EDITORIAL

The Indian Journal of Constitutional Law has since its inception attempted to reflect a style of scholarship that tackles the core constitutional issues with specific thrust on comparative constitutional law. The contributions to the journal reflect an ingenious yet academic approach to examining the law on constitutional issues, thus making for a highly refreshing read. They reconcile and analyse core constitutional concepts across multiple jurisdictions and attempt to discern a pattern, a form of instructive analysis, or mere guidelines that enable us to comprehend domestic issues and constitutional law itself in a more nuanced manner. In pursuance of this goal, the 6th edition of the journal critically examines: 1) the right to fair hearing in European Union law-making; 2) the problems with judicial review and justifications for coup-de-états across nations; 3) a critical-comparative analysis of the Equal Opportunity Commission Bill; 4) the treatment of sodomy laws by the judiciary and the politics behind the struggle for LGBT rights in India, Nepal and Singapore; 5) and an attempt to determine the creation and the development of a common identity of the Indian Constitution.

This editorial has been divided into three sections. The first section highlights the major constitutional developments in India in the year 2013. The second section provides an overview of the contributions to the journal. The third section contains an expression of gratitude to all those people who have made the publication of this journal possible.

Constitutional Developments

The Supreme Court in a concerted effort to uphold the Constitution often plays the role of "sentinel on the qui vive"[1] by exercising its powers of judicial review or constitutional interpretation

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1 *State of Madras* v. *V.G. Row*, AIR 1952 SC 196.

in order to maintain a system of checks and balances that is integral to our legal structure. This power of judicial review enables the Supreme Court to maintain a semblance of rationality in our legal system and thwart flagrant violations of rights and obligations. However, the problem with judicial review is that since its inception in *Marbury* v. *Madison*[2] it has always been coloured by the prevailing political and social landscape, or a judicial perception of the same. The position of a judge in a case where she must decide whether to cross the "Laksman Rekha" of judicial review is best described by Justice Handy's opinion in Lon L Fuller's hypothetical Speluncean Explorers case.[3] Justice Handy set aside the conviction of the accused as he believed that judges must comply with what he considered to be the "popular opinion". This opinion was gathered from his reading of newspapers and opinion polls. Aside from the fact that such sources could be unreliable, a judge's opinion is undoubtedly shaped by his personal experience and what he considers the prevailing public opinion to be. Such considerations play out more expressly in a country like the United States wherein a judge's ideology and perception determine an opinion in a more visible manner. However in a country like India, the deep-seated nature of such considerations inevitably leads to "legal indeterminacy" which often shocks the conscience of the public or the government in certain cases. As a result, the evolution of constitutional law and the development of the nation suffer due to recurring meanderings between progressive and regressive judicial review. In light of this over-arching theme, we have proceeded to analyze the constitutional developments in 2013.

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2 Much of the judge's decision in *Marbury* v. *Madison*, 5 U.S. 137 (1803) was based on the probability that the executive might disregard the appointment of Mr.Marbury if it was done in accordance with the law.

3 Lon L. Fuller, *The Case Of The Speluncean Explorers*, HARV. L. REV., Vol. 62, No. 4, February 1949.

Undoubtedly the most awaited decision of the Supreme Court in 2013 was that of *Koushal* v. *Naz*.[4] The Supreme Court overturned the decision of the Delhi High Court that had read down Section 377 of the Indian Penal Code in order to decriminalize sexual relations between consenting adults of the same sex. Justice G.S. Singhvi who delivered the judgment decided to exercise judicial restraint and noted that it was the duty of the Parliament to amend or repeal the provision. He ruled that since the Parliament had the opportunity to do so and did not take any action despite the Delhi High Court decision or the Law Commission's recommendation, the Court had to respect the legislature's intention. In doing so he failed to consider the fact that the Government had not decided to file an appeal to the Supreme Court from the High Court. This decision was in stark contrast to his controversial judgment in the 2-G case[5], and *Abhay Singh* v. *State of UP*[6] which was delivered on the same day as *Naz*. In the former, the judge cancelled the allotment of telecom licences and mandated that allotment of all natural resources be done only by auction, thereby expressly going against the will of the Government. In the latter, he limited the use of red-lights in cars to those holding constitutional posts, expressly directing the legislature to amend the Motor Vehicle Rules, 1989. Yet most peculiarly, in the absence of any strong reason or even a temporal frame the judge drastically altered his understanding of judicial review in the Naz Judgement.

