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CENTER FOR COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

NATIONAL LAW UNIVERSITY, JODHPUR

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FOREWORD

It is with both, immense pleasure and a heavy heart that I put pen to paper in furtherance of this edition, marking the final lap of the first volume of the Comparative Constitutional Law and Administrative Law Quarterly. Having come a long way since our first edition which was published a little over a year ago, we are grateful for the mounting number of contributions received over the course of the year. Nevertheless, being a quarterly, often pressed for time and obdurate about not compromising on our standards our final shortlists have remained in limit, while adhering to strict criterions of selection.

This edition brings fourth three sterling contributions, touching upon diverse aspects of Constitutional Law and bearing a great deal of contemporary weight. The opening Article titled '*Fundamental Right to Free Primary Education in India*', critically examines the 2012 decision of the Supreme Court upholding the constitutional validity of the Right to Education Act, 2009, by pointing out the "errors in constitutional reasoning" in the majority opinion and suggesting alternative constitutional arguments that could have been used to reach the same decision. It sparks particular interest in the light that like questions of Constitutional Validity are currently placed before a Constitutional Bench of the Supreme Court.

In the next piece, illustratively using the Kenya's constitutional history, *Duncan Okubasu Munabi*, elucidates upon the implications of constitutional flexibility on the lifespan of Constitutions. It provides for an interesting deliberation upon the longevity of one's own national constitution bearing in mind that while constitutions should endure, the manner in which they are amended can influence not only their durability but also the manner in which they can be replaced.

The final piece is a Comment on the much debated *Naz* judgement recently delivered by the Supreme Court in which the previous decision by the Delhi High Court cantering on the Fundamental Rights of homosexuals in India was overturned. In his work, *Shiva Santosh*

argues that the Supreme Court was whimsical in overlooking the constitutional analysis provided by the Delhi High Court, while also emphasizing on the importance of foreign sources, which the Supreme Court ought to have placed due reliance upon.

Besides the brilliant contributions that we have received over the past quarters, the colossal efforts of the members of this editorial team have provided this journal with shape and character, by not just pruning and rewriting words, but being motivated to publish works in their best possible form. Having been a part of this journal from its very inception, it is with gratitude and sincerity, that I wish Professor I P Massey and the new team of editors all the success for volumes to come.

Anusha Ramesh

[Editor-in-Chief]

FUNDAMENTAL RIGHT TO FREE PRIMARY EDUCATION IN INDIA

A CRITICAL EXAMINATION OF *SOCIETY FOR UNAIDED PRIVATE SCHOOLS OF RAJASTHAN V. UNION OF INDIA*

Khagesh Gautam*

ABSTRACT

In 2002, the Constitution of India was amended and article 21A was inserted into Part III of the Constitution that provides for Fundamental Rights. Article 21A, styled as a positive right, provided for free and compulsory education to all children between the age of 6 and 14 years. To enforce this positive right, the Parliament enacted the Right of Children to Free and Compulsory Education Act of 2009. The Act, amongst other things, provided for horizontal affirmative action by reserving 25% seats in *all* schools (i.e. State run, State funded or Privately run) in favour of Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes. It also provided that the private schools cannot charge any fee, tuition or otherwise to those admitted against this 25% quota. Instead the State would reimburse the private schools for these 25% students. The constitutional validity, amongst others, of these two provisions was challenged by the private schools and in 2012; a three judge bench of the Supreme Court of India, in *Society for Un-aided Private Schools of Rajasthan v. Union of India*[1] upheld the constitutional validity of the 2009 Act.

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[1] AIR 2012 S.C. 3445.

This article critically analyses the majority opinion and the dissenting opinion in this case and argues that these two provisions (i.e. the Reservation Provision and the Reimbursement Provision) are constitutionally valid but not for the reasons provided by the majority opinion. The article highlights, what the author believes to be, are errors in constitutional reasoning in the majority opinion and provides alternate constitutional arguments which lead to the same result. The roots of the idea of the Reimbursement Provision are traced to the doctrine of the Court in an eleven judge bench decision in the *TMA Pai* decision. These errors in the Court's reasoning, it is argued, resulted in a missed opportunity to articulate a new standard of review to review positive rights cases in this case.

INTRODUCTION

The right to free primary education was guaranteed as a fundamental right by amending the Constitution of India (hereinafter "**the Constitution**") and inserting Article 21A[2] by the 86th Amendment.[3] A few years later Article 15(5)[4] was inserted into the Constitution by the 93rd Amendment[5] that provided for selective horizontal application of the affirmative action provisions of the Constitution.[6] By virtue of Article 15(5), all educational institutions in India, except minority educational institutions were subjected to the constitutional policy of affirmative action. In *Ashoka Kumar Thakur v. Union of India*[7], (hereinafter "***Ashoka Thakur***") the horizontal application of Article 15(5) was challenged before the Supreme Court (hereinafter "**the Court**") as unconstitutional for being violative of the basic structure of the Constitution.[8] The case was heard by a constitution bench of five judges. In a divided (4-1) verdict, the Court, by majority, held –

> "… Constitution 93rd Amendment Act, 2005, is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State maintained institutions and aided educational institutions. Questions whether the Constitution (Ninety Third Amendment) Act,

[2] INDIA CONST. art. 21A – "Right to education. – The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

[3] The Constitution (Eighty-sixth Amendment) Act, 2002.

[4] INDIA CONST. art. 15, § 5 – "Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."

[5] The Constitution (Ninety Third Amendment) Act, 2005 (with effect from January 20, 2006).

[6] For a discussion on fundamental rights in the Constitution of India and their horizontal application *see* KRISHNASWAMI, SUDHIR, *Horizontal application of fundamental rights and State action in India*, *in* C. RAJ KUMAN & K. CHOCKALINGAM (ed.) HUMAN RIGHTS, JUSTICE, AND CONSTITUTIONAL EMPOWERMENT 47 (2010).

[7] (2008) 4 S.C.R. 1 (India).

[8] *Id*. at 77, ¶ 27 (per Balakrishnan, CJ).

> 2005 would be constitutionally valid or not so far as "private unaided" educational institutions is concerned, is not considered and left open to be decided in an appropriate case."[9]

In the lone dissenting opinion Justice Bhandari held that –

> "The 93rd Amendment's imposition of reservation on unaided institutions has abrogated Article 19(1)(g), a basic feature of the Constitution, in violation of our Constitution's basic structure. Therefore, I sever the 93rd Amendment's reference to "unaided" institutions as *ultra vires* of the Constitution."[10]

Subsequently exercising its power under Article 21A, the Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter "**the RTE Act**"). In *Society for Un-aided Private Schools of Rajasthan v. Union of India*[11] (hereinafter "**the RTE Case**") the constitutional validity of several provisions of the RTE Act was challenged before the Court. The challenge was principally on the ground that the impugned provisions of the law violated the fundamental rights as guaranteed by the Constitution and as interpreted by the Court. The case was heard by a bench comprising three judges of the Court. In a divided

[9] *Id*. at 469 (per 'Judgment By Court'; four separate opinions were delivered that consume a total of 470 printed pages in the law reported cited in note 6).

[10] *Id*. at 412, ¶ 177.

[11] AIR 2012 S.C. 3445 (India) [Hereinafter "The RTE Case"].

(2-1) verdict, the RTE Act was upheld as constitutional.[12] A review petition was subsequently filed and was dismissed.[13]

Chief Justice Kapadia, who wrote the majority opinion, summarized the various provision of the RTE Act.[14] Justice Radhakrishnan who wrote the minority opinion, summarized the legislative history of article 21A.[15] Out of the several provisions of the RTE Act that were challenged, this paper will concentrate only on the constitutional validity of sections 12(1)(c)[16] and 12(2).[17] I will identify the arguments made for and against the constitutional validity of the aforementioned provisions before the Court, how the court dealt with those arguments and on what grounds these two provisions were upheld as constitutionally valid. I

[12] *Id*. at 3510 (per 'Conclusion'; two opinions were delivered that consume a total of 66 pages in the law reported cited in note 10).

[13] Review Petition (C) No.1155/2012 in Writ Petition (C) No.95/2010, order dated September 18, 2012 (the order can be retrieved from the website of the Supreme Court of India at http://www.courtnic.nic.in/courtnicsc.asp using the case number).

[14] *The RTE Case , supra* note 10 at 3455-57, ¶ 7.

[15] *Id*. at 3468-73, ¶¶ 27-38.

[16] RTE Act, § 12(1)(c) – "Extent of school's responsibility for free and compulsory education. – For the purposes of this Act, a school, specified in sub-clauses (*iii*) and (*iv*) of clause (*n*) of section 2 shall admit in class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion."

[17] RTE Act, § 12(1)(c) – "Extent of school's responsibility for free and compulsory education. – The school specified in sub-clause (*iv*) of clause (*n*) of section 2 providing free and compulsory elementary education as specified in clause (*c*) of sub-section (*1*) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (*i*) of clause (*n*) of section 2

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligations."

will argue that the reasons given by the Court are legally incorrect. I will conclude by arguing that the above mentioned provisions of the RTE Act are constitutionally valid and provide alternative constitutional arguments to support my conclusion.

Section 12(1)(c) provides that all schools[18] will reserve a minimum of 25% seats for children who belong to disadvantaged groups[19] and for children who belong to the weaker sections[20] of society. This provision imposes the burden of affirmative action as discharged through the policy of reservation on the private unaided non-minority schools. The beneficiaries mentioned in this provision are the exact same class of people as mentioned in Articles 15(4) and 15(5) of the Constitution. For brevity, Section 12(1)(c) is designated "the Reservation Provision". The Court upheld the Reservation Provision on the ground that it was a reasonable restriction under article 19(6)[21] of the Constitution.[22]

Section 12(2) provides that the private unaided non-minority schools cannot charge the students admitted under the Reservation Provision any fee, tuition or otherwise. They would

[18] RTE Act, § 2(n) – "Definitions – "school" means any recognized school imparting elementary education and includes –

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority."

[19] RTE Act, § 2(d) – "Definitions –"child belonging to disadvantaged" group means achild belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification:"

[20] RTE Act, § 2(e) – "Definitions – "child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification;"

[21] INDIA CONST. art. 19, § 6 – "Nothing in clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of general public, reasonable restrictions on the exercise of the rights conferred by the said sub-clause…"

[22] *The RTE Case , Supra* note 10 at 3460, ¶ 10 (Kapadia, CJ holding that, "To put an obligation on the unaided non-minority school to admit 25% children in class I under Section 12(1)(c) cannot be termed as an unreasonable restriction.")

instead be reimbursed by the State to the extent of ‘per-child-expenditure incurred by the State’ or the actual amount the schools charges, whichever is less. Therefore, the private unaided non-minority school will only receive from the State, as reimbursement, the amount of money which the child admitted under the 25% reservation quota would have paid for in a school run by the State. For brevity, Section 12(2) is designated as “the Reimbursement Provision”. The Court also upheld the Reimbursement Provision on the grounds that it was a reasonable restriction under Article 19(6) of the Constitution.[23]

The rest of this paper is divided into two parts. Part I examines the arguments made for and against the Reservation Provision and how the Court upheld this provision. It identifies the standard of review articulated by the Court to arrive at this finding. It then argues that the Reservation Provision is constitutionally valid albeit not on the grounds on which it was upheld by the Court. It is valid because the Parliament has the constitutional authority under Article 15(5) of the Constitution to enact the Reservation Provision. It then briefly discusses the legal question of the constitutional validity of Article 15(5) of the Constitution and concludes that this question remains judicially unanswered. Part II makes a similar analysis with respect to the Reimbursement Provision. It argues that the examination of the constitutional validity of this provision on grounds of fundamental rights was a good opportunity to formulate a new standard of review to effectively handle the questions of horizontal application of social and economic rights for the Court. However, the Court missed that opportunity. It then identifies the seeds of horizontal application of Article 21A of the Constitution in the doctrine of the Court and argues that the Reimbursement Provision is also constitutionally valid as per the existing doctrine of the Court.

