERSONAL LAW SYSTEM (New Delhi: Oxford University Press 2016).
[23] Werner Menski, *Shah Bano, Narendra Modi and Reality Checks about Global Understandings of Indian Law*, 1(1) NIRMA U. L. J. 26 (2011).

amazingly complex challenges of finding 'the right law' in Southern parts of India.[24]

My main aim, in both local scenarios, was to illustrate the practical relevance of socio-legal expertise and pluralist legal methodology to oppose simplistic globalising and/or state-centric arguments. A decade later, the need to assert the necessity of cultivating diversity-sensitive methodology remains strong, although there is more clarity now about how plurality-conscious governance works in practice in different contexts.[25] India has meanwhile experienced several years of BJP central government under the erstwhile Chief Minister of Gujarat, Narendra Modi, who for many commentators remains a deeply mistrusted political actor and a kind of legal irritant. Today, however, the Indian Prime Minister is no longer a persona non grata abroad, or is directly compared to Hitler, as happened earlier. Notably, that hateful attention is now vigorously directed at Prime Minister Sheikh Hasina of Bangladesh. Here the main reason is that this important country faces impending elections, with no agreement to date about how to manage this crucial electoral test after the strategic abolition of earlier Caretaker Government arrangements in Bangladesh in 2011.[26] Presently, there are also intensely hostile comments about the recent election of Imran Khan as a new Third Force Prime Minister of Pakistan. All of this raises questions whether mainstream political and legal arrangements of colonial heritage and the blueprints of the Global North really do not work well in South Asia. Or should one go wider to scrutinise good governance turbulences in the

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[24] MENSKI, MODERN INDIAN FAMILY LAW, *supra* note 2; Werner Menski, *Asking for the Moon: Legal Uniformity in India from a Kerala Perspective*, 2 KERALA LAW TIMES 52, 52-78 (2006); Werner Menski, *Double Benefits and Muslim Women's Postnuptial Rights*, 2 KERALA LAW TIMES 21, 21-34 (2007); Werner Menski, *Literate Kerala, Bribes and a New Case of Mata: On the Limits of Judicial Patience and Legal Realism*, 4 KERALA LAW TIMES 21, 21-31 (2008).

[25] Werner Menski, *Still Asking for the Moon? Opening Windows of Opportunity for Better Justice in India*, 49 VERFASSUNG UND RECHT IN ÜBERSEE 125, 125-47 (2016).

[26] S.Z. KHAN, THE POLITICS AND LAW OF DEMOCRATIC TRANSITION: CARETAKER GOVERNMENT IN BANGLADESH (London: Routledge 2017).

Global North, prominently the emergence of Trump as US President, the BREXIT turmoil in the United Kingdom, and the recent rise of nationalistic regimes in Poland and Hungary? They all confirm that supposedly well-established legal and political institutions in democracies of the Global North are not necessarily delivering sound democratic structures and outcomes either, let alone anything approaching perfect 'justice'.

Such reality-focused realisations have currently huge implications on how methodologies of conducting legal research and of dealing with plurilateral conflict scenarios are constructed and perceived, as normative conflicts are visible everywhere, often typically based on social normativities in conflict.[27] However, much legal education continues to be monist, rule-centric, top-down, 'black letter' doctrinal instruction, justified as teaching the basic grammar of law. However, a grammar without meaning will struggle to come to life. Law, very clearly much more than rules, whether laid down by sovereigns, parliaments or judges, includes a multitude of competing processes as well as possibly even greater varieties of values.[28] This means that anyone claiming to be in charge of 'the law' must be prepared for balancing a multitude of situation-specific competing expectations, claims and demands. This includes the constant assessment of ethics and judgments about responsible legal or law-related action. Awareness of multiperspectivity and plurilateralism becomes thus a key skill for competent lawyers. Plurilateral interdisciplinarity turns into a core requirement for professional integrity and acumen, while agility becomes an ideally ever-ready survival kit that one is somehow expected to acquire through life experience, rather than formal education. I have suggested

[27] TOPIDI, NORMATIVE PLURALISM AND HUMAN RIGHTS, *supra* note 18.
[28] TWINING, GENERAL JURISPRUDENCE, *supra* note 3, at 8.

earlier that legal education, also in India, can take an activist role in teaching about this.[29]

Rather than repeating earlier arguments about the importance of personal law systems for governance in hugely diverse nation states like India, or even in small Singapore or Brunei, this article therefore sketches out a programme for future comparative law research and its application in the classrooms of leading national law schools in India to comparative constitutional law. In fact, this is needed not only in India, but anywhere in the world. Lawyers in all jurisdictions now encounter various impacts of globalised legal forces and orders that demand and elicit local responses, which might occur as silent dissent, sidestepping any direct engagement. Marvellous examples of skilful avoidance of direct conflict exist. An Italian book comprised almost entirely of pictures provides a pertinent addition to current fierce Indian debates about the necessity of mosques as officially recognised places of worship.[30] Such local legal arrangements then typically manifest as informal global legal orders that remain under constant challenge from various stakeholders. This may be more so in the Global South, where much law remains non-state law, unofficial law, or whatever one wants to call it, which is by no means unknown in the Global North. Notably, this does not make it less powerful than state law. Indeed, such non-state patterns have the potential and the skills to mimic state law structures and processes, while keeping conflicts at local informal levels.[31]

[29] Werner Menski, *Flying Kites in a Global Sky: New Models of Jurisprudence*, 7 SOCIO-LEGAL REVIEW (BANGALORE) 1, 1-22 (2011).

[30] NICOLÓ DEGIORGIS, HIDDEN ISLAM: ISLAMIC MAKESHIFT PLACES OF WORSHIP IN NORTH EAST ITALY, 2009-2013 (Bolzano: Rorhof 2014) [hereinafter "DEGIORGIS, HIDDEN ISLAM"].

[31] K. KOKAL, *Tamāshā*, *supra* note 18, at 189-206.

Since nothing in this intensely dynamic, indeed liquid,[32] environment of law is forever set in stone, law students as future professionals need to be prepared for encountering such challenges, both in terms of theory and practice. Responsible use of any type of law-related activity demands constant assessment and re-balancing of the various interacting law-related inputs to achieve the best possible result at any given time and place. It is not sufficient, as young professionals will soon discover in practice, to simply rely on the shortcut of precedent, or just 'the letter of the law', as competing interpretations generate ample room for further conflict and, thus, negotiation. This ubiquitous scenario will be different under the many diversely different conditions encountered all over the world, but competent lawyering and rights-conscious justicing, at it is now called in India,[33] rather than pompous judging, needs to be aware of these complexities.

In India, it is thus critically important to provide the best possible interdisciplinary legal education achievable within the limited space of the five-year law programmes on offer. The initial teaching on subjects like politics, economics, sociology and history is evidently crucial to open students' eyes to the solid embeddedness of law in society at all levels. Delivering this kind of plurality-conscious education with utmost care appears to me as one of the core needs for improving legal education in India. If many law students initially do not see the point of this endeavour, it is precisely the tasks of their teachers at this crucial early stage to open the students' eyes to law as an interdisciplinary global 'plurality of pluralities'. Mainstream law teachers may never do this, though this is possible, too. Rather than dismissing interdisciplinary teaching support grudgingly as a necessary evil, such 'pre-law' teaching should be integrated

[32] Werner Menski, *The Liquidity of Law as a challenge to Global Theorising,* 11 JURA GENTIUM: PLURALISMO GIURIDICO 19, 19-42 (2014).

[33] Professor Mohan Gopal, Address at the Judicial Academy in Delhi (Jan. 2018).

more fully into existing syllabi. Here, too, more teacher education seems desirable to achieve better standards.[34]

III. THE PROMISING SCOPE FOR SOUTH-SOUTH COMPARISONS

For me, a scholar with one foot each in the Global North and the Global South, the frequent use of denigrating strategies directed at leaders and countries of the Global South, while largely condoning questionable activities by Global Northern leaders and states, leads to a diagnosis of dangerous self-righteousness on the part of many commentators, including scholars of the Global North and their acolytes from the Global South. Objectivity seems to have flown out of the window when partiality and ill-tempered unconstructive criticism rule the roost. Incidentally, this also provides clear-cut evidence of the large role of emotions when dealing with law as a field of analysis.[35] Regarding South Asian law and politics, highly myopic and politicised presuppositions infect much recent writing on Indian laws and South Asian laws more generally, presently with brutal consequences and remarkable disregard for factual accuracy in Bangladesh. Since such excesses of self-righteousness remain present so prominently, South Asia remains framed today as a prime site of serious serial violations of basic rights and abuses of power. The impression created is that deeply confused, dysfunctional postcolonial nation states still have not managed to produce the constitutionally promised levels of justice that particularly the Indian Constitution so effusively offers. While it is certainly wrong to group all South Asian states together, one should also question presumptions that the legal orders of the Global North somehow have perfect legal systems by now, in which systematic rights

[34] See a Special Issue: *Educating the Nation,* 38(3) SOUTH ASIA RESEARCH (2018) [hereinafter "*Educating the Nation*"].

[35] E. Jones, *Transforming Legal Education through Emotions*, 38(3) LEGAL STUDIES 79 (2018).

abuses do not occur. As indicated, I do not think the answer can be in the affirmative.

Pessimistic presumptions of continuous violations of basic rights in the Global South, combined with entrenched presuppositions of guaranteed good governance in the Global North, do not constitute an ethically sound basis for a rational analysis of justice in the Global South, or specifically in India. Basically, this continued struggle with entrenched prejudices obstructs deeper understanding of the various dynamic modifications of responsible governance that local conditions and pressures often make necessary to avoid complete chaos. Many Indian scholars, too, seem unable to overcome such mental blockages and their own inferiority complexes when they start from presumptions that everything in the Global South is somehow deficient because it does not follow the Global North's superior templates. Assessing Indian law on its own terms, rather than by the external criteria of some imposed or projected global yardsticks, remains thus extremely difficult and obviously contested. This then impacts on how such laws are taught all over the world, not only in Indian law schools.

In particular, many observers, including academic teachers, refuse to accept that Indian law is significantly different from so-called Western, purportedly global prototypes, because the nature of the state is different. The dire situation of comparative legal expertise in Indian law schools is well-known, though some recent progress is now recorded.[36] Enormous work remains to be done to understand one's own system first, before rushing to study or compare other models. Significant misrepresentations are also perpetuated by a self-interested publishing industry that makes enormous amounts of money from supplying highly inadequate and often completely outdated law textbooks. However, not all is lost, as there has

[36] M. P. SINGH, THE INDIAN YEARBOOK OF COMPARATIVE LAW 2016 (New Delhi: Oxford University Press 2017).

been some kind of climate change in how Indian legal developments are perceived and taught, with growing recognition and acceptance that Indian law will necessarily need to develop differently from Western models, as law is culture-specific and follows different ethics, while the magnitude of challenges posed in India is unique, too. This realisation impacts also on analyses of constitutional laws and their development. The teaching of personal law systems of India, however, seems largely neglected, partly due to inherent cultural and ideological biases in classifications and categorisations, which are either still colonial, or have become a form of neo-colonial globalised dismissal of anything connected to 'tradition' and 'religion'. It is evident that such hostile approaches to one's own law fail to prepare India's future lawyers for becoming well-versed skilled cultural and legal navigators.

Easy answers and remedies are probably not available, but to dismiss Indian personal laws today as irrational and backward comes pretty close to violating common people's basic human rights. The argument that Indians, too, deserve a right to culture can no longer be treated as outrageously backward, particularly when one considers recent developments in the rainbow nation of South Africa. Comparative law, practised as South-South comparison, teaches that the legal orders of South Asia are not out of line with other global Southern jurisdictions, but are different.[37] The benefits of studying comparative law intensively clearly extend to culture-sensitive analyses of constitutional laws and patterns of responsible, good governance within the Global South. The present article generally endorses this methodology, but adds the cautionary note that the respective cultural and religious specifics of the various jurisdictions and legal orders under comparison should always be considered with the

[37] O. VILHENA, U. BAXI & F. VILJOEN, TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (New Delhi: National Law University Press 2014) [hereinafter "TRANSFORMATIVE CONSTITUTIONALISM"].

greatest possible care. Here, too, past, present and future are connected, different ethics are involved, and being aware of culture-specific notions of linkages offers added scope for deeper analyses of ethically sound, responsible legal actions.

IV. THE BASIC STRUCTURE OF THE INDIAN STATE AND SMOKESCREENS OF DEMOCRACY

This section indicates how explicit recognition of ancient roots and historical specifics within the Indian legal order may contribute to future analyses of the underlying ethics of the Indian state. For, Global Southern good governance seems to involve deliberate strategic silence at times, especially about ethics. While some kinds of 'cultural' knowledge appear to be taken for granted, it appears not always advisable to expose for public scrutiny all that is known and involved in structures of governance and state management. Thus, sometimes silence may be golden and may offer ethically sound solutions without potentially destructive fuss.[38] Specifically, the right moment for certain decisions may be crucial for the success of a particular project. This is not necessarily deviousness, but could be part of a skilful government's toolkit for handling tricky challenges of good governance.[39]

In this context it is pertinent to note here that it is now becoming more widely accepted that India is not really a common law country. The Supreme Court of India is undoubtedly among the world's most powerful courts, primarily because this role was granted to it by the Constitution. The superior position of judges in the Indian legal system exists, however,

[38] See the evidence of unofficial mosques in DEGIORGIS, HIDDEN ISLAM, *supra* note 30.
[39] WERNER MENSKI, *The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda, in* THE MANY FACES OF INDIA. LAW AND POLITICS OF THE SUBCONTINENT 136-82 (M. McLaren ed., New Delhi: Samskriti 2012); Allah Rakha v. Federation of Pakistan (2000); MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT, *supra* note 1, at 378-79.

not merely because of common law heritage. It may have ethical antecedents in ancient roots of wisdom, with connections to higher entities, not political powers, but cosmic concepts related to holistic notions of balancing and some kind of natural justice. This is the kind of naturalistic turn that Twining identifies as potentially useful today, provided it does not turn into irrational suspension of analysis.[40] This chain of arguments thus endorses recourse to 'tradition' in the global search for ethically sound governance.

In post-colonial India, the exalted position of the judiciary is portrayed as mainly related to the specific socio-legal predicaments of a newly independent, long-subjugated country and its requirements for assiduously securing basic justice. Clearly, the people of India, in fact their responsible leaders, gave themselves a highly ambitious Constitution in 1950, knowing full well that many of the promised rights and anticipated achievements would remain mere ambitions and pious hopes for a long time to come, the aspiration 'to establish a new political and moral foundation'.[41] This partly symbolic system required a strong, independent judiciary to secure implementation and guard the nation and its people against various risks of chaos.[42] Moreover, nobody really expected, probably, that India's population would increase so dramatically to now more than 1.3 billion people. Evidently, this is putting enormous pressures on resources, including the environment, spearheading globally pioneering strategies to handle several fundamental crises of development. No other country in the world except China can be compared to India in terms of the magnitude of tasks and challenges faced by anyone wishing to govern and guide such a huge, composite nation responsibly.

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[40] TWINING, GENERAL JURISPRUDENCE, *supra* note 3, at 19.
[41] TRANSFORMATIVE CONSTITUTIONALISM, *supra* note 37, at 3.
[42] Werner Menski, *Sanskrit Law: Excavating Vedic Legal Pluralism,* SOAS SCHOOL OF LAW 1, 1-43 (2010), http://ssrn.com/abstract=1621384; Menski, *Justice, Epistemic Violence in South Asian Studies and the Nebulous Entity of Caste*, *supra* note 8.

While the Constitution is evidently the central pillar of the nation, the country is governed by institutions composed of persons, mainly the Prime Minister, the President and the Supreme Court of India, representing the classic three branches of government. All three institutions are still heavily dominated by males, which today generates gender-focused critiques. Beyond that, global comparative study of constitutional arrangements leads us to believe that as long as academic analysts feel able to certify satisfactory interaction of these major institutions, and those who govern act more or less responsibly, all is well.

I am not claiming to be a constitutional law expert, but have always taken a more cautious view, aware that ethically sterile studies of constitutional law, in global conditions of majoritarian secularised spaces, tend to silence and deliberately cut out the role of 'religion' and thus of ethics, purportedly fearing resurgent 'theocracy'. However, if one takes the view that all religions are actually man-made, basically human constructs imagining and believing in certain divine entities as superior authorities, any fear of theocracy should be more profoundly re-conceived as agile concern about abuses of political and legal authority by certain people in the name of some religion or conviction. Since especially the major theistic religions insist that humans are ultimately unable to 'understand' the deeper nature of the superior divine entity, teaching in various ways that 'God knows best', we should be alert to this further human manipulation of divine authority as a legal actor, even as a kind of global CEO of the world. Taking a non-theistic approach does not, however, deny a role for religion. It simply opposes the abuse of religion. In the Global South, there are well-known non-theistic religions, mostly perennial minority faiths, such as Jainism,[43] but also much bigger communities, including many Hindus, that link themselves to the cosmos or Nature in various

[43] AIDAN RANKIN, JAINISM AND ENVIRONMENTAL PHILOSOPHY: KARMA AND THE WEB OF LIFE (London and New York: Routledge 2018) [hereinafter "RANKIN, JAINISM AND ENVIRONMENTAL PHILOSOPHY"].

culture-specific forms, rather than specific gods. The hegemonic global history of religions, thus, focusing on imagined old men as dominant leaders for certain ways of life, including governance, has trapped itself within flat subjective constructions that, on closer inspection, lack rational legal analysis.

Yet proper reaction to this dilemma cannot be the denial of any role for religion and ethics in relation to law. Instead, deeper constructive critical engagement is needed. In reality, the presently dominant smokescreen of supposedly secular structures of democracy, hiding different patterns of oligarchy, sometimes even outright dictatorship, is always run by certain individuals. Hiding behind those institutional structures, they also have beliefs and ethics, but are often driven by inflated visions of their own importance. US President Trump embodies most dramatically how a strong personality can mesmerise (or antagonise, as the case may be) a voting public by certain gestures and promises. This allows him to conduct governance in an ethically questionable style that fulfils the personal desires and ambitions of the office holder, while also playing to the democratic gallery through material(istic) or public interest arguments that persuaded a majority of voters, but also victimising, at will, whoever angers the powerful potentate. Of course, since political convictions and developmental agenda are never completely agreed within any specific electorate, India's current Prime Minister faces similar predicaments of partial acceptance and considerable opposition, with deep reservations about many current agenda of governance. But Modi as a skilful kite flyer has managed to guide and hold the Indian nation together in many more ways than initial critics imagined. However, as indicated, many things are simply not talked about publicly, but seem to underpin the evident tenacity and ethically grounded decision-making trajectory of such a leader.

Overall, it seems that the panorama of Indian democratic governance has mainly focused on key personalities. First there were Gandhi, Ambedkar

and Nehru, who never completely agreed about anything, then an increasingly authoritarian Indira Gandhi, then Rajiv Gandhi as a modern technocrat. More recently many different leader figures led to the end of Congress domination, which brought significant ethical changes of governance, with details deliberately hidden from full view. So, the smokescreen seems to have changed, but not the institutions themselves, though the way in which they are perceived and operated has partly changed, too. Present semi-hidden modifications raise complex questions about the extent to which concepts of responsible governance in India may now be different from what we think we know from earlier periods and from other parts of the world. A key question may be to whom or what those who govern and lead presently actually feel responsible.

Looking around the Global South, of course we also find significant violations of democratic principles and conventions. Some African rulers have been refusing to step down even after decades in post (Angola, Zimbabwe) and some Asian potentates use every possible trick in the box to stay in power. Presently, a Latin American leader, President Morales in Bolivia, is going as far as claiming a natural right to permanent rule. Such clearly undemocratic excesses of discretion and plain abuses of power fit Twining's warnings about risks for dismantling of conceptual analysis and the need for rational ethically informed scrutiny.[44]

V. RESPONSIBLE GOVERNANCE IN INDIA AND THE SCOPE FOR NEW RESEARCH

The development of constitutional law ideas in India, from 1947 onwards, but with deep historical roots which have largely remained invisible, represents a unique case, whose study remains seriously undeveloped. This is largely because Western secularity-focused methodological approaches

[44] TWINING, GENERAL JURISPRUDENCE, *supra* note 3, at 19.

have been employed, and are still being used, to analyse a definitely non-Western system of living constitutional law that is inevitably connected to something larger than human agency and powers of decision-making.[45] In India, the Napoleonic image created by the presence of an impressive Master Code, the Constitution of 1950 with its numerous amendments to date, is probably inadequately interpreted if it is read as a body of laws applying to all people equally. This was, arguably, never its uncontested intention. The makers of the Constitution, by and large, were very aware, in different ways, that they were merely creating a protective umbrella of legal provisions for a highly diverse nation, a vision for an ethical state of the future, a legal entity in which a plurality of religions would not be a cause for moral panic, but for careful navigation of competing expectations. Hence the makers of the Constitution seem to have formulated a set of basic rules as wide-ranging ambitions for future actions, not full instant guarantees and justiciable entitlements. In a sense, then, the most basic methodology of reading the Indian Constitution depends on whether one wishes to believe or assume that this set of rules and principles of law is an 'is', or merely an 'ought' in many respects.[46] It seems that because India's Constitution is written and promulgated in English, and avoids loaded 'religious' terms like *dharma*, using instead modern terminologies of rights (and since 1976 also explicitly duties, when Article 51-A was added to the Constitution), this has driven academic analysis towards assuming close similarity with other constitutional documents of this kind around the world, a world that is today assumed to be largely a secular space. In fact, this product of intense negotiations is known to be an elaborate compromise of ethical positions, also with regard to the role of religion(s), a unique highly sophisticated culture-specific construct, which then also demands unique methods of analysing it. This, in my view, has not happened yet in sufficient depth, partly because far too many scholars are avoiding the 'religious' elephant in the

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45 RANKIN, JAINISM AND ENVIRONMENTAL PHILOSOPHY, *supra* note 43.

46 BAXI, THE FUTURE OF HUMAN RIGHTS 2002, *supra* note 4, at 9.

room. A deliberate avoidance of pluralist challenges and thus of plurilateralism, however, cannot lead to 'complete justice'.

This is, then, directly comparable to the fundamental problem identified by a brilliant recent study on interpretation of the Qur'an, which, according to the author's core argument, only makes sense for living Muslim law if one examines pre-text, text and context as a continuum of a living and intensely plural tradition.[47] Public law scholars customarily pay lip service to the uniqueness of the Indian Constitution, but simply have not gone far enough in analysing its dynamic special features ethically and holistically in a similarly integrated methodological sequence, focusing instead too much on the legislative text itself. I see the same pitfall of methodology here, and thus similar shortfalls of acquisition of knowledge.

I argued earlier that the moment we cross the Bosporus or Gibraltar,[48] there is much darkness, lack of knowledge and deficient understanding of local socio-cultural specifics. But then I encountered an Italian professor of law and politics, who portrayed the Indian multicultural state eloquently as a *sui generis* case of plurality-conscious governance.[49] This study identifies a complex political and legal structure that poses unknown and partly unknowable challenges of governance and diversity management, providing rich material for further studies in comparative constitutional law, well beyond prominent leader figures.

We have now teamed up through a series of Doctoral Summer Schools in Europe to promote further comparative legal studies. Starting in 2010 in Switzerland, this now extends also into India, with strong Italian involvement. In January 2018, we met at NLUD in Dwarka in Delhi, and

[47] SHAHAB AHMED, WHAT IS ISLAM? THE IMPORTANCE OF BEING ISLAMIC (Princeton University Press 2016).
[48] Menski, Beyond Europe, *supra* note 20.
[49] D. Amirante (2015) *Lo Stato Multiculturale*. Bologna: Bononia University Press, reviewed in *South Asia Research*, 36(2) (July 2016), pp. 284-286.

the latest Summer School in Italy (17-23 September 2018) will be followed up in September 2019, hosted by the Rajiv Gandhi National Law School in Patiala. In this truly global, highly diverse enterprise, a team of senior researchers has been involving many doctoral students and junior academics at different stages of their career, exploring ethical and practical problems of legal pluralism and cross-disciplinary links in increasing depth, beginning to yield wonderful fruits.[50] The new focus on comparative law in the age of globalisation and the related examination of contributions from the Global South to the contemporary debate on legal theory have provided further exciting results that will be published in due course. We are finding that despite the prominence of the officially secular spaces that most nation states claim to be, 'religion' continues to be a major law-related factor in fine-tuning the ethics of responsible governance.

