

CONSTITUTIONAL DYSFUNCTIONALISM

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The Rajya Sabha and the Indian judiciary share a functional link so as to maintain a constitutional equilibrium. Both their designs are oddly detailed for a reason, with no feature existing without purpose. The former is tasked with scrutinising and revising the social/moral policy initiatives of the Lok Sabha-executive combine. In parallel and with respect to the same legislative-executive actions, the judiciary has its task in reviewing recondite issues of constitutional compliance/competence. This paper elaborates upon a state of peak crisis when the two constitutional bodies abandon these behavioural responsibilities, albeit, in different ways. The core of Rajya Sabha's revisionary powers was premised in its unique 'representativeness'. This exclusivity, and the concomitant powers, have been wrested away from it. Resultantly, it seems to have lost its efficacy as a legislative-executive watchman. In its stead, the judiciary has taken up the additional task of filling up moral vacuities in legislative/executive actions. It is not that this probable deviation was not constitutionally accounted for by the limits on the judiciary's writ jurisdiction. However, in an act of defiant circumvention, the judiciary has pushed the relevant theoretical/procedural boundaries to nullify that foresight. Emerging moral-judicial doctrines supply this transgression with perceived legitimacy. These parallel yet different aberrations in both the institutions constitute a state of 'constitutional dysfunctionism'.

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I. INTRODUCTION

In 2020, the Central Government had introduced three pieces of ordinary legislation.¹ The purported objective of these was to reform agriculture

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in India. A numerically stacked Lok Sabha in its favour posed no bar. The Rajya Sabha ('The House'), where the majority tilted in favour of the opposition, attempted to slow the Bills' movement for a surgical scrutiny. However, in a gross violation of the rule-books, a demand for a revisionary vote on the Bills was scuttled by the presiding officer of the House.²

The newly enacted laws subsequently landed before the Supreme Court ('The Court') in 2021. In an unforeseen use of procedural powers, the Court stayed the operation of the said laws as an interim measure.³ The executive was directed to conciliate with those disagreeing on the issue. Staying a law's operation, negating the presumption of constitutionality in the process,⁴ was notoriously novel to begin with. Yet, expanding jurisdiction to include addressing disaffection towards a law was a more egregious development.

The circumstances surrounding the farm laws bring a significant constitutional issue to light: the pace of the document's decomposition. When majoritarian governments come to be formed, two constitutionally envisaged bodies need to take a counter-majoritarian poise. The Rajya Sabha becomes the primary site of opposition, given its different composition from the Lok Sabha. At the same time, the judiciary must exercise its own checks on the ruling executive within the confines of judicial review. The Indian Constitution witnesses the Rajya Sabha crumbling before the will of the Lok Sabha-Executive combine. Whereas, the Supreme Court acts like the said combination itself, abandoning its prime duty of judicial review. Illustrative of this is when it took up both, deliberation and execution, of policies that curb liquor-sale within certain radii of highways.⁵ According to the Court, this was a significant factor contributing to road travel accidents, and came up with a solution for it.⁶ Similarly, it micro-managed the administration of COVID-19 related affairs, which included deliberating upon price caps of the screening tests to the distribution of the vaccine.⁷

¹ The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020, 113 of 2020; Farmers (Empowerment and Protection) Agreement of Price Assurance, Farm Services Bill, 2020, 112 of 2020, Lok Sabha; The Essential Commodities (Amendment) Bill, 2020, 111 of 2020.

² Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha), 2016, Rule 252; *See also*, Yash Sinha, *Precisely Why the Actions in Rajya Sabha Lacked Presumptive Legitimacy*, THE LAW BLOG, November 7, 2020, available at <https://thelawblog.in/2020/11/07/farmers-bill-rajya-sabha-legitimacy/> (Last visited October 30, 2021). The Rajya Sabha Rules require a mandatory division once a challenge to the passage of bill, passed by voice-vote, is raised. The same was raised with respect to the passage of two of the three farm bills when those were voted on in the House. Since members made a din during deliberations, the members had to approach the well so that their challenge could cut through to the Speaker. However, the Rajya Sabha's Presiding Officer arbitrarily introduced a bar on doing so, approving the results of the voice-vote, which favoured the passage by default.

³ *Rakesh Vaishanv v. Union of India*, (2021) 1 SCC 590, ¶¶8, 10.

⁴ *Id.*, ¶8.

⁵ *State of T. N. v. K. Balu*, (2017) 2 SCC 281, ¶¶2-30.

⁶ *Id.*, ¶¶7, 15, 23.

⁷ *See discussion infra* Part III. Cat 29.

This is not to state that the fall of one institution has necessarily caused the other's. Albeit, the Supreme Court has certainly factored in a malignant executive with an indolent legislature to initiate its own overhaul. However, the denudation in the discharge of both the institutions' constitutional obligations have largely been simultaneous yet independent phenomena. Resultantly, neither acts as an effective check against the misuse of powers by a majoritarian executive.

To borrow constitutional law scholar Prof. J. Balkin's terminology, such a state of affairs demonstrates constitutional 'dysfunctionalism'.⁸ This concept has its origins in sociology. Herein, behavioural aberration of one or more actors destabilises a society, as opposed to its fall due to their inactivity. A dysfunction of the Constitution gets conducted when its institutions are differently decadent in parallel, resultantly abandoning their core functions.⁹ This, in turn, disorients the system of achieving its constitutional goals at large.¹⁰ This decay may be by loss of institutional power,¹¹ as is the case with the Rajya Sabha. Or, it may occur by an institute's transition to an impermissible state of power.¹² This is presently illustrated by the Indian judiciary.

When the judiciary is perceived to be meeting citizens' expectations, the mobilisation to reinstate the Upper House's powers dies down. Constitutional dysfunctionism captures this self-sustaining circular loop with geometric precision. This paper, therefore, attempts to fully identify the joints of dysfunction, so that the societal standards shift from cheering a moral court to craving an accountable Upper House.

Part II of this paper focuses on the Rajya Sabha. Part II.A will capture the normative framework within which it was supposed to function like a permanent opposition. As this may not be the prevailing opinion, this part first establishes that this House was designed to be weightier than its Parliamentary counterpart(s). To do so, it will analyse the reasoning behind this chamber's heightened constitutional status. Subsequent to this, Part II.B discusses the prevailing gap between the normative ideal of the Rajya Sabha and its performative reality. It will describe the structural weaknesses that mar the House at present. Holistically, this Part argues that the structural strengths of the House have now been diluted to the point of non-existence.

⁸ Jack M. Balkin & Sanford Levinson, *DEMOCRACY AND DYSFUNCTION* 18 (The University of Chicago Press, 2019); See also Richard L. Hasen, *Political Dysfunction and Constitutional Change*, Vol. 61 (4), *DRAKE LAW REVIEW* 989 (2013).

⁹ Balkin & Levinson, *supra* note 8, at 7-35.

¹⁰ *Id.*; See also Yoni Appelbaum, *America's Fragile Constitution*, *THE ATLANTIC*, October, 2015, available at <https://www.theatlantic.com/magazine/archive/2015/10/our-fragile-constitution/403237/> (Last visited on July 5, 2021).

¹¹ Balkin & Levinson, *supra* note 8, at 14, 59.

¹² *Id.*, at 59.

Part III elaborates upon the Indian judiciary's dysfunctionality. The risks associated with this institution paradoxically lie in its ever-expanding powers of judicial review. Part III. A will attempt to portray the constitutional writ jurisdiction as both exhaustive and power-confining. This will have been demonstrated to imply curbs on any nascent judicial tendency to construct 'social values'. Part III.B supplements that assertion by stating 'morality' as a concept exclusively left out for democracy and deliberation. Hence, it is shown as out of bounds for the judiciary. It will dwell upon evolving 'moral-judicial' concepts that help it breach this boundary. These will be shown as the very core empowering the dubious transition from a writ-based to morality-based jurisdiction. Part III. Ceventually links the previous two assertions made in Parts III.A-B. It describes the erroneous moral jurisdiction as taking judicial-procedural powers to a level absent in the framers' foresight. This includes describing the debilitating changes made to the judiciary's writ jurisdiction. Part III as a whole, therefore, attempts to reveal the dysfunctionality of Courts in their desecration of electoral representativeness.

II. RAJYA SABHA: A PRECIPITOUS FALL

A. HOUSE OF GUARDS

The Rajya Sabha's indispensability to the Indian Constitution, at the surface, may only appear in its unique affiliation to State interests. It is submitted that this is a weak line of argument to both establish and justify this indispensability. Firstly, Indian basic structure doctrine does not seem to have a clear definition. Secondly, it is uncertain whether bicameralism, as an extension of federalism, makes for a basic constitutional feature.¹³ Adding to this vagueness is India's edifice of a parliamentary democracy. That is, the executive is determined from the composition of the house elected directly by the republic.

However, it is proposed that the Rajya Sabha's indispensability to the Indian Constitutional scheme becomes clearer when viewed differently: the determination of the executive is not dependent on one house so that it remains to be a watchdog. In doing so, India borrowed the foundation of the House of Lords but gave it the powers of the U.S. Senate.¹⁴ In this light, it is submitted that the Rajya Sabha's adoption indicates two lines of thought: firstly, it was tasked with checking the deeper ambitions of the Lok Sabha-executive combine; and secondly, the Rajya Sabha is an extension of 'federalism', subservient to the former objective. Resultantly and arguably, its role of an opposition is what makes it of immense constitutional significance.

The origins of the Rajya Sabha lie in the recommendations of the Montagu-Chelmsford Report, which took the eventual form of the Government

¹³ SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE IN INDIA* 66-68 (Oxford University Press, 2nd ed., 2011).

¹⁴ See discussion *infra* at 8.

of India Act, 1919.¹⁵ It had suggested a second chamber for a better representation of minorities.¹⁶ The ulterior motive was to create a chamber of appeal against the new Indian assembly's initiatives, or to at least put the latter's moves in a deliberative gridlock.¹⁷ One half of its composition was to be derived from indirect elections, with assembly members being its exclusive electoral college.¹⁸ The other half would be British Governor-General's nominees.¹⁹ Indians seem to have grasped the nefarious intentions, but did not deem an explicit challenge as conducive to the negotiation. Instead, they appear to have demanded a relatively slight revision: the entire second chamber may be directly elected albeit with higher standards for qualification.²⁰ Barring this, the Council of States shall be a standing committee of the Legislative Assembly.²¹ This was to provide adequate representation to British India. British India had then comprised of princely states with British allegiance. This, it stated, would act as the revisionary house to keep the Indian legislative assembly in check.²²

The British Parliament, examining its earlier stance on the second chamber while contemplating the Government of India Act, 1935 ('1935 Act') thought it to be blatantly exhibitionist of its imperialistic designs.²³ By then, the British were more inclined to mollify the Indian intelligentsia, and decided to retain lesser control through fewer nominees from the British-Indian provinces.²⁴ It also accepted the Indians' suggestion of keeping higher standards of criteria so that it had different interests than those in the Assembly.²⁵ These standards would draw affluent Indians probably schooled in the English education system, and less hostile to the British regime.²⁶ Nevertheless, this proposed second chamber never came to be.²⁷

The debate on the retaining of a second chamber and the manner of electing it reached its denouement during the framing of the present-day Indian Constitution. The Union and Provincial Constitution Committees had started to

¹⁵ R. C. Tripathi, *EMERGENCE OF SECOND CHAMBER IN INDIA*, 12-13 (National Publishing House, 2002).

¹⁶ *Id.*

¹⁷ *Id.*, at 32; See also Adrija Roychowdhury, *New Delhi Architecture was Meant to Soften Nationalism, Parliament House was Always Meant Only for Indians*, THE INDIAN EXPRESS, December 12, 2020, available at <https://indianexpress.com/article/research/new-delhi-central-vista-capital-parliament-house-rashtrapati-bhawan-architecture-7101680/> (Last visited on July 5, 2021).

¹⁸ TRIPATHI, *supra* note 15, at 32; M. Venkaiah Naidu, *The Need for a Second Chamber*, THE HINDU, May 11, 2020, available at <https://www.thehindu.com/opinion/op-ed/the-need-for-a-second-chamber/article31560028.ece> (Last visited on July 5, 2021).

¹⁹ Tripathi, *supra* note 15, at 29.

²⁰ *Id.*

²¹ *Id.*, at 30.

²² *Id.*, at 51.

²³ *Id.*, at 58.

²⁴ *Id.*, at 60-61.

²⁵ *Id.*, at 63-64.

²⁶ *Id.*

²⁷ Naidu, *supra* note 18.

function well before the Assembly, singularly focussing on federal issues.²⁸ At the stage of the proposal, the Union Committee approved of its inclusion, albeit without significant debate.²⁹ Two reasons given for this reflexive adoption stand out. The first of these is that having a revisionary chamber is essential for ‘dignified’ debates.³⁰ The second is that those left out in electoral contests may secure an adequate representation in the Parliament through the Council of States.³¹

In the Constituent Assembly, Article 66 of the Draft Constitution endorsed the Rajya Sabha.³² The concerns of it sedating the pace of progress, representing elites and vestigial colonialism were voiced.³³ These were sought to be allayed by Nehru. He stated that the decision to include a second chamber was that of the provincial governments.³⁴ In arguing for the Rajya Sabha, using these many words, Nehru seems to be taking the ideal of complete representation to its logical conclusion: the Assembly’s claim of building a representative legislature shall be a hoax if it ignores a provincial appeal at that inceptive moment. He also dismissed any concerns about the authenticity of voices coming through indirect elections, by remarking those would be “elected citizens”, regardless.³⁵ He then brought the debate to an end by emphasising upon its revisionary powers. Those powers, he stated, are of utmost significance, given the Lok Sabha may take hasty decisions in the future due to a majoritarian over-confidence.³⁶

Nehru’s phrasing does not seem to decisively establish which of the two reasons dominate for determining the primary task of the House: federal representativeness or moral revisionism. However, it is proposed that the House’s history preceding it is conclusive: it was envisaged as the last site of revision for their legislative actions and executive initiatives.