[23] *Id*. at 3461, ¶ 10 (Kapadia, CJ holding that, “Indeed, by virtue of Section 12(2) read with Section 2(n)(iv), private unaided school would be entitled to be reimbursed with the expenditure incurred by it in providing free and compulsory education to children belonging to the above category to the extent of per child expenditure incurred by the State in a school specified in Section 2(n)(i) or the actual amount charged from the child, whichever is less. Such a restriction is in the interest of the general public. It is also a reasonable restriction.”)

PART I

Constitutional Validity of the Reservation Provision

Constitutional Validity of the Reservation Provision

The petitioner schools in the RTE Case argued that, "… Article 21A casts an obligation on the state and state alone to provide free and compulsory education to children upto the age of 6 to 14 years, which would be evident from the plain reading of Article 21A read with Article 45 … that the constitutional provision never intended to cast responsibility on the private educational institutions along with the State, if that be so like Article 15(5), it would have been specifically provided so in Article 21A. Article 21A or Article 45 does not even remotely indicate any idea of compelling the unaided educational institutions to admit children from the neighbourhood … since no constitutional obligation is cast on the private educational institutions under Article 21A, the State cannot through a legislation transfer its constitutional obligation on the private educational institution". [24]

This argument is built on the presumption that the legislative competence for both the Reservation Provision and the Reimbursement Provision could come only and exclusively from Article 21A of the Constitution. Since such competence has not been granted by Article 21A, they are both unconstitutional. In other words, there is nothing in Article 21A to burden a private unaided non-minority school with reservation of seats in schools. Relying on Article 15(5) (that makes affirmative action horizontal thereby bringing the private unaided schools within its ambit), the petitioners argued that should the Constitution have desired reservation of seats in schools for Scheduled Castes (hereinafter "**SCs**"), Scheduled Tribes (hereinafter

[24] *Id*. at 3480-81, ¶ 60 (Radhakrishnan, J's minority opinion records the submission made by several counsel that appeared in the case from where these arguments are quoted. Kapadia, CJ's majority opinion does not record submission made by counsel.)

"**STs**") and Socially and Educationally Backward Classes (hereinafter "**SEBs**") for furtherance of objectives of Article 21A, Article 21A itself should have provided for such reservation. Since it does not, reservation in favour of SCs, STs and SEBs in private unaided non-minority schools while enacting a law under Article 21A is unconstitutional.

In its defence, the State made two arguments. First, that Article 21A being a 'socio-economic right', which requires 'affirmative State action' in order for the fundamental right to be fulfilled, 'must get priority over' Article 19(1)(g).[25] Second, that article 21A cannot be subject to Article 19(1)(g) since it is a 'stand-alone provision'.[26] These arguments were not specific to the Reservation Provision but were designed to defend the RTE Act as a whole. The State's argument essentially was that Article 21A itself provides for its enforcement through legislation. The RTE Act is a law passed to enforce Article 21A.Therefore the Parliament is competent to pass the RTE Act. The argument is deceptively simple but in reality things are much more complicated.

Chief Justice Kapadia held that the question in this case was whether the Reservation Provision is a reasonable restriction under Article 19(6). He found that the object of the RTE Act was to remove the barriers faced by a child who seeks admission but cannot afford the fee charged by the school. Since this is not unreasonable, by that virtue alone it is not an unreasonable restriction under Article 19(6). The object, he says, is not to restrict the freedom under Article 19(1)(g). He then went on to uphold the validity of the Reservation Provision relying only on Article 19(6). I argue that this holding of Chief Justice Kapadia is incorrect.

The essential question before the Court was that which constitutional provision provides the Parliament the power to enact provisions like the Reservation Provision. It is correct to say

[25] *Id*. at 3479, ¶ 57 (Submissions of the Attorney General for India).

[26] *Id*. at 3480, ¶ 58 (Submissions of the Additional Solicitor General).

that Article 21A is the constitutional provision that gives the Parliament the legislative competence to enact the RTE Act. It is also correct to say that Article 21A does not provide the legislative competence to enact the Reservation Provision. But it would be incorrect to say, as the petitioners argued, that this provision cannot be enacted because no such power is granted by Article 21A.

The power of the Parliament to enact laws providing for reservation of seats in educational institution comes not from article 21A but from Articles 15(4)[27] and 15(5) of the Constitution. Article 15(4) provides that any law providing for reservation of seats in educational institutions for SCs, STs and SEBs cannot be held unconstitutional on the ground that it violates Article 29(2)[28] of the Constitution. While Article 29(2) prohibits the State from discriminating on the grounds *inter alia* of caste alone[29], Article 15(4) carves out an exception for the State allowing it to discriminate on grounds of caste alone provided such discrimination is for the advancement of the beneficiaries of such discrimination.[30] Article 15(5) provides that any law providing for reservation of seats in private educational institutions for SCs, STs and SEBs cannot be held unconstitutional on the ground that it violates Article 19(1)(g)[31] of the Constitution that provides freedom to practice any profession, occupation, trade or business. The Court's conclusion, therefore, that the Reservation Provision is valid because it is a reasonable restriction under Article 19(6) of the Constitution is incorrect. The availability of the fundamental right to practice any profession,

[27] INDIA CONST. art. 15, § 4 – "Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

[28] INDIA CONST. art. 29, § 2 – "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

[29] ARVIND P. DATAR, COMMENTARY ON THE CONSTITUTION OF INDIA 461 (2010).

[30] *Id*. at 462

[31] INDIA CONST. art. 19, § 1, cl. g – "All citizens shall the right to practice any profession, or to carry on any occupation, trade or business."

or to carry on any occupation, trade or business (under Article 19(1)(g)) is subject to reasonable restrictions in the interest of the general public (under Article 19(6)). However, Article 15(5) itself insulates all laws that provide for reservation in private schools from application of Article 19(1)(g) in the first place. Article 19(6) being a restriction on Article 19(1)(g), and Article 19(1)(g) itself being inapplicable to the Reservation Provision in light of Article 15(5), while examining the constitutional validity of the Reservation Provision, Article 19(6) therefore, could not possibly be a relevant consideration.

It could be argued that what Article 15(5) imposes on Article 19(1)(g) is essentially in the nature of a restriction. Even so, this restriction exists independent of, and must be examined independent of, Article 19(6). In the event a law is challenged as being violative of Article 19(1)(g), the State's response that the law is enacted under Article 15(5) for advancement of SCs, STs and SEBs is in and of itself a complete response. In other words, the question that whether or not the law, that the State argues has been enacted under Article 15(5), is a reasonable restriction under Article 19(6) is an incorrect question to ask. The nature of restrictions contemplated under Article 19(6) is fundamentally different from the enabling provisions of Article 15(5) and there is no reason to read both of them together.

Chief Justice Kapadia's approach of giving content to 'reasonable restriction' however is also a curious one. He relied only on Part IV of the Constitution that lay down the Directive Principles of State Policy[32] (hereinafter "**DPSPs**") and read them as reasonable restrictions. This approach takes the position that the DPSPs that are otherwise not justiciable under the Constitution[33] can be used to interpret those provisions of Part III that provide the State the power to restrict the fundamental rights. The result is an extremely deferential standard of

[32] INDIA CONST. Part IV.

[33] *See* INDIA CONST. art. 37 – "Application of the principles contained in this Part. – The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making law."

review. Following this approach, the Chief Justice articulates the following standard to review the impugned law –

> "**The first and foremost principle we have to keep in mind is that what is enjoined by the directive principles (in this case Articles 41, 45 and 46) must be upheld as a "reasonable restriction" under Articles 19(2) and 19(6)**…a directive principle may guide the Court in determining crucial questions on which the validity of an important enactment may be hinged. Thus, **when the courts are required to decide whether the impugned law infringes a fundamental right, the courts need to ask the question whether the impugned law infringes a fundamental right within the limits justified by the directive principles or whether it goes beyond them**."[34]
>
> (Emphasis Added)

It is important to note that this standard begins with a premise that whatever is provided in Part IV (i.e. DPSPs) has to be unquestionably accepted as a reasonable restriction. The content of 'reasonable restrictions' in Article 19(6) therefore is not to be found in that article. It is instead to be found in Part IV of the Constitution. The words of Article 19 therefore are redundant when the Court examines whether the impugned law is a reasonable restriction on the exercise of fundamental rights. Only if the impugned State action goes beyond what is provided in Part IV will the Court hold the impugned State action unconstitutional. This highly deferential standard of review was uncalled for in this case and is unworkable in future cases. Furthermore, the standard as laid down is incorrect since it fails to truly understand the issue that was before the Court.

[34] *The RTE Case, Supra* note 10 at 3458, ¶ 9.

While affirmative action for SCs, STs and SEBs in educational institutions is provided for in Articles 15(4) and 15(5), Article 21A does not provide for affirmative action for anyone. Article 21A only provides that the State is obliged to provide free and compulsory education. As to how to provide this free and compulsory education, the State may by law determine the same. Article 21A does not talk about affirmative action at all and if the same for SCs, STs and SEBs in the RTE Act can be sustained only if expressly allowed by Article 21A then logically the entire part of the RTE Act that provides for 25% reservation of seats for SCs, STs and SEBs is unconstitutional. This could not possibly be correct. Part III of the Constitution itself permits reservation of seats in private schools for the very beneficiaries mentioned in Section 2(d) of the RTE Act. The authority for horizontal application of Article 15(5) by means of the Reservation Provision is to be found in Article 15(5) and not Article 21A. The petitioner schools, the State and the majority opinion- all failed to make this distinction.

The question is whether the Reservation Provision is constitutionally valid when it horizontally imposes the burden of affirmative action as discharged by reservation of seats on a private unaided non-minority school. The answer to that question is yes. Article 15(5) of the Constitution clearly provides that private unaided educational institutions can be subjected to the constitutional policy of affirmative action for advancement of SCs, STs and SEBs. The Reservation Provision is very clearly legislated for the advancement of the very beneficiaries that Article 15(5) constitutionally permits. The Reservation Provision is therefore constitutional.

Constitutional Validity of Article 15(5)

Article 21A and Article 15(5) were originally not a part of the Constitution. Article 21A was inserted by the 86th Amendment while Article 15(5) was inserted by the 93rd Amendment. All

amendments to the Constitution are subject to judicial review by the Court. Using the Basic Structure Review, the Court can review whether or not a constitutional amendment violates the basic structure of the Constitution.[35] If the Court finds in affirmative, it can strike down the impugned amendment.

In *Ashoka Thakur,* Article 15(5) was subjected to a Basic Structure challenge before a constitution bench of five judges of the Court. The question of the horizontal application of Article 15(5) to private unaided non-minority educational institutions was left unanswered. The single judge minority opinion struck down this horizontal application by holding that this violated Article 19(1)(g) which was a part of the Basic Structure of the Constitution.

The correctness of the dissenting opinion in *Ashoka Thakur* has been questioned in the dissenting opinion in the RTE Case[36] on the ground that Article 19(1)(g) 'is not a facet of the basic structure of the Constitution, and can be constitutionally limited in its operation', though, no analysis has been offered for this conclusion. The dissenting judge in the RTE Case was of the view that 'in order to achieve socio-economic rights' the State 'can remove obstacles by limiting the fundamental rights through constitutional amendment'.[37] It is indeed unfortunate that both minority and majority opinions in the RTE Case considered the fundamental rights to be 'obstacles' in the way to achieve socio economic rights.

The minority opinion in *Ashoka Thakur* has been questioned in academic literature as well.[38] Professor Singh has argued that Basic Structure Review can only be invoked when the

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[35] On standards of judicial review in Indian Constitutional Law generally and 'basic structure review' specifically *see* KRISHNASWAMI, SUDHIR, DEMOCRACY AND CONSTITUTIONALISM IN INDIA – A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

[36] *The RTE Case , Supra* note 10 at 3488, ¶ 92 (per Radhakrishnan, J).