In addition to the above, the court's findings with respect to Article 14 and 15 were tenuous. Though the court said that Section 377 creates an intelligible differentia between those who indulge in carnal intercourse and those who do not, it did not attempt to

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4 *Suresh Kumar Koushal* v. *Naz*, Civil Appeal No.10972 of 2013.
5 *Center for Public Interest Litgation* v. *UOI*, AIR 2013 SC 3725.
6 2013 (15) SCALE 26.

determine the nexus between the object and such differentia. Furthermore, throughout the judgment the Court has skirted the issues relating to violation of Article 21 and has not made a finding with respect to the same. It also went to the extent of stating that there is not enough material on record to prove a clear case of discrimination against the LGBT community. These reasons coupled with the attitude and comments of the judges during the hearings which have been made publicly available all suggest that the predilections of the judges inevitably played a major role in the determination of the outcome of the case.

If that were the case then there ought to have been express disclosures and further justifications made by Justice Singhvi in the judgment. This is because unreasoned flip-flops in the understanding and exercise of judicial review are dangerous in that they can damage the stability of the Judiciary and raise questions as to its legitimacy. In such situations the burden falls upon the Indian scholastic community to deconstruct such judicial opinions and expose their inconsistencies. This problem is of a systemic nature and must thus be critically examined to prevent a confused understanding of judicial review.

In *Christian Medical College* v. *Vellore*,[7] the apex court held that the Medical and Dental Council of India's notification[8] providing for a National Eligibility Entrance Test for M.B.B.S, BDS and post-graduate courses was ultra vires the provisions of Articles 19(1)(g), 25, 26(a), 29(1) and 30(1) of the Constitution. In particular the majority, drawing from the *T.M.A Pai case*,[9] held that such an entrance test infringed

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7 2013 (9) SCALE 226.

8 Regulations on Graduate Medical Education (Amendment) 2010 (Part II) and the Post Graduate Medical Education (Amendment) Regulation, 2010 (Part II).

9 *T.M.A. Pai Foundation* v. *State of Karnataka,* (2002) 8 SCC 481.

upon the right of state-run and minority universities to administer themselves. These rights were said to be infringed despite the fact that the MCI argued that it has legislative competence under List I Entry 66 to make such laws. The Court held that the power conferred by the entry could only extend to prescribing minimum standards of qualifications and eligibility. Furthermore, it also held that the MCI is required to furnish any proposed amendments in its rules to the State Government for its comments.[10] Since it did not undertake such consultation the amendment provisions introducing the entrance test were held to be invalid.

The dissenting judge, Justice Dave, emphasized that it is necessary to take the interests of the students appearing for such exams into account. He stressed upon the fact that the NEET would only regulate admissions in order to determine the quality of a student entering into an institution. This would inspire confidence in the admission procedure and lead to merit based selections and would not go against the spirit of the abovementioned fundamental rights. He also said that the policy of reservations for certain classes would still be implemented as the NEET only determines eligibility criteria and not the actual admission of students. Hence, the MCI has only imposed a reasonable restriction on the right to admit students of an institution's choice. In relation to legislative competence, the Judge held that because education is in the concurrent list the state can only legislate if the field is unoccupied by the Union. Since the MCI has the power under List I Entry 66, it has the competence make laws with respect to determination of standards in higher education. Thus, states can only prescribe standards in the absence of any laws to the contrary.

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[10] Section 19(2) and 20 of the Medical Council of India Act, 1948.

This decision goes against the trend of favouring central admission tests and an enquiry into the situation around the matter has to be undertaken. However, on a more fundamental level it confirms our fear of unreasoned flip-flops and concealed judicial predilections. The MCI has already filed a review petition before the Supreme Court in order to undo the effect of the judgment.

Fortunately, such predilections did not play out in *State of Maharashtra* v. *Indian Hotel and Restaurants Association and Anr.*[11] in which the Supreme Court struck down Section 33A and Section 33B of the Bombay Police (Amendment) Act of 2005. The provisions were held to be violative of Articles 19(1)(g) and 14 of the Constitution as they prohibited any type of dancing in an "eating house, permit room or beer bar" to the exclusion of certain elite establishments like three star hotels. The Court held that the ban is based on the "unacceptable presumption" that elite establishments possess certain standards of morality and decency that other establishments do not, and that these standards make otherwise objectionable dances acceptable. Recognizing dancing as a profession, the Court also held that the width of the ban impairs the livelihood of many bar dancers who have no other option but to turn to prostitution in order to support their families. Much to the relief of the parties involved the Court's opinion was not coloured by their personal or perceived public opinion of bar dancers.

