The Limits of Religious and Cultural Claims in Fundamental Rights Cases: A Judicial Framework

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Abstract

In secular, constitutional democracies, religion and culture are assumed to be of legal importance only for deciding the scope of religious and cultural freedom, maintaining communal harmony, and determining the scope of minority protection laws. However, across jurisdictions, courts have been influenced by religion and culture in determining other human rights as well. This phenomenon is especially observed in, but is not restricted to, gender and sexuality cases: abortion, sexual orientation and gender identity, marital rape, sex work, euthanasia, bar dancing, etc.

This thesis examines the limits of religious and cultural influence on fundamental rights questions under secular and liberal constitutions and proposes a judicial framework to determine the same. Using intensity sampling, I select the population of cases (31 in number) pertaining to the abovementioned themes. I then perform a systematic content analysis to extract religious and cultural claims and examine their various attributes. I find that, even though the law has mandated no role for them, such claims determine the outcome in 29% of the cases; 78.5% of those claims are judicially noticed, i.e., admitted without proof. This makes it imperative to investigate the institutional limits upon the judiciary when dealing with religious and cultural claims. The judicial framework that I propose has three pillars: 1. a theory of constitutional interpretation which discusses constitutional restrictions on the judge when considering religious and cultural arguments in fundamental rights cases; 2. a theory of judicial notice to determine when such claims can be admitted without

proof; and 3. A theory of secularism and public reason which argues that once a religious or cultural claim has been admitted, it should be given weight in the final decision only if it matches defensible conceptions of constitutional values.

The thesis makes the following significant contributions to the field: 1. it identifies a unique class of human rights cases that are influenced by religious and cultural claims; and 2. it provides an empirically driven judicial framework to determine the limits of these claims in the outcome of those cases.

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TABLE OF ABBREVIATIONS

1. AIDS: Acquired Immune Deficiency Syndrome.
2. DM: District Magistrate
3. IEA: Indian Evidence Act, 1872.
4. IPC: Indian Penal Code, 1860.
5. ITPA: The Immoral Traffic (Prevention) Act, 1956.
6. LGBT: Lesbian, Gay, Bisexual and Transgender.
7. MHA: Mental Healthcare Act, 2017.
8. MTP: Medical Termination of Pregnancy Act, 1971.
9. POCSO: Protection of Children from Sexual Offences Act, 2012.

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CHAPTER 1- INTRODUCTION

1. The Indian Constitution

When an indigenous constitution was being debated for a newly independent India, it was an impoverished, under-educated nation in the throes of communal riots and massacre resulting from its partition. Millions had been looted, raped, and murdered; Princely States (that had not been part of British India) were vying for independence from the proposed Indian Union and linguistic and ideological disagreements abounded.[1] The task of framing a constitution fell on a Constituent Assembly which was elected indirectly through provincial legislatures and on a franchise limited by property, education, and tax. Given the grounds of their own election and realizing the immense responsibility that lay on their shoulders to stabilize the nation in the wake of the above-mentioned political and social events, the Constituent Assembly, '(...) instinctively knew that the new constitution had to be transformative if it had to have any durability or legitimacy.'[2] Accordingly, they enacted a document that aimed for a radical social transformation of the country.

Though the constitution could easily have been framed by the power in majority in the Assembly, i.e., the Congress Party, its leaders made it a point to include a diversity of opinions. For example, Dr. Ambedkar, who opposed the Congress viewpoint on many counts, was invited to be a part of this constitution making body, as were many other members including women, members of other

[1] Granville Austin, *The Indian Constitution*: *Cornerstone of a Nation* (Clarendon Press 1966); Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16 ICON 389, 403-404.

[2] Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16 ICON 389, 403.

minority communities and ideological opponents, so that in an interview, a previous Assembly member stated an oft-repeated opinion, that, 'there was hardly any shade of public opinion not represented in the Assembly.'[3]

Though the draft constitution was not without its ideological dissenters, they were simultaneously accommodated and contained[4], so that the final document was arrived at in a spirit of compromise, provisions agreed on by consensus rather than by force. Much of the final document sought to re-imagine the country as a pluralistic[5], secular, modern, liberal, industrial, sovereign, governed only by the rule of law. The very process by which the document was enacted provides a strong argument to believe that the Assembly members abjured narrow nationalism and embraced the religious, ethnic, and linguistic diversity of the country, writing provisions in the constitution that they hoped would provide workable solutions for harmonious co-existence. This main document was supported by laws which translated its abstract declarations into specific rules. The practical commitment to the rule of law meant that differences were to be settled in a court of law, and that the litigants and the courts had to adhere to specific criteria to prove and decide the case, respectively. The practical commitment to pluralism meant that while every shade of opinion, religious,

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3 Granville Austin, *The Indian Constitution*: *Cornerstone of a Nation* (Clarendon Press 1966) 13.

4 Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16 ICON 389; Aditya Nigam, 'A Text without Author: Locating Constituent Assembly as Event' (2004) 39 (21) EPW 2107.

5 While the constitution largely subscribes to value pluralism, some of its Articles expressly accommodate value monist views either on religion, culture, or the economic arrangement of society, in the form of programmatic directives to the executive that can be enforced in an incremental way. Some examples include the prohibition of alcohol and the prohibition of cow slaughter, and the establishment of co-operatives and cottage industries to achieve economic self sufficiency. See generally, Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16 ICON 389. Tarunabh Khaitan, 'Directive Principles: Morally Committed Political Constitutionalism' (2019) 82(4) MLR 603.

cultural, or otherwise, was freely permitted, an appropriate place had to be determined for its exercise considering the country's commitment to constitutional values.

2. The Hypothesis

However, when it comes to fundamental rights litigation in India, I hypothesise that commitments to pluralism and the rule of law are not clearly understood either by the judiciary or the litigants. In this thesis, I seek to test this hypothesis by studying the role of religious and cultural claims in fundamental rights litigation in India. For testing my hypothesis, I do not study right to religion cases. Engagement with religious and cultural claims is expected in those cases. I also do not study those cases in which a law has curtailed certain civic rights in deference to religion. For example, religious hate speech law which makes it a criminal offence to say anything with malicious intention to hurt the feelings of another religion.[6] This is because the legal provision has already specified that religion and culture can curtail an individual right and has also determined the appropriate weight that can be given to religious and cultural claims in determining the rights in question. For example, in the hate speech example, the law has already determined that the scope of speech rights is limited to those kinds of speech that do not hurt religious sentiments.

Instead, I study those fundamental rights cases in which neither the constitution nor any statute has provided any role for religion and culture, but they play a role in the litigation of the case. These cases will provide an appropriate site to observe the court's commitment to the rule of law and value pluralism in the light of the constitution.

[6] Indian Penal Code Act 1860, s 295A.

This thesis is born out of my court room observations of some recent landmark human rights cases, specifically; the queer rights cases of the Indian Supreme Court in 2013 and 2014. In April, 2014, the Supreme Court of India extended all of the fundamental rights to transgender persons in India and found that discrimination and abuse against such persons for the reason that they are transgender, violates the equal protection guarantee, freedom of speech and expression, and the right to life under the Indian Constitution.[7]

In so doing, the court *seemingly* relied heavily on the mythological status of the Hijra; a cultural subset of the transgender community in India.[8] The judgment is replete with stories from an ancient past in which the Hijras were blessed subjects, possessing powers to curse and bless, and occupying important strategic and trusted positions within kingdoms. The court then took upon itself the responsibility to restore the status of this population to its past and it was through this logic that the entire transgender community became eligible for constitutional protections. At least, this is what may seem to be the prima facie reason for the judgment. Accordingly, the Supreme Court directed the Central and State Governments to recognize transgender persons in their self-identified gender, and to extend to them several affirmative action measures, such as reservations in public universities and employment, among other things.

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7 National Legal Services Authority v Union of India (2014) 1 SCC 438 (Supreme Court of India).

8 After analysing this case through the framework developed in this thesis, my final conclusion was to the contrary. I found that though the court seems to be motivated by the cultural status of the Hijra, its holding is rooted firmly in independent, justifiable, constitutional values.

Contrast this with the *Suresh Kumar Koushal*[9] case decided in 2013, where the court bartered constitutional morality for popular morality, finding that since the Parliament had not amended Section 377 of the Indian Penal Code (hereinafter, 'IPC') which criminalised sex against the 'order of nature', the will of the people desired the law to remain on the books. It wrongly applied the doctrinal tests for whether the right to equality of the community had been violated, and summarily concluded, in the face of several affidavits submitted to it (which it itself acknowledged) that evidence that the lesbian, gay, bisexual and transgender persons were harassed because of the presence of s 377 was 'singularly laconic',[10] and that the community 'miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them.'[11]

What changed between December 2013 and April 2014? Yes, the bench was different, but the principle of stare decisis is followed in India. There was a significant difference in the way these cases were received by the court. In December 2013, the Supreme Court found that s 377 did not offend the, 'so called rights of LGBT persons'[12]. In April 2014, the same court found that transgender persons are entitled to all constitutional protections and that all fundamental rights apply equally to them as

9 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1 (Supreme Court of India).

10 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1, 66 (Supreme Court of India).

11 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1, 66 (Supreme Court of India).

12 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1, 78 (Supreme Court of India).

to any other person.[13] I hypothesised that the reason for this was that the transgender case had that extra bit of weight and persuasion; it rooted its arguments in culture, myths, legends and epics closely connecting the issue of rights of this community to the history and culture of India. I hypothesised that it was when the court found that rights of the transgender community were, rights deeply rooted in [the] tradition of India, did it set about a course of constitutional correction to clarify that the transgender population is covered within the constitutional scheme. I hypothesised that it was the ability of the transgender case to demonstrate this cultural connection that set it apart from the unfavourable result in the 377 case.

If indeed these hypotheses were correct then religion and culture were playing a role in the final outcome of fundamental rights cases. Yet, neither the constitution nor the statutory law that concerned the abovementioned cases had created a role for religion or culture for the determination of the rights in question. The question that naturally arose from this observation was: can the judiciary of a secular, constitutional, and democratic country, which is supposed to be bound only by values embedded in the constitution, give weight to religious and cultural claims while determining fundamental rights questions? If yes, then what is the appropriate weight that can be given to such claims? I attempt, in this thesis to design an appropriate judicial framework within which religious and cultural claims could be received and weighed in fundamental rights litigation. To be sure, this project does not argue that such extra-legal, religious, and cultural claims should always been rejected by the court. It also does not argue that such claims should be unquestioningly accepted by a court. Instead, this project aims to encourage scholars, litigators, and judges to

[13] National Legal Services Authority v Union of India (2014) 1 SCC 438 (Supreme Court of India).

intercept these claims and accept them as a part of legal reasoning only when they resonate with constitutional commitments.

3. The Chapters

(a). Methodology, Summary of Cases, and Coding (Chapters 2-4)

To answer these questions, I first settle on a set of cases that could aptly demonstrate the phenomenon that I have observed. While the freedom of religion is a guaranteed fundamental right in the country[14], and several other aspects of civic life are regulated by religious or cultural laws[15], there is an arena of personal life decisions that is neither protected by the freedom of religion, nor religiously or culturally regulated by law. In other words, the law has envisaged no role for religion and culture in the determination of rights related to these decisions. The very nature of the problem meant that there was no fixed site from where the cases could be extracted. One option was to study all the fundamental rights cases at the Supreme Court and High Court level. As I show in detail in the Methodology chapter, these cases were too numerous to be feasibly studied within a doctoral thesis. Therefore, I resorted to another sampling technique: intensity sampling. This sampling method selects cases which are theoretically determined to offer depth into a given phenomenon. For reasons that I explain in detail within the Methodology chapter, cases concerning sex, gender, and sexuality, seem to disproportionately, though not exclusively, invite, religious and cultural arguments. Therefore, I began looking for cases within those broad areas, and these were the final themes I settled on: beauty pageants, surrogacy,

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[14] The Constitution of India 1950, art 25.

[15] For example, 295A of the Indian Penal Code criminalizes speech, *inter alia*, which deliberately and maliciously intends to hurts the religious sentiments of any class of citizens. See Indian Penal Code 1860, s 295A. Personal law regulating marriage, inheritance, adoption etc. is another example.

abortion, same sex relations, euthanasia, marital rape, transgender rights, sex work, bar dancing, etc.

I studied the entire population of the fundamental rights challenges within these themes. All those cases asked the court to decide whether a person had a fundamental right to pursue the impugned activity. I coded the religious and cultural claims made specifically in connection with the fundamental rights questions in those cases using data-driven and researcher-driven codes. Data driven codes are semantic codes and mirror the participant's language. They do not require any interpretive framework and the meaning that they want to convey is clear in their expression. A vast majority of the religious and cultural claims I studied fell into this category. An example would be, 'decriminalizing 377 would run afoul all religious practices in the country.'[16] A minority of the claims demanded researcher-driven codes, which require a researcher to invoke conceptual frameworks to identify the explicit meaning within the data. An example of such a claim would be, 'no smoking or drinking by the [beauty pageant] participant is allowed.'[17] To obtain these researcher-driven codes, I found particularly relevant, theoretical insights from postcolonial feminist legal scholarship about how the idea of culture and religion is inextricably tied in with the regulation of sexuality and gender, and how together these aspects construct the idea of a nation.

The cases span from the 1950s to the present time. They relate to multiple High Courts and Supreme Court benches in India, and to multiple political periods in the history of independent India. The point being made here is not that bench

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16 Navtej Singh Johar and Ors v Union of India and Ors Writ Petition (Criminal) No 76 of 2016 (Supreme Court of India).

17 Mahila Jagran Manch v The State of Karnataka and Ors WP 25747/1996 (Karnataka High Court).

composition or the political party in power alters the receptivity of religious and cultural claims in court. That may be the subject of another study. The point is that there is no principled framework within which courts deal with religious and cultural claims made in fundamental rights cases, and that there is a need to devise such a framework.

The content of the cases is discussed in detail in Chapter 2, but a quick overview may be apt here. I begin with the beauty pageant cases of the late 1990s, which centre on the controversy related with India hosting the Miss World Pageant in 1996. While there are no restrictions on beauty pageants being held in India, organisations oppose the holding of such pageants on cultural grounds, arguing that beauty pageants are opposed to Indian culture. The question that arises is whether women (and persons of all genders, but in this case, the case concerned only women) have a fundamental right to participate in such pageants in the context of the cultural opposition to the same. In the abortion cases, the question is whether a woman has a fundamental right to abortion, especially in the context of the sections of the Medical Termination of Pregnancy Act, 1971 (henceforth 'MTP'), especially in the backdrop of section 3 of the Act, which vests the right to invoke an abortion not on the woman, but on a medical practitioner who can authorise abortions only under certain circumstances, and within a certain time-frame from conception. The question that arises in these cases is whether the fundamental right to life and liberty of the concerned woman is violated by this legal framework.

Next, I move on to the marital rape cases. Nonconsensual sex by a man with his wife aged 15 years and over is not classified as rape in India. In other words, marital rape is not a crime in India. Exception 2 of section 375 of the IPC which

provides for this exception is challenged in the Supreme Court. The challenge is narrow in scope and seeks to persuade the court to find the exception unconstitutional with respect to girls between the ages of 15 and 18. The petitioners base their challenge on the dual grounds of the general age of consent (18 years), and the conflict created by the presence of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO'), section 5(n) of which criminalises the very same activity that the exception exempts. The petitioners challenge the exception as violating the equality rights (Articles 14 and 15, specifically 15(3))[18] of girls, by allowing married girls to be violated and protecting unmarried girls. The State's defence rests entirely on tradition and culture. The State's position is that child marriages are based in tradition and culture and that needs to be respected; removing the marital rape exception would destroy the institution of marriage.

The right to die cases primarily ask whether the fundamental right to life (Article 21)[19] includes a right to die. Courts prolifically engage with religious texts from multiple religions while considering this question. Quotations and myths relating to Jainism, Buddhism, Hinduism, Islam, Christianity, etc. feature in the judgment alongside various cultural practices such as *Sati*, *Johar*, etc. The next two sets of cases deal with bar dancing and sex work. Both these activities are not completely banned in the country, but legislation, such as The Bombay Police Act, 1951, and the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants, and Bar Rooms, and Protection of Dignity of Women (Working Therein) Act, 2016, in the case of the former, and the Immoral Traffic (Prevention) Act, 1956 (hereinafter 'ITPA'), in the case of the latter, considerably constrict the scope of practicing these professions.

[18] The Constitution of India, arts 14, 15, and 15(3).

[19] The Constitution of India, art 21.

While in the case of bar dancing, onerous licensing provisions make it well near impossible for entertainment venues to acquire a bar dancing license, in effect wiping out professional opportunities for bar dancers, in the case of sex work, extensive powers are given to the District Magistrate to control the place of sex work and the lives of sex workers, effectively leaving the practitioners of the profession under constant threat and uncertainty. In both sets of cases, bar dancers and sex workers primarily assert that the law violates their fundamental right to practice a profession (Article 19(1)(g))[20]. Certain other fundamental rights claims are also raised in these cases, but they vary across cases and are discussed in detail in the case summaries. The State in both sets of cases defends the laws on the threshold of morality and culture, arguing that bar dance and sex work were immoral acts, damaging public morality, and need to be contained, to both, protect the dignity of women, and to protect the morals of the general populace.

The final set of cases is concerned with sexual orientation and gender identity rights. The sexual orientation cases revolve around section 377 of the IPC, which criminalised, 'carnal intercourse against the order of nature.' Though the section is neutral in its wording, it disproportionately impacts members of the queer community, or those persons who were perceived to be queer. The section is challenged as violating and the right to life, liberty, and expression (Article 21 and 19) of the queer population, and for in effect criminalising their sexual life for no rational reason or legitimate purpose (Article 14). The petitioners representing the queer community also argue that section 377 perpetuates discrimination on the basis only of sex (Article 15), as it ascribes a criminal status to a person only on the basis of the biological sex of their sexual partner. The gender identity cases argue that transgender persons face

[20] The Constitution of India, art 19(1)(g).

widespread societal discrimination owing to the gender non-conformity. Further, they argue that in failing to protect them from these violations, the State is failing to protect their right to equality (Article 14), right against sex discrimination (Article 15), right to expression (Article 19), and the right to life and liberty (Article 21). In both these sets of cases, the State and the petitioners present several cultural arguments, trying to demonstrate that queer and transgender persons are culturally and religiously acceptable in India, or trying to demonstrate that queer persons are western imports antithetical to the culture and tradition of India.

I extract unique religious and cultural claims connected with the fundamental rights questions in each of these cases. I perform a systematic content analysis on the claims and code their various attributes, such as, the nature of the claim (religious or cultural), party making the claim, whether the claim admits of a diversity of religious and cultural viewpoints, the temporality of the claim, and finally, the evidence with which the claim is supported. What emerges from a descriptive analysis of these various attributes points the way for the ensuing chapters. Out of the 31 cases that are studied in the thesis, only 7 cases do not report any religious or cultural claims in the determination of the rights in question. That means that in 24 cases religious and cultural claims either attempt to define, or succeeded in defining the scope of a fundamental right, although the law had allocated no role for such claims in such cases. Further, I find that in 29% of the cases, the outcome is influenced by the religious and cultural claims made in the case. The next important finding is that courts are almost three times more likely than litigants to make a religious or cultural claim, which brings the court into the focus of this research. If the courts are making these claims in deciding these cases then it becomes important to examine: 1. whether they can make such claims; 2. if yes, the threshold these claims must pass to be

admitted into court (the descriptive analysis showed that a vast majority of these claims were being judicially noticed); and 3. the appropriate weight that a court can assign to them in the determination of cases. The remaining chapters answer these questions.

(b). A Justificatory Theory of Constitutional Interpretation (Chapter 5)

This chapter answers the first question raised in the preceding paragraph. Can religious and cultural claims be made in the courts while deciding fundamental rights which have nothing to do with the freedom of religion? There is no codified prohibition preventing the Supreme Court or the High Courts from hearing religion or culture-based evidence in any fundamental rights case. However, is the mere absence of a prohibition sufficient to legitimate the use of religion and culture-based evidence and reasoning in deciding fundamental rights cases in a country that is avowedly secular, democratic, and constitutional? To answer this question, I ask whether there is an underlying philosophy of constitutional interpretation that guides the enterprise of judicial adjudication, specifically in fundamental rights cases. This chapter is then an attempt to address this issue.

Naturally, the first site to answer this question is the text of the constitution itself. However, the text provides no insight into the question. Nothing in the constitutional text illuminates an interpretive philosophy that should guide interpretation. The Constituent Assembly debates also do not discuss this point. Seemingly, the constitution makers felt that they had eliminated the need for interpretation by providing a specific and detailed constitution. However, it became painfully obvious from the first fundamental rights case that reached the Supreme Court that a detailed constitution does not obviate the need for interpretation, because

the judges ultimately need to give meaning to the words written in the document to assess the nature of restriction imposed by the State. I go on to construct a theory for constitutional interpretation based on constitutional practice and theory in India.

I find through a survey of landmark cases that principally three methods of constitutional interpretation have existed in India; positivism, structuralism, and basic structure review. Positivism, 'holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else.'[21] In other words, positivism, as it applies in Indian constitutional interpretation, requires judges to apply the law, regardless of content, so long as it has been enacted in a procedurally correct manner by the body designated to do so. Structuralism, on the other hand is an interpretive approach in which the constitution is, 'interpreted liberally, as a totality, in the light of the spirit pervading it and the philosophy underlying it. A structuralist interpretation aims to articulate the implicit nuances of the Constitution, but may vary according to the ideological or philosophical predilections of the judges.'[22] The final method of constitutional interpretation is the basic structure review. The basic structure test was developed by the Indian Supreme Court in 1973 when it held that the basic features of the constitution cannot be amended. Although the list of basic features is illustrative and evolving, democracy, rule of law, secularism, judicial review, and federalism have over time been held to comprise some of the basic features of the constitution. The basic features are identified by reading the text of the constitution along with the Constituent Assembly debates, the political and legal history of the Indian independence, merged with

[21] SP Sathe, "From Positivism to Structuralism", in Jeffrey Goldsworthy (ed) *Interpreting Constitutions*: *A Comparative Study* (OUP 2007).

[22] SP Sathe, "From Positivism to Structuralism", in Jeffrey Goldsworthy (ed) *Interpreting Constitutions*: *A Comparative Study* (OUP 2007).

justifiable political and moral conceptions.[23] It is a method of interpretation that stipulates that the end result of interpretation cannot violate the non-negotiable features of the constitution.

I find that in each of these methods of constitutional interpretation, words have been interpreted in accordance with their original meaning, in accordance with theories offered by political and moral philosophers, or in accordance with theories offered by the proponents of fidelity and innovation. However, neither of those theories provides an answer as to the appropriate role of religious and cultural claims in fundamental rights litigation in secular, democratic, constitutional countries. Therefore, I fill this gap by devising a justificatory theory for constitutional interpretation that provides an answer to how religious and cultural claims should be weighed while deciding fundamental rights cases. This framework is based on Indian constitutional doctrine and theory.

The first limb of the theory is a concept of reasonableness, not as an outcome, but as a mode of action. I propose that religious and cultural claims can be part of the adjudicatory process if they meet certain processual demands from reasonability. Accordingly, I propose a structural framework within which the reasonability of an action can be determined.

The second limb of the justificatory theory is adherence to precedent, which is mandated by Article 141 of the constitution which states that the law declared by the Supreme Court shall be binding on all courts, and by the rule of law interests of fairness, equality, and certainty. The third limb of the theory is the concept of basic structure doctrine, as it specially relates to the basic feature of secularism. This limb

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[23] Sudhir Krishnaswamy, *Democracy and Constitutionalism* (OUP 2011) 133.

suggests that religious and cultural claims can be considered by the court provided that making them a part of the decision does not offend the Indian constitutional understanding of secularism. The fourth and final limb of the theory is the public reason limb, which provides that religious and cultural claims can be forwarded and accepted in fundamental rights litigation so long as they can be supported by independent public reason.

This justificatory theory provides therefore that although there is no formal restraint on the Indian judiciary from considering religious and cultural claims in fundamental rights litigation, constitutional practice, and theory, provide certain checkpoints through which the process of adjudication must pass to be considered legitimate. Religious and cultural claims which fail to cross the threshold laid down by this theory cannot be legitimately accepted in court, while the ones that do can be accepted in the process of adjudication.

(c). Judicial Notice (Chapter 6)

This chapter attempts to answer the second question raised in this research: once the court decides that it will hear religious and cultural claims, what threshold must these claims cross to be admitted into court? To answer this question, I study the concept of judicial notice, because the coding chapter reveals that in most of the instances the courts take illegal judicial notice of religious and cultural claim (63 out of 103 claims extracted here), overlooking the evidentiary barrier that they must pass to be admitted into court. It therefore becomes important to consider seriously the rules of evidence that govern this issue.

Section 56 of the Indian Evidence Act, 1872 (hereinafter 'IEA') provides that no fact that can be judicially noticed need be proved. Section 57 provides a list of

facts which are judicially noticeable. However, this section does not exhaust the category of judicial notice. All 'notorious' facts can be judicially noticed. Notorious facts are those that are beyond controversy, such as the whether the country is at war, the location of the Parliament, the sessions of Parliament, that rent prices are rising all over the country, so on and so forth. The idea behind this rule is that some facts are so well known that it would waste the time and resources of the court and the litigants to require them to be proved. Such facts are called notorious facts and can be judicially noticed.

As I demonstrate in the chapter, the judges can only judicially notice a fact the notoriety of which is beyond question. I show that owing to the extremely circumstantial and impermanent nature of a 'notorious' fact, doctrine can offer only limited insight into the correct ambit of the rule. Since there are no hard and fast criteria to tell a notorious fact from a non-notorious one, except to say that a notorious fact is one that is within the common knowledge of reasonable persons residing in a particular jurisdiction[24], a certain amount of discretion is inherent in the rule. On balance, when the rule of judicial notice has been expressly invoked, the Indian courts have applied the category of notoriety narrowly. The cases examined in the thesis show that judges have not been attentive, however, to the notoriety criteria when the rule has not been expressly invoked. It is the duty of the judge, whether the judicial notice rule is invoked, to follow the preconditions for the application of that rule. Judges are not exempt from the rules of evidence simply because the rules have not expressly been called into question. They are under an obligation to decide facts in

[24] Muhammad Munir and Harbans Lal Sarin, *Principles and Digest of the Law of Evidence* (4th edn, University Book Agency 1956) 386.

issue and facts relevant to the facts in issue on the basis of evidence, and to by-pass the evidentiary requirement if and only if, these facts are notorious in nature.

Moreover, I find that all but one instance of judicial notice of religious and cultural claims have been illegal in the dataset cases. It demonstrates that the judiciary has incorrectly applied the rule of judicial notice to facts that should have been correctly proven by evidence. For example, in the *Mahila Jagran Manch*[25] case studied herein, the Division Bench of the Karnataka High Court takes judicial notice of the primary fact in issue: Indian culture. The subject matter of the case is whether the organisers could organise a beauty pageant. There is no rule against pageants in India, but certain groups protest the pageants because they think it is against Indian culture. Culture is a fact in issue in this case because the organisers believe that they can conduct the pageant in keeping with Indian culture, whereas the protestors believe that Indian culture is inherently incompatible with such pageants. I demonstrate that this fact in issue should have been ascertained through inferences drawn from evidence submitted. However, no evidence is submitted or requested on this issue. Instead, the court takes judicial notice of 'culture', and decides the case accordingly.

Similarly, the courts take judicial notice of facts relevant to the facts in issue. For instance, in the *Maruti Shripati Dubal*[26] case, also part of this thesis, the court devises the criteria of 'naturalness' to determine whether a right to die could be permitted under the right to life guarantee of the Indian constitution (Article 21). I show that the court is within its powers to devise this criterion. However, having devised this framework, the demonstration of naturalness is relevant to deciding the

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25 Mahila Jagran Manch Bangalore v State of Karnataka and Ors 1999 (4) KarLJ 295 (Karnataka High Court).

26 Maruti Shripati Dubal v State of Maharashtra 1987(1) BomCR 499 (Bombay High Court).

fact in issue, that is, whether the right to end one's life was included within Article 21. Yet, the court deprives the parties of the opportunity to produce and cross-examine evidence on the aspect of naturalness. Instead, it takes judicial notice of different religious stands, from Hinduism, Islam, Jainism, Buddhism, Christianity, etc., on the matter. By no means can these religious positions be said to be notorious. Different texts pertaining to the same religion may provide different perspectives on the act of suicide. Moreover, theological scholars may disagree over the interpretation of texts, making their pronouncements on suicide a matter of reasonable debate. Finally, even if one assumes that religious views on suicide are clear and do not admit of any contradiction or debate, they are by no means 'notorious', i.e., so well-known that no evidence need be produced on their veracity. If indeed the scope of naturalness is to be determined by religion, and in the next chapter, I demonstrate why such a move would be constitutionally illegitimate, I show that the parties should have been provided an opportunity to prove their religious positions by leading evidence.

A further problem in the context of the judicial notice rule, which is also relevant to this thesis, is that the rule allows the court to refer to 'appropriate books and documents' while taking judicial notice of matters of art, public history, science, and literature. This entitlement should not be read as subverting the very basis of the rule that it modifies, i.e., the requirement of notoriety. There are three problems with the 'appropriate books and documents of reference' provision. The first is that this provision is resorted to without fulfilling the pre-condition of notoriety. The second is that there is no statutory or doctrinal guidance available to distinguish, 'appropriate books and documents of reference' of which the court can take judicial notice from other documentary evidence that needs to be proven through the ordinary rules of evidence. I demonstrate that an antiquated and delocalised list of books comprise the

category of 'appropriate books and documents of reference.' It is not clear how these books became eligible to be a part of that list. Further, judicial notice scholars attest that only those books that have enjoyed a certain mainstream career can be considered an appropriate book of reference.[27] The ramifications of this admission are that vernacular histories, subaltern writing, or critical works, are less likely to achieve such mainstream status and are therefore less likely to be considered an 'appropriate book or document of reference.' This leads to the third problem arising out the practice of this provision, which is that the status of mainstream and antiquated books that may have achieved a certain hegemonic status is further strengthened as the contents therein no longer need to be proved in court, whereas books which present subaltern or vernacular points of view need to go through the evidentiary process before their contents can be accepted. Therefore, in practice, this rule promotes a certain cultural hegemony.

(d). Secularism and Public Reason (Chapter 7)

This chapter addresses the third question raised in the thesis, i.e., what weight can courts give to religious and cultural claims while deciding fundamental rights cases? The previous chapters establish that the courts are not prohibited from hearing religious and cultural claims. Those chapters provide a justificatory framework to which the courts must subject these claims in order for this exercise to be valid. In this last chapter, I expand on the application of the last limb of the justificatory framework—secularism and public reason.

In any pluralistic society it is reasonable to assume that there may irreconcilable viewpoints on several fundamental topics. Public reasons are the

[27] Muhammad Munir and Harbans Lal Sarin, *Principles and Digest of the Law of Evidence* (4thedn, University Book Agency 1956) 387.

common set of reasons that people in such societies may agree upon to provide answers for irreconcilable viewpoints. The basic idea behind public reason is that comprehensive, moral, religious, and non-religious doctrines should be replaced by an idea of what is politically reasonable, derived, for instance, from the values embedded in a liberal constitution.[28] Judges are bound by public reason, which imposes a duty of civility on them to explain to citizens the reasons for their decisions in terms of constitutional values. Constitutional values are certainly the subject matter of persuasion and in a state of constant evolution, and it is the job of the interpretive theory to provide defensible interpretations of the words written in the constitution. Only when judges comply with this duty can they expect their decisions to be constitutionally legitimate. In addition, people may have their own reasons, religious or non-religious, for finding public reasons justified. Just because public reason may have this kind of backing does not change its character as public reason.

Dealing with religion in fundamental rights cases often invokes the secularism debate in India. The doctrine of secularism has three key principles, all of which have been developed in the context of religion and its appropriate role in State affairs: 1. the absence of State patronage of any religion; 2. the absence of State religion; and 3. the non-interference of religion in State affairs. The secularism doctrine in India has not been developed in relation to culture at present. Therefore, as far as religious claims are concerned, I examine the court's treatment of them against the threshold of secularism and public reason. Cultural claims are examined through the lens of public reason alone.

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[28] John Rawls, *Political Liberalism* (Columbia University Press 1993).

I show that in many instances, the judges fail to understand the demands of secularism and public reason as they apply to fundamental rights adjudication. In some cases, like the beauty pageant appeal[29], the judges impose restrictions on beauty pageants based on their cultural beliefs about women and their place in society, failing to provide independent public reasons for their holding. In other words, the judges fail to show that the cultural values that they have held important in the determination of the case comport with independent, defensible constitutional conceptions. Another mistake made in certain cases, such as the right to die case of *Rathinam*[30], is that the Supreme Court uses comprehensive religious doctrines to order the values within the constitution, as opposed to the scheme dictated by the constitution, and in so doing, manipulates constitutional conceptions. In that case, the court identifies that the right to life guarantee protects everything that is necessary for a dignified life. The constitutional value of dignity having been identified by the court, the inquiry should have proceeded on the basis of the standards of determination, such as the quality of life, as identified by precedent. Instead, the court conducts a survey of different religious and cultural views on suicide and holds that the right to die is included within the right to life, in part, because of religious and cultural tradition. I unpack these instances of religious and cultural engagement of the court against the threshold of public reason and separate the legitimate use of religion and culture from the illegitimate ones.

The thesis concludes that although there is no prohibition on the courts to consider religious and cultural claims, and neither constitutional text nor doctrine have prima facie held religion and culture to be irrelevant in the determination of

[29] Mahila Jagran Manch, Bangalore v State of Karnataka and Ors 1999(4) KarLJ295 (Karnataka High Court).

[30] P Rathinam and Ors v Union of India and Ors AIR 1994 SC 1844 (Supreme Court of India).

fundamental rights, some fetters exist on the judiciary in light of constitutionalism and the rule of law. First, religious and cultural claims should meet the evidentiary thresholds that any piece of evidence must meet to be admitted into court and the courts cannot simply take judicial notice of religious and cultural claims, which are in many instances, deeply contestable and non-notorious. Secondly, once admitted, the court can only give them weight in the adjudication process if they pass the justificatory checkpoints identified by the constitutional interpretation theory, especially meeting the demands of secularism and public reason.

Chapter 2- Methodology

1. Introduction

The empirical literature on constitutional protection of individual rights is not well-developed.[1] Within this line of inquiry, the scholarly preoccupation has been with the content of rights and methods of enforcement.[2] Therefore, much of this literature is normative in character. There is little focus on the legal conditions that arguments must fulfil to be considered relevant and legitimate in constitutional rights litigation. This thesis focuses on those conditions and provides a framework to assess the constitutionality of religious and cultural arguments based on concepts that are inherent to the constitution and the rule of law.

The method proposed herein is to study certain attributes of religious and cultural claims, such as whether they are supported by evidence, whether they are raised by the court or the litigant, etc., without regard to the content of the claim, or the worldview it forwards. Specifically, systematic content analysis, a method originally developed in the field of communications, and which is gaining increasing recognition in legal research, is employed in the current thesis to study various features of the religious and cultural claims in the context of fundamental rights litigation. The idea is to examine these features to ascertain whether the religious and cultural claims meet legal preconditions to be accepted as legitimate constitutional arguments. Before exploring why systematic content analysis is best suited to study

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1 David S Law, "Constitutions" in Peter Cane and Herbert M. Kritzer(eds) *The Oxford Handbook of Empirical Legal Studies* (OUP 2010) 381.

2 Sujit Choudhry, "Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies," in Sujit Choudhry (ed) *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008) 3-40.

the research question raised in this thesis, it would be appropriate to explore other qualitative research method which had been considered to answer the thesis question.

2. Qualitative Research Methods and Methodologies

Qualitative research addresses the content of texts, either through description, summaries, conceptual development, or thematic analysis of the content.[3] The main qualitative analysis methods are as follows: thematic analysis, interpretative phenomenological analysis (IPA), grounded theory, and pattern-based discourse analysis.[4]

(a). Thematic Analysis

Thematic analysis is a method for identifying themes and patterns of meaning in relation to the research question.[5] It is regarded as the most widely used qualitative research method.[6] It is a unique method among other qualitative methods in that it only provides a method for analysing data, and does not provide methods for data collection, theoretical positions, and epistemological frameworks. In that way, it is not a methodology, but a method, and this also is one of its strengths. This contributes to its flexibility as a method; it is said to work with any kind of research question (except

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3 James Drisko and Tina Maschi, "Qualitative Content Analysis" in *Content Analysis* (OUP 2015) 85.

4 Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 173.

5 Virginia Braun and Victoria Clarke, "Using Thematic Analysis in Psychology" in (2006) 3 QUALITATIVE RESEARCH IN PSYCHOLOGY 77, 79. (This is considered to be the seminal paper in the development of thematic analysis). The authors have clarified that the method that they developed have wider use than psychology on their website: "Although the title of this paper suggests TA is for, or about, psychology, that's not the case! The method has been widely used across the social, behavioural and more applied (clinical, health, education, etc.) sciences." See, Virginia Braun and Victoria Clarke, "What is Thematic Analysis" < https://www.psych.auckland.ac.nz/en/about/thematic-analysis.html#7f465f88ad64a879655581789558d01> last accessed 7 September 2021.

6 Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 175.

for language practice).[7] The method can be applied to identify themes in a bottom-up way (inductive thematic analysis), or through a top-down approach where theoretical ideas are used to analyse data (theoretical thematic analysis). Thematic analysis has also been applied to answer experiential research questions which makes sense of the participants' experience on a certain topic (experiential thematic analysis), and questions relating to how topics are constructed through participant accounts (constructionist thematic analysis). On first blush, it appears that thematic analysis may be a viable method for proceeding with the research question of the thesis. However, on a deeper analysis, the suitability of this method to the research question did not bear out. I shall explain the reasons for this in the next section by comparing it with the content analysis method. For the moment, I shall postpone further discussion on it, and proceed with an overview of other methods which were considered but ultimately disregarded in the thesis.

(b). Interpretative Phenomenological Analysis (IPA)

IPA is of recent origin, developed only in the 1990s, and a popular approach in health, clinical and counselling psychology.[8] It is a methodology as opposed to simply a method, and because of this, comes with well-developed theoretical principles, appropriate research questions, and prescribed data collection methods. IPA is the study of experiences and its concern is with understanding peoples' lived experiences.[9] The approach involves a dual interpretative process called a double

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[7] Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 178.

[8] Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 180.

[9] Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 181.

hermeneutic. IPA researchers are interested in understanding how people make sense of their experiences, first by representing their participant's experience in a way that is true to their account (hermeneutics of empathy), and then by stepping back from the account and asking what assumptions underpin the account (hermeneutics of suspicion).[10] IPA typically employs small homogenous samples, and data is collected through face-face interviews. In sum, IPA tends to focus on significant life experiences and the implications they have for our identities.[11] For example, researchers have studied a woman's transition to motherhood, the impact of chronic pain on the sufferer's sense of self, etc. This methodology was not fit to explore the research question posed in this thesis. The thesis did not seek to study the experiences of litigants when bringing the cases of interest to court but was interested in studying the properties of certain kinds of arguments brought up in those cases. For these reasons, this methodology did not fit the research question.

(c). Grounded Theory

Grounded theory, as the name suggests, is grounded in developing contextually specific theories, developed from a close analysis of the data gathered from concrete, local settings.[12] It was developed in the 1960s by US sociologists and is a very popular qualitative methodology. It is primarily used to study social and social-psychological processes, and best suited to answering questions about influencing

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10 Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 181.

11 Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013)) 181.

12 Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 184.

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factors that underpin a phenomenon. It is accompanied by distinctive procedures like line-by-line coding, memo writing, theoretical sampling, saturation, and famous for advocating non-engagement with relevant literature prior to analysis to prevent the developing theory from being influenced by it.[13] The research question for this thesis was concerned with the properties of the religious and cultural claims. This thesis was not concerned with developing a theory of the factors that lead to such claims being brought to court in certain cases. For this reason, grounded theory did not fit the research question.

(d). Discourse Analysis

Yet another popular method is discourse analysis which developed in the field of psychology and marked the field's turn to the external aspect of behaviour.[14] A discourse is a system of statements that constructs an object. The method posited that self, subjectivity, identity, memory, gender, sexuality, and other questions that psychologists are interested in, should not be seen as private or internal, but rather as social processes or activities which can be understood by looking at language and discourse: discourse analysis is interested in studying the meanings produced and the realities constructed through discourse. It posits that our realities are constructed by the discourses that surround various topics, because language does not simply represent pre-existing meaning, but also creates and reinforces it. This method lends itself to construction type questions, which ask how certain social realities are created, or represented, in certain context. This thesis was not concerned with inquiring into how religious and cultural discourses shape the outcome of the case, a line of inquiry

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13 See generally Kathy Charmaz, *Constructing Grounded Theory*: *A Practical Guide Through Qualitative Analysis* (SAGE 2006).

14 Virginia Braun and Victoria Clarke (n 4) 187. See also Ian Parker, *Discourse Dynamics*: *Critical Analysis for Social and Individual Psychology* (Routledge 1992) 5.

that is followed by feminist legal theorists and other critical legal scholars. Instead, this thesis aimed to draw attention to process (evidence law), and political philosophy and constitutional doctrine, as alternative means of engaging with religious and cultural claims in fundamental rights litigation not concerned with the right to religion. Therefore, discourse analysis was not suited to the thesis.

3. Thematic Analysis versus Qualitative Content Analysis

Following the overview provided above, it seems that thematic analysis could be a strong contender for the research question. Before concluding whether it in fact is, I will explore the procedure involved in the thematic analysis method. Analysis in this method begins with familiarisation with the data, i.e., text, through reading and re-reading with the ultimate aim of coding. Coding is the process of 'identifying aspects of the data that relate to the research question.'[15] It is a word or a phrase that captures the essence of why a particular bit of data is important.[16] Two primary methods of coding are selective coding and complete coding. Selective coding is concerned with identifying instance of the phenomenon under study and separating them from the text. Only certain type of data is selected, leaving the rest aside, resulting in what practitioners call, 'data reduction.'[17] Complete coding, on the other hand, aims to code everything that seems to be of relevance to the research question in the first instance and only later in the analytic process does one become more selective. In the context of the research question in this thesis, selective coding seemed to be more appropriate. That is because it was clear that what the researcher was looking for were instances of

[15] Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 206.

[16] Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 207.

[17] Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 206.

the use of religious and cultural claims by the parties or the judges to justify their legal positions. Accordingly, selective coding was employed.

The next step in thematic analysis is to work one's way from codes to a theme. A theme is a patterned response to a research question. It is broader than a code; codes combine to form a theme. Whereas a code captures one idea, a theme captures many ideas around a central organizing concept. Themes are developed from codes. The researcher reviews the codes with the view to identify similarities and overlaps between them, and salient patterns within them which can be represented under a theme.[18]

It is at this point that the method stops providing a useful guide to a project like this one. This project does not examine religious and cultural claims with the view to identify the most salient themes in those claims. An example of a project that may do so would be a project interested in questions like: what ideas of Indian religion and culture are promoted through the religious and cultural claims made in fundamental rights litigation, or, is there an idea of a golden past created and promoted through the religious and cultural claims in fundamental rights litigation? Many other kinds of questions could also be answered by analysing the salient themes that emerge through coding and analysing the religious and cultural claims. However, that is not the intention of this research project. While many of the procedures employed in the thematic analysis method are useful for this research question, this project is invested in individually exploring certain legal properties of a certain kind of argument made in court, and not in reading them collectively to identify certain sociological themes promoted by them. Therefore, a different analytical method is

[18] Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 224-225.

needed. In what follows, I will explain why systematic or qualitative content analysis is that analytical method.

4. Qualitative or Systematic Content Analysis

Content analysis as a research method has a long history in communications and social science. Initially, it was used to analyse foreign policy, especially during the Second World War. Today, it's most prevalent uses are still in the abovementioned fields, but also in political science where it is used to study party ideology.[19] Much of this research is quantitative in nature; researchers assign numbers to words, and subsequently classify or scale documents according to word count or sentences.

This approach is distinct from the qualitative application of content analysis which typically involves reading the document and offering a synthesis or interpretation of their content.[20] Qualitative content analysis rests on a constructivist epistemology which posits that knowledge is situated and relative, and the active 'product' of human 'knowers.'[21] One of the main research designs in which it finds its use is exploratory design through which the knowledge present in the documents is more clearly described and explored. Qualitative content analysis can be used to fully explicate the meaning of a text,[22] by an explanation of meanings found in the text

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19 Jonathan B. Slapin and Sven-Oliver Proksch, "Words as Data: Content Analysis in Legislative Studies" in Shane Martin et al (eds) *The Oxford Handbook of Legislative Studies* (OUP 2014) 127.

20 Jonathan B. Slapin and Sven-Oliver Proksch, "Words as Data: Content Analysis in Legislative Studies" in Shane Martin et al (eds) *The Oxford Handbook of Legislative Studies* (OUP 2014) 127.

21 James Drisko and Tina Maschi, "Qualitative Content Analysis" in *Content Analysis* (OUP 2015) 91.

22 Philip Mayring, *Qualitative Inhaltsanalyse, Grundlagen und Techniken* (Weinheim 2010).

followed by a description of how these meanings are conveyed. However, this is a rare use of this technique.[23]

The application of content analytical methods to legal research is infrequent and little known. The first important scholarly work on this was done by Hall and Wright whose seminal article tracing the legal genealogy of this method is the starting point for any legal researcher using qualitative content analysis.[24] In their paper, they refer to this method as 'systematic content analysis', and so, for the purpose of providing an overview of their account, I will use this phrase instead of qualitative content analysis.

Hall and Wright argue that systematic content analysis aims for a scientific understanding of the law itself as found in judicial opinions and other legal texts.[25] It is an empirical method to supplement the traditional legal method. It comprises three steps: 1. a systematic case selection; 2. systematic case coding; and 3. a quantitative analysis of cases. As opposed to the traditional legal method which proceeds by selecting landmark cases on a topic and analysing them for notable themes, systematic content analysis requires a researcher to select all cases meeting the pre-defined selection criteria and requires them to consistently code attributes of each case, thereby making sure that the researcher does not omit attributes in favour of predetermined positions. In this thesis, I employ systematic content analysis to select and code, and then employ traditional legal methods, such as normative and doctrinal evaluations, to analyse significant emergent attributes. I also use the term systematic

[23] James Drisko and Tina Maschi, "Qualitative Content Analysis" in *Content Analysis* (OUP 2015) 93.

[24] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) CAL L REV 63.

[25] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) CAL L REV 64.

content analysis instead of qualitative content analysis as that is the standard in legal scholarship.

Hall and Wright trace a history of the method's usage in legal scholarship. They report that the first conscious usage of this method was made by Fred Kort, in a 1957 article wherein he discussed US Supreme Court cases concerning the right to counsel in criminal cases, a total of twenty-eight cases decided between 1932 and 1956.[26] He developed a coding scheme to note and categorise the various facts recorded in the decisions, with a view to arriving at an understanding of the special collection of facts which triggered the appointment of a defence counsel.

Within a few years more scholars joined Kort, and two distinct academic camps were created: one which was interested in predicting legal outcomes, and the other that sought to study personal and political attitudes that drove judicial decision making.[27] From that point forward, systematic content analysis expanded to other legal fields: from labour and zoning laws[28], to negligence law[29], and to examining judicial rhetoric in decision making.[30]

This method is differentiated from docket analysis or traditional quantitative legal analysis, which codes cases for basic information like parties, subject matter,

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[26] Fred Kort, 'Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases', 51 AM. POL. SCI. REV. 1,11 (1957).

[27] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) CAL L REV 68.

[28] Werner F. Grunbaum & Albert Newhouse, 'Quantitative Analysis of Judicial Decisions: Some Problems in Prediction', 3 HOUS. L. Rev. 201 (1965).

[29] Richard A. Posner, 'A Theory of Negligence', 1 J. LEGAL STUD. 29 (1972).

[30] Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown Company 1960) 102-103.

basic outcomes—things that can be obtained from case headnotes or docket sheets.[31] This method is also differentiated from studies on court citation practices.[32] When Hall and Wright wrote their seminal article in 2008, they found that a hundred and thirty-four studies had utilized this method. However, many of those studies had not cited previous studies and were not aware of the existence of this method. This trend is symptomatic of the current studies utilizing this method. There is seldom a reference to previous works using the same method, with the result that this method is not widely known in legal research.

At the present time, this method is growing and gaining acceptance from legal scholars worldwide. It is being used to study a variety of legal subject matters, both judicial and legislative. For example, in 2012, researchers in Japan have used this method to study court opinions on defamation lawsuits against the media.[33] Once the cases were collected from various legal databases, the researchers used systematic content analysis to code various attributes in a systematic way: type of database, attributes of the parties, like sex, age, etc., jurisdiction and level of the court, contents of defamatory sentences, outcome of the cases, amount of damages if any, and whether a public apology was ordered. Further, in 2020, Rachel J Cahill-O'Callaghan used content analysis to study values that underpin decision-making in the hard cases in the UK Supreme Court. To do this, she selected those Supreme Court cases where no clear legal rule or precedent could be utilised to reach a decision. The content

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[31] Rachel J Cahill-O'Callaghan, *Values in the Supreme Court*: *Decisions, Divisions and Diversity* (Hart Publishing 2020) 29.

[32] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) CAL L REV 72.

[33] Noriko Kitajima, "The Protection of Reputation in Japan: A Systematic Analysis of Defamation Cases" (2012) 37(1) *Law and Social Inquiry* 89, 96.

analysis of these cases presented an opportunity to reveal the values that guide the court in its decision-making.[34]

The latest application comes from Paez and colleagues in 2021, who study water conflicts in Colombia. They apply the systematic content analysis method to study legislative documents referring to the right to water from 1991 to 2018 (in this paper, the researchers call it qualitative content analysis). The goal of the paper was to study whether the congress has been an effective political player in focusing on relevant issues. The authors acknowledge that typically content analysis is used to systematically analyse judicial opinions. They proceeded by identifying key narratives and issues present in these documents as is required by the content analysis method.[35]

This thesis aimed to develop a systematic way of analysing religious and cultural claims in judicial opinions. The traditional legal method of selecting landmark judgments on the topic and analysing them for doctrinal and normative themes was unavailable to this thesis, because there are no cases which have achieved landmark status in setting the jurisprudence on this topic. Therefore, systematic content analysis was used to select all the cases which answered the call of the question, study their attributes, and zero-in on the main rule of law concerns that are thrown up when religious or cultural claims are used in fundamental rights litigation which is not about the right to religion.

(a). Sampling

To accomplish the aims of the thesis, the first step was to systematically select a set of cases which fit the description of the research question. However, since the thesis was

[34] Rachel J Cahill-O'Callaghan, *Values in the Supreme Court*: *Decisions, Divisions and Diversity* (Hart Publishing 2020).

[35] Angela M Paez et al, 'Channeling Water Conflicts Through the Legislative Branch in Colombia' in (2021) 13 WATER 1215.

not examining right to religion cases, there was no fixed site from which the relevant dataset of cases could be extracted. One option was to go through the fundamental rights cases in the Indian Supreme Court and various High Courts and examine the religious and cultural claims made therein. However, the sheer number of such cases made that task difficult at the DPhil level.

One of the primary ways in which fundamental rights become the subject matter of litigation is through the writ jurisdiction of the higher judiciary. The latest Annual Report of the Supreme Court records the number of writs filed between 1985 and 2018. This number is 5371 and will be much larger if one were to obtain the figures for the period 1950-1985.[36] Therefore, this method would have yielded an unmanageably large number of cases. Moreover, writs are not the only way through which fundamental rights come to be challenged in court. Special Leave to Appeals (SLP) may also be granted by the Supreme Court from any judgment of the lower court. For example, the case of Suresh Kumar Koushal v Naz Foundation[37], one of the key cases analyzed in this thesis was a SLP. Another means by which a fundamental rights case might make its way into the Supreme Court is through a Civil or Criminal Appeal. For example, the case of State of Maharashtra and Ors v Indian Hotel and Restaurants Association[38], yet another case studied in this research, made its way to the Supreme Court via a civil appeal. The latest report does not record the numbers of SLPs and civil and criminal appeals in the Supreme Court. Even if it did, this number may not accurately reflect the sub-set pertaining to fundamental rights cases within these categories as all SLPs and civil and criminal appeals to not involve a

[36] See "Indian Judiciary: Annual Report 2017-2018" (The Supreme Court of India 2017) 79.

[37] AIR 2014 SC 563 (Supreme Court of India).

[38] AIR 2013 SC 2582 (Supreme Court of India).

fundamental rights question. Finally, fundamental rights questions are also raised through letter petitions converted by the court into public interest litigation[39]. Alone in 2018, 51,514 letter petitions have been filed. There was no way of discerning from this number alone how many pertained to a fundamental rights question.[40]

These numbers also pertain only to the Supreme Court, and the case load of the High court is not included in this estimate. I have presented these numbers here to elucidate the point that reading all fundamental rights cases would have been an impractical undertaking in a DPhil.

Therefore, the method of sampling employed within this thesis to gather a relevant dataset of cases was the intensity sampling method. In this method, those cases are selected which are theoretically determined to offer depth and/or breadth on a given event, belief, or other topic of interest. Researchers purposefully select such cases over others for their potential to yield valuable information and to clarify the impact of contexts. Transferability or generalization is not typically sought nor expected; information richness on a selected topic is the key concern.[41] Accordingly, certain themes were chosen where one would expect to see the phenomenon under study in this thesis. For reasons that will become clear in the theoretical framework guiding the case selection, cases concerning gender, sex, and sexuality, seem to disproportionately, although not exclusively, invite religious and cultural arguments. Accordingly, I began looking at cases which fell under the abovementioned broad areas of inquiry. Themes obtained through this process were further refined by removing right to religion cases, religious and caste discrimination cases, and themes

[39] For example, Bandhua Mukti Morcha v Union of India and Ors(1997) 10 SCC 549 (Supreme Court of India).

[40] See "Indian Judiciary: Annual Report 2017-2018" (The Supreme Court of India 2017) 79.