It seems that through this North-South co-operation we have finally reached a point in global constitutional law debates where talking about the input and role of 'religion' in relation to governance, specifically regarding environmental law, is no longer causing moral panics. It has in fact become integral to our analyses. Transcending also various barriers towards acceptance of difference, rather than silencing potentially troublesome divergences, we can now more confidently attempt to seek to bridge still persisting gaps of understanding and knowledge. The most recent Summer School discussed 'Andean values' and we are no longer afraid to address the controversies over the Asian values debate. A big window of opportunities has been opened for intensive cross-cultural debates about constitutional law, creating an exciting spirit of optimism. Finally, in the global age of plural laws, we feel liberated from earlier fetters of political correctness that declared deeper engagement with local values and ethics an inherent violation of constitutionally entrenched

[50] See especially TOPIDI, NORMATIVE PLURALISM AND HUMAN RIGHTS, *supra* note 18.

guarantees. The path is now cleared for tackling further questions what 'responsible governance' actually means and how Professor Baxi's suggested vision of an 'ethical state' may be further interrogated.

CONCLUSION

Excited about these new academic exchanges, we have resolved not to ignore the practice-focused need to strengthen legal education in India, so that future generations of lawyers and legal scholars may be better equipped to make sense of their own legal system and to compare it sensibly with numerous variants found in other legal orders. Some of these may contain useful elements for incorporation into the respective constantly evolving national legal system, which more likely than not is already a mixed legal system. Having blown away the cobwebs of colonial mentality and Global Northern intellectual domination, we now sense the potential for more rational analyses of current Indian and other global Southern methods of fine-tuning responsible governance. Proceeding in this way is no longer perceived, at least among us, as inherent violation of basic principles of enlightened modernity. Therefore, this project may well become a launching pad for careful re-examination of useful elements of earlier and more recent enlightened traditions found everywhere in the Global South, which is another truly exciting endeavour.

One major challenge for this project is going to be to secure the sustained involvement of law teachers from many parts of the Global South. There is a need to train a whole new generation of highly skilled young academics who can carry on the massive work of producing ethically sound comparative law studies in the age of globalisation, built on plurality-conscious acknowledgements of the contributions to theory and practice made by the many different people of the Global South. These instrumental aims and agenda need to go hand in hand with further ethnographic studies. This will help to understand better how law, as a

central aspect of human life, in its many different manifestations, may best contribute to patterns of ethically sound, responsible and sustainable governance not only in the Global South, but anywhere in the world.

We have already found that it is inappropriate to assume that the Global South should always seek to learn from the Global North. We are also discovering that 'good governance' as a core concept is not simply a matter of top-down regulation, but can be a highly sophisticated and deeply dynamic enterprise of internal self-regulation. All stakeholders ought to have some recognised share. This implies that 'the state' becomes willing to listen to any 'other', including individual citizens, whose right to life, in its numerous dimensions, protected under Article 21 of the Indian Constitution, seems to guarantee rather more today than was originally thought possible. Ethically sensitive states, as well as skilful humans, even if not highly or formally educated, may historically or instinctively know rather a lot about what human happiness and responsible action actually mean in lived experience. It appears that the time has come for the nation, rather than just the citizens, to learn that important lesson.[51]

The global Northern presumption that more state involvement is necessarily positive, currently being revised worldwide, is therefore also on our list of future research agenda. The lessons from the Global South expected from future work are likely to identify many diverse approaches to perceptions of what may be 'the right law' at any particular time and in any particular space. Keeping an open mind about the vast potential of learning from each other, rather than silencing 'the local' as inferior to 'the global' and the state's claims to power seems like a sensible strategy for further plurality-conscious research about what it means, at all levels, to nurture responsible governance. It will also instruct us better about what this then means for visions of an ethical state, and for global visions, which will all, and of necessity, be plural and interdisciplinary.

[51] See the Special Issue on *Educating the Nation*, *supra* note 34.

WHY NO STUDIES CONCERNING THE IMPACT OF JUDICIAL DECISIONS?

- Upendra Baxi[*]

I. PREFATORY

I am glad to have been invited to contribute to this inaugural issue of the GNLU Law and Society Review. The landscape of legal scholarship in India is slowly changing to accommodate other human and social sciences in the professional teaching of law. This is most welcome, yet tendency towards unidisciplinarity thrives and law teaching, learning, research, and writing (TLRW, hereafter) seems to cherish the idea that the theory and practice of law constitute an exclusively autonomous realm, where strangers are welcome as the exotic others provided they never enter the sanctum sanctorum of the study of law itself.

TLRW in silos finds formidable support in several distinctions: the distinction between doctrinal and empirical research,[1] 'pre- law' and 'law' apartheid in National Law Schools and other institutions of learning law which have adopted a five year curriculum,[2] academic promotions, events,

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[1] UPENDRA BAXI, SOCIO-LEGAL RESEARCH IN INDIA : A PROGRAMSCHRIFT (New Delhi, Indian Council of Social Science Research, 1975); republished in *The Journal of Indian Law Institute* , 14:19372; also see, Manoj Kumar Sinha & Deepa Kharb (Ed.), LEGAL RESEARCH METHODOLOGY (Delhi, Lexis Nexis, 2017); ISHWAR BHAT, IDEA AND METHODS OF LEGAL RESEARCH (Oxford University Press, 2019; forthcoming).

[2] The original design of the first National Law School at Bangalore (of which I was a Director-Designate for well over a decade) was to avoid the apartheid between social science and humanities colleagues on the one hand and law teachers on the other. Not many national and other five year law schools attempt to foster interaction, dialogues, and co-teaching among 'law' and 'non-law' teachers. What is more, interaction among the latter is also intriguingly lacking, thus nullifying a modicum of 'integration' of law, social sciences, and humanities.

esteem polices,[3] resources for research[4] and library expansion.[5] We know a good deal about the overweening control of legal education by the Bar Council of India and the University Grants Commission over the policies of admission, pedagogy, timings, curriculum, and evaluation but not enough by way of empirics of regulation in all their ambivalences.[6] All in all, we think we know enough about the successes and failures of legal education but TLRW formations remain at best 'known unknowns'.[7] Perhaps, one way to interrogate unidisciplinarity is to study the TLRW formations in terms of social scientific research paradigms.

Protagonists of unidisciplinarity are right to insist on the loyalty to their versions of the autonomy of legal decisions, whether the domain of executive/administrative, legislative, adjudicatory, implementational/ enforcement methods.

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[3] The patterns of leadership and representation of social science and humanities vis-à-vis professional law teachers have not been studied across five year programme institutions. Nor has been the pattern of promotions and career advancement. I do not know how esteem indicators (scholarly standing and publications as well as related recognition) in 'non-law' spheres are handled by a law vice chancellor and her colleagues.

[4] There is not enough information concerning the ratio of research allocation for the 'non-law'. One would assume that some research initiatives will be rewarded by outside specialist agencies but the competition would rather be high and flow meagerly to individual scholars working in law schools.

[5] We do not know the changing patterns of resource allocations for libraries, of course, subscriptions to electronic databases has to some extent obviated the difficulties of maintaining unsustainable annual subscriptions to relevant journals and to some extent also alleviated the acquisition problem for social science and humanities. Still, a periodic survey of available library materials remains imperative.

[6] Ministry of Law and Justice, Government of India, *A Study To Create Evidence-Based Proposals for Reform of Legal Education in India - Suggestions For Reforms at the National Law Universities set up through State Legislations* 56-62 (Scheme for Action Research and Studies on Judicial Reforms, 2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171842. This Report is valuable as it sheds light on the overall cognate concerns.

[7] NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (Random House Publishing Group, 2007); NASSIM NICHOLAS TALEB, ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER (Penguin, 2012).

After all, these decisions constitute the law ('authoritative legal materials' as Dean Roscoe Pound called these). If these are not studied closely (description, analysis, explanation, evaluation, and even prediction) by TLRW in law schools, where else will these be studied? Besides, every discipline in order to be such has a core of the distinctive disciplinary subject matter, and its ways of TLRW which constitute that core which in turn gives rise to disciplinary boundaries and burdens. Certain privileging of legal knowledges (knowledges about how lawyers and judges, and other institutions think and act) is considered both necessary and desirable. Correspondingly, certain quotients of prescribed ignorance are also considered justified; there are limits to what one may know about the world, not everything that is to be known can be offered in one syllabus or curriculum, or indeed by one degree.

It may come as a surprise to the present generations of TLRW that precisely this sort of championing of unidisciplinarity was urged every time an embrace of other disciplines in law schools was urged! The discussion and debate was framed in terms of 'professional' *v.* 'liberal arts' type and it assumed especial visage in the run-up of 10+2+5 legal education and the creation of National Law Schools. It also surfaced as an issue of confrontation between doctrinal and empirical research. I thought that by this time the matter was settled that TLRW was increasingly a multidisciplinary affair, and it had to take social and human sciences increasingly into account; I would now add also 'hard' or 'natural' sciences as increasingly large numbers of areas like IPR, or data analysis, right to privacy, and even social and economic human rights may not be understood in absence of any scientific grasp. But it seems that the 'eternal return of the same' (to vulgarize Nietzsche's expression) haunts the TLRW operations and formations.

II. IMPACT

In this conversation, I do not attend to the larger questions about the histories and futures TLRW but look at the sorry state of impact of judicial decisions. I say this because while it is thought that judicial decisions are widely obeyed, we do not have accurate information even about the apex court. Successful contempt of court proceedings are rare, although the apex court is quite aware of the problem of effectiveness of its own decisions. As late as 2014, it declared: *'Non-compliance of the orders passed by this Court shakes the very foundation of our judicial system and undermines the rule of law, which we are bound to honour and protect. This is essential to maintain faith and confidence of the people of this country in the judiciary'*.[8]

The law academics do a reasonably good job of the analysis of the normative aspects of adjudication but rarely pause to ask whether judgments of High Courts and the Supreme Court are honoured in practice. The senior lawyers and the organized Bar seem to be unconcerned with the actual impact of the decision, unless prodded by clients. In social action litigation (SAL), commonly still miscalled public interest litigation (PIL), epistolary litigation thrives on hope and trust orders of the Supreme Court, which exercises what is called the 'nudge' function.[9] So serious is the situation that law schools, academic research, and Indian law journals must, in my opinion, take a break from normative law for a couple of years and study across the nation the situation of compliance and impact (the difference between the two is discussed later).

[8] Subrata Roy Sahara v. Union of India and others (2014)8 SCC 470.

[9] Upendra Baxi, *Uprooting Injustice: Organizing Negation: The Enduring Contribution of Justice P.N. Bhagwati*, in MOOL CHAND SHARMA (ED) LAW, JUSTICE, AND JUDICIAL POWER: JUSTICE P.N. BHAGWATI' S JUDICIAL APPROACH, 112-132 (Oakbridge Publications, 2019).

As early as 1982, I had hoped to start a debate in India by a provocatively titled essay but it failed totally to spark any debate![10] This article had no impact on legal scholarship! 'Better late than never' is a good motto for living an eternal life but even a short term neglect of studies in legal impact can lead to massive failures in law making, adjudication, and understanding of law's role in society.

III. A TYPOLOGY?

In order to grasp the phenomenon of low or nil impact, we have to map out the terrain showing how it occurs. The most common strategy is to have the statutory provision which is declared void printed along with the statute. Chintan Chandrachud has pointed out that four years after the Supreme Court ruling invalidating Section 66A of the Information Technology Act, the Internet Freedom Foundation study found that 'the police has continued registering FIRs and the invalidated section is still valid because of the 'continuing presence' of the section 'on the statute book'.[11] No responsibility is owed to the Constitution by any officials or Ministers for this state of affairs; neither the young activist petitioner in that case has drawn the attention of the Court and the Supreme Court has contented itself with passing partial and somewhat effete directions rather than ensure that such things are forever forbidden under the Constitution.

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[10] Upendra Baxi, *Who Bothers about the Supreme Court? The Problem of Impact of Judicial Decisions,* 24 JOURNAL OF THE INDIAN LAW INSTITUTE 4, 842 (1982).

[11] Chintan Chadrachud. *The Afterlife of Section 377*, THE INDIAN EXPRESS (29 January 2018); Apar Gupta and Abhinav Shekhri, *On the Ground, SC Ruling on Section 66-A is frequently Violated*, THE INDIAN EXPRESS, (27 February, 2019). The authors welcome the Supreme Court's invigilation on behalf of the PUCL petition but maintain that "this ended as speedily as it did, the bench never bit into the larger issue of addressing signal failures. Non-compliance with 66-A is only the most visible symptom of a deeper malaise where one branch of the state is simply not being heard by the others. Bridging this communication gap requires a more sustainable solution than requiring someone — PUCL in this case — to knock on the Court's doors".

This strategy is widely prevalent even in the Government of India press publication of the Constitution of India. Article 124 as regularly printed does not acknowledge the important invention of the judicial collegium; and you may be forgiven for thinking that the doctrine of basic structure is not a part of the Constitution because Article 368 nowhere expressly mentions it! What may be the underlying idea, or even implicit theory, about the Constitution animating this approach? Is it the approach that the Constitution may only be amended by following the procedure outlined in Article 368? If this is so, how may one explain the little-known Article 35-A, which is not available in any official text of the Constitution but freely so only on the internet?[12] The matter of whether the President can exercise the amending powers solely entrusted to Parliament (and State Legislatures when required by Article 368) is now shortly to be finally heard by the Supreme Court of India. Further, in such a context, what may be the precise import of the phrase in the Oath under the Third Schedule where the political representatives and justices take an oath to uphold "the Constitution as by law established?" Does that only include the law as established by legislature or also the law declared under Article 141 and 142 which have been conferred by the Apex Court to endow it with some extraordinary powers to declare binding law? Or, both?

In the United States, Professor Rosenberg has created a near perfect moral storm by his *Hollow Hopes*[13] and critique of Lani Guinier's work on

[12] In substance, Article 35-A empowers the Jammu and Kashmir state's legislature to define "permanent resident" of the state and provide special rights and privileges to those permanent residents. It was added to the Constitution through a Presidential Order [The Constitution (Application to Jammu and Kashmir) Order, 1954] by the President of India on 14 May 1954, exercising the powers conferred by clause (1) of the Article 370 of the Indian Constitution, and with the concurrence of the Government of the State of Jammu and Kashmir. The issue is not only constitutional but partly political and very emotive as it is linked with the Instrument of Accession and Kashmiri identity.

[13] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (University of Chicago Press, 1991). See for some notable earlier

demosprudence. I am particularly fond of his critique 'Romancing the Court'.[14] His finding that not many Americans know about the concurring or dissenting opinions of the Supreme Court of the United States, and nothing at all about the oral dissents, is borne out by a large number of empirical social studies. I also agree that oral dissents are least recognized, even by law academics. As general observation, it may even be said that most legal academicians are too 'court-centric'; and do not study the legislatures, the political executive, and the bureaucracy, although studying *not what the judges say but what judges do with what they say* (as Karl Llewelyn was fond of advising first year law students at Chicago) offers a plateful!

But I doubt if anyone else than law academics would systemically study courts and judges; and the changing history and geography and cultures as shaping aspects of constitutional cultures, traditions of legal hermeneutics, and patterns of adjudicatory (demosprudential) leadership. In India most law academics even today study judicial decisions as solitary texts and they teach these acontextually. Although this is neither the time nor place to review the recent trends in Indian legal scholarship, a few observations of trends need to be made in the present context. Doctrinal treatises (mostly written by lawyers and justices, though there are many a welcome trend when leading law publishers invite academics to edit editions of such treatises and even write these on their own) and most scholarly work still remain qualitative, and some of high comparative worth; while some distinctively socio-legal (empirical) in character emerges, jurimetrics type analyses of courts in India have not been systemically pursued by Indian scholars, although with some notable exceptions).[15] In this context, I insist

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explorations, Stephen L. Wasby, *The Supreme Court's Impact: Some Problems of Conceptualization and Measurement*, 5 LAW & SOC. REV. 41(1970-71).

[14] Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563 (2009).

[15] Vijay Gupta, Abhinav Chadrachud, Madhav Kholsa, Shyalshri Shankar, political scientists like Ujjwal Kumar Singh, and sociologists like Nandini Sundar, Kalpana

that at least in the wake of social action litigation (SAL) in India, one ought to study the inter-sectionality[16] between social movements and courts.

I will shortly come to this aspect but I must at the outset say that: (a) impact studies, in their methods of measurement and ideological aims, are notoriously ambivalent; (b) different conceptions of 'politics' animate qualitative versus quantitative studies[17]; and (c) while we ought to be wary of placing "uncritically', as Professor Rosenberg states, courts at the "centre of social movements", we also ought to be equally cautious about any extreme conclusion that there is no social science, or indeed any evidence, of judicial impact on social change or movements.

May I also restate the obvious facts about social movements? First, even when one thinks that it is possible to construct a metatheory or narrative about social movements, these remain (certainly at meso and micro levels) a deeply culture-bound phenomenon, driven by race/caste, gender, faith and community divide, often accentuated by practices of liberal and illiberal politics, national, geo-political, and international. Second, there is a difference between broadly violent and non-violent social movements, rendered even more complex by issues of ethics of self-determination and

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Kannabiran, Anupama Roy, and Pratiksha Baxi; Upendra Baxi, *Towards a Sociology of Indian Law* (ICSSR/Satvahan, 1985).

[16] Dorthe Staunæs, *Where have all the subjects gone? Bringing together the Concepts of Intersectionality and Subjectification*, 11 NORA - Nordic Journal of Feminist and Gender Research 2, 101-110 (2003); Kimberley Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color*, 43 STANFORD LAW REVIEW 6, 1241–99 (1991); Mary John, *Intersectionality: Rejection or Critical Dialogue?* l: 72 33 EPW: ECONOMIC & POLITICAL WEEKLY (2015); Bronmen Morgan (Ed.) *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Aldershot, Ashgate, 2007).

[17] Lani Guinier, The *Supreme Court, 2007 Term – Foreword: Demosprudence through Dissent*, 122 HARV. L. REV. 4, 15-16 (2008); and Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 BOSTON UNIVERSITY LAW REVIEW 581 (2009).

legitimacy or otherwise threat or use of violent means towards just ends. Third, there is a stated difference of kind between OSM (old social movements) and NSM (new social movements) and the linkages/interfaces between the old and the new. Fourth, while some social movements crystallize into NGOs, many do not and remain below and often beyond, the national politics and social science gaze.[18] Fifth, there is the vexed question about the anti-political character of political NSM, recently illustrated from Czech to Arab Springs.[19] Sixth, not all social movements go to courts and not all courts happen to them; there is a certain distance between juridicalization or juridification[20] of social movements and their politicization. Seventh, there is the question of relative autonomy of social movements from the state and the market.

IV. WHAT SHALL "WE" SAY CONSTITUTES THE 'IMPACT' OF JUDICIAL DECISIONS?

This is a difficult problematique. There is no general answer possible to this question because 'we-ness' itself stands differently constituted and challenged. There exist distinct disciplinary boundaries, borders and burdens. This trichotomy, allocating or dividing the space, is much debated by geographers (and to some extent even by historians, at least in terms of periodization) but not fully denied. Impact studies may form a trans-boundary and multidisciplinary research tradition; thus various social

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[18] Upendra Baxi, *The Future of Human Rights*, Ch.3, 7, 8 (Oxford University Press, 2013; Perennial Edition).
[19] As seen recently in the Arab Spring and Occupy movements. *Beyond the Arab Spring: the Evolving Ruling Bargain in the Middle East* (Mehran Kamrava ed., 2014*)* Vijay Prashad*, Arab Spring, Libyan Winter* (Delhi, Leftword,2012)); Boaventura de souse Santos, available at http://alice.ces.uc.pt/en/index.php/transformative-constitutionalism/boaventura-de-sousa-santos-occupy-the-law-can-law-be-emancipatory/#sthash.mA5r543K.dpuf/.
[20] Lars Chr. Blichner, and Andres Molander, *Mapping Juridification* 14 EUROPEAN LAW JOURNAL, 36–54. (2008). Mark Bevir, *Juridification and Democracy*, 62 PARLIAMENTARY AFFAIRS 3, 493–498 (2009); Roger Masterman, *Juridification, Sovereignty and Separation of Powers* , 62 PARLIAMENTARY AFFAIRS 3, 499-502 (2007).

sciences by a conventional (agreed protocols) common study method may constitute as it were a temporary 'we-ness' and thus even constitute new borders; but disciplinary boundaries are otherwise maintained and burdens within these are shared by all the disciplinary specialists. For example, a political scientist studying constitutional courts does not thereby become a legal academic and vice versa. In other words, while trans-disciplinary exists to reconfigure the borders, eradicating boundaries (if this was desirable) is a difficult and different enterprise altogether. Provisionally, one must acknowledge certain geographically constituted facts, of what Immanuel Kant so long ago described as 'conflict of the faculties',[21] and the temporariness or contingencies of impact studies.

That said, when we probe the notion of impact itself, we find that it has been given many a meaning. The first is a narrow meaning of 'compliance'; the second is 'effectiveness' over a period of time --this relates to the immediate, median, and long term *impact constituencies* as I have generally described these (in my 1982 article); the third relates to impact on the general public or social impact; the fourth concerns symbolic versus instrumental impact analysis; and finally, yet without being exhaustive, the *impact of impact analysis*.

Taking this last first, we do not have a social epistemology and political economy perspective concerning the impact of impact studies. Do these change anything at all in real lived life? Assume that we had adequate number of impact studies of symbolic and instrumental impact at hand. Would policy action animating legislatures and courts be any different? No doubt, these policy actors would be fully informed about it but if other motives, interests, or compulsions are greater in strength or intensity they would feel impelled to act accordingly. As regards citizens or the general populace, the impact of impact studies is even harder to access as their

21 IMMANUEL KANT, THE CONFLICT OF THE FACULTIES/DER STREIT DER FAKULTÄTEN, (trans. Mary J. Gregor; New York: Abaris Books, 1979).

actions may be governed by factors other than legal agency or lawful conduct. In both these domains, we need to embrace the notion that irrationality (non-calculative interests) is as important, if not more, as rational choice. Difficulties arise when we attempt to understand the underlying political concerns or ideologies (on some or other version of what Fredrick Jameson so majestically described as the 'political unconscious' of modernity)[22]; he postulated a trans-individual historical/structural underlying an individual narrative.[23] If so, what animates the impact theories and what, if any, is *their impact* offers a worthwhile field of study. The impact of impact studies must remain an imponderable factor in human behaviour.

Yet, those who write about the impact of legislative and judicial decisions have many trans-disciplinary concerns, perhaps best avoiding the extremes that these have great causal impact, or no impact; rather, the interest lies in showing that substantial and moderate impact stands in between these extreme situations. Scientifically, the basic problem is to avoid naïve 'before-after' type studies and to specify an acceptable test for control over rival casual variables or hypothesis, establishing legislative/judicial decision(s) as independent variables. It is also clear that the scholars working in the field of impact aim, epistemologically at least, to establish the boundaries of their discipline, and act against those marauders who impeach these; this gate-keeping function has certainly some scholastic impact. But its wider social impact must remain a matter of some speculation. How may, for example, we study the social costs and benefits of de-mystifying impacts, or certain narratives about 'modern' law?

There are at least three types of symbolic and instrumental impacts: the impact of legal systems as a whole (say, vis-à-vis religion or education),

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[22] FREDRIC JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT, (London and New York, Routledge, 1981).
[23] *Id.* at 116.

median-range impacts of certain legal clustering (say constitutions, specific legal regimes such as tort or contracts), and specific decisions whether legislative or adjudicatory. Within this admittedly rough classification, impact studies speak of questions of compliance and effectiveness. If compliance is too narrow a category (smacking of before and after type comparison), effectiveness is too wide a notion as at least encompassing actual behaviour, general conduct, and changes in belief systems of the targeted individuals or groups and law enforcers and officials. Empirical studies do have to find some measures and protocols of knowing minds or consciousness of persons affected (for weal or woe) by judicial decisions. In a total absence of information about judicial outcome, or reasoning, one may not speak of judicial impact.

It is perhaps for this reason that the Supreme Court of India has developed a jurisprudence of information and legal literacy before Parliament made national laws regarding these measures. The Court's continuing SAL insistence that its orders may be made known by the district judiciary and the executive seem to underscore the importance of legal literacy among the operatives of the system - social activists, and the beneficiaries. High Courts are not lagging behind: as early as 1982, the Gujarat High Court mandated legal literacy programmes by the South Gujarat University when an MPhil thesis about the conditions of work and living was filed by me (while in office) as probably the first book (here a thesis) petition; we continued this work for well over two years. NHRIs (national human rights institutions, as well as state institutions) have also been assigned an important pivotal role in this regard by the Supreme Court and Acts of legislatures. What impact did judicial initiatives have in thus promoting legal awareness and literacy is a matter yet not empirically studied. Further, in studying the effectiveness of judicial decisions, as I had urged in 1982, the *intended* as well *unintended* impacts must also be studied:

as a SAL Petitioner myself I have had to deal with the situation of unintended consequences, including some socially costly ones.[24]

V. IMPACT COMMUNITIES

There are also the differential impacts of judicial decisions depending on the many different communication constituencies [CCs].[25] The one and the same judicial decision may produce compliant/ effective impacts in some CCs and little or none in others. How does one measure the impact when different messages are conveyed to different CCs? At least measurement of differential impact thus forbids any one-size-fits- all criterion.