[37] *Id*. at 3489

[38] M. P. Singh, *Ashoka Thakur v. Union of India: A divided verdict on an undivided social justice measure*, 1 NUJS L. REV. 193 (2008).

amendment has an element of abuse of power or there appears to be a collateral purpose behind the purported scope of the amendment.[39] He has argued that the 93rd Amendment does not abrogate the right to occupation in Article 19(1)(g) and his argument are worth reproducing in full –

> "It is true, as it has been admitted as much by the other judges as by Bhandari J, that the amendment overrules some of the propositions laid down by the Court in *TMA Pai*[40] and *Inamdaar*[41]. But it is nobody's case that it could not be done by an amendment of the Constitution. The amendment does not abrogate the right to occupation or any other right in Article 19(1)(g). Nor does it remove or narrow down the newly recognized right to run educational institutions as occupation. It does not even amend the provision for restrictions that may be imposed on the right to occupation under Article 19(6). It simply clarifies or at the most removes a not essentially required interpretation given to the newly recognized right to occupation to run educational institutions under Article 19(1)(g)." [42]

Entering into a detailed examination of whether or not Article 19(1)(g) is, or should be, a part of the basic structure of the Constitution would be beyond the scope of this paper. It is, however, beyond doubt that the question as to whether the horizontal effect of Article 15(5) extending to private unaided non-minority schools violates the Basic Structure of the Constitution remains judicially unanswered.

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[39] *Id*. at 209

[40] TMA Pai v. State of Karnataka (2002) 8 S.C.C. 481 (India) [Hereinafter "TMA Pai Case"].

[41] PA Inamdar v. State of Maharashtra (2005) 6 S.C.C. 537 (India).

[42] SINGH M.P., *Supra* note 37 at 210.

This very question has now been raised in *Pramati Educational & Cultural Trust v. Union of India*[43] where the constitutional validity of both the 86th Amendment (Article 21A) and the 93rd Amendment (Article 15(5)) has been challenged as violative of the basic structure of the Constitution. The case is currently pending before the Court. It remains to be articulated, but is beyond the scope of this paper, what will be the fate of the Reservation Provision and the Reimbursement Provision now that both Articles 21A and 15(5) are under challenge before the Court.

PART II

Constitutional Validity of the Reimbursement Provision

The Reservation Provision subjected the private schools to affirmative action by way of reservation of seats. In this way it applied those provisions horizontally. The Reimbursement Provision did the same thing. It extended the horizontality of the fundamental right to primary education and took it beyond the reservation of seats. The private schools, not only had to reserve 25% of the seats for the incoming class for SCs, STs and SEBs, they also could not charge any fee. Instead the State will pay their fee. But the Reimbursement Provision puts a cap on the extent of reimbursement which will only be to the extent of "per-child-expenditure incurred by the State".

The petitioner schools argued that this provision was unconstitutional since Article 21A imposes an obligation on 'State and State alone' which cannot be expanded horizontally. They argued that the text of Article 21A as well as the legislative intent behind the provision

[43] Writ Petition (Civil) No. 416 of 2012 (currently pending before a Constitution Bench of the Supreme Court; next listed for February 27, 2014 for further proceedings; a copy of the Petition is on file with author; the daily orders can be retrieved from the website of the Supreme Court of India at *http://www.courtnic.nic.in/courtnicsc.asp* using the case number). As per the recent order (dated February 26, 2014) as available on the Court's website, arguments of one of the Senior Counsel appearing in the matter have been concluded and the matter is listed for further arguments.

clearly showed that Article 21A never intended to put the burden of discharging the constitutional obligation under Article 21A on private educational institutions. The idea is not 'even remotely indicated' in the text of the Constitution.[44] In other words, Article 21A cannot be horizontally applied. Some petitioners argued that this provision makes 'serious inroads' into the rights guaranteed by Part III and 'completely takes away' those rights. This was against the very purpose of incorporating those rights in Part III of the Constitution and therefore cannot be allowed.[45]

The Attorney General argued that Article 21A creates an obligation that binds not just the State but also private or non-state actors.[46] The Solicitor General argued article 21A must be considered a 'stand alone' provision not subject to Article 19(1)(g).[47] Supporting the State, The Azim Premji Foundation, appearing as an intervener argued that Article 21A calls for a horizontal application. Relying on certain other constitutional provisions, the Foundation argued that there are other provisions in the Constitution that have a horizontal application.[48]

However the majority opinion seemed to have missed this question completely. Chief Justice Kapadia held that –

> "Indeed, by virtue of Section 12(2) read with Section 2(n)(iv), private unaided school would be entitled to be reimbursed with the expenditure incurred by it in providing free and compulsory education to children belonging to the above category to the extent of per child expenditure incurred by the State in a school specified in Section 2(n)(i) or the actual amount charged from the child,

[44] *The RTE Case, Supra* note 10 at 3480, ¶ 60.

[45] *Id*. at 3481, ¶ 63.

[46] *Id*. 3479, ¶ 57.

[47] *See THE RTE CASE , supra* note 25.

[48] *The RTE Case , Supra* note 10 at 3480, ¶ 59 (Submissions of the intervener The Azim Premji Foundation).

> whichever is less. Such a restriction is in the interest of the general public. It is also a reasonable restriction."[49]

The Chief Justice does not seem to appreciate that the question of the constitutional validity of the Reimbursement Provision was of extreme constitutional importance. The Court has never had the occasion to deal with a question like this before. Probably because a law like the RTE Act has never been passed by the Parliament before. Instead he chose to invoke the currently existing compartments in Indian Constitutional Law to find the answer to this question.[50] Justice Radhakrishnan however devoted an entire part of his minority opinion to this question[51] and after referring to several international documents, decisions of the South African Constitutional Court and relevant Indian constitutional and legal provisions, concluded that –

> "Primary responsibility of children's rights, therefore, lies with the State and State has to respect, protect and fulfil children's rights[52] … Article 21A requires non-state actors to achieve the socio-economic rights of children in the sense that they shall not destroy or impair those rights and also owe a duty of care. The State, however, cannot free itself from obligations under Article 21A by offloading or outsourcing its obligations to private State actors like unaided private educational institutions or to coerce them to act on the State's dictate[53]… **If the Constitution wanted that obligation to be shared by**

[49] *The RTE Case , Supra* note 22.

[50] For a criticism of the Court on these grounds, *see* MARK GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 483-89 (1987).

[51] *The RTE Case , Supra* note 10 at 349, ¶¶ 110-121 ('Part III – Obligations/Responsibilities of Non-State Actors in Realization of Children's Rights').

[52] *The RTE Case , Supra* note *10* at 3495, ¶ 116.

[53] *Id*. at ¶ 117.

> **private unaided educational institutions the same would have been made explicit in Article 21A**[54].
>
> (Emphasis Added)

The minority opinion, therefore, very clearly held that Article 21A does not permit the Parliament to apply it horizontally. The emphasized portion is of great importance. Justice Radhakrishnan is of the view that if the Constitution does not expressly provide for horizontal application of a provision, it cannot be so applied. Applying the above quoted proposition of constitutional law, Justice Radhakrishnan held that –

> "I am, therefore, of the considered view that Article 21A, as such, does not cast any obligation on the private unaided educational institutions to provide free and compulsory education to the children of the age of 6 to 14 years. Article 21A casts constitutional obligation on the State to provide free and compulsory education to children of the age 6 to 14 years[55]… to compel the unaided non-minority and minority private educational institutions, to admit 25% of the students on the fee structure determined by the State is nothing but an invasion as well as appropriation of the rights guaranteed to them under Article 19(1)(g)…"[56]

In this way the minority opinion goes on to 'read down' the Reimbursement Provision holding that the 25% reservation provision, "…can be given effect to only on the principles of voluntariness, autonomy and consensus and not on compulsion or threat of non-

[54] *Id*. at 3497, ¶ 123.

[55] *Id*. at ¶ 126.

[56] *Id*. at 3500, ¶ 132 and also at 3501, ¶¶ 135 (holding that §12(1)(c) of the RTE Act is not a restriction that falls into article 19(6), rather, it destroys the freedoms guaranteed in article 19(1)(g) and that neither the DPSPs nor article 21A cast any obligation on unaided private schools to provide free and compulsory education to children between to ages of 6 and 14 years).

recognition or non-affiliation."[57] The majority had already upheld the application of both the Reservation as well as the Reimbursement Provision to private unaided non-minority schools and thus the Court held that these provisions will apply to all schools mentioned in Section 12(1) except unaided minority schools.

Ignoring the relevant part of the *TMA Pai* decision

Both majority and minority decisions refer to the *TMA Pai*[58] decision. The minority opinion cites from that decision quite extensively. But both fail to cite that part of *TMA Pai* where the answer to the question of the constitutional validity of the Reimbursement Provision was provided by that bench of eleven judges of the Court.

In *TMA Pai* a eleven judge bench of the Court assembled to decide on the complicated question of the fundamental right to education. The Court examined several questions in this case. One of those was whether or not there is a fundamental right to establish an educational institution under the Constitution. The Court found that such a right is found under Article 19(1)(g) and Article 26.[59] Establishment and running of an educational institution is a fundamental right that falls under the expression 'occupation' in Article 19(1)(g) and is subject to Article 19(6).[60] The right to establish and run an educational institution includes the right to admit students, set up a reasonable fee structure, constitute a governing body, appoint staff (teaching and non-teaching) and take disciplinary action against the staff.[61]

Can private or non-state actors be asked to bear the cost of the constitutional burden of providing free and compulsory primary education that only the State is constitutionally

[57] *Id* at 3510 (per 'Part VI Conclusions', no. 3).

[58] *TMA Pai Case , Supra* note 39.

[59] *Id*. at 533 ¶ 18.

[60] *Id*. at 535, ¶ 25.

[61] *Id*. at 542, ¶ 50.

obligated to discharge? They have been asked to bear this cost by the Parliament by enacting the Reimbursement Provision. It is important now to briefly revisit the engineering of the two provisions being analyzed. The Reservation Provision only provides for reserving 25% seats. That provision in and of itself does not ask the private schools to bear the cost of providing free education. The Reimbursement Provision read with the Reservation Provision asks the private schools to bear the cost of providing free education. Let us say that there was no Reimbursement Provision. It would be a safe bet then that the constitutional challenge to the Reservation Provision would have come, as it has in the past, from the candidates who will now be denied admission because of the 25% reservation. Probably because then the schools would not have had any economic interest in the matter. But the moment the right to design and charge fee is affected, the economic interests of the schools are affected. In this case the litigants were not students but the educational institutions, as was the case in *TMA Pai*.

By virtue of this provision the right to fundamental free primary education has been given a horizontal effect in the sense that private or non-state actors have been asked to bear the financial burden of providing this right. Consequently now, the private unaided non-minority schools will have to charge more money in tuition fee from the other 75% students that they admit in the school. In this way these 75% of the students will be subsidizing the education of the reserved 25% who come from socially or economically weaker sections of the society. In Part I, I have showed that the Reservation Provision is constitutionally valid. To that extent there is no dispute that seats can be reserved for SCs, STs and SEBs in private unaided non-minority schools. The question now is whether imposing the financial burden of delivering free primary education on private or non-state actors is constitutionally permissible.

A strong hint in favour of this comes from the *TMA Pai* case. Chief Justice Kirpal talking specifically about the right to set up a reasonable fee structure held that –

> "With regard to the core components of the rights under Articles 19 and 26(a), it must be held that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships of scholarships, if not granted by the Government… The fee structure must take into account the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students."[62]

Note that Chief Justice Kirpal first speaks of the need to provide a 'freeship' or a 'scholarship' and then talks about the need to generate funds for the institution. The sequence is crucial because, despite there being dissenting minority opinions on other points, on this particular holding all eleven judges agreed. Is the Chief Justice alone when he talks of this constitutional arrangement? He is not. While all other eleven judges agreed, two more went on to say the exact same thing in the exact same way in a concurring opinion.

In their concurring opinion Justice Variava and Justice Bhan held that –

> "If the educational institution is willing to provide free seats then the costs of such free seats could also be partly covered by the fees which are now to be fixed[63]… Of course now by the virtue of this judgment the fee structure, fixed under any regulation or enactment, will have to be reworked so as to enable

[62] *Id*. at 543-44, ¶ 53.

[63] *Id*. at 669, ¶ 392.