[41] Michael Patton, *Qualitative Evaluation and Research Methods* (Sage 1990).

connected with personal laws, because religious and cultural claims are to be expected in those cases. The aim of the thesis was to study the legal properties of religious and cultural arguments in fundamental rights cases which did not fall in the abovementioned categories. Therefore, the final themes selected were: beauty pageants, marital rape, bar dancing, euthanasia, same sex relations, transgender rights, sex work, abortion, and surrogacy.

(b). Coding

Coding began with immersion in the dataset, i.e. the cases, the goal of which was to become aware of the content in context, to identify preliminary categories, connections within the data, and the key perspectives present therein. All coding requires researchers to make determinations of what is relevant and irrelevant, and to an extent, has been described as an "art"[42].

As I described earlier, selective coding was considered to be the most appropriate form of coding for this project. Selective coding, to recall, is the process of identifying the instances of the phenomenon under study and separating them from the text. It is wrongly assumed, Braun and Clarke have argued, that the selective coding process is pre-analytic. It is not so. In order to know what counts as an instance of what one is searching for, it is important in certain instances, to bring to the data certain theoretical understanding.

Accordingly, Braun and Clarke have argued that there are two types of codes produced in the coding process: data-derived codes and researcher derived codes. In the language of socio-legal literature, these codes are depicted by the terms, 'literal

42 Klaus Krippendorff, (1980). *Content analysis: An introduction to its methodology* (Sage 1980) 76. Margrit Schreier, *Qualitative content analysis in practice* (Sage 2012).

meaning'[43] and 'sociological meaning'.[44] The former are semantic codes and mirror the participant's language. These kinds of codes do not require an interpretive framework and the meaning they want to convey is apparent in the language itself.[45] A vast majority of the claims that are analysed in the current thesis fall into this category. They overtly identify the religious and cultural support or objection to the impugned activity. Examples include claims like, "decriminalising 377 would run afoul all religious practices in the country'[46], 'child marriage is a tradition in India and needs to be respected'[47], 'In ancient Indian and Chinese civilisations, it was customary to permit voluntary death and arrangements should, therefore, be provided by UOI to facilitate voluntary death clinics'[48]

However, for a minority of claims to be identified as religious and cultural claims, researcher-derived codes were necessary. Researcher derived codes go beyond the explicit content of the data and require the researcher to invoke conceptual and theoretical frameworks to identify meaning implicit in the data.[49] Certain claims studied in this thesis required assigning researcher-derived codes. The assumptions and frameworks embedded in the data needed to be made explicit to understand them

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43 Reza Banakar, "Studying Cases Empirically" in Reza Bankar and Max Tavers (eds) *Theory and Method in Socio-Legal Research* (OUP 2005) 145.

44 James Drisko and Tina Maschi, "Qualitative Content Analysis" in *Content Analysis* (OUP 2015) 117.

45 Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 207.

46 Navtej Singh Johar and Ors v Union of India and Ors Writ Petition (Criminal) No 76 of 2016 (Supreme Court of India).

47 Independent Thought v Union of India and Ors Writ Petition (Civil) No 382 of 2013 (Supreme Court of India).

48 CA Thomas Master v State of Kerala 2000 CriLJ 3729 (Kerala High Court).

49 Virginia Braun and Victoria Clarke, *Successful Qualitative Research*: *A Practical Guide for Beginners* (SAGE 2013) 207.

as religious and cultural claims. Examples include claims like, 'no smoking or drinking by participants is allowed' in the beauty pageant case, or, 'by marriage a girl gives implicit consent for sex', 'or criminalising rape will destroy the institution of marriage', as in the marital rape case. In these instances, there is in operation a certain idea of culture, specifically Indian culture, which is not made explicit by the speaker. The researcher therefore has to have some theoretical and conceptual frameworks in mind when coding these claims as religious and cultural claims. Particularly relevant for this research were theoretical insights offered by postcolonial feminist legal scholarship. Accordingly, those insights were used to code these claims as religious and cultural claims. These theoretical frameworks are explained in the next section.

5. Theoretical Framework: Culture, Nationalism, and Feminism in India

Culture and religion have come to define sex and sexuality in important ways. This phenomenon is as true of India, as it is elsewhere. The source of culture and religion itself and how it enmeshes with the popular imagination is difficult to pinpoint with certainty. Different fields have offered different insights. For example, psychoanalysis has offered an account of how psyches are constructed in negotiation with the culturally acceptable and unacceptable; a process which begins as the infant begins to understand its world.[50] Similarly, theologians have their own account of culture and religion. Such exercises are also attempted by anthropologists who immerse themselves within different groups to give an account of the culture of that group. To give a definitive account of Indian culture is not a task that is possible within this thesis, if ever. However, as a majority of the themes studied within the thesis deal

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50 Sudhir Kakar, *The Inner World*: *The Psycho-Analytic Study of Childhood and Society in India* (OUP 1978).

with women, sexuality, and culture, it is possible to give an account of how sex and sexuality came to define and be defined by culture in significant ways in India, and how this relationship is represented in law. The account that is presented here arises from the insights of feminist historians and postcolonial feminist legal theorists writing in the second half of the twentieth century and in the present times, in India.

Postcolonial feminist legal theory in India is derived from, and improves upon the insights of, postcolonial theory and subaltern studies. Postcolonial theory itself, is not a cohesive, consensual theory of the world, but instead is marked with heterogeneity and multiplicity. Instead of a cohesive theory, postcolonialism can be understood better by the following significant features.

First, postcolonialism questions the Eurocentric account of human history, in which cultures have moved from an era of darkness to enlightenment, and in which the rise of the nation state and individual rights are seen as the real markers of success. In this ever-progressive narrative, history is seen as always moving towards democracy, rule of law, and good governance. The market is seen as a freedom maximising site and the law is seen as an objective, external, neutral tool which alone will propel us towards greater truth, and maturity. Law is not seen as an instrument of oppression and exclusion; indeed, these fallouts are considered its abuse, and the hope is that these distortions can be corrected gradually by including more and more subjects within its remit. Such an account, post-colonialists argue, neither considers the terms of inclusion within the law nor the connection between these terms and knowledge production. The modalities of knowledge production create not only worthy subjects of the law, but also creates law's others, to whom a totally different

set of considerations apply.[51] Instead, history is presented in a linear progression, with modernity as its goal. Modernity, at the same time is deeply linked with being European and aspiring for European values. This narrative provides a justification for the Imperial project and the civilising mission of colonialism.

Ratna Kapur has ably reminded us that postcolonialism is not merely a temporal marker, which separates the colonial rule from the moment of independence. It is a theoretical lens that continues to be relevant long after the freedom moment to understand the ways in which colonialism continues to reverberate in the postcolonial era.[52] Kapur has said, '[d]espite the yearning to forget the past and look to the future, the break with the Empire does not dispel the cultural, economic, political and legal implications it has had for the postcolonial world.'[53] Thus, even in the postcolonial contemporary period, material subordination to past masters may continue, or the newly free states may replicate the oppression that they experienced on weaker states through economic, political and legal means.

Secondly, postcolonialism also draws attention to power and knowledge production. It demonstrates how identities were imposed on the colonial subjects through anthropology, history, and law, with cultural and historical difference being weaponised as primitiveness to justify colonial rule. This idea is encapsulated in the following words of Ratna Kapur, 'tradition and antiquity served at times for making moral judgments about the native subject, and as one justification for establishing colonial rule in India. Difference was justified by placing of the society at the

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[51] RatnaKapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 21.

[52] RatnaKapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 22.

[53] RatnaKapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 22.

primitive end of the civilisation scale, in need of being civilised through strict discipline and punishment.'[54]

These insights of postcolonialism when applied to liberalism and the rule of law in the present times produce similar findings. In the postcolonial world, the colonial narrative has been replaced with liberalism, significant progress on which was made during the colonial rule in the 18th and 19th century. Liberalism is based on the Locke's idea that all humans are born free, equal and rational, and that they exist as atomised individuals who are prior to history and society. The capacity to reason is the cornerstone of liberalism, and accordingly, the subjects who cannot reason are excluded from its protection. Kapur argues that British writers writing in the 19th century about India had a huge influence on the colonial mindset about India. For example, in James Mills', *History of British India*, the country was depicted as in Kapur's words, 'chaotic, unfathomable, and inscrutable.'[55] India was depicted as incapable of liberty, democracy, and discussion because the natives were childlike, irrational beings without capacity to reason[56]. Owing to this extreme difference from the British, it was relegated to the primitive end of the civilisation spectrum and considered incapable of self-rule.

Thirdly, postcolonial writers have pointed out that liberalism imagines an atomised, universally similar, and ahistorical subject. Here, postcolonial studies are helped by subaltern studies that expose the role of liberalism in excluding voices of the native population and privileging the dominant narrative of the Empire. The

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54 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 23.

55 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 24.

56 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 24,

subaltern studies movement is said to have started in the 1960s when Gramsci's writings revolutionised British Marxism and set in motion a movement of writing history from below. In India, the project took the form of finding the excluded peasant voices, demonstrating the agency of the colonial subject by showing the manner and sites of resistance exercised by them, and in due course, attempting to find an essential peasant consciousness.[57] However, over time, with the influence of poststructuralists like Michel Foucault, subaltern studies expanded its scope of inquiry from the realm of economic subjugation to include multiple locations through which power was exercised and made part of the discourse.[58] Subaltern studies have also shown how the native interacts with the liberal powers that tried to shape it, at once resisting and assimilating these values so that the final product is a hybrid liberal subject—not entirely European and not entirely native any longer as well.

Ratna Kapur argues that postcolonial studies and subaltern scholarship have foregrounded the excluded voices from the normative discourse, but have failed to provide an adequate account of sex and sexuality in their theories. They have also failed to highlight the feminist participation in these discourses.[59] This concern is also seconded by the Indian historian, Uma Chakravarti, who states that the material history that has found favour among historian in Indian since the 1970s, and a short glimpse of which appears in the foregoing paragraph, 'did not include vital aspects relating to gender; further, sexuality and reproduction were not regarded as aspects of

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57 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 26.

58 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 27.

59 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 28.

social relations—either of production or of social reproduction.'[60] In these discourses, sex and sexuality remain unaddressed. Kapur argues that sex and sexuality bring important insights into the understanding of culture, which in turn affects their own legal regulation, and this phenomenon needs to be studied to create analytical tools for understanding culture's relation with law and sexuality. Kapur, in turn, proposes a postcolonial feminist legal theory which explains how the colonial encounter constituted sex and sexual subjects and how this interaction continues to influence present legal understandings.

Kapur's account builds on the work done by feminist historians. Those scholars have shown how ideas around sex and sexuality in India began to be consolidated in their present form in the context of a struggle for legitimacy between the Indian nationalists and Indian social reformers, as the voice of the nation. Kumari Jayawardena's Feminism and Nationalism in the Third World is credited with initiating feminist critique on the nation state. Jayawardena has written that the status of women in India varied in different time periods and according to class, religion, and ethnicity. The 'general situation however, was one of suppression and domination within the bounds of a patriarchal system.'[61] Jayawardena has argued that regardless of caste and class status, and the material conditions of their life, women were subjected to male domination and certain other values that circumscribed their life.[62]

Jayawardena argues that, in the nineteenth century, social evils that affected the lives of women became the subject of public discussion and debate, both among

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[60] Uma Chakravarti, "Of Meta-Narratives and Master Paradigms: Sexuality and the Reification of Women in Early India" CWDS Occasional Paper (2009) 3.

[61] Kumari Jayawardena, "Women, Social Reform and Nationalism in India" in *Feminism and Nationalism in the Third World* (Zed Books, 1994, c1986) 78.

[62] Kumari Jayawardena, "Women, Social Reform and Nationalism in India" in *Feminism and Nationalism in the Third World* (Zed Books, 1994, c1986) 78.

European missionaries and administrators, and indigenous social reformers and nationalists. This was made possible by the changing material conditions of life in India, such as the impact of missionary activities, English education, publication of vernacular literature, liberal ideas from the West, etc.[63] The Europeans emphasised the low status of women as symptomatic of the general backwardness of the country while the social reformers argued that whatever their current position, women had in ancient India occupied a high status.[64] Accordingly, the social reformers began to critique oppressive practices such as child marriage, prohibition of widow remarriage, Sati, etc. and wanted the help of the British administrators to curtail those practices.[65] The nationalists opposed any such move. However, it is to be remembered that the primary distinction between the reformers and the nationalists is not that the former was less patriotic or the latter more rooted in indigenous tradition. It is, as one noted feminist historian, Tanika Sarkar has argued, that these two groups read the Hindu customs and practices very differently. While the reformers considered the oppressive Hindu customs as 'distortion of earlier purity and a major symptoms of present day decay'[66], the nationalists 'celebrated them as an excess reserved over and above colonisation, any change in which would signify the surrender of the last bastion of

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[63] Kumari Jayawardena, "Women, Social Reform and Nationalism in India" in *Feminism and Nationalism in the Third World* (Zed Books, 1994, c1986) 78, Tanika Sarkar, Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism 25.

[64] Kumari Jayawardena, "Women, Social Reform and Nationalism in India" in *Feminism and Nationalism in the Third World* (Zed Books, 1994, c1986) 78.

[65] Jayawardena has qualified the objectives of the reform movements by arguing that the issues that the reformers were agitating on were primarily issues that concerned high caste Hindus. Additionally, she has argued that the thrust of the reform movements was not the true emancipation of women, but to correct certain distortion of Hindu customs which were destabilising the middle class Hindu family. Kumari Jayawardena, "Women, Social Reform and Nationalism in India" in *Feminism and Nationalism in the Third World* (Zed Books, 1994, c1986) 79.

[66] Tanika Sarkar, Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism 36.

freedom.'[67] Therefore, the nationalists sought to guard private life from intrusion from the colonial forces—private life was to be determined by the colonial subject, not the colonial master. Boundary lines were drawn between the legitimate realm of the colonisers (the public life- contracts, criminal law, etc.), and the colonised (private life, family law, religious law).

The Hindu home thus became the site where the Hindu could feel a sense of agency and control, in distinction to the incomprehensibility and powerlessness experienced in public life. To support this claim, Tanika Sarkar has quoted several mid-nineteenth century tracts on marriage and household. One tract states, 'Just as the King reigns over his dominion, so the head of the household (karta) rules over his household.'[68] These tracts also provided 'training in governance' by laying claim to the administrative and political ability of the Hindu; a stance denied to him in the public sphere. The intention of these tracts therefore was also, as Sarkar as argued, to establish a claim to power in the world. By showing that the Hindu is capable of successfully governing his household, an extended claim could be made for the governance of the country. Sarkar quotes a tract that made explicit this claim in the following manner: 'whoever can run a Hindu family can administer a whole realm.'[69]

Sarkar argues that perhaps an unintended consequence for this claim for political power was that, because this claim was staked through the successful

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[67] Tanika Sarkar, Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism 36.

[68] Tanika Sarkar, Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism 38. Cited from, Naryan Ray, *Bangamahila* (Calcutta, nd) 51.

[69] Tanika Sarkar, Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism 38. Cited from, Garhasthya (monthly journal, Calcutta, 1884) 1.

performance of the Karta of a household, it came to politicise household relations.[70] Further, because the Hindu nationalists critiqued the colonial project as a loveless and purely deprivational project, the home was not only a critique of this political arrangement, but it also had to set itself as an alternative to it. Therefore, Sarkar argues, that the home was to be portrayed as arranged on the principle of love; power relations portrayed as purely emotional states of selfless love and self-fulfilment.[71] In this enterprise, the Indian woman, specifically the Hindu woman, came to embody all that was pure, chaste, and worth protecting as the private life. Building on this narrative, Ratna Kapur notes, 'the native woman became the symbol of the incipient Indian nation.'[72]

Opposed to the efforts of the social reformers, were the political nationalists who believed that law was an ineffective means of changing such practices, and education was the right way forward. They also feared that the British would use the barbarity of these practices to justify their rule over India. This also indeed happened, as Kapur has written.[73] Kapur has astutely noted that at no point in these debates did women form part of the discussion. The contest was not about the equal rights of women, but about the right to define the boundaries of the emerging nation states. The battle precipitated against the case of Phulmonee, a 10/11 year old girl who had been married off to a 35 year old man and had died after sustaining injuries resulting from

70 Tanika Sarkar, Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism 38-39.

71 Tanika Sarkar, Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism 39.

72 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 29.

73 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 22.

marital rape at his hands. Since she was above the age of consent—10 years—the husband could not be tried for rape. He was also acquitted of murder. The uproar caused by this case ultimately led to the raising of the age of consent through legislation, but Kapur argues, it also landed a decisive victory to the nationalists. Other historians, like Mrinalini Sinha have also argued that the nationalists were successfully able to cordon off the domestic sphere from colonial interference.[74]

Moreover, Jayawardena has pointed out that although seemingly radical change was sought for the Indian women, in truth, the agitation was for only superficial change. For example, the prohibition of widow remarriage which was practiced by high caste Hindus was creating a class of high caste Hindu sex-workers; women who were rejected by their marital and natal families upon the death of their husbands. Jayawardena and other historians, like Vina Mazumdar, have argued that it was the anxiety that the Hindu family would disintegrated if windows went into sex-work, brought urban high caste, reformers, primarily male, to agitate for changes.[75] She has argued that the thrust of these reform movements was to 'revitalise and preserve the patriarchal family system, produce more companionable wives and mothers, and therefore have a stabilizing effect on society.'[76] Revolutionary changes that presented true alternatives to women's status in society did not form part of the demands of the nationalist movement, and Jayawardena has argued that there was no

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[74] Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005). 31. See also, VrindaNarain, 'Postcolonial Constitutionalism: Complexities and Contradictions' 25(7) Southern California Interdisciplinary Law Journal (2016) 113.

[75] Kumari Jayawardena, "Women, Social Reform and Nationalism in India" in *Feminism and Nationalism in the Third World* (Zed Books, 1994, c1986) 79. See also, Vina Mazumdar, 'The Social Reform Movement in India from Ranade to Nehru' in BR Nanda (ed) *Indian Women from Purdah to Modernity* (New Delhi 1976) 49.

[76] Kumari Jayawardena, "Women, Social Reform and Nationalism in India" in *Feminism and Nationalism in the Third World* (Zed Books, 1994, c1986) 79.

true rising of the feminist consciousness during the struggle for independence. Therefore, as Jayawardena has noted, 'the movement gave the illusion of change while the women were kept within the structural confines of family and society.[77]

Further, although women participated in the struggle for liberation of the country from the colonial rule, they did not or perhaps, could not, '…work out a strategy for their own liberation struggle for their own interests. By subordinating these roles to the national cause they conformed to the traditional pativrata or sati ideal of the self-sacrificing woman.'[78]

Therefore, through the independence struggle, the family was constituted as a pure space of Indian culture, free from colonial intervention. Women in turn, came to represent all that was pure and untouched, and became the symbol of nationalism. India became mother India and women became the mothers of the nation.[79] Women were supposed to symbolise chastity, self-sacrifice, patient, virtuous, passionless, and devoted to kith and kin.[80] By extension, sex and sexuality also was sequestered from the public debate and became the concern of the private sphere.

However, with the rise of the women's movement in India, the rise of the modern film industry with its song and dance sequences, the aspirations of contemporary India to participate in global industries like fashion and modelling,

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77 Kumari Jayawardena, "Women, Social Reform and Nationalism in India" in *Feminism and Nationalism in the Third World* (Zed Books, 1994, c1986) 107.

78 Maria Mies, *Indian Women and Patriarchy* (Vikas 1980) 121.

79 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 31. See also, Mrinalini Sinha, 'Gender and the Nation' in Carole R. McCann & Seung-Kyun Kim, Feminist Theory Reader: Local and Global Perspectives (eds) Feminist Theory Reader (Routledge, 2013) 230.

80 Ratna Kapur, "Feminism's Estrangement" in Asheligh Barnes ed, Critical Reflections on Feminist Engagements with Law in India (2015) 24.

sexuality has become difficult to contain within the once successful public/private divide.

However, the legal debates continue to be defined by the same public/private division that was seen during the British rule. Certain kinds of actions, like rape, sexual violence, even dowry murders, continue to face difficulties as being recognised as public issues. Questioning is linked with disturbing Indian cultural values. Therefore, culture is seen as under threat in a unique way when questions of sex and sexuality are raised.

Ironically, this public/private divide is also shape-shifting. Certain extremely private acts, such as sex work and same-sex relations are also seen to threaten Indian cultural values.[81] Kapur has characterised this distinction as being informed by the, 'dominant sexual ideology, which is pure, chaste, reproductive, non-commercial, heterosexual (in fact, marital), and held sacred.'[82] This explains why certain kinds of expressions of sexuality, even if violent (like marital rape) are protected by the law, whereas other kinds of sexuality, even if consensual (like sex work, bar dancing, or same-sex relations) are punished by the law.

When this framework is applied to the cases that form part of the dataset, certain claims and statements, which do not overtly articulate a religious or cultural premise, reveal such underpinnings. Therefore, the previously impervious statements that no bikinis would be allowed in the beauty pageants, or that no smoking or

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81 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 32.

82 Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 32-33.

drinking of alcohol would be permitted to the female contestants in these contests[83], can now be understood as cultural objections to the beauty pageants, because they seem to threaten the chaste image of the Indian woman and make public her sexuality. Similarly, statements like, 'by marriage, a girl gives express/implied consent for sex'[84], can also now been seen as cultural statements representing the dominant sexual ideology. In addition, certain other statements that do not articulate the cultural premise overtly can also be understood as motivated by cultural understanding of sex and sexuality. Another example of this is the statement made by the Union of India in defending the marital rape exception: criminalising marital rape will destroy the institution of marriage. Kapur's thesis, elaborated above, has shown that sexuality, even violent sexuality, is considered the exclusive reserve of the private sphere. Cultural sanctioned scripts of sexuality, which recognise and value reproductive and heterosexual sex within marriage, take within their fold violent acts of subjugation such as marital rape, such that any challenge to marital rape is seen as a challenge to the cultural script of permissible expressions of sexuality.

Certain other statements like the ones relating to the stigmatised and shameful status of sex work and the danger that sex workers pose to the sanctity of the individual and the community can also now be understood as cultural statements.[85]

The coding process produced 103 data-driven and researcher-driven codes. In other words, 103 religious and cultural claims were extracted from the dataset. I

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83 Mahila Jagran Manch v The State of Karnataka and Ors WP 25747/1996 (Karnataka High Court).

84 Independent Thought v Union of India and Ors Writ Petition (Civil) No 382 of 2013 (Supreme Court of India).

85 Sahyog Mahila Mandal and Anr. v. State of Guj. and Ors. 2004 Guj HC. Shama Bai and Ors. v. UP and Ors. 1958 AllHC

examined various attributes of these claims, which were recorded in sub-codes. These are discussed in detail in Chapter 3 (Coding and Findings).

Writing in 1995, Kapur had already identified how 'culture' was being used to wage legal battles in Indian courts. The cases she focused on concerned representation of sex and sexuality in the public fora. Kapur showed that culture was used to define the 'correct' Indian idea of sex; whether it is that sex, sexual violence, etc. are contrary to Indian values, or that representations of sex and sexuality have always been a part of Indian culture.[86] In fact, the public and legal debates about sex, sexuality, women's rights, rights of sexual minorities, etc., still very much revolves around this kind of engagement with culture.

This is attested by the summary of the cases chosen for this thesis where the litigants and judges both engage at length with whether the impugned act is in line with Indian culture or is counter-cultural. Feminist legal scholarship as it is currently placed also focuses on revealing the sex, culture, subjugation nexus that I have elaborated upon in the foregoing paragraphs.

I believe that what this debate misses is the contribution that can be made by examining the *manner* in which the religious and cultural arguments became a part of the legal record, and whether any obstacles from constitutional law and theory prevent them from being considered as a legitimate basis for the decision. Such an enterprise not only supplements the feminist legal inquiry, it also provides an independent and robust constitutional basis for considering religious and cultural claims, which cannot be resisted by scholar who takes the constitution seriously.

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[86] Ratna Kapur, *Erotic Justice*: *Postcolonialism, Subjects*, *and Rights* (Glasshouse Press 2005) 64.

CHAPTER 3- SUMMARIZING THE CASES

The purpose of this chapter is to summarise the cases with the view to elaborate and contextualize the religious and cultural claims which have been made in them in connection with the fundamental rights claim at issue.

1. Beauty Pageant Cases

The first category of cases recorded in the dataset pertains to beauty pageants. Beauty pageants are not prohibited in India. In 1996, India was chosen as the venue for the Miss World Contest. Close on the heels of that contest, several organizations working in the interest of the public and women challenged the failure of the State to prohibit the same. The relief sought in these cases varied slightly in their particulars but by and large centred around praying for a court order prohibiting the organizers and the State from conducting this event, in recognition of the fact that these contests violated Articles 14, 19, and 21 of the Indian constitution.[87] The first case within this series of litigation was the *Mahila Jagran Manch* v. *The State of Karnataka and Ors.*[88] Mahila Jagran Manch, the petitioner in this case, argued that the beauty pageants were opposed to *Bharatiya sanskriti and culture* (Indian traditions and culture). As the dataset has recorded, they produced no evidence of this claim. They also made several other claims which were not of a religious or cultural nature. Illustratively, they argued that the competition would lead to the spread of AIDS, bring criminal gangs to India, and unleash a wave of crime against Indian women. They also highlighted that the event would strain infrastructural services in Bengaluru (the chosen venue), and cause power failures and water shortages. Finally, they argued that the pageant would

[87] The right to equality, freedom of expression and life, respectively.

[88] WP 25747/1996 (Karnataka High Court).

violate the obscenity provision of the IPC. As the reader will recall, apart from the first argument that beauty pageants should be prohibited because they are opposed to Indian culture, other arguments were predicated on different premises. As a result, they have not been catalogued in the dataset.

The organizers of the pageant rebutted the arguments of the petitioners by drawing attention to the fact that the contest was not merely an attempt to choose the most beautiful girl, but an attempt to find a 'beauty with a purpose', to raise money for children's charities. They argued that the purpose of the competition was to choose someone who displayed discipline and grace in her public and private life, and that the contest was conducted in the most tasteful and artistic fashion. To prove their point, they affirmed before the court the strict rules of the competition which required that the participants be severely monitored. Only single, unmarried, women between the ages of 17-25 were allowed to participate, they were prohibited from drinking and smoking and their movements were heavily regulated. As the reader will notice, these are cultural responses to the petitioners' arguments. To understand why the organizers' responses were cultural in nature, attention must be diverted to Indian post-colonial scholarship. Post-colonial scholars have argued that the image of women as 'repositories of tradition'[89] crystallised with the rise of nationalism in colonial India. The British colonisers regulated the public domain (crime, contract, land rights etc.) whereas the private domain, the home, was left autonomous. The home came to be considered the site of national identity and it had to be protected from the colonial intrusions by chaste, self-sacrificing, submissive, devoted and

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[89] Ruth Vanita, *Gender, Sex and the City*: *Urdu Rekhti Poetry* (Orient Blackswan 2012) 29.

patient women through various labours of love.[90] The woman was supposed to be a sexless entity, merely performing various roles through her life: first, a daughter, then a wife and daughter-in law, and finally a mother.[91] Because of this connection between a woman's sexuality and the health of the Indian culture, women's rights organizations in the case above argued that showing women in a sexual light would be repugnant to Indian culture and tradition. This complex intermingling of Indian tradition and women's dignity produced arguments like, '*Naari tera yeh apmaan, nahi sahega Hindustan.*'[92]

Being unmarried, single, or between a certain age group is not a pre-requisite for participating in a beauty pageant. Similarly, abstaining from drinking and smoking does not contribute to one's ability to better participate in the competition. These responses were geared to quell the fear of cultural corruption put forward by the petitioner. It is not relevant for the present purpose to know the motivation behind these responses that is, whether the organizers also believed in the cultural premise of the pure Indian woman, and sought to explain why the beauty pageant was in keeping with Indian cultural norms, or whether their arguments were a strategic response to those of the petitioner. In either case, what is important to observe, is the fact that their cultural claim was that the proposed beauty pageant was in keeping with Indian culture and tradition. Other arguments made by the petitioners were similarly denied

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90 Ratna Kapur, *Erotic Justice*: *Law and the New Politics of Postcolonialism* (Permanent Black 2005) 53.

91 Sudhir Kakar, *The Inner World*: *A Psychoanalytical Study of Childhood and Society in India* (4thedn, OUP 2012) 66.

92 Translation: Hindustan will not tolerate this insult of women. See, "Anti Miss World Groups Stage Protest Rally" (*Apaarchive*) <http://www.aparchive.com/metadata/youtube/38ad49b4189dac835fe3e2a030a01884> assessed 27 September 2019

for want to proof by the organisers, but have not been explored here in the interest of space and relevance.

The Karnataka High Court in deciding the case, found no merit in any of the petitioners' arguments. It found that the allegations that the beauty pageant will bring a wave of crime to the country, will increase the spread of AIDS, will increase sexual abuse of women, or drain the infrastructural resources of the city, and will violate the obscenity provisions of criminal law, were unsubstantiated by evidence. In fact, the court took judicial notice of the fact that India is comprised of diverse cultures. Whereas there are groups within the country that consider it taboo for women to show parts of their body, there are tribal groups where nudity or semi-nudity is practiced. It also took judicial notice of the fact that showing skin cannot by itself be labelled as a counter-cultural and anti-traditional practice, and that these terms are determined and defined by the practice. The court noted that whereas some Indian dresses like the *sari* expose the mid-riff of a woman but are not considered indecent or opposed to Indian tradition, it may be so considered in some other countries and 'cause eyebrows to be raised.'[93] Similarly, the dress of the gymnast or the swimmer might be skimpier than that worn by the beauty pageant participant but is not considered to corrupt Indian culture. Therefore, the court judicially noticed the diversity of dressing practices in the country, and also the fact that their reception is contextually determined. Accordingly, it dismissed the petition.

This decision of the High Court was appealed and the case was heard by a division bench of the same court. The same arguments were raised in appeal and once again, rebutted by the organisers and the State of Karnataka in the manner above-mentioned. Once again, the State and the organizers sought to reiterate that neither

93 WP 25747/1996 7 (Karnataka High Court).

will the beauty pageant tarnish Indian women or harm Indian culture in any way nor had the petitioners submitted any material to prove the same. Here, the court took judicial notice of Indian culture and tradition and the unique place of women in it. It held that while the holding of a beauty pageant was not itself a violation of the fundamental rights of women, it had to be conducted in a manner that does not offend the culture and tradition of India, and does not cause indignity to women. Accordingly, it laid down some regulations to be compiled with by the organizers while conducting the contest.

When this decision was appealed at the Supreme Court level[94], the original petitioners did not file an appearance. The Supreme Court expressed distress over the regulations imposed by the division bench in the organization of the event especially because that court had placed restrictions on whether the police or army could be used to prevent a law and order breakdown (it is important to interject that massive protests accompanied the contest). It noted that law and order was a State prerogative and the Court was out of place to interfere. Moreover, as regards the morality of beauty pageants, the Supreme Court noted that this was a topic on which diverse views were possible and unless a law had been broken, the division bench ought not to have interfered.

2. Abortion Cases

The question of whether there is a fundamental right to abortion has been considered thrice by the Indian judiciary.[95] In India, the Medical Termination of Pregnancy Act,

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94 Amitabh Bachchan Corporation v Mahila Jagran Manch and Ors. Civil Appeal No. 2021 of 1997 (Supreme Court of India).

95 Only two cases are discussed in this summary here because in the last case, Misbah Umarfaruk Tamboli v Union of India WP 187/2018 (Bombay High Court), the constitutionality of the 20 week ceiling for abortion was raised but not discussed.

1971 (MTP), grants a conditional right to terminate pregnancy. The text of the Act does not make any explicit references to religious or cultural practices motivating its enactment or functioning. The Preamble of the Act states, 'An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto.'[96] The genesis of the Act is seemingly traced to the medical concern for women who underwent unsafe abortions (abortions were criminalized by the IPC), and there is some debate about whether the abortion regime was liberalized as part of the family planning and population control programme of the government of the time.[97]

A heavily medicalised framework characterizes access to abortions. If a medical practitioner in good faith believes that the continuation of the pregnancy will pose a health risk to a woman, either physical or mental[98], or that there is a substantial risk that the child if born would suffer from physical or mental abnormalities and be severely handicapped,[99] then and only then can the pregnancy be terminated. Therefore, there is no right to abortion, generally, but a very narrow sphere of exigencies where abortion may be permissible. Pregnancy resulting from rape and failed contraception (the latter only in case of a married woman) are categorized as pregnancies which cause grave mental injury.[100] However, in the above-mentioned

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96 Preamble of The Medical Termination of Pregnancy Act of 1971.

97 Amar Jesani and Aditi Iyer, 'Abortion Scenario and Politics in India' (1995) Centre for Enquiry into Health and Allied Themes (CEHAT) Reports. On the point of family planning, cf Siddhivinayak Hirve, 'Abortion Policy in India: Lacunae and Future Challenges' (2004) CEHAT 14. Hirve argues that the abortion laws were not brought in as a population control measure. In fact, they were thought to be counterproductive to the idea of positive family planning which the government was trying to push through by encouraging the use of contraception.

98 The Medical Termination of Pregnancy Act 1971, s 3(2) (i).

99 The Medical Termination of Pregnancy Act 1971, s 3(2) (ii).

100 The Medical Termination of Pregnancy Act, section 3 explanation I.

cases, this 'right' must be exercised no more than twenty weeks from the date of pregnancy.[101] Pregnancies cannot be terminated beyond the twenty-week period unless there is a danger of death to the mother. Additionally, India is riddled with the problem of female foeticide. Owing to this, the question that has primarily come up before the courts has been within the realm of criminal law, specifically within section 312 of the IPC, which criminalises causing a miscarriage of a woman (with or without her consent).[102]There the courts chiefly look at cases which argue on the point of female foeticide, accompanied in many instances, with the death of the woman in the process.

Whether the MTP violates the life and liberty guarantee of the Indian constitution (Article 21) came to be considered in the cases of *Nand Kishore Sharma and Ors*. v. *Union of India* and *Anr.* and *Ashaben* v. *State of Gujarat and Others*[103]. In *Nand Kishore,* the question raised was whether the State's decision to prohibit abortion except outside the circumstances contemplated by the Act, and which have been explained above, constituted a violation of the Article 21 rights of the woman. The court did not lay down any religious or cultural claims to contemplate this question. In fact, it categorically stated that the ethics of abortion were not under debate in the case. The court found the rationale for the MTP within its Objects and Reasons, which it laid down as follows: to protect the life of the woman in case the pregnancy would cause her physical or mental injury, and to prohibit the possibilities

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[101] The Medical Termination of Pregnancy Act, section 3 explanation II.

[102] Indian Penal Code, 1860, section 312. Section 312 - Causing miscarriage: Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Explanation-- A woman who causes herself to miscarry, is within the meaning of section.

[103] Ashaben v State of Gujarat and Others 2015 150 AIC 501 (Gujarat High Court).

of deformities and diseases in the child. Therefore, the court reasoned that the MTP was intended to save the life of the woman, enhancing, and not diminishing the life and liberty guarantee of the constitution.

In *Ashaben*, a woman who had become pregnant because of rape in captivity requested a medical termination of her pregnancy. As she was almost twenty-four weeks pregnant, four weeks outside the allowance of the Act, the doctor refused to perform such a termination without court orders. Ashaben prayed that the court disregard the twenty-week period in her case in consideration of the fact that she had been in captivity. The only fact in issue here was whether the MTP could be interpreted liberally despite its clear wording. Once again, the court was answering whether the State prohibition of abortion beyond the twenty-week period was constitutional. The court refused to grant such an extension to the woman on a literal interpretation of the MTP stating that the law was, 'very clear in that regard.'[104] The court noted that the Indian legal regime recognized a woman's reproductive choices relating to procreation, which included deciding whether to have a child, refusing or engaging in sexual relations, and insisting on the use of contraceptives, or undergoing sterilization procedures. However, there was also a compelling State interest in protecting the life of the prospective child, and the impugned law provided a compromise.[105] Here, although the court did not resort to religious or cultural argumentation in coming to its decision, it fortified its decision with reference to religious and cultural ideas. It took judicial notice of the fact that abortion was a

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104 Ashaben v State of Gujarat and Others 2015 150 AIC 501 [18] (Gujarat High Court).

105 In this case, the court took judicial notice of the fact that human life begins 14 days after conception. Taylor's Medical Jurisprudence was cited in support of this finding. Since the judge noticed this fact as a scientific fact and not as a religious or cultural claim, it has not been catalogued in the dataset. Similarly, it has not been addressed in the judicial notice chapter since that chapter analyzes only religious and cultural propositions that were judicially noticed.

‘moral sin.’[106] It seemingly endorsed this conclusion[107] by quoting scriptures (such as *Rig Veda and Atharva Veda*) and thoughts of moral leaders (such as Mahatma Gandhi) of the nation.

> Mahatma Gandhi, Father of the Nation, urged long back in Harijan that God alone can take life because he alone gives it. For the Jains taking away of even animal life is a sin, as, according to them, animals are as much part of God as human beings. Buddhists too preach Ahimsa.
>
> Rig Veda II: Grant us a hundred autumns that we may see the manifold world. May we attain the long lives which have been ordained as from yore.
>
> Atharva Veda I: May we be enabled to see the sun for a long time.[108]

The portion quoted above shows that Mahatma Gandhi, not the leader of any particular religion, but a ‘Mahatma’ (a great soul), in the hearts of many Indians had opined that god is the only one who can take away life since god is the only one who can grant it. Jainism and Buddhism are also opposed to violence, they preach *ahimsa* (non-violence), the court stated, in a metaphor which equated abortion to violence. Finally, the court cited the *Rig Veda* (an expression of divine revelation and eternal truth in Hinduism) and the *Atharva Veda*. The *Vedas* are considered an important part of Hinduism. Devdutt Pattanaik, an Indian mythologist, has explained their significance in these words.

> (…) it must be noted that Hindu scriptures do not serve the same purpose as the Bible in Christianity or the Koran in Islam. Most Hindu scriptures are *smriti*, arising from human memory, not divine will, hence open to rejection and modification. Only the Vedic texts are *shruti*, divine revelations. The *Vedas* (or books of cosmic wisdom) are

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106 Ashaben v State of Gujarat and Others 2015 150 AIC 501, 514-515 (Gujarat High Court).

107 Ashaben v State of Gujarat and Others 2015 150 AIC 501,514-515 (Gujarat High Court).

108 Ashaben v State of Gujarat and Others 2015 150 AIC 501 (Gujarat High Court). This paragraph quoted from the case of Dr Jacob George v State of Kerala (1994) 3 SCC 430 (Supreme Court of India). This case was about a miscarriage and was prosecuted under S. 312 of the Indian Penal Code, 1860. However, before going into the particulars of the case, the court went into religious underpinnings of an abortion claim.

> concerned not with mundane human values, but with eternal and absolute truth. [109]

Vedic texts are therefore divine revelation. The court by citing the *Rig Veda* was in the area of divinity. It cited some verses from the *Rig Veda* and the *Atharva Veda*, quotes from both of which allude to longevity, which it interpreted as the right to be born and thus an argument against abortion.

3. Marital Rape

Marital rape is not a crime in India. Section 375 of the IPC criminalizes non-consensual sexual intercourse of a man with a woman. However, it creates an exception for a man having non-consensual sex with his wife provided she is over 15 years of age. The law is reproduced as under (see specifically, exception 2):

> 375. Rape--A man is said to commit "rape" if he--
>
> (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
>
> (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,
>
> under the circumstances falling under any of the following seven descriptions:--
>
> First --Against her will.
>
> Secondly --Without her consent.

[109] Devdutt Pattanaik, *The Man who was a Woman and Other Queer Tales from Hindu Lore* (Routledge 2012) 9.

> Thirdly --With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt,
>
> Fourthly --With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly --With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> Sixthly --With or without her consent, when she is under eighteen years of age.
>
> Seventhly --When she is unable to communicate consent.
>
> Explanation 1--For the purposes of this section, "vagina" shall also include labia majora.
>
> Explanation 2 --Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
>
> Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.
>
> Exception 1 --A medical procedure or intervention shall not constitute rape.
>
> *Exception 2 --Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape*[Emphasis mine].

This exception was challenged as the State's failure to prohibit an unconstitutional activity. However, this challenge was narrow in its scope. The challenge was not that marital rape as an exception to the crime of rape should be struck down, but that marital rape of a girl child between the ages of 15 and 18 should be removed from the exception. There is yet another case pending in the Delhi High Court, which has

challenged the constitutionality of the marital rape exception as a whole[110] but that case is not yet decided, and will be included in this research in due course.

The case under discussion here is called *Independent Thought* v. *Union of India and Ors.*[111] The petitioners, a child rights organization, primarily argued that non-consensual sexual intercourse of man with his wife who is between 15 and 18 years of age should be rape because 1. The age of consent was 18 years, and because 2. Another law, POCSO, penalized the same activity creating a conflicting legal regime. They argued that this legal regime created a distinction between the right available to a girl child between the ages of 15 and 18 in the event of a rape. They further drew the attention of the court to the fact that this distinction was based entirely on the fact of marriage. If the girl child was not married, she could avail the remedies under both, the IPC and the POCSO, but if she was married, she could only avail the remedy under POCSO. The petitioners mounted a constitutional challenge on two grounds. The first ground was that this exception was against the equality guarantee of the constitution (Article 14) because it served no objective, and was arbitrary and discriminatory. The second ground of the challenge was that the exception was opposed to the beneficial intent of Article 15(3), a further equality guarantee within the constitution, which empowered the State to make special provisions for women and children.

In support of their contentions, the petitioners also filed several research reports which demonstrated that death of young females in the range of 15-19 was on the rise, many of them dying in childbirth, possibly attempting to demonstrate consequences of non-consensual sex and drawing linkages to mortality, as a means of

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110 RIT v Union of India, W.P (C) 284 of 2015 (Pending in the Delhi High Court).

111 Writ Petition (Civil) No. 382 of 2013 (Supreme Court of India).

providing a wider look at the socio-economic and psychological consequences of this gender rights issue.

> The key consequences of child marriage of girls may include early pregnancy; maternal and neonatal mortality; child health problems; educational setbacks; lower employment/livelihood prospects; exposure to violence and abuse, including a range of controlling and inequitable behaviours, leading to inevitable negative physical and psychological consequences; and limited agency of girls to influence decisions about their lives.[112]

What was astonishing was that the State did not deny any of these consequences. It agreed with these findings, and had, in fact, itself been committed to the development of the girl child through several past policies. However, it still failed to protect the girl child from non-consensual sex. The reason for the State's bewildering contradiction became clear in their defence. The State mounted a defence based entirely on tradition and culture. It argued that: 1. by marriage, the girl gave the husband an irrevocable right to have sex with her 2. child marriages were based on tradition and tradition needed to be respected and; 3. several members of Parliament felt that removing the marital rape exception had the potential to destroy marriage.

The court categorically rejected all three contentions. Noting that the age of consent was otherwise 18, the court found that nothing in the fact of marriage could give the girl child the ability to consent. In fact, the court noted the consent of the girl child is assumed on marriage, because this exception derives its lifeblood from the outmoded notion that a married woman was a chattel and the property of her husband. It took judicial notice of this fact by referring to the report prepared by the Committee on Amendments to Criminal Law. It concluded that the equality protection of the constitution meant that any law which created a sex based difference and treated men and women as inherently unequal could not stand constitutional scrutiny. Further, it

[112] Writ Petition (Civil) No. 382 of 2013 852 (Supreme Court of India).

found that the exception violated the equality provision also because there was no reasonable objective that could be inferred from this law, and the only objective that the State seemed to offer was to remove a large category of men from the charge of a crime given that child marriage was quite prevalent in the country (the State had argued that there were at present 23 million child brides in the country[113], which would mean potentially 23 million uncharged cases of marital rape). The court also rejected the argument of the State that the law should be sustained in the name of tradition taking judicial notice of the fact that what was traditional and acceptable at one point may not be so in the present case. Finally, the court noted that the idea that the 'institution' of marriage could be endangered by criminalizing this activity was not supported by any evidence. The court also *suo motu* provided an Article 21 ruling in the case holding that marital rape of the girl child violated her rights to liberty, dignity, and bodily integrity, and were opposed to India's international commitments under the Convention on the Elimination of Discrimination Against Women, the Child Rights Convention, the Human Rights Act of 1993, and the Protection of Women from Domestic Violence Act, 2005.

4. Right to Die

The right to die debate in India has been covered by two parallel, and at times, conflicting legal narratives. The first covers this issue as suicide, and the second covers it as euthanasia. The attempt to commit suicide is a punishable offence under the IPC[114], carrying with it a maximum imprisonment term of one year.

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113 Writ Petition (Civil) No. 382 of 2013 (Supreme Court of India) 823.

114 The Mental Healthcare Act 2017, s 115. Although this section is still on the book, the Act has modified its practical scope by stating that any person who attempts to commit suicide will be assumed to be person in need of mental healthcare.

> Section 309-- Attempt to commit suicide: Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year 1 [or with fine, or with both].

The issue of suicide or the voluntary taking of one's own life has been differentiated from the issue of euthanasia by either considering euthanasia as homicide[115] or by considering it as an issue involving the right of a third party (i.e. a doctor) to do or refrain from doing an act.[116] Because of this differentiation, the issue of the constitutionality of section 309 has come up independently of, and ahead of the euthanasia debate. In other words, the early right to die cases in India sought to hold section 309 unconstitutional, and only then, and perhaps because this section was ultimately found to not offend the constitution, did the legal challenge diversify to include a euthanasia claim. In this section, I will first cover the attempt to suicide cases and then move on to the euthanasia cases.

The criminalization of this activity was first challenged in *Maruti Shripati Dubal* v. *State of Maharashtra*[117] as a violation of the fundamental rights of

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115 Maruti Shripati Dubal v State of Maharashtra 1987CriLJ743 (Bombay High Court).

116 P Rathinam and Ors v Union of India and Ors AIR 1994 SC 1844 (Supreme Court of India).

117 1987 CriLJ 743 (Bombay High Court). Contemporaneous to this challenge was another High Court challenge to section 309 in the Andhra Pradesh High Court. Here the court refused the Article 21 argument that the right to life includes a right to death. It reasoned that although not mentioned explicitly, all other fundamental rights spring from a guarantee of a right to life, and because the State and the constitution exists for common good, a right to die cannot be read within this right. See Cheena Jagdeeswar and Ors v State of Andhra Pradesh Criminal Appeal No. 165 of 1987 (Andhra Pradesh High Court). The question of the constitutionality of section 309 and euthanasia was raised again in the case of Tarakeshwar Chandrabanshi and Ors v The Union of India and Ors (2001 (2) PLJR 321 (Patna High Court). The reader will recall that the decision of one High Court does not bind another therefore the decision in *Maruti* did not foreclose this case from being filed. Interestingly, the right to suicide and euthanasia was brought up not by the person desiring it, for she was in a coma, but by her husband. The issue of euthanasia was never properly framed and the court gave no judgment on it while the issue of suicide was considered irrelevant because the relevant person was in coma. The court also seemed reluctant to deliberate upon these issues because it sensed some foul play in the family of the coma patient. Accordingly, the constitutionality of suicide and euthanasia were not decided in this case. Here, the court refused to look at the question from a religious point of view, and expressly noted that whether religions professing the right to life have any relevance to the matter cannot be decided by the court, and is a matter for personal choice.

expression and life (Articles 19 and 21), and equality (Article 14), because section 309 sought to punish all suicide attempts by the same measure without any further investigation regarding the cause of the attempt. As this section treated potentially unequal cases equally, it violated the equality guarantee of the Indian constitution (Article 14). In fact, in all the challenges relating to section 309, the arguments against them have remained the same and therefore, I will not mention them anew in every case in this summary. These arguments were rebutted by the State by arguing that there was no right to life guarantee in the Indian constitution and Articles 19 and 21 merely provided protection from arbitrary deprivation of life without a reasonable and just procedure. With regard to Article 14, the State argued that it did not have an obligation to create a classification of offenders. Thus, section 309 violated no fundamental rights.

The court accepted the Article 14 contention of the petitioner and found that Article 21 did provide a right to life, different in content from the mere right to be free from arbitrary interference in one's life. The crucial question of law that the court was required to answer was whether the right to life included a right to die. The court took judicial notice of the fact that the normal human impulse is to keep on living and the desire to die is not a symptom of a normal life; it is an unusual situation, which can be a product of any number of personal circumstances, both happy and sad ones. However, just because it is abnormal does not make it an unnatural desire. The decision clearly relied on religious and cultural reasoning to find that Article 21 had not been violated. Taking one's life is a decision about life and as such is included within the protection afforded by Article 21. To demonstrate that suicide was not an unnatural desire and therefore allowable under Article 21, the court took judicial

notice of the status of suicide in different religions like Hinduism, Jainism, Buddhism, Islam and Christianity. The court's views are reproduced below:

> The right to die or to end one's life is not something new or unknown to civilization. Some religions like Hindu and Jain have approved of the practice of ending one's life by one's own act in certain circumstances while condemning it in other circumstances. The attitude of Buddhism has been ambiguous though it has encouraged suicide under certain circumstances such as in the service of religion and country. Neither the Old nor the New Testament has condemned suicide explicitly. However, Christianity has condemned suicide as a form of murder. In contrast the Quran has declared it a crime worse than homicide.[118]

While for Hindu and Jain customs, the court referred to Dr. Kane's book on *Dharmashastras*, no books were referenced for Buddhism, Christianity and Islam. The court elaborately quoted four pages of references from Dr. Kane's book to portray a pluralistic vision of suicide, which was generally considered undesirable and attracted severe consequences, but was permissible in some situations in Vedic and Jain literature. While the appropriateness of taking judicial notice of this book and its contents is explored in the next chapter, some samples of the referencing are worth noting to get an idea of the diversity of approaches on the topic in the *Dharmashastras*. For example, Dr, Kane notes as follows:

> The question whether ending one's life by starting on the Great Journey or by falling from a precipice is sinful, exercised the minds of many writers on Dharmashastra. The Dharmashastra writers generally condemn suicide or an attempt to commit suicide as a great sin. Parasara (IV. 1-2) states that if a man or woman hangs himself or herself through extreme pride or extreme rage or through affliction or fear, he or she falls into hell for sixty thousand years. Manu V. 89 says that no water is to be offered for the benefit of the souls of those who kill themselves.
>
> In spite of this general attitude, exceptions were made in the Smruti's the epics and puranas. When a man was guilty of brahmana murder, he was allowed to meet death at the hands of archers in a battle who knew

118 Maruti Shripati Dubal v State of Maharashtra 1987 CriLJ 743 (Bombay High Court).

> that the sinner wanted to be killed in that way as penance or the sinner may throw himself head downwards in fire (Manu XI. 73. Yaj. III 248)

Additionally, the court took judicial notice of some cultural as well as religious and social practices which permitted suicide. For example, the court took judicial notice of the practice of *Johar* (when women from royal households self-immolated to avoid dishonour at the hands of the enemy), *Sati* (when a widow self-immolated at the funeral pyre of her husband), *Samadhi* (terminating one's life by restrain on breathing), *Prayopaveshan* and *Atmarpana* (starving and sacrificing to death). The court noted the high regard that these kinds of suicide have had in the Indian society, noting also that many political and historical leaders had resorted to this activity without social approbation. In fact, the court noted, '[s]uicide or attempt to commit it as such has thus never been an object of abhorrence or condemnation which would be so if life by itself was considered reverent.'[119] Demonstrating that suicide was thus not unnatural and therefore permissible within the scope of Article 21, and for the Article 14 reasons recorded above, the court found section 309 unconstitutional.

The matter came up for consideration before a division bench of the Supreme Court in *P. Rathinam and Ors.* v. *The Union of India*[120] where the court once again encountered the Article 14 and 21 arguments against the constitutionality of section 309. The court did not accept the Article 14 argument because in its view, ample discretion existed with the judge to punish different suicide attempts differently. The court prefaced its decision by taking judicial notice of the fact that different religious books (like the Quran, the Bible, and the Rig Veda) mentioned suicide[121], as well as the fact that suicide had been committed by persons of all religions in India: Hindus,

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119 Maruti Shripati Dubal v State of Maharashtra 1987 CriLJ 743 [15] (Bombay High Court).

120 AIR 1994 SC 1844 (Supreme Court of India).

121 AIR 1994 SC 1844 [66] (Supreme Court of India).

Muslims, Sikhs, Christians, Buddhists, Jains, and Parsis.[122] In a separate section of the judgment, where the court specifically sought to answer whether suicide was an anti-religious activity, the court resorted to Vedic understandings of life from a scholarly article, sayings of Pope John Paul II on the topic, and Hindu mythology involving a story about Lord Rama. While the appropriateness of doing so will be explored in the judicial notice chapter, the quotations are reproduced below:

> In a paper which Sh. G.P. Tripathi had presented at the World Congress on Law and Medicine held at New Delhi under the caption "Right to die" he stated that every man lives to accomplish four objectives of life: (1) Dharma (religion and moral virtues); (2) Artha (wealth); (3) Kama (love or desire); and (4) Moksha (spiritual enjoyment). All these objectives were said to be earthly, whereas others are to be accomplished beyond life. When the earthly objectives are complete, religion would require a person not to clinch to the body. Shri Tripathi stated that a man has moral right to terminate his life, because death is simply changing the old body into a new one by the process known as Kayakalp, a therapy for rejuvenation.[123]
>
> Insofar as Christians are concerned, reference may be made of what Pope John Paul II stated when he gave his approval to the document issued by the sacred congregation stating: when inevitably death is imminent in spite of the means used, it is permitted in conscience to take decision to refuse forms of treatment that would only secure precarious and burdensome prolongation of life, so long as the normal care due to sick person in similar cases is not interrupted...[124]
>
> Insofar as our country is concerned, mythology says Lord Rama and his brothers took Jalasamadhi in river Saryu near Ayodhya; ancient history says Buddha and Mahavir achieved death by seeking it; modern history of Independence says about various fasts unto death undertaken by no less a person than Father of the Nation, whose spiritual disciple Vinoba Bhave met his end only recently by going on fast…[125]

With these quotations, the court concluded that when religious and spirituals leaders had themselves undertaken to voluntarily end their lives then the mere suggestion that

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[122] AIR 1994 SC 1844 [69] (Supreme Court of India).

