The Quest for Constitutional Identity in India

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Introduction

Constituting Identities

Colonialism gave birth to India as a nation, whose future citizens were primarily unified by the identity of their repressor. Indeed, by no means were the collective experiences of repression uniform across collectives. Reactions to the sentiment of oppression bred disparate identities that coalesced primarily around local manifestations of colonialism and as a consequence, "movements" against it were fragmented. However, with the proliferation of a concerted colonial project across the subcontinent, these movements were imbued with the recognition of a common other, as the generalizations of colonial masters began to brush aside the individuality of separate communities.

So too, movements began to inform each other, constantly evolving separately, only dimly aware that they would come together eventually. As they began to sublimate, the "movement", which now required breadth and the numbers, necessitated a more universal language that had the potential to capture the imagination of a still imaginary nation. We later explore the asymmetries in the manner that variously situated citizens associate with the constitution as a consequence of this grand compromise. Soon enough, the margins began to be erased over, with a ready tendency to fit into categories that were created, where "classifications and the classes they aspire to accommodate, conspire to emerge, hand in hand, each egging the other

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on."[1] Neither colonialism, nor the nationalistic reactions to it, accepted the 'fuzziness' of pre-existing boundaries that lay beyond simple either/or divisions, rejecting the possibility of complex and intricately adopted selfhood.[2]

Not only do these new borders assert similarity within their bounds, but by contrasting identity with that of others, reinforce dissimilarities.[3] The question of such a broad-based identity had not come up until then, and even asking the question cast its content in doubt. The answers merely concretized it, forever placing it in tension with lived realities. British rule concluded, but the colonial legacy remained. The ones at the forefront of formal engagement with the rulers, the Congress party, found themselves accorded the sacred prerogative of translating the aspirations of a "people" into a formal, authoritative document that had the capacity of holding the nation together. Many questions remained though. Was it even possible to capture these aspirations in a document? Could a document breathe life into a nation-state? Or even more fundamentally, did there even exist a "people"?

The Constitution carried the possibility of creating new meaning and its drafting exercise was a leap of faith. Even as it began to acquire form, the rejection of the ethos of the struggle that preceded it was more strongly articulated. Illustratively, the erasure of the village – the idealized model of self-sustenance,[4] and civil disobedience[5]

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1 Ian Hacking, *Making Up People*, in RECONSTRUCTING INDIVIDUALISM: AUTONOMY, INDIVIDUALITY, AND THE SELF IN WESTERN THOUGHT, 228 (Thomas C. Heller et al eds., 1986).

2 Sudipta Kaviraj, *The Imaginary Institution of India*, *in* SUBALTERN STUDIES VII 1, 18-20 (Partha Chatterjee & G Pandey eds., 1993).

3 *See* Frank Bechhofer and David McCrone, *National Identity, Nationalism and Constitutional Change*, *in* NATIONAL IDENTITY, NATIONALISM AND CONSTITUTIONAL CHANGE, 1 (Frank Bechhofer & David McCrone eds., 2009).

4 As per Ambedkar, "What is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism? I am glad that the Draft Constitution

from the future of the nation state, left little for it to carry forward from the struggle that had unified it for so long. The framers aspired to instill constitutional fundamentalism in the document's ability to carry out that task. Like Habermas, they hoped for an identity that would be constructed out of public deliberation,[6] but left little to chance in drafting a Constitution that would be future proof. This paper quests after the promise of the Constitution.

The Constitution is a document of hope, and the manner in which citizens relate to it, and to each other through it, is integral to its success. Over the course of this paper, we explore the process of identity creation through the Constitution. In the first part, we test the bonds that are potentially created by the text and context of the drafting process. We attempt to locate the site of interpretative engagement that results in the cumulation of identity, on the premise that greater inclusivity and a sense of citizen ownership over the constitution improves this dialogue.

After exploring various models of engagement, and modes of identity creation, we settle on the Judiciary as this convergent space. We then interrogate the basic structure doctrine in the second portion, drawing a correlation with notions of constitutional identity. We conclude that the two are hardly coextensive, and that at best, the basic structure doctrine is a unique characterization of it by the Judiciary in

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has discarded the village and adopted the individual as its unit". *See* CONSTITUENT ASSEMBLY DEBATES, Vol. VII, 2 (Nov. 4 1948).

5 As per Ambedkar, "It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods". *See* G.R.S RAO, MANAGING A VISION: DEMOCRACY, DEVELOPMENT AND GOVERNANCE 181 (2005).

6 J Habermas, *Religion in the Public Sphere* 14 EURO. J. PH 1, 1 (2006).

a definitional exercise that vests in them the power to determine the content of constitutional identity.

The Constitution as a Subject of Identity Creation

As markers of association, identities are not necessarily in conflict with each other, but do constantly inform, engage with and alter each other. Community identity, national identity and constitutional identity are separate collective categories involved in one such interplay, without prejudice to many such other categories that find themselves in that complex game.[7] Independently, each of them is vague, unspecific and internally inconsistent.[8] Indeed, identity as a *concept* is unlikely to be plagued by such a lack of specificity at a level where it is *felt*, but not articulated.