The decision in *Lily Thomas* v. *Union of India,*[12] decided by a Bench comprising Justices A.K. Patnaik and Sudhansu Jyoti Mukhopadhaya was another landmark decision that incited mixed reactions. The judges declared Section 8(4) of Representation of

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11 (2013)8SCC51.

12 AIR 2013 SC 2662.

People's Act, 1951 to be ultra vires Article 101 and 191 of the Constitution. The said provision saved a convicted MP or MLA from disqualification if she could obtain a stay on her conviction from an appellate court within three months.

The Court observed that Articles 102 and 191 of the Constitution only allow the Parliament to lay down the law to disqualify an MP or an MLA. They do not confer the power to make a provision protecting sitting members from the disqualifications. Hence, the Parliament was held to lack the legislative competence to enact Section 8(4). Thus, the moment a sitting member is not eligible to be elected as an MP or an MLA, she is immediately disqualified from holding her seat. Subsequently, fresh elections are required to be contested. However, the logical inconsistency in relation to this argument is that the power to stay a conviction of an appellant is available to a higher court not only under the said provision but also under Section 389 of the Criminal Procedure Code. The effect of a stay under Section 389 would be that the judgment of a lower court would temporarily cease to have effect. This creates a legal anomaly because in the event the lower court judgment is not in effect, it is not clear whether a member can retain her seat or would fresh elections need to be conducted. Unfortunately, though the intentions of the judges were good, they did not take such a possibility into account.

In *State of Gujrat* v. *RA Mehta*[13], the Supreme Court put to rest a controversial dispute between the Governor and the Chief Minister relating to the appointment of the local Lokayukta. The issue in the said case was whether the Governor could appoint a Lokayukta in consultation with the Chief Justice without the aid or consultation of

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13 (2013) 3 SCC 1.

the Council of Ministers. The Court held that the Governor is bound to act as per the Council's opinion only in those situations specified by the Constitution and not when the Governor is acting in the capacity of a statutory authority or is acting under the exceptions in Article 163(1). However, when it determined the import and scope of the word 'consultation' contained in Section 3 of the Lokayukta Act, 1986, it came to the conclusion that the Governor acts in her capacity as the Head of the State and hence ought to have taken the aid and advice of the Council of Ministers.

Nevertheless the Court, having observed the fact that the Lokayukta had not been appointed for nine years, said that the Act prescribed that the appointment of the Lokayukta must be free from any political influence[14] and this makes the Chief Justice of the High Court the most apt authority to judge the suitability of a candidate, thereby giving primacy to the recommendation of the Chief Justice. Since in this case such recommendation was regarded, the Court interpreted Section 3 of the Act in a purposive manner. Thus, it held that the requirement to consult was fulfilled as three out of the four statutory authorities had been consulted and because there was correspondence regarding the appointment between the Chief Justice and the Chief Minister. Hence, the appointment of Mr Mehta was saved. Such a pragmatic exercise of judicial power and regard to the facts and circumstances by the Supreme Court is commendable. In a complicated situation of political conflict it was not only able to lay down the law correctly but also did so in the interests of justice.

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[14] Sections 4 and 6 of the Lokayukta Act, 1986.

Bills

The 120th Constitution Amendment Bill was introduced on 24th August 2013 in the Parliament. It seeks to amend Article 124(2)(a) and introduce Article 124A into the Constitution. The new Article provides for a Judicial Appointments Commission and delegates the composition and function of its members to a law made by the Parliament. The amendment to Article 124(2)(a) provides for presidential appointment of Judges in the High Court to be made after consultation with Judges of the Supreme Court and High Courts. The Bill seeks to allow for the legislative overruling of Justice Verma's judgment in *SCAORA* v. *UOI*[15].

The Judicial Appointments Commission Bill, 2013 introduced in conjunction with the above, provides for the establishment of a collegium comprising of the Chief Justice, two senior-most Judges of the Supreme Court, the Union Minister for Law and Justice, the Prime Minister and the Leader of Opposition, and two eminent nominees of the collegiums. Such a Bill proposes to promote equal participation of the executive and judiciary in the appointment of Judges. If passed, it could be interpreted to have jeopardized the independence of the judiciary and its separation from the executive. Given that these are basic features of the Constitution, it will be interesting to see whether the Bills survive constitutional scrutiny.