[123] AIR 1994 SC 1844 [77] (Supreme Court of India).

[124] AIR 1994 SC 1844 [78] (Supreme Court of India).

[125] AIR 1994 SC 1844 [80] (Supreme Court of India).

this activity could be anti-religious was a sacrilege. For this, and for the reasons that suicide or attempt to commit suicide neither violates public policy nor causes any harm to others, the court found that S. 309 was nothing but an unsustainable interference with the personal liberty of people, and therefore violative of Article 21. The decision was therefore, based partly on various religious and cultural views on taking one's own life.

The matter was finally put to rest by a 5-judge bench of the Supreme Court.[126] In considering the validity of the section, the Supreme Court paid attention to the quotations of Manu (an ancient Indian law-giver whose writings are considered important in Hinduism) and other commentators who have translated Vedic works. The court took judicial notice of the same to introduce the idea that in some situations, suicide may not be a sin. Consider these passages from the Laws of Manu cited by the court:[127]

> 31. Or let him walk, fully determined and going straight on, in a north-easterly direction, subsisting on water and air, until his body sinks to rest.
>
> 32. A Brahmana having got rid of his body by one of those modes (i.e. drowning, precipitating burning or starving) practiced by the great sages, is exalted in the world of Brahmana, free from sorrow and fear.

Once again, the petitioners had made the same Article 14 and 21 arguments against the constitutionality of the section.[128] However, the court did not accept the Article 21 argument of the petitioners. It reasoned that Article 21 provided protection from arbitrary deprivation of life and since the intent of Article 21 was the protection of

126 Gian Kaur v State of Punjab AIR 1996 SC 1257 (Supreme Court of India).

127 Gian Kaur v State of Punjab AIR 1996 SC 1257 [15]-[16] (Supreme Court of India).

128 However, the State had changed its Article 21 argument since *Maruti Shripati*. Instead of denying that Article 21 included a positive right to life itself, the State now argued that Article 21 did not include a right to die though it did include a right to life. The Article 14 argument of the State remained the same as in previous cases.

life, by no means could extinction of life be read within its scope. Just because other positive fundamental rights could be read to have negative implications, did not mean that Article 21 could be read to have positive implications. Article 21 included within its scope a right to life with dignity and to the extent that it could help a terminally ill patient who had commenced the process of death, a right to die *may be permissible*[129] to fasten death with dignity, but Article 21 could permit someone to artificially cut down his or her life. The Article 14 argument was once again rejected because the court felt that judges had enough discretion to punish different suicide attempts differently.

In another High Court case, and before the right to die morphed into a euthanasia claim, a petitioner sought to draw a difference between an attempt to suicide (i.e. the crime punished by section 309), and the right to voluntarily put one's life to an end.[130] The petitioner, a retired school teacher who wished to avail of this right for himself, argued that suicide was the act of a frustrated person whereas a right to put an end to one's life after fulfilling all worldly duties was something else. The petitioner argued, without producing any evidence, that ancient Indian and Chinese civilizations were not opposed to voluntarily putting an end to one's life, and what is considered suicide is but one subset of that broad activity, and is criminalized because of the negative image it has in Anglo-Saxon jurisprudence. He prayed that the court recognize this as a fundamental right and that the State be obliged to construct *Mahaprasthana* clinics across all districts to facilitate the same.

The court did not accept the difference between suicide and the right being prayed for in the present case. Referring to the *Gian Kaur* case, it reminded the

[129] However, there was no definitive finding on that issue in this case.

[130] CA Thomas Master v. State of Kerala 2000 CriLJ 3729 (Kerala High Court).

petitioner that writings from the *Manusmriti* had been considered in that decision. Therefore, his accusation that the section 309 decision in *Gian Kaur* had been made without considering Vedic writings on the subject was without merit. While the ultimate decision of this case rested on the ruling in *Gian Kaur*, and the finding that life had sanctity, the court resorted to some couplets from the *Garuda Purana*[131], a *purana* which are ancient Indian texts on a variety of topics, legends, and lore, to establish the sanctity of life:

17. Vinna dehana kasyaapi can-purushaartho na vidyate Tasmaad-deham dhanam rakshetpunyaka-rmaani Saadhayet.	Without the body how can one obtain the objects of human life ? Therefore protecting the body which is the wealth, one should perform the deeds of merit.
18. Rakshayet sarvadaatmaana-maatma sarvasya bhaajariam. Rakshane yatnamaatishthejee vanbhaadraani pashyati.	One should protect his body which is responsi-ble for everything. He who protects himself by all efforts, will see many auspicious occasions in life.
20. Shariirarakshanopaayaah kri-yante sarvadaabudhaiah Necchanti cha punastyaagamapi kushthaadi-roginah.	The wise always undertake the protective meas-ures for the body. Even the person suffering from leprosy and other diseases do not wish to get rid of the body.
22. Aatmaiva yadi naatmaanama-chitebhyo nivaarayet Konsyo hitakarastasmaadaatnaabnam taarayishyati	If one does not prevent what is unpleasant to himself, who else will do it? Therefore one should do what is good to himself.

After citing the abovementioned quotation, the court concluded that, 'in view of the above discussion',[132] it was not possible to accept the claim of the petitioner.

The final step in the right to die debate occurred in the form of two euthanasia cases: *Aruna Ramchandra Shanbaug* v *Union of India and Ors*[133] and *Common Cause (A Regd. Society*) v *Union of India*[134]. The *Shanbaug* case did not indulge in any religious or cultural argument in coming to a decision about the permissibility of passive involuntary euthanasia in India. The only religious and cultural argument in this case was made by the State in rebutting a claim for euthanasia in these words, and

131 CA Thomas Master v. State of Kerala 2000 CriLJ 3729 [21] (Kerala High Court).

132 CA Thomas Master v. State of Kerala 2000 CriLJ 3729 [22] (Kerala High Court).

133 AIR 2011 SC 1290 (Supreme Court of India).

134 (2014) 5 SCC 338 (Supreme Court of India).

without any evidentiary support, 'Indian society is emotional and care oriented: we don't send parents to old age home like in the West.'[135] Finally, the case permitted passive involuntary euthanasia in the case of patients in a permanent vegetative state. It empowered State High Courts to decide such cases after considering medical reports. The *Common Cause* ruling extended the *Aruna Shanbaug* ruling to permit voluntary passive euthanasia while reiterating that active euthanasia was still illegal.

5. Bar Dancing

The legal dispute around bar dancing, i.e. dances performed by professional dancers in bars, centred on two provisions of the Bombay Police Act, 1951 ('The Police Act'). Sections 33A and 33B of this Act prohibited bar dancing in bars, restaurants, and similar establishments which had three stars or less. In addition to the star based exception, dancing was permitted in drama theatres, cinemas, auditoriums, and sports theatres which have a member's only access.

These provisions were challenged by hotel and bar owners. Additionally, the Bharatiya Bargirls Union was also a petitioner in this case. The petitioners alleged that these sections were unconstitutional restraints on the right to carry on a profession (Articles 19(1) (g)). They also argued that these provisions violated equality rights because they applied only to certain kinds of establishments and not to others. The owners alleged that there was no rational nexus behind the classification of establishments where the provisions applied and the object sought to be achieved by the Act. These were the two main petitioners in the case although certain other women's rights organisations also filed similar writ petitions. In addition to the two grounds mentioned above, these petitioners also challenged the provisions as violating

135 AIR 2011 SC 1290 [21] (Supreme Court of India).

the right to life by banning bar dancing without providing for any compensation or rehabilitation, and for restricting the fundamental right to expression. Finally, certain other groups also joined in the challenge and raised the question of the constitutionality of section 33A on the anvil of Article 15 of the constitution as a prohibition on bar dancing disproportionately impacts women as they are primarily the professionals involved in bar dancing. Summarily, therefore, the fundamental right question which arose in this case was whether sections 33A and 33B violated Articles 14, 15, 19 and 21 of the constitution.

The State argued that the policy behind the legislation was to prohibit vulgar dances, which impact public morals. They argued this because the music was loud, and the women were sensuously dressed in these establishments. They contrasted this with traditional Indian dances like *Bharatnatyam* and *Kuchipudi* and asserted regarding bar dances that, 'Indian culture does not approve of this kind of business.'[136]

The court did not find any reason to believe that vulgar dances occur only in lower star establishments, and finding this differentiation based on the star rating of the restaurant unintelligible, found the law violative of Article 14. The court found that such a classification did not serve the stated purpose of the Act which was to end the purported exploitation of women in this industry. The classification only sought to further the business of the richer restaurants at the costs of the poorer ones.[137] The distinction was based on an assumption that the customers in the more elite establishments will not mistreat women whereas the customers in lower class

136 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) Bom CR 705 [72] (Bombay High Court).

137 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) BomCR 705 [36] (Bombay High Court).

establishments will. The court found that there was neither a general consensus nor empirical data produced by the State to support this claim.[138] However, the court did not find that the provisions violated Article 15; viz., discriminated against the bar dancers on the grounds of their sex. The court reasoned that the law was neutral in its wordings and banned both male and female bar dancers. That most of the dancers happened to be women and therefore it was women who were disproportionately affected by the provisions was but a coincidental effect of the legislation, and it could not be found to be unconstitutional in that regard.[139]

On the question of whether the provisions violated Article 19(1)(a) rights of the hotel owners and the dancers to their freedom of speech and expression, the court noted that to answer this question, it had to first answer the question of whether 'dance' was included in the entitlement to 'speech and expression' provided by Article 19(1)(a)?[140] The court took judicial notice of the fact that dancing has been a part of Indian tradition. Whether it is the Kailash Temple at Elora or the paintings in the Ajanata Caves, there is evidence of dancing everywhere. It also held that ancient theological texts like the Vedas, the Upanishads, etc. also bear testimony to the fact that dancing been considered a mode of entertainment.[141] The court noted that it was the State's burden to demonstrate that dancing was vulgar and indecent by its very

138 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) BomCR 705 [120], [133] (Bombay High Court).

139 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) BomCR 705 [24] (Bombay High Court).

140 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) Bom CR 705 [26] (Bombay High Court).

141 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) Bom CR 705 [25] (Bombay High Court).

nature and that it had failed to produce any evidence to discharge this burden.[142] Culturally, adopting an argument from the Bargirls union, it held that dancing for the entertainment of men has been part of Maharashtra's tradition in *Lavnis*, and *Tamashas*. Next, the question considered whether dancing for a commercial purpose could also come within the Article 19(1) (a) entitlement? The court ruled negatively on this point.[143]According to the court, when a dancer dances within a particular commercial establishment, she is doing so not in exercise of her freedom of expression but in the exercise of her right to profession. This is because she is not prevented from dancing in general, but only doing so for a commercial gain in certain establishments. Therefore, it is her fundamental right to profession that is called into question by the impugned professions and not her right to expression. Therefore, the court ruled, that the provisions did not infringe Article 19(1) (a) rights to speech and expression. Therefore, though the court engaged with religious and cultural claims on this ground, it did not let its view on the same, effect the scope of the fundamental right entitlement.

On the Article 19(1) (g) question, the question to be answered was whether the impugned provisions could be construed to be reasonable restrictions in public interest? The court ruled that as the provisions permitted the same dance in some establishments while prohibiting them in others, the dance restrictions could not be said to be in public interest. Accordingly, it found the provisions violative of Article

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142 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) Bom CR 705 [25] (Bombay High Court).

143 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) Bom CR 705 [30] (Bombay High Court).

19(6) which permits the State to place reasonable restrictions on the right to profession in public interest.[144]

Finally, on the Article 21 question, the court held that the prohibition on dancing in bars does not violate the right to life (which includes the right to a livelihood), because the owners of the hotels can continue to conduct their business sans the dance performances, and the bar dancers can dance somewhere else.[145]

The decision of the High Court was appealed in the Supreme Court.[146] The Supreme Court arrived at the same result as the High Court. As a result, the Maharashtra Government removed the tiered application of these sections of the Police Act, and restricted bar dancing everywhere, regardless of the type and class of the entertainment venue.[147] The constitutionality of that section was once again challenged in the Supreme Court. While the challenge was pending, the Supreme Court granted a stay on the section 33A (1) of the impugned Act. The Maharashtra Government in response enacted the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants, and Bar Rooms, and Protection of Dignity of Women (Working Therein) Act, 2016. This Act and its associated Rules came to be challenged in the Supreme Court via a writ filed before the division bench. As the result of this new Act and writ, the pending action was declared infructuous and disposed off.

The purpose of the Act was not to prohibit bar dancing, but to prohibit, as it mentioned in its Preamble, *obscene* dances in bars, restaurants, and hotels. In addition,

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144 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) BomCR 705 [95(8)] (Bombay High Court).

145 Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) BomCR 705 [93(6)] (Bombay High Court).

146 State of Maharashtra and Ors v Indian Hotels and Restaurants Assn and Ors AIR 2013 SC 2582 (Supreme Court of India).

147 Citation unavailable as the case was declared infructuous and disposed off.

it sought to, protect the dignity, and to improve the working and safety conditions of women who worked in these establishments, and to prevent their exploitation. sections 2(8)(i), 6(4) and 8(2) of the Act were challenged along with some sections of the Rules, under Articles 14, 15, 19(1)(a) and (g) and 21 of the constitution. For the purpose of this chapter, I will deal with the fundamental rights challenges to this Act.

Section 2(8) (i) of the Act banned obscene dances in entertainment venues. Obscene dances were defined as those dances which were designed to only arouse the prurient interests of the audience members. Section 6(4) prohibited an entertainment venue from having both a license for a discotheque and a dance bar. Sections 8(1)(2)and(4) criminalised the running of a venue with bar dancing without a license, the allowance of obscene dances and the immoral exploitation of women in these establishments, and the showering or coins or the tipping of the dancers by anyone. The petitioners in the case were once again the hotel and bar owners and the Bharatiya Bargirls Union, the trade union working on behalf of waitresses female singers and dancers working in the bar dance industry.

The counsel for the hotel owners argued that the concept of an 'obscene dance' was vague and did not entail justiciable criteria. The argument was that the phrase was subjective and arbitrary and for that reason violated Article 14 of the constitution.[148] Similarly, the prohibition of a place from having a license for both a discotheque and a dance bar was also without any rational which would further the object of this Act. This was an arbitrary measure which also violated Article 14. [149] Finally, the prohibition against tipping was challenged as discriminatory because the

148 Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [25] (Supreme Court of India).

149 Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [27] (Supreme Court of India).

provision applied only to dancers and not to singers and waitresses.[150] This last provision was challenged further as being violative of Article 19(1) (g) as tips were a major source of income for the dancers and prohibiting that would severely restrict their professional rights.[151] These arguments were further fortified by the counsel for the Bargirls union, who argued that empirical studies support the fact that bar dancers take up this profession to support their desire to live an independent and self-sustaining life.[152] He further argued that until 2004, like other artists, bar dancers had complete freedom to pursue their profession and to negotiate their remuneration with dancer bar owners.

In response, the State argued that section 2(8) was not vague or imprecise as it banned obscene dances, i.e. dances which aroused the 'prurient interests' of the observers. The State argued that the determination of prurient interests was a manageable judicial test, as it was the test devised under section 292 of the IPC which criminalised obscene publications.[153] Although standards of morality are in a state of evolution, the State argued, that it was its prerogative to determine where it stood correctly, and section 2(8) was a manifestation of that determination. The State conceded that prurient interests, which were to be determined by ascertaining whether the dance had a tendency to deprave and corrupt those whose minds are open to immoral influences, and in whose hands the publications are likely to fall, was ultimately a matter fit for judicial review. It was always open to a claimant to contend

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150 Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [29] (Supreme Court of India).

151 Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [29] (Supreme Court of India).

152 Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [39] (Supreme Court of India).

153 Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [60] (Supreme Court of India).

that the dance which was banned under the Act as an obscene dance was in fact not so. However, the legislative prerogative still lay with the State to codify standards of morality, i.e. the State was empowered to outlaw obscene dances.[154] The State also argued that the same motivation to prevent obscene dances guided the enactment of section 6(4) of the Act, prohibiting the same venue from obtaining both dance bar and discotheque licenses.[155] Finally, the State argued that section 8(2) created an offence distinct from obscenity. The offence contemplated by 8(2) was to prohibit obscene dances or the exploitation of women for immoral purposes in any place.[156] Therefore, the punishment contemplated by this section did not need to be the same as the punishment contemplated by the obscenity provision in the IPC. In defending the constitutionality of section 8(4) of the Act, which prevented the giving of tips to the dancers, the State contended that allowing the dancers to be tipped was against the cultural ethos of the society.[157] The State further contended that showering money on women would be method of inducement and since the impugned Act sought to protect the dignity of women, such kind of tipping could not be allowed.

The State's reply to the challenge to the provisions on the grounds of Article 19(1) (a) which protects the fundamental right of expression was that Article 19(2) empowered the State to enact legislation to impose reasonable restrictions on this right in the interest of decency and morality. Similarly, the State argued that it was

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[154] Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [61] (Supreme Court of India).

[155] Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [64] (Supreme Court of India).

[156] Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [65] (Supreme Court of India).

[157] Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [66] (Supreme Court of India).

empowered to restrict the fundamental right to profession through reasonable restrictions in the interest of the general public. Therefore, the State's reply to the challenge of the petitioners of Article 19 grounds was that morality had to play to a role in balancing the right guaranteed therein and the State's prerogative.

The court accepted the State's claim that 'prurient interest' was not a vague term. It was used by section 292 of the IPC and as such using this term to define the scope of obscene dances created a homogenous legal rule regarding obscenity. The court noted that there was sufficient jurisprudential insight available from the precedent to decipher whether a particular dance was obscene.[158] Accordingly, it found section 2(8) (i) of the Act, constitutional. With respect to section 6(4) of the Act which prohibited a venue from holding both, a dance bar and a discotheque license, the court noted that there was absolutely no justifiable reason for doing so. It did not accept the State's contention that this measure was to further fortify its intention to prevent obscenity. The court found no connection between this provision and the object to be achieved by the Act.[159] With respect to the final provision of the Act, viz., section 8(4), which provided penalty to those who allowed their entertainment venues to be used for obscene bar dances or the exploitation of women, the court ruled that the offence created by this section was distinct from the offence of obscenity and therefore the different imprisonment periods did not fall afoul Article 14 equality. [160] With respect to the constitutionality of the tipping provision in section 8(4), the court held that while the prohibition against the throwing of coins or monitisable items was

[158] Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [89] (Supreme Court of India).

[159] Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [90] (Supreme Court of India).

[160] Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [91], [92] (Supreme Court of India).

constitutional in the interests of decency[161], there could be no prohibition against handing over tips to the dancer in person.[162]

Once again, the same moral arguments were put forward by the State which was rejected in a similar fashion by the Supreme Court. The court found that there was absolutely no evidence produced by the State to support their assertion that bar dancing led to depravity or injured public morals.[163] Moreover, the court found no support for the assertion that the dancers came from extremely vulnerable backgrounds and were trafficked into bar dancing. The court stated that standards of morality keep changing with time. The judgment was taken by analysing each contention against constitutional values and the standards of inquiry espoused by those values. The only place in the judgment where the court let its own moral perception of decency affect the judgment was when it upheld the prohibition on showering of currency and money upon the dancers. This led to the constitutional parts of the section being severed from the unconstitutional parts. To this extent, the court's own cultural worldview affected the constitutionality of the section.

6. Sex Work

The legal framework regulating sex work in India is called the Immoral Traffic (Prevention) Act, 1956 (ITPA). According to the ITPA, sex work itself is not criminalized, but exploitation of someone for sex work is criminalized. However, there is no distinction created between voluntary sex work and trafficked sex work,

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161 Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [93] (Supreme Court of India).

162 Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [93] (Supreme Court of India).

163 Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 [73] (Supreme Court of India).

and the umbrella term, 'prostitution' is employed by the Act to cover both voluntary and coerced instances of sex work. The provisions of the Act also do not require the authorities to distinguish voluntary sex from trafficking when exercising their powers under the Act. Moreover, other sections of the ITPA (sections 7, 8, 18 and 20) while not directly criminalizing sex work, criminalize all elements associated with it i.e. soliciting, carrying on prostitution or running a brothel in a public place, in effect stifling the right. This restriction is further amplified by the fact that the Act gives a broad definition of public place; '"public place" means any place intended for use by or accessible to, the public and includes any public conveyance.'[164] Therefore, in effect, any place which is used by the public will be barred from use of a sex worker. Since a sex worker can only attract trade at a place where there is public, in effect the Act criminalizes prostitution. This is further strengthened by the fact that in the litigation, the court never proceeds to ask if the act in question was actually prostitution within the definition of the ITPA. In other words, was the sex work exploitative in nature? It clubs voluntary and exploitative sex work in applying the sections of the ITPA. To study this theme, I will concentrate on the constitutionality of s 2(f) prior to the amendment in 1986, and the constitutionality of ss 7, 8, 18 and 20, both prior and post the 1986 amendment.

The first case on the issue came from the Allahabad High Court[165] where the constitutionality of the Suppression of Immoral Traffic in Women and Children Act, 1956 (SITA), the legal regime that pre-dated the IPTA, was challenged by a sex worker as an unreasonable restraint on her right to carry out her profession. All Indian

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164 The Immoral Traffic Prevention Act of 1956, s 2(h).

165 Shama Bai and Ors v State of Uttar Pradesh Lucknow and Ors AIR 1959 All 57 (Allahabad High Court).

citizens have, via Article 19(1) (g) of the constitution, have the right to 'practice any profession, or to carry on any occupation, business or trade.'[166] The State can make any law placing reasonable restrictions on the right in the interest of the public.[167] The petitioner, Shama Bai, aged 24, contested that sex work was her hereditary trade and her only means of livelihood, and that her cousin and younger brothers were wholly dependent on her. Further, she put before the court that she did not have any chances of being rehabilitated into society as a respectable housewife, and knew no other form of livelihood, therefore, should sex work be criminalised, she would starve.

The court accepted that sex work was a profession, occupation or trade, within the meaning of Article 19(1) (g). The court noted that the Indian Penal Code did not criminalise sex work. The court perused the various sections of the SITA which while not directly criminalising or restricting sex work, placed such restrictions on it that made the carrying on of the profession, practically unviable. Therefore, the court concerned itself with the question of whether the restrictions imposed on the profession were 'reasonable' and therefore passed constitutional scrutiny. The court began its reasoning with making certain moral judgments about the profession of sex work. The court noted that prostitution was 'incompatible with the dignity and worth of the human person and endanger[s] the welfare of the individual, and the family and the community.'[168] Further, the court noted that prostitution was a shame on human civilisation and every civilised country must aim to end it; so long as it was not possible to end it, reasonable restrictions must be imposed to curb the evil effects of

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166 The Constitution of India 1950, art 19(1)(g).

167 The Constitution of India 1950, art 19(6).

168 Shama Bai and Ors v State of Uttar Pradesh Lucknow and Ors AIR 1959 All 57 [3] (Allahabad High Court).

this trade or profession.[169] This moral world view of sex work guided the court as it examined each section of the impugned Act. The sections of the Act itself were overbroad in their wording, and could apply to both, instances of voluntary sex work, and instances of trafficked sex work.

A few sections of the Act would suffice to illustrate this point. For example, section 3 of the Act punished the running of a brothel either for the gain of another person, or for the gain of two or more prostitutes. Therefore, such a section punished brothels maintained by pimps who exploited sex workers, and equally brothels maintained by two or more prostitutes who may had a joint business or an association for the conduct of the trade. Court found the section constitutional because 'the upkeep of brothels not only encourages prostitution but also leads to the commission of various other offences.'[170]

Section 4 of the Act criminalised anybody over the age of 18 years who knowingly lived, whether wholly or partly, on the earnings of a sex worker. This broad section captured not only the pimps and touts who trafficked women into prostitution but also the family members or dependents of a sex worker voluntarily engaged in the profession. Moreover, the section presumed that whoever lived with a sex worker habitually was living on her earnings. This presumption also captured those who were not monetarily dependent on her but just lived with her.[171]

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[169] Shama Bai and Ors v State of Uttar Pradesh Lucknow and Ors AIR 1959 All 57 [4] (Allahabad High Court).

[170] Shama Bai and Ors v State of Uttar Pradesh Lucknow and Ors AIR 1959 All 57 [6] (Allahabad High Court).

[171] Though the court did not find this section unconstitutional, it acknowledged that the presumption envisaged in section 4 was overbroad.

Section 20 of the Act empowered the Magistrate to remove from their jurisdiction any woman or girl who engages in prostitution if he/she considers it necessary to do so in public interest. The wording of this section applies both to those who are in the trade of prostitution voluntarily and those who are trafficked into the profession.[172] However, because of these cultural views which prefaced the judgment, the court either refused to see, or failed to distinguish between sex workers who voluntarily entered the profession and those who were trafficked into it. The court did not attempt to create a distinction between these two activities. To clarify that its stance was of this nature, the court stated, that,

> even if it be assumed (*though I am holding to the contrary*) that the enactment of these provisions to some extent curtails the fundamental rights of prostitutes to carry on their trade or profession, these provisions would nonetheless be valid provisions because if there is any conflict between a fundamental right guaranteed under Article 19 of the constitution and what is prohibited under Article 23 the prohibition contained in the latter Article will prevail over the fundamental right contained in the former Article.[173]

Therefore, although the court had acknowledged at the beginning of its judgment that sex work was a profession and trade, it refused to protect the rights of its practitioners from being enveloped by an overbroad enactment.

The court refused to answer the question of constitutionality of the statute because although she would directly be affected should any order be passed under the Act, no adverse orders had been passed against her at that present moment. On that narrow construction of the rule of standing, the court found that her petition was not

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[172] The court noted that an assumption of unconstitutionality arose against this section because 'public interest' was considered too vague a criterion upon which such a wide discretion was vested in the Magistrate, suggesting an Article 14 violation. The court also noted that the section empowered the Magistrate to remove a prostitute from the city or area for an indefinite period which would affect her fundamental right to carry on her profession. However, the court did not finally pronounce upon the constitutionality of this section because he found the petition ultimately unmaintainable.

[173] Shama Bai and Ors v State of Uttar Pradesh Lucknow and Ors AIR 1959 All 57 [5] (Allahabad High Court).

maintainable just yet. However, the court's view was that had the constitutional challenge been correctly maintainable, section 20 and part of section 4 could be severed from the Act, because there was substance to the challenge to their constitutionality[174], without altering the rest of the Act. In other words, even if the constitutional challenge was correctly maintainable, the court was of the opinion that the Act did not present unreasonable restrictions for the profession of sex work. This position was influenced by its cultural view of the profession as a necessarily shameful activity and therefore worthy of burdensome restrictions against its practice. For example, in examining the constitutionality of section 7 of the Act, which prohibited sex workers from carrying on their trade within two hundred yards of educational institutions, places of worships, schools and such other public places, the court stated that such places, 'had to be kept pure from the contaminated atmosphere of a place where sex work is being carried on.'[175] Accordingly, the judge found these restrictions of a reasonable nature. In the public reason chapter, I will argue that the court reasoned not from public reason but from a moral and cultural standpoint, making its decision constitutional illegitimate. However, the court made some cultural conclusions about the profession of sex work. The court noted that sex work was the result of the 'promiscuous and indecent mode of living of the overcrowded poor'[176], the 'lose manner of the wealthier classes'[177], and the 'demoralizing literature' in the

174 See ns. 85 and 86.

175 Shama Bai and Ors v State of Uttar Pradesh, Lucknow and Ors AIR 1959 All 57 [6] (Allahabad High Court).

176 Shama Bai and Ors v State of Uttar Pradesh Lucknow and Ors AIR 1959 All 57 [2] (Allahabad High Court).

177 Shama Bai and Ors v State of Uttar Pradesh Lucknow and Ors AIR 1959 All 57 [2] (Allahabad High Court).

country.[178] It did not infer these conclusions from any evidence presented but took judicial notice of the same.

In the next constitutionality case[179], the question was whether section 20 of the SITA which gave Magistrates the power to evict a sex worker from her location of business in general public interest, was unconstitutional as per the fundamental right to pursue a profession? The case was brought by six sex workers who had received section 20 orders to remove themselves from the location at which they were presently residing. The sex workers challenged the constitutionality of the section on the threshold of Articles 14 and clauses (d), (e), and (g) of Article 19 of the constitution. While Article 14 prohibited the State from treating people unequally, the abovementioned sub-ss of Article 19 guaranteed to Indian citizens, the right to move across the territory of India, to reside and settle in any part of the country, and to practice and trade, or profession, respectively.

The court had to answer whether this restriction was reasonable, because the State was empowered to impose reasonable restrictions on the right to profession. They argued that the power given to a Magistrate through section 20 to order a sex worker to remove herself from her present location and to not re-enter without permission was calculated to totally prohibit them from practicing their profession and could not be regarded as a reasonable restriction on the profession. Their contention picked up on the suggestion of unconstitutionality articulated by the *Shama Bai* judge.[180]

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178 Shama Bai and Ors v State of Uttar Pradesh Lucknow and Ors AIR 1959 All 57 [2] (Allahabad High Court).

179 Smt Kaushailiya v State AIR 1963 All 7 (Allahabad High Court).

180 See n 86.

In deciding the reasonability of the restriction, the court started from an inherently moralistic stance about sex work. The court stated that, 'prostitution (…) cannot be put on par with normal, respectable professions and trades which have no taint of immorality about them.'[181] In the view of the court, when assessing the nature of restrictions put on a profession, the nature of the profession could not be lost sight of. If the profession was inherently immoral, as the court held sex work to be then the restrictions could extend to the total prohibition of the profession in the interest of the general public. With this reasoning, the judge foreclosed the suggestion of constitutionality forwarded in the obiter of the *Shama Bai* judgment that section 20 orders could be indefinitely in operation and therefore rise from a mere restriction to a total prohibition of the right to practice sex work as a profession, offending the rights protected by Article 19(1)(g). It held, therefore, that the section did not violate the constitution even if in effect it eliminated the possibility for the sex worker to have a business. The moralistic conception of sex work determined the constitutionality of section 20 to the extent that it was capable of totally eliminating the right to practice this profession.

The section was however, found unreasonable because it violated the right of movement and residence in any part of the country (Article 19(1) (d) and (e)). These rights can be reasonably restricted in the interest of the general public. The court found that the power given to the Magistrate under Article 20 to remove a sex worker from his/her area was wide and drastic; it did not give her the option to cease her profession if she wished to continue to reside in the area.[182] The removal is not merely from one neighbourhood to another, but from the whole district, and was not time

181 Smt Kaushailiya v State AIR 1963 All 7 [4] (Allahabad High Court).

182 Smt Kaushailiya v State AIR 1963 All 7 [6] (Allahabad High Court).

bound.[183] The court found that the power given by the section went beyond the correcting the mischief that the section was purportedly enacted to remedy; viz., preventing the practice of sex work in certain localities, and could be used to expel a sex worker from an area permanently.[184] The court found that this violated her rights under Articles 19(1) (d) and (e). Further the court found section 20 unconstitutional to the extent that it delegated unfettered and unguided power to the Magistrate to determine who needed to be evicted in the 'interest of the general public', and what in fact this category was.[185] It granted a right to the Magistrate to act upon their subjective satisfaction without providing any safeguards to ensure that their acts reasonably and fairly in arriving at his/her conclusion.[186]

As the previous decision was a High Court ruling, it did not bind the High Courts of other States. Therefore, the question of the constitutionality of section 20 came up once again in the case of *Vanga Seetharamana* v *Chitta Sambasiva Rao and Ors*[187] before the Andhra Pradesh High Court. The same contentions from 19(d) and (e)[188] were raised before this court as well. However, this court found that the discretion granted by the section was well within reasonable limits. The court found that any order of the Magistrate had to be given only after they had given a show cause notice to the alleged sex worker to present her case. In addition, though the section did not contemplate this, the court found that the sex worker would also have

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183 Smt Kaushailiya v State AIR 1963 All 7 [6] (Allahabad High Court).

184 Smt Kaushailiya v State AIR 1963 All 7 [6] (Allahabad High Court).

185 Smt Kaushailiya v State AIR 1963 All 7 [9] (Allahabad High Court).

186 Smt Kaushailiya v State AIR 1963 All 7 [10] (Allahabad High Court).

187 AIR 1964 AP 400 (Andhra Pradesh High Court).

188 Though the counsel for the petitioner had raised the Article 19(1)(g) contention that section 20 can have the effect of totally prohibiting a sex worker from practicing her profession, he did not articulate them at the argument stage and the court, for this reason, declined to rule on the constitutionality of section 20 on the threshold of Article 19(1)(g).

a chance to cross-examine the evidence presented against her in a hearing before the Magistrate[189] and the court upheld the power of the Magistrate under section 20, including the widespread discretion contemplated in the section to issue evacuation orders to sex workers for indefinite periods because, 'it is rather difficult for even the Magistrate to divine at the time of making the order how long it will take for the woman to be rid of such tendencies as are likely to pollute the atmosphere'[190]

A few other cases need to be mentioned before I close this section. The first is the case of *Ram Kali* v. *A. C. Agarwal and Ors.*[191] In this case, the question was whether section 18(1) of the SITA was unconstitutional as per Article 14 because the section allowed the Magistrate, upon their satisfaction of sex work being practiced in any place, to evict the person in occupation of the property and attach the same, whether or not the person had been found guilty of sex work and related offences by a court under section 7 (specifically, prostitution in public places). As this section could be applied regardless of a trial the respondents, Ram Kali and Ors. argued that it gave wide and arbitrary powers to the magistrate and was violative of the equality guarantee of the constitution. In addition, section 7 empowered the Magistrate to punish a person who was found conducting sex work within two hundred metres of an educational institute, hospital, place of worship or such similar public places. Therefore, the Magistrate had the power to treat similarly situated persons differently, viz., merely punishing a person under section 7 for engaging in prostitution, while attaching the property of another doing the same, under section 18. The Punjab and

189 AIR 1964 AP 400 [7] (Andhra Pradesh High Court). In this respect, this judgment differed from the Allahabad High Court judgment which had found that section 20 did not contemplate rights associated with the judicial process, such as cross-examination. Smt Kaushailiya v State AIR 1963 All 7 [10] (Allahabad High Court).

190 AIR 1964 AP 400 [10] (Andhra Pradesh High Court).

191 AIR 1964 P&H 518 (Punjab and Haryana High Court).

Haryana High Court did not engage in any cultural or religious claims connected with the nature of sex work while deciding the constitutionality of section 18. They noted that action under section 18 did not require a high level of proof as action under section 7. In other words, proceedings under section 7 were more in the nature of a criminal trial in a court, whereas section 18 proceedings did not have the safeguards of a criminal trial. Therefore, if a Magistrate chooses to apply section 7 to one person while applying section 18 to another similarly situated person, discrimination would result. However, since there is a presumption of constitutionality in favour of enacted legislation, the court read the two provisions harmoniously to conclude that section 18 could continue to stay on the books so long as action is first taken under section 7 and a person is found guilty to conducting sex work in the public places mentioned therein.

This case was appealed to the Supreme Court which upheld the decision of the Punjab and Haryana High Court.[192] The Supreme Court concluded that though the section was not unconstitutional and merely provided powers to the Magistrate to take prompt action in public interest, the Magistrate should wait to exercise powers under section 18 until the occupants have been found guilty of sex work, and running a brothel under section 3 or 7 of the Act, respectively. Most recently, in the *Nitu and Ors.* v. *The Govt. of the National Capital Territory of Delhi and Ors.*[193]case, the vires of section 18 of the IPTA came to be questioned once again. The section empowers the District Magistrate (DM) to close a brothel within two hundred yards of a public place, such as an educational institute, a temple, etc. The petitioners, who identified themselves as sex workers, challenged the section as arbitrary, both, because it

192 AC Agarwal and Ors v Ram Kali and Ors AIR 1968 SC 1 (Supreme Court of India).

193 226 (2016) DLT 457 (Delhi High Court).

allowed the DM to evict all persons living in premises believed to be a brothel, regardless of their involvement in sex work, and because, the section empowered the DM to take action against some brothels while overlooking others. For these two reasons, the petitioners contended that the section gave arbitrary discretion to the DM and consequently fell afoul Article 14 of the constitution. Another contention raised by the petitioners was that section 18(1) and (2) empowered two different authorities, the executive (i.e. the DM and the Sub-Divisional Magistrate, respectively), and the judiciary, respectively, to effect the same kind of order, under different circumstances; while 18(1) orders could be passed on the subjective satisfaction of the executive that a room/house was a brothel, the court could only pass such an order once a person has been convicted of offences under section 3 or 7, maintaining a brothel, or prostitution in public places respectively. The petitioners contended that this gave the police the discretion to close down places they believed to be brothels without any crime having been proven, if they so wished, whereas certain other brothels could continue to operate until the crimes under section 3 or 7 could be proven. The legal position of a sex worker depended entirely on whether action had been brought against them under section 3/7, or 18.

The court found section 18 constitutional on its assessment that sub-clauses (1) and (2) empowered different persons to undertake the same action, but in different circumstances. Therefore, they did not provide conflicting legal regimes for the same situation, but were meant to regulate two different situations. Whereas section 18(1) was meant to enable preventative action to prevent sex work in public places so as to not harm the moral conscience of the society immediately surrounding temples, mosques, schools, etc., section 18(2) is punitive in nature and meant to punish persons whose guilt had been proven in court. Accordingly, it upheld the constitutionality of

section 18 of the IPTA. Here, the court found that those exemplary powers given to the DM or the Sub-Divisional Magistrate under section 18(1) were not arbitrary, because they were meant to protect the moral conscience of the society surrounding certain public spaces. In coming to this conclusion, the court implicitly accepted the moral premise from which the State acted, i.e. sex work near certain public places causes extenuated harm to public morals as opposed to other places.

The final case in this section is that of *Sahyog Mahila Mandal*[194]. In this case sections 7(1) (b), 14, and 15 of the IPTA were challenged as unconstitutional. Section 14 and 15 deemed offences committed under this Act cognisable, and, respectively, allowed arrests and searches to proceed without a warrant. The petition arose as a result of the Commissioner of Police declaring Chakla Bazaar, a busy marketplace in Surat, Gujarat, as a notified area where sex work could not be practiced. Chakla Bazaar had initially been on the outskirts of Surat, where sex workers lived and practiced their profession for at least the last four hundred years. With the expansion of the city limits with the passage of time, this area now formed a part of the city limits, and schools, temples, and mosques surrounded this bazaar. The counsel for the petitioner alleged that since the passage of the notification, the police officers had been raiding the homes of the sex workers without warrants, harassing them, and arresting them. They also alleged that the police had not informed the arrestees of the grounds of their arrests and had not produced them before the magistrate as is required by law.

The petitioner alleged that the IPTA had been enacted to punish the trafficker and not a sex worker. They argued that section 14 permitted the police to arrest both

[194] Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 (Gujarat High Court).

the sex worker and the trafficker when in fact, being a sex worker, or indulging in sex work is not a crime. The argument was that this section violated Articles 14 and 21 of the constitution.[195] The petitioner also contended that sections 15(1) and (4) of the Act which allowed the police to search the homes of sex workers without warrant, and remove adult persons from those homes without showing their connection to any crime, was violative of Articles 14 and 21.[196] The petitioner also argued that these powers violated the privacy rights of the sex workers, as the police could come into their premises at any time, without a warrant, and arrest them or go through the belongings. Further the petitioner contended that evicting sex workers from their homes deprives them of their source of livelihood and violates Article 21. Finally, section 71(1) (b) was violated, the petitioner argued because it empowered the Commissioner of Police to notify an area where sex work cannot be carried on, without considering the views of the sex workers, and without giving them a chance to present their case. Therefore section 7(1) (b) violated natural justice rights of the sex workers. [197]

The counsel for the State did not agree with the petitioner that sex work was not illegal. The State's view was that sex work itself is illegal and therefore, it was necessary to invest the police officer with wide ranging powers of search and arrest to weed out the evil of prostitution.[198] With respect to the right to privacy, the State argued that a right to privacy cannot be pleaded in respect of the search of premises at

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195 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [2.1] (Gujarat High Court).

196 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [2.1] (Gujarat High Court).

197 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [2.1] (Gujarat High Court).

198 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [6] (Gujarat High Court).

which a reasonable apprehension of the commission of crime exists.[199] Finally, they argued that the impugned provisions were reasonable restrictions on the Article 14, 19 and 21 rights argued by the petitioners.[200]

The court, while coming to its decision stated that taking a moral view of sex work was not within the purview of judicial office. In the words of the court, 'there are basically two camps, those seeking to eradicate prostitution and those who view the women involved as sex workers. The court has to steer through the non-legal aspects of the debate, because, what social standards must be reflected in the matter of prostitution is in the legislative domain.'[201] However, in spite of this preface, its decision was steeped in a moral view of sex work that considered this profession inherently derogatory to women.[202] The court reasoned that the Indian constitution provides for a dignity right which is violated each time a person commodifies themselves, even of it of their own volition.[203] Such commoditisation devalues the respect for human beings guaranteed in Article 23 which proscribes exploitation. Additionally, the court marshalled Articles 39(e) and 46 to reason that these Articles placed an obligation on the State to secure the health and strength of men and women

199 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [6] (Gujarat High Court).

200 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [6] (Gujarat High Court).

201 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [7.1] (Gujarat High Court).

202 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [8.2] (Gujarat High Court).

203 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [8.1] (Gujarat High Court).

are not abused and that they are not forced to enter vocations unsuited to their age or strength.[204]

Additionally, the court took note of Article 51(e) which obliges every citizen to abandon practices derogatory to the dignity of women. The court elided sex work and trafficking and concluded that permitting sex work is an invitation to trafficking, which in fact is abusive and derogatory to women. The court therefore concluded that it cannot support a plea by the petitioners to carry on their profession.[205]

Coming specifically to the averments made in the petition, the court noted that as far the contention about the unconstitutionality of section 7(1) (b) was considered, it was neither discriminatory nor arbitrary.[206] Further, it held that the purpose of the section was to minimise prostitution in public places such as educational institutes, temples, mosques, etc., so as to reduce the social nuisance associated with sex work. The court noted that sex work in these areas results in harassment of the non-participating members of the public as well, offering pimps an opportunity to attract women and girls, and lure children into prostitution by offering them economic assistance and short term affection.[207] Therefore, the court noted that there was a sufficiently important governmental objective that was fulfilled by the power given in section 7(1) (b) to outlaw sex work in certain public areas as opposed to other ones,

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204 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [8.1] (Gujarat High Court).

205 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [8.5] (Gujarat High Court).

206 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [9.4] (Gujarat High Court).

207 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [9.4] (Gujarat High Court).

and there was nothing discriminatory or arbitrary about the section.[208] Therefore, there was no violation of Article 14. Further, the court noted that the section did not violate Article 21 either because the deprivation of the liberty of the petitioners was following the procedure established by law.[209]

Regarding the alleged violation of the privacy rights of the sex workers by section 7 and 15, the court stated that privacy protects the intimate sphere of meaningful human relationships; one which is concerned with love and making decisions about family, children, marriage. The sex worker does not have a claim to this privacy protection because her sex act with the customers is loveless and commercial.[210] However, she does have a right to privacy, as every person does because of the operation of Article 21, although it is significantly reduced because of the abovementioned conditionality. The weak privacy right, the court held, did not protect the sex worker from searches on her premises which were made in connection with a reasonable apprehension of criminal activities of the kind identified by the ITPA, being carried on at her premises.[211] Finally, with respect to the constitutionality of section 14 which allowed warrantless arrests, the court concluded that this power had been given so that the police can act effectively on the field, where it may not be

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208 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [9.4] (Gujarat High Court).

209 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [9.5] (Gujarat High Court).

210 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [10.1] (Gujarat High Court).

211 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [10.1] (Gujarat High Court).

possible to know whether a sex worker is practicing her profession voluntarily, or whether she is trafficked.[212]

The collective force of all these judgments has been that although sex work is not technically outlawed, extensive powers of search, arrest, eviction, and attachment have been given to the executive to control sex work, severely damaging a sex worker's and her family's ability to have a peaceful existence. Judgments have been replete with the elision of sex work and trafficking, and no effort has been made by the judiciary to separation these two issues. Sex work, although not illegal, has not received the protection and privileges that are due to other professions in the constitution.

7. Same Sex Relations and Transgender Rights

Until the 6th of September, 2018, section 377 of the IPC criminalized sexual intercourse 'against the order of nature.' Although this section did overtly applied to persons of all sexual orientations and gender identities, it was disproportionately applied against lesbian, gay, bisexual and transgender persons (LGBT) to harass them. The section is reproduced as under:

> Section 377-- Of Unnatural Offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> Explanation-- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.[213]

212 Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 [11.2] (Gujarat High Court).

213 The Indian Penal Code 1860, s 377.

Its constitutionality came to be first challenged in *Naz Foundation and Ors.* v. *Govt. of NCT of Delhi and Ors.*[214] The section was challenged by Naz Foundation, a public interest organization working in the area of HIV/AIDS. Naz Foundation challenged the constitutionality of the State's prohibition on certain kinds of sexual intercourse (which applied especially to some persons). They asserted that the section violated Articles 14, 15 (equality), 19(1) (a) (freedom of expression), and 21 (right to privacy and dignity) of the constitution. In terms of the religious and cultural claims put forward in this case, the petitioners argued that the section was based on Judaeo-Christian religious and ethical norms, which permit sexual intercourse only for the purpose of procreation.[215] They argued that such a provision had no place in modern society. In reply, the Union of India argued that the Indian society largely disapproved of homosexuality, and that the sexual mores of the west could not be imported into India. They argued that the law cannot run counter to the society; section 377 was put on the books to reflect the values and morals of the society at that time and Indian society is still not ready to change that.[216] This religious and cultural stand of the Union was echoed by some private interveners in the case who also believed that homosexuality was against the cultural norms of the Indian society. In deciding the case in favour of Naz Foundation, the court expressly rejected the role the religiously or culturally motivated popular morality could play in restricting the access of persons to certain rights.[217] It distinguished constitutional morality from popular morality which was based on 'shifting and subjective' notions of right and wrong, or, in the

[214] WP(C) No.7455/2001 (Delhi High Court).

[215] WP(C) No.7455/2001 [7] (Delhi High Court).

[216] WP(C) No.7455/2001 [12], [13] (Delhi High Court).

[217] WP(C) No.7455/2001 [70] (Delhi High Court).

Rawlsian theory, comprehensive religious and non-religious doctrine.[218] Such notions of right and wrong could not justify State action according to the Court, even if they represent the majoritarian view.[219] In fact, after making this observation, the court took judicial notice of a feature of Indian society— inclusiveness. Thus, this was the correct way to consider religious and cultural evidence, it had already noted that cultural morality cannot affect constitutional outcomes. This was obiter dicta in the case merely offering a sociological basis for the judgment to be honoured. The judgment was based on values embedded within the impugned Articles.

It held that there was no evidence to prove that homosexuality would result in the decay of the Indian civilization, and it was the criminalization of homosexuality, and not the act of homosexuality, which was a western import. It found the section unconstitutional for violating the privacy, dignity, equality, and the freedom of expression rights of LGBT persons. However, the entire section was merely read down because at that time, there was no law on the books to combat child sexual abuse, and cases of sexual abuse of women which were not rape of a peno-vaginal nature[220] (that was the only instance of rape criminalized by law at that time).

This decision was appealed in the Supreme Court in the case of *Suresh Kumar Koushal and Anr.* v. *Naz Foundation and Ors.*[221] The challenge was made by Suresh Kumar Koushal, an astrologer by profession, who contested that the failure of the State to prohibit non-heterosexual intercourse, as was the result of the Delhi High

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218 WP(C) No.7455/2001 [79] (Delhi High Court).

219 WP(C) No.7455/2001 [86] (Delhi High Court).

220 Now there are specific legal provisions to address these issues, viz., POCSO and the Criminal Law Amendment Act 2013 respectively.

221 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1 (Supreme Court of India).

Court decision, was in violation of Indian culture. Once again, Naz Foundation argued that section 377 was a manifestation of Judaeo-Christian morals that are no longer justified in modern Indian society. Additionally, they also emphasized the point that the section did not resonate with historically held sexual values in Indian society. Several religious organisations had joined the appeal as interveners to present their view that section 377 should remain on the books. Trust God Missionaries was one of the interveners and they argued that section 377 was enacted to protect the values and morals of society.[222]

The court in deciding the case, did not explicitly engage in any religious or cultural reasoning. However, it bartered constitutional morality for popular morality finding that since the Parliament had not amended the impugned section since the Delhi High Court case to exclude consensual non-heterosexual sexual intercourse from the purview of section 377, the will of the people desired the law to remain on the books. The reasoning of the court was that there is a presumption of constitutionality in favour of Parliamentary laws, even if they were pre-constitutional (as section 377 was).[223] The court surveyed the precedent on section 377 but concluded that no uniform test could be culled out from those cases. In the view of the court, acts which fell within the ambit of 'against the order of nature' were determinable only in reference to the case and the circumstances of the case itself.[224] The cases that the court had referred to pertained to coercive situations and the court was uncertain whether the punishment imposed in those cases would have been the

222 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1 [16.12] (Supreme Court of India).

223 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1 [28] (Supreme Court of India).

224 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1 [38] (Supreme Court of India).

same had the sexual acts been consensual. Nevertheless, the court held that in the light of the plain meaning and legislative history of section 377, it applied to both, consensual and non-consensual situations.[225] Disregarding the arguments about the disproportionate application of the section, the court emphasised that the section applied to all regardless of sexual orientation or gender identity.[226]

It wrongly applied the intelligible differentia and reasonable nexus test for equal protection questions (Article 14) and summarily concluded, in the face of several affidavits submitted to it (which it itself acknowledged) that evidence that the lesbian, gay, bisexual and transgender persons were harassed because of the presence of S. 377 was 'singularly laconic'[227] and that the community 'miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them.'[228]

The matter was put to rest in the case of *Navtej Singh Johar and Ors* v. *Union of India and Ors.*[229]. In this case, a five judge bench of the Supreme Court finally decided that the State's prohibition on the sexual life of LGBT persons violated Articles 14, 15, 19, and 21 of the constitution. On the Article 14 question, the court reasoned that there was no intelligible way to differentiate between natural and unnatural sex, especially because the idea of natural sex was no longer concerned with

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225 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1 [38] (Supreme Court of India).

226 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1 [38] (Supreme Court of India).

227 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1 [40] (Supreme Court of India).

228 Suresh Kumar Koushal and Anr v Naz Foundation and Others (2014) 1 SCC 1 [40] (Supreme Court of India).

229 Writ Petition (Criminal) No 76 of 2016 (Supreme Court of India).

only procreation. 'Natural' sex, then, was whatever kind of sex to which two adults consented. The court found that the section disproportionately impacted the LGBT population despite its neutral wording. In fact, the real distinction created by the law was between LGBT persons and non-LGBT persons, and not between natural and unnatural sex, and this distinction was unsupported by any legitimate objective and fuelled by nothing more than animus toward this community. Therefore, section 377 failed to fulfil the equality scrutiny of the constitution. A majority of the judges also found that the freedom of speech and expression found in Article 19(1) (a) included the right to express oneself sexually with a consenting partner of any sex. Two Justices, Misra and Khanwalikar, also noted that, decency and morality, which are constitutional grounds for restricting the Article 19(1)(a) rights, are not majoritarian concepts. Therefore, social disgust is not a constitutional ground to restrict this sexuality right. Finally, on the Article 21 question, a majority of the court held that the Article included the right to a sexual partner of choice. LGBT persons can exercise this right in public and in private subject to other decency laws which apply to non-LGBT persons.

While the ratio of the case was strictly legal, and the case was decided on constitutional values, several religious and cultural claims peppered the discussion. For example, the court noted that section 377 was based in Judaeo-Christian morality and the prohibition of a man to lie with another was punishable by death in the Leviticus.[230] The court also attributed the preservation of this morality to the Jewish theologian, Philo of Alexandria.[231] However, these views were not the reason for the decision. They sought to provide a sociological basis to honour the decision.

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230 Navtej Singh Johar and Ors v Union of India and Ors [367] Writ Petition (Criminal) No 76 of 2016 (Supreme Court of India).

231 Navtej Singh Johar and Ors v Union of India and Ors [368] Writ Petition (Criminal) No 76 of 2016 (Supreme Court of India).

However, ultimately, the court acknowledged that the constitutional culture of India was to accommodate different cultures, and constitutional morality leans towards fostering fraternity amongst a heterogeneous community.

In the case of *NALSA* v. *Union of India*[232], the transgender community challenged the State's failure to prohibit discriminatory and hostile behaviour towards itself as a violation of its right to equality (Article 14 and 15), right to free speech and expression (Article 19), and right to life (Article 21). The Supreme Court of India extended all the fundamental rights to transgender persons in India and found that discrimination and abuse against such persons for the reason that they are transgender, violates the equal protection guarantee, freedom of speech and expression and the right to life under the Indian Constitution.

In so doing, the court relied heavily on the mythological status of the Hijra-- a cultural subset of the transgender community in India, and its various regional variations, such as Aravanis, Shiv-Shaktis, Jogappas, etc. The court noted a few mythological tales featuring these subjects. The first related to the epic Ramayana. The tale told the story of Rama, who was condemned to exile by his father. As Rama walked out of Ayodhya, the entire populace followed him to the border of the town. At the edge of the town, Rama turned around and asked all the men and women to return. The Hijras, being neither men nor women, did not feel compelled to follow this instruction and they stayed behind. Rama was impressed with their devotion and

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232 National Legal Services Authority v Union of India (2014) 1 SCC 438 (Supreme Court of India).

conferred on them the power to bless auspicious occasions like births, deaths, marriages, and inaugurations.[233]

The next mythological story related to the Aravanis, the name by which the Hijra population is known in Tamil Nadu. The story was that Aravan, the son of Arjun and Nagakanya, volunteered to be sacrificed to the Goddess Kali to ensure the victory of the Pandavas in the Kurushetra war. His condition was that he wanted to spend his last night in matrimony. Since no woman wanted to marry a man who was destined to die the next day, Lord Krishna took the form of a woman, Mohini, and married Aravan. The Hijras of Tamil Nadu consider themselves the brides of Aravan, and take the name Aravanis.[234]

The court then noted that the Jain texts have also made a reference to transgender persons, including the concept of psychological sex. Finally, the court noted the prestigious positions held by the Hijra population in the Muslim and Ottoman kingdoms of medieval India.[235] In conclusion, it was the court's understanding that the Hijra population, a term it used synonymously to refer to all of the transgender population while invoking these examples, enjoyed a rich and prestigious cultural life in the history of India, but this position changed in the 18th century with the onset of the British rulers who criminalised this population.[236]

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233 National Legal Services Authority v Union of India (2014) 1 SCC 438 [13] (Supreme Court of India).