Indeterminate as it might remain, what is important to us is that identity is up for free appropriation. Identity is usually conceived under two circumstances, either when it needs to be defined for a particular purpose, say legislating upon it, or when it is under threat, i.e. when a claim to identity is challenged. In both situations, something assumed to be definite and stable, is replaced by an experience that induces doubt and uncertainty.[9]

Both forms of identity-creation, or re-creation, have played out in the Indian milieu. The colonial project of framing personal laws and its post-colonial continuity[10] exemplify the aforementioned first instance that other subsequent well-intentioned lawmakers, and an

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7 ANTHONY D. SMITH, NATIONAL IDENTITY 14 (1991).

8 *See* Rogers Brubaker and Frederick Cooper, *Beyond "Identity"*, 29 THEORY AND SOCIETY 1-47 (2000).

9 Kobena Mercer, *Welcome to the Jungle: Identity and Diversity in Postmodern Politics*, in IDENTITY: COMMUNITY, CULTURE, DIFFERENCE 43, 43-72 (Jonathan Rutherford ed., 1990).

10 *See* generally RINA VERMA WILLIAMS, POST COLONIAL POLITICS AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE (2006).

often-misguided judiciary, are still contending with. By concretizing rules of inter-personal engagement, and strictly defining rules of community membership, and permitting limited room to navigate through customary laws, the process engendered a confused citizenry that questioned their commitments to practices they cherished, and once owned. Penal laws tell a similar story.[11]

The second type of identity confrontation has played out in the Indian tryst with secularism. The final draft of the Constitution only mollified in part, a section of an already elitist drafting assembly seeking provisions such as fetters against conversion,[12] symbolic inclusions in the preamble alluding to a Hindu legacy,[13] and even severe objections to minority protection provisions,[14] that would now be understood as being contrary to the more universal agenda of religious and community rights.

The country has since remained captive to this constitutional heritage which, in its most extreme form, has emerged as communalism. Intractable commitments to self-identification came to conflict with an apparently all-encompassing collective acceptance of the new constitutional norms. In either case, exclusion is inevitable – marginal in some instances and complete in others. Rosenfeld, drawing inspiration from Freud and Lacan, has postulated that these identities are negated, transformed and reintegrated into the contested discourse.[15]

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11 The Thuggee and Dacoity Supression Acts enacted between 1836 and 1848 and The Criminal Tribes Act, 1971 are examples.

12 CONSTITUENT ASSEMBLY DEBATES, Vol. V, 11 (Aug. 30, 1947).

13 CONSTITUENT ASSEMBLY DEBATES, VOL. XI, 6 (Nov. 19, 1949).

14 CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, 9 (May 26, 1949).

15 MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY 48, 51 (2010).

One such symptomatic manifestation in the judicial arena is the judgment of the Apex Court in *Aruna Roy*.[16] This social action litigation raised objections to curricular content in school textbooks, which included religious strictures, Sanskrit, Vedic Mathematics and Vedic astrology, claimed to be in violation of the right to education, right to development, right to information – all under Art. 21, which guarantees a right to life and personal liberty; and protections granted to minorities under Arts. 27 and 28.[17] The Court upheld the executive order, citing the Chavan Committee report, broader goals of preventing ills such as corruption, fanaticism, and even drug-abuse, encouraging "*tolerance and national cohesion*", the need to guard against westernization and preserve culture and traditions. On a first level, it is undeniable that such education can be imparted without reference to divisive religious texts. But more significantly, the Court alleging the unity of instructions across religions, even if true, runs contrary to the freedom of conscience of other religious communities, whose precepts deny recognition to other religions.[18] Further, Art. 28 was read in negative terms, as not imposing prohibitions on the study of religious *philosophy* or *culture*, contradistinguished from religious *instruction* or *worship*.[19]

The challenge of constitutional drafting then is to sublimate these tensions of belonging through commonly shared higher aspirations, or alternatively, by recognizing and respecting differences. The success of drafting usually, though not necessarily, requires a unifying constitutional identity, at the level of a shared political and cultural context in a nation-state. Constitutions have eternally

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16 *Ms. Aruna Roy and Others* v. *Union of India*, (2002) 7 SCC 368 ("Aruna Roy").

17 The case also raised other issues of non-consultation with the Central Advisory Board of Education, which were dismissed for not being mandatory.

18 *See A. S. Narayana Deekshitulu* v. *State of AP*, 1996 AIR 1765 for references to the Rig Veda, Brhadarayanakopanishad and the Mahabharat, which were deemed to be an integral part of an Indian way of living for time immemorial.

19 *Aruna Roy*, at ¶¶ 39-41.

grappled with the problem of identifying a minimum threshold of association. Such an identity may be derived from the experiences that preceded its drafting, or those that adequately represent a common identity, that exists beyond, and indeed, despite the constitution. In a memorable line that captures the sentiment, Laurence Tribe describes a constitution as being "*written in blood, rather than ink*".[20] An example of an identity of the latter form can be found in the Bhutanese Constitution, an agglomeration of liberal democratic ideals steeped in strong Buddhist imagery, meant to ease in a transition from monarchy.[21] Debates over the sufficiency of such bonds that have taken place in the European context on factual grounds are instructive of threshold requirements for such identity without claims of its capacity to impact norm creation.[22] Elsewhere, this contest has also been controversially framed in Universalist terms.[23]

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20 LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 29 (2008).