A SAL decision appeals and is judicially intended to reach diverse CCs: the social activist groups, the new commentariat (news, views, and editorial writers) replacing almost the old (the proletariat representing the diverse working classes) and I now add the instant public opinion formed in the social media, the new wave and realistic films and television serials, the Blog, Facebook and Twitter folks being foremost, form a growing part of the CC now.Their activities legitimate structural as well social adjudicatory leadership, though occasionally they also contribute to social criticism of this or that judicial trend.

The second CC is the more traditional; since Article 141 empowers the Supreme Court to declare law that is binding on all Courts throughout the territory of India, all Courts (and judicial bodies) are bound to follow the law so made. The finding that the law so declared is applied by the High Courts may seem a straightforward affair but it is not so as the species of

[24] I have partially narrated these in my reminiscences about the Mathura Open Letter, Agra Home Case and the Bhopal catastrophe case.

[25] UPENDRA BAXI, INTRODUCTION TO KK MATHEW, DEMOCRACY, EQUALITY, AND FREEDOM (Eastern Book Co., 1975).

lawmaking judgments illustrate, where the Supreme Court indicates the general line to be followed but leaves its appropriate Bench to apply the law thus declared. What a larger Bench decided, is for the Constitution Bench to decide, even if the increasing tendency of appending an overall summary may prove a helpful device. Any impact analysis of the intra-Bench agreement stands complicated by the judicial *discourse* (what gets said in the course of the plurality of opinions, and outright dissents) and the *decision* (what is said to have been finally decided).

In other decisional contexts, the High Courts have to decide/discover the 'ratio' of what the Supreme Court may have held; experience has shown that the High Courts often find, or follow, an alternate line of decision embedded in the Supreme Court decisional law as binding. How this is accomplished particularly by the High Courts, and how the Supreme Court decides finally, opens up a fascinating realm into impact analysis within the juristic hierarchy.

The third CC is the executive-legislature combine. Certainly, this combine has accepted the invention, since 1973, of the basic structure and the essential features of the Constitution; it has also accepted the invention of a judicial collegium for about two decades; and accepted the annulment of a constitutional amendment (99th) and the Parliamentary Law enacting the National Judicial Appointments Commission. This means, regardless of comparative constitutional law, studies and perspectives, the Supreme Court has summoned the power of co-governance of the nation (demosprudence, the Indian way).[26] The Court has recognized the plenary powers of Parliament to amend the Constitution and it has rarely invalidated constitutional amendment; yet it has insisted on policing these on the touchstone of basic structure, which really equals judicial review

[26] Upendra Baxi, *Demosprudence v. Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, 14 MACQUARIE UNIVERSITY JOURNAL 3-23(2014); *The Indian Supreme Court and Politics* (Lucknow, Eastern Book Co., 1979).

powers and processes. On the whole, Parliament has also very infrequently reversed Supreme Court decisions. As far as 'accommodation' between the two high governance institutions is concerned, so far it has been staggeringly attained. How far this has contributed to the salience of justices and courts and how far it may have de-politicized central rights and justice issues poses some formidable challenges to impact analysis in general.

The situation is the reverse as far as the executive is concerned; the pattern reveals a total disregard by the Union and State executive of the norms adopted as final by the Supreme Court in adversarial proceedings (as distinct from advisory opinions). Such disregard does not occur merely in exceptional emotionally charged matters -- such as river water disputes among states, or livelihood threatening decisions. But even in the case of the Information Technology Act, as noted earlier, contrary to common belief, is routinely used by law enforcement officers.

To add a further endemic illustration, if one looks at the growth of administrative law in India it is clear that there is a great deal of resistance by civil service to judicial decisions and directions; one is rather surprised at the failure to adhere to a modicum of fairness discipline evolved by the courts. The simple rules enunciated by the Supreme Court since the first decades of the Constitution, as the case law reveals, have not even now been internalized by the executive. Systemic governance corruption and police highhandedness continue also to flourish persist, although judicial normative pronouncements abound. The more recent trend to arrest such political evils by the device of court-monitored investigation shows judicial leadership, both hermeneutical and organizational, at its zenith; only impact studies may empirically show what this alliance between the Court and social movements holds for the constitutional 'idea of India'.

Finally, the impact seems negative as far as corporations and multinational corporations are involved; here the Court has rendered decisions that incline towards unfair globalization and development (as in the archetypical Bhopal catastrophe judicial settlement) and the systemic reversal of labour jurisprudence. The latter is indeed striking when we consider the fact that the Court since Independence has created itself as the magnificent edifice of labour rights and justice. How impact analysis may study judicial self-reversal and its general effect on the cornerstone of independence of judiciary (which it so celebrated recently) remains to be seen.

VI. SYMBOLIC & INSTRUMENTAL DIMENSIONS OF IMPACT ANALYSIS

Borrowing from Robert Gusfeld's sociology,[27] and the work of political scientist Murray Edelman,[28] who drew our attention to the distinction between the symbolic and instrumental political/policy action, I said in my 1982 paper that Indian students of judicial impact would do well to study it.[29] India has a great cultural tradition of symbolism and it has served well the postcolonial Constitution of ours. The Preamble, the Directive Principles, and Fundamental Duties are constitutional texts but are largely significant as symbols of India's commitment to a just, caring, and humane development. Constitutional legitimacy of political action is judged by these egalitarian and dignitarian considerations.

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[27] JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE. STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (University of Illinois Press, 1976).

[28] MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS, (University of Illinois Press, 1976).

[29] Since then, the literature has grown: Bart van Klink and Britta van Beers Lonneke Poort. (ed) *Symbolic Legislation Theory and Developments in Biolaw* (Springer International Publishing AG Switzerland, 2016); Valerie Jenness and Michael Smyth, *The Passage And Implementation Of The Prison Rape Elimination Act: Legal Endogeneity And The Uncertain Road From Symbolic Law To Instrumental Effects*, 22 STANFORD LAW & POLICY REVIEW 489-528 (2011).

A preliminary or threshold aspect is just this: the symbolic addresses the values and altitudinal disposition, whereas the instrumental addresses overt conduct made subject to legal controls and their meanings (interpretation). If a symbolic legislation is a gesture of values to which an organized polity subscribes and it has a long-term educational function, instrumental legal decisions (including judicial decisions) are intended to control behaviour. As has often been acknowledged, the symbolic gesturing is apt for eradicating societal *prejudice* against some people or a group over a period of time; instrumental action, on the contrary, is directed to control and regulate *discrimination*. This is a distinction of great import for impact analysts for they may not judge by standards apt for the symbolic action the realm of instrumental action. Since no political action (justices, too, command a significant degree of legally authorized violence) wears its credentials on face as being symbolic or instrumental, the impact analyst must make some initial choices.

The first decision that an impact analysis student should make is whether the law or judicial action is exhortative or instrumental. But how does one do it? The Sarda Act and the Dowry Prevention Act were, for example, clearly symbolic; they did not affix liabilities and punishments, such offences as contained therein are declared non-cognizable, the definitions of disapproved conduct are amorphous. The amendments to the dowry act subsequently changed the situation and made the law enforceable, offences cognizable and in principle non–bailable, the burden of proof reversed, and harsh penalties imposed. Law reform, to reiterate, made initially what was symbolic into progressively instrumental action programme.

The second task is to examine the distinction with great care. Not all unforced unenforced laws are therefore symbolic, though juristic and sociological reasons for these happenings need to be always discreetly analysed if we are to take, legisprudence seriously. By the same token

creeping enforceability, or even a gradually full enforceability, may not be overlooked. Analyzing impact across the symbolic/ instrumental divide is not an easy task which may not be advanced by ignoring the law/jurisprudence and legisprudence/jurisprudence/demosprudence divide.

Finally, how do we determine the legislative and judicial intention? These are vast questions but this much is clear: the legislative and judicial intent is difficult to determine yet it matters, and is for the time being decisive.[30] And the province of interpretation matters as much as that of the impact.

[30] It is common knowledge (or should it be?) that *Kesavananda* [His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (case citation: (1973) 4 SCC 225] was originally an advisory opinion as it directed the lesser Bench of the Court to dispose of a batch of petitions in accordance with the law declared in the decision (what the law declared was notoriously difficult to determine as the decision was 6:6:1 justices of the Full Court; how the soft law became hardened eventually is a question different from the one which concerns the original moment of the decision. Was it initially symbolic and then became instrumental? Similarly, what may we think of advisory opinions which are judicially stipulated as binding? What of the original *Olga Tellis* decision [Olga Tellis v Bombay Municipal Corporation. (1986) AIR 186]? I have always thought of the case as awaiting a judgment; that is, if we were to raise a fundamental question concerning reasoning plus outcome as a judgment. The trend continues: we had as late as 2014 a judgment of the Supreme Court of India where a two judge Bench decided that it was neither constitutionally or legally valid to pronounce a fatwa but the Court is itself known not to be averse to issue constitutional fatwas from time to time, that is not reasoned decisions, where the reasoning matches the result: see, Upendra Baxi, *Faith and Fatwa*, THE INDIAN EXPRESS (July 22, 2014).

THE NEED FOR SOCIAL BOYCOTT LAWS IN INDIA

- Akhileshwari Reddy[*]

ABSTRACT

The caste system in India is one of the oldest systems of societal hierarchies in the world. It is a system of graded inequality of rights which necessarily means that all castes except the topmost caste face some form of inequality and discrimination. The problems of caste discrimination, social policing and violent enforcement of social mores within castes and communities take many forms, some more subtle than others. The main focus of this paper shall be on one of the subtler and yet extremely pervasive forms of caste-based discrimination, that of 'social boycott'. It is the aim of this paper to analyze social boycotts from multidimensional perspectives through the analysis of the psychological, physiological and economic impact that social boycotts have on one of the most vulnerable groups in India. In order to do this effectively, the Article sets forth the arguments for why there needs to be a separate national law to tackle the menace of social boycotts in India. It then analyses the Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016 – the first ever successful legislation to ban Social Boycotts in the Country and the Lacunae in the Act that need to be addressed in the national Law. Finally, it analyses the Sardar Saydna Ther Saifuddin Saheb v The State of Bombay judgment in order to shed light on the possible constitutional challenges to the proposed National Social Boycotts Prevention Law and to suggest possible counters.

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I. INTRODUCTION

The caste system in India is one of the oldest systems of societal hierarchies in the world. It is a system of stratification that is based on the idea that people are born into their castes. Valassery defined caste as *'an endogamous and hereditary subdivision of an ethnic unit occupying a position of a superior or inferior rank of social esteem in comparison with other such subdivisions'*[1]. It is a system of graded inequality of rights which necessarily means that all castes except the topmost caste face some form of inequality and discrimination. While its origins are still under debate[2], caste is still an important determinant of access to wealth and power in modern day India. The system is divided into four categories, the Brahmins (The priests), the Kshatriyas (The kings and soldiers), the Vaishyas (The traders) and the Shudras (The artisans and manual workers).[3] There is another category of persons known as the untouchables or Dalits, who are deemed to be so impure that they are not granted a place within the four Varnas.[4] This, in essence, indicates that the caste system sees Dalits as being lesser human beings, thus allowing upper castes to see themselves as 'naturally superior' which is a vital factor in their attitudes of entitlement.[5]

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[1] R K PRUTHI, INDIAN CASTE SYSTEM 45 (Discovery Publishing House 2004).
[2] Thomas Sebastian, *Science and Theories of Caste Origins*, 50 Eco. & Pol. W. 32(2015).
[3]Bina B. Hanchinamani, *Human Rights Abuses of Dalits in India*, 8 HUMAN RIGHTS BRIEF 14(2001), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1486&context=hrbrief.
[4] *Id.*
[5] Vani K Borooah, Nidhi Sadana Sabharwal & Sukhdeo Thorat: *Discriminatory behavior: Theories, Methods and Policies*, 7 Indian Institute of Dalit Studies, Working Paper Series 1, 13 (2013).

For the sake of brevity in this paper, while acknowledging that Untouchables face a higher degree of deprivation and discrimination, both the Shudras and the Untouchables will be referred to as 'Dalits'.

The discrimination, deprivation and inequality continue to increase as one goes lower down the caste system impinging upon the civil, political, economic, cultural and religious rights of those within its grasp. It is a system that is characterized by endogamy, principles of pollution and purity and a graded system of access to resources and opportunities.

The problems of caste discrimination, social policing and violent enforcement of social mores within castes and communities takes many forms, some more subtle than others. The main focus of this paper shall be on one of the subtler and yet extremely pervasive forms of caste based discrimination, that of 'social boycott'.[6] Social Boycotts are a form of socio-economic extrajudicial punishment that is imposed on individuals whom 'caste panchayats' believe to have transgressed certain social mores or diktats.

They are manifested in the deprivation and ostracism of those who are boycotted through social exclusion from religious ceremonies and gatherings[7], physical and social segregation and isolation, denial of equal opportunities and rights, restrictions on their social and physical mobility,[8] community-wide gag orders, denial of employment[9] and the stoppage of

[6] Divya Gandhi, *Caste atrocities in Karnataka*, THE HINDU (March 22, 2012), http://www.thehindu.com/todays-paper/tp-opinion/caste-atrocities-in-karnataka/article3052451.ece.
[7] Smita Narula, *Broken People-Caste Violence Against India's "Untouchables*, HUMAN RIGHTS WATCH, (March 12, 2013, 9:00 AM), https://www.hrw.org/report/1999/03/01/broken-people/caste-violence-against-indias-untouchables.
[8] *Supra* note 5.
[9] Adithya Bharadwaj, Karnataka records highest rate of atrocity cases, THE HINDU (Aug. 20, 2015), http://www.thehindu.com/news/national/karnataka/karnataka-records-highest-rate-of-atrocity-cases/article7558271.ece.

sale of necessities of life, including food.[10] It is an insidious and unjust form of discrimination and torment that eventually ends in the slow starvation and isolation of persons subjected to it.[11]

It is the aim of this paper to analyze social boycotts from multidimensional perspectives through the analysis of the psychological, physiological and economic impact that social boycotts have on one of the most vulnerable groups in India. In order to do this effectively, this paper will be divided into the following chapters: Chapter one contained the introduction, chapter two will analyze social boycotts from a sociological perspective and the importance of Caste or Khap Panchayats in the imposition and perpetuation of social boycotts. Chapter three will set forth the rights of Dalits to equality and dignity by enumerating the responsibility of the Indian State to actively protect its Dalit citizens under the Constitution of India and its international and national legal obligations. This chapter will also set forth the case for the implementation of a new law specifically to tackle the plague of social boycotts in India. Taking off from here, Chapter four will briefly critique the *Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016,* and will suggest four crucial ways in which a national law on social boycotts must be improved. The paper will then look at the potential legal challenges that a social boycott law might come up against in Chapter five. The seminal *Sardar Saydna Ther Saifuddin Saheb v The State of Bombay*[12] case will be analyzed in this regard. This will be followed by a conclusion in Chapter six.

II. SOCIOLOGICAL IMPACT & BROADER IMPLICATIONS OF SOCIAL BOYCOTT

[10] B.R.Ambedkar, *What Congress And Gandhi Have Done To The Untouchables*, (last visited Sept. 26, 2018 12:35 PM), http://www.ambedkar.org/ambcd/41D.What%20Congress%20and%20Gandhi%20CHAPTER%20III.html.

[11] *Id.*

[12] Sardar Saydna Ther Saifuddin Saheb v. The State of Bombay, AIR 1962 SC 853.

Social boycotts or social exclusions at their core are instruments of exclusion whose purpose is to cause high levels of deprivation upon those who are subjected to the boycotts. They are not merely used for shunning and shaming of persons who have been boycotted but rather have extremely grave real-world consequences upon the excluded group's ability to live a life of dignity. In essence, social exclusion is the denial of equal rights and opportunities that dominant groups enjoy, resulting in the inability of the excluded individuals to participate in basic political, economic and social functions.[13]

A study by the World Bank found that Dalits are still predominantly forced into traditional, caste-based occupations which are considered menial and low paying.[14] For instance, most persons engaged in the dangerous and legally banned occupation of manual scavenging still belong to the Dalit castes.[15] A study conducted by the Indian Institute of Dalit Studies in 2013 found that there was a direct and adverse correlation between levels of poverty and deprivation and social exclusion.[16] The practice affects every aspect of the boycotted individual's life, including his/her access to livelihood, services such as education and health and even access to basic amenities such as food, water and housing.

For instance, in the village of Jampad, Bidar District in Karnataka, over 250 Dalits were socially boycotted by the caste Hindus for constructing an *Ambedkar Bhavan* – a community hall, on land allotted to them for the

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[13]Sukhadeo Thorat & Nidhi Sadana Sabarwal, *Caste and Social Exclusion – Concepts, Indicators, and Measurement* 7-13 (Indian Institute of Dalit Studies, Vol. 2, Paper No.1, 2010).

[14] Das, Maitreyi Bordia & Mehta Soumya Kapoor, *Poverty and Social Exclusion in India: Dalits*, WORLD BANK GROUP OKR (Dec. 4, 2017, 16:41)

[15] Manual Scavenging, International Dalit Solidarity Network https://idsn.org/key-issues/manual-scavenging/ (last accessed Jan. 3, 2018).

[16] *Supra* note 5 at 17.

purpose.[17] They were systemically deprived of farming jobs, which were their main source of income. The upper castes refused to hire them and instead sent jeeps to hire workers from neighboring villages. Anybody from the upper caste who dared to hire the Dalits was subjected to 5,000 rupee fines and beatings.

In another incident in Rajasthan, when Dalits protested separate seating arrangements in a community event, they were subjected to economic and social boycotts for over six months with even fodder not being sold to them.[18] In yet another case, a fight between two individuals belonging to different castes, led to the social boycott of the entire Dalit community in the Devarakonda Village in Karnataka.[19] This time, the social boycott included the barring of all the Dalit families from entering the village centre.

An unfortunate common thread in almost all cases of social boycotts is the silence and unwillingness of the police to register cases or protect the Dalits victims. It does not help that most upper caste police themselves carry caste prejudices.[20]

Caste Panchayats – Legality and Legitimacy

The biggest perpetrators of this hate crime are the unofficial parallel judicial systems that run across India called 'Caste Panchayats/ Khap Panchayats'. These Social institutions of exclusion play a vital role in the

[17] *50 Dalit families face social boycott in Jampad village*, THE HINDU, (Aug. 22, 2013) https://www.thehindu.com/news/national/karnataka/50-dalit-families-face-social-boycott-in-jampad-village/article5048950.ece.
[18] Damayantee Dhar, *For Dalits in Rural Gujarat, Untouchability Is Still a Part of Everyday Life*, THE WIRE (Aug. 29, 2017), https://thewire.in/caste/gujarat-dalits-untouchability.
[19] *11 Dalit families face social boycott in Dharwad village*, THE INDIAN EXPRESS (June 30, 2017), http://www.newindianexpress.com/states/karnataka/2017/jun/30/11-dalit-families-face-social-boycott-in-dharwad-village-1622515.html.
[20] *Supra* note 6

imposition and perpetuation of social boycotts economically, socially, culturally and politically.[21] The power of these caste panchayats generally lies in the upper caste identities of their members, who are predominantly male village elders – often seen as the gatekeepers of cultural, religious and caste identities in rural India.

Upon learning that individuals belonging to lower castes or those belonging to upper castes have transgressed social and caste barriers, for instance, through inter-caste marriage or the assertion of temple entry rights, these caste panchayats impose social boycotts on the individuals involved, their families and on their larger castes in the villages. These social boycotts are enforced through threats of fines and upper caste and religious solidarity and entail complete non-communication with the excluded group, denial of jobs, refusal of the sale of goods and exclusion from community and religious gatherings.[22] The Supreme Court of India has upheld that individual liberty and the right to choice are a fundamental part of the Right to Life under Article 21 of the Constitution. In *Shakti Vahini v Union of India*[23] the Supreme Court of India, in a case dealing with honour killings (a form of extrajudicial punishment pronounced by caste panchayats), categorically held that these caste panchayats which are rooted in authoritarianism and aim to uphold antiquated notions of restoring family and community honour, do not have the right to impinge upon the rights of individuals based upon *'any kind of moral or social philosophy or self-proclaimed evaluation'*. It held that persons cannot be subjected to hostile or unsafe environments for the lawful exercise of their rights as guaranteed by the Constitution of India. However, as mentioned above, the practice of social boycotts is endemic in India.

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[21] *Supra* note 5 at 13.
[22] *Supra* note 6.
[23] Shakti Vahini v. Union Of India, W.P (Civil) No. 231 of 2010

Having established the patent illegality of the caste panchayats that are often the root cause of the perpetration of social boycotts, this paper will now move on to Chapter III which will establish and enumerate the rights of Dalits in India against such oppression and deprivation of their constitutionally guaranteed rights as equal citizens of India.

III. DALIT RIGHTS IN INDIA

India's International Law Obligations to Protect Dalits

The very idea of a caste system which is based on an inherited hierarchy of humanity is antithetical to the most fundamental idea that underpins the catena of human rights laws, that all persons are born equal in dignity and have equal rights by the very virtue of being human beings.

India in which the caste system still thrives, is a party to the Universal Declaration of Human Rights as well as the International Covenant on Economic, Social and Cultural Rights, both of which stand on the edifice of equal dignity of all persons regardless colour, creed, race, religion or place of birth.

India has also ratified *The International Convention on the Elimination of all Forms of Racial Discrimination* [1](CERD). The CERD requires state parties to positively bring an end to all forms of racial discrimination. The Indian government's stand that the oppression of Dalits in India is outside the jurisdiction of CERD does not hold water. Though the Convention does not contain the term 'caste' in Article 1 that defines racial discrimination[24], in the year 1996 the CERD Committee interpreted descent-based

[24] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S.195.

discrimination to include caste-based discrimination.[25] This was reiterated in the 2002 *CERD General Recommendation XXIX*, where it was held that descent-based discrimination includes *"forms of social stratification such as caste and analogous systems of inherited status which nullify or impair the equal enjoyment of human rights"*.[26] From the above, it is clear that India has a specific obligation under its international law commitments to protect and uphold the rights of its Dalit citizens.

Moving to the domestic legal obligations of the country to protect its Dalit citizens, the paper will now analyse the rights guaranteed to them under the Constitution of India and laws enacted specifically to protect them from caste oppression.

India's Constitutional Law Obligations to Protect Dalits

The Constitution of India is hailed by many as the most progressive document of its kind in the world. It aims to balance the rights of persons belonging to diverse castes, creeds, religions and languages. With regards to the protection of Dalits, the most important Articles are 14, 17 and 43. Recognizing the insidious nature of the caste system, the framers of the Constitution of India through Article 17[1] abolished the practice of untouchability which originates from the belief that Dalits are 'impure' by birth and that an upper caste person who comes into contact with a Dalit becomes impure himself.[27] The substantive right to Equality as envisaged in Article 14 provides that all persons must be treated equally before the law and have equal protection of the laws in India regardless of caste,

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[25] Annapurna Waughray, *Caste Discrimination: A 21st Century Challenge for UK Discrimination Law*, 72 MOD. L. REV. 182-219 (2018).
[26] Clifford Bob, *Dalit Rights are Human Right: Caste Discrimination, International Activism and the Construction of a New Human Rights Issue,* 29 HUM. R. Q. 167, 173(2007).
[27] Manali. S. Deshpande, *History of the Indian Caste System and its Impact on India today*, California Polytechnic State University (Sept.26, 2018, 16:45), http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1043&context=socssp.

colour, creed or sex. Article 43 of the Constitution is a Directive Principle of State Policy, which specifically calls on the State 'to promote the economic and educational interests of persons belonging to scheduled castes and scheduled tribes in India in addition to protecting them from social injustice and exploitation.'[1] Therefore, unmistakably, the Constitution of India itself acknowledges the immense disadvantage and vulnerability that Dalits in the country face and has therefore provided categorically that they must not be discriminated against, either by the State itself or by upper caste individuals.

The Supreme Court of India has over the course of the last seventy years, upheld the rights of Dalits to special protections while acknowledging their historical exploitation and the need to make reparations. In the case of *State of Karnataka v Appa Balu Ingale and Ors*[28] the Supreme Court held that whenever a fundamental right is violated by a private individual, it is the constitutional obligation of the state to ensure that such violation is prevented and to ensure that the fundamental rights of Dalits are respected. In the case of *Manju Devi v Onkarjit Singh Ahluwalia*[29], the Supreme Court recognized the insidious nature of the use of words such as 'Harijan' and 'Dobhi' that are used by upper castes to discriminate against Dalits on the basis of their caste status. In *Safai Karmachari Andolan v Union of India*[30], the court recognized that the practice of untouchability is a constitutional crime and one that must be eradicated by the full implementation of the law. While the Supreme Court has in many instances stood as a guardian of Dalit Rights, a law specifically addressing social boycotts in India would only aid it in protecting Dalits in India.