234 National Legal Services Authority v Union of India (2014) 1 SCC 438 [14] (Supreme Court of India).

235 National Legal Services Authority v Union of India (2014) 1 SCC 438 [16] (Supreme Court of India).

236 National Legal Services Authority v Union of India (2014) 1 SCC 438 [16] (Supreme Court of India).

The judgment is replete with stories from an ancient past in which the Hijras were blessed subjects, possessing powers to curse and to bless and occupying important strategic and trusted positions within kingdoms. The court then took upon itself the responsibility to restore the status of this population to its past and it was through this logic that the entire transgender community became eligible for constitutional protections. It held that transgender persons were entitled to Article 14 equality, which applied to all 'persons' as per the Article.[237] The court held that the non-recognition of the gender identity of transgender persons denies them the equal protection of the laws and exposes them to public and private violence.[238] The court also read the equal protection guarantee of Article 14 as obliging the State to bring in social and economic laws to alleviate the position of transgender persons in society. [239] The court also found that discrimination against transgender persons also violates their Article 15 and 16 rights to be free of sex-based discrimination in various facets of life. The court noted that these Articles had been enacted to correct historical sex based discrimination, but also sought to protect people from discrimination based on stereotypes associated with their sex.[240] They held that sex includes not only primary and secondary biological characteristics, but also one's self image and a deep psychological and emotional sense of sexual character.[241] Therefore, the court held that discrimination on the basis of sex includes discrimination on the basis of gender

[237] National Legal Services Authority v Union of India (2014) 1 SCC 438 [54] (Supreme Court of India).

[238] National Legal Services Authority v Union of India (2014) 1 SCC 438 [55] (Supreme Court of India).

[239] National Legal Services Authority v Union of India (2014) 1 SCC 438 [54] (Supreme Court of India).

[240] National Legal Services Authority v Union of India (2014) 1 SCC 438 [59] (Supreme Court of India).

[241] National Legal Services Authority v Union of India (2014) 1 SCC 438 [59] (Supreme Court of India).

identity.[242] With respect to Article 19(1) (a), the court held that the right to expression includes the right to self-determined gender expressed through dress, words, action, or behaviour, or through any other form, subject to restrictions in Article 19(2).[243] Finally, the court held that Article 21 of the constitution embodies the values of dignity and personal autonomy, and the right to self-expression is protected by both these values.[244]

The court's holding was motivated by the historical position of the transgender, population[245], India's international law commitments, including certain well-known principles adopted in the context of sexual orientation and gender identity (Yogyakarta Principles) and the progress made in the law regarding transgender persons in nations worldwide. Although the court was motivated by the historical and mythological position of the transgender population, it provided independent constitutional reasons for deciding that transgender persons were covered within the fundamental rights scheme. Moreover, the standards of inquiry under each value had its own constitutional basis and were not coloured by religious and cultural claims. Therefore, as I will demonstrate in the public reason chapter, the decision was constitutionally legitimate, and the use of religious and cultural claims did not violate the duty of civility owed by the judges.

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242 National Legal Services Authority v Union of India (2014) 1 SCC 438 [59] (Supreme Court of India).

243 National Legal Services Authority v Union of India (2014) 1 SCC 438 [62] (Supreme Court of India).

244 National Legal Services Authority v Union of India (2014) 1 SCC 438 [68], [69] (Supreme Court of India).

245 National Legal Services Authority v Union of India (2014) 1 SCC 438 [73], [44] (Supreme Court of India).

Accordingly, the Supreme Court directed the Central and State Governments to recognize transgender persons in their self-identified gender and to extend to them, several affirmative action measures such as reservations in public universities and employment, among other things. With this brief introduction to the sub-themes that will be studied in this research, I will now move on to extract religious and cultural claims from the judgments in these cases and codify their attributes.

CHAPTER 4- CODING AND FINDINGS

1. Preliminaries

For the purpose of this chapter, I have extracted religious and cultural claims from the above-mentioned judgments, totaling 31 in number, and coded their attributes as explained below. In order to extract these claims, I have interpreted the religious and cultural claims made in the cases and grouped them according to their uniqueness. In interpreting these claims, I have taken care to avoid grouping multiple expositions of the same claim as different claims. For example, if party has argued in 5 paragraphs that beauty pageants are opposed to the dignity of Indian women then I have coded that as only one claim.

2. Attributes Studied

(a). Overview of Attributes Studied

Once the relevant religious and cultural claims are extracted from each case, I study 11 attributes. Most of them are self-explanatory, and can be mentioned summarily here. They are: case name; date of the decision; name of the court; bench strength; party, (i.e. whether litigant/intervener or court makes the claim); whether the claim is raised in the context of an identified constitutional question; nature of the claim (religious or cultural, or neither); whether the claim espouses a pluralistic conception of religion and culture, or whether it espouses a monist conception of religion and culture. Monist claims are those which believe that the version of religion or culture that they proffer is the only authentic version of the same. Pluralist claims are those which forward religious and cultural views of different religions and cultures on a

particular subject matter, or portray intra religious/cultural variations of the same claim. Whether a claim is monist or pluralist must be gathered in the context of the other religious and cultural claims made in the case. I also study the temporality of the claim, i.e. whether it attempts to portray a contemporary, or historical understanding of religion or culture; the evidence by which the claim is supported, and finally, whether the claim influences the outcome of the case. In other words, is the fundamental right question decided on the basis of the religious or cultural claim raised in the case?

During the coding exercise, certain other questions arise for clarification within each attribute. For reasons of simplicity and clarity, I discuss those issues in the coding chapter and not here (chapter 3). However, two issues need to be discussed immediately to set certain pressing matters at rest, and also to set the stage for the next chapter, which contains a summary of the cases along with a discussion of the religious and cultural claims made in those cases, and their influence on the decision.

(b). Distinguishing Activity Studied from Associated Right

This project focuses only on the cases which challenge the constitutionality of the State's prohibition of an activity, or the State's failure to prohibit the same. In other words, all cases studied here ask whether a person had a fundamental right to pursue the activity mentioned in a particular sub-theme. Other cases concerning fundamental rights associated with that activity are not considered. For example, cases which inquire if there is a fundamental right to abortion are considered, but cases which ask whether the father of a minor girl has a fundamental right to procure an abortion for her if she is unwilling, are not considered. This is because these cases do not question the fundamental right to the act of abortion itself which is the relevant level of

inquiry. These cases constitute a secondary level of inquiry which assumes that the question of constitutionality of abortion has already been settled. Only when it is settled that abortion is constitutional under certain circumstances, can the question of the father's right in this regard be raised.[1] Additionally, cases questioning whether the foetus has a fundamental right to life are also not covered within this research. This is because this questions neither the constitutionality of a prohibited activity, nor the failure of the State to prohibit the activity in question i.e. abortion. Therefore, the question whether a foetus has a right to life does not fulfil the criteria for selection. Similarly, in the case of surrogacy, a case asking whether the children born of surrogacy in India have a fundamental right to be recognized as Indian citizens is not a case concerning the constitutionality of the State's prohibition or the failure to prohibit the act of surrogacy itself, but one concerning the distribution of rights and obligations *ex post facto*, and therefore not studied.[2]

However, some cases which should rightfully be excluded from the dataset for not meeting the selection criteria are nevertheless included because of the way the court has chosen to frame the legal question. A good example is the case of *Aruna Ramchandra Shanbaug* v. *Union of India and Ors.*[3], one of the euthanasia cases studied in the project. Till this case, the question whether a person had a right to die was covered by Section 309 of the Indian Penal Code, 1860 (IPC) which punished attempts to suicide[4], and the euthanasia debate was associated with the question of whether a doctor had the right to facilitate the death of a person by withdrawing

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1 V Krishnan v G Rajan @Madipu Rajan and Anr 1994 (2) MNW (Crl) (Kerala High Court).

2 Jan Balaz v Anand Municipality and 6 Ors AIR 2010 Guj 21 (Gujarat High Court).

3 Writ Petition (Criminal) No. 115 of 2009.

4 The Indian Penal Code 1860, s 309.

treatment. As such, on the logic of the secondary level of inquiry explained above, this case should not have been included in the dataset. However, the court framed the question in a way which merited its inclusion. The court asked whether the State permitted a person to die when they were not in a position to voluntarily refuse treatment. Framed in this way, the question was within the realm of the right to die, and not as the right of a doctor to withdraw treatment. Therefore, this case is included in the dataset. With these preliminary clarifications, I will proceed to examine the religious and cultural claims made in the selected cases.

(c). Religious and Cultural Claims made only in Constitutional Issues Code

In the cases I have coded, the constitutionality question occurs alongside other relevant legal challenges. For example, the State's failure to prohibit beauty pageants is challenged as violating both, the obscenity laws of the country, and constitutional provisions (for example, Article 21). In these situations, I have not tabulated religious and cultural claims pertaining to the obscenity laws as those arguments fall outside the scope of this thesis.

(d). Certain Consequentialist Arguments Excluded

I have excluded consequentialist claims even though these may arguably be based on suppositions of religious or cultural corruption. For example, one claim that was raised in the beauty pageant cases was that permitting beauty pageants would bring a wave of crime against women in India. This claim proclaimed a consequence of the activity under study, and therefore is a consequentialist claim. It may arguably be based on an assumption about the cultural decay unleashed by this activity; that

beauty pageants being displays of loose moral character, might corrupt the morality of the nation as a whole, causing the population to overcome all cultural restraints which require respecting women. As a result, crimes, especially sexual crimes against women would increase. However, these hidden cultural premises have not been identified by the party arguing the case, and by no means can be said to be the only possible cultural explanation for the argument. As a result, by abundant caution, such claims have been excluded. However, some other consequentialist claims have more clear connections with religion or culture, and they have been included. For example, in the marital rape case, defending the constitutionality of the marital rape exception, the State argued that criminalizing marital rape would destroy the institution of marriage. This argument is consequentialist in nature, but has overt connections to a dominant cultural understanding of marriage.

(e). Double Counting Excluded

When a matter is appealed, the appellate judge summarizes the arguments made in the lower court. If their summary contains a religious or cultural claim, I have not tabulated it as I would have tabulated it when covering the case at the lower court level. Re-tabulating the same claim at the appellate stage would result in duplication. However, if at the appellate stage, fresh claims are made by the appealing parties which are also religious or cultural in nature then I have tabulated them even if they are the same as the ones made at the lower court level. Additionally, I have not tabulated those instances in which the court cites with approval religious or cultural claims in a prior case, if I have covered that case, as once again, doing this would result in duplication. When the courts are referring to precedent then I have not coded the religious or cultural claims made in the precedent unless there is some indication

that the court wanted to adopt those claims within the present case. Courts usually signify such intent by underlining or italicising some lines in the precedent to state that they place emphasis (and thus accept) the logic in those lines. For example, consider the case of *CA Master*[5] in which the Kerala High Court was asked whether there existed a fundamental right to voluntarily put an end to one's life. In that case, the petitioner sought to persuade the judge that the question of voluntarily choosing death was not considered in light of ancient Indian writings (especially, the *Manusmriti*) in the previous cases specifically, the case of *Gian Kaur*[6]. The Kerala High Court rejected this claim with reference to couplets from the *Manusmriti* cited in *Gian Kaur* in order to demonstrate that the Indian Supreme Court had considered these couplets and decided against the existence of such a right. At this point, I had to make a choice whether to include or exclude the couplets. I chose to exclude these couplets from the coding scheme because the court does not overtly signify its reliance on them by underlining or italicising, or by any such method. However, as an interpretive exercise, one may consider why the court is repeating only those couplets from the precedent. The court prefaces the couplets by saying, 'suffice it to say that', the concern raised by the petitioner in the present cases was unfounded because the Supreme Court had considered the *Manusmriti* in the *Gian Kaur* decision. This did not give me a reason to conclude that the court was influenced by these religious couplets. Therefore, these religious references were excluded from the coding.

However, at a later point in the case, the court quotes another religious couplet from a religious text called the *Garuda Purana*. These couplets were harder to ignore because the court did not use these couplets only to demonstrate to the petitioner that

[5] CA Thomas Master v State of Kerala 2000 CriLJ 3729 (Kerala High Court).

[6] Gian Kaur v State of Punjab AIR 1996 SC 1257 (Supreme Court of India).

his concerns had already been addressed. These couplets were taken from an insurance case in which the judge reiterated the importance of life by citing some couplets from the *Purana*. This provided a strong argument to believe that the judge cited it in the present case because he wanted to rely on it. Moreover, after this quotation, the judge returned to the case at hand with the following words, 'In view of the above discussion, it is not possible for us to accept the petitioners' contention'[7], giving yet another strong reason to believe that the *Garuda Purana* couplets influenced the decision of the case. Therefore, this reference was included in the coding.

(f). Religio-Cultural Arguments as Distinguished from Social Practices

Some statements directly invoke the state of affairs in the society, but are distinguishable from religious or cultural claims. These statements espouse an opinion on the working of the society, but do not either identify a religious or cultural premise or are based indirectly on one. Moreover, these statements also cannot be construed as a reflection of religion or culture without anything more. Consider for example, the judge's statement in the *Aruna Shanbaug* case justifying why a court order is necessary before performing passive euthanasia:

> In our opinion, if we leave it solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient. Considering the low ethical levels prevailing in our society today and the rampant commercialization and corruption, we cannot rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery.[8]

[7] CA Thomas Master v. State of Kerala 2000CriLJ3729 [22] (Kerala High Court).

[8] AIR 2011 SC 1290 [127] (Supreme Court of India).

This statement identifies various social ills, which in the mind of the judge weigh against empowering the patient's relatives to decide whether life support could be withdrawn. Neither does it overtly nor covertly associate these practices with Indian culture or religion. Therefore, they are not religious or cultural claims.

(g). Prayers not Coded

Relief sought in the cases which may be religious or cultural in nature are also not coded as they are not religious or cultural claims to argue or decide the case, but are in the nature of desired outcomes from the same. For example, in the case of *CA Thomas and Etc.* v. *Union of India and Ors*[9], Thomas prayed that apart from allowing him to commence his own death, a *Mahaprasthana* Kendra (Voluntary Death Clinic) be set up and a commission be established to study the ancient Indian practice of voluntary death so that it may be suitably modified for the present times.[10] This being a relief sought from the court, and not a religious or cultural claim mobilized to argue the case, it has not been coded.

3. Definition of Coded Attributes and Coding Choices

(a). Whether Argument made in Constitution Question

This attribute seeks to record the context in which the coded religious or cultural claim is made. This variable is coded as 0 if no clear constitutional or legal provision is identified in connection with the religious or cultural claim and 1 if a clear constitutional provision has been identified. It is coded NA if no religious or cultural claim has been made in the case. As mentioned above, religious and cultural claims

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[9] CA Thomas Master v State of Kerala 2000 CriLJ 3729 (Kerala High Court).

[10] CA Thomas Master v State of Kerala 2000 CriLJ 3729 [5] (Kerala High Court).

made under other legal heads are not coded. For example, in the beauty pageant cases, religious and cultural claims are also made while testing whether the pageant violates obscenity provisions[11] of the Indian penal law. As these arguments were not made in the course of testing the constitutionality of the State's failure to prohibit the impugned activity, they are outside the scope of this thesis and are not coded.

(b). Party

This attribute seeks to record the party making the religious or cultural claim. This attribute is coded as 'Litigant/Intervener', 'Court', or, 'Not Applicable' in the instances in which no religious or cultural claim is made in a particular case. A claim is ascribed to a party based on the court's summary of the arguments as I do not have access to the filings made in the case. Inevitability therefore, I cannot exclude that there may be some instances in which some other party, and not the court, may have made a certain claim. However, I could not go behind the judgment to see who exactly had made those claims. At the same time, there is ample opportunity provided to the court in the judgment to correctly ascribe a certain claim to a party as every case has a section on the 'summary of the arguments'. Therefore, the court carries the burden to correctly ascribe religious and cultural claims, and when it does not do so, it is not wrong to count those claims as being made by the court. True, it still does not eliminate the possibility of claims being incorrectly ascribed to the court, but the provision the summary section, considerably reduces the chances of it being so.

Moreover, there are some instances in which it is quite clear from the context of the case that the court has come up with the religious and cultural claim entirely on its own. In such cases there is no danger of miscategorisation. Consider for example,

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[11] The Indian Penal Code 1860, s 294.