21 BHUT. CONST. pmbl:
Blessed by the Triple Gem, the protection of our guardian deities, the wisdom of our leaders, the everlasting fortunes of the Pelden Drukpa and the guidance of His Majesty the Druk Gyalpo, Jigme Khesar Namgyel Wangchuck; *Solemnly* pledging ourselves to strengthen the sovereignty of Bhutan, to secure the blessings of liberty, to ensure justice and tranquillity and to enhance the unity, happiness and well being of the people for all time; *Do hereby* ordain and adopt this Constitution for the Kingdom of Bhutan on the Fifteenth Day of the Fifth Month of the Male Earth Rat Year corresponding to the Eighteenth Day of July, Two Thousand and Eight.

22 *See* Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L. J. 282, 282-296 (1995); *See* Jürgen Habermas, *Remarks on Dieter Grimm's "Does Europe Need a Constitution?"*, 1 EUR. L. J. 303, 303-307 (1995).

23 Michel Rosenfeld, *Modern Constitutionalism as Interplay between Identity and Diversity*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 3, 3-10 (Michel Rosenfeld ed., 1994). Three fundamental ingredients are identified – limitations on the powers of government, rule of law and protection of fundamental rights and liberties; *See* Stanley N. Katz, *Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience*, *in* VICKI C. JACKSON AND MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 284-286 (1999). It is interesting to note that the debate though is framed over the categories of classification rather than what they describe. *Comments on Michel*

Indeed, the conceptualization of a constitutional identity requires a break from the past, illustrating a break from a *different* past and the aspirations of a *new* future. For the sake of its acceptance, the Constitution delicately treads this balance to avoid jeopardizing popular self-identity in the name of innovation.[24] The depth of the constitutional and the commitment to a new mode of self-identification is directly related to the intensity of the movement that led to constitution making.[25] While the possibility of popular consensus over this collective self-identification is in the realm of utopian fantasy, it is nevertheless important to identify the identifiers, to better appreciate the identification.

The Indian Constitution was hardly a *people's* constitution, in the sense of public participation or deliberation. As Austin comments, "*the Assembly was the Congress and the Congress was India*".[26] The

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Rosenfeld's "The Identity of the Constitutional Subject, 33 CARDOZO L. REV. 101 (2012).

[24] Sometimes, these antinomies appear within the text or through practice. For example, the equality provision in the American Constitution would appear inconsistent in the absence of a ban on slavery. Such inconsistency is highlighted by the much impugned decisions of *Dredd Scott* v. *Sandford*, 60 U.S. 393 (1857) and later, *Korematsu* v. *United States*, 323 U.S. 214 (1944). In India, the roots of communalism have been traced to the use of Hindu symbolisms in the national movement. *See* CHRISTOPHE JAFFRELOT, THE HINDU NATIONALIST MOVEMENT AND INDIAN POLITICS: 1925 TO THE 1990S 11-45 (1996).

[25] Michel Rosenfeld, *The Problem of 'Identity' in Constitution-Making and Constitutional Reform* (Cardozo Legal Stud. Paper No. 143, 2005), available at http://ssrn.com/abstract=870437. Rosenfeld points to four models preceding constitution making – (i) Revolution-based: which allows a violent rejection of the pre-constitutional order eg. American Constitution; (ii) War-based: victory inspired drafting, which is usually dependent on the internalization of constitutional ideals eg. German Basic Law; (iii) Peaceful/Pacted: resulting from negotiations that follow regime change, which usually depict greater continuity eg. Bhutan. Under this category, the drafting process can degenerate into a never-ending, open field free for all participants with the power of influence to effect their changes eg. Nepal; (iv) Treaty-based: possibly the European Union.

[26] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 8-10 (1966).

unique position which the Congress occupied in the Indian independence movement ensured overwhelming majorities in the provincial assembly elections.[27] The urgency of the process adopted to constitute the constituent assembly combined with the absence of an alternative to the Congress, while not inhibiting incisive discourse within the assembly, would arguably have infused governmental policy into the development of constitutional content. Also, on account of the indirect elections, which decided the composition of the assembly, the constituent assembly's extremely erudite members stood in stark contrast to the masses. Deliberations were consequently devoid of "*any shade of public opinion.*"[28] Even discounting these factors, the failure to involve the citizens' *rising consciousness* by including consultative mechanisms at different stages, attenuates claims of being a *people's* constitution.

Further, the framework of the final Constitution was borrowed from the Government of India Act, 1935. In order to claim ownership, changes needed to be made to the rulers' constitution. However, the 1935 Act did form the *foundational document* of the constitution.[29] Multiple provisions of the constitution are identical reproductions from the 1935 Act and Dr. Ambedkar clearly admitted that there is "*nothing to be ashamed of in borrowing*" from the 1935 Act.[30] On the issue of such a defining influence on the Indian constitution, H.M. Seervai concludes that "*Little could the framers of that Act have dreamt that in the Constitution of a free India they would find the greatest monument to their drafting skill ...*".[31] Even if the influence of the Government of India Act served merely as a template for further constitutional development, in the sense that what was

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27 *Id* at p.9.

28 *Id.* at p.13-16.

29 GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 5 (1999).

30 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 164 (4th edn, Vol. I, 1991).