> educational institutions not only to break even but also to generate some surplus for future development/expansion and to provide for free seats."[64]

Both times the Court speaks of making sure that the ones who cannot afford to pay get access to education first and then goes on to make the 'reasonable surplus' point. The private educational institutions need to generate a reasonable surplus for their own good and accordingly must determine what fee to charge the students. The element of free education for those who cannot pay, however, is one of the factors that goes into determination of the fee.

Is the Reimbursement Provision doing something prohibited by the Constitution? Clearly the doctrine of the Court is very clear on the issue. An eleven judge bench has spoken on the issue and very clearly so. It is difficult to see, in light of these observations, how the Reimbursement Provision could be found unconstitutional.

CONCLUSION

I have demonstrated above that the Reservation Provision is constitutionally valid because the Parliament has the necessary competence to enact such a provision. The fundamental right to primary education can be horizontally applied but not because of Article 21A. This horizontality is to be found in Article 15(5). The insertion of Article 15(5) changed the way the Court is required to judicially review such legislations. The Court cannot take recourse to article 19(g) anymore if the law provides for affirmative action and asks private educational institutions to reserve seats for SCs, STs and SEBs. The Court made a mistake when it judicially reviewed the RTE Act by using article 19(6). The Court made another mistake when it relied exclusively on the DPSPs to give content to 'reasonable restrictions' under

[64] *Id*. at 669, ¶ 393.

Article 19(6). I have also demonstrated that the Reimbursement Provision is constitutionally valid because in *TMA Pai,* the Court had put the need to provide access to quality education to the SCs, STs and SEBs above the need to generate surplus in case of private educational institutions. The Court made a mistake when it used article 19(6) to review the Reimbursement Provision. Now that the Parliament has made the right to primary education a fundamental right, the Court had a great opportunity to articulate a better standard of review which could be applied to 'socio-economic rights' cases by the Courts. The traditional standards of review would not work in these cases. It would require further research and reflection to develop new models of judicial review which the Court can use in order to effectively handle 'socio-economic rights' cases.

THE IMPLICATIONS OF CONSTITUTIONAL FLEXIBILITY ON THE LIFESPAN OF THE KENYAN INDEPENDENCE CONSTITUTION

Duncan Okubasu Munabi*

ABSTRACT

A characteristic of most supreme written constitutions is that they implicate their own amendment procedure. Mostly, they prescribe the manner in which they can be changed. There are written constitutions that are considerably uncomplicated to amend while others are intricate if not impossible to amend. While constitutions should endure, the manner in which they are amended can influence not only their durability but also the manner in which they can be replaced. A constitution that is very rigid may live for a shorter period of time in that a society can easily resort to extra legal means of changing it. Yet, a constitution that is very flexible could easily survive for a longer time but with the risk that it can easily lose its value content. Illustration to this can be drawn from Kenya's constitutional history which reveals that flexibility had a direct impact on the number of years that the Independence Constitution lived. On the one hand, rigidity without proper institutional safeguards rendered the constitution amiable to being very flexible with the effect that the Kenyan society became dissatisfied with the constitution and sought its replacement. On the other hand, the political class on its part exploited the flexible attribute of the constitution when threatened, and through easy to make amendments, lessened the threats to the life of the Kenya's repealed constitution.

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INTRODUCTION

Most written constitutions do not endure.[1] Many are replaced after a short period of existence; some violently and others peaceably. Worldwide, studies show that constitutions endure for an average of about 17.5 years only.[2] While constitutional longevity is not desired as an end in itself, several reasons have been advanced in favour of enduring constitutions.[3] First, a strong relationship is said to exist between long-lived constitutions and democracy.[4] Second, durable constitutions provide predictability making capitalism flourish, and third, enduring constitutions act as an important tool of national cohesion and unity.[5] Generally, constitutions are enacted in anticipation that they will endure and serve not only the enacting generation but also the posterity.[6] In recognition of the changing dynamics of societies though, most, if not all constitutions, are amenable to constitutional change either through amendments or judicial interpretation.[7] However, sometimes, amendments through the constitutionally sanctioned way not being feasible, societies are compelled to resort to extra-constitutional means of constitutional change.[8] For this reason, scholars who have attempted

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[1] By written constitutions, this work means national written constitutions. There are countries that have provincial, regional or state constitutions. Salient is the United States of America whose states have constitutions. The most well-known sub-national level constitution includes the Quebec Constitution in Canada. In Africa, virtually all countries have more than one Constitution after their independence despite that most of them just attained their independence in the 1960s. Countries such as Niger and Chad have had 6 and 9 constitutions respectively from 1960 when they attained their independence. The constitutions in Venezuela have been replaced 26 times since independence, those in Dominican Republic 36 times while the French constitution has been replaced 16 times. Data extracted from LJ Cordiero, 'Constitutions around the world: A view of Latin America' (2008) (164) IDE *Discussion Paper No*. 6.

[2] Zachary, E. et. al., *The Lifespans of Written Constitutions* (2008) 9. *See also* Gathii J who says that 'African Countries have produced a torrent of constitutions since 1989.' Gathii J, *Constitution Making: Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya'* 49 WM. & MARY L. REV., 1109-38 (2008).

[3] ZACHARY, E.*ET AL* , *supra* note 2, at 9.

[4] Zachary E. et al, *supra* note 2 at 9.

[5] ZACHARY E. ET AL, *supra* note 2 at 9.

[6] Zachary E. et al *, supra note 2 at 9.*

[7] *See* VILLE, RJ 'CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATION, AND LEGISLATIVE AND EXECUTIVE ACTIONS (1994, West-port CT: Praeger); *See also*, M Besso, *Constitutional Amendment Procedures and the Informal Construction of Constitutions* 1 THE JOURNAL OF POLITICS 69 (2005).

[8] ZACHARY, E. ET AL , *supra* note 2, at 9.

to investigate durability of constitutions have suggested constitutional flexibility as an antidote for infant constitutional demise.[9] It is argued that constitutions that either lack flexible formal amendment process or effective mechanisms of formal interpretation do not take extra-constitutional actions and often die early.[10] The Kenyan Independence Constitution lived for forty seven years (this is contestable since as shall be shown, it lost its value content after one year). A reflection of Kenya's constitutional history reveals that flexibility implicated on its lifespan in two ways. First, the clamour for constitutional change was ignited by initial amendments (that deprived it of its value content) after it had been rendered extremely flexible. The impetus for its replacement having been set though, flexibility enabled it to live longer than it would have done.

AMENDING FLEXIBLE AND RIGID CONSTITUTIONS

The need for a flexible constitution, one that was considerably easy to amend, was an agenda during the negotiations of Kenya's Independence Constitution.[11] Political elites 'representing' Kenyans contended with the Colonial Secretary that if the constitution was rigid, it was not going to be possible for necessary changes to be made to it and as a result, people would amend it through unconstitutional means.[12] Further, an argument was advanced that if one of the provisions of the constitution was breached as a result of inability to amend it, the remaining part of the constitution would crumble.[13] The Colonial Secretary however was not for a constitution with a simplified procedure of amendment and the request was turned down.[14] Entrenchment was viewed as desirable at that time for a nuanced protection of

[9] *See*. Z Negretto, Gilsburg, T *Replacing and Amending Constitutions:The Logic of Constitutional Change in Latin America* (2010); Zachary E, James M, Ginsburg T, *The Endurance of National Constitutions* (2011).

[10] ZACHARY E. ET AL, *supra* note 2 .

[11] Sanger, C & Nottingham, J, *The Kenya General Election of 1963*, 2 (1) *The Journal of Modern African Studies* 21 (1964). (Hereinafter "Sanger").

[12] *Id* at .21.

[13] Sanger, *supra* note 11 at 21.

[14] .Sanger, *supra* note 11.

individual rights, tribal land entitlements, and regional boundaries.[15] While conceptually, this argument by the political elites was valid in the light of the proposition that unlawful means of constitutional change are often resorted to whenever the amendment procedures are, either too rigid or too difficult to comply with, constitutional rigidity is an aspect of constitutionalism.[16] It affirms the supremacy of a constitution by raising the constitution above those who might want change it and in so doing prevent what Professor Charles Fombard describes as 'arbitrary, hasty and opportunistic changes.'[17]

Constitutions which are not easy to amend are what this paper calls rigid constitutions. Flexible constitutions are those that are easy to change formally through the constitutionally provided mechanisms.[18] Most rigid constitutions, like the United States of America's are difficult to change formally and changes to them often take the form of judicial interpretation.[19] However, this informal change requires an assertive judiciary and not a subservient one. A popular feature of rigid constitutions is the already mentioned use of entrenched clauses.[20] These are clauses which are either difficult to amend or not subject to amendments at all.[21] The rationale behind entrenchment is to afford them a higher safeguard against the vicissitudes of the polity.

A rigid constitution follows a process that is not only different from the process of amending a normal legislation but also an exceptional and more difficult one. Substantively, the power to amend some of its provisions may itself be limited, an architecture that has been adopted in

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[15] Sanger, *supra* note 11 at 20.

[16] *See generally*,Fombard, C.M., *Limits on Powers to Amend Constitutions: Recent Trends in Africa and their Impact on Constitutionalism*, 6 UNIVERSITY OF BOTSWANA LAW JOURNAL 27-60 (2007).

[17] Fombard, C.M, 'Some Perspectives on Durability and Change in Modern African Constitutions' (2010) .

[18] *See* Lorenz, A, '*How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives*' 17 (3) JOURNAL OF THEORETICAL POLITICS 339 (2005).

[19] *See* ZACHARY ET AL, *supra* note 2; *See also* Ferejohn, J *The Politics of Imperfection: The Amendment of Constitutions*, 22 (2) LAW & SOC. INQUIRY 521 (2006).

[20] *See,* e.g., [C.F.] [CONSTITUTION] art 60(Braz.);, Article X, *Constitution of Bosnia and Herzegovina; See also* Katz, E, *On Amending Constitutions: The Legitimacy and Legality of Constitutional Entrenchment* 29 *Columbia Journal of Law & Society* 251 (1995-1996).

[21] *See,* e.g, 1978 CONST. art 89,(France).

many constitutions.[22] For instance, the Constitution of Honduras provides in this regard that the amendment clauses relating to the form of government and re-election of a President are not subject to amendments.[23] The process would be made different and difficult in that first, the procedure of initiating amendments should not be the one used in amending normal legislations. For example, the Kenyan 2010 Constitution also provides in this regard that an initiation of an amendment through 'popular initiative' must be signed by at least one million registered voters.[24] Further, more than one institution may be required to effect an amendment to a rigid constitution and the period for processing the amendments would in some constitutions be lengthened.

Flexible constitutions however have a potential of living for a considerably long period of time.[25] However, the difficulty is, by becoming amiable to political forces and dictates, they lose their value contents or rather, that ability to control. Rigid constitutions are likely to maintain their value content with the risk that they are easily amiable to extra-constitutional modes of constitutional change. In some instances, such overthrows are associated with not only violent revolutions but also a complete breakdown and change of the legal and political order.[26] In the same light, Professor Fombard has challenged entrenched clauses arguing that while constitutions should be designed to endure so that they can ensure political stability, 'they are not immutable documents frozen in time or cast in stone such that they must endure regardless in polity's circumstances and citizen value.'[27]

[22] *See* for instance the eternity clause in the *Basic Law*.
[23] Art 374, Constitution of Honduras.
[24] *See* Art. 275, Constitution of Kenya 2010.
[25] *See generally*, BE Rasch, *Amendment Procedures and Constitutional Stability in* RASCH & CONGLETON, AMENDMENTS 536 (2006).
[26] A salient example demonstrating violent constitutional ousting is Egypt.
[27] FOMBARD,*supra* note 17..

THE KENYAN INDEPENDENCE CONSTITUTION: HOW RIGID WAS IT?