As stated previously, the colonial regime stressed on a separate composition of the House as an ostensible excuse. This composition in the Council was essentially devised to check the Indian legislative assembly’s discretion. The

²⁸ S.B. CHAUBE, *CONSTITUENT ASSEMBLY OF INDIA: A SPRINGBOARD OF REVOLUTION* 181 (Sanctum Books, 2nd ed., 2000).

²⁹ *Id.*, at 206-208.

³⁰ Tripathi, *supra* note 15, at 75; Chaube, *supra* note 28, at 208.

³¹ Tripathi, *supra* note 15, at 75; REPORT OF THE UNION CONSTITUTION COMMITTEE, July 4, 1947, in Shiva Rao, *THE FRAMING OF INDIA’S CONSTITUTION: SELECT DOCUMENTS*, vol. II, 581 (N.M. Tripathi Private Ltd. Bombay, 1967).

³² Drafting Committee to the Constituent Assembly, *Text of Draft Constitution of India*, February 21, 1948, available at https://www.constitutionofindia.net/historical_constitutions/draft_constitution_of_india__1948_21st%20February%201948 (Last visited on July 6, 2021).

³³ CONSTITUENT ASSEMBLY DEBATES, November 9, 1948, *Speeches by Raj Bahadur, N.G. Ranga*, ¶¶7.52.22, 7.52.33, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-09 (Last visited on July 6, 2021).

³⁴ CONSTITUENT ASSEMBLY DEBATES, (September 10, 1949), *Speech by Jawahar Lal Nehru*, ¶9.137.24, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-10#9.137.24 (Last visited on July 6, 2021).

³⁵ *Id.*

³⁶ *Id.*

Constituent Assembly adopting the more or less unabridged version of the House as envisaged by the 1935 Act is, then, denotative. It suggests that the House's role of a legislative-executive watchdog shall remain unchanged.

It is also this version of history which is vindicated by the text of the Constitution. The preponderance of revisionary powers over federal representation is easily discernible from its text. Articles 108(1), 107(5), provisos to 352(4) and (5), and provisos to Article 356(4) and Article 360(2), capture the House's revisionary powers. Among these, it is seen that the last four are exclusive to this House. Article 107(5) allows the bill passed in this House to remain alive despite the dissolution of the Lok Sabha. More significantly, the relevant provisos to emergency provisions ensure a life of at least thirty days for the concerned proclamation if it enjoys the House's singular approval.

Contrarily, only Articles 249(1) and 312(1) denote it to be an exclusive representative of State interests. In other words, and proposedly, it is singularly in these that the Rajya Sabha has exclusive powers to initiate deliberative action on behalf of the states.

Thereby, the claim that Rajya Sabha was supposed to primarily act like the voice of the states so as to extend federalism is shaky. Furthermore, the existence of Article 368(2), providing for state ratification in matters affecting the states, would be otherwise rendered repugnant. In addition to this, the more vulnerable states were already granted compacts like Article 370 (unamended). Added to these features is the existence of provisions like Article 263 that provides for an inter-state council. In this light, the 'federal voice as a primary role' argument does not seem to cut ice.

However, its revisionist role does seem to be primary. Except for money bills, in all other matters pertaining to ordinary legislation, constitutional amendments and raising questions/debates on executive policy, the House has equal powers as the Lok Sabha. If a joint session in the case of a deadlock favours the numerically superior Lok Sabha,³⁷ Rajya Sabha has its own deliberative edge. A bill may remain alive for prolonged scrutiny if it lands before the latter, since it never dissolves.³⁸ This is unlike the Lok Sabha, where the bill lapses upon the House's dissolution. Assuming that one House has a separate constituent to represent in cases of coextensive powers, would be an absurdity.

Hence, both constitutional history and its text establish that Nehru's mention of 'revisionary powers' assumes dominating significance.

³⁷ See The Constitution of India, 1950, Art. 108; Sidharth Chauhan, *Bicameralism: Comparative Insights and Lessons*, Vol. 642, SEMINAR, 42 (2013).

³⁸ The Constitution of India, 1950, Art. 107(4); K.B.S. Sidhu, *No Reason for Bureaucrats to Shirk Decision-Making Now*, THE SCC ONLINE BLOG, July 25, 2018, available at <https://www.scconline.com/blog/post/2018/07/25/no-reason-for-bureaucrats-to-shirk-decision-making-now/> (Last visited on July 6, 2021).

The role of the Rajya Sabha, therefore, is primarily of an opposition. Its different electoral mechanism serves this larger purpose of maintaining a separate political force. With the benefit of hindsight, this prediction about distinctiveness has indeed proved to be largely true. In a period of almost sixty-nine years since its inception in 1952, the political majority of the day has been in a minority in this House for about forty years.³⁹

Moreover, this interpretation is in line with the critical theory surrounding bicameralism. To cqueville states that a directly elected House sustains itself by sheer power; the one elected indirectly operates on perceived public opinion.⁴⁰ The reason is that an indirectly elected house is composed of the privileged, elected by the privileged.⁴¹ This aristocratic flair, as opposed to a classist approach towards public policy, can surgically analyse the deeper implications of a government's acts. It was similarly stressed that the aristocratic nature of one House impels it to take a different approach.⁴² Another view is that members of this House can mould politics through the networks of patronage they enjoy amongst the members of the Lower House.⁴³

It is to be noted that the Indian Constitution has preserved a different composition for the House, but not entirely on the basis of the civil status of its candidates. In fact, its Articles 80(1)-(3) are designedly made up from the corresponding provisions in the Constitutions of South Africa⁴⁴ and Ireland:⁴⁵ the experience cum knowledge criteria and indirect elections from the former; the nomination and representation criteria from the latter.⁴⁶ In other words, it seems to have done away with a purely classist approach prevalent in the English bicameralism, all the while preserving the political maturity as desired by Mill and To cqueville.⁴⁷ Another vital difference comes from the fact that India elects its nominal head of the executive.⁴⁸ For electing this third constituent of Indian Parliament, an equal 'vote-value' has been given to the members of both the chambers.⁴⁹

³⁹ M. Venkaiah Naidu, *Comment | Do Numbers Matter in Rajya Sabha?* THE HINDU, May 13, 2020, available at <https://www.thehindu.com/news/national/comment-do-numbers-matter-in-rajya-sabha/article31569127.ece> (Last visited on July 6, 2021).

⁴⁰ William Selinger, *PARLIAMENTARISM: FROM BURKE TO WEBER* 152-153 (Cambridge University Press, 2019).

⁴¹ *Id.*, at 152.

⁴² *Id.*, at 44.

⁴³ *Id.*, at 55.

⁴⁴ The Union of South Africa Act, 1910, Art. 24.

⁴⁵ The Constitution of Ireland, 1937, Art. 18.

⁴⁶ Chritarth Palli, *A Stitch in Time shall put Article 83 in Line*, THE SCC ONLINE BLOG, May 10, 2016, available at <https://www.sconline.com/blog/post/2016/05/10/a-stitch-in-time-shall-put-article-83-in-line/> (Last visited on July 6, 2021).

⁴⁷ Selinger, *supra* note 40, at 151-153; Arthur Benz, *Shared Rule vs Self-Rule? Bicameralism, Power-Sharing and the 'Joint Decision Trap'*, Vol. 10(2), PERSPECTIVES ON FEDERALISM, E-30, E-32 (2018). See The Constitution of India, 1950, Art. 54.

⁴⁹ Rakesh Dubbudu, *A Dummy's Guide to the President of India's Election*, Factly, June 10, 2017, available at <https://factly.in/a-dummys-guide-to-the-president-of-indias-election/> (Last visited on July 6, 2021).

The core essentiality of a chamber such as this, however, resides in its unique composition which is divorced from the popular vote's influence. This element *per se* lends this chamber with a counter-majoritarian poise.⁵⁰ As Montesquieu states, all components of a Parliament exercising checks on each other is the perfect state of equilibrium. At the same time, he asserted that the directly elected House may, in certain circumstances, become autocratic.⁵¹ Since the Crown lacked significant powers, the indirectly elected House carries an enormous responsibility.⁵² This is squarely applicable to the Indian context. The recent revival of majority governments at the central level ensures a Lok Sabha with a weak opposition within itself. This is compounded by the prevailing law which binds the President to the executive cabinet's decisions.⁵³ It is in this context that Montesquieu's one particular observation on the House of Lords may reveal Rajya Sabha's significance. He had stated that the English Constitution shall be 'doomed' if the House of Lords loses its stature, since this would leave no opposition to the directly elected House.⁵⁴

More than a simple extension of federalism, chambers like the Rajya Sabha take their Parliaments to a more accurate electoral representation. Just like the U.K. and Canada, the Indian Lower House rarely witnessed fifty percent electoral majority accumulating in favour of one political party.⁵⁵ Hence, the Lower House by itself cannot be said to be holistically representative of the society.⁵⁶ A territorial model of bicameralism, however, covers geographical minorities who may otherwise lose past-the-pole contests.⁵⁷ This is because an Upper House with indirectly elected candidates of states is designed to favour the preferences of smaller political parties.⁵⁸ These parties, in turn, may have separate political bases and constituencies than the forces ruling in the Lower House/centre.⁵⁹ The chambers such as the Rajya Sabha have termed to be partially *demos*-enabling in this sense.⁶⁰ That is, bicameral legislatures, are considered a better approximate to electoral majorities due to the additional presence of the Upper House.⁶¹ At the same time, it's both *demos*-constraining and reactive: its unique composition allows to check any majoritarian impulses of the Lower House.⁶²

⁵⁰ Malavika Prasad & Gaurav Mukherjee, *Reinvigorating Bicameralism in India*, Vol. 3(2), University of Oxford Human Rights Hub Journal, 96, 104 (2020).

⁵¹ Selinger, *supra* note 40, at 19.

⁵² *Id.*

⁵³ Samsher Singh v. State of Punjab, (1974) 2 SCC 831, ¶¶33, 36, 44, 57.

⁵⁴ Selinger, *supra* note 40, at 34.

⁵⁵ Meg Russell, *THE CONTEMPORARY HOUSE OF LORDS: WESTMINSTER BICAMERALISM REVIVED* 45 (Oxford University Press, 2013).

⁵⁶ *Id.*

⁵⁷ *Id.*, at 44.

⁵⁸ *Id.*, at 45.

⁵⁹ *Id.*

⁶⁰ Prasad & Mukherjee, *supra* note 50, at 102.

⁶¹ RUSSELL, *supra* note 55.

⁶² Prasad & Mukherjee, *supra* note 50, at 102.

Furthermore, India's Upper House has more in common with the U.S. Senate than the House of Lords.⁶³ It rejected the English model, wherein the entire bicameral legislature dissolves at once. Instead, Article 83 is based on the rotational tenure of the U.S. Senate.⁶⁴ The rule that one-third of its composition be renewed biennially is, by implication, a borrowed Madisonian check. Albeit, Madison had not envisaged fractured mandates nor political parties in his time.⁶⁵ Regardless, according to him in Federalist Paper no. 51, legislature tends to be the strongest political branch of the government.⁶⁶ The permanent character of the Upper House, constantly renewed by State nominees, acts as the best internal check on the same.⁶⁷ This applied with greater force to majoritarian 'parliamentarism', such as the one prevailing in India since 2014.⁶⁸

Relevant provisions relating to the Rajya Sabha are mostly couched in terms of discretion limiting rules.⁶⁹ These seem to denote that the Upper House's constitutional design is supposedly unalterable. This interpretation would be congruous with the larger objective emphasised above. Demonstrably, the House has been assigned with the task of scrutinising and reforming the acts of the Lok Sabha and the Executive. Given the significance of these powers, membership to the House was to be as specific as it could be. The 'federal representativeness' is of no significance *per se* if the House fails to discharge its primary function of revisionism.

B. AN ABORTIVE COUNCIL OF NOMINEES

This Section shall deal with the assaults on the House's powers. Prior to that discussion, the two prevalent criticisms of the House need to be mentioned. Firstly, that it slows-down the initiatives of the Lok Sabha-Executive combine; and secondly, there seems to exist an argument on its redundancy as a symbol of federalism. The multi-party system resulting in a varied set of political powers across different states has been recently used to cite this redundancy.⁷⁰ The preceding Section has demonstrated the second criticism to be a less significant essentiality. At best, its federal-representativeness is a 'means to a larger end'. The first criticism is actually the constitutionally envisaged power, and not an obdurate hurdle to Indian Constitutionalism. This Section will contrarily argue that the House has

⁶³ Even though the United States mostly adheres to a '2 senators per state' rule, see Eric W. Orts, *The Path to Give California 12 Senators, and Vermont Just One*, THE ATLANTIC, January 2, 2019, available at <https://www.theatlantic.com/ideas/archive/2019/01/heres-how-fix-senate/579172/> (Last visited on July 7, 2021).