31 *Id.* at p. 171.

borrowed was simply textual, it is inevitable that the ontological baggage of this structural framework creeps into constitutional interpretation, reinforcing its colonial biases.[32]

While appraising the text, Tribe reminds us that in excessively fetishizing its text, one loses sight of the entirety of a Constitution. He argues that the "*dark matter*" of the Constitution, present not *around*, but *within* the text, constitutes an "*ocean of ideas, propositions, recovered memories, and imagined experiences*", that informs the appreciation of the text.[33] He rejects the notion that the indeterminacy of the content of this invisible constitution should come in the way of recognizing its existence, noting that similar barriers operate even while appreciating its visible portions.[34] Though he does not offer (or even claim to offer) clues that would aid any subsequent discovery of this meta-entity, his characterization broadens our horizon for potentially identifying, or in a limited sense, qualifying elements of constitutional identity.[35]

While the interplay between this constitutional identity and extra-constitutional identities is complex, the Indian experience reveals a formulation of constitutional identity that remains subservient to deeper, extra-constitutional considerations based on religion, language, caste or even nationhood, despite the contestation over the latter.[36] Undoubtedly, the identity derived from a constitution continuously

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32 SARBANI SEN, THE CONSTITUTION OF INDIA: POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS 31-33 (2007). For a critical review of Sen, *See* Rajeev Dhavan, *Sarbani Sen's Popular Sovereignty and Democratic Transformations*, INDIAN J. CONST. L. 204, (2008) (book review).

33 Tribe, *supra* n. 20, at 9.

34 Tribe, *supra* n. 20, at 7-8.

35 The most useful contribution is that he places others before him who made out a case for extra-constitutional interpretation in perspective. *See* for example, Thomas C. Grey, *Do We Have an Unwritten Constitution,* 27 STAN L. REV. 703 (1975).

36 *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law,* 108 YALE L.J. 1225, 1270-71 (1999).

evolves through the life of the text. Abstracting from Baxi's four 'Cs', one can identify the entities that contribute to this cumulative identity[37] – namely, the *constitution* or the 'official' written text; *constitutional law*, the site of authoritative constitutional discourse; *citizen interpretative practices*, though non-authoritative are responsible for judicial activism; *constitutionalism*, the ideology of constitutions that adduce background justifications for constitutional theory and practice.

Though the moment of drafting the text is hugely influential in formulating constitutional identity, this identity constantly evolves dialogically throughout the life of the constitution.[38] This paper would hardly be complete without reference to the champion of citizen involvement. Ackerman takes this proposition further, attempting to restore "*constitutional creativity*" predominantly in the hands of the citizens.[39] Beginning with the all too justified premise that dominant constitutional discourse is primarily the prerogative of the *professionals*, he argues that the American constitution has witnessed amendments beyond the scope of the formal amendment process inscribed in Art. 5 through its unique system of "*plebiscitarian presidency*", which confer substantive mandates onto elected

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37 Upendra Baxi, *Outline of a Theory of Practice of Indian Constitutionalism*, *in* POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 100, 101 (Rajeev Bhargava ed., 2009).

38 Rosenfeld, *supra* note 25, at 8. *See* generally GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 1-33 (2010).

39 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 1-12 (1998). It has had its supporters, who agree that Art. 5 of the U.S Constitution does not exhaust constitutional amendment – e.g., Mark Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39, 48-53 (1990); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CH. L. REV. 1043 (1988) as well as critics e.g., David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 35-51 (1990); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L. J. 19, 54-56 (1988).

candidates.[40] The dialogue that potentially results from the transformative constitutional change translated as a specific directive, even statutory, is decisively concluded through a "*critical election*".[41] Following such "*constitutional moments*", a preservationist court begins to safeguard new constitutional values.[42]

Ackerman posits this debate between foundationalists, who insist that the rightness of such decision is beyond public deliberation, and monists, who equate legislative enactments with the will of the people. Ackerman certainly identifies periods of intense mobilization of public opinion, perhaps even rightly pointing out that these debates are deeper and relatively better informed than they are in other instances. However, it is not clear whether his analysis helps us in any way to accurately identify the scope of the transformation, or whether it even justifies its presumed constitution of a *we*, in "*We, the people*", limiting further our understanding of its impact on constitutional identity.[43]

For our purposes, it is sufficient to restrict ourselves to his descriptive analysis, rather than its avowed prescription for the restoration of *vibrant democracy*.[44] There are a few significant hurdles

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40 Ackerman, *supra* n. 39, at 68; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

41 Ackerman, *supra* note 39, at 270-9. Ackerman also argues for a dualist model that distinguishes between constitutional change and regular statutory changes. He asserts that people adopt different attitudes under either circumstance, conscious of its significance of such moments – being active engaged participants in the first case and usually aloof in the latter.

42 Examples of such constitutional moments can include *Grisworld* v. *Connecticut*, 381 U.S. 479 (1965); *Brown* v. *Board of Edn.*, 347 U.S. 483 (1954).

43 John E. Finn, *Transformation or Transmogrification? Ackerman, Hobbes (as in Calvin and Hobbes), and the Puzzle of Changing Constitutional Identity*, 10 CONST. POL. ECON. 355, 355-365 (1999).

44 *See* generally, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments* 44 STAN. L. REV. 759 (1992).

to transplanting Ackerman's theory to the Indian experience. For one, the amending process requires a much higher threshold in USA, than in India.[45] Second, the disparity between the presidential[46] and parliamentary[47] system implies that the import of mandates in a similar fashion would be unlikely. Power, being more distributed in India and oftentimes even unidentifiable, would force a compromise that would not accurately represent the version of the mandate disseminated during the electoral process, due to the difficulties of a multi-party system and coalition politics.[48] Furthermore, such a system and politics render elections considerably less significant in terms of their tangible impact on government policy or deliberation.