the quotations from the *Garuda Purana* in the *CA Thomas Master* case, which recorded the dialogue between the divine and Garuda, the bird. This quotation was taken from a case considering an insurance claim and reproduced by the judge in a case deciding the permissibility of taking one's life.[12] It can be reasonably assumed that the parties would not be quoting a Puranic passage from an insurance case as a precedent in a totally unconnected matter. Therefore, it can be comfortably assumed that this claim belongs to neither party, and has been made suo motu by the court. The quotation has been reproduced below for reference:

```
17. Vinna dehana kasyaapi can-           Without the body how can one obtain the
purushaartho na vidyate Tasmaad-    objects of human life ? Therefore protecting the
deham dhanam rakshetpunyaka-        body which is the wealth, one should perform the
rmaani Saadhayet.                   deeds of merit.
18. Rakshayet sarvadaatmaana-            One should protect his body which is responsi-
maatma sarvasya bhaajariam.         ble for everything. He who protects himself by all
Rakshane yatnamaatishthejee         efforts, will see many auspicious occasions in life.
vanbhaadraani pashyati.
20. Shariraraksbanopaayaah kri-         The wise always undertake the protective meas-
yante sarvadaabudhaiah Necchanti    ures for the body. Even the person suffering from
cha punastyaagamapi kushthaadi-     leprosy and other diseases do not wish to get rid
roginah.                            of the body.
22. Aatmaiva yadi naatmaanama-          If one does not prevent what is unpleasant to
chitebhyo nivaarayet Konsyo         himself, who else will do it? Therefore one should
hitakarastasmaadaatnaabnam          do what is good to himself.
taarayishyati
------------------------------------------------------------------------------------------
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(c). Nature of Claim

This variable can take 3 values. 1 if the claim is religious in nature, 2 if it cultural, and 0 if no religious or cultural claims are made in a relevant case.[13] The occurrence of the last event is indicative of the fact that no religious or cultural claim has been made in the case in question, and therefore all other attributes (temporality, discursiveness, and evidence) are coded NA.

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12 CA Thomas Master and etc v Union of India and Ors. 2000 CriLJ 3729 (Kerala High Court).

13 There have some relevant cases in which no religio-cultural arguments have been made while deciding the constitutionality of the activity. For example, Nand Kishore Sharma and Ors v Union of India and Anr (abortion), Misbah Umarfaruk Tamboli v UOI (abortion), State of Maharashtra v Indian Hotels and Restaurants Assn and Ors (bar dancing), among others.

(d). Value-Pluralism

This variable can take 3 values depending on the discursiveness of the religious or cultural statement in question. 0 if it is value-monist, 1 if it is pluralist, and NA when this classification is not applicable because no religious or cultural claims have been made in that case. To classify an argument as either monist or pluralist the technique adopted has been broader than just considering the statement on its own. Looking at a statement in isolation may not give the correct picture of its discursive value. Its true value may emerge in the light of the other statements surrounding it. For example, in the *Common Cause* case while discussing the constitutionality of the State's failure to prohibit voluntary passive euthanasia, the court cited the stand of various religions on the right to die. It claimed that Hinduism, Islam, Christianity, Buddhism, and Jainism, all condemn euthanasia. To support this conclusion, the court cited verses from different religious books. If each citation was considered on its own, it would be classified as value-monist. However, given that the purpose of these citations was to put forward the view that differing religion share a common view-point on this matter, this claim has been coded as pluralist.

(e). Temporality

Temporality is a variable that can take 5 values: 0 for contemporary, 1 for historical, 2 for neither, 3 for both, and NA when no religious or cultural claims have been made in the case. Temporality is tricky to classify because no clear boundaries exist between contemporary and historic time periods or claims. In this situation, the route I have taken is this: when a claim does not explicitly locate itself in history, I have coded it as a claim about the contemporary period. However, some claims belong to both the contemporary and the historical period on account of the way that they have

been framed. For example, the claim that, 'beauty pageants are opposed to *Bharatiya sanskriti*[14] and culture', has been coded as a claim that belongs to both the contemporary and historical period because the invocation of tradition in the claim implies a historical reference, but the reference to the present Indian culture implies contemporarily.

(f). Evidence

Evidence is a variable that records the evidentiary support offered for a religious or cultural claim in the relevant case. The variable can take the following values: 0 if the religious and cultural claim has been made by a litigant/intervener and has not been supported with any evidence, 1 if the court has taken judicial notice of a non-notorious claim, 2 if the court has taken judicial notice of a notorious fact, 3 if the court has refused to take judicial notice of a non-notorious religious or cultural fact or has dealt with a religious or cultural claim in accordance with public reason, 4 if the religious or cultural claim made by a litigant/intervener has been supported by an article/book/study, 5 if a religious or cultural claim by a litigant/intervener has been supported by affidavits, and NA if no religious or cultural claims have been made in the case.

In the course of this thesis, a question has often arisen: can moralistic claims, such as, sex work is inherently immoral, or that bar dancing will degrade public morals, or that showering of tips on dancers is indecent, ever be supported by evidence? If yes, how, and if no, does codifying them as unsupported or judicially noticed cultural claims, mischaracterise their nature?

[14] Indian tradition.

I argue that the moralistic claims studied in this thesis are cultural in nature, and also provable. First, moral claims are inherently cultural or religious in nature. Their moral truths are derived from the religious and cultural climate in which they are embedded. For example, a claim that sex work is inherently immoral is a cultural claim that may not have been true in certain other historic periods. Certainly, there are some moral claims over which there is a basic universal agreement in light of the advancement of human rights law and individual rights. For example, a claim such as trafficking is inherently immoral, is once again, a moral claim, but not a cultural claim, because its truth value is not culture dependent. I have not codified such moral claims. The second question regarding how these claims could have been supported by evidence can be answered in this way. The moral claims studied in this thesis, being inherently cultural in nature, can be proven like any other cultural claim. For example, in the *bar dancers* case, the State argued that the prohibition on bar dancing was justified on the grounds that such dances would harm public morals. The court refused to accept this statement as there was no empirical support offered for this statement by the State. Thus, moralistic cultural claims are capable of proof; the effect of a particular action on morals can be demonstrated by producing empirical research on the topic.

(g). Influence on Decision

This variable records whether the religious and cultural claims have cumulatively influenced the decision, fully or partially. The variable takes 4 values: 0, if the religious and cultural claims have not influenced the decision, 1 if they have, whether fully or partially, 2 if they have not influenced the decision but provide sociological support to the verdict, and NA if the fundamental rights question is raised in the

matter but ultimately not addressed, as in *Misbah*, or the petition is found unmaintainable, as in *Shama Bai*.

4. Findings from the Dataset

From the 31 cases analysed, 103 religious and cultural claims emerged. In 7 cases, no religious or cultural claims were observed. This section will describe the frequency of the coded attributes, by themselves and in relation to one another, and set the stage for some observations to be discussed in detail in future chapters.

(a). What is the Nature of the Most Frequently Occurring Claim?

Chart 1

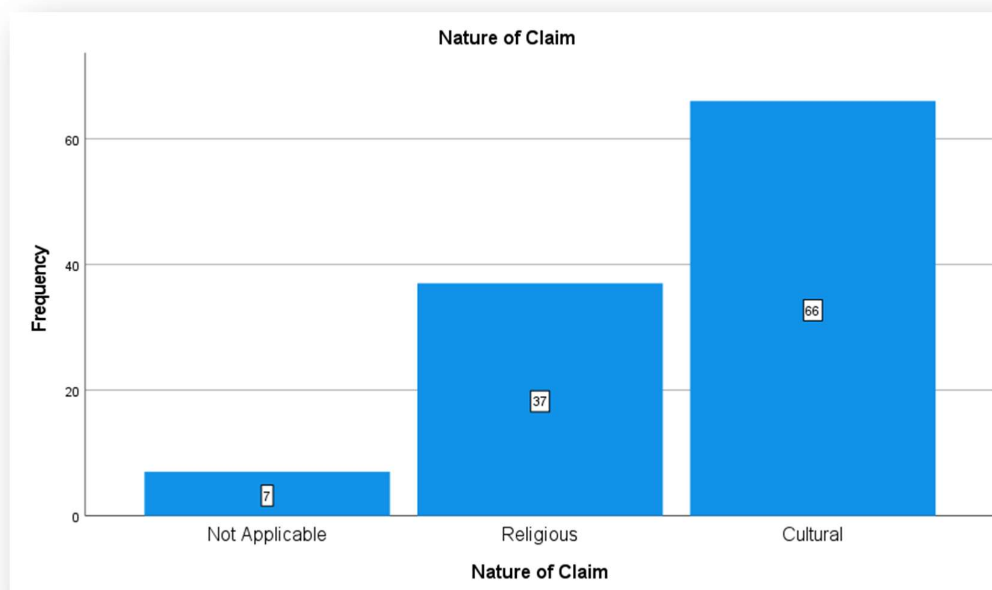


Table 1

Statistics

Nature of Claim

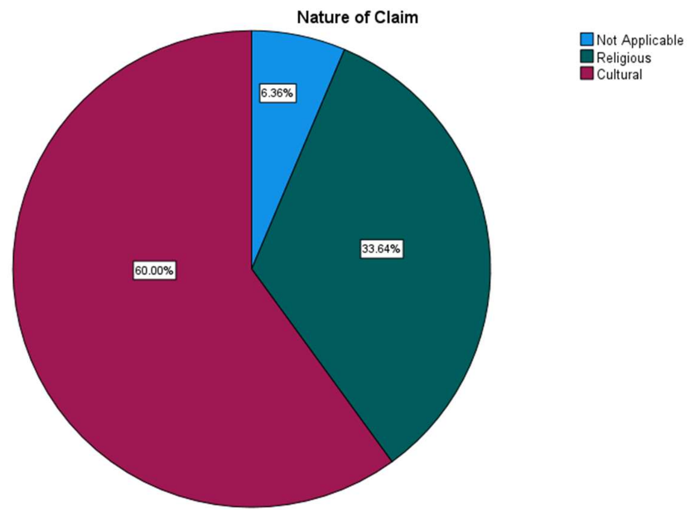
N	Valid	110
	Missing	0

Nature of Claim

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Not Applicable	7	6.4	6.4	6.4
	Religious	37	33.6	33.6	40.0
	Cultural	66	60.0	60.0	100.0
	Total	110	100.0	100.0	

As can be seen from the bar chart and the frequency table above (Table 1), in the dataset there are 7 cases in which religious and cultural claims are not employed. They are coded as 'Not Applicable.' Religious claims occur 37 times and cultural claims occur 66 times. Therefore, the most frequently occurring claims are cultural claims. Table 1 also shows that 60% of the claims are cultural as opposed to only 33.6% religious claims. As a result, cultural claims occur, 60/33.6 = 1.78, or almost twice as frequently as religious claims. The pie-chart below also displays this proportion.

Chart 2



(b). Which Party is making these Religious and Cultural Claims?

Chart 3

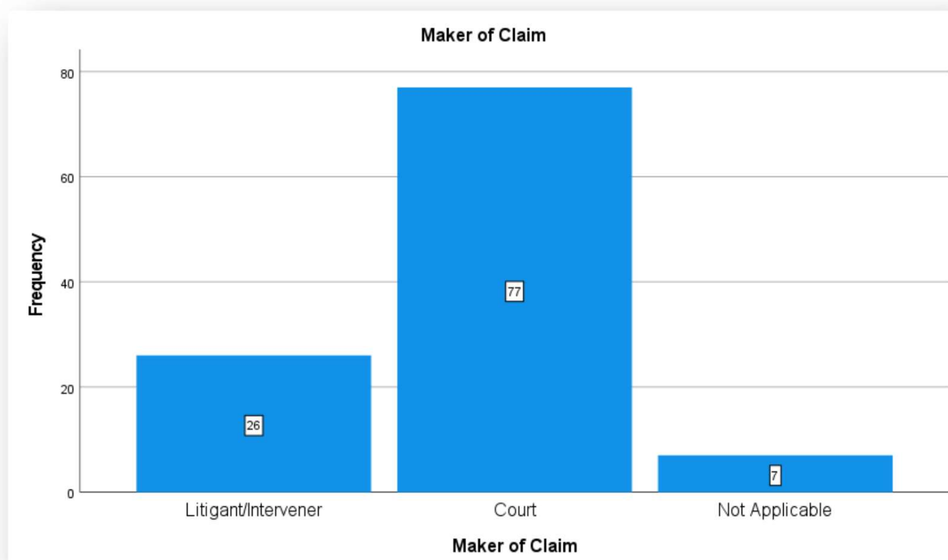


Table 2

Statistics

Maker of Claim

N	Valid	110
	Missing	0

Maker of Claim

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Litigant/Intervener	26	23.6	23.6	23.6
	Court	77	70.0	70.0	93.6
	Not Applicable	7	6.4	6.4	100.0
	Total	110	100.0	100.0	

In the bar graph above, the bars 'Court' and 'Litigants/Interveners' represent the court and the litigants respectively. The bar, 'Not Applicable' represents those cases in which no religious or cultural claims has been made. Evidently, the court is making far more religious and cultural claims than any other party involved in the litigation. In other words, it is typically the court that makes a religious or cultural claim. Table 2 shows that the court is making religious or cultural claims, 77/26 = 2.96, or approximately three times more frequently than the litigants or the interveners. It is possible that the court is simply failing to attribute the argument to the litigant, but without access to material that can show this, I attribute it to the court itself. More specifically, as shown by Table 3 below, of the 77 religious or cultural claims made by the court, 43 are cultural in nature whereas only 34 are religious in nature. In other words, the court makes more cultural claims than religious ones. It is also very

interesting to observe that the litigants or the interveners engage very little with religious claims and have made only 3 religious claims as opposed to 23 cultural ones. See table 3.

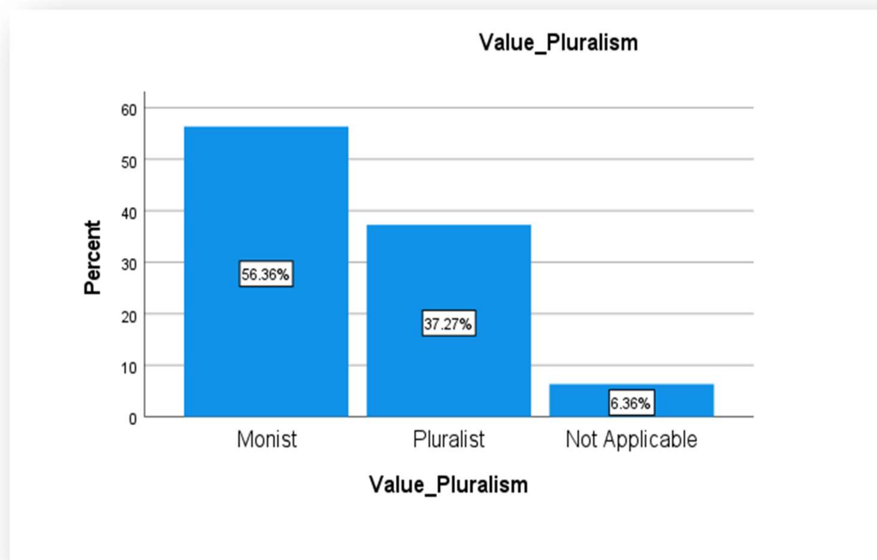
Table 3

Maker of Claim * Nature of Claim Cross tabulation

		Nature of Claim			
		Not Applicable	Religious	Cultural	Total
Maker of Claim	Litigant/Intervener	0	3	23	26
	Court	0	34	43	77
	Not Applicable	7	0	0	7
Total		7	37	66	110

(c). How Pluralistic are the Religious and Cultural Claims?

Chart 4



As can be seen from the bar graph above, the religious and cultural claims presented in court portray a primarily monist conception of the same (56.36%). In other words, they try to influence the fundamental rights of others on a singular conception of religion or culture, which is put forward as the definitive conception of religion and culture. Such claims do not admit of any possibility that their interpretation of religion and culture might not be the only valid interpretation of the same. They do not admit of any regional or theological variation in their claims. Pluralist conceptions are comparatively fewer (37.27%). Pluralist claims admit either that different religions or cultures may have different opinions on the subject, or that there may be intra-religious/intra-cultural variation of the religious and cultural claim. In fact, as the frequency table below (Table 4) will reveal, monist arguments occur 62/41 = 1.5, or one and a half times more than pluralist arguments.

Table 4

Statistics

Value_Pluralism

	Valid	110
	Missing	0

Value_Pluralism

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Monist	62	56.4	56.4	56.4
	Pluralist	41	37.3	37.3	93.6
	Not Applicable	7	6.4	6.4	100.0
	Total	110	100.0	100.0	

The next interesting observation comes in the form of Table 5, which shows that the courts espouse almost an equal frequency of monist and pluralist claims, whereas litigants or interveners primarily espouse monist claims. In comparison to the litigants or the interveners, the courts are significantly pluralistic in nature. However, does this mean that the pluralistic religious and cultural claims influence the decision of the case? This is a question that naturally arises from this statistic, but which is not answered here. I explore the answer to this in Chapter 7.

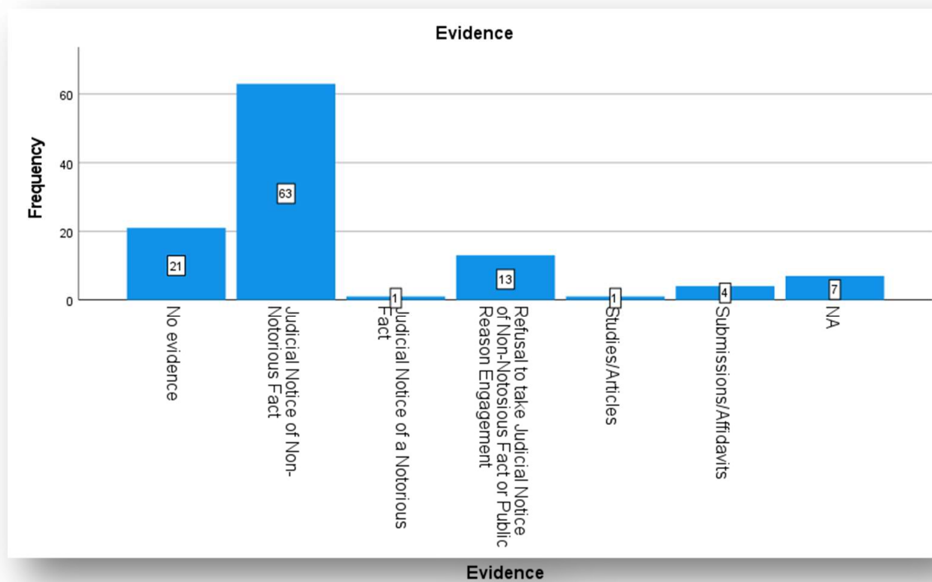
Table 5

Value_Pluralism * Maker of Claim Cross tabulation

		Value_Pluralism			Total
		Monist	Pluralist	Not Applicable	
Maker of Claim	Litigant/Intervener	24	2	0	26
	Court	38	39	0	77
	Not Applicable	0	0	7	7
Total		62	41	7	110

(d). What Evidence are the Religious and Cultural Claims Supported by?

Chart 5



As can be seen from the bar graph above, a majority of the religious and cultural claims are judicially noticed. The bar graph below shows that of the total of 103 religious and cultural claims made in court, 63 are illegally judicially noticed, and 21 are not supported by evidence. This means that 84 claims are admitted into court without evidence. This is 84/103*100 = 81.5% of the claims studied in this thesis. This raises the question of whether religious and cultural claims can indeed be admitted without evidence. I answer this question in Chapter 6, with reference to the judiciary, which is responsible for a majority of these claims (63/84*100 = 75%). Only in 13 out of 103 instances of religious and cultural claims does the judiciary refuse to admit it, or resolves them in accordance with public reason.

(e). In How Many Cases Do the Religious and Cultural Claims Affect Case Outcome?

Table 6

Influence of Religious and Cultural Claims on Outcome

Case	Influence Dec
Mahila Jagran Manch v. Karnataka and Ors.	0
Mahila Jagran Manch v. Karnataka and Ors.(Div. Bench)	1
ABCL v. Mahila Jagran Manch	0
Chandra Rajkumari and Anr. v. Comm. Of Police Hyd.	1
Nand Kishore Sharma and Ors. v. Union of India and Anr.	0
Ashaben v. Gujarat & Ors.	2
Misbah Umarfaruk Tamboli v. UOI	NA
Independent Thought	0
Aruna Ramchandra Shanbaug v. UOI and Ors.	0
CA Thomas Master and etc. v.UOI and Ors.	1
Maruti Shripati Dubal v. State of Maharashtra	1
Cheena Jagdeeswar	0
Rathinam	1
Gian Kaur	1
Common Cause	2
Tarakeshwar Chandrabanshi v. UOI and Ors.	0
Indian Hotel Association and Ors. v. Maharashtra and Ors.	0
State of Maharashtra v. Indian Hotels and Restaurants Assn. and Ors.	0
Indian Hotel and Rest. Assoc. and Ors. v. St. of Maharashtra and Ors.	1
AC Agarwal and Ors. v. Ram Kali and Ors.	0
Ram Kali v. AC Agarwal	0
Nitu and Ors. v. Govt. of NCT of Delhi and Ors.	1

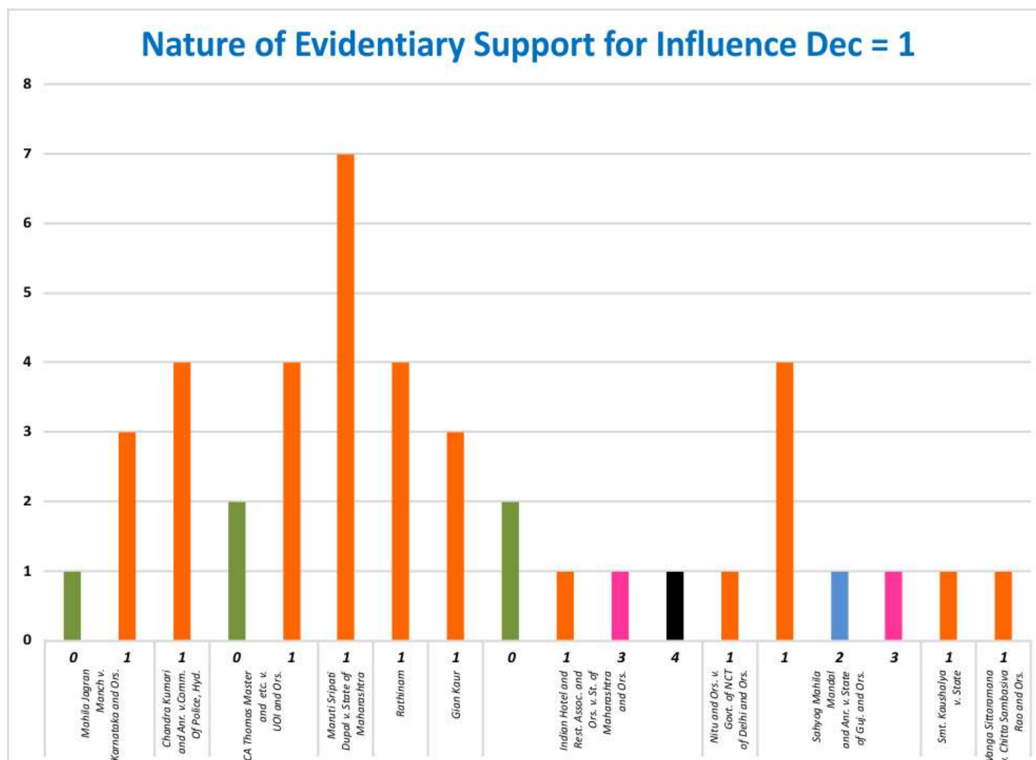
PN Swamy v. Hyd.	0
Sahyog Mahila Mandal and Anr. v. State of Guj. and Ors.	1
Shama Bai and Ors. v.UP and Ors.	NA
Smt.Kaushailiya v. State	1
Vanga Seetharamana v Chitta Sambasiva Rao and Ors.	1
Naz Foundation v. Govt. of NCT of Delhi	2
Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors.	0
Navtej Johar	2
NALSA	2

Table 6 reveals that in 11 out of 31 cases, i.e. in approximately 29% of the cases, religious and cultural claims directly affect the outcome of the case, fully or partially. This finding is especially important in light of the fact that there was no justification for making religious and cultural claims in these cases, because these cases did not concern the freedom of religion nor did they concern any civic rights that were statutorily regulated by religion or culture. Two further inquiries need to be made before concluding whether the phenomenon observed by the statistic above, is constitutionally legitimate. First, is there a theory of constitutional interpretation which would clarify whether religious and cultural claims could be considered in the cases studied, despite there being no textual basis for doing so, and secondly, whether such claims could legitimately affect the outcome of fundamental rights cases?

A final finding from the dataset is that of these 11 cases which are influenced by religion and culture in their decision, in 9 cases, the religious and cultural claim was admitted without evidence or judicially noticed despite being a non-notorious religious/cultural claim. In fact, looking at this set of 11 cases alone, 42 religious and cultural claims were made therein, of which 33 were illegally judicially noticed. This statistic points to the fact that within the dataset, when religious and cultural claims

influence the outcome, an overwhelming majority of those claims are judicially noticed (33/42*100 = 78.5%). This further reinforces the need to study whether the judiciary is permitted to admit religious and cultural claims by-passing the evidentiary requirements. I will answer this question in Chapter 6. See chart 6 below. The x-axis plots the case name and the nature of the evidentiary support for each religious and cultural claim made in the case. Numbers 0-4 on the x-axis signify the nature of evidentiary support as already detailed by the variable 'Evidence.'. Summarily, 1 = illegal judicial notice. To review the other values of 'Evidence', see above (page 121-122).

Chart 6



5. Conclusion

In this chapter, I have specified how the various attributes of the religious and cultural claims will be coded. What has emerged from the coding exercise is that 103 religious and cultural claims have been found in cases where no role had been mandated for religious and cultural claims. In other words, an average of three religious and cultural claims has been made in each of the 31 cases studied. This finding highlights the phenomenon that this thesis proposes to study. Further, I have found that it is typically the courts that are making the religious and cultural claims (77/103).

The next set of important findings related to the evidentiary basis of the claims. It is found that 81.5% of the claims admitted into court are not supported by evidence (84/103*100). They are either judicially noticed (63 claims)or are asserted by the litigant/intervener without any evidence (21 claims). The litigants have made 26 religious and cultural claims. Of these, only 5 are supported by evidence. Therefore, 80.7% of the religious and cultural claims made by litigants/interveners do not have any evidentiary support. Moreover, 63 out of the 77 religious and cultural claims made by court have been judicially noticed although these claims are not beyond controversy. This means that 81.8% of the religious and cultural claims made by court have been judicially noticed through an illegal application of the judicial notice rule, as these claims are not non-notorious. This coupled with the finding that the majority, i.e. 74.75% of the religious and cultural claims are made by court, makes it imperative to review the judicial entitlement and empowerment to admit religious and cultural claims in fundamental rights cases (Chapter 5), and the procedure by which such claims can be admitted (Chapter 6). It is further found, that in 11 out of the 31 cases studied, religious and cultural claims have affected the outcome of the

case. This comprises 29% of the cases. In other words, 29% of the cases have been determined by religious and cultural claims when neither the constitutional nor the statutory text provided any role for religious and cultural claims in the determination of the fundamental rights in question. 78.5% of the claims in these 11 cases had been judicially noticed. This finding reinforces the need to pay particular attention to the concept of judicial notice.

The final important observation from the dataset is that while courts make an equal number of monist and pluralistic claims, they are significantly more pluralistic as compared to the litigant/intervener. At first blush, the pluralistic attitude of the court may seem to comport with the demands of a liberal constitution, but one needs to ask whether a pluralistic religious and cultural claim is a constitutionally legitimate claim. In other words, can such a claim legitimately affect the outcome of a case? If yes, under what circumstances? This question is answered in Chapter 7, which studies Indian constitutional secularism and public reason and provides the answer as to the appropriate role of religion and culture in the context of these two concepts.

CHAPTER 5- A THEORY OF CONSTITUTIONAL INTERPRETATION

The previous chapter found that 74.75% of the religious and cultural claims found in the dataset were made by the courts. Therefore, it becomes imperative to understand the judicial entitlement and empowerment to consider religious and cultural claims in fundamental rights cases. This chapter provides an account of the same. First, it answers the question whether there is any constitutional prohibition on the judiciary from hearing religious and cultural claims in deciding fundamental rights cases. If there is none, then the chapter asks whether there is any theory of constitutional interpretation that can guide the judiciary as it considers religious and cultural claims in the adjudication process. To do this, the chapter first demonstrates that there is no authoritative way in which the Indian constitution must be interpreted. Through a historical look at how the courts have decided cases, it becomes clear that at least three ways of constitutional interpretation exist in India: positivism, structuralism, and basic structure review. In all these modes of interpretation, there is ample scope for the judiciary to take recourse to various intellectual constructs, pragmatism, textualism, constructivism, etc. However, it is found that none of the constructs provides an answer to the role that religious and cultural claims can play in constitutional interpretation. Such a theory is necessary for this thesis because given that the dataset consists of fundamental rights cases, the judiciary is ultimately being called to interpret the constitution. Therefore, the need is felt for a theory specific to the enterprise. Accordingly, I propose theory of constitutional interpretation that provides an account of the conditions under which religious and cultural claims can become part of the adjudication process.

1. The Judiciary Imagined

In the Constituent Assembly, much of the discussion regarding the judiciary took place in the Fundamental Rights Sub-Committee and the Ad-Hoc Committee on the Supreme Court. These discussions were centered on the nature of the writs that the Supreme Court could enforce, the exclusivity of this forum to do so, whether, and under what circumstances the writs could be suspended, and finally, the independence of the judiciary.[1] Seemingly, there was no discussion on a theory of constitutional interpretation that would guide the judges.

The final constitution provides the higher judiciary, the Supreme Court and State High Courts, the power to strike down any State action that is in violation of fundamental rights.[2] Therefore, clearly, the model of legislative supremacy, followed elsewhere, is not followed in India. Resultantly, though the final constitution grants a wide power to the judiciary to interpret the constitution, it does not provide any grounded theoretical approach for doing so. Even those constitutional sites where one could expect such discussions to be sine qua non are marked by a silence on the topic. When the Draft Constitution Article 25 was taken up for discussion in the Constituent Assembly, no discussion occurred on how the Supreme Court would interpret and adjudicate on the constitution. The Draft Article25 (current Article 32 of the Indian Constitution) conferred a fundamental right to move the Supreme Court for the enforcement of fundamental rights and empowered the court to issue substantive writs to enforce the same. This could have been one of the few appropriate sites to lay down an interpretive approach for the higher judiciary. Similarly, Draft Article 117 (current

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1 Granville Austin, *Cornerstone of a Nation* (Clarendon 1966); B. Shiva Rao, *The Framing of India's Constitution: A Study* (Indian Institute of Public Administration 1968) 301-318 and 480-510.

2 The Constitution of India 1950, art 13 read with arts 32 and 226.

Article 141; law declared by the Supreme Court to be binding on all courts)[3] was also not discussed in the deliberations on the Draft Constitution and neither was the Supreme Court's power to do complete justice (Article 142 presently; Article 118 in the Draft)[4].

The reason appears to be the framers' belief that they had written a very specific and detailed constitution and the grounds on which certain fundamental rights could be curtailed, were mentioned in the document itself.[5] This being the clarity of the constitution, they perhaps did not think it necessary to also provide an interpretive approach. In effect, they thought, they had obviated the need for any interpretation of the constitution, at least to a substantial level.[6] Twice we see this attitude reflected in the preparatory documents. The first time through B.R. Ambedkar in a cover letter attached to the Draft Constitution submitted to the Assembly for discussion:

> Fundamental Rights: The Committee has attempted to make these rights and their limitations to which they must necessarily be subject,

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3 The Constitution of India 1950, art 141. Article 141- Law declared by Supreme Court to be binding on all courts.
Article 141 - Law declared by Supreme Court to be binding on all courts
The law declared by the Supreme Court shall be binding on all courts within the territory of India.

4 The Constitution of India 1950, art 142. Article 142 - Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.
Article 142 - Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc
(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order1 prescribe.
(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

5 BN Rau, *Indian Constitution in the Making* (B Shiva Rao ed, Orient Longmans) 364.

6 BN Rau, *Indian Constitution in the Making* (B Shiva Rao ed, Orient Longmans) 364.

> as definite as possible since the courts may have to pronounce on them.[7]

The second occasion was through an article published by B.N. Rau, the Constitutional Adviser, on the 15th of August, 1948. In that article, Rau was replying to a criticism that the Indian fundamental rights provisions had too many 'irritating limitations'[8] such that, 'what is given with one hand is taken away by the other.'[9] Rebutting this criticism, Rau replied that the draft of the Indian constitution specifically empowered the higher judiciary to void laws inconsistent with fundamental rights, unlike for example, the American constitution where the US Supreme Court has gradually arrogated this power to itself[10], but there was no constitutional provision to this effect.[11] As this specific empowerment existed in the Indian Draft Constitution (and then the final constitutional) text itself, Rau reasoned, 'unless, therefore, the constitution itself lays down precisely the qualifications subject to which the rights are conferred, the courts may be powerless in the matter.'[12] A detailed constitution does not preclude constitutional interpretation. Indeed, qualifications subject to which rights are conferred may be provided, but eventually the judiciary will be required to give substantive meaning to these qualifications to be able to assess State action. In the absence of this, the judicial review of State action would become a farcical exercise where all the State would be required to do is slot its curtailment of

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7 Ambedkar letter dated 21.2.1948, to the President while presenting the Draft Constitution. Ambedkar was the chairperson of the Drafting Committee of the Constituent Assembly. See B Shiva Rao, *Framing of India's Constitution*: *volume 3* (NM Tripathi, Indian Institute of Public Administration 1968) 511.

8 BN Rau, *Indian Constitution in the Making* (B Shiva Rao ed, Orient Longmans) 363.

9 BN Rau, *Indian Constitution in the Making* (B Shiva Rao ed, Orient Longmans) 363.

10 Eric Segall, *Originalism as Faith* (CUP 2019).

11 BN Rau, *Indian Constitution in the Making* (B Shiva Rao ed, Orient Longmans) 363.

12 BN Rau, *Indian Constitution in the Making* (B Shiva Rao ed, Orient Longmans) 363.

fundamental rights under textually permissible criteria. That an interpretive approach was necessary became clear from the first fundamental rights case that reached the Supreme Court and the framers' thought that a detailed constitution would obviate this problem did not bear out in the long run.

2. The Judiciary in Practice: Positivism, Structuralism, and the Basic Structure Review

In many instances in Indian scholarship, the phrase, 'constitutional interpretation' is used to denote the adjudicatory style of the judiciary, specifically to denote a difference between a narrow textual reading and liberal, 'spirit of the constitution' type of reading. This is the context to which I am referring when I use this phrase. In addition, quotations that I cite from this literature have also used 'constitutional interpretation' in the same way. This will become clearer as I go through the cases below, but it is worth pointing this out early to avoid any confusion as the American literature on constitutional interpretation has a wholly different normative focus. When that literature uses the term, 'constitutional interpretation', it refers to how the constitutional text should be interpreted; whether it should be interpreted according to its historical meaning at the time of enactment, or whether it should be interpreted according to the intention of the framers when they wrote the document, or whether it should be interpreted according to a political and moral conception of the constitutional text that is in line with the constitutional enterprise, etc. My focus, however, will be on Indian interpretive methods, and my narrative will be built on those methods.

If one were to delineate an interpretive theory that guides the higher judiciary in practice, i.e. the Supreme Court of India, and the High Courts of the States, one

might consider a doctrinal study of the cases instituted in these courts. However, the sheer numbers make this an impractical venture. As an estimate, in 2019, 37,174 cases were filed in the Supreme Court.[13] These cases have not been differentiated according to subject matter, making it hard to identify the ones relating to fundamental rights. Additionally, any doctrinal survey of the fundamental rights decisions would reveal more than one approach to constitutional interpretation. In these circumstances, an alternate methodology might provide a more workable solution. Accordingly, I will concentrate on the secondary literature about constitutional interpretation and discuss the prominent interpretive theories that seem to emerge from those analyses. Secondary literature on constitutional interpretation proceeds by studying what scholars refer to as landmark cases, to draw theoretical conclusions about the working of the judiciary.

The very first fundamental rights case, *AK Gopalan* v. *The Union of India*[14] revealed the limitations of the framers' belief that an extremely detailed constitution would eliminate the need for interpretation. The question in this case was whether the Preventive Detention Act, 1950 was constitutionally valid. Relevant for this discussion is one of the grounds for challenge which was whether the Act violated Article 21. The Article states that no one shall be deprived of life or personal liberty without the procedure established by law. With respect to the Article 21 challenge, the question was whether the word, 'law' used therein meant lex (enacted law) or jus (just law), the former signifying a narrow textualist interpretation, and the latter, a wider, more liberal one assessing the fairness of the law. A majority of the court found that

[13] Indian Judiciary: Annual Report 2018-2019 (The Supreme Court of India 2018-19) 81.

[14] AIR 1950 SC 27. 1950 was the year that the constitution was adopted.

the word law, in Article 21 meant enacted law, specifically rejecting a 'spirit of the constitution' kind of interpretation.

With the very first case, the battle lines of interpretive approaches were drawn. An early Indian constitutional law scholar noted, 'the choice of the proper method in particular cases is not always an easy decision.'[15] He examined the early cases to find that the court chose, with more or less frequency, between two different methods of interpretation. Though it preferred primarily to go via the route of textual interpretation, it had issued in some cases, liberal interpretations, or interpretations in the spirit of the constitution.[16] These two modes of interpretation have been the dominant modes since that time. SP Sathe, a noted constitutional law scholar, has identified them as positivism and structuralism. Positivism, 'holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else.'[17] Structuralism, on the other hand is an interpretive approach in which the constitution is, 'interpreted liberally, as a totality, in the light of the spirit pervading it and the philosophy underlying it. A structuralist interpretation aims to articulate the implicit nuances of the Constitution, but may vary according to the ideological or philosophical predilections of the judges.'[18] He also

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15 Charles Henry Alexandrowicz, *Constitutional Developments in India* (OUP 1957) 19-20.

16 Charles Henry Alexandrowicz, *Constitutional Developments in India* (OUP 1957) 19-20. Other scholars have also argued that the early years of the Supreme Court were marked by a textualist approach that concentrated on the meaning of words used in the document, in the present form. Chintan Chandrachud, "Constitutional Interpretation" in Sujit Choudhary et al (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2016) 76.

17 SP Sathe, "From Positivism to Structuralism", in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (OUP 2007).

18 SP Sathe, "From Positivism to Structuralism", in Jeffrey Goldsworthy (ed) *Interpreting Constitutions*: *A Comparative Study* (OUP 2007).

calls this method of interpretation result-oriented or teleological.[19] Judges freely consider multiple provisions of the constitution, along with ideas of fairness and natural justice to arrive at structuralist interpretations.

The positivist versus structuralist debate alludes to a famous debate in legal philosophy whose most influential modern proponents are HLA Hart on the one hand, and Ronald Dworkin on the other. An in-depth investigation of these positions is precluded by the scope of this research; a brief introduction will suffice for the present purposes. Positivists argue that the criterion for the legal validity of a rule is set by the rules of recognition. For example, a provision of law is valid because it has been enacted following the appropriate legislative procedure. The content of a law is a totally different matter.[20] That a law may appear morally unjust in its content does not invalidate its existence so long as it has been created in compliance with the rules of recognition. There is a prima facie duty on the judge to apply a valid and clear law though the duty is limited by fairness of the law.[21] If the statute is unclear then the judge may act as a deputy of the legislature and using discretion, fill the gaps.[22]. However, Sathe's use of the term 'positivism' does not carry the above-mentioned broad connotation. He uses the term to denote those interpretive techniques which applied the law identified through the legal criteria for validity, without regard for its content, purpose and effect.

On the other hand, non-positivist or structuralist scholars argue that the legal validity of a law is derived from an interpretive process. When faced with a legal

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19 SP Sathe, "From Positivism to Structuralism", in Jeffrey Goldsworthy (ed) *Interpreting Constitutions*: *A Comparative Study* (OUP 2007) 227, 263.

20 HLA Hart, *The Concept of Law* (OUP 1961).

21 HLA Hart, *The Concept of Law (*OUP 1955) 185-86.

22 Suri Ratnapala, "Separation of Law and Morality" in *Jurisprudence* (CUP 2018) 224.

provision, the judge tries to think of the best possible political and moral universe that could have justified the existence of the provision in question, and interprets it according to the dictates of that political and moral conception. The judge is therefore free to reject interpretations which do not fit the political and moral universe in which the law is situated.[23] Sathe used the term, 'structuralism' to denote those adjudicatory techniques that went beyond assessing whether a law complied with the legal criteria for validity, and sought to interpret the constitution according to justifiable political and moral conceptions.

He argued that the Supreme Court began as a positivist court though it slowly moved to structuralism, in part to answer the questions unanticipated by the constitution, and in part because no written bill of rights which uses open-ended terms to entrench rights can remain wholly positivist over time.[24] From the very first fundamental rights case, it became evident that judges would have to fill the, 'leeway of choice'[25] left by the constitutional text.

Although viewed longitudinally over time, the Supreme Court moved from positivism to structuralism, each period which was said to be dominated by one approach was said to be punctuated by the other. I will illustrate these approaches using the property law cases. These cases were specifically chosen for this purpose because apart from demonstrating how structuralism and positivism work in the Indian constitutional context, they trace the evolution of a new form of judicial

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23 Ronald Dworkin, *Law's Empire* (Fontana Press 1986). For a further elaboration on the debate between positivist and anti-positivists, see, Andrei Marmor, "Exclusive Legal Positivism" in Coleman et al (eds.) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) and "Legal Positivism" in the Stanford Encyclopedia of Philosophy.

24 SP Sathe, "From Positivism to Structuralism", in Jeffrey Goldsworthy (ed) *Interpreting Constitutions*: *A Comparative Study* (OUP 2007) 227.

25 SP Sathe, "From Positivism to Structuralism", in Jeffrey Goldsworthy (ed) *Interpreting Constitutions*: *A Comparative Study* (OUP 2007) 231.

review; the basic structure review, which I classify as an additional and independent method of constitutional interpretation. Sathe specifically discusses the cases in the background of the property rights agitation that marked the period immediately after independence.[26] He notes that through its practice of revenue collection, the colonial rulers had vested property in revenue collectors, slowly but steadily widening the wealth gap between the collectors and the peasants. The situation was so grave that this became one of the issues that the leaders of the independence movement promised to resolve once the country became free. This caused some anxiety among the revenue collectors who sought to insert, and indeed succeeded in having inserted, a right to property in the Government of India Act, 1935. This property right carried over to the Indian constitution as a fundamental right which guaranteed that no person shall be deprived of his property without the authority of the law (Article 31(1), eventually repealed in 1978). This property right stood in stark contrast to the socialist and equalizing inclination of the Government immediately in power after independence. The tussle between the constitutionally granted fundamental right, and the government agenda marked a site for some of the most intense battles over constitutional interpretation. In resolving these cases, the Supreme Court resorted, sometimes to a structuralist approach of interpretation, and sometimes to a positivist one.[27]

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[26] SP Sathe, "From Positivism to Structuralism", in Jeffrey Goldsworthy (ed) *Interpreting Constitutions*: *A Comparative Study* (OUP 2007) 239.

[27] Sathe notes that the approach varied to serve the teleological purpose: i.e. to decide in favour of the propertied class, and by extension, in favour of property rights. See SP Sathe, "From Positivism to Structuralism", in Jeffrey Goldsworthy (ed) *Interpreting Constitutions*: *A Comparative Study* (OUP 2007) 239. This is not entirely correct. In the State of Bihar v Kamleshwar case, the decision of the Supreme Court was decidedly against the interests of the propertied classes.

A few examples will suffice to show these differing approaches. In the case of State of *Bihar* v. *Kamleshwar*[28], a 1952 Supreme Court appeal considered the constitutional validity of the land reform legislation enacted by the states of Bihar, Madhya Pradesh, and Uttar Pradesh. Article 31 (2) provided that any law authorizing the State acquisition of land for public purposes could not do so without either fixing the compensation to be given for such acquisition, or specifying the principles on which the compensation could be given. The impugned legislation did not articulate a public purpose behind acquisition, and did not fix a fair compensation to be given for acquisition. Article 31(4) operated as an exception to Article 31(2) and provided that if any land reform Bills had been pending before the constitution had been enacted, and had later come into effect (as the ones in question had) then, 'notwithstanding anything in the constitution', those pieces of legislation would be exempt from the requirements of Article 31(2). The question was whether Article 31(4) put the impugned legislation beyond the purview of the constitution, or whether regardless of the express wordings of Article 31(4), a fair compensation for acquired land was a sine qua non of any law that sanctioned acquisition. In other words, the justices had to choose between a positivist interpretation of the constitution, and a structuralist one.

Here, Dr. Ambedkar, representing a set of landed classes, specifically made an argument based on a structuralist interpretation of the constitution. He argued that a constitution based on equality, justice, and liberty could not be interpreted to disallow fair compensation for land acquisition. Other counsel attached to other sets of landed classes also made arguments drawing the attention of the court to certain constitutional provisions which should continue to govern these cases despite the exemption envisaged in Article 31(4). Those arguments were positivist in nature, and

[28] AIR 1952 SC 252 (Supreme Court of India).

I do not recount them here because they are beside the purpose of this summary. The Ambedkar argument is very illuminating because he was the chairperson of the constitution Drafting Committee and through his argument here, we can see a glimpse of how the framers, or at least some of them, might have intended the constitution to be interpreted. Though such a 'spirit of the constitution' type of interpretation was adopted by the Supreme Court in later cases, it was expressly rejected in this one. In this case, the constitutional bench[29], speaking through Justice Patanjali Shastri expressly favoured a positivist interpretation of the constitution. The Justice stated that it was true that the established legal tradition surrounding the law of eminent domain required the articulation of a public purpose and a fair compensation. However, when the constitution had expressly exempted certain legislation from those common law requirements, no structuralist interpretation could win the day. Accordingly, the impugned legislation was found to be constitutional.

The very same year, another constitutional bench of the Supreme Court, 3 out of the 5 judges of which had participated in the preceding case, came to a different conclusion about the interpretation of the constitution. In this case, the *Bela Banerjee*[30] case, the West Bengal Land Development and Planning Act, 1948 was called into question. The Act had fixed the compensation for land acquired under it to the market value as on the 31st of December, 1946. Since the impugned Act was permanent in nature, and under it acquisitions could be carried out for many years, fixing the market price to a particular historical date, which alluded to a time before land prices had risen (due to the end of World War II) could result in patent injustice. The adequacy of the compensation was challenged and the State took refuge under

[29] A 5 judge bench.

[30] The State of West Bengal v Mrs Bela Banerjee and Others AIR 1954 SC 170 (Supreme Court of India).

Article 31(2). They argued that that Article only obligated them to 'fixe[s] the amount of the compensation,' or determine the principles on which it was to be determined. Since the Act had done the former, the State had met its legal obligation and the adequacy of the compensation could not be called into question. It was once again Justice Sastri who delivered the judgment for the court but this time, he adopted a structuralist interpretation and noted that the very determination of the concept of 'compensation' required ascertaining that the amount offered was a, 'just equivalent of what the owner has been deprived of.'[31] Accordingly, the Bengal Act was found to be unconstitutional.

A note needs to be made here about the division between positivist and structuralist ways of constitutional interpretation, especially when it comes to rights-based cases. The source of the controversy (Article 31(2)) does not itself come with the meaning of the word, 'compensation'. Therefore, the judges must imbue it with meaning. In such instances, the line between textual source-based argumentation and argumentation that looks at a morality behind a provision begins to blur. For example, in the *Bela Banerjee* case, it might not be immediately clear a structuralist interpretation was applied. It could very well be understood in positivist terms as the textual meaning of the word compensation. However, in the Indian context, positivist approaches are those that go along with the parliament defined meaning of a phrase, whereas structuralist approaches are those that interrogate the parliamentary defined meaning and take a moral view of the same.

What followed from here was a back and forth between the court and the parliament over property rights; the government would try to implement its land

[31] The State Of West Bengal v Mrs Bela Banerjee and Others 1954 AIR SC 170 (Supreme Court of India).

reform agenda by constitutional amendments and the Supreme Court's inconsistent interpretive techniques sometimes hindered those plans. For example, following the *Bela Banerjee* case the government amended the constitution to state that the adequacy of the compensation could not be challenged in court.[32] Still, the Supreme Court continued to find that compensation had to have a necessary connection with fair value. In *P. Vajravelu Mudaliar* v. *Special Deputy Collector*, *Madras*[33], 10 years after the *Bela Banerjee* had been decided, a constitutional bench of the Supreme Court found that that the government had chosen to retain the word 'compensation' while enacting the amendment signified their intention to accept the Supreme Court interpretation of that word. Compensation had to be a fair price, and not an illusory amount. This back and forth between the government and the Supreme Court in the early years has been the subject of keen study by many scholars of Indian constitutional law. It has recently been noted that the constitution 'was amended seventeen times in its first fourteen years. At least half these amendments curtailed judicial review or amended fundamental rights in order to reverse the impact of a Supreme Court judgment.'[34]

As interesting as this historical study is, an extended digression into the property cases is not necessary, as the point with which I am concerned here is not a political analysis of the early Supreme Court, but the interpretive approaches of the judiciary. As this brief survey has shown, the court used both positivist and structuralist approaches to adjudication. The significant number of constitutional amendments generated another important constitutional question, which concerned

[32] The Constitution (Fourth Amendment) Act 1955.

[33] AIR 1965 SC 1017 (Supreme Court of India).

[34] Rohit De, 'The Republic of Writs: Litigious Citizens, Constitutional Law and Everyday Life in India' (Princeton University 2013) 6.

the limit of the amending power of the parliament: could the parliament modify the constitution to negatively affect a fundamental right?

The Supreme Court conclusively answered this question in the negative, overturning its earlier rulings on the matter. In *Golaknath and Ors.* v. *State of Punjab and Anr.*[35], the parliament amended the constitution and placed land reform legislation which deprived the Golaknath family of their property, beyond judicial review. The Supreme Court by a 6:5 majority stated that amending power of parliament had implied limits and that the constitution could not be amended to curb fundamental rights. At that moment, as SP Sathe correctly notes, the court made an open admission of its law-making power: akin to a veto. Up to this point, the Supreme Court had only circumvented the parliamentary intention behind amendments by issuing creative interpretations of the text of the amended Articles, but it had not found a constitutional amendment (as opposed to ordinary legislation) unconstitutional. The government in power perceived its ability to implement its plans greatly frustrated by these judicial tactics.

Matters came to a head in 1973, after 23 years of struggle, in the *Keshavananda Bharati* case.[36] Following the *Golaknath* decision, the parliament once again amended the constitution (24th amendment), which stated that the parliamentary power to amend was beyond the pale of judicial review. This amendment also amended Article 368 of the constitution; the textual source of parliament's amending power, to clearly state that it constituted the *power*, as opposed to the *procedure*, to amend the constitution. Further the amendment also clarified that constitutional amendments were not 'law' for the purposes of being subjected to a fundamental

35 AIR 1967 SC 1643 (Supreme Court of India).

36 Keshavananda Bharati v The State of Kerala AIR 1973 SC 1461.

rights scrutiny. Along with the 24th amendment, some other amendments were made which furthered the government's socialist plan.

The validity of these amendments was challenged in the *Keshavananda Bharati* case. In this case, by a majority of 7:6, the Supreme Court found that though the parliament could amend the constitution and even curtail fundamental rights, the power to do so was not unlimited. It could amend the constitution so long as it did not damage or destroy the basic features of the constitution. The basic features or the basic structures test in time became its own standard of judicial review, but its origins in this case showcased once again, the structuralist approaches to interpretation. A structuralist interpretation of the constitution required, the court reasoned, that there be implied limitations to the amending powers of the parliament. This was necessary if constitutionalism itself was to be preserved. Additionally, Article 368 was amended to clarify that it empowered parliament to amend the constitution. It provided a procedure for the amendment and stated that once the procedure was followed, the '(…) constitution shall stand amended.' The court interpreted the word 'constitution' in this phrase to state that the thrust of the new Article 368 was to state that even after the amendment, what remains should be identifiable as the 'constitution' i.e. the document pre-dating the amendment. Therefore, the quintessence of the constitution could not be changed. This basic structure test was thus solidified in this case and attempts to dislodge it have failed.[37] Though the basic features are an illustrative, evolutionary list, democracy, rule of law, secularism, judicial review, and federalism have since been recognized as some of the basic features of the Indian constitution.[38]

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37 For Example, Minerva Mills Ltd v The Union of India AIR 1980 SC 1789; Indira Nehru Gandhi v Shri Raj Narain and Anr AIR 1975 SC 2299.

38 Sudhir Krishnaswamy, *Democracy and Constitutionalism* (OUP 2011).

Basic features are identified by reading the text of the constitution, along with its political and moral philosophy, the political history of Indian independence and constitution making, and the Constituent Assembly Debates.

> In each case the court considers, in the circumstances before it, whether the basic feature claimed to be damaged in the case is adequately supported by the textual provisions of the constitution. Where such a feature is thus supported by the constitutional text taken as whole, the court evaluates arguments from the constitution's underlying moral or political philosophy, the political history of the freedom movement, and more particularly speeches in the Constituent Assembly Debates, to assess whether such features are 'basic' or foundational to the normative identity of the constitution.[39]

The emergent result is itself of great importance. In addition to the positivist and structuralist method of interpretation, this has emerged as another method by which State action has come to be interpreted. The basic structure doctrine is a method of interpretation which stipulates that the result of interpretation cannot violate the basic structure of the constitution. It is a method with a premise that ensures the constitutionality of the result.

3. Summarizing Interpretive Approaches of the Judiciary

The previous section put forth three primary interpretive methods used by the higher judiciary to interpret the constitution: positivism, structuralism, and basic structure review. In each of these methods of interpretation, there is ample scope for words to be interpreted in their original meaning[40]. Additionally, when interpreting the provisions of the constitution as per its spirit, the courts have sometimes innovated to

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[39] Sudhir Krishnaswamy, *Democracy and Constitutionalism* (OUP 2011) 133.

[40] Upendra Baxi, "A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence" (2003) 1(4) ICON 572.

meet social and economic demands in way that Joseph Raz has suggested[41], and sometimes harked to a political universe that the constitution sought to usher and derived certain conceptions of words used in the document (like Dworkin)[42]. The theories that are offered by originalists, political and moral philosophers, and proponents of fidelity and innovation, are set at a very high level of abstraction and do not provide answers to meet Indian adjudicatory challenges. In particular, they do not delineate the role that religious and cultural arguments could play in fundamental rights cases of the kind studied in my thesis.

Additionally, the Indian constitution does not prohibit the judiciary from hearing religion and culture-based evidence. The rules of evidence law only regulate relevance and admissibility of evidence, and do not place any bar on the substantive nature of evidence that the judiciary may consider in reaching a decision. Neither is any line of inquiry forbidden to the judiciary. Further, the salient question in the thesis is whether religion and culture can be legitimate considerations when courts adjudicate the fundamental rights cases in question. This question is prior to and separate from the question of judicial review. Therefore, doctrinal exposition on the Articles most frequently raised in the dataset (Articles 14, 19 and 21) would not illuminate the matter. Since the dataset studied herein concerned fundamental rights cases, the courts would need to eventually interpret the constitution. Therefore, the thesis called for a normative framework for interpreting the constitution which specifically accounted for the role that religious and cultural claims can play in such a process. The possibility of using several interpretive techniques was considered: textualism, pragmatism, originalism, constructivism, etc. However, these options were

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41 Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in Larry Alexander ed, *Constitutionalism*: *Philosophical Foundations* (CUP 1998) 152-53.

42 Ronald Dworkin, *Laws Empire* (Fontana Press 1986).

not pursued because it was felt that it would be difficult to fit the multiple judgments in any particular theme into any single intellectual construct. The task would be made difficult if this were to be done across a number of themes, with cases spanning different decades.

Considering all these factors together, it was found to be more useful to sketch out a theory of constitutional interpretation that concentrates not directly on whether the constitution should be read narrowly or liberally, but instead on interpretive results that can be justified. According to this theory, which I propose in the next section, valid constitutional interpretation produces justifiable interpretive results. This theory can be seen as justificatory checkpoints through which the process of interpretation must pass to arrive at a valid result. It is built on constitutional theory and practice in India.

4. A Theoretical Framework for Constitutional Interpretation

The following section illustrates an interpretive theory of the constitution which delineates the role that religious and cultural claims can play in constitutional adjudication. Since the theory below is a justificatory one, religious and cultural claims must justify themselves on each of the following grounds: 1. the claims must be reasonable, structurally speaking; 2. the religious claims may be accepted in adjudication without offending the constitutional essential of secularism; and 3. the cultural claims may be accepted in adjudication without offending public reason. Each ground is explained below.

(a). Reasonableness

MP Singh has shown in his seminal paper that reasonableness has become a general principle of constitutional law, delinked from provisional fetters.[43] This means that courts are now capable of assessing inherent irrationality in the law, even though in practice the courts' approach may be more deferential.[44] Thus, reasonableness is primarily viewed as a normative tool which can be deployed in characterising State action or inaction. However, this thesis proposes that reasonableness is also a structural tool which can guide the mode of decision-making. This becomes clear by regarding the distinction between thick and thin evaluative concepts. It is said that thin evaluative concepts are those which embody conclusions about what is good, or true, or right.[45] Thick evaluative concepts on the other hand point the direction through which those conclusions can be reached. So, examples of thick evaluative concepts can include modes of behaviour such as kindness, thoughtfulness, tact, bravery etc. Judged on this standard, reasonableness is both a thick and a thin evaluative concept[46]: doing the reasonable thing is itself a good (and here I am talking in terms of constitutional conclusions), but arriving at those conclusions through reasonable means, whether it is intermediate conclusions about facts in issue, or evidentiary inferences, or summations of the legal position, is also necessary in the adjudicatory process. It is this processual understanding of reasonableness that can

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43 MP Singh, 'The Constitutional Principle of Reasonableness' (1987) 3 SCC J-31, J-38, 39.

44 For an historical argument for an active evaluative role for the judiciary under Article 19 analysis, see Vikram Aditya Narayan and Jahnavi Sindhu, 'A Historical Argument for Proportionality under the Indian Constitution' in (2018) 2 (1) Ind. LRev.

45 Johnathan Dancy, *Ethics without Principles* (OUP 2004) 84.

46 Compare Neil MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 162. MacCormick considers reasonableness a thick evaluative standard.

provide important insights while considering religious and cultural claims in the adjudication process. Specifically, they are as follows:

a. A reasonable religious and cultural claim cannot reflect only the personal taste of the proposer. This requirement binds both the State and litigants, but the burden is especially pronounced when the State makes a religious and cultural claim. This is because the State carries an explicit constitutional burden to adhere to the rule of law, of which reasonableness is a key part. State action cannot proceed on personal taste. A reasonable claim is concerned with foreseeable justifications, 'serious possibilities and probabilities'[47] and not remote or fanciful risks and propositions.[48] It comes with a correlative duty of justification on those who seek to defend their claim. This requires that those who seek to justify their claims as reasonable, whether it is State or a private entity, must provide reasons for the same, unless they are otherwise exempt. In other words, just because something appears to someone to be the reasonable thing to do, does not make it so. Justificatory reasons help identify statements asserting reasonableness and differentiate them from those asserting personal taste. When claims of reasonableness are left unexamined, they risk of giving way to personal taste.

b. Judges are required to remove subjectivity in arriving at their decisions. There might always remain an 'irreducible subjectivity'[49] in the process of judgment, but a few guidelines can still steer the process toward objectivity. In considering

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47 MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 166.

48 MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 166.

49 MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 163.

whether particular course of action is reasonable, the judges will conduct: i. a multi-factored analysis and take into account all relevant criteria, failing which they would be acting unreasonably.[50] Relevance is concerned with the terms in which adjudicatory powers are granted, and the reasons for which they are granted.[51] For example, the State's morality might be a relevant criterion for a court to consider in an Article 19 analysis as this is textually permissible, but it would not without additional justification be considered a relevant criterion in an Article 14 or 21 analysis as there is no textual basis for the same. That additional justification might just come in the form of former case law which has sanctioned morality as a relevant factor in such analyses, but that will not save morality from being tested on the threshold of reasonableness anew in each new case ii. the judges will consider evidence on all sides, following the proper procedure for the same, rejecting irrelevant or illegal evidence; iii. the judgments will not have internal contradictions; iv. value judgments expressed in judgments will be applicable to other situations which are similar in relevant aspects.[52]

c. As reasonableness abjures fanaticism and apathy, a reasonable course of action will have a natural affinity towards maintaining equality among the parties involved.[53] As a result of this, an inquiry into reasonableness of religious and cultural claims will be especially sensitive to critiques of inequality whether they are in the

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[50] MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 164.

[51] MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 172.

[52] Points iii and iv have been adapted from rules of general practical discourse; See Robert Alexy, *A Theory of Legal Argumentation* (OUP Clarendon Press 1989) 188-191.

[53] Modified and adapted from the rules for allocating burden of argument in the rules of practical discourse; see Robert Alexy, *A Theory of Legal Argumentation* (OUP Clarendon Press 1989) 195-197.

areas of race, caste, class, gender, sexuality, sociology, economy, or political capital etc. This will assure the mutability and the longevity of the concept and ensure its relevance with changing times. Reasonableness will be changed by these critiques as well. Points of law evolve through time so that it is reasonable to assume that in certain areas no backward movement will occur. An easy example to understand this is to consider the question of inherent differences between men and women. It is now beyond question in the legal sphere that there are no appreciable cognitive differences between men and women, as a rule. Therefore, it is a constitutional expectation that any State action justified on inherent cognitive differences between men and women will not pass constitutional muster. The word is still out on inherent differences on sporting abilities of the sexes and so there is no constitutional expectation set yet, although there is an expectation that the constitutional benches will strive for greater entitlements under equality provisions; that the march of the law will be forward and not backward.

d. Judges will be able to differentiate reasonable religious and cultural claims from merely common ones. A reasonable solution is not necessarily the same as a common one. A common, traditional, or mainstream mode of thinking or action does not *ipso facto* constitute a reasonable solution. This point is of special importance for this thesis. My thesis has found that religious and cultural arguments pass untested by evidentiary standards, from the litigants to the courts, and in many instances are invoked by courts themselves. Religious and cultural arguments circulate freely in society, and may make up a person's commonsensical, traditional, or mainstream, everyday way of thinking about a topic. They may animate the repertoire of reasonable modes of action or solutions. Law and culture scholars like Robert Post, Naomi Mezy, and Ratna Kapur have shown that law simultaneously tries to enforce

antecedent cultural norms, and set them down.[54] They have also demonstrated that culture is not stable and singular, but a continuously evolving site of contested meanings.[55] Therefore, when law is invoked to enforce cultural values, through a State action, what is actually being attempted by the State is an advancement of one or the other side of an ongoing cultural disagreement.[56] This understanding of culture's interaction with law can seemingly break the equivalence between religious and cultural sentiments and reasonableness, and require the judge to evaluate State action through a constitutional lens and the set of cultural values permissible in the document (more on this in the secularism component of the framework).

e. A reasonable conclusion is a subject of persuasion.[57] If a conclusion fails to be persuasive, it is not reasonable. If a single dominant reason for the final decision is found unreasonable, the decision may be overturned.[58]

(b). Adherence to Precedent

India adheres to the doctrine of legal precedent. The doctrine states that if a present fact situation is similar to one previously adjudicated then a similar legal result must follow. This obligation is constitutionally entrenched. Article 141 of the Indian Constitution states that the law declared by the Supreme Court shall be binding on all courts in the country. Similarly, the law declared by the High Court of each State

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54 Robert Post, 'Law and Cultural Conflict', (2003) (78) Chi-Kent L.Rev. 485. Naomi Mezey, 'Law as Culture', (2001) 13 Yale Journal of Law and Human Rights 35, 46.

55 Robert Post, 'Law and Cultural Conflict', (2003) Chi-Kent L.Rev. 485, 487, 491.

56 Robert Post, 'Law and Cultural Conflict', (2003) Chi-Kent L.Rev. 492.

57 MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 163.

58 MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 182.

binds the lower courts of that State while having persuasive power over other High Courts and the Supreme Court. Several rule of law interests are met by adherence to the doctrine of precedent. The first is the interest of justice, which requires that equal cases be treated equally.[59] The second is the interest of impartiality, which requires that the same justice must be given to everyone.[60] The third interest is that of certainty. It is in the public interest, and once again intrinsically connected to the idea of rule of law that people should be able to organize their lives with certainty. Knowing the legal from the illegal, and the liabilities that may result from certain courses of action will allow them to organize their actions. The fourth reason to adhere to precedent is the rather practical one, and that is the economy of effort which saves judges from going over the same questions again and again, re-inventing the wheel, in a manner of speaking.[61] Finally, this doctrine has special significance in theorizing about constitutional law. Constitutions are meant to endure and provide stability to the political and legal life of a society. Therefore, a certain amount of restraint is practicable when departing from precedent.[62]

Along with understanding the reasons for adherence to precedent, it is also important to consider that a reasonable theory of precedent must necessarily come with a certain amount of flexibility. When a case is decided, the judge takes a decision based on the facts of that case as presented by the litigants and in the light of the

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[59] MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 143.

[60] MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 143.

[61] MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (OUP 2005) 143.

[62] Kevin M. Stack, 'The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains', (2017) 102 Cornell Law Review 1667, 1678.

arguments made by the litigants (in most cases judges do not pass a ruling on a point of law which has not been raised). The judgment carries the burden most immediately of resolving the present dispute, but also to a foreseeable extent, providing answers to variations of the facts in question. As precedent has this relativistic quality, in the future new doubts and qualifications may arise so that what seems right at the present may only be 'qualifiedly right' in the future.[63] However, the reasons for adherence to precedent mentioned in the previous paragraph must always be kept in mind before departing from them. So far as practicable, the stability and the adaptability interest of law should be fulfilled by finding newer applications of precedent rather than departing from them. Departure must also be tempered by the demands of reasonability. If a certain way of ruling about a point of law or fact was perhaps reasonable at a certain point of time, but is no longer so, a justifiable and reasonable cause would exist for departing from precedent. It is in recognition of these factors that the Indian Supreme Court has ruled that though its rulings bind the lower courts, it itself is not bound by them and is capable of adapting and correcting its mistakes as and when they are discovered.

(c). Basic Structure Doctrine: Secularism

For the purpose of my thesis, the next important justificatory checkpoint is the basic structure doctrine, and especially the facet of secularism which is considered as one of the basic features of Indian constitutionalism. Interpretation must not deviate from the ideal of secularism embedded in the basic structure of the constitution. The constitutional demands of secularism can aid to clarify the extent to which religious claims can shape fundamental rights. A companion doctrine of public reason can be

[63] MacCormick, "Being Reasonable" in *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005) 148.

furnished to determine the extent to which cultural claims can determine fundamental rights.

The genesis of the basic structure doctrine has been explained above. As the reader will recall, the doctrine serves as a qualitative test which asks whether a particular State action damages or destroys the basic features of the constitution and causes the constitution to lose its basic identity.[64] Therefore, there is scope for reasonable disagreement among the judges as to whether a State action in fact does so, and the framework to arrive at reasonable decisions can be employed here to solve the disagreements. The doctrine was developed to review the constitutionality of constitutional amendments. It now also serves as a standard of review and has since been applied to check the constitutionality of legislation[65], as well as actions of the State.[66]

The Indian State's relationship with religion can be divided into the following categories: 1. The State's obligation to not interfere in the individual exercise of religion[67]; 2. State's obligation to enhance the capabilities of practitioners of religion, and religious and cultural institutions[68]; and 3. The State's own stance with respect to the role of religion in State activities. State activities require the State to lay down

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64 Sudhir Krishnaswamy, *Democracy and Constitutionalism* (OUP 2011) 112.

65 Dr M Ismail Faruqui v Union of India and Ors AIR 1995 SC 605 (Supreme Court of India), and Sudhir Krishnaswamy, *Democracy and Constitutionalism* (OUP 2011) 103-109.

66 SR Bommai v Union of India AIR 1994 SC 1918 (Supreme Court of India).

67 Most notably, Article 25 of the constitution which guarantees the freedom of religion.

68 Most notably, Article 25(2) (b) which empowers the State to throw open Hindu religious institutions to all classes of Hindus who may have previously been discriminated and excluded from these spaces.

rules governing interactions between fellow beings, or with social groups.[69] It is the third category with which I am concerned in my thesis. When scholars and courts talk about the basic feature of secularism, it is the third category of concerns that they are addressing. Before going further, it is important to address a preliminary point. Culture and religion are inextricably tied. They influence and contribute to the content of each other to the extent that is not possible to strip culture off religion. There is no cultural value that is purely only cultural, and therefore the secularism arrangements put in place in Indian constitution ought to apply not just to religious, but also to cultural statements. However, as I will demonstrate in detail in chapter 6, the constitutional doctrine on secularism only covers religion at present and does not extend to culture. It is entirely possible, that based on the interlinkages that I have alluded to above, in time, this doctrine will apply to culture as well. However, as it does not at the moment, I will employ the secularism lens to religious claims made in the dataset and employ the public reason tool to analyse both cultural and religious claims.

Although secularism was identified as one of the basic features of the constitution in the *Keshavanada Bharati* case, its component features were not delineated.[70] At the same time, scholars have noted that, 'it is now accepted that the Indian version of secularism differs from the American or the European model.'[71]By

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69 SR Bommai v Union of India AIR 1994 SC 1918 (Supreme Court of India). In contrast to religious activities which concern the relationship to a person with themself.

70 Keshavananda Bharati v. The State of Kerala AIR 1973 SC 1461 [23].

71 Ronojoy Sen, "Secularism and Religious Freedom" in Sujith Choudhary et al (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2016) 885.

this they mean that India does not subscribe to the idea of the 'naked public sphere'[72] or the absence of religion from the public sphere. The word secular was inserted into the Indian constitution only in 1976 but had been one of the foundational principles on which the newly independent Indian State was sought to be built. The Objectives Resolution, which was the first normative text to be debated in the Constituent Assembly, saw many Assembly members refer to the secular nature of the State that they proposed to establish. They envisioned equal respect for all religions and cultures and abjured majoritarianism of any sought.[73] These discussions have contributed to the idea of the formation of Indian secularism, which treats all religions equally, and does not privilege one over the other. Indian secularism promotes a mutual tolerance and fraternity among religions and at the same time abhors state patronage of any one religion.[74] The most important case which sheds light on Indian secularism is the case of *S. R. Bommai*. In that case, the judges cited President Radhakrishnan, the first President of India, whose speech in the Constituent Assembly embodied the abovementioned idea of secularism:

> [T]he Indian State will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interests of religion and government.[75]

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72 Akeel Bilgrami, ed, *Beyond the Secular West* (Columbia University Press 2016). Also recently mentioned in the case of Abhiram Singh v CD Commachen (Dead) by Lrs Civil Appeal No 37 of 1992 (Supreme Court of India).

73 The Objectives Resolution, Volume 1, Constituent Assembly Debates 16th-19th December, 1946, and 22nd January, 1947.

74 SR Bommai v Union of India AIR 1994 SC 1918 (Supreme Court of India).

75 SR Bommai v Union of India AIR 1994 SC 1918 [25] (Supreme Court of India).

This idea of secularism also places a duty on all Indian citizens to foster a spirit of fraternity, transcending linguistic, regional and sectional diversities. This duty was added to the constitution in 1976 as Article 51(e). All citizens of India have a duty to, 'promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, and to value and preserve the rich heritage of our composite culture.'[76]

The collective force of these judgments and constitutional amendments is that Indian secularism abhors the establishment of a theocratic State, or the alignment of State instrumentalities with the patronage of religion, but at the same time does not require the absence of religion from the public sphere and strives to give equal respect to all religions. Therefore, it would seem that religious claims are not ipso facto excluded from the judicial determination of personal life choices. Does this mean that religious reasoning and argumentation should always be respected in State actions? This cannot be a workable solution for two reasons: 1. First, it will be simply impractical because inter/intra religious views on a topic may clash, and 2. Second, India's liberal constitution[77] will necessarily set limits on religious reasoning to extent that it curtails liberal values.