⁶⁴ Palli, *supra* note 46.

⁶⁵ James Yoho, *Madison on the Beneficial Effects of Interest Groups: What was Left Unsaid in "Federalist" 10*, Vol. 27(4), POLITY 587 (1995).

⁶⁶ LIBRARY OF CONGRESS, FEDERALIST NOS. 51-60, available at <https://guides.loc.gov/federalist-papers/text-51-60> (Last visited on July 7, 2021).

⁶⁷ *Id.*; Chauhan, *supra* note 37, at 45.

⁶⁸ Prasad & Mukherjee, *supra* note 50, at 106.

⁶⁹ See The Constitution of India, arts. 80, 83(1), 84(b), 107(4), 249 & 344(4).

⁷⁰ Balkin & Levinson, *supra* note 8, at 25.

witnessed a diminution in its powers. This, it attempts to demonstrate, is largely caused by distorting its composition.

The obstructive powers wielded by the Rajya Sabha become easily demonstrable even without factoring in the legal text and the history surrounding it. The only metric required is the behavioural attitude of the Lok Sabha-Executive combine towards its powers. The very Nehru who fended attacks on the House's potential to slow progress and instead justified them as revisionary powers, seemed to have abandoned that approach. He rushed ahead with the controversial First Amendment without awaiting the Rajya Sabha's inauguration.⁷¹ This was in spite of a lawyer-President, who had presided over the Constituent Assembly, citing the designed bicameralism as an 'essential' for such an amendment.⁷² The Supreme Court also approved of it, holding Lok Sabha's exercise of Article 368 as sufficient demonstration of constituent power.⁷³

The opposing sentiments cited in the Constituent Assembly also intermittently rose from the dead, in the form of Lok Sabha resolutions and private member bills. The timing of each shares a nefarious similarity. All of those were attempted exclusively when a Lok Sabha majority was in place: 1954, 1973 (Lok Sabha resolutions), 1971, 1972, 1975 and 1981 (Private member bills).⁷⁴ The last notable, albeit non-legislative, instance of similar objections was in 2015, when a single-party majority was re-established in the Lok Sabha, after several decades.⁷⁵

This evident majoritarian grouch was accompanied by constitutionally suspect moves within the Parliament. The very first Nehru majority in the Lok Sabha did not include members from the new Upper House for the Public Accounts Committee.⁷⁶ However, this was only a small detractive nudge, when seen in light of further developments.

The most debilitating assault took place in the year 2003. The subtle usage of the Rajya Sabha for admitting those defeated in direct elections, eventually materialised as law:§3 of Representation of People Act, 1951 was eventually

⁷¹ Tripudaman Singh, *SIXTEEN STORMY DAYS: THE STORY OF THE FIRST AMENDMENT TO THE CONSTITUTION OF INDIA* 129 (Penguin Random House, 2020).

⁷² *Id.*

⁷³ Sankari Prasad Singh Deo v. Union of India, 1951 SCC 966, ¶13 (prospectively overruled in Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225).

⁷⁴ Rajya Sabha Secretariat, *Sixty Years of Rajya Sabha (1952-2012)* 31 (2012).

⁷⁵ Nistula Hebbar, *Jay Panda favours rethink on veto power of Rajya Sabha*, THE HINDU, March 25, 2016, available at <https://www.thehindu.com/news/national/jay-panda-favours-rethink-on-veto-power-of-rajya-sabha/article7884580.ece> (Last visited on July 7, 2021); Jagdeep S. Chhokar, *Rajya Sabha versus Lok Sabha: FM Arun Jaitley's Remarks Questioning the Role of Rajya Sabha are Misplaced*, NEWSLAUNDRY, May 22, 2015, available at <https://www.newslaundry.com/2015/05/22/rajya-sabha-versus-lok-sabha-fm-arun-jaitleys-remarks-questioning-the-role-of-rajya-sabha-are-misplaced> (Last visited on July 7, 2021).

⁷⁶ Naidu, *supra* note 39.

amended.⁷⁷ The pre-requisite of having been ordinarily resident in the state to represent it, evaporated for future candidates.⁷⁸ This was against the recommendations of the then National Commission to Review the Working of the Constitution.⁷⁹ Toeing the ‘extension of federalism’ line of argument, it stated the said amendment would upset geopolitical representation of states.⁸⁰ This change apart, other provisions were amended to permit open ballots, wherein a political party could scrutinise the votes about to be cast for such elections.⁸¹

In judicial review of all the above, the Supreme Court chose neither side in the revisionary and extension of federalism debate. Of the two, it only came to examine the latter, and exposed the frailty of the same. In deciding *Kuldip Nayar v. Union of India* (‘Kuldip Nayar’),⁸² it asserted that the draft Constitution itself omitted domicile requirements for the House’s membership. The conclusion it drew from this was that the modification to federal representativeness was constitutionally insignificant.⁸³ It stated that basic structure was not an adjudicatory issue in this case.⁸⁴ The Court grounds this assertion by reasoning that federalism requires the appellation of a true federation.⁸⁵ India, it states, is not a true federation to begin with, and that the Centre has powers to completely dissolve a state.⁸⁶ Federalism, then, cannot possibly be said to be basic enough to preserve a domicile requirement in such scenarios.⁸⁷ The same Court’s benches came to partly revise this view. Explicit departure took place in *Rojer Mathew v. South Indian Bank Ltd.* (‘Rojer Mathew’),⁸⁸ analysing the power of the Lok Sabha to categorise money bills, and inexplicitly in *State (NCT of Delhi) v. Union of India* (‘Delhi Govt. case’)⁸⁹ when it espoused cooperative federalism for GNCT, Delhi. However, neither effaced Kuldip Nayar. Eventually, a nine-judge bench in *Jindal Stainless Ltd. v. State of Haryana* (‘Jindal III’),⁹⁰ has adopted Kuldip Nayar’s point regarding India not being a true federation. The basic structure argument premised on the

⁷⁷ The Representation of People Act, 1951, §3 amended *vide* The Representation of People (Amendment) Act, 2003 (w.e.f. August 28, 2003).

⁷⁸ “A person shall not be qualified to be chosen as a representative of any State or Union territory in the Council of States unless he is an elector for a Parliamentary Constituency in India (emphasis added).”

⁷⁹ Report of the National Commission to Review the Working of the Constitution, vol. 1, ¶5.11.5 (2002).

⁸⁰ *Id.*

⁸¹ See The Representation of People Act, 1951, §§59, 94, 128 amended *vide* The Representation of People (Amendment) Act, 2003 (w.e.f. August 28, 2003).

⁸² *Kuldip Nayar v. Union of India* (2006) 7 SCC 1, ¶140.

⁸³ *Id.*, ¶147.

⁸⁴ *Id.*, ¶¶ 451, 452.

⁸⁵ *Kuldip Nayar v. Union of India* (2006) 7 SCC 1, ¶71.

⁸⁶ *Id.*

⁸⁷ Shreehari Aney & Abhay Anturkar, *Recasting of Federal Structure of the Indian Constitution*, THE SCC ONLINE BLOG, April 2, 2021, available at <https://www.sconline.com/blog/post/2021/04/02/indian-constitution/#:~:text=A%20Bill%20for%20amending%20the,the%20States%20by%20resolution%20to> (Last visited on July 7, 2021).

⁸⁸ *Rojer Mathew v. South Indian Bank Ltd.*, (2020) 6 SCC 1.

⁸⁹ *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501.

⁹⁰ *Jindal Stainless Ltd. v. State of Haryana*, (2017) 12 SCC 1, ¶¶87, 88.

federalism-oriented view of the Rajya Sabha is, therefore, further lacking in legitimacy due to jurisprudentially revealed reasons.

The removal of domicile requirement has valid criticisms from those who strongly view Rajya Sabha as an extension of federalism.⁹¹ As a hypothetical illustration, this may lead to a situation where two states are formally represented by certain representatives in the Rajya Sabha. None of them may have ever resided in their respective constituencies. In debating an inter-state river dispute between the states, the inauthenticity of their representation becomes extremely significant.⁹²

However, the greater flaw is illuminated in light of its supposed status, as carved out by the preceding Section. Indian Constitution envisaged a Lok Sabha-Executive combine, the election to which was to be monitored by an independent constitutional body. The legality of this combination's actions will be checked by another constitutional institution, namely, the higher judiciary. All remaining matters between these two ends of the spectrum, were to be monitored by the Rajya Sabha. For this, a revolving yet permanent composition of opposing political forces was placed as a mechanism of check. Hence, tinkering with this mechanism does not solely undermine federalism, but precipitates a larger constitutional crisis. If the mechanism allows non-residents to be elected, risk of patronage looms large. The member now has a leased life of a Member of Parliament, conferred by party superiors as a 'gift'. Patronage implies stronger grasp of party command's ambitions, instead of the voter's own conscience.

The U.S. Constitution's modification⁹³ to coincide modes of election to the Senate and the Congress was similarly termed as a constitutional digression.⁹⁴ The very structural intent behind the Senate evaporates once its composition is substantially altered.⁹⁵

This patronage argument is all the more significant due to the weakened election procedure of the Rajya Sabha. Voting is generally categorised into either rights-based or duty-based measures. The former entails a choice-based paradigm. The voter may continue the secrecy of her vote or reveal it in public, at will. The latter eliminates conscience voting. All votes become means to an end.

⁹¹ Shoaib Daniyal, *How the Rajya Sabha Went from Being a House of States to a House of Political High Commands*, THE SCROLL, August 8, 2017, available at <https://scroll.in/article/846458/how-the-rajya-sabha-went-from-being-a-house-of-states-to-a-house-of-political-high-commands> (Last visited on November 1, 2021); Kuldeep Nayar, *Who Belongs to the House, who Doesn't*, THE INDIAN EXPRESS, May 19, 2016, available at <https://indianexpress.com/article/opinion/columns/rajya-sabha-membership-supreme-court-who-belongs-to-the-house-who-doesnt-2807591/> (Last visited on November 1, 2021).

⁹² Aney & Anturkar, *supra* note 87.

⁹³ The Constitution of United States, 1789 (Amendment XVII).

⁹⁴ Balkin & Levinson, *supra* note 8, at 11.

⁹⁵ *Id.*, 48, 142.

As stated earlier, a new provision⁹⁶ was inserted in 2004 to make elections to the Rajya Sabha ‘duty based’. All members of the Rajya Sabha electoral college are since mandated to reveal their ballots to an agent deputised by their political party.⁹⁷ The provision operates before the ballot is cast. The Court in *Kuldip Nayar* declined to interfere, stating that a ‘constitutional’ right such as this is amendable.⁹⁸

The top court went further in *Pashupati Nath Sukul v. Nem Chandra Jain*⁹⁹ to hold these elections as non-deliberative in nature. Members needn’t have taken the constitutional oath to discharge a legislative assembly’s functions to cast their vote for these.¹⁰⁰ Presently, a vote in an election to the Upper House is not governed by the voter’s consent, nor her conscience. Nor is it akin to a deliberative exercise. Demonstrably, the weakened stature of the House carries judicial legitimacy.

The last major denudation in this regard, has been occurring in parallel, since the Constitution came into force. Articles 80 and 83 collectively require a partial revision in the state’s representation in the House, on a cyclical basis. In other words, only a portion of the state assembly’s representatives retire at once, while the others are elected by the same assembly in a separate time-frame.¹⁰¹ However, irregular and complete dissolution of state assemblies denotes that all of a single state’s representatives to the House are elected at once. These dissolutions have been frequent, and occur by way of numerous reasons. Illustratively, these include state/national emergencies and re-organisation of states.¹⁰² The implication is that the clock of Rajya Sabha elections of the affected state is reset. All its representatives to the Upper House shall be elected *enmasse*. As opposed to every second year, the states of Punjab, Jammu & Kashmir (till its statehood) and GNCT, Delhi have, mostly, elected all their representatives to the House, at once, every sixth year.¹⁰³

This desynchronization carries the risk of a more drastic implication. An outgoing legislative assembly, governed by this deformed election cycle, may nominate all the members in its outgoing fifth year. If the composition of the new assembly is markedly different, the representatives in the House may not bemoaning the latest state representation.¹⁰⁴ This deformity in schedule seems to *per se* oppose the very core of Article 83(1).

⁹⁶ The Conduct of Election Rules, Rule 39-AA, inserted *vide* The Conduct of Election (Amendment) Rules, 2004 (w.e.f. February 27, 2004).

⁹⁷ See also *supra* note 81.

⁹⁸ *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1, ¶463-464.

⁹⁹ *Pashupati Nath Sukul v. Nem Chandra Jain*, (1984) 2 SCC 404, ¶¶18, 20.