Collectively, these questions beg a revisit of the principles of public deliberation and creation of authoritative rules. In a positivist account, neither citizen interpretations nor practices have any bearing in constituting the legal system,[49] contra "*popular constitutionalists*",[50] for whom constitutional interpretations of the people are sometimes in conflict with those offered by the courts.[51] To reconcile this transformation of expression into authority, they either need to make out a case for its distillation at the hands of state officials, or for the

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45 U.S. CONST. art.5; INDIAN CONST. art. 368.

46 *See* OTIS H. STEPHENS, JR., AND JOHN M. SCHEB II, AMERICAN CONSTITUTIONAL LAW, 163-181 (3rdedn., 2003).

47 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2021-94 (4thedn., Vol. II, 1991).

48 *See* Mahendra P. Singh and Douglas V. Verney, *Challenges to India's Centralized Parliamentary Federalism*, 33 PUBLIUS, 1-20 (2003); *See* Mahesh P. Rangarajan, POLITY IN TRANSITION: INDIA AFTER THE 2004 GENERAL ELECTIONS, 40 ECON. & POL. WEEKLY 3598-3605 (2005).

49 *See* generally JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (1980).

50 Rosalind Dixon, *Amending Constitutional Identity* 33 CARDOZO L. REV. 1847, 1847-1858 (2012). *See* Mathew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?* 10 Nw .UNIV. L. REV. 719, 719-723 (2006).

51 Tushnet, *Popular Constitutionalism As Political Law*, 81 CHI.-KENT L. REV. 991-1006 (2006)

proposition that citizens have a "*coequal or dominant role in deeming it as such*" - both of which are unviable, by virtue of being either too shallow or an overestimation.[52] The underlying premise of both accounts is the existence of "*certain canonical groups*" that are fundamentally responsible for generating 'law' within a system, be it in an *explanatory* or *normative* context.[53] Indeed, the quest to identify any passively deduced,[54] single recognitional group as determinatively creating a constitutional identity, or even legal norms, is doomed to fail.[55]

To resolve this particular dilemma in the Indian case, it is imperative that we identify the *site* of such expression, at least marginally fulfilling aspirations of popular dialogical interpretation where discourse is transformed into normativity. Ginsburg, Melton and Elkins' imperious empirical work on *The Endurance of National Constitutions*, offers some clues. Distinguishing fickle political, "*environmental factors*" from more easily measurable textual, "*design factors*", they identify a correlation between the specificity, inclusiveness and flexibility of constitutional provisions – all, conditions for the adaptability of a *tool*, and the longevity of a constitution[56] Understandably, the use of a tool lies in the hands of its wielder.

Indeed, the Indian constitution is not sustained on an inherent identity derived from it. The specificity threshold is met by its exhaustive drafting. As for the inclusiveness requirement, the Constitution creates interstices for a wide range of social actors to claim ownership over. However, this form of inclusiveness is narrowly

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52 Adler, *supra* n. 50, at 721.

53 Adler, *supra* n. 50, at 727-745.

54 Laurence Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 440 (1983).

55 Adler, *supra* n. 50, at 749.

56 TOM GINSBURG, THE ENDURANCE OF NATIONAL CONSTITUTIONS 2-11 (2009).

restricted to the specific provisions reflecting a citizen's association with it, without extending to the totality of the constitutional body. For instance, Arts. 14, 15(1), 15(2), 15(4), 16(1), 16(2), 16(4), 25(1), 27, 28 of the Indian Constitution are provisions indicative of 'collective rights', exercisable by minorities amongst others, while Arts. 29(1), 29(2), 30(1) and 30(2) are best indicative of special concessions, specific to minority groups. This asymmetry, Khosla argues, reflects that citizens are not equal and has "*opened up new spaces in our politics, novel politics in constitutional engineering and exhibited a respect for indeterminacy*".[57] The extent to which a minority's exercise of collective rights is flavored by the content of specific rights further adds to the overall indeterminacy. As a result, extra-constitutional identities prevail over binding commitments to the text.

Having been amended nearly a hundred times in its history, the adaptability of the Indian Constitution is reflected through a relatively straightforward amendment process, requiring varying standards of assent from elected representatives depending on the kind of provision sought to be amended. The first ratified Constitution indicated that the Courts were to be subservient to the wishes of elected representatives who were capable of reversing unfavourable decisions of the judiciary by simple majorities. Further, by rejecting the proposal to introduce substantive due process under the life and liberty provision,[58] the eventuality of greater judicial interference in the decisions of the Parliament was decisively avoided.[59] It is another matter that the doctrine crept back into constitutional deliberation

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57 MADHAV KHOSLA, THE INDIAN CONSTITUTION 160-165 (2012).

58 CONSTITUENT ASSEMBLY DEBATES, Vol. IX, 35 (Sep. 15, 1949); CONSTITUENT ASSEMBLY DEBATES, Vol. VII, 20 (Dec. 6, 1947).

59 Manoj Mate, *The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 175, 179-180 (2010). He also attributes the superiority of the Parliament over the Judiciary to a tradition of Austinian positivism.

riding on the Supreme Court's broad-stroked formulation of the basic structure doctrine.

A considerable amount of scholarship has focused on tempering judicial overreach in certain constitutional matters, presuming that elected representatives are the only competent body to reach such a determination.[60] The positivist narrative explains that, *in fact*, the judiciary remains supreme, with their primary role as authoritatively settling questions on constitutional norms.[61] We suspect that the "*foundationalist*" account would argue that correctness of any determination is beyond any participants in the constitutional project.