India's National Legal Obligations to Protect Dalits

[28] *State of Karnataka v Appa Balu Ingale, 1995 Supp (4) SCC 469.*
[29] Manju Devi v Onkarjit Singh Ahluwalia, (2017) 13 SCC 439.
[30] Safai Karmachari Andolan v Union of India, (2014) 11 SCC 224.

The most important legislation outside of the Constitution that is meant to protect Dalits in India is the *1989 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (PoA Act)* that criminalizes the abuse and humiliation of Dalits in India. The prohibited crimes under the Act themselves point to the kinds of degrading treatment that Dalits have faced and continue to face in India despite 70 years of freedom; these crimes include but are not limited to prohibitions on being forced to walk naked on the streets, bonded labour and having faeces thrown into their premises among other equally disturbing mistreatments.

Dr. B. R. Ambedkar was one of the first persons in modern India to address the violent oppression of lower castes by upper castes in India. He recognized that the power imbalance between the two groups and resource capture by the latter made the practice of social boycotts almost a death sentence on the lower castes.[31] This led him to insist that the clauses criminalizing its practice be included in the Government of India Act, 1919. A majority of these clauses were later made a part of the *Protection of Civil Rights Act, 1955*. This Act specifically and extensively deals with caste crimes related to untouchability and includes penalties for various forms of boycotts in housing, work for hire, rendering of services, business etc. However, this is an Act that is rarely used in modern India and has thus fallen into disuse.

Now that the legal obligations of India to proactively and positively protect the rights of its Dalit citizens have been established, the paper will now move on to an analysis of why a new law, that deals specifically with the crime of Social Boycotts is the need of the day in the Country.

The Need for a New Social Boycott Law in India

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[31] *Supra* note 8.

Although the PoA Act defines[32] and classifies social and economic boycotts as crimes[33], there are two factors that make the Act unsuitable and inadequate to address the endemic nature of social boycotts in the state. The first is that the PoA Act has been a highly ineffectual piece of legislation that has failed to have a significant impact on the reduction of atrocities against Scheduled Castes (SCs) and Scheduled Tribes (STs).[34] India has extremely low conviction rates for crimes committed against Dalits, standing at a dismal 25.7%[35] (a reduction from 31.7% conviction rate in 2008) for Scheduled Castes (SCs) and 20.8% (a reduction from 27.2%) for Scheduled Tribes (STs) as per the *2016 National Crime Records Bureau Report*.[36] Additionally, the number of crimes against Scheduled Castes have increased exponentially from 33,000 cases in 2008 to 40,800 cases in 2016, indicating the ineffectiveness of the PoA Act in curbing caste atrocities[37]

With an average crime rate incidence (number of FIRs registered per one lakh population)[38] of 20.3% and 6.3% against SCs and STs respectively[39]

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[32] The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989, § 2(eb), No. 33, Acts of Parliament, 1989 (India).

[33] The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989, § 3(zc), No. 33, Acts of Parliament, 1989 (India).

[34] FP Staff, Maratha agitation: NCRB records more crimes against SC/STs in Maharashtra but low conviction rate, F.P (Sept. 26, 2016), http://www.firstpost.com/india/maratha-agitation-ncrb-records-more-crimes-against-scsts-in-maharashtra-but-low-conviction-rate-3028194.html.

[35] Alok Prasanna Kumar, *Constitutional Validity and Article 26 - Social Boycott Act*, 51 ECO. & POL. W., 21 (2016).

[36] Crime in India, 2016 Statistics , National Crime Records Bureau, Ministry of Home affairs http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf (last accessed 26 September 2018)

[37] Mayank Jain, *Cases of atrocities on Dalits continue to rise amid falling convictions*, (April 4, 2018), BUSINESS STANDARD, https://www.business-standard.com/article/current-affairs/cases-of-atrocities-on-dalits-continue-to-rise-amid-falling-convictions-118040400049_1.html.

[38] *Supra* note 29.

and the unlikelihood of its improvement in the near future, clubbing social boycott crimes with the PoA Act will further delay justice to the victims of such targeted exclusion.[40] This is more likely to be true now, considering the body-blow dealt by the Supreme Court of India to the PoA Act in the recent *Dr. Subhash Kashinath Mahajan v The State of Maharashtra*[41] case, whereby the court prescribed automatic arrests and the registration of cases against perpetrators of caste crimes under the Act. Although the damage done by the Court has been mitigated by the passage of the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2018*[42]*,* the judgment in and of itself is an indicator of the rising brutality and mistreatment of Dalits in the country.[43]

Second, the PoA Act while addressing atrocities against scheduled castes and scheduled tribes does not address the unique inter-caste, intra-caste and inter-religion aspects of social boycott. Therefore, persons affected by social boycott intra caste do not have recourse to justice under the PoA, making it necessary for a specific social boycott law that will address the discrimination and ostracization of this form within castes and religions.

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[39] M. A. Baby, *Struggle against Caste Oppression: Two Recent Incidents in Karnataka*, PEOPLE'S DEMOCRACY (Dec. 30, 2018), http://peoplesdemocracy.in/2015/0809_pd/struggle-against-caste-oppression-two-recent-incidents-karnataka.

[40] Gaurav Vivek Bhatnagar, Data on SC/ST Atrocities Act Points to Weak Implementation, Not 'Misuse', THE WIRE (March 22, 2018), https://thewire.in/caste/not-just-misuse-of-sc-st-act-ncrb-data-and-mha-report-point-to-weak-implementation.

[41] Dr. Subhash Kashinath Mahajan v The State of Maharashtra, (Crl) No. 416 of 2018.

[42] Parliament Passes Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2018 , Press Information Bureau, Government of India, http://pib.nic.in/newsite/PrintRelease.aspx?relid=181758, last accessed 26 September 2018.

[43] *Supra* note 30.

The existing *Protection of Civil Rights Act, 1955* too lacks the comprehensiveness necessary to tackle social boycotts as it only deals with discrimination, ostracization and boycotts arising from the practice of untouchability. Additionally, the Act provides for very minimal punishments for the crime of social boycotts, ranging from one month to six months, which is inadequate to act as a deterrent.

IV. CRITIQUE OF THE MAHARASHTRA SOCIAL BOYCOTT ACT

Undoubtedly, an Act that deals comprehensively with social boycotts is the need of the hour.[44] In the year 2016 alone, 47, 360 cases were registered under the PoA Act.[45] Maharashtra's initiative in dealing specifically with the crime of social boycotts is laudable and must be emulated across India.

An Act akin to the *Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016 (The Maharashtra Act)* must be adopted.[46] Under the Maharashtra Act, social boycott has been rendered illegal and punishable under the law with an imprisonment of up to three years, a fine of up to one lakh or both of the perpetrator and his/her accomplices. It also specifically enumerates the many situations and forms in which social boycotts might be imposed, such as ostracization, refusal to

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44 Concern over rising cases of Dalit atrocities, THE HINDU (Feb. 25, 2017), http://www.thehindu.com/todays-paper/tp-national/tp-karnataka/concern-over-rising-cases-of-dalit-atrocities/article17364739.ece.

45 Crime in India, 2016 Statistics, National Crime Records Bureau, Ministry of Home affairs http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf. last accessed 26 September 2018

46 Betwa Sharma, Maharashtra's New Law against Social Boycott Could Spark a Renaissance, Say Activists, HUFFINGTON POST (April 14, 2018), http://www.huffingtonpost.in/2016/04/14/social-boycott-maharashtr_n_9690170.html.

allow religious or caste-based ceremonies, the denial of use of schools, hospitals, burial grounds etc. to Dalits.

However, it is essential that the proposed law address the lacunae present in the Maharashtra Act such that its existing pitfalls are avoided. Four vital additional areas that the national Social Boycott Act needs to address are those of Definition of 'victim', inter-caste marriage, witness protection and police sensitization.

Victim' Definition

There is a clear contradiction between the definition of 'Victim' under Section 2 (h) of the Maharashtra Act and Section 3 of the Act that lists the various types of Social Boycotts under the Act. Social Boycotts are a sociological weapon against Dalits and therefore, more often than not, the harm that they cause to the victims is psychological and dignitarian in nature.[47] However, the definition of the term 'Victim' in the Maharashtra Act only encompasses three types of harm, physical, monetary and property related. Yet, under Section 3 of same Act, numerous acts such as 'obstruction of individuals from practicing social observance'[48], 'making the life of such member miserable'[49] etc. refer to psychological harm rather than physical, monetary or property related harm. Therefore, this is a clause that needs to be amended in any future Act that aims to address Social Boycotts in India.

Inter-caste Marriages

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47 Gautam Bhatia, *The New Maharashtra Social Boycott Law: Key Constitutional Issues*, IND. CONST. LAW & PHIL. https://indconlawphil.wordpress.com/2016/04/21/the-new-maharashtra-social-boycott-law-key-constitutional-issues last accessed 26 September 2018.

48 Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016, § 3(i), No.44, Acts of Maharashtra State Legislature, 2017 (India).

49 Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016, § 3(iv), No.44, Acts of Maharashtra State Legislature, 2017 (India).

One of the most common reasons for the imposition of social boycott is as a punishment for inter-caste marriages.[50] Punitive measures for inter-caste marriage through social boycotts have included ostracization from religious celebrations, marriages and funerals within the families thus resulting in the cutting off of all social bonds and support to the couples.[51] It is vital that the framers of the social boycott law utilize this opportunity to challenge and criminalize this practice of social boycott of persons entering into consensual inter-caste marriages.[52]

Witness Protection

Witnesses turning hostile is a problem across the criminal justice system in India[53] and one whose gravity and need for correction has been reiterated by multiple committees including the Law Commission of India in its 14th,178th and 18th Reports.

Witness hostility is especially high in cases based on caste discrimination and understandably so.[54] This issue assumes an even weightier dimension

[50] Anagha Ingole, Maharashtra's Law on Social Boycott-A Critical Review, Vol. 52, Issue No. 32, 12 Aug, 2017 Economic and Political Weekly http://www.epw.in/journal/2017/32/commentary/maharashtras-law-social-boycott.html last accessed 26 September 2018

[51] Shalaka Shinde, *Opponents of inter-caste marriage booked under Social Boycott Act in Pune*, HINDUSTAN TIMES (July 19, 2018), https://www.hindustantimes.com/pune-news/opponents-of-inter-caste-marriage-booked-under-social-boycott-act-in-pune/story-5PQtnU2pLoPIBIwygIFkgP.html.

[52] Sathish G.T, *Family faces boycott over inter-caste marriage*, THE HINDU (March 31, 2017), http://www.thehindu.com/news/national/karnataka/family-faces-boycott-over-inter-caste-marriage/article17753389.ece.

[53] Jagdeep S Chhokar, *Witnesses in the wilderness: Why India needs a witness protection programme we can trust*, FIRST POST (Feb. 21, 2016), https://www.firstpost.com/india/witnesses-in-the-wilderness-why-india-needs-a-witness-protection-programme-we-can-trust-2633652.html.

[54] Hansa Malhotra, Hostile Witnesses behind Acquittals under SC/ST Act in Maharashtra, THE QUINT (Dec. 6, 2016), https://www.thequint.com/news/india/maharashtra-

when the power disparity between the accused and the witness and the potential for violence is rooted as it is in this case, in caste hierarchies. Instances of upper caste persons coercing and threatening persons who are to depose against them in cases of caste discrimination are a well-documented hurdle to prosecution due to an atmosphere of impunity for caste based atrocities in this country.[55]

It is vital therefore that witnesses in social boycott cases along with their families, if necessary, be provided with the safety and security of accommodation in safe houses to eliminate the possibility of coercion and violence.[56] As of 2018, the Centre has drafted and circulated to the state governments, a draft *National Witness Protection Scheme*[57] after having been ordered by the Supreme Court of India to do so in the case of *Mahender Chawla v Union of India, Ministry of Home Affairs Secretary.*[58] It can only be hoped that this time around, the states do the needful and protect India's citizens and take a step forward in ensuring fair trials in this country.

Police Sensitization

Instances of the police themselves supporting 'upper caste' discrimination and attempting to silence the voices of 'lower castes' have been far too

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hostile-witnesses-behind-most-acquittals-scheduled-castes-tribes-prevention-of-atrocities-act-marathas.

[55] Jayshree Bajoria, Why India needs a victim and witness protection law, THE INDIAN EXPRESS (Dec. 21, 2017), https://indianexpress.com/article/gender/why-india-needs-a-victim-and-witness-protection-law-4989649/.

[56] *Ibid*

[57] Witness Protection Scheme, 2018 – Draft 2 https://nalsa.gov.in/sites/default/files/document/Suggestions_on%20_Witness_Protection_Scheme.pdf. last accessed 26 September 2018.

[58] Mahender Chawla v Union of India, Ministry of Home Affairs Secretary, W.P. (Crl.) No. 156/2016

many to let this issue lie without remedy.[59] Any new law dealing with social boycotts must, therefore, find a way to discourage caste prejudice in the police system through amendments to the respective Police Acts across states by possibly implementing a system of demerits for proven cases of casteism which would have consequences on career advancements.

V. POTENTIAL CONSTITUTIONAL CHALLENGES

A potential constitutional challenge against a law barring social boycotts based on caste could arise on the grounds of violations of the right to freedom of religion under Articles 25 and 26 of the Constitution of India. A seminal case, the *Sardar Saydna Ther Saifuddin Saheb v The State of Bombay*[60], dealt with whether the religious head (Dai) of the Dawoodi Bohra sect could legally excommunicate members from the sect even though such an excommunication would impinge upon the civil and constitutional rights of those so excommunicated and would also run counter to the Bombay Prevention of Excommunication Act, 1949 which had barred the same. Although the majority judges upheld the right of the Dai to excommunicate the members of the Sect, it is the reasoned judgement of the Minority Judge, Justice B.P. Sinha that the Researcher believes will stand the test of time and constitutional morality.

In his minority opinion, Justice Sinha upheld the constitutional validity of the Bombay Prevention of Excommunication Act, 1949 on two grounds, one, that the Legislature of Bombay was competent to enact the Bombay Prevention of Excommunication Act, as an act to further social reform in matters of religion as provided for under Article 25(2)(b).

[59] *Supra* note 1.
[60] Mahender Chawla v Union of India, Ministry of Home Affairs Secretary, AIR 1962 SC 853.

Next, a distinction was drawn between 'matters of religion' as provided under Article 26 (b) and 'activities associated with religion', with the former being practices which are essential and integral to the religion and therefore, beyond the pale of judicial or legislative interference and the latter being activities merely incidental to the religion and therefore, amenable to judicial scrutiny and legislative reform. Where the excommunication of members of the Dawoodi Bohras was leading to a denial of their civil rights including their right to enter their place of worship and exclusion from communal burial grounds, Justice Sinha held that the right of excommunication was not a purely religious right and was an activity merely associated with the religion and therefore, under the purview of the legislature and the judiciary to scrutinize.

On the Article 26(b) challenge: The argument of the Dai was that the Bombay Act impinged upon on this right of the Dai by prohibiting the exercise of his power of excommunication of the members of the Dawoodi Bohra community under Article 26(b). Article 26(b) grants the right to freedom of management of religious affairs. Justice Sinha held that Article 26(b) would have to be read subject to Article 25(b)(2) of the Constitution of India, which is an exception to the right to freedom of religion in so far as it allows reform of religion to further social reform. Most importantly, Justice Sinha delved into the crux of the practice of excommunication which much like social boycotts was to turn a person into a pariah and an attempt to deprive such a person of their human dignity. He noted that excommunication in effect treated a person as an untouchable and therefore opined that any Act enacted to counter the same would be in line with the right against untouchability provided under Article 17 of the Constitution of India.

Any challenge to the proposed Social Boycott law on the grounds of right to the freedom of religion will have to successfully navigate the above

parameters of Articles 17,25(b)(2) and 26(b)to succeed and that seems unlikely.

CONCLUSION

This Article has been an endeavor to highlight the pervasive and persistent nature of caste prejudice, in the form of social boycotts in contemporary India. In Chapter one, the insidious nature of social boycotts and the repercussions of its practice to discriminate against and exploit Dalits has been dealt with. In chapter 2, the Article establishes that the State is obligated under multiple spheres of law including international, national and constitutional, to protect the rights of Dalits and to punish those responsible for the perpetration of caste based crimes against them. Chapter three analyzed and critiqued the *Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016* to provide a more comprehensive blueprint for a potential pan Indian law on the criminalization and prevention of social boycotts. In chapter five, this Article dealt with the potential constitutional challenges that could arise from the proposed Social Boycott Law and the ways to navigate such challenges.

Moral vigilantism to enforce caste prejudices that impinge upon the civil, social and political rights of individuals has no place in today's India and in fact, never did. It is imperative that the ills of the caste system be eradicated and the implementation of stringent social boycott legislation across India would be a right step in that direction. Social boycotts are a tool of oppression and severely impact the ideals of liberty and freedom of choice that are envisaged under the Constitution of India and therefore wholly mala fide and illegal. The universal principles of non-discrimination and equality must be India's guiding lights in combating this purulent disease. Not only does the state have to enact laws that protect Dalits but it must also ensure that its own institutions are not themselves

acting as agents of this oppression. The failure of the government of India in prohibiting and penalizing the perpetrators of social boycotts is a failure of both its moral duty to its citizens as well as its obligations under both national and international laws.

GENDER MAINSTREAMING IN INDIAN JUDICIARY: PARTICIPATORY PARITY AND REPRESENTATION IN THREE-TIER SYSTEM

- Keerty Nakray[*] & Arshiya Chauhan[**]

ABSTRACT

The main aim of this paper is to examine the scope of gender mainstreaming in Indian judiciary. The Indian judiciary reflects the male-dominated and patriarchal ethos of the society. Largely characterised in terms of institutional biases against the women, the paper argues in favour of progressive gender mainstreaming in the Indian judiciary to ensure the realisation of constitutional goals of social justice. First, the paper delineates women's representation in the Indian judiciary at all levels. Second, the paper contends that improvements in women's representation in the judiciary remain intrinsic to constitutional ideals of gender equality and social justice. Finally, it concludes that gender diversity within the Indian judiciary should reflect that plurality of the society and the need for an egalitarian approach towards the marginalised.

I. INTRODUCTION

The judiciary should be representative of the society it serves. Diversity within the judiciary reflects the fair and impartial attributes of judiciary.[1] Judicial decisions and the execution of justice have a bearing on the everyday lives of the citizens of a country. The United Nations Basic Principles on the Independence of Judiciary stated that there must be no

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[1] Reddick M. Et. Al., *Racial and Gender Diversity on State Courts, An AJS study* (2009).

discrimination in appointments on any grounds, including sex.[2] The presence of women judges signals equality of opportunity for women in the legal profession. Rosemary Hunter rightly argues that the inclusion of women judges provides for an appointment process that is merit-based, fair, and non-discriminatory; and it also offers an active mentoring for other women who wish to pursue careers in law and the judiciary.[3]

Recently, the Supreme Court of India delivered many path-breaking verdicts ranging from the *Triple Talaq* judgment, the *Aadhar* case, the Sabarimala temple entry case to the matter of a Parsi woman fighting for her right to faith after marrying outside her religion and the latest being on the adultery law. In the five-judge bench decision, which ruled that *triple talaq* be unconstitutional and un-Islamic, the bench was a diverse one in terms that it represented five different faiths but failed to be gender diverse. Ironically, the judgment that impacted the lives of millions of Muslim women did not have even one woman judge (except Justice R. Banumathi) among the 25 male judges of the Supreme Court at that time. Though, the bench which delivered the *triple talaq* judgment, reflected the religious diversity, it failed on gender representation. Notably, Justice Rohinton Nariman, Justice Uday Lalit and Justice Joseph Kurien ruled that *triple talaq* was unconstitutional whereas Justice Abdul Nazeer and Chief Justice JS Khehar upheld the validity of *triple talaq*. The important point to be noted is that the judges from minority communities might rule differently from the judges from majority community. Equal rights for all women, especially Muslim women is a non-negotiable right, these dissenting voices have important ramifications for minority rights and representation within Indian judiciary. Similarly, the verdict that lifted a ban, which prevented women of menstruating age from entering the

[2] *UN Basic Principles on the Independence of the Judiciary* [Endorsed by General Assembly Res 40/32 (29 November 1985) and Res 40/146] (13 December 1985), http://www.refworld.org/pdfid/4a7837af2.pdf.

[3] Rosemary Hunter, *More than just a different face? Judicial Diversity and Decision-Making,* 68 CURRENT LEGAL PROBLEMS 119-41(2015).

Ayyappa temple at Sabarimala, had only one woman judge on its Bench. The erstwhile Chief Justice of India, Dipak Misra, by 4:1 majority ruled that "*restrictions put by Sabarimala temple cannot be held as essential religious practice… Patriarchy in religion cannot be permitted to trump over the element of pure devotion borne out of faith and the freedom to practice and profess one's religion*".[4] Justice Indu Malhotra, the only woman judge and the lone dissenting one stated that "*notions of rationality cannot be invoked in matters of religion*". She added that "*religious practices cannot solely be tested by the right to equality. It is up to the worshippers, not the Court, to decide what is the religion's essential practice*". Justice Malhotra made this dissent on the ground that issues which have deep religious connotations should not be tinkered with to maintain a secular atmosphere in the country. She was of the view that the issue, in this case, is not limited to Sabarimala, but will have far-reaching implications for other places of worship.

Indian judiciary, despite its inefficiencies and inadequacies, remains an intrinsically essential institution in modern India. The minority, marginalised and women still hold hopes that the courts will deliver the justice. The modern three-tier judiciary in India has its roots in colonial India. It epitomised the British efforts to introduce a modern capitalist system in a profoundly religious and conservative country. It aimed to displace the traditional Hindu and Mohammedan laws which formed its basis on age-old traditions often deemed as discriminatory towards the poor and marginalised. India with its diversity requires a complex set of politics of recognition which will bind together religious, linguistic and ethnically plural groups. Within this gender inequality remains a potent means of social exclusion with ramifications of women's well-being. The main aim of this paper is to examine the advancements made by the Indian

[4] Indian Young Lawyers Association v. The State of Kerala. Writ Petition (Civil) No. 373 of 2006,
https://www.supremecourtofindia.nic.in/supremecourt/2006/18956/18956_2006_Judgement_28-Sep-2018.pdf.

judiciary in bringing women into positions of power and reflect on the plurality of Indian society: first, the paper will provide an overview of women's representation in Indian judiciary. Second, drawing on theoretical standpoints why does judicial diversity matter in multi-cultural societies. Third, the paper will draw on international law and national laws specifically the Indian constitution and Supreme Court judgment which are of critical importance. Finally, it will conclude that judicial diversity remains an essential means of assuaging social cleavages.

II. OVERVIEW OF WOMEN'S REPRESENTATION IN INDIAN JUDICIARY: COMPARATIVE PERSPECTIVES

Anna Chandy became a legal trailblazer in 1959 since she was the first Indian female to be appointed to a High Court in India.[5] Her appointment created history as she was the first woman to hold this position not only in India but among all the Commonwealth nations.[6] Thirty years later, another woman from Kerala, Justice M. Fathima Beevi became the first female judge to be a part of the Supreme Court of India.[7] Presently, there are three female presiding judges out of the total twenty-eight judges (with a sanctioned strength of 31 judges) in the Court namely, Justices R. Banumathi, Indu Malhotra and Indira Banerjee; the latter being the eighth woman judge to be elevated to the Apex Court in its sixty-eight years of existence. The non-representation of women in judiciary is certainly not restricted to India, even the developed countries such as the UK grapple

[5] Former Judges, High Court of Kerala, http://highcourtofkerala.nic.in/frmrjudges.html (last accessed Dec. 21, 2018).

[6] Anna Chandy was appointed as a First Grade Munsif in Travancore in 1937. This made her the first female judge in India and, in 1948, she was raised to the position of a District Judge. She became the first female High Court judge on 9th February 1959. *See* J DEVIKA, HER-SELF: EARLY WRITINGS ON GENDER BY MALAYALEE WOMEN 1898-1938 19 (Stree, Kolkata, 2005).