¹⁰⁰ *Id.*

¹⁰¹ Palli, *supra* note 46 (to ensure this as a trend, the first Rajya Sabha composition had retired different members of the same state on a ‘draw of lots’ basis, with varied time-frames).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Recently, the Kerala High Court disagreed, asserting that early occupancy of Rajya Sabha is more democratic than reflecting the latest composition of the concerned state legislative assembly, see

It is the cumulative impact of all the above deformities that make the Upper House a council of nominees. The impact is visible as well. The era antedating 2003-04 saw the House defeating four constitutional amendment bills passed by the Lok Sabha.¹⁰⁵ It similarly thwarted four ordinary pieces of legislation.¹⁰⁶ Yet another integral exercise of its revisionist power is seen in analysing the blueprint of a ruling government's objectives, viz., the Presidential address.¹⁰⁷ In 1980, 1989 and 2001, the Rajya Sabha succeeded in amending it.¹⁰⁸

None of this, except for defeating a single piece of ordinary legislation coming from the Lower House, has occurred post 2003-04.¹⁰⁹ The most probable inference is that the patronage dynamics intended by the changes discussed above, have materialised. It is further proposed that the implications of this patronage may have implications not completely fathomable. Two interesting developments, debatably qualifying as constitutional incongruities, are advanced to help grasp the same. Firstly, the House has witnessed its members becoming finance ministers, even though it has very limited revisionary powers over financial matters.¹¹⁰ Secondly, instances of the head of the Union cabinet belonging to this chamber of the indirectly elected ought to be seen as peculiar.¹¹¹ The cabinet is derived from political forces dominating the Lower House, for which the Constitution mandates direct elections.¹¹² It is submitted that given the suggestive Lok Sabha priority in both, any probable patronage affecting either appears all the more illegitimate.

Any remaining powers are continuously denatured using dubious tactics. The categorisation of intended laws as money bills¹¹³ has been curtailed to a degree. However, the pruning mechanism, namely the decision in *Rojer Mathew*,¹¹⁴

Kerala Legislative Assembly v. Election Commission of India, 2021 SCC OnLine Ker 1727, ¶42.

¹⁰⁵ Shemin Joy, *Rajya Sabha Hits New Milestone as 250th Session Begins*, DECCAN HERALD, November 18, 2019, available at <https://www.deccanherald.com/national/rajya-sabha-hits-new-milestone-as-250th-session-begins-777157.html> (Last visited on July 6, 2021).

¹⁰⁶ *Id.*; Rajya Sabha Secretariat, *supra* note 74, 70.

¹⁰⁷ See The Constitution of India, 1950, Art. 87.

¹⁰⁸ Rajya Sabha Secretariat, *supra* note 74, 11.

¹⁰⁹ *Id.*, at 70; RAJYA SABHA SECRETARIAT, *Statistical Information*, available at https://rajyasabha.nic.in/business/statisticalinformation_ses.aspx (Last visited on July 7, 2021).

¹¹⁰ (Indo-Asian News Service), *Most of Modi's Important Ministers are Rajya Sabha Members*, BUSINESS STANDARD, March 5, 2019, available at https://www.business-standard.com/article/news-ians/most-of-modi-s-important-ministers-are-rajya-sabha-members-119030501163_1.html (Last visited on July 7, 2021); See The Constitution of India, 1950, Arts. 109, 116, 117.

¹¹¹ PRESS TRUST OF INDIA, *Prime Minister's Rajya Sabha Term Expires on Jun 14, Polls on May 30*, May 8, 2013, available at <https://economictimes.indiatimes.com/news/politics-and-nation/prime-ministers-rajya-sabha-term-expires-on-jun-14-polls-on-may-30/articleshow/19953826.cms> (Last visited on July 7, 2021).

¹¹² See The Constitution of India, 1950, Art. 75(3); "The Council of Ministers shall be collectively responsible to the House of the People".

¹¹³ *SC Rules Out Review of Aadhaar Order, with One Dissent: On Money Bill*, THE INDIAN EXPRESS, January 21, 2021, available at <https://indianexpress.com/article/india/sc-rules-out-review-of-aadhaar-order-with-one-dissent-on-money-bill-7155132/> (Last visited on July 7, 2021).

¹¹⁴ *Rojer Mathew v. South Indian Bank Ltd.*, (2020) 6 SCC 1.

could not overrule a larger bench which had partly permitted it.¹¹⁵ The decision in *Roger Mathew* interpreted the term ‘only’ in Article 110(1) as exclusively referring to the core provisions of the bill, for which it was brought about.¹¹⁶ To make this clear restriction clearer, it stated that Article 110(1)(g) denotes that it is these core provisions that have to be incidentally related to the rest of the clause.¹¹⁷

However, this interpretation of the word ‘only’ was not devoted any exposition in the coordinate-bench decision given in *K.S. Puttaswamy v. Union of India*.¹¹⁸ Therein, the holding was contradictory to the findings above with respect to Article 110(g): an incidental provision of charging expenses from the Consolidated Fund of India was deemed as qualifying the substantive portions of the bill as under Article 110.¹¹⁹ Noting this holding and no elaboration in justification for it, the Court in *Roger Mathew* rightfully discerned a contradiction.¹²⁰ Hence, its restrictive reading of Article 110, and which maximised the *Rajya Sabha*’s role in legislative scrutiny, is not *res integra*.

Another tactic is to coax the House into shifting the fora of federal discussions, where the opposition loses its majority status. The GST Amendment Bill was proposed to the *Rajya Sabha* with GST Council as a site of negotiating the specifics of compensation. Except, the GST Council gave the ruling government an overriding veto,¹²¹ the exact opposite of circumstances had the site been the *Rajya Sabha*.¹²²

The House, therefore, remains ostensibly functional. The nature of functionality is altered. Arguably, its weakened stature compels it to toe the Government’s line. The House’s dissociation from constitutional objectives is shocking in its immensity. As argued, this immensity is to be grasped from the loss of its counter-majoritarian poise, and not from its diminution as a federal feature. The latter is only a means to an end: enabling the said counter-revisionary powers. The inter-state river dispute hypothetical may be valid from a federalism-point of view. However, the state assemblies may still continue to dispute amongst themselves in that illustration, and federalism may still remain intact. That, then, does not fully capture the House’s conduced weakness in revisionary powers.

¹¹⁵ *K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1 (decision of the five-judge bench of the Supreme Court with respect to Aadhar).

¹¹⁶ *Roger Mathew v. South Indian Bank Ltd.*, (2020) 6 SCC 1, ¶109.

¹¹⁷ *Id.*, ¶112.

¹¹⁸ *K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1.

¹¹⁹ *Id.*, ¶¶472, 515.5.

¹²⁰ *Roger Mathew v. South Indian Bank Ltd.*, (2020) 6 SCC 1, ¶¶87-92, 105-118, 223.1.

¹²¹ Alok Prasanna Kumar, *For a Mess of Potage: The GST’s Promise of Increased Revenue to States Comes at the Cost of the Federal Structure of the Constitution*, Vol. 28(2) NATIONAL LAW SCHOOL OF INDIA REVIEW, 97 (2016).

¹²² Dipak Mondal, *The Final Frontier*, August 28, 2016, BUSINESS TODAY, available at <https://www.businesstoday.in/magazine/focus/story/gst-has-to-get-past-many-big-hurdles-before-146819-2016-08-10> (Last visited on July 7, 2021).

Another illustration may help establish this relative importance. Hypothetically put, all states may have only non-resident members representing it; in such a composition one state may not at all be represented in the Rajya Sabha. The non-resident representatives may not be well-versed or even cognisant with the ground realities of their represented states. As an alternative hypothetical, the representatives may be elected by a previously outgoing assembly of the state, different in political composition from the current one. The implication of either hypothetical is that the concerned state lacks genuine representatives in the House. In these circumstances, situations akin to those of 1977 or 1991 may be further assumed.¹²³ That is, the Rajya Sabha, as the only ‘functioning’ House, has to debate and determine the applicability of Article 356 on the concerned state. Concededly, the holistic federal-representation argument still stands in a scenario such as this: the concerned state may lack a genuine defence, given the absence of a genuine state representative. However, this is not the constitutional damage *per se*. The damage comes to be when the House of nominees plays to the tunes of the executive and mechanically imposes the emergency on the voiceless state. Even as non-resident members, they may voice genuine concerns and protect constitutionalism. However, given they are but political nominees, their discretion stands materially altered. The damage is, then, the lack of revisionism.

Another approach to this hypothetical shall help the argument attempted herein. In the first hypothetical, it may be variably assumed that the House includes representatives from all the states and union territories, even if only non-residents. This, in no conceivable way, is ensuring its revisionary powers by default. This house of nominees remains likelier to succumbing to a majoritarian Lok Sabha-executive combine, for reasons elaborated upon earlier.¹²⁴ Hence, the House’s dysfunctionality is exclusively situated in its inability to perform revisions, and not in lacking federal representativeness alone. Unfortunately, this state has already been reached.

III. THE JUDICIARY: REIGNING SUPREME IN MORALITY

A. *LIMITATIONS WRIT LARGE*

The very constitutional design of the judiciary as an institution suggests that judges are barred from effecting social morality. This is submitted to be reflected by an oddly nuanced investiture of the writ jurisdiction.

At the very outset, Ambedkar’s responses to objections regarding Article 32 are implicative in this regard. Kamath had objected to a set of spelled

¹²³ Rajya Sabha Secretariat, *supra* note 74, 18.

¹²⁴ See discussion *supra* at 12-14.

out specific writs.¹²⁵ He apprehended a reduced discretion for the courts to mould variable reliefs. Ambedkar reiterated the text of Article 32, Clause (1) in response.¹²⁶ He stated that along with Clause (2), Article 32 gave the Supreme Court both generic and specific powers to come up with a relief required to enforce a right. At the same time, Sarwate had called for giving the judiciary explicit powers to go into facts.¹²⁷ To this, Ambedkar offered a theoretical explanation of writs as a rebuttal. He stated that all the five writs were prerogative in nature.¹²⁸ That is, normal procedural adherence of court proceedings is dispensed away with and only the alleged violation of a fundamental right is looked into.¹²⁹ He added that some of these may be invoked in ordinary course of procedural adherence as well, like an ordinary suit/trial.¹³⁰ He termed them as ‘writs in action’.¹³¹ Only three prerogative writs enjoy this status, in tandem: *mandamus*, *certiorari* and prohibition.¹³²

Hence, Ambedkar’s Article 32 had the power to visit facts surrounding formation of laws. The provision also authorised the judiciary to issue orders and directions apart from writs, apropos of the special requirements of a case. It is proposed that this is a deliberate formulation from carefully chosen terms. At the same time, he had quietly excised the classically sixth prerogative writ of *procedendo*, which had otherwise prevailed in British India.¹³³ This writ confers a court of superior jurisdiction with the power to order one lower in hierarchy, ‘to proceed to judgment’.¹³⁴ That is, the latter may be asked to expedite a certain proceeding or to undo a ‘stay’, deemed as slow-paced by the former.¹³⁵ Hence, the power to set pace of a proceeding was taken away from writ courts. The High Courts have Articles 226 and 227, while the Supreme Court possesses Articles 132-134 A, along with Article 136. These illustratively include granting powers to the higher court for analysing previously discussed questions of law, or to call records from those proceedings. All these specific remedies come with specific triggers

¹²⁵ CONSTITUENT ASSEMBLY DEBATES, December 9, 1948, *Speech by H.V. KAMATH*, ¶7.70.57, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-09#7.70.57 (Last visited on July 7, 2021).

¹²⁶ *Id.*

¹²⁷ CONSTITUENT ASSEMBLY DEBATES, December 9, 1948, *speech by V.S. SARWATE*, ¶7.70.74 available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-09#7.70.74 (Last visited on July 7, 2021).

¹²⁸ CONSTITUENT ASSEMBLY DEBATES, December 9, 1948, *speech by B.R. AMBEDKAR*, ¶7.70.171 available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-09#7.70.171 (Last visited on July 7, 2021).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ DR. AMBEDKAR FOUNDATION, Vol. 17(2) *Dr. Babasaheb Ambedkar, Writings and Speeches*, 55, 60 (2014); R. Nataraja Iyer, In Re, 1912 SCC OnLine Mad 156; National Carbon Co., In Re, 1934 SCC OnLine Cal 84, at 460; Juggilal Kamlatpat v. Collector, 1945 SCC OnLine Bom 33, at 686.

¹³⁴ Walter W. Toxey, *The Ombudsman in the Common Law System*, Vol.11(1), WILLIAM & MARY LAW REVIEW, 137, 141 (1969); BLACK’S LAW DICTIONARY 1323 (9th ed., 2004).

¹³⁵ Marcellus S. Whaley, *Common Law Writs*, Vol. 11(5), SOUTH CAROLINA LAW REVIEW, 185, 208 (1959).

as pre-requisites.¹³⁶ Juxtaposed to this nuanced enumeration, the Parliament was granted the power to modify or introduce new writs.¹³⁷ The responses cited to satisfy Kamath and Sarwate, then, do not seem to imply a power to judicially modify prevailing writs.