Discounting sustained civil society movements that might have otherwise had a cerebral, but *informal* impact, citizen influence on the Parliament through formal channels is solely expressed through periodic elections. However, from its inception, access to the higher judiciary has been far more straightforward and more so in matters of constitutional incursions. This "*juridical democracy*", which emerged after the emergency blunders, served to augment the institutional acceptability and popularity of the Indian apex court.[62] In addition to the arguable impact of the judiciary's expansion of standing on providing access to justice for the dispossessed, its formative influence on providing a platform to address "*potentially explosive social and*

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60 For instance, *see* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27STAN. L REV. 585, 588-597 (1975); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

61 *See* Christopher Kutz, *The Judicial Community*, 11 PHIL. ISSUES 442, 458-462 (2001). *See* JOSEPHRAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (1980).

62 Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD., 107-108 (1985).

political movements" is undeniable.[63] This *epistolary jurisdiction* of the higher judiciary unrecognizably altered the procedural requirements for filing applications under Article 32 and Article 226 before the Supreme Court and the High Courts respectively.[64]

Such applications are filed against the *state* and the limitless possibilities of direct citizen engagement with the state are facilitated, except before an unelected, non-representative adjudicatory body. Further, this tryst is restricted to narrow matters of constitutional *law*, the habitat of professional discourse that does not necessarily account for citizen aspirations sought to be actualized in a transformative sense.

The formation of constitutional identity certainly is an accumulation of forms of associating with the constitution beyond *just* in its legal sense. In any case, as evidenced by countless rejections of petitions on grounds of being matters of "policy", that are acknowledged as the exclusive preserve of the government of the day,[65] or merely being "frivolous",[66] these cases do not reflect the breadth of potential citizen engagement, even within constitutional law. Empirical data attests to the claim that the disadvantaged category of citizens who formed the original focus for exercising expansive jurisdiction is changing.[67] Moreover, as this prerogative is exercised

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63 *See* Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L. J. 57, 70-72 (1994).

64 *S.P. Gupta* v. *Union of India*, [1982] 2 S.C.R 365; *See* G.L. Peiris, *Public Interest Dimension in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP. L. Q. 66, 67-70 (1991).

65 Ashok H. Desai and S. Murlidhar, *Public Interest Litigation: Potential and Problems*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159, 176-179 (B.N. Kirpal*et. al.* eds., 2000).

66 Some of the notable instances in which the Supreme Court refused to proceed to the admissions stage include the mining in Niyamgiri Hills and the dismissal of the petition against building of the Commonwealth Games infrastructure on the riverbed.

67 Varun Gauri, *Public Interest Litigation in India* 7-13 (Policy Research Working Paper No. 5109, 2009). Also, the shift in focus detrimentally affects the

only when there is some intrusion on the right of an individual or a class of individuals, the resultant conversation is hardly inclusive in the scope of interlocutors. In any case, despite being stunted by these institutional limitations, the higher judiciary has curiously grown into the most active site for "dialogue" in constitutional matters.

In the name of socialism and a defense of popular sovereignty, the first three decades witnessed a tussle between the executive and the judiciary, contesting the right to private property and limits of judicial review, respectively. This contest birthed the first appropriations over defining the *identity* of the constitution.

The Basic Structure Doctrine as an Exercise in Identity Creation

The Nehruvian model of socialism, meant to infuse social and economic equality, manifested itself through aggressive agrarian land redistribution measures. Aggrieved landowners sought judicial intervention against these measures, which were executed without due process or compensation for acquisitions, alleging infractions into the fundamental 'right to acquire, hold and dispose of property'. Repeatedly, the Supreme Court upheld their claims.[68] With the intent of nullifying these judgments, the Parliament inserted the Ninth Schedule into the Constitution in 1951. The Schedule originally contained the land reform legislations that were placed above challenges on the grounds of such measures violating fundamental rights.[69] Judicial mediation on the grounds of insufficient procedural safeguards continued to mollify petitioners.[70]

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disadvantaged groups. *See* Usha Ramanathan, *Demolition Drive*, 40 ECON. & POL. WEEKLY 2908 (2005).

68 *See State of Bihar* v. *Kameshwar Singh*, (1952) S.C.R. 889.

69 *Maharashtra* v. *Man Singh*, (1978) 2 S.C.R. 856.

70 *See* S.P. Sathe, *Judicial Activism: The Indian Experience* 6 WASH. U. J. L. &POL'Y 029 (2001).

These cases had begun to engender broader concerns regarding the limits of the amending power of the Parliament, and boiled over in *Golak Nath*,[71] drawing the lines for a protracted battle between judicial and parliamentary supremacy. By a razor thin majority of 6-5, the Court decided that constitutional amendments could not render fundamental rights unenforceable, attempting to balance the integrity of the constitution and the Parliamentary prerogative to legislate upon entrenched feudalistic models. For the purpose of practicability, the Court also introduced the *doctrine of prospective over-ruling*, under which only future claims on the same grounds would be upheld, without disturbing the land reforms already enacted by the Parliament and various state legislatures.