Contributions

This year's edition begins with Aditya Sondhi's tribute to Late Justice J.S. Verma and his contribution to Constitutional Law. Mr.Sondhi reminisces the manner in which Justice Verma "*pushed the*

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15 (1993) 4 SCC 441.

contours of law" to settle controversial constitutional issues. In particular, he discusses how Justice Verma introduced the concept of continuing mandamus in *Vineet Narain and Others* v. *Union of India and Others;*[16] creatively interpreted Article 124(2) of the Constitution in *SCAORA* v. *UOI* to introduce the concept of a 'collegium of judges'; and ingeniously relied on international conventions in order to lay down binding guidelines that dealt with sexual harassment in the workplace. He concludes by remembering Justice Verma as a "conscientious dissenter" who was willing to "forge new tools" to fill the lacunae in law and uphold fundamental rights.

Alexander Turk has presented an erudite piece on the right to fair hearing in a parliamentary context in the landscape of the European Union becoming a legislative forum. He argues that the right to be heard is not merely an administrative law principle and that it has become a fundamental right. Subsequently, after an overview of appertaining decisions of the Union Courts in Europe he advocates that they have excluded participation rights in the legislative process based on an incorrect perception of the legal system in which such rights have been applied. The author notes that law-making in the European Union is already constrained due to unequal representation. He thus argues that there is a need to enhance the democratic legitimacy of the European Union through the principle of participatory democracy. Thus, when the process of rule-making involves individualised determinations that affect people, the Court must not shy away from granting participation rights.

Such a piece becomes extremely relevant from the standpoint of the controversy surrounding the Lokpal Bill. As of now there is no

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16 AIR 1998 SC 889.

binding obligation on the Parliament to consider a meaningful contribution to law-making from any member of society. However, to not give effect to overwhelming public opinion questions the legitimacy of an incumbent government thus underscoring the importance of such contributions. The nascent idea of the AamAdmi party to have "mohallasabhas" or neighbourhood meetings demonstrates a refreshing understanding of the same. However, the extent to which such a model can be institutionalized in a country like India is another question altogether.

Daniel Lansberg's piece provides an overview of 'necessity' doctrines and theories used by the Judiciary to validate coups in developing democracies in the common law system. His paper examines the aftermath of a "coup d'état" where a non-executive body seizes power and the court provides premeditated reasoning to validate or absolve the actors. He then traces the origin of the doctrine of necessity and its Grotian and Kelsinian facets that are applied in such situations. The author, cognizant of the threat a judiciary may be under, worries that premeditated decisions that justify such coups will create precedents that can weaken the legitimacy of a government. To prevent such a situation he examines the feasibility of several solutions like physical removal of courts from the countries they represent, mass resignation of judges, and declaring such issues non-justiciable. Nevertheless, he submits that Constitutions are better suited at constraining coups ex ante than taking measures after the act has taken place, making it advisable for democracies to have provisions that contemplate a possible overthrow of the government or its structures. Thus, provisions that indicate the circumstances and procedure for scrapping the constitution or a "right to resist proviso" allowing people to challenge or attack a regime under certain conditions might avoid problems regarding legitimacy.

This argument becomes relevant in the Indian context when the Emergency Provisions of the Constitution are triggered. The Emergency provisions have allowed us to maintain a semblance of balance in times of crisis but have also been misused in the past. Perhaps the decision in *ADM Jabalpur* v. *Shivkant Shukla*[17] could have been avoided if the independence of the judiciary could have been maintained.

The debate on whether such matters are justiciable played out in the State of Rajasthan decision, where the Supreme Court held that a question of whether the President should proclaim an emergency under Article 356 is a political question. The decision was overruled in *SR Bommai* v. *Union of India* and the Court held that if a decision was made on *mala fide* or irrelevant grounds it could be struck down. Such a decision armed the Indian Judiciary to deal with matters regarding encroachment of powers, thus restoring the balance of power and preventing the abuse of constitutional provisions.

Pushan Dwivedi's note provides us with a succinct albeit critical legislative analysis of the Equal Opportunity Commission Bill. The Bill seeks to provide for progressive conceptualization of non-discrimination and broaden the scope of Article 14 and 15 of the Constitution. He argues that the Bill is theoretically flexible but practically restrained as it does not itself prohibit discrimination and relies on the grounds mentioned in Article 15 and 16. It also limits the horizontal application of rights by limiting the jurisdiction of the Commission to entities that come under Article 12. In light of such limitations he comes to the conclusion that the legislature has merely passed on the duty of making hard policy to the Judiciary. He then

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17 AIR 1976 SC 1207

examines the mandate of the Commission to prevent discrimination in the housing sector and argues that the present framework is not sufficient in itself. Finally, he compares the Bill with the Fair Housing Act of the United States and argues that the Bill ought to prevent discrimination in private property usage which has a public dimension. The Equal Opportunity Commission Bill was expected to herald a new era of equality in society, finally allowing for horizontal enforcement of rights. Unfortunately, the draft of the Bill tabled in last year's budget session has limited itself to countering discrimination against religious minorities. Such an approach has taken the sting out a Bill that was already without teeth thus making it a shadow of what it was originally envisaged to be.