The categorisation of Ambedkar's approach towards the judiciary as 'restrictive' is further gleaned from his preferred ideal of a constitutional design. He thought of the Constitution only as specifying institutional functioning of the three constitutional branches.¹³⁸ The ultimate power, however, shall vest with politically active constituents.¹³⁹ Even in this scheme, the initiatives shall be those of the executive, under the guidance of which the legislature shall function.¹⁴⁰ These executive 'initiatives', in the absence of a clear definition, have been taken to mean vast policy making powers which extend from pre to post-legislative stages.¹⁴¹ Again, he argues that constitutional directives for governance-based policy are specifically addressed to these two organs.¹⁴²

Another instance is Ambedkar decrying blind faith in the judiciary. Whilst arguing for quasi-federalism as a rigid feature and the possibility of the Court tinkering with it, he objected strongly. *Inter-alia*, he stated that it would be out of the judiciary's normal functioning to modify it in the future.¹⁴³ Its function, he states, is only to re-interpret the law and not re-assign allocated power amongst institutions.¹⁴⁴ Jurist Madhav Khosla has described Article 21's background in a manner that seems to denote Ambedkar's position on it as laden with implications.¹⁴⁵ He stated that Ambedkar understood that procedural due process would

¹³⁶ See *Kunhayammed v. State of Kerala*, (2000) 6 SCC 359, ¶¶13-14; *Surya Dev Rai v. Ram Chander Rai*, (2003) 6 SCC 675, ¶22.

¹³⁷ The Constitution of India, 1950, Art. 139 (It states "Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for any purposes other than those mentioned in clause (2) of Article 32").

¹³⁸ CONSTITUENT ASSEMBLY DEBATES, November 15, 1948, *speech by* B.R. AMBEDKAR, ¶7.53.39, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-15#7.53.39 (Last visited on July 7, 2021).

¹³⁹ CONSTITUENT ASSEMBLY DEBATES, November 25, 1949, *speech by* B.R. AMBEDKAR, ¶11.165.309, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25#11.165.309 (Last visited on July 7, 2021).

¹⁴⁰ CONSTITUENT ASSEMBLY DEBATES, December 10, 1948, *speech by* B.R. AMBEDKAR, ¶7.71.46, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-10#7.71.46 (Last visited on July 7, 2021).

¹⁴¹ Shubhankar Dam, *Executive* in *The Oxford Handbook of the Indian Constitution* 321 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, Oxford University Press, 2016).

¹⁴² CONSTITUENT ASSEMBLY DEBATES, November 19, 1948, *speech by* B.R. AMBEDKAR, ¶7.56.26, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-19#7.56.26 (Last visited on July 7, 2021).

¹⁴³ CONSTITUENT ASSEMBLY DEBATES, November 25, 1949, *speech by* B.R. Ambedkar, ¶11.165.314, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25#11.165.314 (Last visited on July 7, 2021).

¹⁴⁴ *Id.*

¹⁴⁵ Madhav Khosla, *INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY* 68 (Harvard University Press, 2020).

have enhanced the powers of the legislature.¹⁴⁶ Whereas, a substantive version would have done the same for the judiciary.¹⁴⁷ In ultimately siding with the former at the time, it is submitted that Ambedkar seems to have preferred a politically packed legislature over a handful of whimsical judges. It is further proposed that this view is aligned with Ambedkar's suspicions of the Indian judiciary's domination by a certain section of the society.¹⁴⁸ Hence, it may be presumed that Ambedkar was more trusting of a legislature/executive that would have more representatives, probably including some voice of the minorities. Judiciary, antithetically, was to comprise of the unelected few.

In support of the above contentions is the adopted constitutional design. It is unhesitatingly rooted in the concept of 'deliberative democracy'.¹⁴⁹ This concept asserts that the sovereign will of the people resides predominantly in representative institutions.¹⁵⁰ The chosen representatives shall have to frame laws reflecting the prevailing sensibilities through and within the constitutional framework.¹⁵¹ This model of democracy seems to treat the sovereign will as a constant by-product of a functional society present in the last elected legislature. It is opposed to a 'voluntaristic democracy', which requires chaotic referendums to test the constituents' current desires.¹⁵²

But it is also a fact that a valid legislation is a form of coercion.¹⁵³ The constitutional design, therefore, suggests that the constituents may accept coercion only if it comes through legislation, by the act of their representatives.¹⁵⁴ A coercive imposition of a value system from the unelected, then, seems to be an impossibility. The Constituent Assembly's assertion that no court is to act like a 'third chamber'¹⁵⁵ validates this line of reasoning. Another important link in the chain is Mahavir Tyagi's seemingly resonant assertion made in the context of Article 368. He states flexibility needs to be granted to the future generation, implying that future representatives may bring about constitutional changes.¹⁵⁶ These changes,

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Prakash Y. Ambedkar, *The Dalits and the Law*, THE CITIZEN, April 14, 2018, available at <https://www.thecitizen.in/index.php/en/newsdetail/index/4/13534/the-dalits-and-the-law> (Last visited on July 8, 2021).

¹⁴⁹ Sanjay Palshikar, *Democracy and Constitutionalism* in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 215 (Rajeev Bhargava, 11th ed., 2018).

¹⁵⁰ Gabriel Bianchi, *Introducing Deliberative Democracy: A Goal, A Tool or Just A Context?*, Vol. 18(1) HUMAN AFFAIRS, 100, 104 (2008).

¹⁵¹ Palshikar, *supra* note 149.

¹⁵² *Id.*

¹⁵³ Grant Lamond, *The Coerciveness of Law*, Vol. 20(1), OXFORD JOURNAL OF LEGAL STUDIES, 39, 47-57 (2000).

¹⁵⁴ *Id.*, at 39.

¹⁵⁵ CONSTITUENT ASSEMBLY DEBATES, September 10, 1949, *speech by* JAWAHARLAL NEHRU, ¶9.137.23, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-10#9.137.23 (Last visited on July 8, 2021).

¹⁵⁶ CONSTITUENT ASSEMBLY DEBATES, (September 10, 1949), *speech by* MAHAVIR TYAGI, ¶9.143.555-9.143.556, available at https://www.constitutionofindia.net/constitution_assembly_debates/

as touched upon in Part I.A., have to pass a gridlock mechanism of debate. The judiciary, demonstrably, shall only monitor constitutional competence and compliance in these.¹⁵⁷

There is no discretion for the court to use writs in a manner not specified, or to alter the nature thereof. In fact, prerogative writs require a litigant-based initiation of judicial processes. This is seen as a strong indicium of separation in powers.¹⁵⁸

Succinctly put, either extended or abstract contours of writs may have risked assailing the broader constitutional intent for a ‘deliberative edge’. The Indian judiciary’s function to preclude right-violations may have remained the same even without Article 13.¹⁵⁹ However, its powers to perform this function are necessarily sourced from its writ jurisdiction.¹⁶⁰ Demonstrably and simultaneously, the representative institutions have the exceptional right of re-writing those. In other words, if rights may be reduced to an admixture of subjective desires, it shall be exclusively through Parliamentary will. This is not reflected in public compliance with judiciary, since this arrangement lacks the very episteme of consent.¹⁶¹

B. MISPERCEIVED LEGITIMACY FOR A ‘MORAL COURT’

It is submitted that the writ jurisdiction described in the preceding Section no way suggests that it is completely flawless. It arguably has its flaws, which become pertinently visible in cases dealing in socio-moral issues plaguing the society. Most illustratively, this is seen in it not wholly grasping the problems associated with the ‘moral realm’ of caste.¹⁶²

This is stated so because the ritual power of determining ‘touch ability’ resides with the upper castes of the Hindu society.¹⁶³ They singularly reserve the right to distribute moral resources, pertinent of these being ‘social association’¹⁶⁴ with the historically marginalised lower castes. A reading of Articles 32/226 will then seem to be odd. An aggrieved belonging to the resource-deprived marginalised category, is required to approach a writ court and establish ‘untouchability’.¹⁶⁵ Supposing the courts realise this problem, they have an optional remedy: try and

volume/9/1949-09-17#9.143.555 (Last visited on July 8, 2021).

¹⁵⁷ Krishnaswamy, *supra* note 13, at 120.

¹⁵⁸ Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, Vol. 81(2), CORNELL LAW REVIEW, 393, 426 (1996).

¹⁵⁹ A.K. Gopalan v. State of Madras, AIR 1950 SC 27, ¶7.

¹⁶⁰ *Id.*, ¶299.

¹⁶¹ Balkin & Levinson, *supra* note 8, at 9.

¹⁶² Gopal Guru, *Constitutional Justice: Positional and Cultural* in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 241, 242 (Rajeev Bhargava, 11th ed., 2018).

¹⁶³ *Id.*, 241.

¹⁶⁴ *Id.*, 242.

¹⁶⁵ *Id.*, 242.

push the contours of its powers available within Articles 32/226, through substantive interpretation. It may be further supposed that to strip the upper castes of this moral power, the chosen remedy may be to read cast-connotative surnames as a ‘prohibited practice’ in Article 17.¹⁶⁶ It is argued that the judiciary may or may not successfully cure a morally deficient writ jurisdiction, but does cross a line in doing so. Firstly, this is a matter affecting large-scale policy: this interpretation may have implications on deeply interwoven statutory/policy frameworks that base affirmative action on the surnames of the marginalised castes.¹⁶⁷

Secondly, this would be opposing Ambedkar’s notion of ‘constitutional morality’. The erstwhile political opposition to ideas demanding a complete make-up of the society,¹⁶⁸ and his unwillingness to confer judiciary this power may help explain this constraint. Ambedkar may have allowed this change to come from a sensitised conscience of a future polity. In this light, a curative judicial-interpretation would then be impermissible law-making and a top-down imposition of a social cure. However, the judiciary has already indulged in a transgression similar to the one advanced by this illustration, and will be discussed later.¹⁶⁹ This Section restricts itself to the perceived legitimacy it taps into for committing these, and explains why any such perception is faulty.

It is submitted that the judiciary derives this superficial legitimacy by ‘looking through’ constitutional provisions, which is beyond permissible liberal interpretation. A pertinent instance of this is found in *Daryao v. State of U.P.* (‘Daryao’),¹⁷⁰ wherein it had correctly reiterated that Article 32 is intended to protect fundamental rights. But then it extends its powers to check acts dealing in ‘high public policy’, which supposedly underpins Part III of the Constitution.¹⁷¹

The judiciary has previously recognised its proper bounds imposed by the separation of powers doctrine. It has previously stated that the judiciary is barred from taking away an essential function of any of the other two branches.¹⁷² But the adherence to this and similar *dicta* has been shaky.¹⁷³

¹⁶⁶ “‘Untouchability’ is abolished and its practice in any form is forbidden”.

¹⁶⁷ See Jeya Rani, *So the Term ‘Dalit’ Can’t Be Used But ‘Brahmin’ and 6,000 Other Caste Names Can*, THE WIRE, September 14, 2018, available at <https://thewire.in/caste/dalit-brahmin-caste-names> (Last visited on July 8, 2021).

¹⁶⁸ Pritam Singh, *Hindu Bias in India’s ‘Secular’ Constitution: Probing Flaws in the Instruments of Governance*, Vol. 26(6), THIRD WORLD QUARTERLY, 909, 911-922 (2005).

¹⁶⁹ See discussion *infra* at 26-28.

¹⁷⁰ *Daryao v. State of U.P.*, AIR 1961 SC 1457.

¹⁷¹ *Id.*, ¶8.

¹⁷² *Bhim Singh v. Union of India*, (2010) 5 SCC 538, ¶¶77-78, 80, 87; See also *Ashwani Kumar v. Union of India*, (2020) 13 SCC 585, ¶14. The separation of powers has been held to be a basic feature of the Constitution.

¹⁷³ See discussion *infra* Part III.C.

While High Courts have their share of using morality as grounds for reasoning,¹⁷⁴ Article 141¹⁷⁵ makes the corresponding transgressions by the Supreme Court much more significant. Judicial overreach has been an unfortunate development in the post-Emergency era,¹⁷⁶ but there is a growing trend of legitimising it. This is not simply emanating from confused equivalences of rights and deliberative policies. This seems to be originating from abstract concepts such as the judicial version of Ambedkar's 'constitutional morality'. Building upon and fuelling this principle is the idea of 'transformative constitutionalism'.

Before dwelling upon these concepts, Ambedkar's direct reference to 'constitutional morality' needs to be described. This was cited in the context of the oddly specific enumeration of administrative powers in the document. Originated by the historian Grotes, the concept was supposed to help fill the vacuum introduced by constitutional governance to people not (yet) acclimated to it.¹⁷⁷ Succinctly put, it denotes gradual acceptance of constitutional norms by the society.¹⁷⁸ Ambedkar stressed that this sensitisation has to flow from citizens to institutions.¹⁷⁹ The implication being that abstract right-based provisions are to be evolved by political actors, along with their representatives.

The Indian judicial version, however, is somewhat a closer version of the opinion in Daryao. When it was first devised in *Naz Foundation v. State (NCT of Delhi)* ('Naz'),¹⁸⁰ the objective was to disregard societal notions of morality for the adjudication at hand.¹⁸¹ The Delhi High Court, in opining on the then §377 of the Indian Penal Code, 1860, wanted to counter the (cited)¹⁸² majoritarian views of morality.¹⁸³ Albeit, this is not the usage of this concept that Ambedkar had envisaged.¹⁸⁴ In disregarding the prevailing notions of morality, the concept was prof-

¹⁷⁴ (Press Trust of India), *Live-in-Relationships Morally, Socially Unacceptable — Punjab and Haryana HC*, THE PRINT, May 18, 2021, available at <https://theprint.in/judiciary/live-in-relationships-morally-socially-unacceptable-punjab-and-haryana-hc/660560/> (Last visited on July 8, 2021).