Even though Kenyans did not own the process of drafting the maiden constitution, it had fairly laudable attributes. Kamau Kuria described the maiden Kenyan Constitution in the following manner:

> "American, and above all, English constitutional jurisprudence gave the Kenyan framers their model for self-government under law. Kenya would be a multi-party democracy, with powers divided amongst independent judiciary, a bicameral legislature and an independent executive. The government's power would further be restrained by a justiciable bill of rights, federalism, a professional civil service, civilian supremacy over the armed forces, a tenured attorney general and restriction on the exercise of emergency powers."[28]

These ideals had to be safeguarded against the political elites, a suspicious group that had participated in negotiating it. The Independence Constitution was considerably rigid in some respect. Passing an amendment to it required the input of both houses, the Senate and the National Assembly.[29] Some amendments required at least 75 % of the members in the both houses while others demanded even a higher threshold in the upper house.[30] For some of the clauses, the framework constitution had even proposed a 75 p% vote of each house, or, a new alternative -a two-thirds majority in a nation-wide referendum.[31] Further millage was provided in that in cases where voting was supported by the majority of the members and not opposed by more than35% of the members, a further vote would have had to be taken.[32]

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[28] GK Kuria. *Confronting Dictatorship in Kenya* 2 (4) JOURNAL OF DEMOCRACY 119 (1991).

[29] Sanger , *supra* note 11.

[30] Mutua, M, *Justice under siege: The Rule of Law and Judicial Subservience in Kenya*, 23 HUM. RTS. Q. 96 (2001).

[31] Sanger, *supra* note 11..

[32] Sanger, *supra* note 11.

Okoth-Ogendo notes about its framework that had made it difficult for the Independence Constitution to be amended in the following manner:

> "An extremely rigid procedure was established, particularly for 'entrenched clauses'- those dealing with citizenship, fundamental rights, senate provisions, regional structures, the judiciary, land; to change these a 75% vote in both second and third reading in the lower house and a 90% vote in the senate were needed."[33]

The main safeguard for rigidity was thus in raising the threshold for voting for an amendment. Proper constitutional design for a rigid constitution would however require more than just raising the threshold for passing an amendment. The maiden constitution should also have followed a process that was not only different from the process of normal legislation but also a special and more demanding one. One handicap on the part of the Independence Constitution was that whereas it prescribed a higher vote's percentage to pass an amendment which was to be considered by the bicameral legislature it had created, the process of initiating the amendments had not been made cumbrous. Furthermore, it did not set time constraints that would require the amendments to be considered for a long period. The fifth substantive amendment to it was as a result of this handicap introduced, debated and passed within forty eight hours only.[34]

INSTITUTIONAL SAFEGUARD TO THE INDEPENDENCE CONSTITUTION

Weak institutions shielded the constitutional authority to amend the constitution. There was further no vivacious institution that would consider the lawfulness or otherwise of the amendments to the constitution. If an amendment was passed in disregard to the laid out procedures, it would possibly not be questioned. For that reason, most amendments to the

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[33] Okoth-Ogendo H.W.O, *The Politics of Constitutional Change in Kenya Since Independence, 1963-1968*, 71 THE AFRICAN AFFAIRS 17 (1972).
[34] *Id* at 27.

constitution were of dubious legality particularly those that were done before the voting threshold was lowered. In other jurisdictions courts would safeguard the constitution by considering the lawfulness of the amendments so that they are in line with the constitution or at least constitutional principles.[35] The court system that had been established by the Independence Constitution had weak review powers. However, considering that most of the judges that served then were non-black, it would have been improper for the courts to have strong review powers. During independence, there was euphoria towards uhuru (freedom) from colonial Britain and restraint and self-censoring by British born or educated judges was certainly desired.[36]

Besides, the authority of the courts to question the lawfulness of the amendments had in a way been curtailed. First, there was no inbuilt provision in the constitution empowering the courts to question amendments particularly after the abolition of one of the houses and a subsequent amendment to the procedure of amending the constitution. Second, the jurisdiction of the courts to challenge the legality of an amendment to the constitution had been ousted.[37] Whenever a bill to amend the constitution was passed, the speaker would certify it. Certification in itself would affirm the amendment.[38] The certificate could not be questioned in court even on the basis that the procedure in the constitution was not followed. The role of the courts in safeguarding the Constitution (or at least the people's right to participate in changing it) was thus largely muted until 2004 when the constitutionality of the *Constitution of Kenya Review Act, 1998* and the constitution making process was challenged in the case of *Timothy Njoya & 6 Others v The Attorney General & 2 Others*.[39] In that case,

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[35] A salient example is South Africa's Constitutional Court.

[36] *See*, e.g, KURIA, *supra* note 28, at 120. *See also*, T Marshall, *The Reminiscence of Thurgood Marshall (Columbia oral History Office, 1977)*, *in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS AND REMINISCENCE 413, 446 (Tushnet, Mark ed.),

[37] *See* OGENDO, *supra* note 33..

[38] OGENDO, *supra* note 33.

[39] *Miscellaneous Civil Application* No 82 of 2004.

judicial review proceedings were instituted to challenge the review process as set out in the *Constitution of Kenya Review Act 1998*. The leading judgment by Ringera J affirmed the role of Kenyans themselves to participate in a process leading to constitutional replacement. Before 2010 also, judges largely lacked independence as a result of the manner in which they were appointed and removed.[40] Assuming even that the role of courts to question the lawfulness of the amendments had been prescribed in the Independence Constitution, it was unlikely that that role would be asserted by even the non-black judges. The judiciary was docile and seemingly scared of the executive, an incidence that reduced it to almost irrelevance. Professor Makau Mutua notes regarding this nature of the judiciary thus:

> "…the force of habit and the culture of subservience to officialdom was too difficult to overcome, despite the protections provided for in the independence Constitution. The regimes of President Kenyatta and President Moi, his successor, treated the courts just like any other agency within the executive. Finally in 1988, President Moi prevailed over the rubber stamp Parliament to pass a constitutional amendment with far reaching implications for judicial independence and respect for human rights in Kenya. In a stunning act of docility, the KANU Parliament removed the security of tenure for judges."[41]

Thus, during its lifetime, the Independence Constitution did not enjoy judicial protection from deleterious amendments. Its life lay squarely in the hands of the executive and the legislature; the judiciary was subservient to the two. What made it even more difficult for the legislature to safeguard the Constitution was the fact that the then members of the cabinet were drawn from the National Assembly itself. Arguably, this meant that if the president wanted to pass an amendment, he would easily influence parliament to pass it. Cabinet

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[40] J Cottrell & Y Ghai, *Constitution Making and Democratization in Kenya*, 14 (1) *Democratization* 3 (2007).
[41] MUTUA, supra note 30 at 101.

members were the president's appointees chosen from parliament. Parliament, as a body that had been vested with the powers to amend the constitution, was vulnerable to manipulation by the executive. The initial inbuilt check was in parliamentary restriction which was intended to guard against tenuous control of parliament.[42]

Further the private bar, the Law Society of Kenya, was weak, sometimes being controlled by the state. The private bar, according to Makau Mutua, 'solidly allied with the Kenya African National Union (KANU) whenever president Moi Government carried out widespread attacks on outspoken critics of his regime.'[43] As such it could not effectually agitate against opportunistic amendments.

ADULTERATION OF THE INDEPENDENCE CONSTITUTION: THE RUINING AMENDMENTS

Just after independence, the 1963 Constitution underwent a number of substantial amendments, some of which stripped it of its already frail rigid characteristic. The very first amendment came into being in 1963, just after the elections.[44] In the Independence Constitution, Kenya had a parliamentary system of government with a Prime Minister as the head of state. That first amendment declared Kenya a republic and created a new form of government, the presidential system.[45] Kenyatta, who then was the prime minister, became president automatically without approval of the people. This certainly contravened the republican legal thought which envisages that leaders should be chosen by the people.[46]

Then came the second amendment which sought to alter the regional arrangements that had been set out in the Independence Constitution.[47] These two were substantive and significant but did not have as much an ominous effect as the third substantive amendment. The third

[42] *See generally*, Y.P. Ghai, *The Government of Kenya and the Kenyan Constitution'* EAST AFRICAN JOURNAL 27 (1967).
[43] *Id*
[44] OGENDO, *supra* note 33 at , 19.
[45] OGENDO, *supra* note 33 at 19.
[46] OGENDO, *supra* note 33 at 19.
[47] *Ogendo, supra* note 33 at 20.

amendment ripped the Independence Constitution of its ability to control the manner of amending it.[48] It changed the procedure for amending the Independence Constitution.[49] It did so by reducing the voting threshold for amending the Constitution from the set 75 % (for some clauses) in both houses to 65% in both houses for all purposes.[50] In doing so, the entrenched clauses stood abolished. Since then, it was easy for parliament to pass any amendment. Because of the flexibility orchestrated by the third amendment, institutions established by the Constitution became weaker and some even came crumbling. In this regard, the senate was abolished through the seventh amendment. These sullying amendments had the effect of destroying not only the identity of the maiden constitution, but, as mentioned, also its value content. The constitutional power to control the acts and decisions of the executive and legislature remained largely unbridled and the Independence Constitution then became a tool for suppressing political opposition.

Most, if not all, amendments to the constitution were politically enthused. According to Nyongo, one of the ways of succeeding in politics is by eliminating the opposition.[51] All the amendments to the constitution appear to have been aimed at achieving this end. One of the functions of a constitution is to act as a tool of control. It controled the exercise of public power so that the power created by the constitution is used for the purposes for which it was created. This was however not the case with the Independence Constitution. It did not limit and control the use of public power. It was largely used to propagate political interest for personal gain, not for the gain of the wider Kenyan society. According to Okoth-Ogendo, 'the process of amendment was used almost exclusively to solve political problems, some of

[48] OGENDO, *supra* note 33 at 19.
[49] Act. No 14 of 1965.
[50] *Id.*
[51] Nyongo, PA, *State and Society in Kenya: The Disintegration of Coalitions and the Rise of Presidential Authoritarianism*, 88 (351) AFRICAN AFFAIRS 250 (1989).

which were of a public and defensible nature, others private and indefensible.'[52] The constitution was thus increasingly used as a tool to direct who gets into power. This use of the constitution is disclosed in the work of Professor Ghai and Professor Cottrell who write:

> "The institutions of the government and economy decayed under the shadow of a powerful president and his inner circle. These institutions became merely instruments of support to the ruling party, and even electoral process was twisted to serve it. There was no effective separation of powers. Parliament became ineffective. There were few institutions for accountability, such as an ombudsman, and such institutions as existed, like the auditor-general, were rendered toothless. Merit as the criterion for appointment or promotion in public services was replaced by political or ethnic connections, or monetary payments."[53]

Thus, whenever a threat to the then existent political status quo arose, an amendment would be passed to the constitution to dispose that threat. The devolution arrangements *(Majimbo)* were considered as a threat to the benefits of a unitary system of government and an attempt to consolidate power with a central executive saw its abolition. Professor Lawrence Juma notes for instance that "the strong KANU political elite overthrew the Majimbo Constitution."[54] A bicameral legislature was replaced by a unicameral one with the effect that it now became considerably easy to initiate and pass constitutional amendments In 1976 when Odinga Oginga announced that he would resign from being the Vice President with a view to forming an opposition government, the Constitution was amended to provide that Members of Parliament who sought to join opposition parties had to resign first and face re-

[52] OGENDO, *supra* note 33 at 10.
[53] COTTRELL & GHAI, *supra* note 40 at 10.
[54] L Juma, *Ethnic Politics and the Constitutional Review Process in Kenya*, TULSA J. COMP. & INT'L & COMP. L. 490 (2001-2002).

election.[55] The aim of this amendment was arguably to seclude Odinga from politics and power.

THREAT ON THE LIFE OF THE INDEPENDENCE CONSTITUTION: THE IMPACT OF 1982 EVENTS

There was a deadly menace to the life of the Independence Constitution in 1982. This threat was at the instance of the 1982 unsuccessful coup. There was an attempt to overthrow the then Moi government by a group of soldiers who took over the state radio station, 'Voice of Kenyan' and declared that they had taken over the government.[56] Had the coup succeeded, the constitution no doubt would stand ousted. While this may have had nothing to do with the flexible nature of the Constitution, it was a visible reaction to the mode of governance that the flexible constitution had ushered. It is easy to show that a dichotomy between the relationship of the presidency and an ousting of the president most often leads to an overthrow of the constitution. No doubt also, that would have led to a complete breakdown of the legal and political order. Political in the sense that KANU as a party would have been toppled. The constitution would then have endured for what would have been only nineteen years. In response to the attempted coup, Moi resorted to a restructuring of the military coupled with widespread and systemic suppression of the opposition. A constitutional amendment was passed in this regard, giving the police the power to detain critics of Moi.[57] He filled the military with loyalists particularly from his own tribe, Kalenjin.[58]

The environment that had been created by the post 1968 constitution had defied the rule of law and notions of a democratic rule. There was a systematic consolidation of the state power

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[55] THROUP, D & HORNSBURY, C, 'MULTIPARTY POLITICS IN KENYA, THE KENYATTA AND MOI STATES AND THE TRIUMPH OF THE SYSTEM IN THE 1992 ELECTION, (James Currey ed., 1998) 1.