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[76] The Constitution of India, art 51(e).

[77] India's commitment to the ideal of liberty can be found in its Preamble and its particular constitutional Articles (21). Apart from this, the fundamental rights chapter of the constitution provides a list of basic rights and liberties, which have a special priority in public life, and into which the limits of State excursions have been specifically limited. This is the traditional understanding of liberty from the sense of JS Mill, *On Liberty* (John W Parker and Son 1859), John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) Chi.LRev. 765, and Isaiah Berlin, "Two Concepts of Liberty," Four Essays On Liberty, (Oxford, England: Oxford University Press, 1969) 118-172. However, the Supreme Court has found State obligation to promote human freedom hidden within fundamental rights guarantees. Therefore, for example, they have found that Article 21 not only prevents the State from depriving the liberty of persons without due process of law, it also includes a positive obligation on the State to provide certain rights to persons so that they can have a claim to life at all. This includes, for example, compulsory and basic education up to the age of 14 years. Therefore, in the Indian constitutional culture, a traditional negative understanding of liberty as an area free from State coercion co-exists with a positive understanding based on a human capability approach and

The constitutional prohibition on the State is that it cannot give patronage to any one religion. However, what is the stance of Indian constitutionalism on those views which are at the intersections of various, or all, religions? As happened in India, if many religious leaders present arguments from their religion supporting a ban on same-sex sexual relationships, do these arguments, without more, merit inclusion in the thought process of the judiciary while arriving at a final decision? The answer is no: the encroachment of religion or culture in State actions is prohibited. Consider the following passage from the *Bommai* case which confirms this view.

> One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. *In fact, the encroachment of religion into secular activities is strictly prohibited.* This is evident from the provisions of the Constitution to which we have made reference above. The State's tolerance of religion or religions does not make it either a religious or a theocratic State. *When the State allows citizens to practice and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State.* The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State.[78] [Emphasis mine].

Therefore, what emerges at the end of this discussion is a rather complex picture. On the one hand all religions are to be respected and there is no exclusion of them from the public sphere, but there is a prohibition on the encroachment on religion on State activities. What is the line between equal respect and encroachment? I suggest that the concept of public reason can be employed to broker a relationship between religious and cultural claims and their weight in State actions.

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bolstered by the Directive Principles of State Policy. On the capability approach see generally Amartya Sen, *Development as Freedom* (Knopf 2009).

[78] SR Bommai v Union of India AIR 1994 SC 1918 [25] (Supreme Court of India).

(d). Public Reason

John Rawls defines public reason as a kind of reasoning in which ideas of, 'truth or right based on comprehensive doctrines[79] are replaced by an idea of the politically reasonable addressed to the citizens as citizens.'[80] To understand this solution, we have to understand the premises from which Rawls is arguing. Rawls argues that: 1.a liberal society that is marked by pluralism of thought cannot rely on any one religious or secular doctrine of right and wrong to solve disagreements about fundamental questions. 2. At the same time, liberalism is not a neutral doctrine but has its own idea of the good.[81] Liberal societies endorse certain political values like equality, dignity, justice etc. The particular conceptions of these values may differ in different societies and may be in a state of evolution. Liberal constitutions may have a list of basic liberties and rights, which are assigned a special priority, and which contain intricate arrangements between individual freedom and government restraint. These rights and liberties may have a special place in the working of social and political organizations. For the tool of public reason to be applicable, it is not necessary that the conceptions of the rights and liberties found in the constitutional document or practice be fixed. Conceptions of various rights and liberties can be in a state of evolution or subject to debate.[82]Conceptions will be mediated through the instruments of reasonableness, reliance on precedent, and the basic structure doctrine, which I have detailed above.

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[79] Such as religious doctrines.

[80] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LR 765, 799.

[81] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LR 765, 802.

[82] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LR 765, fn 35, 778. Rawls also mentions that the concept of public reason only works in a constitutional democratic set up which contains a set of liberal political values

In such a pluralistic, liberal society, Rawls' proposal is that State actions supported by public reason should be considered legitimate. 'The idea of public reason specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government's relation to its subject and their relation to each other.'[83] In other words, State actors, like judges, should offer reasons which are based in a reasonable conception of the liberal political values found in their constitutional regime.[84] For Rawls, these values could be identified as conceptions of justice, but the public reason tool is not tied exclusively to it.[85] Rawls has said that, 'political virtues are identified and justified by the need for certain qualities of character in the citizens of a just and stable constitutional regime.'[86] Therefore, each liberal regime can have its own set of liberal values which define the political and moral values of the regime. It is these values, Rawls argues, that should form the basis of reasoning in State actions.

5.1. What Role Can Religious and Cultural Arguments Play in Public Reason?

Does this negate the role of religious and cultural claims completely from the reasoning of State actors? Rawls answers that it does not. He argues that religious and cultural reasoning can be used in State reasoning if they fulfill the proviso. The proviso allows us to, 'introduce into [the] political discussion at any time our comprehensive doctrine, religious or non-religious, provided that in due course, we give properly public reasons to support the principles our comprehensive doctrines is

[83] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LR 765, 799

[84] Rawls calls this the duty of civility.

[85] John Rawls, 'The Idea of Public Reason Revisited' 64(3) U.Chi.LR 765,774 (1997).

[86] John Rawls, *Political Liberalism* (1995 CUP) 195.

said to support.'[87] Therefore this proviso allows religious and cultural claims to feature in public discourse, including arguments from litigants, and court rulings, as long as they are supportable by independent, defensible conceptions of the liberal values to which the constitutional regime subscribes.

For the process of public reasoning to be complete, a further condition needs to be fulfilled. That condition is of reciprocity. Reciprocity requires not only that one understands the reason for a State action, but also that one can be expected to reasonably accept it as a free and equal citizen. Therefore, a choice that one is helpless to resist because of one's minority status is not a free and equal choice. Similarly, a choice that one accepts because of other forms of discrimination in the society is also not a free choice.[88]

Therefore, public reason offers a way to view religious and cultural argumentation in State affairs as something that is not antithetical to the enterprise of a liberal, democratic constitutional State. So long as State actors (most importantly, judges for this thesis), offer their judicial reasoning through public reasons that free and equal members of the public can be expected to accept, the fact that the reasoning resonates with, or was inspired by, a religious and cultural idea, is not unacceptable, and does not render the State action illiberal.[89] This method of reasoning can help arrive at decisions on even the most fundamental topics, and even if there are stand-

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87 John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LR 765, 776.

88 John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LR 765, 792.

89 As Cecil Laborde has pointed out, illiberality of a State action depends on its content, and not its association with religious and cultural ideas. Additionally, many liberal constitutions have illiberal provisions, such as preventive detention laws justified due to a nation's security interests; laws that punish for contempt of court; laws that punish speech meant to arouse enmity between neighbouring countries, etc. Cecil Laborde, *Liberalism's Religion* (HUP 2017) 128.

offs on the issue, all members of the public can be reassured that the decision is legitimate. This ties in to the idea of the rule of law which I will elaborate in the Judicial Notice Chapter. As Rawls notes:

> In particular, when hotly disputed questions, such as that of abortion, arise which may lead to a stand-off between different political conceptions, citizens must vote on the question according to their complete ordering of political values. Indeed this is a normal case: unanimity of views is not to be expected—reasonable political conceptions of justice do not always lead to the same conclusion, nor do citizens holding the same conception always agree on particular issues. Yet the outcome of the vote, as I said before, is to be seen as legitimate provided all government officials, supported by reasonable citizens, of a reasonably just constitutional regime sincerely vote on in accordance with the idea of public reason. This doesn't mean that the idea is true or correct, but that it is reasonable and legitimate law, binding on citizens by the majority principle.[90]

However, Rawls's requirement that all reasonable persons may be expected to reasonably accept the public reason for a particular State decision may place too high a burden. All persons may not accept a public reason for a State action. They might do so without giving up their claims to reasonability.

A more practical burden put on the public reason tool is that of accessibility, as proposed by Cécile Laborde.[91] Laborde's work focuses on the abovementioned proviso on Rawls' public reason and modifies and clarifies the scope of the same. Working with public reason, she also posits that, 'Public reason is the collective reason of the democratic publics. The basic thought is that State proffered reasons for laws must be articulated in a language that members of the public can understand and engage with.'[92] As State proffered reasons only need to be those reasons which the public can engage with and understand, the bar that public reason has to meet in

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90 John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LR 765, 798.

91 Cecil Laborde, *Liberalism's Religion* (HUP 2017) 119.

92 Cecil Laborde, *Liberalism's Religion* (HUP 2017) 119.

Laborde's theory is a lower one than in Rawls', and is more realistic. She argues that public reason need only be accessible; i.e. capable of being understood and assessed, even though it may not be acceptable.[93]

> Accessible reasons can be understood and assessed, but need not be endorsed according to common standards…[94] if I do not agree with a reason presented to me…does it matter that I can *understand* and *assess* it (that I can evaluate its force according to common standards). It does.[95]

Whether it is the reciprocity or the accessibility of public reasons, there is still a disquieting possibility that a State action might clear those bars, but still advance prima facie illiberal laws. Primary examples of these are instances in which a State tries to advance a certain religious rhetoric in the name of national tradition or social order. These cases fall afoul the liberal commitment to equality and dignity, by denying those to the people who do not identify with the religious rhetoric. In these cases, one has to make an all things considered judgment about how to achieve the best liberal balance in the circumstances that merit illiberal actions in the name of social order or national security, or one has to make a clear ordering of liberal values and decide that some things (like enforcing a national tradition) is clearly against the

[93] Cecil Laborde, *Liberalism's Religion* (HUP 2017) 119.

[94] Cecil Laborde, *Liberalism's Religion* (HUP 2017) 119.

[95] Cecil Laborde, *Liberalism's Religion* (HUP 2017) 121. In the Notes section of her book, Laborde defines yet again what accessible reasons are. She writes. "A's reason R_A is accessible to the public if and only if members of the public regard R_A as justified for A according to common evaluative standards. This definition of accessibility differs from the one that she articulates in the main text of the book, and which has be relied on above. Here, the requirement is that members of the public find R_A justified which is a higher burden for R_A to fulfil than merely be understood and assessed according to common evaluative standards. I argue that the latter is more realistic when theorizing the working of public institutions in pluralistic societies. Accessible reasons differ from two other categories of reasons which Laborde identifies: intelligible reasons, and shareable reasons. "Intelligible reasons can be understood only in relation to the specific doctrine or epistemic standards of the speaker." (119). "Shareable reasons are endorsed according to common standards" (119).

mandate of a liberal State, even if the reasons behind them are accessible (and regardless of whether are religiously motivated).[96]

5. Conclusion

In this chapter, I have put forth a theory of constitutional interpretation to guide the process of considering religious and cultural claims in the adjudication process. In doing so, I have attempted to synthesize several doctrinal and theoretical insights that hold special importance for the interpretation of this constitution. The chapter begins by noting that although the higher judiciary, the Indian Supreme Court and the state High Courts, have the power to test the constitutionality of State action, neither the constitutional text nor the Assembly debates provide any guidance on how the courts may go about this enterprise. In the absence of this guidance, I turn to case law.

The overview of constitutional litigation notes two primary ways in which constitutional interpretation has proceeded. The first is positivism, which, in the Indian context means that the courts do not examine the merits of impugned State actions so long as there is a formalistic compliance with the criteria for legal validity. The classic example of this is the first constitutional law case decided by the Supreme Court in which it ruled that the word 'law' used in Article 21 meant only an enactment validly put in place by the legislature, and not a 'just' law. The second method of interpretation is structuralism. In the Indian context, the structuralist method relies on the spirit of the constitution to interpret the words in it. It is alive to the transformative aspirations of the constitution; the desire of the constitution makers to usher a radical social and economic change in the State that they sought to introduce through the constitution. The classic example of this method of adjudication

[96] Cecil Laborde, *Liberalism's Religion* (HUP 2017) 132.

is found when the Supreme Court reviews land reform legislation and interprets the word 'compensation' used in Article 31(2) to mean something just and fair in return for the land acquired for the State, and not mean an illusory amount fixed by the same. Eventually, the basic structure doctrine emerges as a new method of interpretation, which is based on the premise that interpretation cannot result in certain conclusions. Although basic structure review has not been recognized as an interpretive method up to now, I understand it as one because it places limits on interpretation. The reality is that the Indian courts have used a plethora of interpretive techniques including originalism, moral and philosophical interpretation, and even interpretation requiring innovation in the face of new social and economic scenarios. Therefore, this research did not generate unifying interpretive techniques.

In the light of this, I propose a theory of constitutional interpretation which requires that valid constitutional interpretation passes certain justification. It is embedded in constitutional practice in the Indian landscape which is synthesized with theoretical inputs. It is not a framework for the interpretation of the entire constitution, but it provides an approach for interpreting the constitution in fundamental rights cases and is especially tailored to provide an approach for determining the limits of religious and cultural claims in such litigation.

The principal elements of the framework are reasonableness, the doctrine of precedent, the basic structure doctrine, and public reason. Reasonableness is a basic ingredient of the rule of law. I propose certain structural features of reasonableness which can provide important checkpoints against which religious and cultural claims must be assessed. In short this element requires that a reasonable result has to pay attention to procedural rules surrounding litigation, such as classification of facts,

impartiality, evidence appraisal, etc., and to the normative import of their conclusions, while remaining mindful to the fact that reasonableness is not always the same thing as mainstream thought.

Reasonableness is not sufficient by itself to guide interpretation. The doctrine of precedent is also important. Since the doctrine is a legal rule in India, it would necessarily inform consideration of reasonableness. I sketch out some fundamental rules to keep in mind while adhering to precedent, such as the inherent flexibility embedded in the concept of precedent, as well the justifications for discarding precedent in changed societal scenarios. Next, I tackle the State arrangement with respect to religion and culture in the context of day-to-day State activities. This brings me to the basic structure doctrine, especially to the concept of secularism, which has over the course of time been unequivocally recognized as one of the basic features of the Indian constitutional State. This understanding then has to necessarily inform the theory. I expand my theory to incorporate constitutional secularism as a necessary requirement to which the judiciary must adhere while deciding fundamental rights cases, especially of the kind considered in this thesis, the ones that posit fundamental rights claims alongside religious arguments, to both, oppose and further these claims.

Indian constitutional secularism states that religion and culture need not be absent from the public sphere but cannot encroach upon State activities. The fundamental rights cases by which the State arranges its relationship vis-à-vis individuals and groups, certainly falls within the purview of State action, and is the appropriate field for the operation of secularism. However, case law and constitutional text have once again not provided a clear picture on how this relationship must be worked out. To fill this gap, I provide a theoretical basis for considering religious and

cultural claims in fundamental rights adjudication. I argue that religious and cultural claims need not be rejected outright in constitutional cases; indeed there is no principled reason for doing so as neither the constitutional text nor the constitutional practice advocates absence of religion and culture from the public sphere. I suggest instead, that religious and cultural claims can be admitted and considered in fundamental rights cases of the kind studied in this thesis so long as they are supportable by independent, public reasons (derived through the framework suggested above). I will in the later chapters demonstrate how the courts can go about this enterprise, by putting the religious and cultural arguments extracted from my dataset, through this measure.

CHAPTER 6- JUDICIAL NOTICE

1. Introduction

One of the key findings in Chapter 4 was that out of the 103 religious and cultural claims of interest found in the dataset, 63, or 61.16% made their way into the judgments through illegal judicial notice. Further, that chapter also found that the outcomes in 11/31 cases were influenced by religious and cultural claims. With respect to the religious and cultural claims found within those cases, 78.5% were illegally judicially noticed. Collectively, these two findings make it imperative to understand the court's power of judicial notice. When can the court judicially notice a fact, and what recourses are available to stop illegal usages of the provision?

When the judiciary exceeds the correct remit of the judicial notice provision, it deprives the party, against whose interest it takes judicial notice, of an opportunity to respond by cross-examination or the introduction of evidence, chipping away at an essential guarantee in the adversarial process. Such a move by the judiciary causes an injury to the affected party for which there is no remedy. Therefore, it is imperative, that the scope of judicial notice be correctly understood and applied, to preserve, among others, the claim of India as a rule of law country.

The chapter will first introduce the concept of judicial notice and summarize its purpose and general application before noting how it entered Indian evidence law. It will then introduce the concept of 'notorious fact', which is central to understanding and correctly applying this rule. As the notoriety of a fact is circumstantial and time dependent, the doctrinal tradition on this rule has limited insight. I will, with the help of some key cases and philosophical scholarly work, illuminate how this rule can be

misapplied when the judges substitute their opinion (either in the form of a bald assertion or by referring to books) on a disputed fact, which ought to have been proven by the procedure highlighted by the IEA. Further, semantic ambiguities in the text of the rule ease the process for the misapplication of the rule. I find that when the judicial notice rule is expressly invoked in cases, the courts have very carefully construed, 'notorious facts', and on the whole not substituted their own opinion for the same. However, when the rule is not expressly invoked, one sees illegal instances of judicial notice. The dataset cases especially demonstrate this point. The dataset shows that courts have substituted their own opinion through judicial notice on facts in issue and facts relevant to the same. Further, they have done their own research or quoted from antiquated textbooks on debatable issues bypassing the evidentiary process through which documentary evidence must be admitted in court.

The result is that the litigants are deprived of the opportunity to question the veracity of a disputed fact (in cross-examination) and rob them of their rights in the adversarial process. This results in the violation of the rule of law which goes against the grain of the constitution.

2. Statement of the Rule, Origins, and Purpose

In a legal dispute before a court a party needs to prove disputed facts to obtain a favourable result. The IEA lays down that in each dispute, facts in issue and other facts relevant to the facts in issue (and no other facts) need to be proved by evidence.[97]Facts in issue are those facts which if proved will result in the attachment

[97] The Indian Evidence Act 1872, ss 1-55. Sometimes the relevance of a fact is confused with the admissibility of evidence to prove it. Though evidence can be admitted to prove only those facts which are in issue or relevant to a case, there might be some legal rules regulating admissibility in particular circumstances. For example, communication between spouses might be relevant to prove a particular fact but may not be admissible because this communication is

of legal liability.[98] Relevant facts are those facts that are not themselves in issue, but may affect the existence of the facts in issue, and can be used to make inferences regarding facts in issue.[99] If a party fails to prove a fact then the court cannot rely on it in coming to its decision. The IEA highlights the procedure for proving a fact. However, the IEA also envisages exceptions to the above-mentioned general rule. Under the IEA, a party will not be required to prove a fact that, it has admitted[100], or is estopped from denying[101], or of which a court may take judicial notice. Judicial notice is a rule of evidence law that states that, in certain situations, the judge may accept a factual claim as proven without evidence being led.[102] This rule is not limited to any particular sort of proceeding in court but applies to all categories of the same. In the words of Thayer, an early influential authority on the rule: '[w]hereabout in the law does the doctrine of judicial notice belong? Wherever the process of reasoning has a place and that is everywhere.'[103] He had also argued that this rule is coeval with legal process itself, capable of being traced back to civil and Canon law. Broadly, three

privileged. At the same time, questions put in cross-examination to discredit the witness may be admissible but not relevant under some circumstances. Finally, the question of how much weight must be attached to an admitted piece of evidence depends on the facts of each case, and no rule in the IEA governs this enterprise. The judge must use their own powers of reasoning, observation, and their general experience to make inferences from the evidence admitted. Ram Bihari Yadav v State of Bihar and Ors 1998 CriLJ 2515, 2517 (Supreme Court of India).

98 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 9.

99 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 9-10.

100 The Indian Evidence Act 1872, s 58.

101 The Indian Evidence Act 1872, s 115.

102 James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown 1898) 277.

103 James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown 1898) 278.

categories of claims fall within the scope of the rule: 1. Matters which are so notoriously well known that it is unnecessary to produce evidence to prove them; 2. Matters which the judge ought to be aware of as they fall within the realm of judicial function[104]; and 3. Miscellaneous matters which though they may not be notorious by themselves, are capable of 'instant and unquestionable determination' and can be accurately ascertained by referring to materials of indisputable accuracy.[105]

However, the Indian formulation of this law defies this clear categorization. IEA was formulated under the British rule and has been retained after the adoption of the Indian Constitution. It was drafted by James Fitzjames Stephen who, while explaining the principles of the Indian law he drafted on the subject, stated that the newly drafted law drew heavily in substance from the English law, and had been modified light of the Indian circumstances:

> [t]he Indian Evidence Act is little more than an attempt to reduce the English Law of evidence to the form of express propositions arranged

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[104] For example, it is within the judicial realm to make a final determination of what the law is in a particular locality or foreign State. The judge may do this either by investigating the matter on their own, or by hearing the evidence produced by the litigants, or by combining the two methods. Another matter which falls within the judicial realm is the construction of the meaning of a document (as opposed to construction of the meaning of words in a document). Wigmore explained this example by citing a contract containing ambiguous words like 'fine barley' which was the subject matter of trade in the impugned contract. While the determination of the word 'fine' in this context fell upon the jury, i.e. the jury were empowered to decide exactly what was meant 'fine barley' in the context of that trade and with respect to the parties involved, the effect of the agreement i.e. whether it translated into a valid contract, and the ensuing rights and duties of each party, were to be determined by the court. John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol 5 (2nd edn Little Brown and Company 1923) 2556. Another example given by Wigmore of facts falling within this category is the dictionary meaning of words. Wigmore notes that courts resort freely to dictionaries for the meaning of words so far as even relying on them when the very scope of the meaning of the word is the disputed question in the case. Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol 5 (2nd edn Little Brown and Company 1923) 1699.

[105] Such as the name of court officials, government servants occupying certain posts etc. John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol 5 (2nd edn Little Brown and Company 1923) 3598-3599. Facts about which reasonable professionals may disagree cannot be judicially noticed. Cantrell v. Knoxville Community Dev. Corp., 60 F. 3d 1177 (6th Cir. 1995).

> in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.[106]

The rule governing judicial notice is crystallized in the form of sections 56 and 57 of the IEA. Whereas section 56 provides that no fact which is judicially noticed need be proved, section 57 provides a list of facts of which the court shall take judicial notice. However, this list does not exhaust all the facts of which judicial notice may be taken.[107] All facts which are notoriously well-known can be judicially noticed, as I will demonstrate below. Additionally, the section offers no philosophical basis for the rule, and it is only by taking into account Stephen's declaration made early on, that the Indian Evidence Act is just an attempt to crystallize the English law on the matter, that one can begin to search for a philosophical basis. The philosophical underpinning of the rule is that some facts are so notoriously well-known that spending time in requiring their proof would be a waste of the resources of the litigants and the court, and would transform litigation into an overly burdensome formality. The basic purpose of the rule is to save time, labour, and expense in securing and introducing evidence in matters that are ordinarily not disputed, and which the opponent does not *bona fide* dispute. It is assumed that the tribunal's general knowledge, or a slight search on their part, would prove the veracity of the claim.[108]

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[106] James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 2. On the state of English law on the matter, Stephen stated, 'The law of evidence in England was formed piecemeal, on a case to case basis, its general propositions emerging from circumstance as opposed to principle, and in many instances qualified by exceptions inconsistent with the principles on which they seemed to be based.'

[107] First recorded in the case of Baqridi and Ors. v Rahim Bux AIR 1926 Oudh 352 (Oudh Judicial Commissioner's Court).

[108] Wigmore, *A Pocket Code of the Rules of Evidence in at Law* (Little, Brown 1915) 476.

3. The Indian Law

A quick overview of section 57 provides that the following specific facts are to be compulsorily judicially noticed in Indian law: 1. domestic laws; 2. public Acts passed by the UK legislature, and all private and local Acts of which the legislature has directed that judicial notice must be taken; 3. course of proceedings of the State legislature, constituent assembly of India, and the Parliament of the UK; 4. Articles of War of the army, navy and air force; 5. geographical divisions of time; 6. territories of India; 7. the names of court officials; 8. the rules of the road; 9. public festival and fasts and holidays mentioned in the official gazette; 10. the commencement and termination of hostilities between India and any other country; 11. the seals of the Indian courts; 12. the existence of every State, and its national flag as recognized by the Government of India; and 13. matters of public history, art and literature.[109]

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[109] The provision states that the courts may refer to books and documents when it comes to noticing public history, art and literature. This sub-section has never been the subject matter of interpretation in the Indian courts so it is not clear whether 'may' means 'shall' here i.e., whether it is compulsory for the courts to refer to documents and books before taking judicial notice of matters of public history, art and literature.

The section is reproduced below:

Section 57 - Facts of which Court must take judicial notice

The Court shall take judicial notice of the following facts:-

(1) All laws in force in the territory of India;

(2) All public Acts passed or hereafter to be passed by Parliament of the United Kingdom and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed;

(3) Articles of War for the Indian Army Navy or Air Force;

(4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any law for the time being in force in a Province or in the States;

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;

(6) All seals of which English Courts take judicial notice: the seals of all the Courts in India and all Courts out of India established by the authority of the Central Government or the Crown Representative; the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by the Constitution or an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India;

(7) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette;

(8) The existence, title and national flag of every State or Sovereign recognized by the Government of India;

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;

(10) The territories under the dominion of the Government of India;

(11) The commencement, continuance, and termination of hostilities between the Government of India and any other State of body of persons;

(12) The names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of or all advocates, attorneys, proctors, vakils pleaders and other persons authorized by law to appear or act before it;

(13) The rule of the road on land or at sea.

> In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.
>
> If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

The penultimate sentence of the section states that, 'in all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.' Ostensibly, this sentence throws the entire law of judicial notice into turmoil, for the animating principle behind the rule is that some things are so well known that they do not need proof. If judges refer to books and documents before making an inference about a fact then clearly the matter is not notoriously well known and requires further study before determination. Yet, this does not seem to disturb scholars writing in this area, who note that judges have been doing this as a matter of routine:

> The Court itself may, without calling upon a party, refer to appropriate books and documents of reference. There is nothing to prevent the Court itself making an inquiry if it has only imperfect information or none at all, on the subject: and the Courts have in several cases, made, or caused to be made, such inquiries.[110]

While the Indian courts have not engaged with the potential conflict between the penultimate sentence of the Section and the philosophical underpinning of the judicial notice rule, some insight is available from the Supreme Court of Bangladesh. Bangladesh's evidence law is identical to India's and it has the same provision regarding judicial notice. In 2009, a 5-judge bench of the Bangladesh High Court[111] stated that the first step in taking judicial notice is that a fact must be so well known

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110 Muhammad Munir and Harbans Lal Sarin, *Principles and Digest of the Law of Evidence* (4thedn, University Book Agency 1956) 386.

111 A division of the Supreme Court of Bangladesh which is the highest court in the land.

that evidence regarding its truth is deemed unnecessary, and if the court is not aware of that fact then it may refer to a book. The kinds of instances captured by this explanation would be of the following nature. Suppose the determination of the dispute at hand requires knowledge of the stock prices of the shares of a certain company, then the appropriate stock exchange publication can be referred to find that price. There would be no reasonable dispute that the stock exchange publication would contain the authentic record of the stock prices. In other words, the courts could not refer to books or documents to form an opinion about a disputed fact. Other sections of the IEA provide for that eventuality as I will explain below. Here, I reproduce the Bangladesh High's Courts words in which it captured the abovementioned rule:

> 722. The Court may take judicial notice under section 57 of the Evidence Act certain matters which are so notorious or clearly established that evidence of their existence is deemed unnecessary. The facts enumerated in section 57 of the Evidence Act, if their existence comes into question, the party who assert their existence in the first instance, produce any evidence in support of their assertions. They need only ask the Court to say whether these facts exist or not, if the Court's own knowledge will not help it, then it must look the matter up: the Court can if it thinks proper, call upon the parties to assist it.[112]

Similarly, scholars Monir and Sarin have argued that the rule of judicial notice is always guided by the principle of notoriety. That principle applied to section 57(13) of the IEA would mean that it is not every matter of public history, literature, science, or art that can be taken judicial notice of, but it is only matters which are of such notoriety that they can be assumed to be part of the common knowledge of citizens:

> [t]he Court can take judicial notice, not of all matters of history, literature, science or art indiscriminately, but only of such matters of public history, literature, science or art as are of such notoriety that

[112] Major Md Bazlul Huda (Artillery) v State 2010 30 BLD (AD) 67 (Supreme Court of Bangladesh).

> they may be presumed as forming part of the common knowledge of every educated citizen.[113]

Therefore, in addition to the instance pointed out by the Bangladesh High Court, the penultimate provision of section 57 should be read as stating that once the condition of notoriety has been met then the judge may refer to appropriate books of reference to *refresh their memory*, but not to form an opinion on the matter. Hodge Maleck Q.C. in an updated chapter on judicial notice in the latest Phipson on Evidence makes a similar suggestion when he states under the heading of 'Refreshing Memory of Judge, that,

> When in doubt as to any matter to be noticed, the judge may refer for information to appropriate sources-- e.g. to dictionaries for the meaning of words, to histories, firmans, and treaties to determine the status of a foreign ruler, or to the officials of a public department.[114]

Both, the structural placement of the assertion under the abovementioned heading, and the content of the assertion itself, that *in matters to be noticed, judges may refer…* suggest strongly the view of Maleck Q.C. that for reference to appropriate books, the matter must be judicially noticeable under this rule i.e. it must have attained notoriety. Therefore, if a matter is not notorious, a judge cannot form an opinion on it by referring to books, and any attempt to do so can be challenged as an illegal application of the rule of judicial notice. This section also makes amply clear that to fully grasp the workings of the rule, one must first understand the concept of notorious facts.

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113 Muhammad Munir and Harbans Lal Sarin, *Principles and Digest of the Law of Evidence* (4thedn, University Book Agency 1956) 386.

114 Hodge Maleck, 'Judicial Notice' in Hodege Maleck (ed), *Phipson on Evidence* (19th edn, Thomson Reuters 2018) 80. See also, Norrie v NSW Registrar of Births, Deaths and Marriages [2013] NSWCA 14, 94 (High Court of Australia).

(a). The Notoriety of a Fact is Impermanent and Circumstantial

The doctrine of judicial notice is always guided by the principle that some things are just so well known or capable of being determined so easily and accurately that requiring proof of them will be an unnecessary waste of time and resources of the court and the litigants.[115] James Fitzjames Stephen wrote in an introduction to the IEA that,

> Certain facts are so notorious in themselves, or are stated in so authentic a manner in well-known and accessible publications, that they require no proof. The court, if it does not know them, can inform itself upon them without formally taking evidence. These facts are said to be judicially noticed[116]

These well-known facts are called notorious facts. Therefore, while section 57 provides a list of facts that the courts, *all courts*, must take judicial notice of, several other items can be judicially noticed. In other words, no particular set of cases exhaust all the items that the judiciary is empowered to notice judicially. At best, one can study some illustrative examples of the facts that have been so noticed to develop an intuition about the rule. Since Stephen's motivation to draft this rule was drawn from English legal practice, one might look at some items that English courts have judicially noticed over the years. For example, the following facts have been judicially noticed: that a fortnight is too short a period for human gestation[117], that one of the key purposes of the University of Oxford is the spread of education[118], that cats

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[115] Onkar Nath and Ors. v The Delhi Administration AIR 1977 SC 1108 (Supreme Court of India).

[116] James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 129.

[117] R v Luffe (1807), 8 East 193.

[118] Re Oxford Poor Rate Case (1857), 8 E&B 184.

are kept for domestic purposes, that the streets of London are full of traffic[119], and any number of such mundane things.[120] Similarly, in the Indian context, the following facts have previously been held to be notorious: the location of the Central Government in New Delhi[121], the rules of executive business of the government[122], the period of world economic depression[123], the custom of bankers to charge interest on overdrawn amounts[124], political movements and disturbances of 1942[125], communal disturbances after partition, so on and so forth.[126] The Indian Supreme Court has taken judicial notice of the territories of India[127], and that areas which now constitute the State of Rajasthan were independent states of different conditions and dimensions before[128]. The Supreme Court has refused to take judicial notice of a newspaper report in the absence of a witness reporting to have perceived the fact reported[129]. Additionally, it has taken judicial notice of the fact that rent has increased everywhere[130], but has refused to take judicial notice of the fact that it is impossible

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119 Nye v. Niblett, [1918] 1 KB 23.

120 Rupert Cross, Evidence (Butterworth 1958) 144.

121 PN Films Ltd v UOI AIR 1955 Bom 381 (Bombay High Court).

122 Kamala Kant v Emperor AIR 1944 Pat 354 (Patna High Court).

123 Ram Tarak Singha v Saligram Singha AIR 1944 Cal 153 (Calcutta High Court).

124 UP Union Bank Ltd v Dina Nath Raja Ram AIR 1953 All 637 (Allahabad High Court).

125 Kedar v Emperor AIR 1944 All 94 (Allahabad High Court).

126 John George Woodroffe, Syed Amer Ali, and Janki Prasad Singhal, *Law of Evidence* vol 2 (12th edn, Law Book Company 1968) 1156;

127 M Masthan Sahib v Chief Commissioner Pondicherry AIR 1962 SC 797 (Supreme Court of India).

128 Municipal Board of Abu Road v Jaishiv and Ors AIR 1988 SC 388 (Supreme Court of India).

129 Laxmi Raj Shetty v State of Tamil Nadu AIR 1988 SC 1274 (Supreme Court of India).

130 DC Oswal v VK Subbiah and Ors AIR 1992 SC 184 (Supreme Court of India).

for a tenant to find an alternative accommodation if asked to vacate present premises by the landlady.[131]

While these examples may provide some insight into understanding the meaning of the word 'notorious' as used in the doctrine of judicial notice, they must not be taken out of context from one case to the other, for what was notorious at the time a particular case was decided may not be notorious in the present moment. For example, one of the illustrations of a notorious fact provided by Rupert Cross, a key English authority writing on evidence law, was that 'young boys have playful habits.'[132] What was notoriously well known in that case i.e. young boys have playful habits may not be so famously notorious anymore; with the advancement of cognitive, psychological, and sociological research on children, one may find that several social facts such as gender roles, socialization, class status, etc. qualify this statement. Nor is it the case that what was found notorious in a case law in England (or for that matter USA, Canada, Australia or any other country) would by that simple fact be found notoriously well known in India. Stephen himself cautioned against excessive reference to the practice of evidence in other commonwealth countries:

> As the first section repeals all unwritten rules of evidence, and as the Act itself supplies a distinct body of law upon the subject, its object would be defeated by elaborate references to English law.[133]

However, since there are no hard and fast criteria to determine the notoriety of a factual proposition, except to say that such a fact should be within the common knowledge of reasonable persons residing at a particular jurisdiction, a certain amount

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131 Bhagwan Das v Jiley Kaur and Ors AIR 1991 SC 266 (Supreme Court of India).

132 Rupert Cross, *Evidence* (Butterworth 1958) 144 taken from Clayton v, Hardwick Colliery Co. Ltd (1915) 32 TLR 159.

133 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 129.

of discretion inheres in this category. Whereas on balance, the Indian courts have applied this rule in a narrow way, it does not exclude the possibility that notoriety may, in some instances, be applied to a fact that in reality, carries with itself some controversy. In fact, the observations from the dataset have revealed this very eventuality. The findings show that in the chosen dataset, all but one instance of judicial notice has been illegal. Out of 64 claims that were judicially notice, 63 claims were non-notorious facts. At the same time, it is equally true that there have been no instances in which the judicial notice of non-notorious fact has been the subject matter of a legal challenge.

The remainder of the chapter will expose the insidious possibilities inherent in the category of notoriety. It will not provide a doctrinal summary of judicial notice in India. Such an exercise is unhelpful to the present purpose, because notoriety, as I have demonstrated above, is neither dependent on precedent, nor capable of being exhaustively catalogued. At the same time, it is important to understand the degree of discretion written into this law so that its unauthorized uses can be observed and checked, and the provision whose original purpose was efficiency, does not remove from the operation of evidence law, those facts that squarely require to be proven before a court accepts them.

(b). Judicial Notice Taken of Facts which ought to have been proved by Evidence

The category of notoriety can be contested. A salient point emerging from the cases studied in this thesis is that the judges have taken judicial notice of facts that should have been proved correctly by the introduction of evidence. As mentioned at the beginning of this chapter, there are two kinds of facts which need to be proved for the

determination of any legal dispute: facts in issue and relevant facts. The judiciary has substituted its opinion in the determination of both these kinds of facts. This section will first discuss the cases in which the courts have done this, and then demonstrate that the same can be observed in various cases in the dataset as well.

1.1. Judicial Notice of Facts in Issue

Before demonstrating how the courts have substituted their opinions on facts in issue in the dataset, an introduction to the concept of facts in issue would be apt. A key case in point is the case of *Mohd. Ishaq Ilmi* v. *State of U.P.*[134] The relevant facts of the case are that the editor of a daily, *Siyasat*, had taken offence at the republication of an American book called, 'Religious Leaders', which contained offensive statements about the Prophet Mohammad. The republication was carried out by *Bharatiya Vidya Bhawan*, but soon withdrawn. However, the editor of the daily launched a concerted agitation against this book, quoting objectionable passages from it, accompanied with his own comments, speeches, and translations on the subject matter. The writings of the editor continued beyond the withdrawal of the book, and he was eventually detained by the police through a detention order under the Preventive Detention Act, 1950.

The detention order was justified on the grounds that the editor had: 1. promoted communal hatred; 2. 'exploited the religious sentiments of the Muslims by working them up to a communal frenzy'[135] and; 3. 'created disaffection and discontent among the Muslims, towards the Government.'[136] Specifically, the detention order

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[134] AIR 1957 All. 782 (Allahabad High Court). The matter did not reach the Supreme Court.

[135] AIR 1957 All. 782 (Allahabad High Court).

[136] AIR 1957 All. 782 (Allahabad High Court).

highlighted incidents which incited Muslims to commit breaches of peace. These incidents related to giving publicity to the objectionable materials, appealing to them to organize strikes, staging demonstrations (even *Satyagrah*), and holding meetings with a two-fold demand: the proscription of the book, and the removal of the general editor of *Bharatiya Vidya Bhawan* (who had previously apologized for the publication and withdrawn it from further printing) from his post. The order also noted that the editor had published speeches from local Muslim leaders on the issue in which they had noted that Muslims of their area were 'full of anger and excitement' over the book. Further, the order took cognizance of a news item published by the editor to the effect that Muslims should endure death and sacrifice their lives and property rather than tolerate insults to their prophet and religion. The order noted a news item published by the editor that noted that the government (a Congress government at the time) was secular only in name, that it was highly brahmanical, and that the army shared the same demographic characteristics. Further, the order noted that the editor had published news items noting communal riots in Agra, Moradabad, and the procession taken out by some Muslim students at a university. The order noted that the editor had condemned *Jan Sanghis* and certain newspapers for defaming those who agitated for the abovementioned demands. The order further noted that the editor had published a news item noting a meeting by *Jan Sanghis* where they had raised the slogan, '*khoon ka badla khoon.*'[137] It noted that the editor had published a news item alleging that the Hindu *Mahasabha* and the *Jan Sangh* had incited communal riots in Gorakhpur, Orai, Moradabad, etc. The order contained a list of many such incidents: the point of laying some of them out in detail here is to show that, even in the words of the preventive detention order, none of the incidents for which the editor was

[137] Blood for blood.

detained found him directly provoking Muslims to violence or taking arms against any particular section of the society.[138] However, the detention order attributed several breaches of peace, a communal riot in Aligarh and Moradabad among other places, and injuries and death to some to the publications in the *Siyasat.*

Among the grounds highlighted in the Preventive Detention Act, 1950, a preventive detention order could be made out against a person when the Central or State government was satisfied that a person needed to be prevented from acting in a prejudicial manner with respect to public order. Threat to public order was measured by the likelihood of violence, and therefore, whether violence was a natural consequence of the articles was a fact in issue. Facts in issue, as Stephen has defined, are those facts, which by themselves, or in connection with others, constitute a state of things such that the existence of a disputed right or liability is but a matter of legal inference from them.[139] Therefore, if it could be proven that violence was a natural consequence of the articles then it could be inferred that the editor was a threat to public order.

The counsel for the editor (the petitioner in the case) argued that the petitioner had never advocated or incited violence, and that it was his fundamental right to criticize the government and advocate for its overthrow, if he so wished. The Allahabad High Court did not accept this contention. In its view, statements which

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138 It should also be noted that the detention order mentioned one incident on the day of the arrest in which the editor was allegedly out on the streets of Kanpur armed with *lathis* and *dandas* (sticks and rods). The order maintained that the intention of the editor was to propagate and participate in a communal riot that evening in Kanpur. However, the judgment does not engage with this part of the order and is entirely based on whether the writings of the editor could be said to incite violence. Therefore, it is reasonable to assume that the involvement of the editor with violence directly was either found untrue or was irrelevant to determine the legality of the detention order.

139 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 9.

could normally be understood to disturb peace and order would provide grounds for detention. As per the Court, the newspaper articles were of a nature that they would incite Muslims to violence, even though they expressly advised them not to 'lose their heads or to do anything that would have the effect of jeopardising the cause for which the petitioner was making such strenuous efforts.'[140] The court concluded that even though the article did not directly advocate violence, the effect of the newspaper articles would be to give rise to a breach of peace, sooner or later. In the words of the Court:

> It is a notorious fact of which we were justified in taking judicial notice that in cases in which communal feelings have been exploited and communal frenzy has been worked up, violence has invariably resulted sooner or later whether such violence was advocated or not. We are not, therefore, prepared to accept the contention of the learned counsel for the petitioner that unless a person advocates violence or incites people to use violence or other illegitimate courses, he cannot be legally detained under the Preventive Detention Act.[141]

Therefore, the court took what was a fact in issue in a particular case, i.e. whether the writings of Ishaq Ilmi resulted in violence, and by applying the instrument of judicial notice on to it, foreclosed the question. By using judicial notice, the court foreclosed proof of the very thing that needed to be proved for the detention order to be sustained. In other words, the first ground on which the order was based i.e., arousing the Muslim population to a communal frenzy and exhorting them to commit breaches of peace, was held to be justified merely because the court took judicial notice of the most crucial question of fact in the case.[142]

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[140] AIR 1957 All. 782 (Allahabad High Court).

[141] AIR 1957 All. 782 (Allahabad High Court).

[142] The end result of the case was that the preventative detention order was quashed because the court found that one of the grounds on which the order was based was irrelevant. The court found that the second ground i.e. exciting disaffection against the government, was not a legal ground on which such an order could be sustained unless violence had been advocated for or

1.1.1 Judicial Notice incorrectly applied to facts in issue in the dataset

The same event occurred in the division bench appeal of the beauty pageant case, *Mahila Jagran Manch* v. *State of Karnataka and Ors.*[143], one of the cases studied in the dataset. The reader will recall that certain public interest organizations had challenged the constitutionality of the State's failure to prohibit beauty pageants as violations of fundamental rights guaranteed by the Indian constitution. The single bench of the Karnataka High Court had dismissed this writ, and the decision was appealed before a division bench of the same court. The division bench modified the judgment of the single bench, stating that while a beauty pageant was not illegal per se, it had to be conducted in keeping with Indian culture and tradition and in a way that did not offend the dignity of women.

The reader will recall that the opponents of the pageant had posited that beauty contests themselves were against the culture and tradition of India. Therefore, the determination of whether this was so was a fact in issue. Culture was a contested category in this case and therefore not a notorious matter of which the court could take judicial notice. However, the court did not consider any evidence to decide this issue. Instead, it took judicial notice of the cultural heritage of India, and the unique position of women within it. Moreover, it did not provide any guidance to understand what was meant by Indian cultural heritage, how a beauty pageant would likely wreck it, and how the pageant could be conducted in consonance with this heritage. Similarly, it did not provide any guidance to understand what the unique position of women in the country was, and how the beauty pageant could be conducted in a

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was the ordinary consequence of such provocation. Since no violence was advocated or occurred against the government, the ground was not sustained. Since the order consisted of both relevant and irrelevant grounds, it was quashed.

143 1996 Kar. HC (Div) (Karnataka High Court).

manner which is respectful of this. It assumed that everyone thought of Indian culture and its composites in exactly the same way, and this the court was not empowered to do. Indian culture was a contested category in this case which was evident from the fact that one party thought that the mere holding of a beauty pageant was counter cultural, whereas the other party thought that the beauty pageant could be held in a way that was consistent with cultural pre-requisites. Therefore, the court was not empowered to take judicial notice of Indian culture in this case. The court was empowered to draw inferences from opposing assertions of culture based on the evidence, but it was not empowered to render this question of fact moot through judicial notice of a non-notorious proposition. This action of the court offends the very spirit of judicial notice i.e., judicial notice can only be taken of those facts which are so notoriously well known that requiring their proof would be a waste of time and resources. Neither of the parties had submitted any material to prove what Indian culture or the place of women within it was. Among other things, the court directed that no alcohol could be served in the competition, once again taking judicial notice of social and moral ethics of the Indian society: the core contested category in the case.[144]

[144] The same can be observed in the case of *Smt. Kaushalya* v *State* AIR 1963 All 71(Allahabad High Court), which forms a part of the dataset. Here the court was to decide if S. 20 of the Suppression of Immoral Traffic in Women and Girls Act 1956 was unconstitutional as an unreasonable restraint on the fundamental right to profession. The court's refusal to find it so was based entirely on it taking judicial notice that sex work was a tainted profession and the protections available to the professions free of this moral taint would not apply to it. The normative position from which the judiciary started played a determinative role in the outcome of the judgment. Whether sex work is in fact tainted is a contestable moral and cultural claim and not the right subject matter of judicial notice. I will demonstrate in the public reason chapter that when moral doctrines unsanctioned by public reason determine the outcome of a case, the outcome is constitutionally illegitimate.

1.2. Judicial Notice of Facts Relevant to the Facts in Issue

Before demonstrating how the courts have substituted their opinions on facts relevant to facts in issue in the dataset, an introduction to the concept would be apt. A key case on the point is *Abida Khatoon* v. *State of U.P.*[145] The facts of the case are that a married couple, born in India, had visited Pakistan in February, 1950, to see the ailing brother of the wife, and though it is not clear whether they had moved there to settle or to visit, they subsequently wished to return to India under the Nehru-Liaqat[146] Pact and to be re-settled there. However, upon their return to India, the legality of their eligibility to re-settle in India was questioned and the State served deportation orders on them. They filed a suit before the IInd Additional Civil Judge of Agra, praying for a declaration that they were Indian citizens and could not be deported. After that suit failed to secure them that status, they filed an appeal before the Allahabad High Court.

To determine that they had lost their Indian citizenship, two things had to be demonstrated. First, it had to be demonstrated that they left India with the intention of making Pakistan their permanent home, and secondly, it had to be demonstrated that they succeeded in making Pakistan their domicile. A negative answer to either of these questions would conclude the matter in favour of Indian citizenship for the couple. Therefore, the intention of the couple at the time of leaving India was an important fact in issue.

To begin the proceedings, the High Court held that if a person was a citizen of India when they left the country then the presumption of citizenship lies in their

[145] AIR 1963 All 260 (Allahabad).

[146] An agreement between the leaders of India and Pakistan which allowed persons who had migrated to either India or Pakistan during partition to return home.

favour. If the State wanted to dispute their citizenship, the onus lay on it to prove that. In the pleadings at the lower court level, it was determined that the relevant question of fact was whether the couple had left India with the intention of settling in Pakistan. In the application filed before the lower court judge (the IInd Additional Civil Judge, in this case), the husband had stated that he had also left India in 1950 because of communal riots that had broken out in Uttar Pradesh at the time. Though the entire decision could not turn on it, the veracity of this statement was nevertheless relevant to the ultimate finding on intention. Thus, whether the husband left India because of the riots was a relevant question of fact: relevant to the fact in issue. The lower court judge concluded that the husband could not have left Uttar Pradesh in 1950 because communal riots had broken out. He took judicial notice of the fact that the statement could not be true because, 'by then the conditions in our country had fully settled and force of the exodus of the Muslim population had considerably subsided.'[147] This combined with some other admissions of the husband empowered the IInd Additional Civil Judge to conclude that the couple had left India with the intention of settling in Pakistan.

The High Court found that the lower court judge had incorrectly relied on its own opinion to come to the conclusion that the conditions in the country had *fully settled* by 1950. The High Court noted that though it was true that the post-partition chaos had settled down considerably by 1950, it was equally true that riots had broken out in Uttar Pradesh in 1950, which could plausibly be what encouraged the husband to leave at that moment. Since the intention with which the couple left the country was an important factual issue in the case, and the veracity of the husband's statement

[147] AIR 1963 All 260 (Allahabad High Court).

was relevant to the determination of that issue, a conclusion based on an assumption (in place of evidence) was not permissible.

> A Court can take judicial notice of what are known as notorious facts but the question whether the conditions in February 1950 were "fully settled" is a matter of opinion and somewhat controversial. It is true that in 1950 the volume of the exodus of Muslim population to Pakistan had been reduced considerably but it is equally true that in that year communal riots flared up in parts of Uttar Pradesh which forced some Muslims to go to Pakistan. In observing that the conditions had "fully settled", the learned Judge was importing into the evidence his own opinion. The Court cannot smuggle into the evidence its own opinion of controversial situations disguised as notorious facts. Moreover, the fact that conditions had become settled and the exodus of Muslim population to Pakistan had subsided was irrelevant in ascertaining the intention of the plaintiffs in going to Pakistan.[148]

Having said so, the High Court reassessed the evidence relating to the intention of the couple at the time of their departure from India.

1.2.1 JUDICIAL NOTICE INCORRECTLY APPLIED TO FACTS RELEVANT TO FACTS IN ISSUE IN THE DATASET

The dataset that I have studied has also showed many instances in which the court has bartered a conclusion based on examination of evidence for one based on its opinion. In the first euthanasia case of *Maruti Shripati Dubal* v *State of Maharashtra*[149], the court had to decide whether the State's prohibition on suicide violated the fundamental right to life under Article 21. The Court devised the standard of naturalness to assess the content of the right to life guarantee within the constitution. There is no fixed normative framework within which Article 21 rights are to be discovered, and the judges have almost unrestricted powers of enumeration under this Article. In this case therefore, the court was within its powers when it devised the naturalness framework to find the scope of the right to life guarantee within Article

148 AIR 1963 All 260 (Allahabad High Court).

149 1987CriLJ743 (Bombay High Court).

21. Thus, to determine whether a right euthanasia was covered by Article 21 (fact in issue), the court had to determine whether the impulse to die was natural (relevant fact).

As noted in chapter 2, the court relied heavily on religious teachings to conclude that though the impulse to die was unusual, it was not unnatural and therefore permissible within the purview of Article 21.[150] The court made observations about the status of suicide in different religions such as Christianity, Islam, Buddhism, Hinduism, and Jainism. While the observations regarding Hinduism and Jainism were supported by quotations from a textbook (in the next section I will argue that reliance on this textbook was illegal), observations about Islam, Christianity and Buddhism were completed unsupported in the judgment. In other words, the court took judicial notice of these religious views. The court's views are reproduced below:

> The right to die or to end one's life is not something new or unknown to civilization. Some religions like Hindu and Jain have approved of the practice of ending one's life by one's own act in certain circumstances while condemning it in other circumstances. The attitude of Buddhism has been ambiguous though it has encouraged suicide under certain circumstances such as in the service of religion and country. Neither the Old nor the New Testament has condemned suicide explicitly. However, Christianity has condemned suicide as a form of murder. In contrast the Quran has declared it a crime worse than homicide.[151]

Additionally, it also noted that suicide was practiced in historical times, and was known and celebrated in India by different names: *Sati, Samadhi, Prayopaveshan* and *Atmarpana*:

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150 In this case, the court made unnaturalness the test of determining whether something is permitted within Article 21.

151 Maruti Shripati Dubal v State of Maharashtra 1987CriLJ743 [13] (Bombay High Court).

> In our own country Johars (mass suicides or self-immolations) of ladies from the royal houses to avoid being dishonoured by the enemies, Sati (self-immolation by the widow on the burning pyre of her deceased husband), Samadhi (termination of one's life by self-restraint on breathing), Prayopaveshan (starving to death) and Atmarpana (self-sacrifice) have always been acclaimed with reverence.[152]

These religious and cultural observations were central to the court establishing that there was nothing unnatural in the desire to die. This case presents an important case study to observe how the court replaces its own opinion to conclude with respect to a relevant fact. Here it was the opinion of the judge that suicide was permissible by religion and celebrated in certain instances in the society, and therefore there was nothing unnatural about it. It is important to note that it is not the conclusion that I take issue with here, in fact, for the present chapter, the conclusion is irrelevant. I take issue with the process of arriving at this conclusion. If the court had determined, as was within its judicial role to do, that 'naturalness' was a relevant fact to decide the controversy in the case i.e., whether a prohibition on suicide violates the right to life then the court should have taken evidence with respect to that. The court could have invited the parties to submit evidence through affidavits and written submissions, or through the specific evidence taking procedures mentioned in the Rules of the court. In addition, sections 45 and 60 of the IEA empower the court to take expert evidence, and peruse treatises on subjects. Had the court decided the question of naturalness on evidence, it would have also given the opposing party (the State in this case) an opportunity to rebut this evidence in cross-examination, or through rejoinders and replies, as is appropriate to the proceeding.

152 Maruti Shripati Dubal v State of Maharashtra 1987CriLJ743 [15] (Bombay High Court).

Similarly, in the case of *P Rathinam and Ors v Union of India and Ors*[153] a division bench of the Indian Supreme Court found S.309 unconstitutional as per Article 21 because, among other reasons, religious leaders, like Lord Rama and Pope John Paul II had either practiced it or found it permissible under certain circumstances. The court noted that Lord Rama had taken *jalasamadhi*[154] in the Saryu River whereas Lord Buddha and Mahavir Jain had achieved death by seeking it. Pope John Paul II had given his approval to the refusal of treatment by a person whose death was imminent. Once again, the court made religion's stand on suicide a relevant fact in considering whether section 309 violated Article 21[155], but did not allow evidence to be produced on it. Instead, it concluded with respect to this relevant fact by replacing the evidentiary process with judicial notice. Judicial notice can only be taken of a notorious fact. However, the stands of different religions on suicide or the right to die are not notorious i.e., they are not so well-known that no evidence needs be produced to prove them. This was an arena in which the court should have invited evidence to be lead and witnesses to be examined before concluding with respect to the same. By substituting its opinion in the place of evidence, the court made illegal use of the judicial notice power.[156]

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153 AIR 1994 SC 1844 (Supreme Court of India).

154 The act of giving up life by drowning.

155 The court identified the dignity conception of Article 21, but instead of deciding this case according to the standards identified with this value, the court invoked religious doctrine to order the values within Article 21. In the chapter on Public Reason, I explore how this move of the Court was constitutionally illegitimate.

156 In *Ashaben* v *State of Gujarat and Ors* 2015 AIR CC 3387 (Gujarat High Court), the court took judicial notice of the fact that life is the most sublime creation of god. When the existence of god itself is not notoriously believed, there can hardly be any doubt that life as the most sublime creation of god cannot said to be a notorious fact. Similarly, the court noted that Jainism and Buddhism are opposed to violence, which might well be true but is not a notorious fact which can be accepted without proof. Similarly, the court took judicial notice of the fact that some religions are opposed to even contraception, which once again, might well be true but cannot be accepted as a notorious fact especially since the court itself did not do

The cases discussed so far have shown how the judges incorrectly applied the judicial notice rule to contestable religious and cultural claims. By no means do I seek to argue that had the judicial notice rule not been applied, or had the judge allowed the parties to lead evidence to support their religious and cultural claims, the inferences drawn from such evidence would have automatically been eligible to form part of the reasoning of the decision. What role these religious and cultural inferences could play is a separate matter, and will be decided by the demands of secularism and public reason which I discuss in the next chapter.

(c). Appropriate Books of Reference: An Antiquated and De-localized List

A further trouble with the judicial notice law in India is that section 57 permits the court to refer to 'appropriate books and documents of reference' in taking judicial notice. This phrase is not defined by the IEA, and the courts have provided no test to determine the 'appropriateness' of a book of reference. What little can be said about appropriate books of reference emerges from the commentaries of Indian evidence law scholars. Commentators writing about this part of the rule only go so far as to list a series of books that the courts have noted to be an appropriate book of reference. Going through the list, the reader quickly realizes that these books are not only antiquated, but written in colonial times by colonial rulers of India. At best, colonial writings formulated by the ruling class would suffer from incompleteness by being far

well to name any such religion. The court's claim that abortion stains the honour of the family and that conception through rape makes a woman a subject of scorn in the Indian society are also facts which need to be proved before they are accepted. The court substituted its own judgment in coming to a conclusion about abortion, and though these findings did not directly affect the outcome in this case, a blind reliance on them without noticing that these were matters in need of proof can artificially expand the scope of judicial notice subverting the adversarial process.

removed from the subject matter, and at worst they would mischaracterize the subject matter. The British have left and India is a sovereign country, and it is no longer apparent why these books should still be considered appropriate by a court. If there are some lasting principles highlighted in these books then they ought to be made explicit by the court, for without doing so the court unjustly removes some writings from being questioned while the reasons behind that move remain unknown.

A sample of these books are as follows: Lord Cornwallis' Minute, Sir John Shore's Minute of June 1789, Malthus' Definition of Rent, Mill's Political Economy, Elphinstone's History of India, Hallam's Middle Ages Vol. III, Grant Duff's History of the Marathas, Colebrook's Remarks on the History of Bengal, Maine's Ancient Law, Forsyth's Constitutional Law, Taylor's Medical Jurisprudence, Dubois Hindu Manners, Customs and Ceremonies, Encyclopaedia Britannica, Borrodailes's Caste Rules, Simcox's Primitive Civilization, Wilke's History of Mysore, Thurston's Castes and Tribes of Southern India, so on and so forth.[157] This list demonstrates that the appropriate books are rather outdated and written by Englishmen. No modern book by any contemporary scholar forms part of this list, regardless of whether that author's work is considered mainstream or subaltern. The criterion for judging the appropriateness of a book is also completely opaque and as such it is unclear how a book can be found to be appropriate unless the judges themselves say so, or the book is mentioned in a commentary on judicial notice. A further suggestion that this list admits only those books which have enjoyed a certain mainstream career would be appropriate under this section. Morin and Sarin have observed as follows:

[157] Sudipto Sarkar and VR Manohar (eds), *Sarkar's Law of Evidence in India, Pakistan, Bangladesh, Burma and Ceylon* vol 1(16thedn, Wadhwa and Company Nagpur 2007) 1130-1131.

> Vernacular histories which have not received any recognition as historical works of value and reliability relating to matters of public or general interest nor have been referred to in any well-known historical work are inadmissible.[158]

1.1 ***Illegal Reliance on Appropriate Books of Reference in the Dataset***

In the dataset under consideration, the courts have relied more than once on books and documents to make findings about relevant facts.[159] Yet they have not detailed even once why that book falls within the category of 'appropriate books and documents of reference' under section 57. For example, in the case of *CA Thomas Master* v. *State of Kerala*[160], the court referred to passages from the *Garuda Purana* to conclude that life was precious and therefore the relief sought by the petitioner viz. the right to voluntarily initiate death, was impermissible. That this citation was critical to the court concluding in this fashion can be gleaned from the statement of the court that, 'in view of the above discussion, it is not possible for us to accept the petitioner's contention (…).'[161] The passages of the *Garuda Purana* relied on the court are produced hereunder:

158 Muhammad Munir and Harbans Lal Sarin, *Principles and Digest of the Law of Evidence* (4thedn, University Book Agency 1956) 387.

159 As mentioned in the previous chapter, if the judgment does not reveal that one of the parties had produced a book or document for the court to refer to, I have assumed that the court has introduced that book into the proceedings on its own.

160 2000 CriLJ 3729 (High Court of Kerala).

161 2000 CriLJ 3729 (High Court of Kerala).

17. Vinna dehana kasyaapi can- purushaartho na vidyate Tasmaad- deham dhanam rakshetpunyaka- rmaani Saadhayet.	Without the body how can one obtain the objects of human life ? Therefore protecting the body which is the wealth, one should perform the deeds of merit.
18. Rakshayet sarvadaatmaana- maatma sarvasya bhaajariam. Rakshane yatnamaatishthejee vanbhaadraani pashyati.	One should protect his body which is responsi- ble for everything. He who protects himself by all efforts, will see many auspicious occasions in life.
20. Sharirarakshanopaayaah kri- yante sarvadaabudhaiah Necchanti cha punastyaagamapi kushthaadi- roginah.	The wise always undertake the protective meas- ures for the body. Even the person suffering from leprosy and other diseases do not wish to get rid of the body.
22. Aatmaiva yadi naatmaanama- chitebhyo nivaarayet Konsyo hitakarastasmaadaatnaabnam taarayishyati	If one does not prevent what is unpleasant to himself, who else will do it? Therefore one should do what is good to himself.

Yet another instance in which the court has referred to books or documents under this section without explaining how they meet the appropriateness criteria is the case of *Maruti Dubal*. In this case, the court quoted extensively from Dr. Kane's History of Dharmashashtra's Volume II, to conclude that while Hinduism and Jainism generally condemn suicide, there are some instances in which these religions permit suicide. These quotations along with other observations about the stance of different religions, was the basis on which the court concluded that the impulse to die, though unusual, was not unnatural, and therefore the State's prohibition on it unreasonably restrained the right to life. Some quotations from the book are produced hereunder:

> The Dharmashastra writers generally condemn suicide or an attempt to commit suicide as a great sin…Manu V. 89 says that no water is to be offered for the benefit of the souls of those who kill themselves. The Adiparva (179.20) declares that one who commits suicide does not reach blissful worlds. Vas. Dh. S. (23.14-16) ordains "whoever kills himself becomes abhisasta (guilty of mortal sin) and his sapindas have to perform no death rites for him; a man becomes a killer of the self when he destroys himself by wood (i.e. by fire), water, clods and stones (i.e. by striking his head against a stone), weapon, poison, or ropes (i.e. by hanging). They also quote a verse that dvija who through affection performs the last rites of a man who commits suicide must undergo the penance of Candrayana with Tapta-krcchra". Vas. Dh. S. 23.18 prescribes a prayascitta for merely resolving to kill oneself (even when no attempt is made). Yama (20-21) prescribes that when a person tries to do away with himself by such methods as hanging, if he dies, his body should be smeared with impure things and if he lives he should be fined two hundred panas; his friends and sons should each be

> fined one pana and then they should undergo the penance laid down in the sastra.
>
> At extremely holy places like Prayaga, the Sarasvati and Banaras persons were allowed to kill themselves by drowning with the desire of securing release from samsara. The salyaparva (39. 33-34) states 'whoever abandons his body at Prthudaka on the northern bank of the Sarasvati after repeating Vedic prayers would not be troubled by death thereafter'. The Anusasanaparva (25. 62-64) says that if a man knowing the Vedanta and understanding the ephemeral nature of life abandons life in the holy Himalayas by fasting, he would reach the world of brahma. Vide also Vanaparva 85.83 (about suicides at Prayaga). The Matsyapurana (186. 34-35) eulogises the peak of Amarakantaka by stating 'whoever dies at Amarakantaka by fire, poison, water or by fasting enjoys the pleasures (described in verses 28-33). He who throws himself down (from the peaks of Amarakantaka) never returns (to 'samsara)'
>
> Among Jains a similar rule prevailed. The Ratnakarandasravakacara (Chap. 5) of Samantabhadra (about 2nd Century A.D.) dilates on Sallekhana, which consists in abandoning the body for the accumulation of merit in calamities, famines, extreme old age and incurable disease. The Kalandri (Sirohi State) Inscription records the suicide of a Jain congregation by fasting in samvat 1389 (E.I. Vol. XX, Appending p. 98 No. 691). From the account of the death of kalanos the Indian gymnosophist at 73 given by Megasthenes (Mc Crindle p. 106) we can gather that the practice of religious suicide prevailed long before the 4th century B.C. Strabo (XV. 1.4) states that with the ambassadors that came to Augustus Caesar from India also arrived an Indian gymnosophist who committed himself to the flames like Kalanos who exhibited the same spectacle before Alexander.

Note that the concern here is not that the court referred to religious texts. There is no formal prohibition on the court to refer to any kind of text. The appropriate weight that the court can accord these religious expositions will be explored in the next chapter. The concern is that the court does not explain why Dr. Kane's book on the Dharmashastras should be accepted as a true treatise of the Vedic and Jain view on religion and can be referred to without being cross-examined by the litigants.[162]

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[162] Yet another example in the data-set is found in the case of *P Rathinam and Ors* v *Union of India and Ors* AIR 1994 SC 1844 (Supreme Court of India) when the court refers to an article by Tripathi to conclude that once the various duties of life have been fulfilled, a person could renounce his/her body. In that article, as per the court, Tripathi had argued that there are four objectives of life: *dharma, artha, kama, and moksha*, and once a person had fulfilled these objectives, he/she had the moral right to terminate life. The court also refers to the

1.2 Evidence-Taking Procedure for Books, Magazines, and Newspaper Articles

A search for the philosophical basis to understand what might be meant by appropriate books and documents in this section, led me back to one of the key texts in the area of evidence written by Wigmore, who, as I noted at the beginning of the chapter stated that judicial notice can be taken of facts which can be ascertained from sources of indubitable accuracy. I propose that the scope of these sources should be understood in light of the primarily section—Section 57. This means that, since the section requires that certain facts should be judicially noticed, such as domestic law, proceedings of the constituent assembly, divisions of time, geographical areas, rules of the road, etc., sources which contain the most authentic version of this kind of information should be taken to mean what the section refers to as 'appropriate books or documents of reference.' This would include, for example, the Union of India and State Gazette publications, which contain important government notifications, including laws, notifications uploaded on the website of ministries, cases found on legal databases such as Manupatra and Supreme Court Cases Online, and other such sources understood in a narrow way. The test ought to be that the source should be the most authentic source to procure the information sought.

However, the mere fact that a certain opinion is found in these sources ought not to be conclusive of the fact that that opinion is unquestionable.[163] For example, in

Encyclopaedia of Religion to survey various religious conceptions of 'life' to conclude that life may not end with death. The court does not justify why the documents referred to in this case qualify as 'appropriate books of reference' on the path to judicial notice. These inferences were relevant to the court's decision that Section 309 does not violate the right to life guaranteed by Article 21.I will demonstrate in the next chapter how the court used these religious conceptions to identify and order the values within Article 21.

[163] Vimla Bai (Dead) by Lrs v Hiralal Gupta and Ors 1989 [Supp] 2 SCR 759 (Supreme Court of India).

the dataset case of *Independent Thought* v. *Union of India and Another*[164], the court referred to the Report of the Committee on Criminal Law Amendment, which had found that the marital rape exception was based on the old custom of coverture according to which the wife was the property of the husband. This finding was relevant for the court to conclude that the marital rape exception has its genesis in the assumed inequality of the sexes. The report is an appropriate book of reference as far as the findings of the committee go. However, in my argument, it is not an appropriate book of reference to *establish* the custom. In other words, the courts cannot take judicial notice of the existence of a custom just because the committee report has found it so. In order for the custom to be proven or disproven it must be presented and cross-examined as a relevant fact. The IEA is especially well-suited to this exercise because it contains appropriate procedures for referring to books, and the opinions of experts. Section 45 provides that when the court has to form an opinion on a matter of science or art, the opinion of an expert is relevant:

> 45. Opinions of experts— When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.
>
> 45A. Opinion of Examiner of Electronic Evidence— When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000 (21 of 2000), is a relevant fact.
>
> Explanation— For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.

Similarly, section 59 established the rule regarding proving facts in issue and relevant facts in a litigation:

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164 (2017) 10 SCC 800 (Supreme Court of India).

> All facts, except the contents of documents or electronic records, may be proved by oral evidence.[165]

Section 60 states the conditions under which treatises can be introduced in court:

> Oral evidence must, in all cases whatever, be direct; that is to say--
>
> If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
>
> If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
>
> If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
>
> If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:
>
> Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:
>
> Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.[166]

These sections make sure that if evidence is to be taken on a contested matter of public history, art, science or literature, then it must be done though expert opinion or through the production of a treatise.

In the light of this discussion consider the case of *Toyota Jidosha Kabushiki Kaisha* v. *Deepak Mangal and Ors.*[167] in which the court wrongly applied section 57(13) of the IEA and relying on the documentary evidence submitted by one of the parties, in the form of magazine and newspaper articles and books, took judicial

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165 The Indian Evidence Act 1872, s 59.

166 The Indian Evidence Act 1872, s 60.

167 2016(67) PTC374 (Del) (Delhi High Court).

notice of the fact that the Toyota Company was the first company to introduce the hybrid car, Prius, and had a registered Trademark for the same. This was an important disputed fact since the legal battle concerned an allegedly illegal use of the Prius Trademark. The court was patently wrong in taking judicial notice after relying on books, magazines and newspaper articles. Section 81 of the IEA provides a presumption of genuineness to newspaper articles and journals, but they cannot be accepted as true till the writer of the articles testifies before the court that he or she did indeed perceive the facts written in the article.[168]

Similarly, as regards books, the only presumption present in the IEA is that they were written and published at the place and time that they purport to be so written and published (section 87 IEA). Admission of books as evidence to prove a relevant fact exists on the rule book only as an exception to the general rule that all facts (except the contents of documents and electronic records) must be proved by oral evidence (section 59 IEA). No presumption of genuineness attaches to books, and the only way permissible in the IEA for books to be admitted is if they have achieved the status of a treatise which is commonly found on sale, and if the author is either dead or cannot be produced as a witness before the court without undue delay and expense (proviso to section 60 IEA), or if the writer of the book deposes before the court that he/she perceives the facts mentioned in the book. Even so, magazines, articles, and books admitted to evidence in this way are subject to cross-examination.

1.3 The Appropriate Time to File the Evidence

With respect to the cases which form the subject matter of the current project, the Supreme Court Rules, 2013 provide for evidence taking procedure in the five

[168] Laxmi Raj Shetty v State of Tamil Nadu AIR 1988 SC 1274 (Supreme Court of India).

categories into which the cases can be split: 1. writs; 2. civil appeals; 3. criminal appeals; and 4. public interest litigation; and 5. special leave to appeal (Order VIII, XIX, XXI, XXVI and XXXVIII). These Orders provide that documents to be relied on in the litigation are to be filed at the filing counter at the time of filing the petition/writ etc. Documents not filed at the time can be introduced only with the permission of the court. Similarly, the High Court Rules of different High courts will provide for the appropriate time to file different pieces of evidence that the parties wish to rely on during the course of the litigation. Therefore, while sections 45 and 60 provide the manner in which the evidence (either in terms of expert opinion, books, reports, or affidavits) is to weighted, the 2013 Rules provide the time at which these documents can be introduced. This would be the lawful way to ensure that the courts do not by-pass evidentiary requirements simply by reference to some books or documents. Proceedings which are held in contravention of this process can be challenged on this ground. Although the illegal use of judicial notice has not been expressly recognised as a ground of appeal, the Supreme Court has overturned in the *Abida Khatoon* case mentioned above, a decision of a High Court partly on the ground of the illegal use of judicial notice to determine a relevant fact. If the facts are not notorious, as religious views on suicide are not, then the appropriate procedure would have been to admit the evidence via sections 45 and 60, reserving judicial notice under section 57 only for uncontested notorious facts. I once again note, Morin and Sarin on this issue:

> (…) when a court is asked to refer to a work of a science or art under section 57, it is not necessary to show, as it is under section 60 that the condition as to the unavailability of the author of the work exists. There is, this, an apparent conflict between sections 45 and 60 on the one hand and section 57 on the other. This conflict is, however, more apparent than real, as the true view seems to be that when the matter of science or art is one of which the court may properly take judicial

> notice, the court may refer to any standard work on the subject whether its author be dead or alive; but when the matter is one of which the Court cannot properly take judicial notice, the work can be referred to only if the condition mentioned in section 60 as to the unavailability of its author exists.[169]

(d). Judicial Notice to be distinguished from the Ability of the Judge to Appraise the Evidence

The ability of a judge to consider some facts as proven without the need of seeing evidence must be distinguished from the ability of the judge to appraise evidence. A judge is always empowered to consider the evidence before them and come to a justifiable conclusion on the same. For example, in the above-mentioned case of *Abida Khatoon* v. *State of UP*[170] the judge had to make relevant findings of fact. Most importantly, the judge had to conclude whether: 1. the declaration of Pakistani citizenship; and 2. the application for a Pakistani passport itself, could lead to a conclusion that the couple had acquired Pakistani citizenship. With respect to the former contention, the court noted that the Indian State carried the burden of proving that this amounted to Pakistani citizenship, and since they had failed to cross-examine the couple on their explanation for the abovementioned declaration, the court accepted the explanation offered by the couple.

With respect to the latter, the couple explained that once they decided to return to India (from Pakistan), after the death of the wife's brother, a friend advised them that obtaining a Pakistani passport was the easiest way to return to India. They explained that this and no other reason existed for their Pakistani passport. Once again, the High Court found that the burden of disproving this statement lay on the

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[169] Muhammad Munir and Harbans Lal Sarin, *Principles and Digest of the Law of Evidence* (4thedn, University Book Agency 1956) 387-88.

[170] AIR 1963 All 260 (Allahabad High Court).

Indian State, and since the State, 'had not been able to discredit the explanation given by the plaintiffs'[171], the fact was decided in favour of the couple.

A common mistake made under this topic has been to mischaracterize cases in which the court has appraised evidence, whether it is sociological, historical, political or economic, or of any other hue, to infer the policy behind a legislation, as judicial notice cases. This mistake proceeds by characterizing this kind of evidence as legislative fact, and asserting that, 'findings or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence.'[172] However, this characterization is incorrect. Inferences on legislative policy are no different from inferences drawn on other disputed facts and must proceed by the court weighing rival evidence. Any attempt to persuade a court to take into account legislative policy which is unsupported by evidence or through evidence which is not subject to cross-examination, must be intercepted as an incorrect application of rules of judicial notice. This does not mean that parties will not be able to demonstrate the alleged policy behind legislation. Any evidence sought to be introduced by the parties as to legislative policy must be introduced in accordance with the provisions of the IEA (or the relevant evidence law, as the case may be) so that it can be subject to cross-examination. I will now demonstrate that the distinction of legislative fact created by American scholarship is incorrect.

The American (USA) case of *Muller* v. *Oregon*[173] is often presented as a key case on judicial notice in that jurisdiction. In that case, an Oregon State law restricted

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171 AIR 1963 All 260 (Allahabad).

172 See for example Kenneth Culp Davis, 'Judicial Notice' (1955) 55 COLUM L REV 945, 953.

173 208 US 412 (1908).

the number of hours that a woman could work. This restriction was challenged as a discriminatory piece of legislation based only on sex, which had no connection with ensuring the public health, safety or welfare, and was nothing but an unreasonable restraint on the fundamental right to liberty (which includes the right to sell labour) of women. The State countered that: 1. it was empowered to place reasonable restraints on liberty in the interest of public health, safety or welfare; 2. that this legislation attained that purpose and; 3. it was justified to place this restriction on women and not men. It is important to note that in a prior case (*Lochner* v. *New York*[174]), the US Supreme Court had found a similar New York statute, which limited the working hours of men, unconstitutional, as an unreasonable restraint on their liberty.

For the women challenging this Oregon statute, this case was a simple application of *Lochner*. Owing to this precedent, this legislation could be sustained only if could be shown that the difference in sex was an issue of fact upon which this enactment could be sustained. Therefore, the effect of long working hours on the female body was a critical fact to answer this question. To reach a conclusion as to this fact, the court sought to rely on evidence which was in the nature of over ninety reports of bureaus, commissions, inspector of factories, hygiene commissioners, statisticians, etc., from the US and abroad testifying to the effect that long working hours were injurious to the health of women due to their physical make up. All these reports seemed to agree that there was a danger in allowing a woman to work long hours, specifically because of her: 1. physical organization; 2. maternal functions; 3. responsibility of rearing and education of children; and 4. responsibility of the maintenance of the home. All these reasons were said to be provide the basis for reduced working hours for women. These reports were collected in a brief by Louis

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[174] 198 US 45 (1905).

Brandeis, counsel for the State of Oregon. Thus, the name Brandies brief for research of a similar nature being filed in subsequent litigation. Apart from reports, the brief also presented: a. a list of States in the US which had a similar legislation and sought to restrict the working hours of women in one way or another; and b. a list of foreign legislation which placed similar restrictions on women's working hours.

The US Supreme Court held in this case that a woman is 'not an equal competitor with her brother', and there is that in her 'disposition and habit' which operates against the full operation of the fundamental right to liberty with respect to her. The Court noted that a woman is differentiated from a man in physical structure, and although in many respects she has been given equal rights with the man, she still depends on him in many instances, and is not 'upon an equality'[175] with him. Therefore, she constituted a separate class and could be subject to legislation that did not apply to men.[176] The Court concluded that the legislation was a reasonable restriction in public interest because as per the medical testimony (which is not mentioned as a part of the Brandies Brief) long hours of standing could adversely affect the health of a woman which would have repercussions for the well-being of the offspring, the production of which was the natural duty of her sex. Therefore, for the vigour and well-being of the future race, this difference could be sustained.

In coming to this conclusion, the extent to which the court relied on the brief filed by Louis Brandies is unclear. It acknowledged that it could not rely on the reports mentioned in the brief because they were not, 'technically speaking, authorities.' It further noted that constitutional questions could not be settled by a

175 208 US 412 (1908), 422.

176 Incidentally, the court also noted that a separate legislation was also justifiable to save her from greed and from the 'passions of man.' 208 US 412 (1908), 422.

popular view on the matter. However, it then shifted its stance to note that when there is a 'widespread' and 'long standing view' regarding a debated question of fact, then it is 'worthy of consideration' (the reports in the brief, that is). It followed up that suggestion by stating that the court could take 'judicial cognizance of all matters of general knowledge.'[177] Now it is unclear whether the court based its opinion on the brief or took judicial notice of the weakness of the fairer sex.

To begin with, it is unclear what the word 'authorities' meant in the paragraph above. Did it mean that the reports were not authoritative because they are not made by experts in a field? There is good reason to assume that that might not have been what the court was referring to because the reports of the commissioners, statisticians, inspector of factories, were reports made by people well versed with the working of factories and industrial operations, and would qualify as expert reports. Therefore, arguably, it was not in this sense the court stated that the reports were not authorities. Alternatively, 'authorities' could be used to signify that these reports did not constitute the kinds of documentary evidence that the court could look at to make an assessment about a debatable question of fact. If the word 'authorities' was used in this second sense then it points to a nicety of the evidence law practice in the US at the time which would have prescribed when documentary evidence could be considered and to prove which questions of fact. I will later demonstrate that as per the prevalent rules of evidence at the time in the US, the judges were empowered to consider and infer from the Brandies brief.

[177] 208 US 412 (1908), 421.

Next, what did the judge mean when he stated that the court could take, 'judicial cognizance of all matters of general knowledge?'[178] Did he mean that it was general knowledge that women were the weaker sex and that their standing for long hours on their feet would have adverse implications for the future of the human race? If yes, then the court could have taken judicial notice of the fact, no matter that that view may have been coloured by misogyny and paternalism. This would be the correct application of the principle of judicial notice even as it would illustrate, most glaringly, the faults with the liberal application of the rule of judicial notice; that if unrestrained this rule can substitute for public/popular opinion. This is unacceptable from the point of view of a constitution that envisages that fundamental rights can be curtailed only under a limited set of circumstances (of which public opinion is not one).

However, what the judge arguably did in this case was use an incorrect understanding of judicial notice to refer to the Brandeis brief to *form* an opinion on the strengths and capacities of women and decided the case accordingly. This has coloured future understanding of the rule, at least in the American jurisdiction.[179] As the reader will recall from the sections above, the essential condition for taking judicial notice is that a matter of fact must be notorious. If an opinion needs to be formed after studying various documents, the matter is outside the scope of judicial notice, and as such this activity can only be sustained under some other permissive rule of evidence. As I have shown above, to say that the judge may form an opinion about women's working capabilities after studying the Brandies brief is to militate against the very essence of judicial notice. Characterizing the actions of the *Muller*

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[178] 208 US 412 (1908), 421.

[179] See for example Kenneth Culp Davis, 'Judicial Notice' (1955) 55 COLUM L REV 945.

court as judicial notice had troubled Wigmore, who mentioned in his celebrated treatise:

> Where a legislative act is argued to be unconstitutional, and this is to depend upon the unreasonableness, or lack of possible reasonableness, of the law in its purpose or operation, and thus the external facts furnishing the possible legislative motive or the possible actual affect must be considered, this incidental question of fact is not for the jury, but for the Court. Hence, no testimony, of experts, or otherwise, would be admitted for the jury. But by what theory or method shall the Court receive information of the alleged facts? This is an interesting inquiry, hitherto not carefully worked out by the courts. The principle of judicial notice has been loosely invoked. [180] [Emphasis mine].

From this quotation it is clear that Wigmore was not sure what theory sustained the consideration of something like a Brandeis brief. Since the claim in *Muller* v *Oregon* did not depend on proving a document, rules of documentary evidence would be unhelpful in this scenario. Additionally, Wigmore was not sure whether this could be classified as valid exercise of judicial notice. In fact, in his chapter on judicial notice, he specifically noted, 'the question of a method of informing the Court on facts relevant to the constitutionality of a statute is in need of special and frank consideration.'[181] Interestingly, *Muller* v *Oregon* is not a case mentioned by Wigmore in the judicial notice chapter of his 1923 treatise. This, of course, does not remove this case from this category, but its exclusion from not only the chapter but his entire treatise indicates that this case might not be an example of the expansive use of judicial notice that scholarship has mistaken it to be. Wigmore pointed to an article by Prof. Henry Schofield on cases similar to the *Muller* case to consider the important questions which arise when the courts consider sociological evidence of the kind

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[180] Wigmore, *A Treatise on the Anglo American Systems of Trial at Common Law* vol 5 (2nd edn, Little, Brown and Company 1923) 2555.

[181] John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol 5 (2nd edn Little Brown and Company 1923) 2569.

submitted in the Brandies brief. Prof. Schofield provided the correct answer as to why the judge in *Muller* v. *Oregon* was empowered to consider the Brandies Brief and make a factual conclusion and this was highlighted in Thayer's treatise on evidence.[182]

The judge was entitled to do so, Thayer had explained, because the judge had always been entitled to conclude regarding questions of fact. Courts had existed even before a jury was heard of, and though juries decided some questions of fact (and questions of fact only), it was a fallacy to conclude that all questions of fact were decided by a jury.[183] Judges frequently decided certain questions of fact even in a jury trial such as whether a confession was voluntarily given; whether the claim that a litigant was a minor was actually true, etc.[184] Therefore, the judge in *Muller* was entitled to decide on the fact of the effect of long working hours on the physical health of women because some questions of fact still fell within the realm of the Court. For the purpose of this inquiry, it is not relevant to differentiate which kinds of questions of fact fell within this realm. The important point here is to merely note that it was not the theory of judicial notice, but another theory that sustained the actions of the judge in *Muller*.[185]

As mentioned in the previous section of this chapter, the Supreme Court Rules, 2013, provide through various Orders, the appropriate time at which

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182 Henry Schofield, 'New Trials and the Seventh Amendment: Slocum v. New York Life Insurance Co.' (1913), 8 ILLLREV 287. See fn 65 of this article.

183 James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown 1898) 184, 185.

184 James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown 1898) page 185.

185 Other cases have been inspired by *Muller* in accepting Brandies Brief like dockets. For example, *Anti- Inflation Reference* 1976 68 DLR (3d) 452 (Supreme Court of Canada).

documents can be submitted to the court for consideration. There is no bar, either in the Rules, or as I have shown above, in the powers of the court to consider these documents if submitted at the correct time. This procedure allows for opposing parties to have access to each other's documentation, and to disprove the same through their own submissions. To reiterate, the court can refer to these documents not because of the power of judicial notice, but because the court is entitled to make inferences about matters of fact on the basis of evidence submitted. Other rules of evidence law would regulate the power of the judge. For example, the scheme imagined under the IEA is that a judge is entitled to consider opinions of dead or unavailable authors from treatises (s 60) and from experts (s 45). Since these items will enter the prosecution as an item of evidence, the opposite party will have an appropriate occasion to make assertions to disprove it during the proceedings.

The degree to which a judge must be convinced before deciding in the direction the evidence leads is, 'a very high degree of probability.'[186] Although Stephen had said that the degree of probability required in judicial inquiries may not admit of exact measurement or description, yet this degree of probability need not be as high as those required in scientific inquiry.[187] The method of studying the competing degrees of probability proposed by Stephen is called the Mill's Difference Method, which states that all known facts in a judicial proceeding must be arranged in accordance with the hypotheses or the known or unknown facts which account for

[186] James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 35.

[187] James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 35.

them.[188] If all but one hypothesis is inconsistent with the known fact, that hypothesis is proven.[189] If more than one hypothesis is consistent with the known fact then the more reasonably probable one is said to be proven.[190] If such is the object of judicial inquiry, Stephen explained that it is carried out by inferences from assertions.[191] While each evidence Act may provide certain rules for weeding out untruthful or unreliable assertions (like providing conditions as to competence, conflict of interest, and circumstances under which a witnesses assertion may be believed or disbelieved)[192], the judge can be helped only so much in his/her conclusions. Stephen explains this limitation with the help of limitations of cross examination,

> A cool, steady liar who happens not to be open to contradiction will baffle the most skilful cross-examiner in the absence of accidents...no rules of evidence which the legislator can enact can perceptibility affect this difficulty. Judges must deal with it as well as they can by use of their natural faculties and acquired experience, and the miscarriages of justice in which they will be involved by reason of it must be set down to the imperfection of our means of arriving at the truth.[193]

Therefore, when the judges make inferences from sociological, historical or any such kind of documentary evidence submitted in accordance with the law then they are in fact doing what judges are required to do, and this activity can be differentiated from judicial notice.

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188 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 37.

189 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 37.

190 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 37.

191 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 38.

192 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 42.

193 James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction on the Principles of Judicial Evidence* (Thacker Spink and Co 1872) 41.

4. Conclusion

This chapter demonstrates how the judiciary has circumvented the checks and balances envisaged in the IEA and illegally applied the judicial notice rule in the dataset cases. Whereas in some cases, the court has substituted its own opinion on a disputed fact without considering evidence, in others it has referred to books and documents, thereby by-passing the procedure highlighted in sections 45 and 60 of the IEA. These practices of the judiciary are illegal and can form the basis of a challenge to the decision of the case. However, at present, there are no recorded instances of such challenges in the Indian court systems.[194] Although judicial notice has not been explicitly provided as a ground for appeal, in the cases discussed above, I show that the Supreme Court, in the *Abida Khatoon* case, overturned an illegal use of judicial notice by the High Court and considered the evidence afresh to arrive at its decision. In this chapter, I provide a framework to evaluate the use of the judicial notice rule by the judge. If a particular instance of judicial notice does not abide by this framework, litigators can raise an objection to the judge's use of judicial notice. Further, they can also appeal to a higher court if an illegal use of judicial notice has decided either a relevant fact or a fact in issue. The right to be heard is an essential aspect of the principles of natural justice which guide the adjudicatory process. If the judicial notice rule is used illegally, it deprives litigants of the right to be heard because they are

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[194] However, the 10th Circuit of the United States Court of Appeals reversed a district court decision with respect to damages because the district court failed to take judicial notice of the historical retirement fund earnings of the Northrop Grumman Fund available on the website, as requested by the claimant. He had also provided the court with the web address for the same. O'Toole v. Northop Grumman Corporation 499 F 3d 1218 (10th Circuit, 2007, United States Court of Appeals). Contrast this judgment with Gerristen v. Warner Brothers Entertainment Inc. 112 F Supp 3d 1011 2016 (California USA) which differed from the abovementioned judgment on whether judicial notice could be taken of information appearing on third party websites. However, the point of interest for the present chapter is to note that incorrect instances of judicial notice can give rise to grounds of appeal; whether information occurring on third party websites is the correct subject matter of judicial notice is irrelevant to this point.

deprived of the opportunity to rebut the judge's conclusion either through cross-examination or the production of their own evidence. The litigants are left remediless against an illegal manoeuvre by the judge.

It is important that courts see the difference between the subject matters capable of being judicially noticed and matters incapable of being judicially noticed. This of course does not bar the court from considering religious or cultural evidence, but it clarifies the channels through which such evidence can be admitted. It further clarifies how such evidence can be proven. Most of all, this clarity on procedure provides the best chance for the court to be aware of the reasons for its decisions and to exclude those reasons which do not clear the constitutional threshold.

CHAPTER 7- SECULARISM AND PUBLIC REASON

1. Aim of the Chapter

Previous chapters have demonstrated that it the court, rather than the litigant, that is more prone to invoking religious and cultural claims. In the dataset studied, the court mentioned religious and cultural claims approximately 75% of the time (77/103*100). In the last chapter, I have looked at this phenomenon from an evidentiary basis. At this point, it is apposite to pose a normative question. Even if the religious and cultural claims clear the necessary evidentiary hurdle to be admitted in court, to what extent can they legitimately influence the outcome of decisions? In the present chapter, I employ the concepts of secularism and public reason, two key constitutional concepts, to provide an answer to this question.

As I have shown in the previous chapters, religious and cultural claims are not per se forbidden from consideration by the courts. This means that all instances in which the judiciary engages with such claims cannot outright be rejected as unconstitutional moves. The type of the claim and the nature of the engagement need to be analysed against secularism and public reason to separate the instances of legitimate engagement from the illegitimate ones.

Before going into this exercise, I will illustrate the nature of constitutional argumentation and recount how the concept of public reason can help provide judges a road map to weigh religious and cultural claims en route the final decision.

2. The Nature of Constitutional Argumentation

In this section, I will briefly reiterate the Rawlsian stance on harmonising constitutional essentials and religious arguments. In particular, I will pay attention to the 'proviso', proposed by Rawls, and refined by Cecil Laborde. The proviso provides a mechanism that can be used by the State, and more importantly for this thesis, the judges, to reconcile the seemingly conflicting religious and cultural claims with liberal values. Pluralism of thought and belief is reasonable in free and democratic societies. At times these fundamental thoughts and beliefs may be irreconcilable and in those circumstances, the need would be felt for agreeing on a common set of reasons that persons may provide each other to answer fundamental political questions at stake. These reasons, John Rawls calls public reasons. The basic thought is that truth based on comprehensive doctrines, religious and non-religious, should be replaced by an idea of the politically reasonable in liberal societies, such as the values embedded in liberal constitutions. This reasoning applies in public political fora. There is a lot of scholarship about the specific dividing line between a public and an informal political forum, but that discussion is beyond the scope of this thesis.[1] What is amply clear is that public reason is to apply to the discourse of judges when they write their decisions. Therefore, on the judges, is a duty of civility which requires them to explain to other citizens the reasons for their decisions in terms of

[1] For example, Rawls is of the view that public reason need not apply in background culture, i.e., discussions in private societies, associations, churches, etc. John Rawls, *Political Liberalism* (Columbia University Press 1993) 214. However, discourse in the background culture cannot override the basic rights of citizens in the political order. See, for example, Rawls' discussion on how public reason applies to gendered family arrangements although the domain of the family may prima facie be unconnected with the public political forum. John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LRev. 765, 791-793. However, Habermas reads the scope of the Rawlsian public reason to be that public reasons should be required in these associations. See Jürgen Habermas, *Nationalism and Religion* (Polity Press 2008) 122.

constitutional conceptions. Conceptions of constitutional values and reasonableness are dynamic concepts and subject to persuasion; facts explicitly acknowledged in the Rawlsian theory[2], and an essential fact to keep in mind about the nature of constitutional argumentation. In the theoretical chapter, I have proposed a method for arriving at defensible conceptions of constitutional commitments.

As long as religious and cultural arguments are in line with public reason, they are welcome in court. In addition, people may have their own religious and philosophical reasons for finding the public reason justified. Just because public reason has this kind of backing in some instances does not change it basic character as a public reason.[3] Assuming, for example, that there is one constitutionally sanctioned conception of equality, then it should not matter that religious arguments further that conception or that this mode of equality has the 'backing' of religion. Not only is such an exercise already happening in the 'background culture'[4], such as at homes, classrooms, extra-curricular associations etc., but also a look at legal history will also demonstrate the successful use of such a 'strategy' which can form, as Rawls states, 'a sociological basis encouraging citizens to hono[u]r the ideal of public reason'[5]. There is no principled reason, unless a society lends itself to close- mindedness towards multiplicity of views that a court or a public forum should refuse to entertain and consider seriously, claims based in religion and culture and test them against constitutional principles.

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2 For instance, compare the different conceptions of equality in *Dredd Scott* v *Sanford* 60 US 393 and *Brown* v. *Board of Education* 347 US 483. However, Rawls is confident that, 'an orderly contest between them over time is a reliable way to find which one, if any, is most reasonable.' John Rawls, *Political Liberalism* (Columbia University Press 1993) 225-227.

3 John Rawls, *Political Liberalism* (Columbia University Press 1993) 242.

4 John Rawls, *Political Liberalism* (Columbia University Press 1993) 249.

5 John Rawls, *Political Liberalism* (Columbia University Press 1993) 249.

Before proceeding further on the roadmap, I pause here to note a particular feature of the Rawlsian duty of civility introduced earlier in the section. This deviation is necessary to place Rawls' theory in perspective for the current enterprise. I note here that John Rawls proposes to place the duty of civility on citizens as well in certain circumstance. For example, Rawls is of the view that when citizens vote especially on constitutional essentials affecting basic matters of justice, or hotly debated topics then they are to be guided not by their comprehensive doctrines of truth but by public reason.[6] There is some scholarly debate about this exceptional application of the duty of civility to private citizens. This exception seems to be a part of Rawls theory although the practicality of it has been questioned by other scholars in the field, such as Jürgen Habermas. Habermas argues that, '(…) the normative expectation that all religious citizens when casting their vote should ultimately let themselves be guided by secular considerations is to ignore the realities of devout life, an existence *guided* by faith.'[7] I agree with Habermas' position and accordingly, in my thesis, I do not require that litigants in the cases studied should bear the burden of presenting secular reasons for their oppositions to State action/inaction. I do this for two reasons: first, for the reason of practicality as pointed out by Habermas, and second, because there is no prohibition on religious and cultural claims being introduced in support of one's position, in either the rules of procedure of the courts or any other law or legal principle in practice in India. However, the State still has the burden of fulfilling the duty of civility. That is, even if they accept a religious and cultural claim and find that it illuminates the discussion, they have to find that the thrust of those claims resonate with reasonably defensible constitutional conceptions.

[6] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LRev. 765, 798.

[7] See Jürgen Habermas, *Nationalism and Religion* (Polity Press 2008) 129. See Patrick Loobuyck and Stefan Rummes, 'Religious Arguments in the Public Sphere: Comparing Habermas with Rawls' 5(2011) Ars Disputandi Supplement Series 237.

At this point, it will be profitable to divert attention to the nature of constitutional argumentation in India. The contest begins with identifying a particular constitutional provision or principle that is at stake in the litigation. Then the search begins to see whether the basis for deciding the issue is sufficiently clear in the provision or the principle; either in the form of text or doctrine. The contest then hinges on persuading the judge that the interpretation of the text/doctrine heretofore adopted by the court is valid or invalid, depending on the side making the argument. The side that is better able to persuade the judge wins the day. In the theoretical chapter attached to this thesis, I have identified a justificatory theory of interpretation, which draws from various elements of Indian constitutional theory, doctrine and practice, geared toward providing a measure for the judges in their journeys toward persuasion. If this is the nature of constitutional argumentation then conceptions of constitutional provisions are always up for debate and reconsideration, subject to the limitations I have identified in my theory.

The specific limitations that are of interest to this chapter are the duty of civility imposed by public reason, and the basic feature of secularism. In this section, I have explained the duty of civility and the proviso which judges must comply by in secular democracies. Rawls is of the view that if judges are able to do this then all reasonable persons should be able to accept the State decision as legitimate (the condition of reciprocity). However, as I have pointed out in the theoretical chapter, this places a high burden on reasonable citizens who may not accept a State reason although it is arrived through public reason, and they may do so without giving up their claims to reasonableness. A less burdensome obligation on reasonable persons is that the decision arrived by the State through public reason be accessible, i.e., capable of being understood and engaged with, without being acceptable. Cecil Laborde

proposes this standard, and this is the standard that I employ in this thesis.[8] The accessibility condition only requires that the decision arrived at must be capable of being understood by the application of common standards. An example of this would be a decision arrived at by the Court which is in line with the doctrine on a constitutional provision, although repugnant in content. In such a situation, one may not accept the decision, in the Rawlsian sense, but can still understand how the judge arrived at that it. Applying the abovementioned viewpoints to the present thesis, I argue that judgments that are able to fulfill the duty of civility are legitimate decisions, even though they employ religious and cultural reasoning, so long as the final decision is justifiable by the interpretive theory identified in this thesis. Specifically, the strand of the interpretive theory that is of interest to this chapter is the content of the basic feature of secularism and public reason.

Before proceeding to the doctrine regarding secularism, I would like to draw the attention of the reader to the Constituent Assembly debates to argue that although the word 'secular' was not added to the constitution until 1976, the Assembly members had a very clear idea that the prospective Indian State was not to be religious entity nor give patronage to any particular religion. This historical context will provide the base on which the doctrine is built and will help to fortify the idea of secularism in India. In a recent case[9], the Kerala High Court has held that the Indian concept of secularism was based on the ancient understanding of secularism in India, perhaps explaining why the concept was not included in the Indian constitution when

[8] Cecil Laborde, *Liberalism's Religion* (HUP 2017).

[9] The Trustee Hidaya Educational & Charitable Trust v State of Kerala and Ors ILR 2020 (1) Kerala 462 (Kerala High Court).

it was first adopted.[10] It was only when the Parliament perceived a threat to the pluralistic characteristic of the nation did it explicitly insert a reference to secularism via the 42nd amendment Act in 1976. The insertion of the word 'secular' has been recently challenged in the Allahabad High Court. The challenge was that it was beyond the powers of the Parliament to amend the Preamble since it was technically not a 'provision' of the constitution but merely symbolised its ideals. They also contended that the idea was secularism was 'thrust' upon the public and is 'creating havoc in public life.'[11] Dismissing the petition, the Allahabad High Court found the contention of thrusting secularism on the Indian population, 'fundamentally flawed', stating instead that secularism has always, 'been ingrained in the scheme of the Constitution of India.'[12]

The reason why the word secular was not added to the constitution at the time is because the Indian brand of secularism was different from the way that secularism was popularly understood at the time; a strict separation of religion and State; an understanding that originated in western countries. As the Indian understanding was different, the framers refrained from inserting that term. As I will show through the various constitutional Articles below, the secularism envisaged by India guarantees a right to religion to all persons but outlaws certain religious practices (like untouchability), and empowers the State to regulate the economic, financial, and secular activities of the religion.

10 ILR 2020 (1) Kerala 462 [13] (Kerala High Court).

11 Hindu Front for Justice and Ors. v. Union of India and Ors. Misc. Bench No. 11318 of 2015 [2] (Allahabad High Court).

12 Hindu Front for Justice and Ors. v. Union of India and Ors. Misc. Bench No. 11318 of 2015 [7] (Allahabad High Court).

3. Historical Context

At the time that the Constituent Assembly had started its proceedings, political uncertainty and social unrest prevailed in India. While the Muslim League had refused to join the proceedings, the British government stated that if the Muslim League did not participate in the making of the constitution, they would be unwilling to impose it on the unwilling parts of the country.[13] At the same time, there was anxiety among leaders of other minority groups as well, such as religious and race minority groups, Sikhs, Parsis, Anglo Indians, to name a few, that certain fundamental rights be protected and certain political representation be guaranteed through reservations. It was in this atmosphere that the Indian constitution was to be set up. Therefore some commitments to religious freedoms and non-discrimination were necessary to get everyone on board.

In the landmark case of *S.R. Bommai* in which the Indian court clearly deliberated upon the import of secularism as a basic feature[14], K. Ramaswamy, J.stated that:

> Though the concept of "secularism" was not expressly engrafted while making the Constitution, its sweep, operation and visibility are apparent from fundamental rights and directive principles and their related provisions.[15]

There are two important occasions to observe the prospective State's own position with respect to religion in State affairs. The first is the discussion surrounding the

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13 Benegal Shiva Rao, *The Framing of India's Constitution*: *A Study* (NM Tripathi, Indian Institute of Public Administration, 1968) 121.

14 Though secularism had been identified as a basic feature in the *Keshavanada Bharati* case, *Bommai* was the first case to elucidate the concept in depth. *Keshavananda Bharati* v *The State of Kerala* AIR 1973 SC 1461 (Supreme Court of India). *SR Bommai* v *Union of India* 1994 AIR 1918 (Supreme Court of India).

15 *SR Bommai* v *Union of India* 1994 AIR 1918 (Supreme Court of India).

Objectives Resolution, and the second is the discussion surrounding the proposal to add the words 'in the name of God' at the beginning of the Preamble.[16]

(a). The Objectives Resolution

On the 5th day of the Assembly, Jawaharlal Nehru recited a resolution for adoption: the Objectives resolution. In this resolution, he affirmed the resolve of the Assembly to draw up a constitution which guaranteed and secured the right of the people of India to faith belief and worship (subject to law and public morality).[17] This is one aspect of secularism though it is outside the scope of the thesis. In the discussion that followed this resolution several Assembly members affirmed their position that the State that was to be conceived would not be a Hindu dominated State, but all minorities, Sikhs, Parsis, tribal, Anglo-Indians, Muslims etc. would receive adequate safeguards in the constitution. At the same time, the Assembly members were weary of separate electorates because they felt that those were responsible for 'communal and separatist' tendencies.[18] Therefore, the system for reservation for minorities, except for SC/ST was done away with. The key message was that of unity within diversity and not that of domination by the majority over the minority: 'We shall frame a constitution which will do justice to all minorities and which shall not overlook any community.'[19] Sikh and Parsi representatives at the Assembly also refused separate electorates and affirmed their confidence in the Assembly to not trample upon their rights although they were in the minority.

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16 Constituent Assembly Debates Volume X, 17th October 1949, 432-42.

17 Benegal Shiva Rao, *The Framing of India's Constitution*: *A Study* (NM Tripathi, Indian Institute of Public Administration, 1968) 122.

18 *SR Bommai* v *Union of India* 1994 AIR 1918 [26] (Supreme Court of India).

19 The Hon'ble Rev. JM Nichols-Roy, 18thDecember, 1946, Discussion of the Objectives Resolution. See Constituent Assembly Debates Volume I.

(b). 'In the Name of God' Debate

On the 17th of October, 1949, Assembly member Kamath moved an amendment to amend the Preamble in such a way that it began with the phrase, 'In the name of God, we the people of India…' He proposed that the constitution be adopted in the name of god. His justification behind moving this amendment was to invoke the divine so that the divine voice informs the implementation of the constitution in the best way possible: 'to transmute our baser metal into gold.'

> Whatever our shortcomings, whatever the defects and errors of this Constitution let us pray that God will give us strength, courage and wisdom to transmute our baser metal into gold, through hard work, suffering and sacrifice for India and for her people. This has been the voice of our ancient civilization, has been the voice through all these centuries, a voice distinctive, vital and creative, and if we, the people of India, heed that voice, all will be well with us.[20]

To this, Assembly member AT Pillai responded that doing so would force religion on people and make faith in god compulsory. Doing so would affect the fundamental right of faith enshrined in the constitution. Mr. Kunzu also argued in the same vein that the adoption of such a resolution about a matter that is deeply personal would run counter to liberty of thought, faith, belief and worship—all of which were promised in the very same Preamble the amendment wanted to modify. Yet another Assembly member, Ms. Rohini Kumar Chaudhary, proposed that instead of the name of the god, the constitution be adopted in the name of the goddess; a proposal that was laughed off by the Assembly. Assembly member Thirumala Rao interpreted Mr. Kamath's amendment as asking the three-hundred-member Assembly to decide whether India wants a God or not. The amendment was put to vote and defeated by a simple majority. Rao has noted that this was one of the only instances in which the

[20] Constituent Assembly Debates Volume X, 17th October 1949, 432-42.

Constituent Assembly was divided and a show of hands was required. They ayes lost to the nays: 41 to 68.[21]

Another Assembly member, Mr. Shiban Lal Saxena, proposed a similar amendment, wishing to add the following words to the opening of the Preamble:

> In the name of God the Almighty, under whose inspiration and guidance, the Father of our Nation, Mahatma Gandhi, led the Nation from slavery into Freedom, by unique adherence to the eternal principles of Satya and Ahimsa, and who sustained the millions of our countrymen and the martyrs of the Nation in their heroic and unremitting struggle to regain the Complete Independence of our Motherland…[22]

He argued that India had made great discoveries in the spiritual realm and he wondered why Assembly members were afraid to acknowledge god in this instance. He recounted other world constitutions—such as the Irish one, where homage had been paid to god at the very beginning of the Preamble. However, this motion was withdrawn by him on the request of an Assembly member. Since the overt mention to god did not find favour with the Assembly members, Mr. Govind Malaviya, proposed an amendment to add the following words at the beginning of the Preamble, 'By the Grace of the Supreme Being, Lord of the Universe, called by different names (...)' He argued that doing so did not privilege any particular god, and yet acknowledged the religiosity of the populace which had been a 'most distinctive and permanent feature of the thought and belief, of the tradition, of the culture and of the history of the entire life of the people of this country from time immemorial.' This amendment was treated as a point of order by the President of the Assembly, Dr. Rajendra Prasad, who ruled that the matter of the insertion of god, by whatever named called, had been decided by

21 The Framing of India's Constitution: A Study (B Shiva Rao et al eds, Indian Institute of Public Administration 1968) 131.

22 Constituent Assembly Debates Volume X, 17th October 1949, 432-42.

the Assembly, through the two previous amendments. The point of order being decided, there was no further deliberation on this amendment.

In conclusion, it is apparent that the Assembly members did not think it correct to impose a god or a goddess on the subjects. They were even opposed to imposing a plurality of gods. They understood the freedom of religion and faith guarantee as giving the people a choice of their own god and even reject god; a choice that would be negated if the Assembly made the decision. The Assembly members felt that the liberty of thought, belief and worship foreclosed any discussion on superimposing god on people. The building blocks of the secularism doctrine can be found in this discussion. The State was to have no religion of its own and everyone was free to decide whether a supreme being was to have a role in their life.

4. Normative Foundations of Secularism

In the theoretical chapter, I introduced the constitutional conception of Indian secularism. I summarily discussed how that conception can help us understand the role that religion is permitted to play in State activities. In this section, first, I will summarize the key points on the topic from that chapter and provide an overview of different political thoughts on the concept. This will help delineate the particulars of Indian secularism as it stands today and provide critical insights to the State obligation in different scenarios.

Secularism, in the Indian context does not signify a strict separation of the State and religion. Instead, secularism signifies that the State honours all religious faiths equally.[23] A fuller account of how this commitment manifests in constitutional

[23] Christophe Jaffrelot, 'The Fate of Secularism in India' in Milan Vaishnav (ed) *Indian Democracy and Religious Freedom* (Carnegie Endowment for International Peace 2019).

theory and doctrine has been provided later in the chapter. The word 'secular' was inserted into the Preamble of the Indian Constitution by the 42nd Amendment Act of 1976. The amended Preamble now resolves to constitute India into a 'socialist, secular, democratic republic.' The object of inserting this word into the Indian constitution was made clear in the Objects and Reasons of the 42nd Amendment:

> [T]o spell out expressly the high ideas of socialism, secularism and the integrity of the nation…these institutions have been subjected to considerable stresses and strains and vested interests have been trying to promote their selfish ends to the great detriment of public good.[24]

Relying on the abovementioned Objects and Reasons, DD Basu's Constitution of India argues that the 42nd Amendment only made explicit what was already provided in the constitution.[25] Other scholars have also agreed that even though the word was only inserted in 1976, secularism has been a grounding constitutional principle since the inception of the Indian constitution. An indication of this, as former Supreme Court Justice O. Chinnappa Reddy has pointed out, is that secularism was held to be the part of the basic structure of the Indian constitution in the *Keshavananda Bharati* case, which concluded three years before the 42nd Amendment.[26] Justice Reddy has further argued that all the principles of secularism had already been worked out at the inception of the constitution. His argument is that the Preambular resolve to secure social and political justice, liberty of thought and expression, belief, faith, worship, the equality of status and opportunity, and the dignity and the worth of the individual

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Democaracy and Religious Nationalism 2019.

[24] The Constitution of India, 42nd Amendment Act 1976.

[25] *Commentary on the Constitution of India* (SS Subramani J ed, 9th edn 2014) 560.

[26] O Chinnappa Reddy, *The Court and the Constitution of India*: *The Summit and the Shallows* (OUP 2010) 153.

are manifestation of the secular resolve of the constitution.[27] He further argues that neither the concept of citizenship nor the fundamental rights, both defined in the constitution, make any distinction or grant any preference to persons depending on their religion, language, or ethnicity.[28]

As I have mentioned in the theoretical chapter, secularism is one of the basic features of Indian constitutionalism. It was identified as such in the *Keshavananda Bharati* case as forming part of the inalienable basic structure of the constitution. Although the basic structure test was developed to test the constitutionality of constitutional amendments, it is now applied to the judicial review of legislation and State actions.[29]

The constitution can neither be amended, nor be interpreted, in a way that contradicts a basic feature. Although there can be reasonable disagreement about the specific content of a basic feature, I have already proposed a way to resolve such disagreement through the justificatory framework for constitutional interpretation developed in the theoretical chapter.

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27 O Chinnappa Reddy, *The Court and the Constitution of India*: *The Summit and the Shallows* (OUP 2010) 153.

28 O Chinnappa Reddy, *The Court and the Constitution of India*: *The Summit and the Shallows* (OUP 2010) 153.

29 Sudhir Krishnaswamy, *Democracy and Constitutionalism* (OUP 2011) 103-109.

(a). The Secular Attitude: The Key to Understanding Constitutional Secularism

Before delving into the specific constitutional Articles dealing with secularism, it is important to note the following account of Indian secularism, which is important for an understanding of the conception of secularism embedded in the Indian constitution. In the *SR Bommai* case which I will detail below, one of the justices recalled M.C. Setalvad's 1965 Secularism lecture, in which he sought to differentiate a 'secular attitude' from a 'secular State.' He argued that many people have their outlook governed by or rooted in religion.. The secular attitude means to turn away from this approach in our interactions with our fellow human beings and social groups, so that we can base our lives and actions more on worldly considerations and restrict religion to its proper sphere, viz., the advancement of the spiritual life of a person.[30] He argued that the secular attitude is ever important in understanding and applying secularism in India. The implication of this argument, with which I agree, was that the secular attitude is the unifying principle which explains how the right to religion co-exists with extensive rights of the State to interfere in certain aspects of religion, including in certain religious aspects. It also explains the obligations on the State when it deals with matters that dictate its interaction with different social groups, including fixing the arrangements for inter-group interactions.

While the secular attitude is instrumental, in my view, in understanding the constitutional vision of secularism, it is not without its critics. The attack comes from a school of anti-secularism, exemplified by the works of three prominent political

[30] SR Bommai v Union of India1994 AIR 1918 [88] (Supreme Court of India).

scientists, Partha Chaterjee, TN Madan, and Ashis Nandy. In their writings, they have noted that the secular attitude is the cause for communalism. By separating the State from religion and imposing upon the populace a modern package of scientific growth, rational thinking, nation building, national security and development, the secular State asks them to dilute their faith in service of assimilation and consolidation of the nation-State. However, it 'guarantees no protection to them against the sufferings inflicted by the State itself.'[31] The secular State arrogates to itself, the role of the 'sole arbiter[s] among traditional communities, to claim for themselves a monopoly on religious and ethnic tolerance and on political rationality.'[32] In so doing, the State fails to take seriously, religious claims, which gives rise to majority and minority communalism. Communalism is therefore, the dialectic other of modernity's secularism. Accordingly, they caution that,

> The only way that secularism in South Asia, understood as interreligious understanding, may succeed would be for us to take both religion and secularism seriously and not reject the former as superstition and the latter to a mask for communalism or mere expediency.[33]

Partha Chatterjee has shown how State intervention in religion can give rise to communal feelings. He has written about the legislative reform immediately following independence through which various practices within Hindu religion were modified or eliminated. Examples abound from the arena of access to and management of temples and permissible practices therein. Similarly, reforms were made to marriage and inheritance laws including, permissibility of divorce,

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31 Ashis Nandy, 'The Politics of Secularism and the Recovery of Religious Tolerance' 1988 ALTERNATIVES 177, 185.

32 Ashis Nandy, 'The Politics of Secularism and the Recovery of Religious Tolerance' 1988 ALTERNATIVES 192.

33 TN Madan, 'Secularism in its Place' 1987 JOURNAL OF ASIAN STUDIES 747, 758.

prohibition of polygamy, equal inheritance rights for sons and daughter (until 2006, only unmarried daughters), etc. Such reforms made if not exclusively, then primarily in the Hindu religion, empower certain groups to label the interventions as pseudo-secular.[34]

This is because, as Ratna Kapur has argued, one of the core aspects of Indian secularism, viz., equal respect for all religions, has been incorrectly equated with 'a very particular understanding of equality'[35], i.e., formal equality between religions. This conflation is used to argue for an assimilationist politics, where religious difference is eliminated by requiring the religious practices of a minority community to align with those of the majority community, the practices of which are treated as the standard. Special protections for the practices of the minority community are termed appeasement measures and a violation of the true spirit of secularism.[36] Such a recasting of the equal respect aspect of Indian secularism as formal equality between all religions, misunderstands the requirements of 'equal respect' which can require accommodations and protections in light of the historical and socio-cultural positioning of a particular religious community. This is the correct understanding of the requirements of 'equal respect' and Ratna Kapur has termed this secularism, correctly in my view, 'substantive secularism.'[37]

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34 Partha Chatterjee, 'Secularism and Toleration' 1994 EPW 29(28) 1768.

35 Ratna Kapur, 'Belief in the Rule of Law and the Hindu Nation and the Rule of Law' in Angana P. Chatterji et al (eds) *Majoritarian State* (OUP 2019) 356.

36 Ratna Kapur, 'Belief in the Rule of Law and the Hindu Nation and the Rule of Law' in Angana P. Chatterji et al (eds) *Majoritarian State* (OUP 2019) 356.

37 Ratna Kapur, 'Belief in the Rule of Law and the Hindu Nation and the Rule of Law' in Angana P. Chatterji et al (eds) *Majoritarian State* (OUP 2019) 363.

In a recent decision, the Supreme Court went so far as to hold that secularism can create remedies even where there are no rights. In a five-judge unanimous judgment, the court finally put to rest a land dispute that had rocked the nation for decades.[38] The Ayodhya land dispute, about which I write in more detail below, saw fractions of Hindu and Muslim groups engaged in a dispute regarding the ownership of a piece of land, about 1500 square feet in size, at Ayodhya in Uttar Pradesh in India. In 2018, the Supreme Court decided that on a balance of probabilities, the Hindus were able to establish a better possessory claim than the Muslims. However, the court went further to note that in the course of the dispute, a mosque that had stood on the disputed property, and which the Muslims had used as a worship site, had been desecrated in 1949 without lawful authority and was finally unlawfully razed to the ground in 1992. Therefore, the Muslims were ousted from the place of worship even as the true ownership of the property was under dispute. The court held that in a secular nation governed by the rule of law, such an event should not have occurred. Indian secularism is motivated by equality of all faiths and mutual tolerance, and as these secular ideals had been damaged by the abovementioned actions, grounds for remedy had been created. To course-correct secularism, then, the court ordered restitution in the form of alternate land to the Muslims. Although the court did not use the phrase 'substantive secularism' anywhere in their judgment, in my view this case is an example of the very same concept. Secularism, with equal respect as its animating principle can call for solutions which have an equality enhancing effect, like the case in point. It would be erroneous to equate Indian secularism to the formal equality between all religions.

[38] M. Siddiq (D) thr. L.Rs. vs. Mahant Suresh Das and Ors. (09.11.2019 - SC) : MANU/SC/1538/2019.

An extended consideration of the ramifications of this conception is precluded by the scope of the thesis. It is a theoretical proposal for reimagining the meaning the meaning of secularism and it requires a fuller consideration, in terms of its dimensions, consequences, and compatibility with other constitutional principles. Further works can refine this conception. For the present normative inquiry, it is sufficient to analyse the decisions in the dataset on the anvil of the current doctrine on secularism.

5. Doctrinal Secularism

Historically, the most important case to discuss the role of religion in State action in India was the case of *S.R. Bommai*, decided by nine judges of the Supreme Court. This case forms the doctrinal basis of secularism in India. This particular case marked the start of the legal battle in Ayodhya which concluded in the 2018 judgment discussed immediately above. The relevant facts of the case were that there was a mosque on a disputed land in Ayodhya in Uttar Pradesh. There had been a long dispute between some Hindu and Muslim groups about the true ownership of the land. While the mosque currently stood on the disputed property, some Hindu groups contested that the inner sanctum of the current structure was the true birthplace of Lord Ram. In 1992, the BJP government had come to power in Uttar Pradesh with the resolution of this dispute as one of the main items on its election manifesto. Eventually, the mosque was razed to the ground by volunteers of the RSS, an ideological association closely associated with the BJP. Following this, riots broke out in several parts of the country and there was considerable damage to life and property. The Uttar Pradesh government resigned, taking responsibility for its failure to contain the situation. Three other states, Himachal Pradesh, Madhya Pradesh, and Rajasthan

also had BJP governments. The Congress government at the Centre declared President's rule in these States and the respective State governments were disbanded. This action was challenged in the Supreme Court. The Supreme Court was asked to clarify the scope of judicial review regarding the President's rule[39]: specifically, whether the deployment of anti-secular policies by a state government could be adequate grounds for holding that, 'that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution' (President's Rule). A nine-judge bench of the Supreme Court answered this question in the affirmative. In the *Bommai* case, the following key points emerged regarding secularism. These points form the bedrock upon which the doctrine of secularism rests in India.

(a). No State Patronage of Religion

First, the State would not favour any religion. However, this does not mean that religion and culture is to be absent from the public sphere. This feature grants certain rights to the subjects while placing certain obligations on the State. A person is permitted to practice their religion, and preserve their culture, both in the private and in the public sphere. This flows from the following provisions in the Indian Constitution. Article 25 guarantees to all persons, the freedom of conscience, and the right to freely, profess, practice, and propagate religion.[40] Article 26 guarantees to religious denominations, a right to manage their own affairs in matters of religion.[41]

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[39] The Constitution of India, art 356. A constitutional provision whereby the central government can take control of the State machinery under certain conditions.

[40] The Constitution of India 1950, art 25.

[41] The Constitution of India 1950, art 26.

Similarly, Article 29(1) entitles every citizen to conserve their language, script, and culture.

At the same time, the State cannot privilege or discriminate against a person depending on their religious affiliation or beliefs.[42] Article 15 states that the State shall not discriminate against any citizen on the basis of their religion. Article 29(2) states that no citizen shall be denied admission into any State aided or State maintained educational institution on the grounds of their religion. Another important embodiment of the lack of State patronage commitment can be found in Article 27, which guarantees that no person shall be compelled to pay taxes for the maintenance of any religion or religious denominations.[43] Article 28 also guarantees that no religious instruction shall be provided by educational institutions maintained wholly out of State funds[44], and that in other educational institutions, which are recognized by the State or receive aid from the State, there shall be no requirement on any person to attend any religious instruction.[45] Article 30(2) states that while making decisions about aid, the State shall not discriminate against an educational institution on the ground that it is under a minority management, whether based in language or religion. Though the Articles 25-30 are commonly seen as codifying certain aspects of Indian secularism, some commentators have also read the protections embodied in Articles 14, 15(1) and (2), 16(1) and Article 19 (1), in essence the equality guarantee and the

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42 Abhishek Shukla v. High Court of Judicature at Allahabad AIR 2018 All 32 [43] (Allahabad High Court). See quotation from Jawaharlal Nehru in the Constituent Assembly Debates cited in *Trustee, Hidaya Educational and Charitable Trust* v. *State of Keralaand Ors*. ILR 2020 (1) Kerala 462[10] (Kerala High Court).

43 The Constitution of India 1950, art 27.

44 The Constitution of India 1950, art 28(1).

45 The Constitution of India 1950, art 28(3).