¹⁷⁵ "The law declared by the Supreme Court shall be binding on all courts within the territory of India".

¹⁷⁶ Rajeev Dhavan, *Governance by the Judiciary: Into the Next Millennium* in INDIAN JUDICIARY AND POLITICS: THE CHANGING LANDSCAPE 84-91 (B.D. Dua, M.P. Singh & Rekha Saxena, Manohar Publishers, 2008).

¹⁷⁷ Abhinav Chandrachud, *The Many Meanings of Constitutional Morality*, SSRN, January 2020, 2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665 (Last visited on July 8, 2021) ('Chandrachud').

¹⁷⁸ *Id.*

¹⁷⁹ CONSTITUENT ASSEMBLY DEBATES, November 4, 1948 *speech by B.R. AMBEDKAR*, ¶7.48.229, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04#7.48.229 (Last visited on July 8, 2021).

¹⁸⁰ *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762 (affirmed in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1).

¹⁸¹ Chandrachud, *supra* note 177, 9.

¹⁸² *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762, ¶13.

¹⁸³ Chandrachud, *supra* note 177, 9; *See also* Saumya Uma & Samudyata Sreenath, *Legal Imagination and Social Reform: Navtej Johar Revisited*, Vol. 13(3), NUJS L. REV. (2020).

¹⁸⁴ *Id.*, 9.

ferred as a justification for sticking to the Constitutional text and to the inferable morality therein. While the liberal reading of a regressive provision was laudable and was eventually affirmed, the new meaning ascribed to constitutional morality is submitted to be dubious.

The consolidation of this concept as a valid judicial tool was achieved in the Delhi Govt. case.¹⁸⁵ This version extends to testing State actions.¹⁸⁶ Furthermore, this case was not struggling between social morality and those deducible from the Constitutional text. It was a case determining the rights of one federal unit *vis-à-vis* another. In reading an expanded version of the federalism, it held that all State action must conform not just to the Constitutional text, but to its very aspirational essence.¹⁸⁷ This essence, it states, lies in the institution-building as espoused by Ambedkar when he mentioned 'constitutional morality'.¹⁸⁸ Eventually, it comes to state that gleaning this essence by way of judicial interpretation is one of the steps in the process.¹⁸⁹

The extent of judicial exploration into the unstated morality remained unclear. It only seems to have laid an edifice of abstract principles, conferring an amorphous power to the courts. Liberal interpretation aligned with broader constitutional aims is not the objectionable section of this reasoning. The risk is that of courts infusing their version of morality into law.

An illustration of the open-ended definition is embodied by cases said to be covered by 'transformative constitutionalism'. Elaborated upon by the constitutional law scholar Gautam Bhatia, it suggests that the evolutionary character of the Constitution has to come by way of a 'judicial response'.¹⁹⁰ He disclaims that the judiciary shall not acquire the exclusive right to do so.¹⁹¹ However, the specifics of the concept are illustratively described through binding/non-binding judicial determinations.¹⁹² The same involve courts curing legislative-executive induced infirmities through an interpretive exercise.¹⁹³ At its core, this concept demands that constitutional provisions be interpreted to reorient the very relationship between citizens and the State.¹⁹⁴ Post-colonialism is not the only event that helps shape constitutional interpretation:¹⁹⁵ the Constitution is, in tandem, a culmination of all the preceding social, economic and cultural evolutionary trends

¹⁸⁵ State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501.

¹⁸⁶ Chandrachud, *supra* note 177.

¹⁸⁷ State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501, ¶¶58-63, 284.3, 300-302.

¹⁸⁸ *Id.*, ¶59.

¹⁸⁹ *Id.*, ¶¶63, 284.1, 295, 302.

¹⁹⁰ Gautam Bhatia, *THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS* 346 (Harper Collins India, 2019).

¹⁹¹ *Id.*, xxxvi-xxxviii.

¹⁹² *Id.*, 3-326.

¹⁹³ *Id.*, xxiv-xxvi.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

in this relationship within the Indian society itself.¹⁹⁶ On the whole, it seems to suggest that all constitutional organs ought to function with this larger intent in mind, which will include congruous judicial interpretations.

For instance, forced labour or *begari* under the Constitution¹⁹⁷ was phrased according to the then contemporary sensibilities. The erstwhile literature would have only factored in coercion that was perceivable in that period of time. However, given that the makers adopted an open-ended definition, the Constitution must dynamically extend to inequities that arise with time.¹⁹⁸ Illustratively, it may be undue bargaining power of the employer with increased industrialisation of the economy.¹⁹⁹ The judiciary's interpretation that mandates a minimal existential in payments, then, carries the reorientation of relationships between citizens and the State to its constitutional end.

However, the concept has features not necessarily bound to desired legal interpretations. Generally, authorising the judiciary to use historical text, with no clear method, is considered to be fraught with risks.²⁰⁰ Arguably, a judge's subjective interpretation of history to hunt underlying morality eventually takes the shape of the law's 'correct exposition'.²⁰¹ Arguably, this concept unintentionally exhorts the judiciary to substitute conceivable constitutional intent with its own notions of morality. The result is a legitimised moral jurisdiction for the Supreme Court. To his credit, Bhatia had expressed that he did not wish for the courts to become a vehicle for the desired transformation.²⁰² As will be demonstrated in the remainder of this paper, the interpretive exercise he inadvertently espouses eventually betrays this qualifier.

The ill-effect brought about by this concept's alliance with constitutional morality is best illustrated by the concurring judgment of Chandrachud J., in *Indian Young Lawyers Association v. The State of Kerala* ('Sabarimala').²⁰³

The majority view and Nariman J.'s concurring opinion, insofar as they overlapped, were straight-forward. The religious practices that involve extinguishing a class of citizens' fundamental right under Article 25(1) are unconstitutional.²⁰⁴ Any essentiality that they may possess, becomes legally insignificant in such circumstances.²⁰⁵ However, Chandrachud J. reached the same conclusion by adopting a reasoning not based in 'class-discrimination' but 'individuality'.²⁰⁶ In

¹⁹⁶ *Id.*

¹⁹⁷ The Constitution of India, 1950, Art. 23.

¹⁹⁸ Bhatia, *supra* note 190, 191-201.

¹⁹⁹ *Id.*, 172-176, 191-201.

²⁰⁰ KRISHNASWAMY, *supra* note 13, 18.

²⁰¹ *See infra* note 244.

²⁰² Bhatia, *supra* note 190, at xxxv.

²⁰³ *Indian Young Lawyers Assn. v. State of Kerala*, (2019) 11 SCC 1.

²⁰⁴ *Id.*, ¶¶3, 176.8, 183, 190, 191, 195, 196, 200.

²⁰⁵ *Id.*

²⁰⁶ *Id.*, ¶¶394.

his view, the social impact of religion is to mandatorily affect the civil status of an individual.²⁰⁷ This was still a somewhat agreeable proposition. But consequently, he cites constitutional morality for protecting ‘individual happiness’ from the former.²⁰⁸ Referring to individualism as the core unit of the Constitution,²⁰⁹ he holds: the prioritisation of group constitutional rights over that of an individual’s, is bad law.²¹⁰

This was deemed to be extremely transformative.²¹¹ This approach, it was argued, factors in both historical discrimination against women and the cultural trivialisation of it.²¹² A challenged social practice that has the potential of making dignified life inaccessible, needs to be checked for institutional discrimination.²¹³

It is submitted that at the very outset, Ambedkar may have intended individuality to be the defining structure in the draft Constitution,²¹⁴ but it did not come to be. After losing his original Assembly seat to Partition, he was a political nominee of the Indian National Congress.²¹⁵ The implication was that he was politically compelled to amend those portions of the draft that were sensitive to group sentiments.²¹⁶ Arghya Sengupta is, then, correct in pointing the same out to conclude that this reasoning was devoid of any constitutional basis.²¹⁷ Prioritising ‘individualism’ above fraternity and diversity in a Constitution that has directives for the state and society to redistribute goods to enhance the collective good, is odd.²¹⁸ Proposedly, the individuals in question were targeted for their subscription

²⁰⁷ *Id.*

²⁰⁸ *Id.*, ¶115 (Misra J., speaking for himself and Khanwilkar J., also cites Constitutional morality in ¶106, albeit, without any elaboration).

²⁰⁹ Indian Young Lawyers Assn. v. State of Kerala, (2019) 11 SCC 1, ¶125.

²¹⁰ *Id.*, ¶115-219.

²¹¹ Gautam Bhatia, *The Sabarimala Judgment – III: Justice Chandrachud and Radical Equality*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, September 29, 2018, available at <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/> (Last visited on July 9, 2021).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ CONSTITUENT ASSEMBLY DEBATES, November 4, 1948, *speech by* B.R. AMBEDKAR, ¶7.48.232, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04#7.48.232 (Last visited on July 9, 2021).

²¹⁵ Rohit De, A PEOPLE’S CONSTITUTION: THE EVERYDAY LIFE OF LAW IN THE INDIAN REPUBLIC 8 (Princeton University Press, 2018); Arundhati Roy, *The Doctor and the Saint*, THE CARAVAN, March 1, 2014, available at <https://caravanmagazine.in/reportage/doctor-and-saint> (Last visited on July 9, 2021).

²¹⁶ Jesús Francisco Cháirez-Garza, “Bound Hand and Foot and Handed Over to the Caste Hindus”: Ambedkar, Untouchability and the Politics of Partition, Vol.55(1), THE INDIAN ECONOMIC AND SOCIAL HISTORY REVIEW, 1, 22-26 (2018); KHOSLA, *supra* note 145, at 148-150.

²¹⁷ Arghya Sengupta, *The Constitution Dharma: Intention to Protect Religious Freedoms of Groups, no Matter How Small, is Unarguable*, THE TIMES OF INDIA, October 1, 2018, available at <https://timesofindia.indiatimes.com/blogs/toi-edit-page/the-constitution-dharma-intention-to-protect-religious-freedoms-of-groups-no-matter-how-small-is-unarguable/> (July 9, 2021).

²¹⁸ Curiously, it was only his opinion that specifically mentioned subordination of one order by a patriarchal one, in its paragraph 301. And yet, the opinion subsequently digresses towards an

to a historically subjugated class.²¹⁹ Without this associative link, the individualist line of reasoning may have held. However, the problem is not solely in the merits of the reasoning or misidentifying the Constitution's multi-faceted moralism to be monolithic.

The debilitating infirmity lies in this opinion prescribing what social morality ought to be, using the guise of constitutional morality. This was moulding the Constitution in the judge's own image, analytically unrelated to the adjudicatory concern at hand. The majority and concurring Nariman J. had viewed the impugned delegated legislation²²⁰ within the four corners of Articles 14, 15, 25 and 26. The exclusion of the group was held to be a barred 'essentiality'.²²¹ Whereas, Chandrachud J. substituted his ideas of normative morality for the society's, to reach the same conclusion. His intent to pro-actively shape the normative features of the society is clearly decipherable from the following excerpt:

"[...]a Constitutional court such as ours is faced with an additional task.[...] it must seek to recognize and transform the underlying social and legal structures that perpetuate practices against the constitutional vision (emphasis added)."²²²

In supposed vindication, he immediately follows this by misquoting Ambedkar. Therein, the latter seems to have cited the need of shaping the society, even if that extends to interfering with religion.²²³ Except, this point was asserted to justify limited State interference in personal laws, exclusively by way of legislation.²²⁴

Succinctly put, Chandrachud J.'s view regarding the basis of the Constitution for testing the applicability of Article 25 cannot be conceivably justified. This is precisely where Fuller had drawn a line between law and morality: in culling out the intrinsic moral aspect of the law, the judge only needs to look at the relevant provision's purpose in governance, discounting her own preferred value-system.²²⁵ The notion of the Supreme Court, a miniscule section of that very society and the least representative of the three main constitutional organs,²²⁶ gets finality through Article 141. The same applies to the High Courts, albeit, they lack

atomic reasoning, rather than reading the Constitution to assail the larger systemic, group-based discrimination.

²¹⁹ Indian Young Lawyers Assn. v. State of Kerala, (2019) 11 SCC 1, ¶¶368, 370, 422.6.

²²⁰ The Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965.

²²¹ Indian Young Lawyers Assn. v. State of Kerala, (2019) 11 SCC 1, ¶¶96, 110-111, 126, 209.

²²² *Id.*, ¶398.

²²³ CONSTITUENT ASSEMBLY DEBATES, December 2, 1948, *speech by* B.R. AMBEDKAR, ¶7.65.178, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02#7.65.178 (Last visited on July 9, 2021).

²²⁴ *Id.*

²²⁵ William Powers Jr., *Lon L. Fuller by Robert Summers*, DUKE LAW JOURNAL 221, 225, 233 (1985).

²²⁶ *Constitutional Morality: Not Only Domain of Judiciary*, CPRG INDIA, December 13, 2018, available at <http://www.cprgindia.org/blog/opinion/constitutional-morality-not-the-domain-of-judiciary/> (Last visited on July 9, 2021).

this conclusiveness of opinion. The writ jurisdiction only confers the judiciary with powers to scrutinise the society's contemporary moral sensibilities in the form of laws or its chosen government's acts. Any clarifications that concepts such as those discussed above do not intend to lend judges' opinions normative priority appear to be wholly vacuous.²²⁷ Proposedly, both the concepts possess moral but no methodological clarity.