[56] See K Mutunga, *Moment of Bravado that Changed Kenya*, DAILY NATION, 31 July 2012 *as available on* http://www.nation.co.ke/Features/DN2/How+1982+coup+changed+Kenya/-/957860/1467488/-/m1ppqp/-/index.html (Last visited on 3 March 2014)

[57] *See* MUTUNGA *supra* note 56.

[58] *See*, MUTUA, *supra* note 30.

which when coupled with erosion of the powers of the legislature and judiciary resulted in an unbridled abuse of state power. Massive violation of human rights directed at stifling opposition which took the form of political assassinations, arbitrary detention of political opponents to systematic torture and plundering of public resources became widespread.[59] Repressive laws and policies were employed by post- independence governments, all of which were geared towards ensuring that the then ruling party remains politically floating. It is also in this year that an amendment was passed in 1982 which had the effect of repression of political dissent as well as media freedoms. This came through the famous 'section 1' amendment that declared Kenya a one party state. Section 2A made it a requirement that an elected official be a member of the KANU.[60] According to Dr Kuria, the logic of the one party state was to use the law to destroy the political enemies of the sole legal party.'

The social and economic welfare of the Kenyan people during this period and thereafter became largely compromised as the civil and political liberties remained in captivity. Professor Yash Ghai and Professor Jill Cottrell note on this resultant ambiance in the following manner:

> "There was a sharp decline in the economy and the breakdown of the infrastructure; decreasing levels of production and export; illegal acquisition by the politically well-connected of huge tracts of land without putting it to productive use; and massive unemployment. People increasingly lost access to the basic necessities of life, while a few lived in unimaginable affluence. Guarantees of the security of person or business disappeared. Consequently there was a massive retreat from public life, an inward lookingness, a lack of openness and trust; and pervasive fear which drove many into exile."[61]

[59] *See* KURIA, *supra* note 28.
[60] G Lindsay 'Kenya: The Struggle to Create a Democracy' (1995) *BYU Law Review* 1995.
[61] COTTRELL & GHAI, *supra* note 40 at 4.

The period between 1982 and 1991 became therefore politically tumultuous. Moi's presidency became exceedingly unpopular. The unpopularity was heightened in about 1988 as a result of strong-arm politics and corruption in the government then, a situation that prevailed until early 1990s.[62] Dr Kamau Kuria captures the political dynamics of that time when he presents the 1992 scenario in two perspectives.[63] He notes that on the one side was 'a movement dedicated to restoring multi-party democracy' while on the other side was President Moi who he portrays as 'a long time enemy of free political completion who came to power in 1978 and imposed a constitutional barn for four years on multi-party democracy.'[64] The period between 1982 and 1991 was an extremely political and hostile environment and it is at that time that revolutionizing ideologies were incubated. Many who opposed the government fled the country seeking refuge.[65]

By 1991, it is arguable that a stage had been set for constitutional ousting. Kenyans had become dissatisfied with the Moi governance and wanted to do away with it. No doubt, by doing away with Moi, they would do away with the constitution on the basis of which he justified his rule. Dr Kamau Kuria notes that Kenya faced a disaster, 'possibly even a bloody civil war.'[66] Had the president not bowed to political pressure and repealed the 1982 amendment, the constitution would possibly have lived only until then. Had the constitution not been flexible enough to allow for an amendment repealing section 2A or had it been a cumbersome one, the probable recourse would have been through ousting, given the polarised nature of the country then, coupled with external pressure. However, so much power had been concentrated on the presidency such that the amendment repealing section 2A did not midwife the desired change. According to the Committee of Experts that drafted the 2010

[62] KURIA, *supra* note 28 at 115.
[63] KURIA, *supra* note 28.
[64] KURIA, *supra* note 28.
[65] COTTRELL & GHAI, *supra* note 40 at 4.
[66] KURIA, *supra* note 28.

Constitution, repeal of section 2A was itself 'insufficient to create a democratic constitutional framework.' Professor Lawrence Juma notes in this regard that the 1992 elections proved them wrong given that in 1992 and 1997 Moi was still in power and his dominance had not been tampered with.[67]

LIVING LONGER: A FRUSTRATION OF THE CONSTITUTIONAL REVIEW PROCESS AND THE EFFECT OF THE *NJOYA JUDGEMENT*

Having lost all its constraining essence, there was political consensus to 'review' the constitution (Independence Constitution). Although it could lead to it, review of a constitution does not necessarily mean its replacement.[68] It may just have the effect of changing many parts of it. Other than a few amendments that sought to underpin democratic and republican ideals like limiting the term's limits, it is at this stage that constitutional review became an agenda of both the government and the opposition.[69] This came with the enactment of the *Constitution of Kenya Review Act, 1997* to facilitate the review process. The Act was intended to facilitate review of the constitution by the people of Kenya and its alteration by parliament.[70] This Act did thus envisage a complete replacement of the constitution but through parliament.[71] The Act established the Constitution of Kenya Review Commission (CKRC) and tasked it with the role of facilitating that review.[72] In 2000, members of the CKRC were appointed with Professor Yash Pal Ghai as its chair person. Following massive public awareness and collection of the views of Kenyans, a draft

[67] JUMA *supra* note 47 at 1.
[68] Constitutional review does not mean consideration of acts of state organs by Courts to ensure they conform to the constitution.
[69] *See Generally*, GR Murunga &SW, *Kenya: The Struggle for Democracy* (2007).
[70] *See* Preamble, *Constitution of Kenya Review Act*, 2007.
[71] *Id.*
[72] *See* the Kenyan Forum: 2010-2011, *The Forum Hasn't Forgotten: The Kenya Human Rights Commission* (Part 1) *as available on* http://kenya-forum.com/styled-4/index.html accessed 20 January 2014.

constitution was published as envisaged by the 1997 draft. However, Moi put the process in abeyance having prorogued parliament in October 2002 in view of elections.[73]

Constitutional change had become an essential agenda for many political parties at that time. After the 2002 elections that saw the coming into power of National Rainbow Coalition (NARC), the National Constitutional Conference was reconvened and a draft constitution, which was popularly known as the *Bomas Draft* produced.[74] However, the process was sabotaged mainly by politicians. According to Professor Yash Ghai, the autonomy and process of the National Constitutional Conference was subverted by politicians 'of various hues, not only by boycotts, irrelevant grand standing or simple lack of interest but by outright bribery of delegates'.[75] Nonetheless as noted, a draft was adopted on 23 March 2004. Thus, had that the *Bomas draft* been adopted, the then Constitution would have died in 2004 since under article 311 of the *Bomas draft*, the then existent Constitution would stand repealed upon coming into force of the *Bomas draft.*

Soon thereafter, a group of persons led by Dr Timothy Njoya challenged among other things the constitutionality of the *Constitution of Kenya Review Act,1997* on the basis that it deprived the people of Kenya the opportunity to review the constitution and instead vested it in parliament.[76] Among other things, the court held that the process had not given the people their fundamental right to alter the constitution.[77] The effect of this judgment was to de-legitimise review as a means of a wholesome constitutional change. It also meant that Kenyans had now to participate in the constitutional change process directly through a referendum. This participation was demonstrated in 2005 through a rejection of a proposed

[73] *See* COTTRELL & GHAI *supra* note 34 at 7.
[74] COTTRELL & GHAI, *supra* note 34 at 7.
[75] COTTRELL & GHAI *supra* note, 16.
[76] Njoya & 6 Others v The Attorney General & 2 Others, Miscellaneous Civil Case No. 81 of 2004.
[77] *Id.*

constitution, popularly referred to as the *Wako draft.*[78] The Wako draft had been adopted by parliament but was rejected by the people in a referendum on 21 November 2005 through a 58 % 'no' vote against it.[79] This draft had been supported generally by the government and President Kibaki had led the 'yes' team to vote in favour of that draft.[80] That also implies that had the *Wako draft* been approved in the referendum, the 1963 Constitution would not have lived for 47 years.

THE ULTIMATE DEMISE

The ultimate demise of the independence Constitution was at the instance of the 2007 and 2008 post-election violence and the consequent 'mediation talks'.[81] This was after the disputed elections results that drove the country into chaos. Kofi Annan, the former United Nations Secretary General acted as the mediator in the talks with a view of resolving both the then existing problem and also to seek long term solutions to the problems that had led to the chaos. One of the agendas of the talks was the famous 'Agenda Four' which had identified constitutional review as one of the main themes towards restoration of ultimate peace in Kenya.[82] Pursuant to that agenda, parliament enacted the *Constitution of Kenya Review Act, 2008.* That Act was meant to facilitate the making of a new constitution. In terms of the Act, the Committee of Experts was constituted and tasked with preparing a draft of the constitution.

In the same year the repealed constitution was amended through an insertion of section 47A which provided that:

> ***47A***. *(1) Subject to this section, this Constitution may be replaced.*

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[78] M Chege, '*Kenya: back to the Brink*?' 19 (4) JOURNAL OF DEMOCRACY 132 (2008).
[79] *Id.*
[80] See., , Kenyans Reject New Constitution, BBC NEWS, 22 November 2005*as available on* http://news.bbc.co.uk/2/hi/4455538.stm (Last visited on 3 March 2014).
[81] *See* Final Report of the Committee of Experts on Constitutional Review 16.
[82] *Id.*

(2) Notwithstanding anything to the contrary in this Constitution

(a) the sovereign right to replace this Constitution with a new Constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum, in accordance with this section;

(b) when a draft Constitution proposing the replacement of this Constitution has been introduced into the National Assembly, no alteration shall be made in it unless such alteration is supported by the votes of not less than sixty-five percent of all the members Assembly (excluding ex-officio members);

(c) the National Assembly shall, within thirty days of the introduction in the Assembly of a draft Constitution proposing the replacement of this Constitution, debate all proposed amendments to the draft Constitution, and submit to the Attorney-General the draft Constitution and any proposed amendments thereto as may be approved Replacement of the Constitution. 10 0f 2008, s. 5. by the Assembly in accordance with paragraph (b).

(3) …..

Through this amendment, parliament envisioned the replacement of the constitution through an amendment. It was an extremely unique provision, not contained in most world constitutions. Judging by the American standards, most supreme constitutions are designed to live forever.[83] They envisage change through amendments, review or interpretation. It is rare to find a constitution proving that it could be replaced. However, the repealed Kenyan Constitution contemplated its own replacement. It did so by explicitly stating that it could be

[83] *See* Elster J, '*Born to be Immortal: The Constitution Making Process*.' COOLEY LECTURES UNIVERSITY OF MICHIGAN LAW SCHOOL, April 15-17.

replaced and then set out a procedure through which such a replacement would be effected. As observed in the introduction, most constitutions do not have an inbuilt replacement clause. Thus, most are replaced through extra-constitutional means which would take many forms including violent overthrow of the constitution. It is a supposition in this contribution that if a constitution provides for the manner in which it would be replaced, there are high chances that such a replacement can be peaceful.

Contemporaneous with the constitutional amendment, the *Constitution of Kenya Review Act, 2008* was enacted by parliament and provided the institutional arrangements to facilitate the review process. This Act established a Committee of Experts (COE) consisting of both citizens and non-citizens. The COE came up with a draft constitution which was adopted by parliament and then subjected to a referendum. It received an approval of Kenyans by a 67 % 'yes' vote.