In doing so, the opinion of the Chief Justice carved out an exalted space for fundamental rights – *primordial rights* occupying a "*transcendental position beyond the reach of Parliament*",[72] thereby evoking the grammar of natural law. Though it went unarticulated in the dissent, the appeal to natural law would be problematic for a few reasons. First, the judgment presupposes a direct correlation between the content of the constitution and the strictures of natural law. Indeed, it imposes on the constitution claims that are not made within its text and impedes efforts at socio-economic equality that would otherwise remain possible. As a matter of use in constitutional interpretation, natural law creates a parallel system of authority, unrestricted by rules of *stare decisis*, probably more fundamental to the judicial system than natural law. Jacobsohn ruefully refers to Justice Black's aphorism, calling natural rights an "*incongruous excrescence upon the Constitution*".[73]

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71 *I.C. Golaknath* v. *State of Punjab*, 1967 SCR (2) 762. (hereinafter, "Golaknath").

72 *Golaknath*, at ¶ 20.

73 *Adamson* v. *California*, 332 U.S. 46, 75 (1947). GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 53 (2010).

In response, the Parliament amended the amendment provision by inserting Art. 368 (5), bestowing upon itself the authority to amend *any* part of the Constitution. In arguably the most important case in the history of the Supreme Court, *Kesavananda Bharati*, another deeply divided bench ruled (7-6) that certain features of the constitution were integral to its existence and could not be abrogated by the legislature. The power of the judiciary to question such legislative action too was deemed to constitute a feature of this 'basic structure' of the Constitution.

The court reversed its judgment in *Golak Nath*, but asserted its own authority to quash amendments that transgressed this 'basic structure', assuming definitional authority over the identity of the Constitution. The attachment between fundamental rights and natural law was severed, with the Court observing, "*Its* [natural law] *gods are locked in internecine conflict*".[74] The most significant impetus for the move came from Nani Palkhivala's reference to Dietrich Conrad, a German scholar of Indian politics, who had contemporaneously warned of the dangers of an easily amendable constitution, drawing parallels with a Nazi regime that defaced the Weimar Constitution in its quest for power.[75]

The process of identifying the elements of constitutional identity is an exercise designed to maintain and defend an "*inner sameness and continuity*".[76] Such an exercise inherently limits the fungibility of the identification, rejecting sudden, disruptive changes in pattern or character. It will be interesting to observe whether the Court in the future will revisit the validity of past markers of identity. Else, this process creates a self-contained, self-fulfilling prophecy, possibly removed from social reality.

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74 *Kesavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1461, at 2006.

75 Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, INDIAN Y. INT'L AFF. 15 (1970).

76 ERIK H. ERIKSON, DIMENSIONS OF A NEW IDENTITY 204 (1974).

The Court's framing of 'basic structure' as a holistic, open-textured concept,[77] beyond specific enumeration, could have been directed at avoiding the possibility of uni-dimensionally locking-in the destiny of this constitutional regime. Dworkin argues against a formulation of integrity in law that demands consistency in principle across all historical stages, and opines that it "*does not require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a previous generation.*"[78] To him, interpretation is situated in the present and looks backward only as far as necessitated by contemporary circumstances.[79] His explanation requires to be modified in the context of a document, whose content is continuously being created, or as presumed to be while interpretative authority is being claimed, "unraveled".

The full impact of the Court's formulation of basic structure has primarily been felt through its application in subsequent cases, most unsettlingly in the *Election Case*.[80] In 1975, a single judge of the Allahabad high court judge charged Indira Gandhi of electoral fraud in her constituency in the 1971 elections. Almost spontaneously, the 39thAmendment was passed to immunize the Prime Minister from judicial inquiry. In this case, the court once again adopted the basic structure doctrine to strike down the amendment. The timing of the judgment, which was delivered in the early days of the Emergency declared by Gandhi, elevated the doctrine to a mythical status, and catapulted it into popular consciousness by projecting the judiciary as the only successful opposition against the excesses of the executive.[81]

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77 Beyond the "*core of settled meaning*" - H.L.A. HART, THE CONCEPT OF LAW 124-25 (1961).

78 RONALD DWORKIN, LAW'S EMPIRE 227 (1986).

79 *Id.*

80 *Indira Gandhi* v. *Raj Narain*, AIR 1975 SC 2299,

81 The emergency era court has a different history. *A. D. M. Jabalpur* v. *Shukla*, AIR 1976 SC 1377, the most impugned judgment from the emergency days, is

It is important to clarify that the doctrine is attracted depending not on how far-reaching the change sought to be made is, but when the basic structure is threatened. The doctrine has been identified by open-textured terms such as democracy, independence of judiciary, constitutional supremacy, secularism, separation of powers, etc. Krishnaswamy contends that the interpretation of these broad terms is tempered by the contextual understanding of the text, and their application in precedents.[82]

The co-option of the answers to questions fundamental to the nature of constitutional identity, especially when framed so broadly, concentrate the collective imagination of a polity in the hands of the judiciary, also keeping it relevant in any further inquiry.[83] And, clearly it has. Attempts to negative the impact of the decision in *Kesavananda Bharati* were rejected in quick time. The first of these attempts oddly came through Chief Justice A. N. Ray without any party, or even the government filing a review petition. In what is regarded as his finest hour of advocacy, Nani Palkhivala averted the overruling of the judgment, and the thirteen member bench was dissolved within two days of oral arguments. Unperturbed, the Parliament immediately passed the 42nd Amendment, 1976, which was also nullified by the 44th Amendment, passed upon the defeat of the Congress Party. Over time, there has been a greater acceptance of the doctrine, as illustrated by the terms of reference for the constitution of the National Commission to Review the Working of the Constitution, 2002, which stated that the

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characterized as the "*lowest point that could ever be touched by any court with a conscience*". *See* O. CHINAPPA REDDY, THE COURT AND THE CONSTITUTION OF INDIA - SUMMITS AND SHALLOWS (2010).