The arguments against such concepts shall appear to be more justifiable from an accountability-oriented stance. Through an act of self-declaration, the higher judiciary has held itself not to be a part of the 'State' for the purposes of Article 12.²²⁸ Hence, judge-made law is ever exempt from Article 13(2). That is, its decisions are considered only as the 'correct exposition' of the prevailing law.²²⁹ In any case, wrong application of law by *any* authority is insufficient for invoking the jurisdiction under Article 32.²³⁰ Hence, checking a higher judicial act itself for the violation of this doctrine is legally-hazy, much less it being subject to representative institutions.

At the same time, the same criticism may be advanced for the 'basic structure'. However, it is submitted that any such equivalence in vagueness between the two, as attempted by Abhinav Chandrachud,²³¹ shall be unjust. As jurist Sudhir Krishnaswamy's comprehensive survey of the 'basic structure doctrine' concludes, it is very measured in its import.²³² As a major limitation on a judge's discretion, normative essentiality of a provision is discerned through an exercise of structural interpretation.²³³ That is, a complex multi-provisional analysis is utilised to determine whether a feature/provision is basic to the Constitution.²³⁴ This offers a reasonable safeguard on judicial prescriptiveness by limiting the range of choices for interpretation.²³⁵ Furthermore, the relevant accountability factor in the basic structure is that it gives an edge to 'deliberation'.²³⁶ This concept only points out the lacking deliberative scrutiny on part of representative institutions in bringing about a constitutional change.²³⁷ Succinctly put, the aim of the doctrine is to ensure the sanction of all three organs when a basic feature is sought to be changed.²³⁸ This was evident when it accepted a declared basic feature's legislative overrule.²³⁹ These cumulatively ensure that the courts do not lay down substantial

²²⁷ Bhatia, *supra* note 190, at xxxvi.

²²⁸ Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388, ¶7.

²²⁹ Chandi Ram v. ITO, 1995 SCC OnLine Raj 505, ¶14.

²³⁰ J. Fernandes & Co. v. Chief Controller of Imports and Exports, (1975) 1 SCC 716, ¶16.

²³¹ Chandrachud, *supra* note 177, at 2-14.

²³² Krishnaswamy, *supra* note 13, at 189-229.

²³³ *Id.*, 178-183.

²³⁴ *Id.*, 188.

²³⁵ *Id.*, 182, 183.

²³⁶ *Id.*, 204.

²³⁷ *Id.*

²³⁸ Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, ¶555.

²³⁹ M. Nagaraj v. Union of India, (2006) 8 SCC 212.

principles or impose normative frameworks.²⁴⁰ As Krishnaswamy puts it, the doctrine exists to avoid a ‘deliberative dysfunction’.²⁴¹ So while even this doctrine does not address the accountability-oriented apprehensions cited previously, there exists both a pre-emptive safeguard and an *ex-post facto* check. So far, no judicial or scholarly analyses indicate constitutional morality to be possessing any of these. While legislative overruling of any such precedent is yet to happen, constitutional morality has been declared as not confined to structural interpretation.²⁴²

The link between these judicial-moral concepts is unequivocal. It was most cogently phrased by the Kerala High Court very recently. Therein, it was stated that the transformative character of the document entails a constant analysis of visible changes relative to the society’s past.²⁴³ To gauge the occurrence and extent of such changes, each challenged action is to be tested as whether it brings the desired constitutional morality closer to reality.²⁴⁴ Discerning both, the prescriptive desire and the act’s proximity to it, the Court concludes, is to be headed none other than by the judiciary.²⁴⁵

C. A HOLY-GARBED WRIT THAT KNOWS NO BOUNDS

Necessity-based thinking to shape the society’s morality is nowhere mentioned as the judiciary’s permissible role. As such, prescriptive declarations of this kind require debate and discussion, as opposed to a monologic disquisition.

However, in spite of constitutional morality encouraging the latter, the judiciary cannot be labelled dysfunctional *per se*. In Sabarimala, the concurring judgment in question was only misinterpreting the Constitution by breaching the bounds of legal theory. Conceivably, there was no procedural overreach, despite laying down grounds for it in the future. Similarly, in the Delhi Govt. case, the concept was innocuously used as a form of liberal interpretation to advance the contours of federalism. Shaping substantive consequences by supposing a moral jurisdiction is only arudimentary step towards a larger problem.

The undesirable development occurs when this abstract concept is reified in a manner that both enables and legitimises the judiciary’s overreach. In other words, dysfunctionality comes to be when an institution fails to discharge its functions within the supposed theoretical boundaries, or digressively alters its functioning.²⁴⁶ It is submitted that the Indian judiciary has demonstrated both, mostly in deciding cases that have the appearance of desirable moral-social

²⁴⁰ Krishnaswamy, *supra* note 13, at 204.

²⁴¹ *Id.*

²⁴² Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶123.

²⁴³ Hidayat Educational & Charitable Trust v. State of Kerala, 2020 SCC OnLine Ker 312, ¶¶8-10.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Balkin & Levinson, *supra* note 8, at 139-151.

solutions. India has seen unwanted 'judicialisation'.²⁴⁷ This concept is defined as a set of two inseparable phenomena: firstly, judicial intervention in executive/legislative policy making; and secondly, increased imposition of quasi/legal rules in non-judicial negotiations and decision making.²⁴⁸ Arguably, both indicate an overreach by modifying procedural limits. The necessity-based approach of the judiciary has this precise effect: it expands its writ-powers to a level marked as impermissible by the Constitution. They are viewed as unjust fetters, as opposed to legitimate restraints.

For instance, and as asserted previously, the incorporation of Article 139 is implicative in this background. Furthermore, the only powers of rule-making given to the Supreme Court are captured in Article 145, that strictly relate to its procedural convenience. It is submitted that it would imply there exist no judicial powers to modify writs, given they are considered substantive concerns.²⁴⁹ At best, only the writ of *habeas corpus* has been interpreted to be concurrently procedural in nature.²⁵⁰

However, there exist several modifications of substantive writs specified in Articles 32 and 226. An inclusive list of illustrations would include the Supreme Court devising the anticipatory *mandamus*²⁵¹ and the continuing *mandamus*.²⁵² Further addition is the Madras High Court's creation of a '*certioriarified mandamus*' under Article 226,²⁵³ and the Supreme Court's reflexive adoption of it.²⁵⁴ In exercising this power, courts may call for records of proceedings of constitutional authorities discharging functions that may or may not be quasi/judicial in nature. High Courts have also tacitly revived the orders similar to *procedendo*. There exist petitions and ensuing orders specifically seeking expeditious disposal of lower court proceedings, the very crux of *procedendo*.²⁵⁵

It is argued that procedural modifications to its powers have a close link to the judiciary's ever expanding role of a normative guide for the Indian society. This is very easily demonstrable through the decisions deemed to be indicative of transformative constitutionalism.

²⁴⁷ R.K. Barik, *Politics of Judicial Administration* in INDIAN JUDICIARY AND POLITICS: THE CHANGING LANDSCAPE, 181 (B. D. Dua, M.P. Singh & Rekha Saxena, Manohar Publishers, 2008).

²⁴⁸ *Id.*

²⁴⁹ Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388, ¶6.

²⁵⁰ Kanu Sanyal v. Distt. Magistrate, (1973) 2 SCC 674, ¶4.

²⁵¹ Deepak Bajaj v. State of Maharashtra, (2008) 16 SCC 14, ¶19; S. Vijayarani v. Elementary Educational Officer, 2013 SCC OnLine Mad 2505; K. Venkatesh v. State of A.P., 2014 SCC OnLine Hyd 1059.

²⁵² Mihika Poddar & Bhavya Nahar, '*Continuing Mandamus*' - A Judicial Innovation to Bridge the Right-Remedy Gap, Vol. 10(3), NUJS L. REV., 11-27 (2017).

²⁵³ D. Jeyaselvi v. Govt. of T. N., 1993 SCC OnLine Mad 184; N. Kumaravel v. State of T. N., 2015 SCC OnLine Mad 5265.

²⁵⁴ Y. Mahaboob Sheriff v. Mysore State Transport Authority, AIR 1960 SC 321, ¶12.

²⁵⁵ Amit Garg v. Tabassum Gazala, 2014 SCC OnLine All 3540; Anamika Pandey v. Syed Naeem Ahmad, Misc. Single No. 2114 of 2019 (All. H.C.) (Unreported); Jayamma v. K. Basanthi, W.P. No. 38284 of 2014 (Kar. H.C.); *But see* Ali Shad Usmani v. Ali Isteba, 2014 SCC OnLine All 15838.

At the very outset, *Bandhua Mukti Morcha v. Union of India* did interpret Article 23 in a dynamic manner, for reasons previously stated.²⁵⁶ However, it concludes by introducing continuing *mandamus* to India.²⁵⁷ This device is not a conclusive operative order regarding the prayers sought in a writ petition, but acts as a clock monitoring the activities of the party under directions.²⁵⁸ This is a variant of a previously existing writ, not sanctioned by the Parliament. So while one section of the decision was indeed transformative by constitutionalising minimal existential in wages so as to eliminate forced labour, the other was procedurally unjustifiable. This did not attain any of the court's surveillance-associated goals,²⁵⁹ but the new writ has found wide acceptance regardless.²⁶⁰

Procedural overreach has been the core element of a few other cases falling under transformative constitutionalism. An overruled High Court judgment in *T. Sareetha v. T. Venkata Subbaiah*²⁶¹ may be noted in this regard. Bhatia deems it transformative for the successful challenge made to the vires of §9 of the Hindu Marriage Act, 1955. The concerned High Court accepted the ingenious argument raised therein: marital intercourse can be of no concern to the State, and remains a private affair.²⁶² Accordingly, it struck down the impugned provision. The glaring infirmity was that a civil revision petition was utilised in determining unconstitutionality of a provision.²⁶³ There exists no legal provision that permits a challenge of constitutionality to be raised in a trial court. Nor is it possible to equate §115 of the Code of Civil Procedure, 1908 with writ-enabling constitutional provisions. While Bhatia only found this overreach to be 'unconventional',²⁶⁴ it is the very definition of overreach in procedural limitations.

The more egregious instance of transgression is found in *IMA v. Union of India*.²⁶⁵ Put succinctly, the case involved a medical college which significantly sourced its funding from regimental fees and widow/widower funds of army personnel. The concerned state government in the territory of which it was supposed to operate had previously acted under Article 15(5). That is, there prevailed a state enactment imposing mandatory reservation of certain seats for certain sections of the society. The petitioner therein had successfully applied for an exemption from the same.

²⁵⁶ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

²⁵⁷ *Id.*, ¶80.

²⁵⁸ Poddar & Nahar, *supra* note 252.

²⁵⁹ Arun Shourie, COURTS AND THEIR JUDGMENTS 17-61 (Rupa & Co., 2nd ed., 2005) (the order remained a paper tiger for about sixteen years from the date of the judgment).

²⁶⁰ Lakshay Garg & Ashika Jain, NUJS CONSTITUTIONAL LAW SOCIETY, *Migrant Crisis: Is Continuing Mandamus the Ultimate Glimmer of Hope to Fix the Problem?*, July 24, 2020, available at <https://wbnujscls.wordpress.com/2020/07/24/migrant-crisis-is-continuing-mandamus-the-ultimate-glimmer-of-hope-to-fix-the-problem/> (Last visited on July 9, 2021).

²⁶¹ *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90 (overruled in *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) 4 SCC 90).

²⁶² *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90 ¶31, 37.

²⁶³ *Id.*, ¶1.

²⁶⁴ Bhatia, *supra* note 190, at 436.

²⁶⁵ *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179.

The Supreme Court found this exemption to be unconstitutional.²⁶⁶ As correctly pointed out by Bhatia, it held the contours of Article 15(2) to be broad enough to extend horizontally.²⁶⁷ The point is well-made, since it is hard to rebut that private actors preserve and perpetuate institutional discrimination. Logically extended, they ought to be covered by Article 15(2). Except, this case did not deal with this particular provision at all.

The pertinent question of law was whether a law made under Article 15(5), which is an enabling provision,²⁶⁸ could be selectively retracted. The Court unjustifiably termed this act as impermissible under Article 15(5),²⁶⁹ and suggests possible discrimination for the purposes of Article 15(2).²⁷⁰ Contextually, this linkage occurs right before the conclusion of the judgment, as if to vindicate the court's inclination towards making Article 15(5) mandatory.²⁷¹

In other words, it makes a directory provision of Article 15(5) mandatory. If it were to be breached, a negative obligation captured by Article 15(2) shall be said to have been violated. This is conflating an elective positive obligation on the state with a mandatory negative obligation. It is to be noted that an elective positive obligation requires institutions, such as the State, to frame policy-based laws factoring in the resources of the legislative subjects.²⁷² Contrarily, negative rights are prohibitions on either the State or the society, regardless of resource availability.²⁷³ While the attempt to affect substantive outcome is also an issue here, the change brought about in the meaning of two provisions is nothing less than bypassing Article 368. It is extremely curious as to how a decision could be transformative when such a dichotomy in obligations is dissolved by non-legislative action/constitutional amendment. All the above cases seem to have a forward-looking outlook in terms of substantive interpretation. However, the same is negated when a holistic analysis detects a procedural overreach.