The 2010 Constitution which was then promulgated on 27 August 2010 after the referendum provides at article 264 that:

> *"The Constitution in force immediately before the effective date shall stand repealed on the effective date…."*

The Kenyan Independence Constitution thus died after forty seven years. As was noted, it was not a subject of violent constitutional ousting. Given the average dying age of most constitutions, after 17.5 years, the Kenyan Independence Constitution can be said to have been an enduring constitution. As noted though, the Independence Constitution confirmed the assertion that longevity should not be desired as an end in itself since, despite having lived for 47 years, it lost its value content at a juvenile age and did not control the use of public power as would be expected of a constitution.[84]

[84] See an illustration of this role by Guerra in D.P Guerra *Perfecting the Constitution: The Case of Article V of the Amendment Process* (2013) 193.

CONCLUSION

Scholars who have investigated constitutional durability have argued that the tentative solution to infant constitutional demise is constitutional flexibility.[85] They view flexible constitutions as capable of responding to changing social and political environments and in so doing live for a long period of time.[86] This proposition is challenged but also affirmed by Kenya's constitutional history. It is arguable that had the repealed Constitution not been flexible it would not have been amiable to the political dictates in the period around 1990's when there was a widespread call for its replacement. Its post 1991 history reveals that it was amended to accommodate the ideologies that furthered the calls for its replacement- re-introduction of multi-party democracy.

However, it is also arguable that had the constitution been made more rigid, yet institutionally safeguarded, it would possibly have lived longer than 47 years. This would be the case because the very calls for constitutional change came after it had been amended several times, through amendments that ruined its value content. After the ruining amendments, a politically hostile environment was created which suppressed the interest of the opposition as it supported the interest of the ruling party, KANU. The repealed constitution could not enjoy political goodwill from the opposition that it sought to suppress and as a result, clamoured for its replacement. Dr Kamau Kuria affirms this supposition when he notes that the constitutional process in 1992 was intended to "restore the constitutional principles adopted in 1963 with the addition of safeguards intended to prevent the emergence of one party dictatorship."[87]

There is indeed a link between constitutional rigidity and shortened constitutional lifespan. Therefore, it may not be necessarily true that constitutional flexibility enhances constitutional

[85] *See* G NEGRETTO, *supra* note 2; T GILSBURG ET AL *supra* note 2..
[86] *Id*.
[87] KURIA, *supra* note 28 at116.

lifespan. Constitutional flexibility can have the effect of destroying the value content of a constitution through exploitative amendments, a phenomenon that may put the very life of that constitution in jeopardy judging by the Kenyan constitutional history. In designing a constitution, a balance should be struck so that the constitution is neither very flexible nor extraordinarily rigid. Such constitutions could live longer while retaining their value content.

STIFLING CONSTITUTIONAL DIALOGUE: WHY *KOUSHAL* STANDS FOR THE 'PROCESS FAILURE' OF COMPARATIVISM IN INDIA

Yelamanchili Shiva Santosh Kumar*

ABSTRACT

Comparative resources played a crucial role on our fundamental rights jurisprudence. In evolving interpretative solutions necessary to resolve constitutional dilemmas and to fully grasp our living constitution, Indian courts have been informed and influenced by foreign cases, scholarly material and international covenants. However, an almost absolute lack of methodological rigor and uniformity in the process of adjudication by Indian courts must form the background for this usage of foreign sources. Indeed, *Koushal* forces us to look for this background. In *Koushal*, the Supreme Court refused to engage with the near flawless constitutional analysis of the Delhi High Court because the High Court used comparative resources to aid its understanding of our constitutional guarantees. This paradoxical and whimsical refusal was despite the High Court's considered usage of foreign sources. This comment specifically highlights how the Supreme Court used a generic and inapplicable reason to side-step the interpretation offered by the High Court. It generally notes the need for adequate justification to precede reliance on foreign sources.

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INTRODUCTION

A debate on any aspect of the constitutional adjudication methodology employed by the Indian judiciary must begin with some context to help us understand why Indian courts undoubtedly indulge in tasks which would fall within the realm of governance elsewhere. Procedural innovations such as the PIL, sympathetic judges and to some extent, conscious litigation strategies have diluted *locus* requirements and created a *populist* court.[1] Our fundamental rights jurisprudence sought to make up for a governance deficit. Such expansive jurisdiction of the apex court went unquestioned as their verdicts appeased the masses, made up for political paralysis and were articulately couched in the *language ofrights*. As Upendra Baxi commented, the courts are indeed seen as the *only surviving assurance of fair-play and justice*.[2] The Indian courts accepted the separation of powers doctrine as a necessary casualty and took too seriously, Frankfurter J's comment that "*the court's authority- possessed of neither the purse nor the sword- ultimately rests on sustained public confidence in its moral sanction*".[3] The expansive role usurped by the courts was far beyond their traditional responsibilities. However, the popularity of PIL and the nature of judgments rendered ensured that there were hardly any calls for reform. The result-oriented attitude towards judgments justified the judiciary's actions in popular narrative and deflected attention from the methods used to reason and arrive at judgments.

In this context, to this attitude, the Supreme Court's verdict in *Koushal*[4]delivers a wake-up call. *Koushal*, with its unacceptable result and dubious reasoning, brings the necessary focus

[1]Bhagwati, P.N.& Dias, C.J., *The Judiciary in India: A Hunger and Thirst for Justice*5 NUJS L. REV. 171- 188 (2012); Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation* 13 WIS. INT'L L.J. 57-70 (1994); Baxi,Upendra,*Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*THIRD WORLD LEGAL STUD. 107, 108-112 (1985).

[2]BAXI,UPENDRA,THE INDIAN SUPREME COURT AND POLITICS XI-XII (1979).

[3]Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter.J., dissenting).

[4]Suresh Kumar Koushal v. Naz Foundation and others, Civil Appeal No.10972 of 2013 (hereinafter, "Koushal").

to the *process of adjudication* adopted by the courts. The reasoning and the sources used for such reasoning come into sharp scrutiny as it is clear that a court with unfettered and unelected power can take away rights as well. The manner in which the Delhi High Court crafted the judgment before it went on appeal to the Supreme Court is one of the best Indian examples of using comparative law.[5] It placed the only legally sustainable interpretation upon Arts. 14, 15 and 21 of the Indian constitution after referring to foreign material. On appeal, the Supreme Court refused to engage with the High Court's interpretation of Arts. 14, 15 and 21 by citing irrelevance of foreign precedent.[6]Citing foreign cases, material and international covenants to expansively interpret rights is the most commonly used methodological tool by Indian courts.[7]Despite a note of caution[8], using comparative resources is common while dealing with cases involving fundamental rights.[9] Therefore, this *whimsical* dismissal by the apex court reflects the clear lack of methodological rigor in Indian judgments. The issue of whether foreign material can be used has seen immense debate in the United States with

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[5]Naz Foundation v. Union of India, (2009) 160 DLT 277 (Hereinafter, 'Naz').

[6] In Koushal, the SC is egregiously wrong in its selective application of the deference principle as well. However, this comment is restricted to examining how engaging with the interpretation of constitutional provisions was sidelined by rejection of foreign cases.

[7]Dhavan,Rajeev, '*Borrowed Ideas: On the Impact of American Scholarship on Indian Law*', 33(3) AM. J. COMP. L.505 (1985); Adam M. Smith, '*Making itself at home: Understanding Foreign Law in Domestic Jurisprudence – The Indian case*', 24 BERKELEY J. INT'L L. 218 (2006). Most cases involving fundamental rights inevitably rely on foreign precedents or international covenants to justify a particular interpretation. For some notable examples, *see* VineetNarain v. Union of India, (1998) 1 SCC 226; Maneka Gandhi v. Union of India, (1978) 1 SCC 248; Bachan Singh v. State of Punjab, (1980) 2 SCC 684; Indian Express Newspapers (Bombay) v. Union of India, (1985) 1 SCC 641; Bennett & Coleman v. Union of India & Ors., (1998) 8 SCC 594;Sunil Batra (II) v. Delhi Administration, (1980) 3 SCC 488; M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544; M.C. Mehta v. Union of India, (1988) 1 SCC 471; Kharak Singh v. State of Uttar Pradesh & Ors., (1964) 2 SCJ 107; R. Rajagopal v. State of Tamil Nadu, (1994) 6 S.C.C. 632.

[8]Jagmohan Singh v. State of U.P., (1973) 1 SCC 20; Surendra Pal v. Saraswathi, (1974) 2 SCC 600. Both these judgments were cited by the Supreme Court in *Koushal* to reject the usage of foreign precedent by the Delhi High Court.

[9]*See* Balakrishnan,K.G., *The Role of Foreign Precedents in a Country's Legal System,*22 NATIONAL LAW SCHOOL OF INDIA REV., 1-16 (1010).

some judges sitting at opposite ends of the spectrum.[10] There is a lack of such debate in India as the basis for judgments has often been ignored.[11] This comment shall use the Supreme Court's grand failure in *Koushal* to call for methodological uniformity in adjudication process[12], a task made more difficult by the Supreme Court's practice of sitting in benches of two.[13]

OUTLINING THE CONTOURS OF USING COMPARATIVE CONSTITUTIONAL LAW

This section shall briefly consider the methods through which comparative constitutional law should be used to enrich our constitutional discourse. Subsequently, the Delhi High Court's interpretation of Arts. 14, 15 and 21 in *Naz* shall be deconstructed to show that it was a reasonable attempt at valid use of comparative constitutional law and hence, establish that the Supreme Court dodged appropriate examination to arrive at a pre-determined conclusion.

Thiruvengadam captures the practice of reliance on comparative material through the term '*trans-judicial influence*'.[14] Compared to other terms such as constitutional borrowing and transplantation, trans-judicial influence better encapsulates the purpose behind comparative

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[10]*See* Ginsburg, R., *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*22 YALE L. &POL'Y REV. 329 (2004); R Alford, *Misusing International Sources to Interpret the Constitution*98AM. J. INT'L L. 57 (2004); *A Conversation Between Supreme Court Justices* 3 INT'L J. CONST. L. 519 (2005).

[11]Khaitan,Tarunabh, *Koushal v. Naz: The Legislative Court*, U.K. CONST. L. BLOG (December 22, 2013), http://ukconstitutionallaw.org/2013/12/22/tarunabh-khaitan-koushal-v-naz-the-legislative-court/.

[12]Hirschl,Ran,*On the Blurred Methodological Matrix of Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 39, 39-67 (Sujit Choudhry ed., 2006).

[13]Since the Indian Supreme Court mostly sits in benches of two, different results can be reached in various courtrooms on the same issue. Hence, the criticism that the Indian Supreme Court speaks in multiple divergent voices; Nick Robinson, *The Indian Supreme Court and its Benches* SEMINAR available athttp://india-seminar.com/2013/642/642_nick_robinson.htm.

[14]Thiruvengadam,Arun,*'In Pursuit of 'the Common Illumination of Our House': Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia'*, INDIAN J. CONSTITUTIONAL L.67 68 (2008). Rajeev Dhavan, *'Borrowed Ideas: On the Impact of American Scholarship on Indian Law'*, 33(3) AM. J. COMP. L. 505-526 (1985).

constitutional law which is to adapt, adjust and learn from elsewhere to make an informed choice while adjudicating.[15] The idea is to see how various courts across the globe have approached constitutional questions and examine whether we can take their assistance after adequately realizing the structural, political, social and even, economic differences between the systems.[16] In the U.S, where the greatest amount of opposition to usage of foreign sources is seen, concerns range from losing sovereignty and obeying foreign commands to promotion of political agendas by selective citation of material.[17] These concerns are valid and the onus is upon the court using comparative material to justify its sources. Citation of comparative material from a limited sample is arguably the biggest hurdle to usage of foreign precedent.[18] As Scalia comments with dangerous eloquence, '*[w]hen it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree*, *we don't use it'*.[19] Selective citation will erode the legitimacy of adjudication and taint the decision-making process with charges of promoting moral perceptions or political ideologies. However, we cannot refuse to gain from the substantive benefits of comparativism merely because judges do not sufficiently equip themselves and deliver decisions which will negate the concern of cherry-picking. A systemic reminder to the judges about this responsibility of *considered usage* will suffice.