82 SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA xi-xxxiii (2009).

83 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 75 FORDHAM L. REV. 721-753 (2006).

commission would "*recommend changes ... without interfering with its* [the Constitution's] *basic structure or features.*"[84]

However, this apparent finality of judicial interpretation of constitutional identity is wholly subject to its execution by the Parliament. Perhaps, a point of inflexion could potentially emerge when the body of concepts under the broad umbrella of basic structure collapse within themselves, unable to deal with inconsistencies, either internal to the content of the doctrine, or in the manner in which it confronts very real, self-created, non-authoritative notions of constitutional identity.

Conclusion

The evolution of the basic structure doctrine maps out the first attempt to create a sense of collective existence in Indian polity, carved out from a Constitution that failed to capture it within its text. However, the process has raised many concerns. Some of these were identified as appropriation of constitutional identity by a non-representative institution, treading a delicate balance in the separation of powers between various branches of government. The latter's attendant failings aside, the most significant of these concerns is that the site of its creation are the Courts. Moreover, the resultant citizen-state engagement was found to be limited in both scope and content, with matters complicated by the sense of finality to their decisions in resolving questions of constitutional law.

Ran Hirschl aptly termed the judicialization of key governance questions, "juristocracy", or rule by the judiciary, whose history of self-empowerment in the Indian context also offers important insights on the frailties of identity creation and definition. These included the necessity of employing open-textured ideas to articulate a political

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[84] National Commission to Review the Working of the Constitution, report available at http://lawmin.nic.in/ncrwc/ncrwcreport.htm.

theory around and within the constitution. This conception of a shared constitutional heritage represents aspirations that transcend, and could possibly run against the grain of values framed in simple majoritarian terms. Indeed, the counter-majoritarian inclinations of the Judiciary could possibly exacerbate the disconnect between felt identity, even aspirational, and their identification.

Over the years, the basic structure doctrine has been employed beyond limiting amendments to the constitution. One could hypothesize that the continued articulation of basic structure has developed a constellation of ideas that inescapably begin to have a more pervasive impact on adjudication. In the chronology of its evolution, basic structure was first rejected as a qualifier for parliamentary action other than constitutional amendments. In the next stage, it begins to be referenced more elaborately in the obiter dicta of the judgment on other matters as well. In its present form, the doctrine has begun to be applied even to other forms of state action.[85] An important caveat that needs to find mention here is that these three stages are operating in parallel, with the doctrine continuously broadening in form and import.

So far there has been nothing in this piece to suggest the exportability of the doctrine, which developed under unique circumstances in India. The cross-jurisdictional engagement in the South Asian context offers an interesting account. In a three-member Cabinet Committee set up to finalize the 1990 draft of the Nepali Constitution, the Ministers limited the scope of amendments to the Constitution under Art. 116 insofar as they did not 'prejudice the spirit of the Preamble'. This is certainly representative of an attempt to

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[85] Krishnaswamy, *supra* n. 82, at xxix-xxxiii.

delineate a Nepali constitutional identity whose vessel was the Preamble of the popularly adopted Constitution.[86]

In Sri Lanka, basic structure was invoked, and rejected, in a challenge to the Provincial Councils Bill in the 13th Amendment Case.[87] The Court held that the Sri Lankan Constitution would survive without loss of identity and that, "*The basic structure or framework of the Constitution will continue intact in its integrity*", in respect of the unitary structure of the Sri Lankan State retained by an ethno-religious majority.[88] Thus, without accepting the import of secular/federal principles, which feature in the Indian basic structure, the Court employed the model to negatively define for itself a conception of basic structure.

In contrast, the Bangladeshi Supreme Court voided the 8th Amendment to the Constitution in *Anwar Hossain Chowdhury*,[89] holding that the amending power was subject to the immutability of the basic structure of the Constitution. The logic that the amendment provisions, being a "derivative constituent power", could not destroy its basic structure resonates with *Kesavananda Bharati*. Like its Indian counterpart, the Court could not reach a consensus on the content of basic structure. However, very interestingly, there was a consensus across counsels and the bench, including the dissenting judges, on the existence of certain fundamental inviolable standards that operate as an inherent limitation on constitutional amendments.[90]

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86 Mara Malagodi, *The Rejection of the Minority Approach in the 1990 on Institution Making Experience: A Reflection on the Influence of Foreign Institutional Models*. CONSTITUTIONALISM AND DIVERSITY IN NEPAL SEMINAR (2007), available at www.uni-bielefeld.de/midea/pdf/Mara.pdf.

87 *In Re The Thirteenth Amendment to the Constitution and the Provincial Councils Bill*, 2 Sri L. R. 312 (1987).

88 *Id.* at 329.

89 *Anwar Hossain Chowdhury* v. *Bangladesh*,18 CLC (AD) (1989).

90 Afzal, J. notes that in the name of amendment, "*the Constitution cannot be destroyed.*"*Id.*, at ¶600.

In conclusion, our hypothesis is that constitutional identity, much like other identities is potentially vast and unknowable, but definitional projects such as the basic structure are reminiscent of a settlement on artificial islands reclaimed from the ocean that is constitutional identity – a vantage point that is a site of continuous construction, from where every foray to the ocean marks a leap of faith, and opportunity.