[7] Former Chief Justice & Judges, Supreme Court of India, https://www.sci.gov.in/chief-justice-judges (last accessed Dec. 23, 2018).

with similar gender imbalance in its judiciary. For instance, the UK Supreme Court got its first female President, Lady Brenda Marjorie Hale, only in the last year since its inception.[8]

Table 1.1 Global Data on Women's Representation in Judiciary

Country	Number of Judges	% Female Judges
United States of America [9]	9	33%
United Kingdom [10]	12	25%
China [11]	15	7%
India [12]	28	11%
South Africa[13]	29	34%
Brazil [14]	11	18%

India is one of the gender unequal countries in the world. High economic growth rates have not led to improvements in human development. Gender parity is fundamental to ensure economic growth and development of a country. The Organisation for Economic Co-operation

[8] Brenda Marjorie Hale, Lady Hale Richmond took up appointment as President of the Supreme Court in September 2017. In October 2009, she became the first woman Justice of the Supreme Court of the United Kingdom. *See* THE SUPREME COURT, UNITED KINGDOM, https://www.supremecourt.uk/about/biographies-of-the-justices.html (last visited Dec. 24, 2018).
[9] Supreme Court of the United States
https://www.supremecourt.gov/about/justices.aspx
[10] Biographies of Justices https://www.supremecourt.uk/about/biographies-of-the-justices.html
[11] The Supreme People's Court of the People's Republic of China
http://english.court.gov.cn/justices.html
[12] Supreme Court of India https://www.sci.gov.in/chief-justice-judges
[13] Constitutional Court of South Africa
https://www.concourt.org.za/index.php/judges/current-judges
[14] Federal Supreme Court Brasilia
http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120056

and Development (OECD) defines Gender Pay Gap as the difference between median earnings of men and women relative to median earnings of men.[15] As per a research conducted by the World Bank, in their World Development Report 2019 on *The Changing Nature of Work*, it was shown that women accumulate less human capital (skills and knowledge) at work and through their careers.[16] The report highlights that the payoffs to work experience is lower for women across the world as compared to men. For instance, in Venezuela, for each additional year of work, men's wages increase by 2.2 per cent, compared with only 1.5 per cent for women. This difference is more substantial for countries like Mali, where returns for men are 3.1 per cent, but only 1.6 per cent for women. The World Economic Forum published a Global Gender Gap Report 2017[17], whereby an average gap of 32.0% remains to be closed worldwide across the four thematic dimensions (Economic Participation and Opportunity; Educational Attainment; Health and Survival; and Political Empowerment) in order to achieve universal gender parity. As per World Bank Data in 2017, female employment in services participation rate in India is 25.94% only.[18]

The judicial system consists of 'Higher Judiciary' and 'Lower/Subordinate Judiciary', wherein the former comprises of the Supreme Court of India and the 24 High Courts while the latter covers the District and Sessions Courts and the courts below it. The first course of action in addressing the abysmal state of women in the Indian judiciary is collection of data on the gender composition across different courts. The data is divided into two

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15 OECD (2018), GENDER WAGE GAP (INDICATOR), https://data.oecd.org/earnwage/gender-wage-gap.htm#indicator-chart (last accessed Dec. 23, 2018).

16 World Bank 2019, *World Development Report 2019: The Changing Nature of Work* (Washington DC) doi:10.1596/978-1-4648-1328-3.

17 *See The Global Gender Gap Report 2017*, WORLD ECONOMIC FORUM (2019), http://www3.weforum.org/docs/WEF_GGGR_2017.pdf.

18 WORLD BANK GROUP, https://data.worldbank.org (last accessed Dec. 23, 2018).

segments in this paper: Tier wise representation and State & District wise representation. The Tier wise data entry divides the judicial system into two levels within the hierarchy: The Supreme Court of India & the 24 High Courts. The name and number of judges of the Supreme Court are obtained from the official website of the Court.[19] For the 24 High Courts, tabular form is used in order to exemplify the abysmal gender discrepancy.[20] Furthermore every State comprises of numerous smaller districts.[21] After totalling the figures collected from all the Districts of one State, the number of men and women judges for each State is available.[22]

Since the inception of the Supreme Court of India in 1950, a total of 336 judges, have been appointed to the Apex Court, out of which only eight have been women. The apex court got its first woman judge, Justice M. Fathima Beevi, in 1989 and the second – Justice Sujata V. Manohar was appointed seven years later in 1994. Presently, there are three women judges in the Supreme Court, and this is the highest number of female judges that the Apex Court has witnessed at a single point. The Supreme Court had a new Chief Justice, Justice Ranjan Gogoi appointed four weeks ago, however, it never witnessed a single female Chief Justice of India.[23]

Out of the 647 High Court judges in toto, only 74 positions are occupied by women, which is just a little over 10%. The Madras High Court has the highest number of woman judges at present, followed by the High Court

[19] Chief Justice & Judges, Supreme Court of India, https://www.sci.gov.in/chief-justice-judges (last accessed Dec. 23, 2018).
[20] Official websites of the High Courts, http://indiancourts.nic.in (last accessed Dec. 23, 2018).
[21] E-Courts Mission Mode Project. Official website of District Courts of India, https://districts.ecourts.gov.in (last accessed Dec. 23, 2018).
[22] The stacked bar graphs for District wise representation is inclusive of male, female and unknown judges. The unknown constitutes those who cannot be allotted in either male or female classification through their names.
[23] Former Chief Justice & Judges, Supreme Court of India, https://www.sci.gov.in/chief-justice-judges (last accessed Dec. 23, 2018).

of Bombay. The High Courts of Punjab & Haryana, Delhi and Kerala maintain a fairly decent proportion of women judges in comparison. The High Courts of Allahabad, Rajasthan and Orissa are functioning with merely 5% of women judges. Worse still are the High Courts of Himachal Pradesh, Manipur, Meghalaya, Tripura and Uttarakhand which have zero women judges[24] According to the report by Vidhi Centre for Legal Policy, the lower judiciary across India has a meagre 27.6% female judges. The figures from the High Courts and the Supreme Court disclose that the state of affairs at the higher judiciary is not less dismal, considering that the Jammu and Kashmir High Court had to wait for nine decades to get its first woman judge and first female Chief Justice in 2018.[25]

Table 1.2 Gender Representation in Three-Tier Judiciary [26]

	Male Judges	Female Judges
Supreme Court of India	28	3
High Courts of India	573	74
District Courts	11,445	4,506

Table 1.3 State Wise Analysis of Indian Judiciary[27]

[24] Ghosh A., *With the Lower Judiciary still an old boys' club, the gender imbalance must be addressed*, THE WIRE (2018), https://thewire.in/gender/lower-judiciary-old-boys-club-gender-imbalance.

[25] Justice Sindhu Sharma was sworn in as a judge of the Jammu and Kashmir High Court on 10 August 2018, followed by Justice Gita Mittal's swearing-in-ceremony as the Chief Justice of the High Court on the next day. *See* Mandhani A, *After a wait of 90 years, Jammu and Kashmir High Court finally has two women judges now,* LIVE LAW (2018), https://www.livelaw.in/after-a-wait-of-90-years-jammu-and-kashmir-high-court-finally-has-two-woman-judges-now/.

[26] Tilting the Scale: Gender Imbalance in the Lower Judiciary https://vidhilegalpolicy.in/reports/report-on-gender-imbalance-in-the-lower-judiciary

[27] E-Courts Mission Mode Project https://districts.ecourts.gov.in/

State	Male	Female Judges	Total
Andaman & Nicobar Islands	10	0	10
Andhra Pradesh	327	231	561
Assam	175	135	310
Bihar	941	166	1107
Chandigarh	20	10	30
Chhattisgarh	223	130	352
Delhi	240	116	356
Goa	19	21	40
Gujarat	841	161	1002
Haryana	313	155	468
Himachal Pradesh	81	34	115
Jammu & Kashmir	166	38	204
Karnataka	646	258	914 (10 unknown)
Kerala	295	147	442
Jharkhand	326	54	383 (3 unknown)
Madhya Pradesh	938	313	1251
Maharashtra	1505	591	2096
Manipur	12	7	26 (7 unknown)
Meghalaya	12	13	25
Mizoram	14	10	24
Nagaland	32	9	41
Odisha	389	222	611
Puducherry	13	11	24
Punjab	306	198	504
Rajasthan	703	258	961
Sikkim	7	9	16

Tamil Nadu	600	363	963
Telangana	197	155	352
Tripura	64	33	97
Uttarakhand	122	65	187
Uttar Pradesh	1391	383	1774
West Bengal	526	210	736

There are no explicit laws that prohibit the entry of women judges in India. Poor representation is mostly an outcome of sociological factors such as gender discrimination, patriarchal social structure and bias in the recruitment process.

III. GENDER DISCRIMINATION & PATRIARCHAL SOCIAL STRUCTURE

Nancy Fraser in the redistribution-recognition dilemma[28] examines inequality as a result of economic structures of society whereas the recognition standpoint views inequality as having its basis in culture. Therefore, policies need to consider both economic redistributions along with cultural biases. Subsequently, Nancy Fraser added 'participatory parity' to ensure the equal participation of all adult members of society as peers; not only addressed based on legal equality but also regarding shared material resources and inter-subjective meaning associated with human equality as intrinsic to institutions (Fraser, 1996, 2005)[29]. Inter-sectionality is an important dimension of feminist analysis, as women are not only disadvantaged because of their gender but also because of their race, caste,

[28] Fraser N, *From redistribution to recognition? Dilemmas of justice in a "Post-Socialist" age*, NEW LEFT REV. 68–93(1995).

[29] Fraser N, *Social justice in the age of identity politics: Redistribution, recognition and participation,* THE TANNER LECTURES ON HUMAN VALUES, 1–60 (Stanford University, California); Fraser N, *Mapping the feminist imagination: From redistribution to recognition to representation,* 12 (3) CONSTELLATIONS: AN INTERNATIONAL JOURNAL OF CRITICAL AND DEMOCRATIC THEORY 295–307 (2005).

religion, aboriginal and ethnic status. Kimberle Crenshaw[30] highlights that the overlap of various social identities such as race, gender, age, caste, class, religion and sexual orientation etc. contributes to discrimination and oppression. Crenshaw argues that the various forms of social stratification do not exist separately from each other but are combined together. Women in India lack rational representation in judiciary due to a combination of characteristics, and not only 'gender'. India is home to a multi-caste system, which serves as one of the identities for the restricted representation of women, among other social and economic factors, apart from their gender.

Till today, women are disadvantaged in many public and private spheres of their lives in contrast to their male counterparts. They are underrepresented in the judiciary, in the Parliament and State legislatures and in many senior positions across a range of jobs. Not to mention, there still exists a substantial pay gap between men and women. There is a potential bias in the promotion process as well, which is addressed in the next segment. In most cases, males are given preference for positions in high offices of government. Women judges have also been at the receiving end of sexism in the profession. There have been various occasions of lawyers malign female judges or subject them to unwanted criticism owing to their gender. In Delhi, a female judge filed a First Information Report (FIR) against a male lawyer, who used 'sexually explicit remarks' against this judge.[31] Bureaucratic institutions have been occupied mostly by men, who in turn promote men and overlook women. Historically, women have not been a part of the judiciary and other governmental institutions are owing to their reproductive responsibilities. More importantly, men still

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[30] Crenshaw K, *Mapping the margins: Intersectionality, identity politics, and violence against women of color*, 43 STAN. L. REV. 1241–99(1991).

[31] Kaunain Sherrif M, *Women judge abused by lawyer: Judicial service body urges HC, Bar Council to act*, INDIAN EXPRESS (2015), https://indianexpress.com/article/cities/delhi/woman-judge-abused-by-lawyer-judicial-service-body-urges-hc-bar-council-to-act/.

exercise social control over institutions. Patriarchal domination is maintained by continually excluding women from decision-making. The former Supreme Court Justice Gyan Sudha Misra reportedly told a fellow male judge, who was constantly questioning her understanding of an issue, "Stop judging the judge, and start judging the matter".[32] Women are socialised into accepting inferior positions which are further exacerbated in workplaces as men question women's competence. Sexism is exercised when men are privileged over women in promotion and other career enhancing opportunities. The underlying assumption is that men are primary breadwinners and women tend to stop working or reduce her efficiency at work with on-set of motherhood.

IV. GENDER BIAS IN RECRUITMENT & APPOINTMENT PROCESS

Selection in the lower judiciary is through a merit based competitive examination and an interview, which is held state-wise. Male and female candidates are given equal opportunity to appear in the judicial services examination and there are a good number of women qualifying as judges in the lower judiciary.[33] Appointment of a judge in the High Court is listed under Article 217 clause (2) of the Indian Constitution.[34] Although the

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[32] Mishra S., *The Sexist Bar*, THE WEEK (2016), https://www.theweek.in/theweek/cover/gender-discrimination-in-judiciary.html?fb_comment_id=958691684232353_1081142638653923. [Hereinafter as "The Sexist Bar"]

[33] Former Supreme Court Judge, Sujata Manohar points out that, "there are more women judges in judicial service as the selection is by an examination and interview. Those who reach the position of district judges are considered for appointment as High Court judges. This results in less women judicial officers reaching the High Court". *See* Mishra S., *The Sexist Bar*, THE WEEK (2016), https://www.theweek.in/theweek/cover/gender-discrimination-in-judiciary.html?fb_comment_id=958691684232353_1081142638653923.

[34] *Article 217 (2)*: A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and –

(a) has for at least ten years held a judicial office in the territory of India; or

appointments to the High Court is made by the President of India, it is only done so after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of that High Court.[35] This process of promotion to higher judiciary creates scope of discrimination as the process lacks transparency. The statistics already establish that there are a high number of female judges in the lower judiciary, but extremely few senior women judges in the higher judicial services. The standards applied to a woman when considering her for elevation are higher than those applied to a male judge. Former Supreme Court Justice Gyan Sudha Misra reasons this on 'lack of faith and belief in the abilities of women which is still rooted in society and more so in the male psyche and the reason we prefer females in higher judiciary is more for the sake of symbol rather than their equal participation.'[36]

The Article 124 clause (3) of the Indian Constitution describes the process for appointment of judges of the Supreme Court.[37] Under this article, the judges of the Supreme Court are appointed by the President of India after consultation with the judges of the Supreme Court and High Courts.[38] The

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession.

[35] *Article 217 (1)*: Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.

[36] The Sexist Bar, *supra* note 24.

[37] *Article 124 (3)*: A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—

(*a*) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

(*b*) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or

(*c*) is, in the opinion of the President, a distinguished jurist.

[38] *Article 124 (2)*: Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the

process of appointment of judges to the Apex Court has recently undergone massive debate in the Collegium v. NJAC argument. The appointment of judges in the Supreme Court continues to be as per the collegium system. The collegium is inclusive of the CJI and the next four senior-most judges and their decision is binding on the President. Although this collegium brought independence in the functioning of the higher judiciary, the system is a non-transparent one. This opaque and inaccessible proceedings of the collegium tend to have a negative impact on women's inclusion in the judiciary. Justice J. Chelameswar, the only judge to dissent in the NJAC judgment made the same point against the lack of transparency and remarked that it was, "*wholly illogical and inconsistent with the foundations of the theory of democracy…*".[39] Underrepresentation of women in higher judiciary relates to horizontal gender segregation. Women are better represented in family and other first instance courts, which results in fewer women being promoted to higher judiciary. The roles of women judges are subject to considerable limitations. For example, they are often not allowed to preside criminal courts or to hand down capital punishments.

CONCLUSION

The judiciary needs to be judicious in being representative of the diversity. In order to promote equality for women and men judges, the paper emphasizes on the solution of Affirmative Action for women. A parliamentary standing committee on law and justice proposed reservation

Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:
Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

[39] Dissenting Opinion by Justice J. Chelameswar in Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1 (Para 104).

for women in the higher judiciary. "*The standing committee, in its report in 2015, recommended that women should have equal representation in the higher judiciary, and to ensure that, reservation could be considered*," said Dr E.M.S. Natchiappan, who is former chairman of the committee.[40] In the same year, the Supreme Court Women Lawyers Association argued before the Supreme Court that there should be a greater representation of women on the Bench.[41] Without the corrective measures in place, women would continue to be at a disadvantaged position in the social structure for years to come. Oxfam India in a policy brief titled, 'Why India needs the Women's Reservation Bill' stated that the Bill is a step to undo the margin that women face in the political life.[42] Reservations in the higher judiciary and a transparent process of appointment and promotions are the need of the hour to overcome the abysmal gender disparity in the Indian judiciary.

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[40] The Sexist Bar, *supra* note 24.

[41] Nataranjan J., *The Glass ceiling in the judiciary seems very hard to break for women*, HINDUSTAN TIMES (2017), https://www.hindustantimes.com/opinion/the-glass-ceiling-in-the-judiciary-seems-very-hard-to-break-for-women/story-KKqcwswlQy1EyQoDoPzCqM.html.

[42] *Why India needs the Women's Reservation Bill*, 10 OXFAM INDIA POLICY BRIEF (2014), https://www.oxfamindia.org/sites/default/files/pb-why-india-needs-the-women%27s-reservation-bill-150214-en.pdf.

INTERNATIONALLY COOPERATIVE SOLUTIONS TO THE DETERIORATING SITUATION IN ANTARCTICA

- Armin Rosencranz, D.K. Kaul & Aditya Vora***

ABSTRACT

Global warming has been discussed and debated at length and the role of Antarctica in that debate has been vital. If we keep burning fossil fuels, global warming will melt all the ice in the world causing the sea level to rise by more than 200 feet. This will inundate a majority of the world's coastlines. Antarctica holds four-fifths of all the ice in the world and therefore it is imperative to prevent the melting of the Antarctic ice caps. We therefore call upon all States to reach a consensus and save the continent. We do so by pointing out the flaws in the Antarctic Treaty System and the need to put stringent regulations in place to curb human activities in the region.

Keywords: *Antarctica, Antarctica Treaty System, Global Warming*

I. INTRODUCTION

In this article we focus on the international instruments governing the region of Antarctica. The Antarctic Treaty was signed in 1959, with its preamble requiring that the Antarctic region be devoted solely to peaceful scientific activities and no country claiming right over the territory. The Antarctic Treaty has ensured that it remains dynamic through changing circumstances. The Antarctic Treaty has now become the Antarctic Treaty System, with various Protocols and Declarations being added to the

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Antarctic Treaty, especially the 1991 Madrid Protocol which inserted stringent environmental regulations into the Antarctic Treaty System.

Despite the strong foundations that these documents were built on, environmental problems continue to persist in the area and the time for change has come once again. With global warming on the rise and increasing pressures from corporations to exploit the area, there is an urgent need to amend the Antarctic Treaty System so that it remains relevant. States have attempted to exercise control over the region, and this has also led to notable opinions by the International Court of Justice. We urge the entities concerned to acknowledge the drawbacks of past actions and endeavor to address these problems in a systematic and time-bound manner.

After the introduction, in Part II, we will discuss the numerous issues facing Antarctica currently. We will explore the Antarctic Treaty System and determine that the current legal regime requires an overhaul, especially in light of the excessive human activity in the region and the harmful effects of global warming. In Part III we will offer solutions to these issues and implore the world community to reach a consensus to save and protect the Antarctic region, and in effect, the world at large. We will conclude in Part IV by providing our opinion on the controversial issues.

II. THE TRIAD OF ISSUES FACING ANTARCTICA

Before we begin analyzing the issues, we will [a] provide an overview of the Antarctic Treaty System; followed by [b] instances of its poor implementation; [c] the failure of the world community to create an Antarctic Sanctuary to prevent human activities in the region; and finally [d] the harmful effects of global warming.

An overview of the Antarctic Treaty System

(i) The Antarctic Treaty, 1961

The Antarctic Treaty of 1961 (AT) was established to build state collaboration based on the International Geophysical Year of 1957-58. The Antarctic Treaty System (ATS) refers to a set of treaties and resolutions (close to 200) passed by the governing body of the AT. It was concluded in 1959 by 12 parties. The AT makes it clear that there are no territorial sovereigns on the continent.

Creating a demilitarized nuclear-free zone, the AT sought to promote scientific endeavors and a peaceful environment, which was reinforced by the third International Polar Year in 2007-08. Since its inception, 53 State Parties have acceded to the AT.[1] Twenty-eight of these have decision-making responsibilities as Consultative Parties. The AT addresses terrestrial claims, marine resources and exploitation of minerals.[2]

For some resources, the situation becomes complicated. For iced freshwater resources, a meeting of the State Parties to the AT was held in October 1989 where Recommendation XV-21 was adopted on the 'exploitation of icebergs'.[3] The Recommendation placed restrictions on commercial exploitation of ice, and called for more information to study the adverse impacts of such exploitation.[4] However, conflict between the Madrid Protocol (see below) and Recommendation XV-21 may arise, and could create problems later on.

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[1] Secretariat of the Antarctic Treaty, https://www.ats.aq/devAS/ats_parties.aspx?lang=e (last accessed Dec. 22, 2018).
[2] The Antarctic Treaty, Jun. 23, 1961, 402 U.N.T.S. 71.
[3] RECOMMENDATION ATCM XV-21 (Dec. 12, 2012), www.ats.aq.
[4] PIERRE-MARIE DUPUY AND JORGE. E. VINUALES, INTERNATIONAL ENVIRONMENTAL LAW 114-115 (Cambridge University Press, 2015).

A number of bodies, most notably the Arctic Environmental Protection Strategy of 1991 and the Arctic Council of 1996 (whose working groups focus on the policy measures to protect the marine and coastal environment from activities taking place on land and at sea) proactively work towards the protection of the environment, and influence national policies of all affected States to conserve the region.[5] The United Nations Convention on the Law of Sea (UNCLOS), which also deals with these aspects, ceases to be relevant in the Antarctic region because more specific treaties govern the region in greater depth.

(ii) The Madrid Protocol, 1991

The Protocol on Environmental Protection to the Antarctic Treaty, also known as the Madrid Protocol of 1991 was adopted by the concerned consultative parties and amended the Antarctic Treaty of 1961. The reason this Protocol is particularly important is because the Antarctic Treaty System earlier did not prioritize the conservation of living resources in the region. It only set out certain areas as 'Specially Protected Areas' to preserve the 'unique natural ecological system' of the area without defining their scope. The Protocol was a major revision to these designated areas. The Protocol set out the Antarctic Specially Managed Area and Antarctic Specially Protected Area and specified their scope and range. In addition, it laid down Multiple-use Planning Areas to assist and coordinate actions among parties and to reduce environmental impacts.[6]

Antarctica is designated as a 'natural reserve for peace and science' under Article 2 of the Madrid Protocol. Article 6 promotes a spirit of consultative capacity building in constructing research stations and bases in the region, whereas Article 3, despite no concrete definition of the term 'wilderness', paves the way for programs and action plans. Article 2 and 3,

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[5] *Id.* at 115-117.
[6] *Id.* at 120-122.

in a sense, came to be recognized as the backbone of the Protocol and provided for the standard of appraisal of all activities conducted there, which was an unprecedented feat. The Committee on Environmental Protection (CEP) provides Treaty parties with advice and recommendations, which considerably shape their respective national policies.[7]

Most importantly, Article 7 of the Protocol prohibits commercial exploitation of mineral resources for any activity other than scientific research, which can also be curtailed in certain cases for conservation purposes. It also makes an environmental impact assessment (EIA) mandatory before conducting any activity. Interference with the flora and fauna of the region has been kept to a strict minimum. Article 16 promotes a culture of information-sharing regarding the acts and omissions of parties with respect to implementing the Protocol. The six Annexes to the Protocol set out the requirements for EIA, flora-fauna conservation, waste disposal and management, prevention of marine pollution, liabilities for environmental emergencies and area conservation and management.[8]

The Annexes to the Protocol also lay down guidelines and standards. For the protection of flora and fauna of the region, Annex II of the Protocol provides a set of measures. For instance, 'taking' of mammal species attracts very serious penalties, even for scientific purposes. But there have been cases where environmental protection has been ignored in order to pursue national interests.

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[7] Donald R. Rothwell, *Polar Environmental Protection and International Law: The 1991 Antarctic Protocol*, 11(3) EUR. J. OF INTL. L., 591-[6] 14 (2000).

[8] The Protocol on Environmental Protection to the Antarctic Treaty, 1991; Kevin A. Hughes et al., "*Antarctic environmental protection: Strengthening the links between science and governance*", 83 ENV. SCI. & POL. 86, 88 (2018)

Waste management and disposal is provided for in Annex III. However, the standard of 'maximum extent applicable' has been applied, thereby allowing for a wide interpretation and reducing the responsibility that states carry while implementing these. As a result, waste has been a neglected issue over the past few years.