The judiciary's intervention in matters of public policy out of social concerns is further illustrative of the argument above. In *Sankalp Charitable Trust v. Union of India*, the Supreme Court recalled a three-year old judgment to resurrect the common medical examination, the 'National Eligibility cum Entrance Test'.²⁷⁴ This was imposed on all state-affiliated and private medical universities, including private-unaided minority institutes.²⁷⁵ As agreeably put by Dr. Faizan

²⁶⁶ *Id.*, ¶69.

²⁶⁷ Bhatia, *supra* note 190, at 131-139.

²⁶⁸ *Pramati Educational & Cultural Trust v. Union of India*, (2014) 8 SCC 1, ¶34.

²⁶⁹ *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179 ¶234.

²⁷⁰ *Id.*, ¶187.

²⁷¹ *Id.*, ¶186, 188.

²⁷² Cécile Fabre, *Constitutionalising Social Rights*, Vol. 6(3), THE JOURNAL OF POLITICAL PHILOSOPHY, 263, 278-280 (1998).

²⁷³ William A. Parent, *Right and Wrong by Charles Fried*, Vol. 90(1), THE UNIVERSITY OF CHICAGO PRESS JOURNALS, 141,142 (1979).

²⁷⁴ *Sankalp Charitable Trust v. Union of India*, (2016) 7 SCC 487.

²⁷⁵ *Id.*, ¶10.

Mustafa,²⁷⁶ this obliterated the very essence of *T.M.A Pai v. State of Karnataka*.²⁷⁷ That decision had put forth a case for complete autonomy to private-unaided minority institutions in running themselves. Most anomalously, an interim order was elevating a minority opinion to an operational status.²⁷⁸

When met with the COVID-19 pandemic, the judiciary similarly went about with a similar stream of unjust interventions.²⁷⁹ It started from reviewing and setting price caps on screening tests for detecting the viral infection.²⁸⁰ It gradually took the form of courts determining which tests and medicines shall be the most effective, to dictating policy of vaccination to the executive.²⁸¹ In its infinite wisdom, the Court directed that both the privileged and those lacking in means shall be vaccinated gratuitously. It is difficult to grasp as to how this is outside the purview of policy-making, otherwise the domain of a representative institution.

The other significant breach is the judicial interference with the selection of chief ministers. Article 329(b) bars courts from directly entertaining disputes pertaining to a legislature's electoral matters. They may reach the courts only by way of election petitions as envisaged by election laws.²⁸² Furthermore, actions of a Speaker in a legislative chamber are supposed to be shielded from judicial interference.²⁸³

The court has come to deploy the writ jurisdiction to radically depart from the mandated legal route. More questionable is its utilisation to go a step further: imposing behavioural responsibilities for the speakers and elected members after the conclusion of elections.

These dilutions were gradual in their pace. In *Jagdambika Palv. Union of India* ('Jagdambika Pal'),²⁸⁴ a special leave petition was filed, asserting a floor test's disregard to be a substantial question of law. The High Court's in-

²⁷⁶ The Print Team, *Talk Point: Has the Judiciary's Overreach in Cricket, Medical Education, Among Others, Dsamaged its Credibility?*, THE PRINT, January 31, 2018, available at <https://theprint.in/talk-point/has-the-judiciarys-overreach-in-medical-education-damaged-its-credibility/32573/> (Last visited on July 9, 2021).

²⁷⁷ *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481.

²⁷⁸ The Print Team, *supra* note 276.

²⁷⁹ S.N. Aggarwal, *Judicial Overreach in Times of Covid-19*, THE INDIAN EXPRESS, May 18, 2021, available at <https://indianexpress.com/article/opinion/judicial-overreach-in-times-of-covid-19-7320256/> (Last visited on July 9, 2021); THE INDIAN EXPRESS TEAM (Express News Service), *Doctrine of Impossibility: SC Stay on Allahabad HC Covid Order*, May 22, 2021, available at <https://indianexpress.com/article/india/allahabad-hc-covid-order-sc-up-government-covid-death-toll-7325096/> (Last visited on July 9, 2021).

²⁸⁰ *Shashank Deo Sudhi v. Union of India* (2020) 5 SCC 132.

²⁸¹ Aggarwal, *supra* note 279; *Distribution of Essential Supplies and Services During Pandemic*, In re (2021) 7 SCC 772.

²⁸² *Id.*; See The Representation of the People Act, 1951, §80.

²⁸³ *Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651, ¶110; The Constitution of India, 1950, Art. 122.

²⁸⁴ *Jagdambika Pal v. Union of India*, (1999) 9 SCC 95.

interference was sought for staying an unlawful dismissal of a state government by the Governor without a floor test.²⁸⁵ But both the High Court and subsequently, the Supreme Court, deemed fit to go to the extent of directing a floor test.²⁸⁶ This unjustifiable exercise of power resurfaced in the case of *Anil Kumar Jha v. Union of India*.²⁸⁷ Therein, a floor test was judicially directed in a writ petition seeking *quo warranto* as against the chief minister so elected. It is pertinent to mention here that Article 32 requires two pre-conditions to be satisfied for its invocation.²⁸⁸ Firstly, a violation of Part III shall be the subject matter of such petitions. Secondly, the violation should be demonstrated as affecting the petitioner. Both of these may be dispensed with when a challenged State action allegedly lacks in jurisdiction or authority.²⁸⁹ Jurisdiction for *quo warranto* qualifies as this exceptional remedy: it is available when the occupation of a public office is challenged for wanting in legitimacy, such as a chief minister's.²⁹⁰ It ought to follow that the remedy by way of this writ is to only negate the transgression of authority/usurpation of office.²⁹¹ But in this case the Court dwelled upon the next step of 'replacement': it specified the dates of elections, barred the Governor from nominating members *ad-interim*, and monitored the entire phenomenon in real-time.²⁹² This set a precedent to judicially conduct floor tests using the writ jurisdiction, in a series of subsequent cases.²⁹³

However, even in this set of peculiar developments, the most recent is the most constitutionally suspect. In *Shivraj Singh Chouhan v. Speaker Madhya Pradesh Legislative Assembly*, the issue before the court was securing the petitioners' right to participate in a floor test.²⁹⁴ Unlike the cases following *Jagdambika Pal* where the right of a person holding the chief minister's office was explicitly challenged, this was a non-issue here. Herein, the jurisdiction for Article 32 was engineered by alleging a restriction on the freedom of movement.²⁹⁵ Regardless, the Court somehow promenaded into directing a floor test.²⁹⁶ Most curiously, one of the primary reasons for the Court to take this direction was 'constitutional morality'.²⁹⁷ Constitutional morality and the concomitant ethos, the Court reasoned, necessitated that State power be precluded from political misuse.²⁹⁸ With great deference, it is submitted that the same ethos also require other

²⁸⁵ *Narendra Kumar Singh Gaur v. Union of India*, 1998 SCC OnLine All 112.

²⁸⁶ *Jagdambika Pal v. Union of India*, (1999) 9 SCC 95, 302.

²⁸⁷ *Anil Kumar Jha v. Union of India*, (2005) 3 SCC 150.

²⁸⁸ *Ujjam Bai v. State of U.P.*, 1962 SCC OnLine SC 8, ¶195.

²⁸⁹ *Id.*; Public interest litigation, however, also relaxes the criterion of locus-standi when seeking the issuance of a writ without necessarily challenging a State action.

²⁹⁰ *B.R. Kapur v. State of T.N.*, (2001) 7 SCC 231, ¶79.

²⁹¹ *Id.*

²⁹² *Anil Kumar Jha v. Union of India*, (2005) 3 SCC 150 ¶¶5-6.

²⁹³ *Chandrakant Kavlekar v. Union of India*, (2017) 3 SCC 758; *G. Parmeshwara v. Union of India*, (2018) 16 SCC 46.

²⁹⁴ *Shivraj Singh Chouhan v. M. P. Legislative Assembly*, (2020) 17 SCC 1.

²⁹⁵ *Id.*, ¶2.

²⁹⁶ *Id.*, ¶30.

²⁹⁷ *Id.*, ¶¶8, 53.

²⁹⁸ *Id.*, ¶¶54, 57.

basic constitutional justifications. In constitutional litigation, there exists a ‘writ-hierarchy’.²⁹⁹ That is, High Courts which constitutionally possess the wider writ jurisdiction³⁰⁰ ought to have been the first forum of remedy.³⁰¹ Regardless, the significant aberration from law in this case was the Court’s order to conduct a floor test, when it was neither an issue nor procedurally sanctioned.

A peculiar feature will seem to emerge from these developments. Firstly, procedural overreach is demonstrably against the Constitution. Secondly, the source of this overreach emanates from the judiciary’s newfound moral-revisionist powers, which is *per se* against the very precepts of the constitutional framework. However, when viewed and used cumulatively, the two developments curiously give an appellation of a ‘rights-enhancing constitutionalism’. That is, the consequence of the procedurally impermissible adjudication is nevertheless a progressive outcome for the society, with a consolidation of substantive rights. However, as argued previously, the specific constitutional route to achieve this enhancement of substantive rights was marred for several reasons.

By 2021, to lend this ostensible legitimacy for procedural aberrations greater force, the Supreme Court has ended up consolidating a false dichotomy. Supposedly, *mandamus* directed policies and judicial review of the prevailing ones are mutually exclusive concerns.³⁰² With great deference and for reasons supplied previously, it is submitted that this dichotomy can be easily falsified. Both, legal procedures to test State action/laws, and deliberation of policies inevitably dealing in morality, may easily dissolve into each other. This is achieved by the judiciary impermissibly widening the contours of its exclusive power, namely, the writ jurisdiction.

IV. CONCLUSION

Both the Rajya Sabha and the Indian judiciary have features that ensure they are no pale replicas of their foreign counterparts. These features imparted a nuanced design to each, to ensure stability-oriented constitutional goals. Both remain functional in the literal sense. That is, they have been ostensibly discharging their assigned businesses since their constitutional inception.

Yet, the decadence in both is easily discerned from a structural point of view. The Rajya Sabha was designed as an institution unto itself, and was tasked with revisionism. This supposedly entailed revising the acts of the Lok Sabha-executive pair, if needed. Its unique composition may limitedly suggest ‘federal representativeness’ as its essentiality. The same also assured higher probability

²⁹⁹ Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649, ¶33; Union of India v. Paul Manickam, (2003) 8 SCC 342, ¶22.

³⁰⁰ Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649, ¶31; Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691, ¶20.

³⁰¹ Kanubhai Brahmhatt v. State of Gujarat, 1989 Supp (2) SCC 310.

³⁰² Rachna v. Union of India, (2021) 5 SCC 638, ¶45.

of a fixed opposition in case of political majorities, given the prevailing multi-party system. However, the gauge of its functional adherence to the Constitution lies in its revisionist powers. The composition was largely supposed to impart its revisionist powers with the constitutionally desired significance. The change in composition may be an attack on its federal character, but the larger damage is a diminution in its constitutional stature. In the past few years, this composition has been mauled. The judiciary furnished no support. Resultantly, the House is sufficiently fettered in its core functioning, and has become more of a strategic site for the ruling political forces. The lack of any major revisionary instances in the recent years is indicative of this very problem.

At the same time, the judiciary is in a different state of decay. As opposed to the Rajya Sabha, the judiciary seems to have authored its own decadence. Contrary to structural weaknesses and inaction, the judiciary has gone on to attain unprecedented levels of power. To understand this decay, its detailed writ jurisdiction is to be read with the glaring undertone of a constitutional priority to 'representativeness'. The Indian scheme had envisaged that substantive outcomes be shaped by the people through democratic mechanisms. The writ powers of an institution divorced from electoral processes are, then, *per se* barred from doing so. Yet, an emerging legitimacy of the judiciary's moral jurisdiction has the precise antithetical effect. While it is not denied that the Constitution has an evolutionary outline to it, the task was specifically reserved for its representative institutions. The judiciary may only assist them from within its proper bounds. Once it starts infusing constitutional text with its own preferred value-systems rather than discerning the prevailing ones, the dysfunction begins. Almost all of it escapes critique or draws support from the 'moral-judicial doctrines'. This is largely because the procedural overreach is yielding some desirable moral-social outcomes. Such concepts are teleological, and do well in supplying courts with malleable frameworks for discretionary outcomes. This nascent digression fully shapes up when the infusion reaches the stage of modifying writ jurisdiction. In doing so, the judiciary has developed significant impermissible powers. These pertinently include an impermissible expansion of jurisdiction and the manufacture of writ-variants. From a constitutional point of view, it has become dysfunctional.

The two institutional phenomena combined lead to constitutional dysfunctionality. The objective of having an upper chamber that could revise the moral-social initiatives of the majority has been usurped by the judiciary. To perform this additional task, judicial review and other objectives of the writ jurisdiction shall, necessarily, be compromised. Given the House's weakness, this misappropriation seems justified. However, legitimacy is a subjective appellation. This role-reversal desecrates an intelligent design, which was supposed to maintain a self-sustaining constitutional ecosystem. Unless their positional roles are restored, sustaining that ecosystem shall become more of a Sisyphian task.