Badrinarayanan Seetharamanan and Yelamanchili Shiva Santosh Kumar, in a highly engaging piece, titled the '*Quest For Constitutional Identity*' explore the process of identity creation through the constitution. They note that a well drafted constitution unifies constitutional identity even though it is constantly evolving. This is demonstrated by their reliance on other constitutions across the world that attempt to "reconcile the experiences of the past and the aspirations of the future".

In their quest for determining an Indian Constitutional identity, the authors cite the colonial personal laws project and the experiments with secularism as forms of identity creation which the constitution is required to represent. After examining the same, they come to the conclusion that Indian constitutional identity is predominantly determined by extra-constitutional considerations based on religion, language, caste or even nationhood and is more than just the legal text. The authors then attempt to determine a site for the location of the engagement between the state and the citizen and

finally decide upon the Higher Judiciary, despite certain limitations involved. After doing so, they examine whether the basic structure can be used to determine constitutional identity. After examining the history of the doctrine in light of the 9th Schedule and the cases after *Keshavananda Bharti,* they come to the conclusion that the basic structure doctrine is a mere design to maintain the continuity of the constitution and can be counter-majoritarian. It fails to capture disruptive changes and the unknowable nature of constitutional identity.

Manav Kapur's piece is a comparison of sodomy laws and the political impact of the gay rights movement in Nepal, India and Singapore. It critically examines the politics behind the struggle for LGBT rights and the various (and mixed) results this has had across jurisdictions. The author also looks at the common justifications courts (and other Constitutions) have relied on when dealing either with the retention or abolition of these values. Interestingly, the author has explored the argument that courts are not the sole arenas where constitutional (especially rights-based) arguments take place.

This was a factor that played a large role in the Indian Supreme Court's judgment in the *Naz Foundation* decision in which it held that adult consensual sex is an offence under the Indian Penal Code. It must be noted that this article was written before the Supreme Court judgment was delivered. However the judgment does not substantially alter the author's analysis or arguments.

Lastly, Anant Padmananabhan presents a succinct book review of Madhav Khosla's 'Short Introduction to the Indian Constitution.' He appreciates the book for being opinionated as well as refreshing in its treatment of controversial constitutional issues.

Mr. Padmananabhan notes that the author places emphasis on the theme of asymmetry across the constitution. Asymmetry is used as an analytical device to explain special status accorded to certain states, reservations and the difficulties in the basic structure doctrine. The book also discusses horizontal application of fundamental rights, the jurisprudence on Article 21 and the basic structure doctrine. In summation Mr Padmananabhan considers 'Short Introduction to the Indian Constitution' a well written crisp narrative on Indian constitutional law and theory.

Acknowledgments

Firstly, we profess our sincere thanks to Prof. Faizan Mustafa, Vice- Chancellor, NALSAR University of Law and Prof. Vijendra Kumar, Registrar for pledging their support and time which was instrumental to the release of this Journal. We also highly appreciate the generosity of Mr. K. K. Venugopal and the M. K. Nambyar SAARCLAW Charitable Trust that has allowed us to come out with this issue. We are glad that they have supported this journal since its inception and shall always fall short in expressing our gratitude for their undying support. Further, Mr. Sudhir Krishnaswamy's concern and help to this Journal is sincerely appreciated and received with gratitude.

The Advisory Board of the Journal has been a source of inspiration and we thank them for their involvement. The Faculty at NALSAR has always lent us a helping hand. We express our sincere gratitude to Dr. N Vasanthi for having actively encouraged this initiative, and for reviewing our work. We would also like to specially thank Prof. Siddharth Chauhan for his ideas and help in soliciting

articles. Furthermore we thank Prof Jagteshwar Sohi, Prof Manav Kapur and Mr. Mohsin Alam for their ideas and inputs.

Most importantly we would like to thank those people who peer reviewed selected articles. The peer-review process is fundamental to this journal as it gives the editors perspectives of third persons who have specific knowledge of a particular facet of constitutional law or jurisprudence. This enables us to maintain the high degree of scholarship and stylistic maturity that we pride ourselves on. Hence, our special gratitude goes out to Prof. Tania Groppi, Vinay Kesari, Radhika Gupta, Saurabh Bhattacharjee, Mohsin Alam, Manav Kapur, Anup Surendranath and Alok Prasanna.

Lastly, we also thank the administrative staff for the assistance they have rendered.