The Protocol provided the basic framework for designating areas as Antarctic Specially Protected Areas (ASPA). Notably, at the Antarctic Treaty Consultative Members' 1972 meeting (ATCM 1972), Recommendation VII-2 was made, which gave examples of protected land and water habitats. Later, Annex V of 2002 consolidated these areas and set up a mechanism to protect these areas. The assessments clearly show that many of the areas are not properly monitored, and that these protected areas are far closer to tourist areas than the affected ice-free areas. Alarmingly, this trend seems to be growing, along with a growing need for conservation planning to protect these areas. This entails identifying the vision and the goals of this planning, laying out the scope of such activities, involving all concerned stakeholders and having a constant review system.[9] Regarding marine pollution, Annex IV addresses the discharge of garbage, sewage and other wastes.[10]

A. LEGAL LOOPHOLES AND POOR IMPLEMENTATION OF THE ATS

Though Article IV of the AT freezes sovereignty claims over the region, conventions such as the Seals Convention of 1972 and the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) allow limited access to marine living resources, and thus appropriation is not precluded. For instance, the Seal Convention allows this access only for

[9] Bernard W.T. Coetzee et al., "*Expanding the Protected Area Network in Antarctica is Urgent and Readily Achievable*", CONSERVATION LETTERS, WILEY PERIODICALS INC., 670-680 (2017).

[10] Donald R. Rothwell, *Polar Environmental Protection and International Law: The 1991 Antarctic Protocol*, 11(3) EUR. J. OF INTL. L., 591-614 (2000).

the purposes of conservation, scientific study and the rational and human uses of seal resources. But the regime is strict when it comes to mineral resources, as can be seen by the prohibition imposed by Article 7 of the Madrid Protocol. Situations of conflict between the Madrid Protocol and the AT Recommendation XV-21 on exploiting icebergs are yet to arise and may create problems later on.

The Madrid Protocol has faced considerable criticism, largely because of its inability to achieve speedy implementation. Apart from the fact that its provisions are not strongly worded, it fails to address the impact of factors such as tourism on the region. A working group was formed to implement the provisions of the Protocol, but the varying interpretations leave too much room for states to use them in ways that suit their interests.[11] As per the Protocol, the consultative parties along with the initial drafters have more powers as compared to those who acceded to the treaty later. This contravenes the norm that calls for benefits to trickle down to all states in a fair manner. Thus, weak standards have led to faulty implementation of this norm, often in pursuance of the vested interests of states.[12]

B. HUMAN ACTIVITY IN THE REGION AND THE FIGHT TO STOP IT

Increase in human activity and the adoption of new general treaties are important issues threatening the ATS. It is now a well-documented reality that the Antarctic icecaps are melting.13 Further, technological and transport advancements make it easier for humans in general to reach the continent. Overall, the total number of Antarctic visitors in 2017-2018 was 51,707, an increase of 17% compared to 2016-2017. Apart from the mere

[11] *Id.*
[12] Edward Guntrip, *The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed*, 4(2) MELB. J. OF INTL. L. 376 (2003).
[13] R. Lefeber, *Polar Warming: An Opportune Inconvenience* (Draft), *Amsterdam Law School Legal Studies Research Paper No. 2012-86*, Amsterdam: University of Amsterdam. DOI: 10.2139/ssrn.2151241.

presence of humans, there are fresh activities that are polluting and harming the region.

All these activities have affected the fragile ecosystem of Antarctica. An instance of the threat of climate change and pollution was clearly seen in the expedition of a Greenpeace ship in Charlotte Bay of the Antarctic Peninsula. It was an effort to create an ocean sanctuary of 1.8 million square kilometers -- one of the largest protected areas on Earth. In the process, the sheer diversity of the flora, fauna and resources that the region had to offer was a revelation. It shed light on the impact climate change has had on the Antarctic region.

To create this sanctuary and protect the Antarctic region, governments of various countries met in Hobart, Australia in 2018 to designate a protected area at one of Antarctica's main ocean points, the Weddell Sea. The move was intended to put the region out of the reach of human activities that exploit the area. This move would have helped preserve the biodiverse species in Antarctica[14] However, the move failed.

The repercussions with the continued level of environmental pollution are alarming. Scientists have estimated that the sea level will rise by three to four meters by 2100 because of Antarctica's melting ice caps.[15] Thus, the rejection of the proposed ocean sanctuary only adds to the already existing concerns about Antarctica's future. Covering the Weddell Sea and a sizeable portion of the Antarctic Peninsula, the move would have helped

[14] Javier Bardem, *I've Seen the Antarctic's Untouched Beauty: There is still time to protect it*, THE GUARDIAN (Oct. 16, 2018), https://www.theguardian.com/commentisfree/2018/oct/16/antarctic-ocean-sanctuary-climate-change-javier-bardem.

[15] Dahr Jamail, *Earth's Ice Loss: "Is A Nuclear Explosion of Geological Change"*, TRUTHOUT (Oct. 9, 2018), https://truthout.org/articles/earths-ice-loss-is-a-nuclear-explosion-of-geologic-change/.

combat climate change because of the massive amounts of carbon dioxide that the sea soaks up.

There was much dismay among conservationists over the failure to make the Weddell Sea a sanctuary. Delaying tactics and interventions having nothing to do with science blocked the proposal. The sanctuary was proposed by the CCAMLR. Russia, China and Norway rejected the effort to protect these waters, according to many environmental groups, because the area covered would have prevented fishing in the region and would have helped safeguard the area's flora and fauna. Because a unanimous agreement was required, this move failed.

According to a United Nations report, humans have wiped out 60% of Antarctica's animal population, with only 12 years remaining to save the region. Organizations such as Greenpeace have criticized CCAMLR, which could not get the political support to create the sanctuary. The countries at the conference were more concerned with their own vested interests, including expanding the fisheries zones. There is consternation at how such bodies are failing to fulfill the mandates that they set out. The general public must join the movement for a Global Ocean Treaty, which is currently being negotiated at the United Nations.[16]

C. EFFECTS OF GLOBAL WARMING

Another changing circumstance which calls for stringent re-negotiation of the ATS is the harmful effect of global warming on the Antarctic region. As the years have gone by, the effects of global warming are there for everyone to see. A major cause of the current situation is the International Seabed Authority (ISA). It is granting far too many licenses for mineral

[16] Matthew Taylor, *Antarctic's future in doubt after plan for world's biggest marine reserve is blocked*, THE GUARDIAN (Nov. 2 2018), https://www.theguardian.com/world/2018/nov/02/plan-create-worlds-biggest-nature-reserve-antarctic-rejected.

exploitation despite a conditional prohibition imposed by the Madrid Protocol. Unregulated tourism, as mentioned above, has exacerbated the problem.

Despite the Preamble of the treaty promoting peace and international cooperation, the cumulative impact of climate change, coupled with several states disregarding the objectives and inaccurate scientific findings, has put the region in jeopardy.[17] To make matters worse, since there are no sovereigns in the region, countries like the U.S.A. have used the commons to their advantage: The US makes no claim to any particular territory in the region, but has kept alive the opportunity to exploit the vast resources in the different areas there. Examples of such exploitation include fishing of marine life such as 'krill' (shrimp-based crustacean) and mineral resources.[18]

There have been a number of attempts to determine the mean annual temperature change in Antarctica. The studies have faced problems of data from too many stations and the lack of quality control over the observations. Nonetheless, reliable data sets indicate that most of the stations are warming up. Other reflections of this variability can be seen in the form of rapid increase in wind speeds and surface pressures, and a decrease in the pressure trends.[19]

Adding to these concerns, the new Trump administration has cut funding of climate change research. Yet, NASA collaborated with the German Research Center for Geosciences for a satellite mission in sending Gravity Recovery and Climate Experiment Follow-on (GRACE-FO) to space.

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[17] Nils Vanstappen, *Challenges for the Antarctic Treaty System*, LEUVEN CENTRE FOR GLOBAL GOVERNANCE STUDIES - POLICY BRIEF NO. 21, 4-16 (2013).
[18] Christopher C. Joyner & Ethel R. Theis, *The United States and Antarctica: Rethinking the Interplay of Law and Interests*, 20(1) CORNELL INTL. L. J. 65, 76-77, 83 (1987).
[19] John Turner et al., *Antarctic Climate Change during the Last 50 years*, INTL. J. OF CLIMATOLOGY, 279-294 (2005).

This could contribute towards finding out more information on melting of Antarctic ice sheets and related sea-level rise. Scientists have observed that the growing volume of carbon dioxide in the air has contributed to these adverse phenomena. This could detrimentally affect coastlines, which could further impact population planning, migration and national security.[20]

The infrastructure in Antarctica is deteriorating because of the high costs of maintenance. For instance, the USA-maintained McMurdo station is one of the many ambitious research and astronomical stations that studies the region. However, especially with the new Trump administration, the purse strings on improving the infrastructure have tightened. Even the US ice breaking ships are in a decrepit condition. All the superpowers, including China and Russia, have multiple bases and camps strategically set up in the region. Thus, the region is an area of incipient conflict.[21]

Antarctica is melting rapidly: The rate of losing its ice has increased three-fold since 2007, with a forty percent increase in 2012-2017. This will inevitably contribute to rising sea levels and warming waters. It will also lead to more moisture in the air and increased rainfall.[22]

The calving and eventual disintegration of the ice sheets in East Antarctica, most notably the Amery ice shelf and the Larsen B ice shelf, is reflective of

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[20] Abby Smith, *Antarctica is Thawing Faster, Tripling Its Effect on Rising Seas*, BLOOMBERG ENVIRONMENT, (Jun. 13 2018), https://www.bna.com/antarctica-thawing-faster-n73014476449/.

[21] Justin Gillis and Jonathan Corum, *Where Else Does the U.S. Have an Infrastructure Problem? Antarctica*, NEW YORK TIMES, (Jul 17, 2017), https://www.nytimes.com/2017/07/17/climate/where-else-does-the-us-have-an-infrastructure-problem antarctica.html?&moduleDen=click&contentCollection=Climate®ion=Footer&module=MoreInSection&version=WhatsNext&contentID=WhatsNext&pgtype=article.

[22] Kendra Pierre-Louis, *Antarctica Is Melting Three Times as Fast as a Decade Ago*, NEW YORK TIMES, (Jun. 13, 2018), https://www.nytimes.com/2018/06/13/climate/antarctica-ice-melting-faster.html.

the environmental hazard that we are facing. In West Antarctica as well, the same developments have been noticed. Recent events such as the breakaway of a huge iceberg from the Larsen C ice shelf come as clear warnings. Moreover, the frequency of such breaks is likely to increase over the coming years.[23] Another collapse was seen with the George VI ice shelf, contributing massively to sea-level rise. These shelves are situated below sea-level and are a landmark example of the growing trend of ice-shelf instability.[24]

Melting of sea ice remains one of the biggest threats to the region. Over the last three decades, about eight percent of the ice sheet cover has melted. The existing cover has also become thinner by as high as forty percent in some regions.[25] With high emissions of heat-trapping gases causing ice sheets to melt, sea levels are expected to rise by as much as three feet by the end of the century. Many coastal cities such as New York, Venice and Sydney are at risk.[26]

Ice-loss in Antarctica between 2012 and 2017 reached approximately 219 billion tons. Ice-loss will be even more apparent in the regions of West

[23] Helen A. Fricker et al., *Iceberg calving from the Amery Ice Shelf, East Antarctica*, 34 ANNALS OF GLACIOLOGY 241, 245 (2002).
[24] Clemens Schannwell et al., *Dynamic Response of Antarctic Peninsula Ice Sheet to potential collapse of Larsen C and George VI ice shelves*, THE CRYOSPHERE (Jul. 19, 2018), https://doi.org/10.5194/tc-12-2307-2018, http://nora.nerc.ac.uk/id/eprint/520594/1/tc-12-2307-2018.pdf.
[25] SUSAN J. HASSOL, IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT 24-25, (Cambridge University Press, 2004).
[26] Justin Gillis, *Climate Model Predicts West Antarctic Ice Sheets Could Melt Rapidly*, NEW YORK TIMES (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/science/global-warming-antarctica-ice-sheet-sea-level-rise.html.

Antarctica, where the ice sheets rest directly above the sea bed and react to even small changes in ocean temperature.[27]

These climate-related changes have led to rising average temperatures. There is an increased concentration of carbon dioxide in the air along with increased rain and climate fluctuations. Thawing of the frozen grounds will enable transportation to and from the region, and consequently easier access to resources. This will also negatively affect the soil, vegetation and general biodiversity of the region. Living creatures too are affected. For instance, marine mammals and certain species of seabirds will drastically shrink.[28]

III. SOLUTIONS TO THE PROBLEM

A. SOLUTIONS IN INTERNATIONAL LAW

Many scholars argue that the AT ought to be applied as an *erga omnes* (towards all) obligation for its effective implementation as a universally accepted regime. Part of this endeavor must include the effort to open the treaty to all countries for membership. Most existing members refuse to let that happen because of their own vested interests. The express assent of all member-states must be confirmed before any obligation becomes binding. Article 10 of the treaty strives to make this obligation binding to some extent by way of acquiescence from non-parties. These hindrances have temporarily impeded the treaty from attaining *erga omnes* status, at least from a customary law perspective.[29]

[27] Abby Smith, *Antarctica is Thawing Faster, Tripling Its Effect on Rising Seas*, BLOOMBERG ENVIRONMENT (Jun. 13, 2018), https://www.bna.com/antarctica-thawing-faster-n73014476449/.
[28] *Supra* note 26 at 8-11.
[29] Bruno Simma, *The Antarctic Treaty as a Treaty Providing for an Objective Regime*, 19(2) CORNELL INTL. L. J., 189-191, 193-194, 197, 205-206 (1986).

Jurisdiction remains another major problem in the region. Since there are no sovereign states in Antarctica, the normal principles of jurisdiction with respect to territoriality cannot be applied. To claim jurisdiction in maritime zones, sovereign coastal states must exist to enforce the laws. Otherwise, all such waters would be a part of the high seas under international law. The Antarctic Treaty contains rules on jurisdiction in cases of violations, but it does not tackle general cases of criminal and civil law. It presupposes that parties know which activities are organized in its territory, and calls for an environmental impact assessment and an advance notice with regard to activities not limited to scientific research. Even uniform enforceability of laws cannot be claimed since most parties are not included in the treaty system and resist the way the treaty system operates.[30]

Due to the abundance of natural resources in Antarctica, there is a growing voice for the concept of common heritage of mankind to apply to the region's resources. But there was considerable debate about how it would apply to the ATS.[31] The New International Economic Order [a set of proposals put forward during the 1970's by some developing countries through the United Nations Conference on Trade and Development] sought equitable distribution of resources among developed and developing countries and aimed at curbing economic disparity. This would give property rights over these resources to all nations. However, because of the mineral resources on the continent, most ATS nations want to ignore the shared global commons principle, to continue exclusive exploitation.[32]

[30] Nils Vanstappen, *Challenges for the Antarctic Treaty System*, LEUVEN CENTRE FOR GLOBAL GOVERNANCE STUDIES - POLICY BRIEF NO. 21, 17-20 (2013).
[31] Zou Keyuan, *The Common Heritage of Mankind and the Antarctic Treaty System*, 38(2) NETHER. INTL. L. REV., 173-198 (1991).
[32] Bernard P. Herber, *The Common Heritage Principle: Antarctica and the Developing Nations*, 50(4) AMER. J. OF ECO. & SOCIO. 391-406 (1991).

B. ROLE OF THE COURTS IN PROTECTING THE REGION

The following two cases can be seen as pivotal case law to understand the dynamics of the region. The first case shows how a state has chosen to exercise control over the region. By declaring the region as part of the global commons, extraterritorial application of a domestic statute was justified. The second case is a classic case of how the International Court of Justice curtailed the activities of a state party, for the preservation of the continent, more specifically the marine environment of the region. Both cases demonstrate the role of courts in protecting the environment.

In Environmental Defense Fund (EDF) v. Massey,[33] the decision of the US National Science Foundation to incinerate food wastes (through burning in an open landfill) in Antarctica was challenged through the prayer of declaratory and injunctive relief by EDF, a non-profit US civil society organization. The authorities had not prepared an environmental impact assessment report, even though the US National Environment Policy Act of 1969 (NEPA) required such report for any "major action significantly affecting the quality of the human environment." The US Court of Appeals for the District of Columbia reversed the decision of the lower court and remanded the matter, seeing a violation of the NEPA. It was held that NEPA could apply to the extraterritorial activities of federal agencies as well. It was further held that the presumption against extraterritoriality will not apply when the effects are felt in Antarctica. The court found Antarctica to be part of the global commons and not a sovereign territory per se. Thus, the US was justified in exercising control over potentially harmful activities at the US McMurdo research station.[34]

[33] 772 F. Supp. 1296 (D.D.C. 1991).

[34] THE ENVIRONMENTAL LAW REPORTER (23 ELR 20601), https://elr.info/litigation/%5Bfield_article_volume-raw%5D/20601/environmental-defense-fund-v-massey; David A. Wirth, *Environmental Defense Fund, Inc. v. Massey*, 87(4) THE AMER. J. OF INTL. L., 626-635, (1993); Thomas E. Digan, *NEPA and the Presumption*

In the Antarctic Whaling case[35], Australia, a vocal supporter of the ban on commercial whaling, challenged the slaughter of whales by Japan, which was purportedly done for scientific purposes. Proceedings in the case were instituted in 2010 by Australia: Australia accused Japan of pursuing the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) in breach of its obligations under the International Convention for the Regulation of Whaling. Although the International Whaling Convention allows for the catching of a certain number of whales by the Japanese fleet, these whale captures have been deplored by Australia as harming the marine environment.[36] The International Court of Justice ruled in favor of Australia, holding that the whaling done, from an objective standpoint, was not strictly for the purposes of scientific research. Hence, Japan violated Article VIII, paragraph 1 of the International Convention for the Regulation of Whaling. Japan's research whaling in the Antarctic (JARPA and JARPA II) had, in the Court's view, carried out excessive lethal sampling of whales for 'scientific research' and was contrary to the objective of preserving the species.37 The permits were accordingly revoked. The ICJ ordered Japan

against Extraterritorial Application: The Foreign Policy Exclusion, 11(1) J. OF CONTEMP. HEALTH L. & POLICY, 165-196, (1995).

[35] Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014.

[36] Justin McCurry, *It's Australia v Japan over whaling in the Antarctic*, THE GUARDIAN (June 25, 2013), https://www.theguardian.com/environment/2013/jun/25/australia-japan-whaling-antarctic-challenge

[37] Marc Mangel, *Whales, science and scientific whaling in the International Court of Justice*, 113(51) PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA, 14523-14527 (2016), http://www.pnas.org/content/pnas/113/51/14523.full.pdf.

to revoke any authorization, permit or license to take or kill whales in relation to JARPA II.[38] [39]

Parties, especially Parties to the Antarctic Treaty System, should take advantage of international courts to ensure better compliance with the relevant international legal instruments

C. CALL FOR CONSENSUS & NEGOTIATIONS

The foremost solution to the deteriorating situation in Antarctica is for the Antarctic Treaty Members to pressurize all states to ratify the ATS and implement it in a stringent manner. Fresh treaties are of no avail if they are not implemented adequately. Further, once this goal is formalized, we only reach a point where no fresh harm is done to the region. There is no remediation of previous harm.

When negotiating these new rules, lawmakers should rely on scientific data. The accuracy of the scientific data is an essential pre-requisite to ensure a successful environmental protection framework. The lack of concrete scientific information will make it difficult for Antarctic Treaty Members to act more proactively. It is necessary to implement long term tracking instruments at research centers in Antarctica to adequately comment on harm caused. The Trump administration's withdrawal of funding for climate change research will undoubtedly cause further deterioration of the continent.

[38] Marko Milanovic, *ICJ Decides the Whaling in the Antarctic Case: Australia Wins*, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (2014).
[39] Guillaume Gros, *The ICJ's handling of Science in the Whaling of the Antarctic Case: A Whale of a Case?*, 6(3) J. OF INTL. DISPUTE SETTLEMENT, 578-620, (2015).

CONCLUSION

In our view, courts and international law can only help save the region if the Antarctic Treaty member-states ensure that there is full application of the ATS. Despite the treaty systems contributing towards establishing a stable legal regime in the area, large-scale exploitation by private parties and states continues virtually unabated. Notwithstanding a growing voice in favor of Antarctica's inclusion within the regime of global commons, state conflicts over disputed territories and exploitation of resources have continued.

The international community must cope with the problem of cumulative impacts. It is the combination of little activities that is putting the fragile ecosystem of Antarctica under severe stress. The melting polar icecaps are a reality, as is the growing number of tourists. It is amazing to see that there is still no cooperative international action over the continual rise in temperature of the region.

The behavior of States towards the region needs to change. There needs to be an informed discussion of the harm caused to the Antarctic region and its fragile ecosystem. Actions like the expedition of a Greenpeace ship in Charlotte Bay should be widely publicized to ensure awareness and political support. Time-bound actions in pursuance of Antarctica's protection and conservation are necessary to sustain the region.

MEASURING THE PROGRESS OF JUSTICE AT THE GRASSROOTS IN INDIA: CIVIL SOCIETY'S COLLABORATIVE ROLE IN TRACKING SDG 16

*- Jane E. Schukoske**

ABSTRACT

This article discusses measuring progress towards justice in people's everyday lives in India. United Nations (UN) member states adopted access to justice in the seventeen Sustainable Development Goals (SDG) for the 2030 Agenda launched in 2016. SDG 16 commits nations to "[p]romote peaceful and inclusive societies for sustainable development provide access to justice for all and build effective, accountable and inclusive institutions at all levels." SDG 16 is an opportunity to study, identify, and imagine meaningful ways for civil society to supplement government data from law enforcement, budget allocations for public services, birth records, and the like. The article examines early work on SDG 16 indicators and data collection planning by the government and civil society in India, including observations from a nongovernmental organization about how its good rural governance program meets SDG 16 targets. S M Sehgal Foundation collaborates with communities to empower villagers to know their rights and remedies to seek when people face injustice. Such civil society organizations provide a valuable communication bridge between grassroots communities and government departments providing public services and grievance redressal. Legal professionals, civil society organizations, and government officials collaborate on SDG 16 to improve access to justice. Law faculty and students should join the leadership in SDG 16 efforts to improve legal education, contribute research and deepen understanding of the issues at the grassroots near their campuses. The emergence of international discussion on SDG 16 highlights the mandate to nations, and ultimately communities, to better measure how people experience justice every day.

"Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."

- United Nations Sustainable Development Goal 16

I. INTRODUCTION

Countries that are members of the United Nations (UN) took a pioneering step by embracing peace, justice, and strong institutions as a sustainable development goal (SDG) in their 2030 Agenda that began January 1, 2016.[1] The seventeen SDGs guide national policies with a comprehensive goal for 2030 to eradicate "poverty in all its forms and dimensions, including extreme poverty . . . the greatest global challenge and an indispensable requirement for sustainable development."[2] SDG 16 quoted above focuses on three broad categories of social justice: prevention of crime, violence, and terrorism; effective institutions, rule of law, and aspects of governance; and implementation of the goal by national and global institutions.[3]

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[1] United Nations members had adopted the Millennium Development Goals (MDGs) for the period 2000-2015. None of the eight MDGs included justice as a target. *See* United Nations, Millennium Development Goals and Beyond 2015, http://www.un.org/millenniumgoals/ (last viewed Nov. 19, 2018).

[2] United Nations, *Transforming our World: The 2030 Agenda for Sustainable Development* (2015), available at https://sustainabledevelopment.un.org/post2015/transformingourworld/publication.

[3] Three targets focus on prevention of crime, violence, and terrorism:

- reduction of violence and related deaths (target 16.1),
- an end to abuse, exploitation, trafficking of children (16.2), and
- reduction of illicit financial and arms flows, and all forms of organized crime (16.4).

Seven targets address effective institutions, rule of law and some aspects of governance:

- "promote the rule of law at the national and international levels and ensure equal access to justice for all" (16.3);

Each country, responsible for its own economic and social development, measures its own progress toward the sustainable development goals. Around the world, nations are scrambling to put in place strategies and measures for this brand new collective goal of peace, justice, and strong institutions. For SDG 16 targets, available data is drawn in most countries from law enforcement, budget deviations on public services provided, birth records, freedom of information act implementation, and human rights institutions.[4] Since SDG 16 is a new international target, we can expect that refinement of SDG 16 data sources and measurement will be a work in progress in the coming years.

- reduction of corruption and bribery (16.5),
- "develop effective, accountable and transparent institutions" (16.6),
- "responsive, inclusive, participatory and representative decision-making" (16.7),
- "provide legal identity for all, including birth registration" (16.9),
- "public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements" (16.10), and
- promote and enforce non-discriminatory laws and policies for sustainable development" (16.b)],

and two targets address implementation of SDG 16:

- "strengthen relevant national institutions to prevent violence and combat terrorism and crime" (16.a), and
- increasing "the participation of developing countries in the institutions of global governance" (16.8)].

See Noora Johanna Arajarvi, *The Rule of Law in the 2030 Agenda*, BERLIN POTSDAM RESEARCH GROUP, "The International Rule of Law – Rise or Decline?", KFG Working Paper No. 9, at 22 (June 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992016 (last viewed Nov. 19, 2018).

[4] Report of the Secretary General, Progress towards Sustainable Development Goals (8 June 2017) pp. 16–18, https://unstats.un.org/sdgs/files/report/2017/secretary-general-sdg-report-2017--EN.pdf (last viewed Nov. 7, 2018).