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[15]Scheppele, Kim L., *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models,* 1 INT'L J. CONST. L. 296, 297 (2003).

[16]ALAN BRUDNER, CONSTITUTIONAL GOODS VII (2004).

[17]Choudhry,Sujit,*Migration as a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 8-13 (Sujit Choudhry ed., 2006).

[18]Barak- Erez, Daphne,*The Institutional Aspects of Comparative Law,* 15 COLUM. J. EUR. L. 478, 478-490 (2009); Ian Cram, *Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases* 68 CAMBRIDGE L.J. 118, 140-141 (2009).

[19]*Id.,* at p. 7.

There is no rationale with which one approaches or justifies reliance on comparative constitutional law in India. [20] This opens up an opportunity for criticism on this ground whenever there is disagreement with the judgment. Sujit Choudhry identifies three models of comparative constitutional interpretation- particularist, universalist and dialogic models.[21] The particularist model personifies constitutional interpretation as a strategy specific to the nation's particular circumstances. It posits the constitution as a document heralding a specific national identity.[22] The universalist position argues that constitutional systems share certain core common features. Constitutionalism[23] and the aspirational tones underlying foundational documents inform the universalist stance. The dialogic model understands one's legal system by using foreign precedent as a *stimulus*. To my mind, this category best reflects the goals of comparative constitutional law. It is crucial for these models to be popularized for informed adjudication.

Given emerging empirical projects[24] and hopefully, informed and reasoned usage of foreign precedent due to heightened scrutiny on this issue, there is enough reason to believe that comparative constitutional law, rightly applied, holds immense promise for Indian adjudication.

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[20]Choudhry,Sujit, *How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights and Dialogical Interpretation*, in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 45, 55 (Sunil Khilnani et al eds., 2013).

[21]*Id* at pp. 58- 72.

[22]See Bechhofer, Frank & Mc Crone, David, National Identity, Nationalism and Constitutional Change, in NATIONAL IDENTITY, NATIONALISM AND CONSTITUTIONAL CHANGE, 1 (Frank Bechhofer& David McCrone eds., 2009).

[23]*See generally* JON ELSTER, CONSTITUTIONALISM AND DEMOCRACY, 1-19(Jon Elster et al eds., 1988).

[24]GINSBURG, TOM*ET AL*, THE ENDURANCE OF NATIONAL CONSTITUTIONS 2-11 (2009).

PURPOSIVE INTERPRETATION OF OUR CONSTITUTIONAL ARCHITECTURE: NAZ'SANALYSIS OF ARTS. 14, 15 AND 21

The parallels between *Naz* and *Lawrence*[25], the U.S. Supreme Court decision which invalidated the sodomy legislation are striking. Eskridge Jr. identifies that usage of foreign law played a significant analytical role in *Lawrence*.[26] *Lawrence* was attacked by those opposed to usage of foreign cases for its extensive reliance on *Dudgeon,*[27] a decision delivered by the European Court of Human Rights.[28] However, as Khosla indicates, unlike the criticism against *Lawrence* that it relied on a few select judgments, *Naz* covered a wide sample of countries from Asia, Africa, Americas, Australia and Europe for analyzing the issues before it.[29] The Delhi High Court paid no *blind obeisance* to foreign judgments but analyzed their relevance in interpreting the depth of our constitutional guarantees. [30]

Invoking Art. 21 to Protect an Individual's Dignity, Autonomy and Privacy

Naz held that criminalization of private consensual adult sexual acts under S. 377 of the Indian Penal Code violated Art. 21. Half a century back, Hart observed that criminalizing homosexuality affects the balance of the '*individual's emotional life, happiness and personality*'.[31] Hence, Hart argued that '*values worth their price in loss of freedom*' must be at stake for the price of enforcing laws against homosexuality. In law, one must prove a compelling state interest to negate the right to life and personal liberty granted enshrined

[25]Lawrence v. Texas, 123 S. Ct. 2472 (2003) (hereinafter, 'Lawrence').

[26]Eskridge, William N., Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*2 INT'L J. CONST. L. 555 (2004).

[27]Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981) (hereinafter, 'Dudgeon').

[28] *See* Lund ,Nelson & McGuiness, John O., *Lawrence v. Texas and Judicial Hubris,* 102 MICH L. REV. 1551 (2004).

[29]Madhav Khosla, *Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision,*59 AM. J. COMP. L. 909, 909-934 (2011).

[30]ArunThiruvengadam, *The Global Dialogue Among Courts: Social Rights Jurisprudence of the Supreme Court of India from a Comparative Perspective, in Human Rights*, in JUSTICE, & CONSTITUTIONAL EMPOWERMENT 264, 307-309 (C. Raj Kumar and K. Chockalingam eds., 2007).

[31]H.L.A HART, LAW, LIBERTY AND MORALITY 22 (1963).

under Art. 21. In *Naz*, the Delhi High Court characterized *immutable sexuality* as an expression of one's liberty. For this, it cited the Yogyakarta principles apart from Indian and foreign decisions. It proceeded to construct an inherent right to privacy i.e. *a private space in which man may become and remain himself* under Art. 21. Recognizing that the Indian constitution contained no *explicit* right to privacy, it discussed the global trends on protection of privacy in light of Indian case-law on privacy rights and proceeded to hold that an expectation of privacy was intrinsic to individual liberty. On similar terms, it reasoned that an individual's dignity and sexual autonomy are protected under the right to liberty.

The court upheld the counter-majoritarian promise of the Indian constitution by recognizing that morality of the majority cannot repress the minority. It examined the history behind S. 377 and the subsequent rejection of like provisions after the Wolfenden Committee Report which argued for decriminalization of homosexuality as there is a '*realm of morality and immorality which is not the law's business*'. A brief theoretical point on the interface between morality and law is necessary to understand the court's reasoning. Immediately after the Wolfenden Committee Report, Lord Devlin criticized it by stating that suppression of vice is within the law's mandate.[32] As Hart points out, this is paralleling James Fitzjames Stephen's thought, a century back, that law should prosecute '*grosser forms of vice*'.[33] The premise of their argument stemmed from a recognition that a '*recognized morality*' binds any society and a violation of this recognized morality shatters the organized society. Thus, criminalization of morals is necessary for preservation. Hart responds to Devlin's resistance by introducing a distinction between positive morality and critical morality. Critical morality is independent of public opinion. He argues that this distinction differentiates between *about* morality and *of* morality and asks that we need to question whether it is moral to enforce morality at all. This morality of enforcement forms critical morality and is crucial to

[32]*See generally* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1970).

[33]*See generally* HART, *supra* note 31. .

determine criminalization of an act, perceived to be morally deplorable. Hart reasons that actual practices or morality of a community is not sufficient justification for the society to criminalize morals. This justification is necessary as the enforcement of morals is leading to '*inflicting misery of punishment*' despite there being no victim.

On these lines, the court in *Naz* makes a distinction between popular morality and constitutional morality. While holding that constitutional morality is not shocked by homosexual acts, the court described popular morality as irrelevant to a determination of whether criminalization of homosexuality is a compelling state interest. It also refused to accept promotion of public health as being dependent on criminalization of homosexuality. The state contended that high rates of HIV positive cases among homosexuals shows that criminalizing them is necessary for public health. On facts, the court reached a converse conclusion holding that criminalization forces homosexuals to hide themselves from public scrutiny leading to a greater prevalence rate of HIV among homosexuals. Decriminalization will further the reach of health workers and further the state objective of public health. Hence, the court concluded that criminalization served no compelling state interest. Throughout its analysis, the court used foreign cases, international covenants, articles and reports only to wholly comprehend the scope of the constitutional guarantee under Art. 21. There is no instance of transplanting a particular alien concept sans analysis as to why Art. 21 would necessarily include such a concept. The court engaged in meaningful conversation with foreign sources.

Striking Down S. 377 as Violative of the Constitution's Equality Guarantee

Naz begins its analysis on Art. 14 by recognizing that the constitution permits class differentiation only when there is a rational nexus between the differentiation and the legislation's objective, an intelligible differentia justifying the differentiation and if the legislation's objective is constitutionally valid.

It asserts that S. 377 creates a class by *the nature of actions it criminalizes*. By criminalizing the sexual acts associated with a particular class, S. 377 criminalizes the conduct, practices or relationship of a *solitary class*. There is no intelligible basis for this differentiation. After viewing homosexuals as a class, the court clarifies there is no rational nexus between criminalizing homosexuality and the objective of public health or protecting women and children.

No Discrimination on the Basis of Sex Prevents Discrimination on the Basis of Sexual Orientation as well

Art. 15 explicitly prohibits discrimination on the basis of sex. Similar prohibition against discrimination is found in anti-discrimination provisions and international covenants such as the ICCPR. The court identified the thread running through foreign decisions as preventing discrimination based on stereotypes of '*a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity*'.[34]The court then opined that sexual orientation was a personal characteristic *analogous* to sex and therefore, discrimination on such a ground was not permitted by the constitution. This step is a testament to an evolving constitution where the unwritten sentiment influences our textual interpretation.[35]

THE SUPREME COURT'S BEWILDERING LACK OF CONSTITUTIONAL APTITUDE

The thrust of *Naz* was to characterize the rights of sexual minorities as fundamental rights protected under the constitution. *Koushal* indicates a marked lack of engagement with this subject. The acute lack of personal empathy by the judges towards sexual minorities finds its way into the judgment. *Koushal* escapes from comprehensively analyzing why the right to liberty, equality and right against discrimination do not stand violated by laughably

[34]¶ 102, Naz.

[35]*See generally*, LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

advocating deference and leaving it to the parliament to decide whether or not to retain S. 377. This strategy proceeds on the premise that it is up-to the parliament's *choice*. Provision of existing rights is not a matter of political choice.

It is pertinent to comment on *Koushal's* treatment of the interpretation placed upon Arts. 14, 15 and 21 in *Naz*. The imprudent nature of *Koushal's* treatment is self-evident. On Art. 14, *Koushal* offers that '*those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes*'(emphasis supplied).[36]As the bare text of S. 377 criminalizes conduct which might result in different classes but not class *per se*, Art. 14 is satisfied. The court does not consider Art. 15 at all. On Art. 21, the court duly recognizes that privacy, dignity and autonomy rights are covered under Art. 21. After such acceptance, in a baffling move, the court refuses to hold S. 377 as violative of Art. 21 as the section is not violative but the manner in which the section is used against particular classes is violative of Art. 21. The court refuses to acknowledge that the section sanctions depredations against the privacy, dignity and autonomy of sexual minorities by criminalizing their conduct.

In order to compensate for this deficient and near non-existent analysis, *Koushal* criticizes the use of foreign cases by the Delhi High Court and refuses to consider them. *Koushal's* refusal to examine foreign cases does not explain its refusal to engage with the interpretation placed upon Arts. 14, 15 and 21 by the Delhi High Court after learning from such foreign cases.

CONCLUSION

The Supreme Court threw up warning signs[37] that adjudication without methodological rigor can yield terrible results as well and it would serve us well to look beyond immediate results.

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[36]¶ 42, Koushal.

[37]*See* Smita,Narula, *Impunity for Communal Violence in India*, in JUSTICE& CONSTITUTIONAL EMPOWERMENT 363, 373-378 (C. Raj Kumar and K. Chockalingam eds., 2007).

Koushal is the culmination. It is necessary for us to examine the reasons behind a decision and the process leading to its construction. Interspersing every judgment, even when not necessary or warranted, with more than an adequate dose of foreign jurisprudence has become the norm in constitutional adjudication. In some instances like *Naz*, their usage is well reasoned. However, *Koushal* used the generic argument of cultural relativism to reject the interpretation placed upon constitutional provisions by *Naz* because the Delhi High Court used foreign cases *also* as a source. It is this selective application or rejection which forms the hallmark of adjudication process in India. This comment contextualizes the process of adjudication in India through scrutinizing *Naz*. It explains that comparativism is a tool which cannot be loosely used. It shows how the lack of a *process* has been used by the Supreme Court to side-step original constitutional analysis by the Delhi High Court through citing generic and irrelevant objections not applicable to the case at hand. This comment issues a clarion call for re-examining the court's role and the dynamics of its decision making.