In 2019, a UN body called the High Level Political Forum will facilitate voluntary national reviews for the first time measuring progress toward SDG 16, as well as five other sustainable development goals.[5] The voluntary national review linking development and justice is a tremendous opportunity for focusing on efforts and outcomes at the grassroots. The review will also be a catalyst for reflection on meaningful measurement of progress by all those involved in justice delivery.[6]

This article for readers in the legal profession and civil society organizations focuses on progress towards and measurement of *justice*. Historically, what have lawyers measured about justice? On the individual level, lawyers focus on their own professional efforts - time, fees, and litigation success. Legal aid organizations often reports outreach numbers, legal services provided and public interest litigation successes. The emergence of international discussion on SDG 16 brings the opportunity and challenge to better measure how justice is experienced in people's daily lives.

II. APPROACH TO SDG 16 IN INDIA

In India, the National Institution for Transforming India (NITI Aayog) accepted the role of coordinator for implementation and interfacing with the union ministries[7] and state governments.[8] NITI Aayog convened

[5] UN Sustainable Development Knowledge Platform, High Level Political Forum, (last viewed Nov. 20, 2018), https://sustainabledevelopment.un.org/hlpf.

[6] NITI Aayog, Sustainable Development Goals, From the States, http://www.niti.gov.in/content/states. (last viewed Nov. 7, 2018).

[7] NITI Aayog Development Monitoring and Evaluation Office, Government of India, Sustainable Development Goals (SDGs), Targets, CSS, Interventions and Nodal Ministries, Draft Mapping (SDG 16 at p. 27), (August 2017), http://niti.gov.in/writereaddata/files/SDGs%20V22-Mapping_August%202017.pdf; (SDG 16 at pp.45-46), (August 2018),http://niti.gov.in/writereaddata/files/SDGMapping-Document-NITI_0.pdf (last viewed Nov. 7, 2018).

separate consultations on most of the SDGs and held a National Conclave on SDGs in December 2017 with a broad range of stakeholders, including civil society organizations.[9] Since then, Niti Aayog has announced the decentralized strategy that Gram Panchayats (elected village councils) will play a key role in implementation of SDG 16, with support from centrally sponsored/central sector schemes including Rastriya Gram Swaraj Abhiyan (RGSA, aimed at developing capacities of Gram Panchayats), infrastructure support for Gram Nyayalayas (village courts) and e-courts (improved court case management), Aadhaar (a unique identification number), Digital India (online services for citizens) and modernization of police forces.[10] In July 2018, the central government sought annual action plans under RGSA from the states that are to include focus on the Sustainable Development Goals.[11]

In December 2018, NITI Aayog issued *SDG India Index Baseline Report 2018* containing indicators for measuring progress under selected targets of the SDGs, including these for SDG 16: "reported murders per 1 lakh population" (target 16.1), "reported cognizable crimes against children per 1 lakh population" (target 16.2), "estimated number of courts per 10 lakh

8 NITI Aayog, Sustainable Development Goals, From the States, http://www.niti.gov.in/content/states (last viewed Nov. 7, 2018).

9 NITI Aayog, National and Regional Consultations on SDGs, http://niti.gov.in/content/national-and-regional-consultations (last viewed Nov. 19, 2018) and National Conclave on SDGs, 19-20 December 2017, A Report, p. 15 (summing up that participants observed there was no work on SDG 16), http://niti.gov.in/writereaddata/files/NationalConclaveonSDG_19-20Dec2017.pdf (last viewed Nov. 19, 2018).

10 Niti Aayog, Sustainable Development Goals India Mapping of Central Sector Schemes and Ministeries of Government of India (August 2018) (SDG 16 at pp.45-46) http://niti.gov.in/writereaddata/files/SDGMapping-Document-NITI_0.pdf (last viewed Nov. 19, 2018).

11 RGSA Cover letter from Spec Sec Shalini Prasad, MoPR 18 July 2018 available at Rashtriya Gram Swaraj Abhiyan Government of India, http://rgsa.nic.in/#downloads. (last viewed Nov. 20, 2018).

persons" (target 16.3), "estimated reported corruption crimes per 1 crore population" (target 16.5), and "percentage of births registered" and "percentage of population covered under *Aadhaar*"[12] (target 16.9). The Report notes that "[t]hese indicators have been selected based on availability of data at the national level and to ensure comparability across States and Union Territories (UTs)."[13]

III. THE VALUE OF CIVIL SOCIETY INPUT ON SDG 16

The Commonwealth Human Rights Initiative, based in New Delhi, issued a report of baseline data sources for India's SDG 16 indicators, which spans official central and state databases, as well as unofficial sources.[14] The report notes the important supplemental value of civil society data, stating, "Civil society data is valuable as it not only questions the official narrative of development, but also provides information where none exists

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12 NITI Aayog, *SDG India Index Baseline Report 2018* (2018), p. 179, http://niti.gov.in/writereaddata/files/SDX_Index_India_21.12.2018.pdf (last viewed Dec. 27, 2018).

13 *Id.*

14 Commonwealth Human Rights Initiative, *SDG 16 India Mapping the Datascape* (2018), report available at http://www.humanrightsinitiative.org/download/SDG%2016%20India%20Mapping%20the%20Datascape.pdf (last viewed 20 Nov 2018). "The official data sources in this report are from the Government of India, drawing upon reports of the central and state governments as well as reports of government-appointed committees, court documents and judgments. In addition [CHRI has] looked into Public Interest Litigation (PIL) materials, census and National Sample Surveys (NSS), and data gathered from Right to Information (RTI) requests." *Id.* at 10. "The Ministry of Home Affairs (MHA) at the Centre is the nodal agency for SDG 16 in India. The National Crime Records Bureau (NCRB) under the MHA is the primary repository of all-India crime related statistics, including its annual flagship reports, Crime in India and Prison Statistics India. Other official sources for SDG 16 related data and information are: the MHA; the Bureau of Police Research and Development (BPRD); the National Judicial Data Grid; the Ministry of Law and Justice; the National Legal Services Authority (NALSA); the Ministry of Social Justice and Empowerment; the National Human Rights Commission of India (NHRC); the Central and State Information Commissions; and the Ministry of Women and Child Development (MWCD) for children-related SDG 16 targets and indicators."

through official sources."[15]

Civil society organizations (CSOs) that build trust with grassroots communities learn about ground realities. The Government of Haryana's 2017 report, Vision 2030, outlined current SDG 16 interventions and projects and strategies for success in the future, and acknowledged the importance of NGOs and other institutions as "valuable partners in . . . efforts to make residents more aware of their rights, as well as shepherding particularly those from vulnerable communities through the legal process for obtaining justice."[16]

Seizing the opportunity to draw attention to the new United Nations sustainable development goal on justice, some CSOs focusing on access to justice published resources for civil society participation in the SDG 16 planning and implementation process. The resource, *Advocacy: Justice and the SDGs*[17] includes "legal empowerment" in the description of access to

[15] *Id.* at p. 6. The report cautions that civil society data may lack standardization, reflect small sample size and scope, and suffer from inconsistencies in research design.

[16] Government of Haryana, *Vision 2030* at pp. 125–26, (2017), https://esaharyana.gov.in/Portals/0/undp-2030.pdf (last viewed 7 Nov 2018). Its focus for the future is to: "reduce all forms of violence (especially against women) . . . and abuse, exploitation, trafficking and all forms of violence against children; ensure access to justice for all, especially the disadvantaged and vulnerable sections of society; promote peace through prompt, transparent, and fair law enforcement and positive interactions between the police and various sections of society; strengthen the Police Department's law enforcement machinery as well as the Prosecution Department." *See Id.* at p. 119. The report credits the Haryana State Legal Services Authority's role in proving legal aid, legal literacy awareness, and dispute resolution through Lok Adalats and mediation. *See Id.* at p. 122.

[17] *Advocacy: Justice and the SDGs: How to translate international justice commitments into national reform* (2016), https://tapnetwork2030.org/accesstojustice/ (last viewed Nov. 7, 2018). Nonprofit organizations, Namati, the International Legal Foundation, the Open Society Justice Initiative, the American Bar Association Rule of Law Initiative, and the Transparency, Accountability and Participation (TAP) Network developed advocacy, for 2030 Agenda. The TAP Network produced a companion resource, *TAP Goal 16 Advocacy Toolkit* (2016), available at http://tapnetwork2030.org/goal-16-advocacy-toolkit/goal16toolkitdownload/ (last viewed Nov. 20, 2018), (containing tools such as

justice, defined as "a person's ability to understand, use, and shape the law to secure justice and ensure that their basic needs are met… Legal empowerment places the power of law in the hands of the people. It helps people exercise their rights and pursue remedies in any and all areas affected by laws and policies, such as within administrative agencies where food aid is distributed, legal identity documents are obtained, or environmental regulations are enforced."[18]

CSOs that promote legal empowerment in India can transmit community perspectives on measuring progress toward justice. To illustrate this, I draw on the experience of S M Sehgal Foundation (SMSF), an Indian public charitable trust that works with rural communities on an initiative named Good Rural Governance.

IV. GRASSROOTS DATA FOR SDG 16 INPUT

From a rural community perspective, what are the measures for progress on legal empowerment and "effective institutions, rule of law, and aspects of governance"? For an accurate picture, data should be gathered from community experiences. CSOs play a vital bridging role that is particularly important in communities where many people lacking formal education do not know their legal rights or how to hold local governments accountable to secure them.

SMSF's Good Rural Governance program plays such a bridging role in its work with rural communities in Nuh (formerly named Mewat) District of

justice data gap analysis, stakeholder gap analysis, and citizen-generated data collection to help nations define and measure SDG 16 progress).

[18] *Advocacy: Justice and the SDGs*, *Id.*, at p. 6.

the state of Haryana, India.[19] In 2008, the SMSF team consulted with villagers in a few localities about local issues regarding provision of public entitlements and services and the role that citizen participation could play in securing improved service delivery. The villagers embraced the idea of having ongoing dialogue and dubbed the effort *"Sushasan Abhi!"* ("Good Governance Now!"). Since then, the good governance initiative has spread to almost all villages in Nuh district.

The SMSF team conducts village leadership schools to teach the basics of how the government provides services. Villagers learn from SMSF about the networks responsible for public service delivery (village committees, councils, and specific government officials) and the grievance mechanisms for raising complaints. Community members learn to stand up for their rights and to use grievance mechanisms. They seek justice in access to and proper delivery of a reliable supply of water and electricity, maintenance of drainage to minimize standing water and related health hazards, support for construction of toilets to improve village sanitation, proper provision of government-funded day care centers and school lunch programs, regulation of the distribution of subsidized rations (e.g., food grains, sugar, kerosene), construction of village roads, payment of government pensions, and payment of housing construction subsidies, among others. SMSF operates a toll-free hotline for residents having problems accessing benefits such as school lunches, subsidized food grains, and pensions.

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[19] NITI Aayog has designated Mewat District as an "aspirational district", defined by "deprivation enumerated under the Socio-Economic Caste Census, key health and education sector performance and state of basic infrastructure."
NITI Aayog, *Transformation of Aspirational Districts* (March 2018) at p.1, available at http://niti.gov.in/writereaddata/files/document_publication/AspirationalDistrictsBaselineRankingMarch2018.pdf (last viewed Nov. 20, 2018). Mewat ranks the lowest, number 101 of 101 districts. Aspirational Districts Baseline Ranking – March 2018, p. 8, http://niti.gov.in/writereaddata/files/document_publication/AspirationalDistrictsBaselineRankingMarch2018.pdf (last viewed Nov. 20, 2018).

SMSF collaborates with the District Legal Services Authority (DLSA), the judge-supervised government body charged with providing legal aid, to conduct legal literacy camps on school grounds and other convenient locations.[20] This collaboration benefits the missions of both organizations, aiding the DLSA by enhancing outreach and communications with community members and building trust among community members with whom SMSF works about their rights and the grievance mechanisms existing to protect them. In fact, the DLSA and its state and national counterparts are justice institutions under the SDG 16 umbrella.

In disputes with private parties, villagers often lack confidence to assert their claims because they are unfamiliar with dispute resolution systems or they fear people in power. Villagers have spoken with SMSF about wrongful occupation of land previously allocated to the poor, retaliatory job firing for reporting corruption, and fraudulent collection of fees by con artists. When villagers see that relief may actually be available, they begin to understand and exercise legal empowerment.

V. INPUT MONITORING JUSTICE TARGETS: A CSO'S EXPERIENCE

To show how SMSF measures progress on Good Rural Governance, Dr. Vikas Jha, the director of the SMSF Governance and Policy Advocacy program, provided data from the Good Rural Governance annual report for April 1, 2016–March 31, 2017 on the 423 villages covered and 48,602 villagers reached. Asked to match SDG 16 targets with available measures, he identified the following three:

[20] Navneet Narwal & Jane Schukoske, Legal Literacy Camps: Collaboration of Civil Society Organisations and District Legal Services Authorities to Better Serve the Public, Haryana State Legal Services Authority Newsletter, Dec 2016 & Jan 2017, pp. 27-30, (2016-17) http://hslsa.gov.in/sites/default/files/documents/december-2.pdf (last viewed Nov. 8, 2018).

Target 16.6: Develop effective, accountable, and transparent institutions at all levels: SMSF measures progress by showing the improvement in subsidized ration distribution (13,200 increase), services to pregnant woman and children age 0–5 (4,400), the school lunch program (6,000), and distribution of school supplies and uniforms to students (9,532). Vigilant citizens and school management committees that have learned how to monitor these government programs are holding government accountable, and this has resulted in improvement of services.

Target 16.7: Ensure responsive, inclusive, participatory, and representative decision-making at all levels: SMSF sees progress measured by the number of citizens who are participating in government programs by approaching government departments and the percentage of women participating in various forums [at community meetings: 17,105 women (37%) and 29,409 men (63%); at legal literacy camps: 1,509 women (34%) and 2,894 men (66%)] and what they achieved.

Target 16.10: Ensure public access to information and protect fundamental freedoms in accordance with national legislation and international agreements: During the year, SMSF found that citizens had raised 576 grievances, 113 through Right to Information (RTI) Act petitions, and 463 by filing administrative applications or complaints. From the 576 grievances, citizens received only 140 responses.

Citizens who engaged with the Good Rural Governance (GRG) team in 2016–17 faced and spoke up about a broad range of problems. Grievances included water supply, reliable electric supply, drainage maintenance, sanitation improvement, road maintenance, school lunch and day care quality, distribution of subsidized food grain, government pension issuance, private occupation of land allotted to forty-eight families below poverty level, private occupation of school grounds, cases of retaliatory firing of a school employee for reporting corruption, and fraudulent

collection of funds. Individual citizens and a women's vigilance group monitored the provision of benefits and services at the local level and raised problems publicly at Legal Literacy camps attended by the head of the District Legal Services Authority and local officials.

The GRG team documented twenty five case studies of successes in securing public services and government benefits that community members achieved through the Haryana Chief Minister's Grievance Redressal and Monitoring System[21], called the "Chief Minister's Window." When citizens file grievances through this system, the Chief Minister's office sends such complaints to local departments for action.

From its grassroots work, the SMSF team recognized the importance of being able to measure progress towards justice in rural communities to sow hope and motivate citizens to participate actively in local governance. The SMSF data collected to measure progress locally maybe useful for assessing progress towards targets 16.6, 16.7, and 16.10 elsewhere: the robustness of provision of public services, inclusive participation in community decision-making and legal literacy forums, and citizen use of RTI and grievance mechanisms. These measures are consistent with a "target matrix for Gram Panchayats on Select SDGs" published by researchers in India in 2018.[22]

For measurement over time, the numbers must be understood in context. For example, the Haryana Chief Minister's grievance system has to some extent replaced the Right to Information Act as a way to prompt action by government departments, so the meaning of reduction over time in RTI petitions may be difficult to interpret in that state. There may be other

[21] Avaliable online at http://cmharyanacell.nic.in/.

[22] Anirudh Chakradhar and Balakrishna Pisupati, *Localising the Sustainable Development Goals (SDGs): Options for India, FLEDGE India, 2018*, http://fledgein.org/wp-content/uploads/2018/05/Localising-the-SDGs-Options-for-India.pdf (last viewed Nov. 18, 2018).

measures for assessing access to justice in the delivery of public services, such as comparing percentages of people who receive benefits from government programs and services with estimates of the total number of eligible people.

CONCLUSION

Looking ahead to 2019: First formal measurement of progress toward justice under SDG 16

SDG 16 signifies a path-breaking global commitment to equal access to justice for all and is a clarion call for widespread discussion on progress towards justice in disadvantaged communities. At the voluntary national reviews to measure progress toward SDG 16 at the UN High Level Political Forum in 2019, nations will share the strategies that they have developed so far.

In the coming months, civil society organizations and law schools in India should collaborate on and study implementation of RGSA, which requires substantial capacity building of Gram Panchayats for relevant planning and data collection on SDG 16 as well as other goals.[23] Universities, including law faculties, may indeed identify ways in which they can contribute to Gram Panchayat development and data analysis.[24] They may identify other contextually relevant measures for progress on justice, and bring the discussion of everyday justice into legal education dialogue. In this way, CSOs and law schools can contribute to the development of frameworks for measuring legal empowerment to supplement the existing data that the government collects on crime and budgets and through Aadhaar. This

[23] *See, e.g.*, *Id.*

[24] Lennart Levi and Bo Rothstein, *Universities must lead on Sustainable Development Goals*, UNIVERSITY WORLD NEWS GLOBAL EDITION - Issue No. 528 (Nov. 9, 2018) available at http://www.universityworldnews.com/article.php?story=20181106131352348 (last viewed 20 Nov 2018).

work can supplement the data collection of national ministries and state governments and may show the way for those bodies to include positive indications of progress on legal empowerment in their still-evolving Vision 2030 plans for achieving the SDGs.

To measure progress towards the 2030 target date, the measurement tools and baseline data must be established as soon as possible. Civil society organizations can provide platforms to elicit community input on lived experience of justice. Moreover, legal researchers, law school clinics, legal services authorities, and law students as they prepare for and step into their legal careers have the opportunity and challenge to track progress on global justice under SDG 16. They can benefit from grassroots experience through research and collaboration with civil society organizations.

As the experience and data provided above by S M Sehgal Foundation highlights, community experience provides context to imagine and assess effective, accountable, and transparent institutions (16.6), responsive, inclusive, participatory decision-making (16.7), and public access to information and protection of fundamental freedoms (16.10). With justice finally on the global development agenda, it is the time to define quantitative and narrative measures of justice, including legal empowerment, and assess the progress made.

LIBERTY, PRIVACY AND AADHAR: HAS THE SUPREME COURT USHERED IN A SURVEILLANCE SOCIETY?

- *Shyam Divan*[*]

Good morning, students and members of the faculty.

It is, as always, invigorating to be at a great centre of learning. I note a strong participation of all genders. As the poet and Professor of Humanities, Leela Gandhi reminds us in 'Grandmother':

My grandmother, growing old, deciphers,

Daughters are verbs and sons ciphers.[1]

For a practitioner who earns his keep facing a bench of stern judges, addressing a gathering of students and academics is a welcome diversion. I must confess that this time around I was a bit anxious. When the date for this lecture was fixed several weeks ago, I had a gnawing doubt about the durability of what I might say. The invitation mentioned '*Privacy*' but lurking in the shadow was that word '*Aadhaar*.' Now, this might not have been a source of much anxiety several weeks ago when arguments were still being heard in the *Aadhaar* case.[2]

The trouble with the lecture fixed on 29th September 2018 was its proximity to 3rd of October, 2018, the date when our next Chief Justice takes charge. This meant a fair possibility that the *Aadhaar* judgment could be rendered on 1st October, the last day of Chief Justice Dipak Misra's tenure. I feared that my thesis would perish in 24 hours, much like the

[*] Senior Advocate, Supreme Court of India.

[1] LEELA GANDHI, 'GRANDMOTHER' IN MEASURES OF HOME 8 (Orient Blackswan 2000).

[2] Justice K. S. Puttaswamy v. Union of India, 2018 (12) SCALE 1.

Mayfly. As it happened, the Court delivered its judgment on 26th September 2018. While the full potential and impact of its directions and the principles enunciated will take several weeks to unravel, I will share with you my thoughts on *Puttaswamy- II*;[3] *Puttaswamy- I*[4] being the nine-judge bench judgment which recognized the fundamental right to privacy.

More importantly, I have chosen to address some larger issues beyond Aadhaar that confront our society in the context of constitutionalism, rule of law, and rapid changes in technology. Across the globe there is a challenge to the liberal order. Liberal values secured to us by Parts III and IV of the Constitution are continuously tested by governmental actions. The challenge today is more complex. To preserve our liberties, we must contest not just the State, but also corporations which deploy technologies with tremendous reach and penetration. The contests for budding lawyers like you and for citizens more generally will involve understanding new technologies and ensuring that global corporations and state actors do not compromise our hard fought freedoms.

But before I peer into the future let me cast my eye into the past.

In January 2014, my brother Vivek forwarded me a link on the website 'ancestry.com.' Here was an image of a yellowish page from a typed register dating back to 20th October, 1922. Atop the page was 'Name of Ship: *Barengaria*; Port of Arrival: *Southampton*.' The Steamship Line was the *'Cunard'* and against the printed words 'Whence Arrived:' was written '*New York*.' None of this would have mattered much but at serial number 56 against the caption 'Names and Descriptions of British Passengers' stood the name of my grandfather, Baburao J Divan. The register correctly records his occupation as 'Student' and puts his age at 26.

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[3] *Id.*

[4] Justice K. S. Puttaswamy v. Union of India (UOI) and Ors., AIR 2017 SC 4161.

The image of this register and its details triggered a whole succession of happy images. What might Baburao have looked like at 26? What might he have worn as he briefly stepped ashore at Southampton? How long might the transatlantic journey have taken? Was he nervous or self-assured? Here, in this nearly century-old register was a wealth of information that I enjoyed because it fleetingly brought to life a grandparent I never knew.

Baburao was sailing back to India after completing a course in Pedagogy at Columbia University. His father Jeevanlal had in 1908 started the Proprietary High School not far from here, in Ahemdabad. It was born of a protest against British discrimination. Baburao planned to join what is today the Divan-Ballubhai School. But several twists and turns in the tale took his career in another direction, away from the 10,000-student strong institution of today.

Speaking of schools, allow me to transport you to Kundi Girls School in Murhu, 35 kms south of Ranchi. On 28th June last year I accompanied two development economists Jean Dreze and Reetika Khera on a visit to this residential school. This was one of several schools that the State of Jharkhand runs for Adivasi girls from forest dwelling communities. It is truly a wonderful initiative. The reason for the visit was to see firsthand how Aadhaar works on the ground.

All the school children were required to authenticate their attendance on a fingerprint reader twice a day – in the morning when school starts and again at around noon, before the mid-day meal. On that day, the Jharkhand State school website in real time showed 130 girls attending the school when in fact; the number was close to 230. The reason for this discrepancy was that from amongst 190 girls who had Aadhaar, the authentication system did not match the fingerprints for nearly 60 children. The physical registers maintained by the class teachers recorded the presence of nearly 60 children who were present in school but had

fallen off the map as far as the Aadhaar based attendance system was concerned. Fortunately, so far, the mid-day meals are not withheld because of non-authentication.

As you know, one of the justifications for Aadhaar is to eliminate false identities. The government claims that subsidies and benefits are diverted to persons who do not exist, in short-hand '*ghosts*'. Instead, in an ironic reversal, Aadhaar at the Kundi Girls School was *creating* and not *eliminating* ghosts. Young Adivasi girls in flesh and blood, very much alive were rendered ghosts because the technological limitations of Aadhaar did not read their fingerprints and register their presence. The principal of the school informed us that such huge discrepancies occurred every day.

On the same trip we visited a village with a musical name, Sosotoli in the Khunti district. There, Jainathram had not received grains since September 2016, because his fingerprint authentication failed. Tilokumari, who cannot speak and can barely hear, was also unable to get her grain due to fingerprint authentication failures.

What do these travels back in time – the Southampton entry register, and the travels to the Jharkhand School tell us about data and privacy? I think the register is a good place to begin because you have a neat, organized layout of information particular to the individual. We know who arrived, when, how and from where. You recall how this excited me because of its teasing effect on my imagination. Here was information stored in a distinct silo – in this case the port entry register. The register is an archive, open and yet discreet in guarding its passengers from a full-frontal disclosure. It is a vault of data, available but unconnected to other silos of data about those ship passengers.

And now to the *Adivasi* school girls. The electronic attendance register maintained through Aadhaar authentication is equally well organized. It

identifies the student, records the time and pinpoints the location, with the name of the school displayed on the state website. This is the troubling part. The attendance electronically tracked over the career of the student – in school, at exams, at picnics, at scholarship awards, in college or perhaps at a national law university, at work, when travelling**,** – and so on, will help profile the student as she progresses through life. The Aadhaar register will authenticate and electronically register all these actions. The Aadhaar number seeded across databases such as banks, telephone companies, airlines, taxi services, e-commerce platforms, hospitals and what have you – will leave an *indelible authentication trail* that will give the State and its organs tremendous power over an individual. The metadata arising from an individual's Aadhaar history will enable profiling, tracking and eventually usher in a surveillance society.

Both the Southampton port register of 1922 and the Aadhaar electronic authentication register of 2017 are records of data. Southampton's was harmless. While you could imagine a thing or two about those who disembarked, there was very little about a person that you could reconstruct.

The problem with the centralized register authentication system of Aadhaar is that the program becomes a universal, ubiquitous platform or a comprehensive register to record repeated authentications. The government's mission once shared and encouraged by corporate interests was to compel state and private sector actors to rely on Aadhaar for identification of every customer for every transaction. In this manner, the government would get money by charging the company for the authentication service and the corporate would save money by using a simpler identification mechanism conducting an independent background check. This magical win-win situation is hugely problematic because of the architecture of Aadhaar.

An electronic register recording authentication across time helps a state to build profiles of individuals. Let us consider the potential of the Aadhaar platform. It can be used by a biometric reader for unlocking a door, starting a car, clocking into an office, withdrawing money from the ATM, boarding a flight, paying a cab, and in a million other situations, where you interact with a service provider or find yourself at a biometric gateway. While all this is welcome from a convenience perspective, we must ensure that our liberties remain intact. If Aadhaar is allowed to grow and expand unchecked, from metadata and the authentication records, it will be used to profile individuals, predict their habits, and eventually gain dominance.

Central to the challenge in the Aadhaar case was the concern that this huge mountain of data in the hands of the state will irreversibly alter the relationship between the citizen and the state. The concern of the petitioners was that over time, with every service linked to Aadhaar, disabling Aadhaar would mean civil death. Imagine, at the switch of a button you would not have access to your bank accounts, investments, telephones, rations, scholarships, and routine requirements. Such would be the power of the state over the citizen.

There was a far greater concern as well. This had to do with the surveillance state. What does a surveillance state look like? Consider China, where the government has employed surveillance technology to fine residents for jaywalking and uses facial recognition technology to arrest a person attending a pop concert. In this dystopia, facial recognition software and powerful algorithms enable the government to rate citizens on trustworthiness, and attribute a citizen score. The Government of China crawls through social media and other data to assess whether you are a good or bad citizen. How far could Aadhaar go?

Since we have so many budding lawyers in the audience, allow me to introduce to you two affidavits filed before the Supreme Court on the

subject of surveillance. Here I take a hint from Dean Singh, who requested that I share '*what happened outside the reported judgments.'* Well, there are two affidavits. Both the affidavits which I will quote from were furnished by the petitioners challenging the Aadhaar project. The first is from Sameer Kelekar, an electrical engineer from IIT Mumbai, with a PhD from Columbia University, New York. In his affidavit dated 6 April, 2016, he said:

"That as someone with fairly extensive experience of cyber security, I can categorically state that this project is highly imprudent, as it throws open the clear possibility of compromising basic privacy by facilitating real-time and non real- time surveillance of UID holders by the UID authority and other actors that may gain access to the authentication records held with the said authority or authentication data traffic. . .

I have perused the documents that UIDAI has put out in relation to the design of the Aadhaar authentication system, and I can categorically state it is quite easy to know the place and type of transaction every time such authentication takes place using a scanner for fingerprints or iris and the records of these in the UID/Aadhaar database. Knowing the various types of transactions done via a particular Aadhaar number would help UIDAI or related parties to track the behaviour of a person using Aadhaar.

Further, I also point out that UIDAI recommends that each point of service device i.e. the device from which an authentication request emanates, register itself with the UIDAI and acquire for itself a unique device ID, which shall then be passed to UIDAI along with the request for every authentication transaction. I state herein that the said method of uniquely identifying every device and being able to map every authentication transaction to be emanating from a unique registered device further makes the task of tracking down the place from which an authentication request emanates easier."

Jude T. D'Souza a security system specialist affirmed in his affidavit on 22nd November 2016:

"As the Aadhaar verification system is used progressively in more and more applications, the extent and pervasiveness of the surveillance will increase.

By way of illustration, if Aadhaar verification using a fingerprint reader is carried out at say an airport for boarding an aircraft or at a public distribution shop for collection of rations or for withdrawing money from an Automatic Teller at a bank (ATM), the State will know the precise location of the individual.

Even if the GPS systems is disabled, since the fingerprint reader is communicating with the central depository through an electronic connection, it is easily possible to locate the finger print reader and in that manner, the place where the individual seeking verification is located."

Remarkably, despite these powerful affidavits, during the hearing the State and UIDAI could not on oath through an expert challenge these statements. One might have thought that this was surely a point on which the Court would strike down Aadhaar. Surely our Constitution is not a charter for a totalitarian State.

Midway through the hearing, the government introduced the report of its foremost expert, Professor Manindra Agrawal who holds the distinguished Chair of N. Rama Rao Professor at IIT Kanpur. This is what he said in his report on behalf of UIDAI submitted in the Supreme Court:

"Finally let us turn attention to Verification Log. Its leakage may affect both the security and the privacy of an individual as one can extract identities of several people . . . and also locate the places of transactions [done] by an individual in the past five years. . . . Tracking current location is possible."

After the report was read and re-read in the Supreme Court, I felt that there was no conceivable manner that the Court could now ignore our

compelling submission on the advent of a surveillance State through Aadhaar. The majority judgment discounted the surveillance state submissions. How did it do so? Simple. The majority judgment very simply does not deal with the affidavit of Dr. Sameer Kelekar or the affidavit of J. T. D'Souza, or the government's expert report put in by Professor Manindra Agrawal.

Imagine, on an issue as important as state surveillance, when every expert before the Court on oath pointed to '*real-time location tracking',* the Court employed the ultimate veto. A veto ignoring an inconvenient truth. A veto ignoring pleadings and choosing instead to rely on a power-point presentation by the CEO of UIDAI. Our liberty is in peril because of a judicial preference for a power-point over two sworn affidavits and one distinguished IIT Professor's report. As the Austrian writer Stefan Zweig recounts in 'The Tide of Fortune'*, 'several turning points in history pivot on the unlikely or the unexpected.'*

Let this not dispirit you. It will happen in your careers as lawyers and it will happen again in the Supreme Court of India in the years ahead. Very simply, judges will *not* deal with any material or evidence on the record and pointed out during the hearing – that detracts from the preferred outcome. I have witnessed this with those we consider amongst the best of judges.

Allow me to cut away from the decision of the Supreme Court and travel briefly to the origins of fingerprint science.

While finger marks have been used as signatures since antiquity in India, Japan and China, the use of the fingerprint for individual identification is relatively recent. Prof. Chandak Sengoopta in his dazzling survey 'Imprint of the Raj', recounts how pioneering initiatives in the field of fingerprint use began here in India under a colonial civil servant named Sir William

James Herschel.[5] Herschel introduced fingerprints as an administrative innovation to ensure an improvement in this gloomy milieu: "*Civil cases were especially rich in perjured evidence and forged documents, usually on both sides.*"[6] In 1858, Herschel insisted that a local businessman Rajyadhar Konai affix his palm print on the contract so that there could be no subsequent rescission. Herschel's next target was the registration department, the idea being that once the fingerprints were affixed no trickery could defeat the bargain.[7]

The justifications for introducing fingerprinting in India are described by Prof. Sengoopta in powerful terms which are undoubtedly racist. He recounts an 1866 opinion of an Inspector General of Police that in India, '*perjury is the rule and not the exception*' and that even the Privy Council had been moved to comment on '*the lamentable disregard of truth prevailing amongst the Natives of India*.'[8] Elsewhere, Prof. Sengoopta writes that in the telling of George Otto Trevelyan, no Indian-hater by the standards of the era: '*A Hindoo never sticks at a lie, but in the witness-box he surpasses himself...*'[9]

Now all of this may be explained as the curse of colonial rulers who considered themselves superior to 'the natives'. The tragedy of the mindless expansion of Aadhaar is that the Government of India in the 21st century is as untrusting of its citizens as the colonial rulers. The justification for linking the PAN Card, bank accounts, SIMs, school admissions, board examinations, pensions, salaries, rations, and what have you, stems from an essential distrust that the State holds against its citizens. The State that '*We the people*' created under the Constitution

5 CHANDAK SENGOOPTA, IMPRINT OF THE RAJ: HOW FINGERPRINTING WAS BORN IN COLONIAL INDIA (Pan Macmillan 2003) [hereinafter CHANDAK SENGOOPTA].
6 *Id.* at 49.
7 CHANDAK SENGOOPTA, *supra* note 5, at 74.
8 *Id.* at 48.
9 *Id.* at 50.

regards us as a nation of knaves. This is a tragic distortion of republican government.

Now let me tell you something about the recent Aadhaar judgment and what it bodes for the future. First, I will briefly describe the nearly 600 pages long majority judgment. There is a minority of one and a majority of four. There is a plurality of three comprising Justice Sikri, the author of the judgment, Chief Justice Misra and Justice Khanwilkar. There is concurrence by Justice Bhushan. That makes four. There is a ringing dissent by Justice D.Y. Chandrachud, who directed some very sharp questions at us when we were arguing the case.

Let me briefly tell you about the main points in the majority judgment authored by Justice Sikri. One of the most important issues was the issue of the Money Bill. As you know, Article 110 defines the scope of a Money Bill. This Article covers Bills that contain 'only provisions dealing with all or any of the following matters' and then sets out a series of matters essentially dealing with finance and taxation. Where a Bill deals only with finance and taxation, it is regarded as a Money Bill and a Money Bill does not have to pass through the Rajya Sabha. So is 'The Aadhaar (Targeted Delivery of Financial & Other Subsidies, Benefits And Services) Act, 2016' spanning 59 sections and several chapters, a Money Bill? The Act sets up a statutory authority called the UIDAI and the world's first national biometric authentication system. It sets up the Central Identities Data Repository (CIDR). It has entire chapters on data protection, on penalties, on authentication, on the entire ecology of the Aadhaar system and how it works. The Act provides for registrars, operators at the ground level and tiers in-between. Then of course, the Act makes two crucial provisions: section 7, where for benefits and subsidies, people must have either Aadhaar registration or go through the Aadhaar authentication process. Another vital provision is section 57 which enables the extension of Aadhaar to the private and corporate sector.

I assure you that you can read and re-read Article 110 and there is almost no manner of interpreting an Act like Aadhaar as being a Money Bill. Nevertheless, the Supreme Court of India held that it is. The minority judgment of Justice Chandrachud holds that this simply cannot be a Money Bill and therefore the Aadhaar Act is liable to be struck down on that ground alone. Both the majority and the minority agree on two important aspects. First, the importance of the Rajya Sabha in the legislative process and second, that the Court retains the power of judicial review over the decision of the Speaker who certifies that a particular bill is or is not a Money Bill. In reaching this conclusion, the Supreme Court overruled earlier smaller bench decisions, which suggested the contrary. When you go back to the classroom, please pick up Article 110, please have a look at the Aadhaar Act and critique the Supreme Court decision. It is an important part of your legal education and growth as responsible citizens to question reasoning where it lacks conviction. That is how we develop and improve as a society wedded to the Rule of Law.

The second broad strategy which the majority judgment employs is that while upholding the Aadhaar Act as a whole, it strikes down or reads down a number of specific provisions. I will give you a broad analysis of the issue, and then go into the details, where necessary. What the Supreme Court has done is that it has limited the scope of the Aadhaar programme. The Court has shrunk Aadhaar.

The majority either excised or removed certain statutory provisions altogether or drastically reduced their scope and operation in the hope that this would be an answer to the petitioners' surveillance challenge. So far as mobile number linkage to Aadhaar is concerned, the majority judgment and of course the minority judgment, said that the action of the government is *ultra vires*. An earlier order of the Supreme Court was misconstrued by the government to extend the programme to mobile phones. A very important claim of the petitioners was against the

notifications and regulations made under the Prevention of Money Laundering Act (PMLA), which required you to link your bank accounts, any investments in shares, mutual funds etc. that you might have to the Aadhaar number. This was held by the majority to be grossly disproportionate, an invasion of privacy and was struck down.

In respect of children, the majority concluded that there cannot be any compulsion. At the same time, parents' consent may be obtained until the age of 18 to issue Aadhaar. On reaching 18, the individual must be given a choice to opt out of Aadhaar.

Another gain for the petitioners is with respect to examinations such as CBSE, NEET, JEE. These boards required Aadhaar for sitting in the exam. This has been struck down since the requirement was not backed by statute.

Then, there was the exclusion argument. During the hearing, we produced affidavits of persons who had actually gone into the field and seen for themselves how individuals were being denied food rations. The deponents had seen and verified the starvation deaths caused by inaccessibility of rations due to the authentication failures. Imagine, a person entitled to food rations, cannot access the grain because the State is blind to the individual, can't see a human being in flesh and blood, but recognizes only a number. We read those affidavits in Court. They were very powerful and moving testimonies. None of these found a mention in the majority judgment.

The journalist Geetanjali Krishna brings out quite vividly what exclusion means:

Few, if any, were aware that this week also marked the first death anniversary of a little girl whose family couldn't get their food entitlements as their Aadhaar number

hadn't yet been seeded with the household ration card. Eleven-year-old Santoshi died on September 28 in Jharkhand, her final request for rice going unheeded by her desperate family. Her last words were "bhat, bhat," her mother Koyli Devi had told us, months after her daughter's death. "My daughter was not sick, she simply died of hunger," Devi had said.

As per the Right to Food campaign, 56 hunger deaths were reported between 2015 and 2018, of which 42 happened in 2017-18. Campaign activists aver that many of these deaths occurred because of Aadhaar based exclusions.[10]

Krishna concludes:

The question to ask is this: What price are we as a society willing to pay, to weed out phony beneficiaries from the country's public distribution system? I think there's only one answer: Let a thousand "fake" beneficiaries steal from the system, than have a single Santoshi die, crying for 'bhat bhat' in her final moments- simply because her Aadhaar and ration card weren't interlinked.

The majority judgment discounts the exclusion argument despite the affidavit evidence. It then makes the dismissive observation that, 'we accept the assurance of the government and no one will stand excluded from the ration distribution system that citizens are entitled to.'

The Supreme Court has shrunk the storage of metadata, which was permissible for up to five years, is now six months. So UIDAI, in terms of the judgment, can store the data only for six months. This may result in difficulties for the UIDAI which claims to require metadata for fraud detection.

An odd conclusion of the majority is upholding the PAN-Aadhaar linkage. What is the point of giving a child a choice to opt out of Aadhaar on

[10] Geetanjali Krishna, *Hunger in Times of Aadhaar*, Business Standard, 28 September 2018.

attaining majority, where Aadhaar will inevitably be required for income tax? This is one of the areas where the majority judgment is internally inconsistent. As far as benefits and subsidies are concerned, the majority judgment, has narrowly construed benefits and subsidies to mean something which is directly linked to payment from the Consolidated Fund of India and thereby contained the expansion of Aadhaar.

A huge gain for the petitioners is that the Supreme Court has axed the entire private sector element in the Aadhaar programme. People, who were previously working in the UIDAI, left UIDAI with the knowledge to set up private enterprises based on Aadhaar authentication. The applications could be used by corporations seeking to profile job-seekers, while entering an airport or boarding an aircraft and to establish customer identity when making delivery of ordered goods. All of that has been eliminated, for now. The result is a tremendous diminution of the potential for surveillance, tracking and profiling.

This is a huge blow. The government could earn substantial amounts through authentication payments. So, if you go to an ATM with an Aadhaar enabled system and you put your fingerprint on the reader, the UIDAI will charge let's say Rs. 10 for authentication. Now, that entire revenue stream has been cut off by both the majority as well as the minority. All the five judges are unanimous on this. This is going to severely impact the expansion of the Aadhaar ecosystem, at least in the near term.

Then there is a direction issued by the majority, as far as illegal immigrants are concerned: '*We direct the respondents to take suitable measures to ensure that illegal immigrants are not entitled to take any such benefits of subsidies etc.'* This shows that despite many days of arguments, the Supreme Court missed out on some basic points. For example, the judges used the words 'Aadhaar' and 'citizenship' together. Whereas Aadhaar, as you know, is

linked to 'residency' and not citizenship. How does someone at the enrolment agency verify who is an illegal immigrant? There is no mode of screening illegal immigrants. Nevertheless, the Court has issued this direction to the government that illegal immigrants should be weeded out of the system or at any rate shouldn't receive subsidies.

A major disappointment for me personally, was that the Supreme Court did not have courage to stand up for itself and its own orders. The Supreme Court, during the pendency of the case, had passed a series of interim orders, telling the government that it could not expand the programme until the Court finally heard and disposed of the case. So we argued before the Supreme Court that before trying to protect the country from the Aadhaar epidemic, please protect yourself so that at least we have a Supreme Court which the Central Government and the States will obey. While the minority comes down heavily on the State for bypassing the interim orders, the majority held in effect that,

'Yes, it's true that we had passed interim orders, but those were issued before the Aadhaar Act was passed and since the State was acting under this law, we will look the other way.'

The solution to the surveillance problem according to the majority was to shrink the scope of Aadhaar. Now that Aadhaar was not going to extend to every aspect of life and was essentially confined to subsidies, the majority held that the invasion of privacy and threat of surveillance would not be that great.

It is disappointing that the court appears to discount the privacy concerns of those who depend on subsidies. We are all citizens. There is no difference between individuals who have to rely on subsidies and those who don't. Their privacy rights are as important in the constitutional scheme to the rights of those of us who don't require government benefits

and subsidies. What the majority missed was the basic principle that in a country which is a democracy, and where citizens enjoy freedoms, individuals must have a choice on how to identify themselves. If I am entitled to rations, give me a choice to establish my identity. You cannot reduce an individual to a number. But the majority on the Supreme Court was not persuaded by that argument.

The Aadhaar judgment is worth critically examining because ultimately the legitimacy of an institution like the Supreme Court derives from the power of its reasoning and analysis. We respect the Supreme Court of India because it is at the top of the judicial pyramid. But the real reason why the citizenry respects the Supreme Court is because over time the soundness of the reasoning contained in its judgments has enhanced its reputation. I am afraid that the majority judgment in Aadhaar falls very short on these counts – particularly with respect to surveillance, Money Bill, Rule of Law and good governance.

The dissenting judgment of Justice D Y Chandrachud has several significant features. It accepts that what was happening between 2009 and 2016 in the country was lawless, as there was no statute to back the collection of data of 100 crore people. The data was not just being taken by government departments, but also private entities without any control. The majority judgment again does not deal with this argument and uses the silent veto of simply ignoring the submission. The minority judgment holds that the Aadhaar programme could usher in a surveillance state. The minority judgment holds that this is certainly not a Money Bill, and the Act falls on that ground. It raises and elevates the arguments raised on behalf of the petitioners, both with respect to identity and exclusion. It says that both the Aadhaar Act and the Aadhaar programme fail as they do not adequately deal with exclusion. Reading the dissent exposes how hollow, superficial and plainly wrong the majority is.

Here, I quote from the well-known passage by Charles Evans Hughes, the 11th Chief Justice of the United States:

'*A dissent in a court of last resort is an appeal to the brooding spirit of law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting justice believes the Court to have been betrayed.*'

This is the value of the dissenting judgment.

I am sure you recall how two judges of the Supreme Court got it terribly wrong in the *Koushal Case*[11] on Section 377. That blunder was recently corrected by a five judge Constitutional Bench of the same Court.[12] I hope the majority judgment in Aadhaar will likewise be rectified.

So where do we stand? First, the Court dramatically scaled down Aadhaar. We now have a shrunken and relatively skeletal creature. Second, the Court fell short. It failed to summon the constitutional courage and the institutional courage required to decide a case correctly, particularly in a case such as this, with consequences for every citizen of the country. Third, the dissenting judgment is our best hope for the future and I do hope that its reasoning will eventually prevail. The inconsistencies in the majority judgment will stand exposed and liable to correction in the future. Finally, Aadhaar has been de-fanged, but not destroyed. It is very simply not as venomous as it was before the judgment. However, the corporate sector and the government will not accept this shrunken Aadhaar. They will come roaring back with new legislation and new gambits. The eternal task for the vigilant citizen remains. It will fall on you and other young citizens to fashion strategies and to toil to preserve our precious liberties.

[11] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.
[12] Navtej Singh Johar v. Union of India, (2018) 10 SCALE 386.

There is a new offering by an Israeli scholar Yuval Harai titled '21 Lessons for the 21st Century'. Two subtitles in the book caught my eye. The first chapter titled 'Liberty' is subtitled '*Big Data is watching you*'. He doesn't specifically look at Aadhaar, but his future projection is that liberty will be imperiled greatly by Big Data. More than the State it is Big Data that may constrict our freedoms. The chapter on 'Equality' is also intriguingly subtitled as '*Those who Own the Data Own the Future*'.

I think this is worthy of reflection. One of the questions that I ask myself is – who owns my fingerprints? Is it my property? We are not slaves. The Constitution of India is certainly not a charter of servitude. Surely, we are independent, thinking beings and constitutionally so recognized. If I own my fingerprints, can I not decide as to where and when to put them? These arguments were all ignored by the majority judgment in Aadhaar. But keep Aadhaar aside, on a much broader level, data and ownership and control of data are going to be very important issues. Unless principles are judicially and legislatively evolved as to who controls data, we can be manipulated easily. Targeted advertisement, targeted news, how it reaches you and subtly influences your opinions, are contemporary challenges. Just crunching the metadata surrounding your emails is enough to draw your profile.

We have to start learning to pay for our freedoms. In a digitized world, if we want to have a digitized democracy, as against a digitized dictatorship – we have to pay for the internet and pay for the news. This may not be for every specific service but may take the shape of a general 'Internet Tax'. It is a subject for all of you in this audience to think about deeply. It is for all of us, as a species across the planet, to come up with a set of suitable principles.

In his poem '*Approaching Fifty*', Arvind Krishna Mehrotra uses an unwiped bathroom mirror to peer into the past, look at the present and gaze into the future:

Sometimes,

In unwiped bathroom mirrors,

He sees all three faces

Looking at him:

His own,

The grey-haired man's

Whose life policy has matured.

And the mocking youth's

Who paid the first premium.[13]

Wiping that mirror and wiping the data is really at the heart of digital freedom. If we have the power, the right and the entitlement to wipe out our personal data and decide who may use it—we retain our liberties. The individual needs to be in control, much like Mehrotra who saw himself, his youthful face and also a much older visage. I think the battle for dominion over data is going to rage across the globe, not only in our country. It's going to be fierce. Are we going to cede this right to government as in the case of Aadhaar? Are we going to cede this valuable control to large corporations? Or are we, in our endeavour to preserve

[13] ARVIND KRISHNA MEHROTRA, THE TRANSFIGURING PLACES 1 (Orient Blackswan 1998).

and protect our liberties, going to come up with new principles so that we retain control over our data?

Thank you.

SUBMISSION GUIDELINES

The GNLU Law and Society Review is open for academicians, research scholars, and doctoral students. The Review encourages undergraduate students to contribute case comments. Submissions must pertain to issues having socio-legal significance.

- All submissions will have to be accompanied by an Abstract, explaining the aims and objectives of the paper. The word limit for the Abstract is 500 words.
- All submissions must be unique and genuine and not plagiarised from any sources. Plagiarism of any sort will result in immediate disqualification.
- The title of the Paper must be appropriate.
- The cover page of the paper must contain the title and the details of the authors. The name of the author should be followed by footnote mark (*) for the first author and (**) for the second author. The footnotes should give educational qualifications and the institutional details of the contributor/s.
- The paper should be free from all grammatical and spelling errors. Co-authorship is allowed to a maximum of 2 authors.
- All submissions made, must not have been previously published or under consideration elsewhere.
- All submissions must follow the "The Bluebook: A Uniform System of Citation (20th Ed.)". Non-conformity could be a ground for rejection.

- The body of the manuscript must be in the font "Garamond", font size 12, line spacing 1.5. All footnotes must be in Font "Garamond", font size 10, line spacing 1. Abstract and full paper submissions must be made in Microsoft Office (doc./docx.) formats only.
- The submissions could fall under any of the following categories:

  - Articles (6000 words or above, excluding footnotes);
  - Essays (3500-6000 words excluding footnotes);
  - Book Reviews/Case Commentary/Short Notes (1500-3500 words excluding footnotes)

- Submissions must be made to glsr@gnlu.ac.in. Authors can expect to receive decisions on their submissions within two months of their submissions.

NOTES

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