freedom of speech and expression guarantee, to also be codified aspects of secularism to a certain extent.[46]

However, prohibition against State patronage of religion does not prevent the State from discharging its obligations. For example, the State is charged with the general obligation to ensure the safety of the public and property. The State cannot refuse to do so only because the property happens to belong to a religious group. It cannot shirk its responsibility by invoking the principle of secularism. This development of the secularism principle has found favour in a recent decision of the Indian Supreme Court. The court held that the State has the obligation to protect religious property belonging to all religions. Protection of religious property and places of worship is an essential feature of Indian secularism.[47]

(b). Absence of State Religion

The second key principle of the secularism doctrine is that the State would have no religion of its own,[48] but it would give equal respect to all religious beliefs and display

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46 *DD Basu's Commentary on the Constitution of India* (SS Subramani J ed, 9th edn 2014) 561-562.

47 State of Gujarat v IRCG and Ors (2018) 13 SCC 687 [21] (Supreme Court of India).The court held that the State was obliged to protect such property and even compensate for its failure to do so by providing repair costs etc. The court held that such costs were to be met through the tax collected by State. Curiously, the Supreme Court stated that a substantial part of the tax should not be spent on this purpose as doing so would offend secularism. Article 27 of the Indian constitution guarantees that no person shall be compelled to pay taxes for the maintenance or promotion of religion or religious denominations. The Article does not incorporate within its wording any differentiation between a substantial portion of tax money and an unsubstantial portion of tax money. It is not entirely clear how spending an unsubstantial portion of the tax on repairs would not harm secularism, but spending a substantial portion would. Arguably, the answer to the question, is the State responsible to protect religious property, lies in meditating upon the unique brand of Indian secularism, and not in delineating the exact percentage point of tax returns that could be devoted to this purpose without offending it. If the protection of religious property is permitted, and even required by Indian secularism, then it should be irrelevant how much money, or what proportion of the tax collected is used by the State for this purpose.

48 Recently reiterated in Abhishek Shukla v High Court of Judicature at Allahabad AIR 2018 All 32 [43] (Allahabad High Court).

equal benevolence towards them.[49] Some instances of the codification of this commitment can be seen in Sections 153A, 295, 297 and 505 of the IPC. These provisions criminalize various instances of instigating discord between members of different religions or hurting the religious sentiments of any group. These provisions signify the State's commitment to protect all religions in the country. A concomitant duty rests on citizens to foster fraternity and harmony among themselves by transcending communal and religious (among other) boundaries.[50]

What does it mean to say that the State shall have no religion of its own? It means that there would be no official State religion although the State would not be anti-god.[51] Indian secularism does not require the State to take an official stance on the presence or absence of god. The State is not required to declare itself as either a believer, or an atheist[52], or even agnostic to god. Different State officials may define their relationship with god in different ways and they are not prohibited from talking about their relationship with this entity in their official affairs. What is prohibited is that their relationship with god or the obligations they assume because of their religious beliefs should dictate their official *decisions*.

A question may be asked to test the limits of the claims made immediately above. Can the State official, such as a Head of the State, visit temples, or attend functions and events of a religious nature? In other words, will doing so imply that the State has a religion? DD Basu's commentary argues that such visits do not per se

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49 *SR Bommai* v *Union of India* 1994 AIR 1918 [88] (Supreme Court of India).

50 The Constitution of India 1950, art 51A(e).

51 *SR Bommai* v *Union of India* 1994 AIR 1918 (Supreme Court of India).

52 *MP Gopalakrishna Nair* v *State of Kerala* AIR 2005 SC 3053.

become unsecular. They are unsecular only when they show discrimination. Further, he states that problematising such visits creates,

> [I]rresponsible criticism from a section of uninitiated people some of whom even profess the Hindu religion, that is anti-secular for the President or the Prime Minister of India to pay homage to Hindu shrines. These people shut their eyes to Art. 25(1) which does not say that a person ceases to be a "person" and must forget his personal religion as a condition for his becoming the Head of the State. It becomes unsecular only if, as a Head of the State, he shows any *discrimination* in favour of Hinduism or against other religions.[53]

This argument seems to be in line with the constitutional understanding of secularism. Arguably, the matter rests on understanding the scenarios in which such visits could amount to discrimination in favour of a particular religion, or against a particular religion. Unfortunately, the higher judiciary has not given this matter sufficient thought, although it had the occasion to do so in one case. A case in point is *S. Nalliahkhan* v *The Prime Minister of India*[54]. The question that arose in this case was whether the President and Prime Minister of India, and the Governors and the Chief Ministers of states can be prevented from visiting temples, mosques, and churches, or attending religious functions held therein, because of the constitutional guarantee of secularism. Here, the Madras High Court opined that Indian secularism did not mean that the State was anti-religious, but that it accords equal respect to all religions. The concept of equality of all religions does not lead to prohibiting State functionaries from visiting different holy places belonging to different religions. This case had provided the High Court with an appropriate opportunity to develop an understanding of discrimination when it comes to religious visits and functions by State functionaries. However, the court did not delve into the matter and as a result it is still an open question.

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53 *Commentary on the Constitution of India* (SS Subramani J ed, 9th edn 2014) 563.

54 MANU/TN/0801/1993.

1.1 Does Equal Respect Secularism Preclude State Interference in Religion?

The next important point to consider with respect with the absence of State religion, or in other words, equal respect secularism, is that this is not the same as saying that the State has no say whatsoever in matters of religion. Laws can be made regulating the secular, financial, political and economic affairs of the religion.[55] Additionally, the State can enact laws to reform religion and for the throwing open of public Hindu religious institutions to all sections of Hindus.[56] The justifiable extent of the State's interference with religious affairs is dominated by the essential practices doctrine,[57] developed by the Supreme Court of India. A brief digression into the test is merited at this point.

The essential practices test, a judicially manufactured test, attempts to delineate the essential features of a religion from the non-essential ones, giving the State a greater leeway of interference in those aspects of religion which are found not to be essential to its practice.[58] While essential practices of a religion may be curbed in light only of public order, morality, health, and other fundamental rights,[59] non-essential practices can be modified for a wider variety of reasons. Economic, financial, secular and political aspects of a religion can be modified by State law even in the absence of the above justificatory grounds.

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55 The Constitution of India 1950, art 25(2) (a). See also SP Mittal v Union of India [1983] 1 SCR 729 (Supreme Court of India).

56 The Constitution of India 1950, art 25(2) (b).

57 The Commissioner Hindu Religious Endowments Madras v Shri Lakhmindra Thirtha Swamiar of Shri Shirur Mutt 1954 AIR 282 (Supreme Court of India).

58 For more on essential features, see Ronojoy Sen, 'Secularism and Religious Freedom' in Sujith Choudhary et al (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2016) 885 and Deepa Das Acevedo, 'Secularism in the Indian Context' 38(1) LSI 2013.

59 The Constitution of India 1950, art 25(1).

Abhinav Chandrachud[60] has written that in the early years of the Supreme Court, the question that the judges would ask is whether the impugned law interfered with a practice which was essentially religious, as opposed to essentially secular. However, the current practice is to ask if the practice, even if religious, is essential to the religion. There are various factors to be kept in mind while deciding this question: the views of the followers[61], the centrality of the belief[62], the antiquity of the belief[63], and its obligatory nature.[64] However, Chandrachud has argued that recently, the Supreme Court has begun its move away from essential practices text. In the *Ayodhya* judgment, the Supreme Court had to determine whether a mosque, the Babri Masjid, has once indeed stood on the disputed property. An argument was made against this possibility by citing Islamic theological principles which state that no graves could be made close to a mosque site. The presence of graves around the disputed site then bolstered the belief, the argument proceeded, that there had never been a mosque there. The court refused to consider the veracity of this argument, holding that, 'it would be inappropriate for the court to enter upon an area of theology and to assume the role of an interpreter of the Hadees.'[65]

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60 Abhinav Chandrachud, *Republic of Religion: The Rise and Fall of Colonial Secularism in India* (Penguin 2020) 110.

61 Indian Young Lawyers Association v State of Kerala (2018) SCC Online SC 1690 (paragraph 209), placing reliance on Sri Venkataraman Devaru v State of Mysore AIR 1958 SC 255. See Abhinav Chandrachud, *Republic of Religion: The Rise and Fall of Colonial Secularism in India* (Penguin 2020) 110.

62 Commission of Police v Acharya Jagadishwarananda Avadhuta (2004) 12 SCC 770 (paragraph 9).

63 Commission of Police v Acharya Jagadishwarananda Avadhuta (2004) 12 SCC 770 (paragraph 9).

64 Indian Young Lawyers Association v State of Kerala (2018) SCC Online SC 1690, paragraphs 224-25.

65 M. Siddiq v Mahant Suresh Das Civil Appeal Nos 10866-10867 of 2010, judgment dated 9 November 2019 paragraph 77.

It is likely that the essential practices test will in the future be considerably diluted to mean only, 'accepting the faith and belief of the worshipper.'[66] However, that remains to be seen. At any rate, a further discussion about the details and implications of the essential practices test are precluded by the scope of this thesis, because this thesis is concerned not with proposing a way to delineate the religious and secular aspect of religion (a line of inquiry concerned setting the limits of religious rights), but with the State's modus operandi for permitting religious argumentation or religion and culture based reasoning in its own adjudication on non-religious matters. Since Indian doctrinal development on the freedom of religion has not been faced with questions like whether the right to religion includes a right to limit the entitlements of others (one possible manifestation of the religious exception claim), this chapter examines the extent to which the secularism can illuminate the thesis question.

Returning now to the main point: equal respect secularism does not mean that the State cannot interfere with religious practices. Katrak and Kulkarni have argued that equal respect includes the State's to ability interfere in the religious practices of religions, so long as the degree of interference is the same.[67] Because religious practices vary among religions, this test can verily be applied in many instances. Further, Ratna Kapur's conception of substantive secularism detailed above will present an objection to the Katrak and Kulkarni conception that is being discussed here. To recall, Kapur's argument was that equal respect secularism does not equate to

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66 Id.

67 Malcolm Katrak and Shardool Kulkarni, 'Unravelling the Indian Conception of Secularism: Tremors of the Pandemic and Beyond' in (2020) SECULARISM and NON RELIGION 10(4).

formal equality secularism, and so the State is not required to interfere in each religion in the same way or to the same degree. However, Kapur's proposal does not consider contingencies external to a religion which may require State interference. Her proposal is rooted in the internal principles of a religion and its socio-political place in a polity. So, an exigency like COVID and the demands it makes on State to impose restrictions on religious practices without flouting secularism, is not considered in her theory.

However, in Katrak and Kulkarni conception, the State's allegiance to equal respect as commitment to the same degree of interference proves to be useful in the analysis of restrictions placed during COVID. By a circular dated 24th of March, 2020, the Ministry of Home Affairs in India declared COVID a pandemic and empowered the Central and State governments to take effective measures to limit the spread of coronavirus.[68] It also issued certain guidelines to this end.[69] Clause 9 of these guidelines stated that 'all religious worship places shall be closed for public. No religious congregations will be permitted, without any exception.' Further, by clause 10, all religious and cultural gatherings were barred. Those falling afoul these guidelines were to be prosecuted under the National Disaster Management Act, 2005. Around the same time, the Tablighi Jamat, an Islamic organisation, organised a gathering for members of its congregation. The gathering saw thousands of Indians and foreigners associated with the congregation gather at the Nizamuddin Mosque in New Delhi. In the wake of the pandemic, the government evacuated and quarantined

[68] Government of India: Ministry of Home Affairs, Ministry of Home Affairs Order No. 40-3/2020-DM-I (A).

[69] Government of India: Ministry of Home Affairs, Annexure to Ministry of Home Affairs Order No. 40-3/2020-D: Guidelines on the measures to be taken by Ministries/Departments of Government of India, State/Union Territory Governments and State/Union Territory Authorities for containment of Covid-19 epidemic in the country.

about 2000 members of the congregation, and later expressed its will to blacklist the foreigners who had attended the gathering. Police complaints were initiated against these attendees through First Information Reports (FIRs), State governments were asked to identify and quarantine these individuals and bolstered by speeches made by politicians in the country, a wave of Islamophobia rose in which Muslims were blamed for spreading the pandemic in the country.[70] In one of the cases referenced below, a High Court judge, Nalawade J summarized the treatment of the attendees of the Tablighi Jamat at the hands of the government in the following words:

> There was big propaganda in print media and electronic media against the foreigners who had come to Markaz Delhi and an attempt was made to create a picture that these foreigners were responsible for spreading Covid-19 virus in India. There was virtually persecution against these foreigners. A political Government tries to find the scapegoat when there is pandemic or calamity and the circumstances show that there is probability that these foreigners were chosen to make them scapegoats.[71]

The government's response has been criticized for selectively scrutinizing members of this congregation and not attaching the similar level of scrutiny to other large religious congregations, among other things.[72] The different High Courts of the land were asked to quash the FIRs registered against the attendees. In *Konan Kodio Ganstone* v *State of Maharashtra*[73], the Bombay High Court quashed the FIRs finding that there was no application of mind by the Maharashtra Police who seemed to have been acting under political pressure whilst registering the complaints. They had

70 Malcolm Katrak and Shardool Kulkarni, 'Unravelling the Indian Conception of Secularism: Tremors of the Pandemic and Beyond' in (2020) SECULARISM AND NON RELIGION 10(4) 8.

71 2020 SCC Online Bom 877 para 27.

72 Malcolm Katrak and Shardool Kulkarni, 'Unravelling the Indian Conception of Secularism: Tremors of the Pandemic and Beyond' in (2020) SECULARISM AND NON RELIGION 10(4) 8.

73 2020 SCC Online Bom 877.

registered cases against the Jamatis although no prima facie case was made out against them. Quashing these FIRs, the Bombay High Court noted that there was a, 'smell of malice to the action taken against these foreigners and Muslims for their alleged activities.'[74] Similarly, in *Farhan Hussain* v *State*, the Karnataka High Court quashed the FIRs registered against the members of the Tablighi Jamat and ordered them to leave the country and not return for 10 years. Finally, in the Madras High Court case of *Md Kameual Islam* v *State*[75], bail was granted to foreign nationals who were members of the Tablighi Jamat.

Katrak and Kulkarni have contrasted the stance taken by the central and certain state governments in the Tablighi Jamat case with the stance taken by the Orissa Government in the *Rath Yatra* case. *Rath Yatra* or chariot procession is an annual Hindu festival in which the statues of deities are taken out of the temples and taken on a chariot procession through their towns, so that they can meet their devotees. Although the central government had, in compliance with the Ministry of Home Affairs circular, placed restrictions on religious gatherings, the Orissa government was keen to proceed with the *Rath Yatra*. Accordingly, it approached the Supreme Court of India to obtain its permission to do so. It assured the court of the highest standards of hygiene, minimal public attendance, and social distancing. Although the Supreme Court had refused such permission in *Orissa Vikas Parishad* v *Union of India*[76], it eventually relented under strict conditions, allowing the chariot procession, 'in a limited way without public attendance.' However, the public attendance and distancing requirements were flouted giving rise to a massive spike in

[74] 2020 SCC Online Bom 877 para 35.

[75] 2020 SCC Online Mad 1171.

[76] 2020 SCC Online 533.

COVID cases in Orissa. No cases were registered against attendees. Thus, Katrak and Kulkarni have argued that the State has interfered more with the affairs of the Muslim religion than the affairs of the Hindu religion, in the instances cited in these preceding paragraphs. In so doing, the State has fallen short of meeting its obligations under secularism: equal degree of interference with different religions.

1.2 Does Equal Respect Secularism Require State Interference in Religion?

The constitutional permission granted to the State to interfere with religion gives rise to another question; can secularism, not just justify, but *require* State interference? This way of the casting the net of secularism is what is at the heart of the Uniform Civil Code debate: a proposed law to unify the law relating to marriage, family, and inheritance. This debate has largely remained political up to now and its tide has risen and fallen over the 70 years of Indian independence. The details of this debate are beyond the pale of this thesis. Recently, however, this rhetoric has made its way into the courtroom.

In the *triple talaq* case, the question before the Supreme Court was whether the religious rule permitted in certain schools of Muslim law, which allowed Muslim men to divorce their wives by uttering *talaq* thrice, could be permitted to continue? To determine the constitutional answer to this question, the Supreme Court was required to consider the demands of the fundamental right to equality and the fundamental right to religion. The petition was brought by a Muslim woman who had been divorced in this manner, and she raised the contention that *triple talaq* violated her right to equality (Articles 14 and 15), by placing the power to divorce unilaterally and irrevocably in the hands of her husband. The Muslim Women Personal Law Board, which joined the petition as interveners agreed with the contention of the chief

petitioner. In addition, they proffered an argument from secularism; they argued that *triple talaq* places Muslim women in a worse off position that women from other religions.[77] The Attorney General of India, who also joined the petition, representing the Union of India, agreed with the equality contention raised above. In addition, he backed and strengthened the secularism argument made by the Muslim Women Personal Law Board. He asked whether in a secular democracy, religion can be a reason to deny equal status and dignity to Muslim women. No, he contended. The practice of *triple talaq* was repugnant to secularism because secularism could not abide unjust practices in the name of religion. This is because secularism means non discrimination on the grounds of religion, but through the *triple talaq*, case Muslim women were being treated worse than women of other religions only because they were Muslims.

In other words, the arguments of the Muslim Women Personal Law Board and the Union of India recast the issue from a sex equality issue to a religious equality (or secularism) issue. The argument of the Attorney General is produced hereunder:

> In the context of the above debate, it was submitted, that the pivotal issue that needed to be answered was, whether under a secular Constitution, Muslim women could be discriminated against, merely by virtue of their religious identity. And/or whether Muslim women, could be relegated to a status significantly more vulnerable than their counterparts who professed other faiths-Hindu, Christian, Zoroastrian, Buddhist, Sikh, Jain, etc. In other words, the fundamental question for determination by this Court, according to learned Attorney General was, whether in a secular democracy, religion can be a reason to deny equal status and dignity, to Muslim women.[78]

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[77] Shayara Bano and Ors v Union of India and Ors AIR 2017 SC 4609 [61].

[78] Shayara Bano and Ors v Union of India and Ors AIR 2017 SC 4609 [62], see also [65] [66] (Supreme Court of India).

An argument of this kind confuses equal respect for all religions with sameness of religion, and if accepted, creates grounds for State intervention. While equal respect for all religions is in line with Indian secularism, sameness of religions is not. The justices of the Supreme Court did not base their final decision on the question of secularism. The issue was settled on the grounds of sex equality. The practice of *triple talaq* was found to be manifestly arbitrary, i.e. capricious, excessive, disproportionate, irrational, and without adequate determining principle, because it empowered Muslim men to instantly and irrevocably divorce their wives on a whim, without reasonable cause, without affording any opportunity for reconciliation.[79] The call to equate secularism with religious sameness was not answered by the Supreme Court.

Contrast this case with the *Sabrimala* case, which dealt with a religious practice which restricted the entry of women aged 10-50 in the Sabrimala temple. This ban was challenged. The challenge was allowed on the ground that such a provision was against constitutional morality and the fundamental right of equality of women devotees, violative of dignity and liberty— even if we consider the ban to be an essential practice of religion. Secularism in this case was understood as giving everyone the right to their religion but not requiring that everyone practices their religion in exactly the same way. In other words, no argument was made that Hindu women suffer a disadvantage because of their religion, one that other religious women may not suffer because women belonging to other religions do not face bans from entering their places of worship. On the other hand, it was accepted that once everyone's right to religion is secured, the practices are open to constitutional scrutiny. This was not because of the dictates of secularism but because the

[79] Shayara Bano and Ors v Union of India and Ors AIR 2017 SC 4609 [284] (Supreme Court of India).

constitution itself provided for this in Articles 25-28. Justice Indu Malhotra dissented saying that in a secular polity, the right to religion meant had to be respected even if they practice unequal things, the courts had to respect them. However, she reached this conclusion not on an extended consideration of what secularism requires but on her conclusion that religious rights were not subject to Part III rights.

(c). Non-Interference of Religion in State Affairs

Finally, and most importantly for this thesis, the Supreme Court in the *Bommai* case stated that religion cannot mix in any secular activities of the State. In other words, the encroachment of religion, either implicitly or explicitly in State activities is forbidden. In the words of the *Bommai* court, 'In matters of State religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed.'[80] A case on point is the case of *Rajesh Mand and Or*s. v. *State of Kerala and Ors*.,[81] where the question was, whether the District Collector (the highest executive office in a District) could permit a Muslim body to construct a burial ground on their property, if such property was located close to a Hindu temple. The planning and construction licenses were to be handed out by the executive in this case, and as such, this was a matter of the State. The impugned order of the District Collector which permitted the construction, did not suffer from any technical legal frailty. However, the order was challenged before the High Court. The High Court had to consider the question whether permitting the burial ground was in line with the secular ideals of the constitution. The petitioners in the case, who opposed the construction, argued that there was a Hindu temple located nearby, and the presence

[80] *SR Bommai* v *Union of India* 1994 AIR 1918 (Supreme Court of India).

[81] WA No 1169 of 2014 in WP(C) 16966/2013 (High Court of Kerala at Ernakulam).

of a Muslim burial ground close to that would offend Hindu religious sentiments.[82] Dismissing the petition, the judge in the case remarked that allowing such claim (that of hurt sentiments) to stop another person from exercising their right would be the 'death knell' of Indian secularism.[83] The land belonged to the group that wanted to set up the burial ground, and as long as they had met other technical legal conditions for doing so, another's religious sentiments could not be a reason for stopping them. Thus, religious sentiments of one group could not be a reason to decide a particular State matter in a particular way.

In fact, even private entities, when discharging State functions, must abide by the principle of secularism.[84] One such function has been recently held to be the activity of imparting education, particularly, elementary education, which has been incorporated as a fundamental right of citizens between the ages of 6 and 14. If elementary education is an activity in which citizens must necessarily partake then education providers need to conform to the constitutional values of the state. The constitutional value of secularism as relevant in the Indian context means that schools cannot provide exclusive religious education on one religion to the exclusion of other religions: 'it negates neutrality, promotes discrimination and denies equal treatment.'[85] Religious instruction or study based on religious pluralism though, is permitted.[86] Though minority educational institutions have a right to set up their own

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82 A No 1169 of 2014 in WP(C) 16966/2013, para 3 (High Court of Kerala at Ernakulam).

83 Ibid [8]. Actually the phrase death knell was used by the Single Judge bench where this case was first heard. This particular judgment reiterates that reasoning and refuses to interfere with the justification.

84 ILR 2020 (1) Kerala 462 [17], [18] (Kerala High Court).

85 ILR 2020 (1) Kerala 462 [23] (Kerala High Court).

86 ILR 2020 (1) Kerala 462 [23] (Kerala High Court).

educational institutions, if they are providing elementary education, and if they seek State recognition, then they must conform to this understanding of secular education, even though they may not be receiving any aid from the State.[87] This means that such a school cannot provide religious instruction on one religion only, but it would be permissible for them to provide religious instruction on multiple religions.[88]

It is difficult to reconcile this case with the understanding of secularism which prevents the mixing of State affairs and religion. However, I argue that this case should be understood in its context. This case concerned an educational institution set up by a religious body. The right of religious institutions to provide religious instruction is guaranteed by the constitution in certain situations.[89] At the same time, religion cannot mix with State affairs. Since the incorporation of the new fundamental right to elementary education as Article 21-A, the educational institute also became a State functionary with respect to education for 6-14-year olds. Therefore, the court in this case, interpreted its religious instruction right consistent with secularism.

Further, this feature of secularism also prohibits the encroachment of religion in State affairs. The encroachment may not be in the form of a direct religious takeover of the State by religion. *Bommai* has stated that religion encroaches upon State affairs even when a particular political party pursues an unsecular mandate.

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[87] In fact, in this judgment, the court also passed a general order directing other schools as well to desist from imparting religious education without government permission. Does this affect the fundamental right of minority institutions to set up their own educational institutions? This question was not answered by the present case.

[88] It is difficult to know, however, how many religions should be taught in the school so that religious instruction is in line with the dictates of secularism. At the same time, even if a school provides religious instruction on multiple religions, does its failure to provide the same on some other religions run afoul the constitutional ideal of secularism? Such questions remain unanswered by the doctrine at the moment.

[89] The Constitution of India 1950, art 28(2).

Some instances of direct encroachment have been proscribed by legislation. For example, section 123(3), Representation of People Act, 1951 declares as a corrupt practice any attempt to procure votes in an election on the basis of religion.[90] However, indirect encroachment of religion upon State matters is also forbidden. For example, in the *Bommai* case, the chief ministers of Himachal Pradesh, Madhya Pradesh and Rajasthan, were members of the RSS, the organization responsible for the demolition of the Babri Masjid. The actions of their governments seemed to demonstrate support for the demolition. It was alleged that the State governments in question welcomed the volunteers who were involved in the demolition back to their States and in many instances members of these governments were part of the receiving party. These actions seemed to signify an unsecular character of the government. This was an example of how religion can encroach upon State affairs, indirectly. The *Bommai* holding implies that even in cases where there is an indirect encroachment of religion in State affairs, an objection from secularism is apposite. The following quotation from that case summarizes the position stated above:

> 243. It is clear that if any party or organisation seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution would certainly be guilty of following an unconstitutional course of action. Political parties are formed and exist to capture or share State power. That is their aim. They may be associations of individuals but one cannot ignore the functional relevance. An association of individuals may be devoted to propagation of religion; it would be a religious body. Another may be devoted to promotion of culture; it would be an (sic) cultural organisation. They are not aimed at acquiring State power, whereas a political party does. That is one of its main objectives. This is what we mean by saying 'functional relevance'. One cannot conceive of a democratic form of government without the political parties. They are part of the Political system and constitutional scheme. Nay, they are integral to the governance of a democratic society. If the Constitution requires the State to be secular in thought and action, the

90 Representation of People Act 1951.

> same requirement attaches to political parties as well. The Constitution does not recognise, it does not permit, mixing religion and State power. Both must be kept apart. That is the constitutional injunction. None can say otherwise so long as this Constitution governs this country. Introducing religion into politics is to introduce an impermissible element into body politic and an imbalance in our constitutional system. If a political party espousing a particular religion comes to power, that religion tends to become, in practice, the official religion. All other religions come to acquire a secondary status, at any rate, a less favourable position. This would be plainly antithetical to Articles 14 to 16, 25 and the entire constitutional scheme adumbrated hereinabove.[91]

The requirement to implement the secular ideals of the constitution also rest upon the court since it is a State institution. The third feature of secularism detailed above leads to the conclusion that if religion dictates the decision of the court in a secular matter, and does so without presenting properly public reasons for the same, the decision can be said to be illegitimate under the secularism guarantee of the constitution.

It is important to note there are some important deviations from the doctrine, presented most acutely in the *Ismail Faruqui* case[92] and the Hindutva cases[93] (as they are collectively called). In the *Ismail Faruqui* case, there was a constitutional challenge to a Central Act[94], which sought to acquire a disputed piece of property between the Hindus and Muslims and proposed to rebuild it in a specific way. Specifically, the Act proposed to build a trust for a Ram temple, a mosque, a museum, and to provide amenities to the worshippers. The challenge was that this Act did not treat the disputed land as in fact disputed, and allowing such an Act to proceed would in effect privilege the claim of the Hindus on the land. The Supreme Court rejected

91 *SR Bommai* v *Union of India* 1994 AIR 1918 [243] (Supreme Court of India).

92 (Supreme Court of India).

93 Refers to the group of eleven cases which were collectively considered. The central case was Dr Ramesh Yeshwant Prabhoo v Shri Prabhakar Kashinath Kunte and Ors 1995 SCALE 1 (Supreme Court of India).

94 Acquisition of Certain Area at Ayodhya Act 1993.

this argument and held that secularism had thrived in India because of Hindu tolerance and that such the Act did not threaten it in any way. They failed to see that their ruling effectively privileged one religion's claim over the land although the property was in dispute. Similarly, in the Hindutva cases, the speeches made by certain candidates up for election in the State of Maharashtra came under challenge. These speeches sought to ignite communal disharmony and persuade the populace to vote for the candidate on a fear-based message: vote for me or else the Muslims will turn India into a Muslim country. Sections 123(3) and 3(a) of the Representation of People Act, 1951, classify as corrupt practices any attempt to persuade a voter to vote or refrain from voting for any person on the ground of their religion, and the incitement of hatred among various religious communities. These are certain aspects of codified secularism, which undoubtedly flow from the basic constitutional commitment to secularism in India with substantial equality as its animating principle. In this case as well, the Supreme Court noted that there was nothing corrupt in these speeches. Instead, the court ruled that those speeches promoted the Indian way of life and India's ethos and appeared as a criticism of the appeasement politics practiced by other parties, which sought to provide certain privileges to minority religious groups. Ratna Kapur has argued[95] these judgments equated Hindutva, a particular exclusionist incarnation of Hinduism, with the constitutional commitment to secularism. However, these judgments were given by Supreme Court benches that were considerably smaller than the *Bommai* bench and are at best, deviations from the doctrine of secularism as has been identified by the *Bommai* bench. It is important to note that these cases present complex questions on the true meaning of secularism and at points

[95] Ratna Kapur, 'A Leap of Faith: The Construction of Hindu Majoritarianism Through Secular Law', (2014) 113(1) South Atlantic Q.

intersect with the scope of the freedom of religion guarantee in the constitution. By contrast, the religious and cultural claims that I am studying in this thesis clarify the meaning of secularism in more insidious circumstances, often when there is no religious clash between groups, and therefore these claims remain understudied as possible intrusions into Indian secularism.

Before concluding this overview, it is important to mention a recent case of the Allahabad High Court. In the case of *Allahabad Heritage Society and Ors* v *State of UP and Ors*[96], the High Court was asked to decide whether changing the name of Allahabad to Prayagraj was within the competence of the UP Government. The question primarily revolved around potential substantive and procedural violations of the Uttar Pradesh Revenue Code, 2006 ('Revenue Code'), which allowed the government to set the limits of a revenue area, including changing its name under certain conditions. In addition, a question also arose whether the name change violated the constitutional principles of secularism, for reasons which will become clear upon perusing the Cabinet note accompanying the name-change decision.

The note stated that there was a relentless demand from the people of Allahabad to change the name of the city to Prayagraj. Further, it stated that the Board of Revenue in UP had ascertained that there were 14 river confluences (*prayags*) mentioned in the ancient scriptures of which Allahabad was the only one whose name had been changed, although it was the chief of all confluences (*prayagraj*). The Board had furher ascertained, the note mentioned, that the change of name from Prayag to Allahabad had always created doubt at the national and international level, and therefore it was logic and just, to return the ancient city, which represented all

96 2019 (3) AD J616 (Allahabad High Court India).

cultures, to its original name. Doing so, would also bolster Indian culture nationally and internationally, and increase religious tourism. Further, the note stated that the proposed name change would also be in line with the city's Vedic and Puranic identity. Therefore, the Cabinet note chiefly highlighted the significance of the city in Hindu religious scripture and Hindu religious life. Could a State action motivated by religious reasons pass constitutional muster?

The court held that the UP Government had not violated any procedural or substantive provisions of the Revenue Code in the name-change process. Then it set out to consider whether the name change flouted Indian secularism. It found that it did not. In coming to its conclusion, the court noted the heterogeneity and religious tolerance which marked Indian history, and which was noted also in the *Bommai* case.

> India is a heterogeneous society where different cultures of the world have settled. This diversity necessarily gave rise to conflict, but the older leaders handled these matters with sagacity, by preaching the philosophy of accommodation and tolerance-- which can be seen as the essential pillars of the bridge of secularism, which itself operates as a bridge from tradition to modernity.[97]

The court cited the *Bommai* case further to note that secularism in India bears a positive and affirmative ring. It operates separately from personal faith and is a political concept revolving around the State and its institutions. It is limited to the material and temporal aspects of life. It believes in freedom, equality and fellowship. It does not believe in harking back to a country's history or 'seeking shelter in its spiritual or cultural identity dehors the man's need for his full development.'[98] 182].

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97 2019 (3) AD J616 (Allahabad High Court India), para 96. Cited from Bommai.

98 2019 (3) AD J616 (Allahabad High Court India) para 96, cited from Bommai para 182.

In effect, the aspect of secularism which emphasises tolerance and respect for the other's faith was emphasised in the court's extract from *Bommai*. The court further noted that Bommai had stated that true religion does not teach hatred, and secularism requires that one should never stay aloof or insensitive to the suffering of any religion-- whether one's own or someone else's. The tolerance aspect of the secularism was also noted in *Valsamma Paul* v *Cochin University*[99] which the court cited next.

This case noted that the Indian culture is a blend of several cultural strains brought together by a unity of spirit. This unity was the most remarkable and everlasting feature of Indian culture--university in diversity. This spirit fosters cordiality and tolerances and makes possible the continuity of India. Therefore, it should be the endeavour of everyone to 'develop several identities which constantly interact and overlap and prove a meeting point for all members of different religious communities, castes, sections, sub-sections and religions to promote rational approach to life and society and [this] would establish a national composite and cosmopolitan culture and way of life.'[100]

The next precedent that the court took recourse to was *Ms Aruna Roy & Ors* v. UOI[101] wherein the Supreme Court once again had the occasion to opine on the meaning of Indian secularism. Once again, that case reiterated that secularism means developing a understanding and respect towards different religions. *Sarva-Dharma*

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99 (1996) 3 SCC 545.

100 2019 (3) AD J616 (Allahabad High Court India) para 97, cited from Valsamma para 22.

101 (2002) 7 SCC 368.

Sambhav, equal respect for all religions, and not *Sarva Dharma Abhav*, the total negation of all religions.

The court then applied this understanding of secularism to the present question. Does changing the name of a city based on its cultural and religious significance from the ancient to the present times, as signified by literary and historical texts, offend the secular ethos of the constitution? The court answered this question in the negative. It reasoned that the evidence placed on record has shown that the city was a major centre of culture and pilgrimage, its name mentioned in the accounts of foreign travellers from distant lands. Further, it has been the site of centuries of cultural social transactions. Therefore, the site identified by the name of 'Prayag' is, in the words of the court, 'a reflection of the composite Indian culture.'[102] Accordingly, the reasons given for the name change are not without any legal basis.

The court here implies that because the site in question was a melting pot of different cultures and events of historical and religious significance, re-naming it to reflect the name it had when many of those events took place, exemplifies it as a site of Indian secularism— i.e., the peaceful co-existence of different cultures. However, when the site was named Allahabad, was the same idea of secularism not being promoted— if the new name does not offend secularism, did the old name did? It could be argued that the change of name could trigger communal feelings and negatively affect the feeling of tolerance that secularism seeks to promote. Perhaps, secularism does not cover such consequentialist understandings of actions— its purpose if not to establish tolerance, but to identify it. It seems a difficult line of reasoning to accept given the court's own description of how the Indian understanding

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[102] 2019 (3) AD J616 (Allahabad High Court India), para 106

secularism was developed. It seems very much an instrument of not only identifying but also propagating peace. The court's reasoning is silent as to the consequences of the name change on the meaning of secularism. Perhaps the court was not required to examine this point. It can be argued that the point that the court was required to determine was only whether the new name offended secularism. Apart from the question I have raised above regarding how a name can exemplify a spirit of tolerance, another point needs to be noted in this case. In citing the Supreme Court precedent of SR Bommai, the court had reiterated this sentence from the case: '[secularism] does not believe in hark back either into country's history or seek shelter in its spiritual or cultural identity.'[103] Having cited so, the court does not justify its deviation from this principle laid down by the Supreme Court and considers historical and literary references as a valid basis for name change. The case is currently under appeal in the Supreme Court.

6. Applying Secularism and Public Reason to the Dataset

The foregoing sections have provided an overview of the two main frameworks that will used to analyse the religious and cultural statements that have been extracted from the dataset. The doctrine of secularism defines not only the Indian State's official stance, but also the scope of its interaction, with religion. The doctrine as developed up to the present point only applies to religion. Whether it applies also to define the State's position with respect to different cultural views is a matter that remains unanswered by the court and the constitution. Religion and culture have several convergences. Many religious commands translate into cultural attitudes such that they have a life independent of religion. Similarly, culture contributes to the

[103] *Bommai* [120].

interpretation and development of religion. With a religion as diffuse as Hinduism, which has many deities, several holy books, and several regional traditions, separating culture from religion may indeed be an illusory exercise. It is possible that in the future the Supreme Court will find that the concept of secularism defines the State's relation with both religion and cultural views. The court may find that functionally, these views are similar, and the commitment to a constitution means that the State needs to decide according to the values embedded in that document, and not, in the absence of properly public reasons, as per the religious and cultural views that seem most persuasive. However, in the absence of such equivalence, I employ the following yardstick to examine the arguments of interest for this thesis. For religious claims that are presented in a particular matter, I examine their propriety in constitutional litigation on the threshold of both secularism and the public reason proviso, and for the cultural claims presented in the cases, I examine their propriety only on the threshold of the public reason proviso.

To recall the idea of public reason and the proviso here, before proceeding to dealing with the cases below, public reasons are the reasons that subjects of a constitutional democratic, secular State may give one another when deciding constitutional questions.[104] In the case of India, the content of that public reason is the subject of constant discovery through the principles and values embedded in its largely liberal constitution. To engage in public reason, Rawls argues, is to appeal to the conceptions of these political values, while debating constitutional questions. As I

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[104] Rawls uses the phrase 'fundamental political questions' to identify the arena of the application of public reason. However, phrasing seems to invite the conclusion that in less fundamental political questions, one may employ comprehensive religious or non-religious doctrines to arrive at an answer. What if these less fundamental questions are nonetheless constitutional questions or matters of the State? If comprehensive religious or non-religious doctrines can indeed be used to answer them then can the State seriously maintain that it is a constitutional democratic secular set-up?

have demonstrated in the theoretical chapter, certain ideals, principles and lines of inquiry, guide the discovery of these conceptions. The proviso to public reason allows one to introduce into this debate comprehensive religious doctrine and cultural claims so long as one can 'give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.'[105]

(a). Beauty Pageant Cases

In the beauty pageant cases, I noted the arguments of the litigants who were opposed to the pageants. They petitioned the court to order the State to prohibit these contests because they argued that such competitions were opposed to Indian culture and traditions (*Mahila Jagran Manch*)[106]. It is to be remembered, as I mentioned in the methodology chapter, that the religious and cultural claims do not appear in isolation, most of the time. They are accompanied by other legal claims. However, the scope of this thesis is to examine the courts' treatment of religious and cultural claims alone. To be sure, there was no legal prohibition on organizing beauty pageants. Beauty pageants could certainly be regulated by the State in the interest of public order, but in the present case no restrictions had been put in place by the State.

As I have demonstrated in the summary of the cases, the organizers of the beauty pageants countered these cultural claims with cultural claims of their own. They tried to demonstrate that the contest rules had been made keeping in mind the Indian culture and tradition, and because of that reason, the contest did not offend cultural traditions of India. Specifically, they pointed to the following rules: that the contestants had to be women between the ages of 17 and 25, who were single,

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105 John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LRev. 765, 776.

106 *Mahila Jagran Manch* v. *The State of Karnataka and Ors* WP 25747/1996 (Karnataka High Court).

unmarried, and had no children. Additionally, they were not allowed to drink alcohol or smoke cigarettes and there would be no bikini round in the pageant. In the methodology chapter, I have already explained why these are cultural arguments. Summarily, I have classified them as such because they draw on several cultural tropes about the 'ideal Indian woman.'

These claims agreed in principle with the petitioners on a conception of Indian culture and the need to design rights in accordance with culture. Where their stand differed from the petitioners was that while the petitioners argued that no version of a beauty contest could be permissible culturally, the organisers thought it was possible to organise a beauty pageant by modifying the rules according to cultural mores. The judge in this case decided correctly when he noted that India was comprised of different cultures. There was no singular definition of Indian culture and tradition. What was acceptable in certain sub-cultures was not acceptable in others, and unless a law had been violated, it was not a fit case to rule. Although the judge did not identify the animating reason for his decision, his instincts were right: he noted that no one group had the moral right to insist that everyone follow their culture. In fact what had happened was that no public reasons had been presented for the cultural claims presented by both sides of the litigation. The petition was dismissed accordingly.

Presumably in this case the petitioners were making an argument that beauty pageants should be banned in exercise of the morality restriction on the freedom of speech and expression. This was not explicitly stated at any point in the judgment as they did not frame their challenge in any constitutional terms. However, even if this was the intention, there was no attempt by the petitioners to persuade the judge that the political and moral conceptions of the morality restriction included an

understanding of morality that they were forwarding. Further, there was no attempt to demonstrate that any constitutional values and principles required ordering a stop to the pageant. In other words, there was a failure to provide properly public reasons, independent of the reasons presented by the cultural views, that the views forwarded by the petitioners were supported by the principles and values of the constitution. However, even if they had done so, it would have likely been unsuccessful because it is the State, and not the Court which can impose restrictions on the grounds of morality. The Court is empowered only to assess the constitutionality of that restriction.

When this decision was appealed before the division bench of the High Court[107], the same argument was raised by both parties. Here, the court interjected on Indian culture and noted that while beauty pageants were not opposed to Indian culture, they had to be conducted in a manner that is consistent with it. The division bench noted that Indian women had a unique position in Indian culture which needed to be protected, and that the serving of alcohol in the pageants would be opposed to the ethics and morals of the Indian society. Accordingly, the judge passed some regulations that had to be complied with by the organizers to conduct the contest. In the judicial notice chapter, I have explained why Indian culture was a fact in issue in this case and it was beyond the powers of the judiciary to take judicial notice of its particulars and rule accordingly. Here, I will explain how the surmises of the judges offended Indian secularism.

Analysing the claims from the public reason proviso, I observe that the equivalence of these claims with the constitutional commitments of the country were

[107] Mahila Jagran Manch Bangalore v. State of Karnataka and Ors. 1999 (4) KarLJ 295 (Karnataka High Court).

not shown. Cecil Laborde has argued that State proffered reasons are reasons that the public can access and engage with, even if they do not accept them. In constitutional interpretation, this means that the judges are under a duty, a duty of civility, to demonstrate that the cultural values propounded above, are supported, independently, by justifiable conceptions of the political values embedded in the constitution. The conception of these political values, public reason in other words, should be discoverable by principles, standards, ideals, lines of inquiry; an interpretive exercise. The judge failed to fulfill the duty of civility required of constitutional adjudication. He did mention that Article 51A placed an obligation on the State to ensure the dignity of women but there is no engagement with this provision. Article 51A(e) places a fundamental duty on the citizens of India to denounce practices which are derogatory to women. Fundamental duties are not enforceable by writs although the Supreme Court has previously announced them to be aids in constitutional interpretation, and has stated that they can be used as guidance to frame constitutional remedies.[108] Specifically, with respect to Article 51A (e), the obligation created by that duty has been used in a few cases to argue against a proposed restriction on women's rights.[109] However, the court has not paid any attention to those arguments and as such, although the political value has been identified, the conceptions of those values justifiable on the threshold of the constitution have not been delineated. The principles and the lines of inquiry that need to be followed for discovering politically reasonable conceptions embedded in this Article have not been excavated. In the absence of this, other constitutional values and principles will provide the public

[108] AIIMS Students' Union v AIIMS and others (2002) 1 SCC 428 and In Re Ramlila Maidan Incident Dt 4/5.6.2011 v Home Secretary Union of India and Ors Suo Motu Criminal Writ Petition (Crl) No 122 of 2011(Supreme Court of India).

[109] For example, Indian Young Lawyers' Association and Ors v State of Kerala Writ Petition (Civil) No 373 of 2006 (Supreme Court of India) and Shayara Bano v Union of India and Ors WP(Civil) No 118 of 2016 (Supreme Court of India).

reason against which the question of liberties, specifically, women's liberties will be resolved. However, this does not happen in this case. Although the litigants argued that beauty pageants offended Articles 14, 19, and 21, there was no effort from either the litigants or the judges to ground their arguments in the doctrine or jurisprudence or arguable conceptions of those Articles, which either provided independent public reason, or illuminated the content of 'practices derogatory to women' in a way that justified the extinction of their liberty to participate in beauty pageants. In any case, as I have mentioned above, they would have not succeeded even if they had done so because it is the State, and not private persons, that is empowered to restrict fundamental rights on morality grounds. As the judges failed to engage in their duty of civility, they failed to invite a duty of reciprocity from the subjects. In other words, the decision of the case, to the extent that it was based on cultural claims, was illegitimate.

(b). Marital Rape and Sex Work Cases

As the reader may recall from chapter 2, marital rape is not a crime in India. An act of non-consensual sex of a man with his wife is not classified as the crime of rape if the wife is above 15 years of age. In the case of *Independent Thought*[110], the petitioners sought to challenge the marital rape exception to rape with respect to girls within the age of 15 and 18. Previously, I have summarized the arguments and the ruling of the court. Here, I will study the claims used by the Union of India to defend its stance. The Union of India's defense of this exception was based entirely on a specific cultural idea of marriage; that child marriage is a tradition in India and should be respected, that upon marriage, the girl gives irrevocable consent for sex, and that if

[110] Independent Thought v Union of India and Anr (2017) 10 SCC 800.

marital rape was criminalized the whole institution of marriage would crumble. The State's argument provided no independent public reasons that support this conception of rights within a marriage. Therefore, the State failed to fulfill its duty of civility. To understand the rights and obligations that may flow in an intimate relationship such as a marriage, a purely moralistic conception based on a certain view of life that characterizes the role of the spouses with respect to each other, will fail to satisfy the constraint of reciprocity, because reasonable people, including deeply religious and culturally entrenched people, may disagree about this conception, given pluralism of thought. Therefore, this moral conception has to be rejected in favour of a political conception of marriage, one that is based on constitutional values such as equality, dignity, and liberty, in the case of the Indian constitution. In fact, the court in this case did engage in public reasoning, by appealing to the conceptions of the political values found in the constitution, viz., the right to equality and the right to life, rejecting the moralistic reasons presented by the State in favour of the public reasons presented by the petitioners.

Similarly, in the sex work cases of *Shama Bai*[111] and *Smt. Kaushailiya*[112], the court was faced with deciding the constitutionality of the SITA. While *Shama Bai* did not find any Sections unconstitutional for the technical reasons I have explained in the summary[113], *Smt. Kaushailiya* found Section 20 of the Act which empowered the Magistrate to indefinitely expel sex workers from their area, constitutional. To understand the obligations of the State toward different professions, the court should

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111 Shama Bai and Ors v State of Uttar Pradesh Lucknow AIR 1959 All 57 (Allahabad High Court).

112 *Smt. Kaushailiya* v State AIR 1963 All 71 (Allahabad High Court).

113 The petition was found to be unmaintainable because the petitioner had not yet suffered any direct harm under the Act.

have reasoned on the basis of public reasons which define the relationship between the State and the professional. The public reasons would encompass conceptions of different political values found in the constitution: equality, liberty, and the fundamental right to a profession. These fundamental rights can only be curbed by the State through reasonable restrictions. Instead, the court adopted a moralistic lens to define the scope of obligations that the State owes to different professions, and found that the inherent immorality of sex work demanded considerably less protection than other respectable professions. The judge, in *Vanga Sittaramana* v. *Chitta Sambasiva Rao and Ors*[114], also let his moralistic view of sex work as a profession influences his view on the reasonableness of a restriction. One of the questions raised in the case was whether Section 20 of the SITA which, among other things, gave a District Magistrate the power to issue an order for the removal of a sex worker from the area of her professional practice for an indefinite time, was constitutional. In other words, the question asked in this case was whether an indefinite order or removal could correctly be classified as a 'restriction' on the right to profession, or would it be more apt to classify it as a prohibition on the profession? The judge found this unlimited discretion constitutional because his moralistic view of sex work coloured his estimation of what a reasonable restriction on a profession could be. In this case, the judge found himself ruling that an indefinite order of removal, though it would have the effect of prohibiting and not simply restricting professional opportunities for a sex worker in their regular area of work, was reasonable, because the judge's moralistic view prevented him from considering the sex worker worthy of the same professional rights as practitioners of other professions. Holding the indefinite period of the removal order constitutional, the judge ruled it justified stating that, 'it is rather

[114] AIR1964AP400 (Andhra Pradesh High Court).

difficult for even the Magistrate to divine at the time of making the order how long it will take for the woman to be rid of such tendencies as are likely to pollute the atmosphere.'[115]

(c). Abortion Cases

The *Ashaben*[116] case challenged the constitutionality of one of the key provisions of the MTP, which restricted the period within which an abortion could be performed to 20 weeks. The court concluded that the constitution recognized the reproductive choices of a woman, but the State had a compelling interest in protecting life, and the MTP provided a suitable compromise; the 20-day period was not unconstitutional. Although the decision of the court was based in constitutional precedent, it padded its decision with views on abortion from different religions and cultural quarters.

The judge noted that abortion was a moral sin and cultural leaders such Mahatma Gandhi was himself opposed to it. He noted the Jain and Buddhist proscription against violence and interpreted the Rig and Atharva Veda in a way that outlawed abortion. Concentrating only on the religious claims made in this case, these claims were pluralistic because they employ the collective force of several religious views. The Indian secular commitment, especially the first characteristic that I have identified above, which is that the State cannot give patronage to any one religious view may at first sight seem to allow such a multi religious claim to be weighed as a legitimate claim in the adjudication process. The argument could be that by accepting

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[115] Similarly, in the Nitu case, the court found that the preventative powers under Section 18(1) were justified on the grounds that sex work in certain public places like mosques, schools, temples, provides extenuated moral harm to public morals. Nitu and Ors v The Govt of the National Capital Territory of Delhi and Ors WP (Civil) No 4414/2012 (Delhi High Court). Add Sahyog Mahila Mandal and Anr v The State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003.

[116] Ashaben v State of Gujarat and Ors 2015 AIR CC 3387 (Gujarat High Court).

a religious claim that many Indian religions may advocate, the State is not patronizing any particular religion, but enforcing the collective will of all of them.

However, this is only a partial analysis of the situation. The third feature of Indian secularism is that religious claims cannot encroach upon State affairs. This proscription provides protection not only against religious majoritarianism, but also against multiple religions encroaching on State affairs. What is forbidden to one religion is forbidden to all religions: religions cannot regulate State affairs. The catch-phrase of Indian secularism, 'unity in diversity', cannot be employed in a way that demolishes the very pillar on which Indian secularism stands. While a multiplicity of religions are allowed to flourish in the public and private sphere, none of them, either singly or jointly, can influence a matter which properly falls within the purview of the State. Abortions in India are regulated by the MTP Act, which is not a religious statute and its stated objective is to not control a religious right. It is an Act that has been enacted to provide the power to medical practitioners to terminate the pregnancy under specified conditions to save the life of pregnant women.[117]As the regulation of abortion is a State matter, religious doctrine, in the absence of public reason, cannot decide the matter.

As always, if properly public reasons exist, independent of the religious imperatives, to support the principles propounded by the various comprehensive religious doctrines, the objections from secularism fails. However, this case did not require such a consideration because the decision was based on the values embedded in Article 21. Therefore, by citing various religious opinions on the matter, the judge

[117] As such, the Act exists as an exception to the general criminal proscription against 'Causing a Miscarriage of a Woman', with or without her consent. Section 312 of the Indian Penal Code 1860, s 312.

was merely providing a sociological basis for honouring the public reason. This exercise does not offend the duty of civility and therefore the engagement with religious teachings in this case was carried out in a constitutionally legitimate manner.

(d). Right to Die Cases

In the right to die case of *Rathinam*[118], the constitutionality of Section 309 of the IPC which criminalizes attempts to suicide, was challenged in the Supreme Court of India.[119]The question was whether the right to life guaranteed to all persons under the Indian constitution, allowed a person to take their own life.

The court interpreted the concept of Article 21 to carry within it the value of dignity. Therefore, the right to life guaranteed a right to life with dignity, a value that stands in contrast with a life of mere animal existence.[120] In the theoretical chapter, I have shown that the dignity conception of Article 21 has become one of the primary conceptions of this Article. So, the judgment was engaged with a politically sanctioned value here- dignity. Quality of life assessed through physical and mental health which is necessary to enjoy the political and civil goods of the State was identified as a desirable standard for the achievement of this value. The position of the law at that moment was that the right to life could not be waived.

The court observed that Hindu religion envisions four stages of life: Dharma, Artha, Kama, and Moksha. Once a person has attained these stages, according to some scholars, a man has a moral right to terminate his life. The court also cited a statement

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118 P. Rathinam and Ors. v. Union of India and Ors. AIR 1994 SC 1844 (Supreme Court of India).

119 P. Rathinam and Ors. v. Union of India and Ors. AIR 1994 SC 1844 (Supreme Court of India).

120 P. Rathinam and Ors. v. Union of India and Ors. AIR 1994 SC 1844, 8 (Supreme Court of India).

by Pope John Paul II, the religious leader of the Catholic faith, who had stated that when death is imminent despite employing the available means of treatment then it is not unconscientious for a person to refuse further treatment. The court referenced, in addition, the Encyclopedia of Religion and noted that it discussed various religious views on the concept of 'life' but ultimately concluded that no universally acceptable concept accompanies this term. Accordingly, 'life' may not end with the end of the body. The encyclopedia advanced the view that one who takes their own life may not be actually committing a sin against their religion. The court then referenced Hindu mythology reminding the readers that Rama and his brothers had taken *Jalasamadhi*[121] in the Sarayu River, and that even Mahavir Jain and Buddha had achieved death by seeking it.[122] Thus, the court concluded that suicide is not an anti-religious activity. In addition to this survey of religious views, the court also noted whether suicide was immoral, whether it harmed public policy, and whether it caused adverse sociological consequences. The court answered all these questions in the negative. Finally, since attempts to suicide do not harm others, at least physically, no case was made out, in the court's view for the State's interference with the liberty of an individual to take their life. Accordingly, the court ruled that s 309 of IPC was void under Article 21.

From a Rawlsian public reason perspective, this mode of reasoning is illegitimate. The Rawlsian theory requires that the values discovered within various constitutional commitments must be ordered according to the scheme dictated by the constitution, and not according to the logic of the comprehensive religious or non-

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[121] The relinquishment of life by immersing oneself in water.

[122] P. Rathinam and Ors. v. Union of India and Ors. AIR 1994 SC 1844, 18 (Supreme Court of India).

religious doctrine. In other words, constitutional conceptions are not 'puppets manipulated behind the scenes by comprehensive doctrine.'[123] This step in the discovery of public reason is very important and its importance can be seen in accounting for hard cases such as the present one. The political value identified under the right to life guarantee was that of dignity. The duty of the court was to base its discussion on standards and lines of inquiry (such as the quality of life standard which the court identified from precedent) provided by that value. Instead the court invoked comprehensive doctrines of religion, morality etc. to identify and order the values within the concept of Article 21. Therefore, the decision arrived at by the court was constitutionally illegitimate.

As I have mentioned in the abortion case above, it is important to draw a difference between those decisions in which religious and cultural views merely provide sociological reasons for honouring public reason without changing the nature and content of public reason, and those which use religion and culture to order the values found within different political concepts of the constitution. While the former kinds of decisions are not in violation of the commitment to secularism and public reason, the latter kinds of decisions violate both these commitments.

Another example of the same can be observed in the dataset in the case of *CA Thomas Master*[124], in which court was required to answer once again whether the right to life could protect the right of an individual to choose to end his life. The petitioner sought permission of the court to end his own life as he had fulfilled his duties. He argued that the fundamental right to life under Article 21 allowed him to choose death as well. He argued that the same was permitted under ancient Indian and

[123] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LRev. 765, 777.

[124] CA Thomas Master and etc v Union of India and Ors 2000CrlJ3729 (Kerala High Court).

Chinese civilizations. He sought to draw a distinction between suicide and the right to choose death; the former being an act of a frustrated person while the latter being the choice of a person who has fulfilled all his duties in life.By this time, the question of whether taking one's own life is permissible had already been decided via the litigation on constitutional challenge to section 309 of the IPC (*Gian Kaur* case). The petitioner in this case sought to distinguish his prayer from the ambit of S.309. He argued instead that the *Gian Kaur* case was unduly influenced by Anglo-Saxon jurisprudence and the court had failed to consider ancient Indian theological texts while arriving at that decision.

The Kerala High Court failed to see a distinction between the right to end one's life after completion of all duties, and the right to commit suicide. It reasoned that the whole debate around this question required answering whether the right to die was a value embedded in the right guaranteed by Article 21. The court noted that this question had been put to rest by the Supreme Court. Without going into those reasons, the court noted that the views of Manu, the author of the Manusmriti, had been taken into account in the *Gian Kaur* case. The court reiterated some *shlokas* from that book that were cited in the *Gian Kaur* case. The *shlokas* are as under:

> 31. Or let him walk, fully determined and going straight on, in a northeasterly direction, subsisting, on water and air, until his body sinks to rest.
>
> 32. A Brahmana having got rid of his body by one of those modes (i.e. drowning, precipitating burning or starving) practiced (sic) by the great sages, is exalted in the world of Brahmana, free from sorrow and fear.[125]

The court also reminded that petitioner that the *Gian Kaur* court had also employed some notes from the philologist Max Muller on the Laws of Manu, which had

[125] CA Thomas Master and etc v Union of India and Ors 2000CrlJ3729 [14] (Kerala High Court).

confirmed that death by starvation was considered a befitting way to end one's life if one were a hermit. The note also mentioned that Jain ascetics also considered this approach to end one's life particularly meritorious.

However, after making these observations that court returned to the observations made in the *Gian Kaur* case. The court had investigated the question whether the right to life included a right to choose not to live. It found that the value encompassed within the right to life guarantee was the protection of life, and was unable to construe that value ever permitting the extinction of life. Additionally, the court also found the value of dignity embedded in this guarantee, and reasoned that while dignity enhancing activities would hence be covered by the right to life, dignity extinguishing ones would not. These views of the court came from a moral view which characterizes how people should regard their life: as sacred, holy and inviolable. Before finally concluding its decision in this case, the court also noted another Supreme Court judgment that reasoned that the value that was sought to be protected by Article 21 was self-preservation. It cited verses from the *Garuda Purana* to support the view that life was precious and inviolable. Ultimately, in the present case, the court did not allow the petition. Here, as in the *Gian Kaur* case, though several values were identified within the concept of the 'right to life', they were ordered not according to the features and structures of Article 21, but according to how they occurred within the comprehensive religious doctrines of the judge. In the words of John Rawls, they were 'manipulated from behind the scenes by

comprehensive doctrines.'[126] This is a failed attempt at public reasoning and consequently does not create a duty of reciprocity among the subjects.[127]

7. Cases in Which No Religious and Cultural Claims were made

This category refers to a null set of religious and cultural claims, but these cases present an important case study in understanding secularism and public reason. It is because in these cases both the litigants and the judges realise that religious and cultural claims have no legitimate role to play in the outcome of the case and accordingly they present no claims from this realm. These cases do not need to surpass the objection from secularism or meet the public reason proviso because in the first place, the arguments in these cases are based on different political conceptions of constitutional values. Seven cases which form part of the dataset display this phenomenon. Examples of this phenomenon can be found in two abortion cases[128], two right to die case[129], the bar dancing appeal[130], and two cases concerning sex work[131].

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126 John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) U.Chi.LRev. 765, 777.

127 The Maruti Shripati Dubal v State of Maharashtra 1987(1) BomCR 499 (Bombay High Court) studied in this thesis suffered from the same infirmity. The court sought no independent public reasons for why those values support the principles proposed by religion.

128 Nand Kishore Sharma and Ors v Union of India and Anr 2005 SCC Online Raj 90 (Rajasthan High Court); Misbah Umarfaruk Writ Petition No 187 of 2018 (Bombay HC 2018).

129 Aruna Ramchandra Shanbaug v Union of India and Ors Writ Petition (Criminal) No 115 of 2009 (Supreme Court of India) and Common Cause (A Regd Society) v Union of India Civil Petition (No) 215 of 2005 (Supreme Court of India).

130 State of Maharashtra and Ors v Indian Hotels and Restaurants Assn. and Ors. (2013) 8 SCC 519 (Supreme Court of India).

131 AC Agarwal and Ors v Ram Kali and Ors. AIR 1968 SC 1; Ram Kali v AC Agarwal AIR 1964 P&H 518 (Punjab and Haryana High Court).

8. Conclusion

In this chapter, I have examined the religious and cultural claims extracted in the dataset against the Indian constitutional understanding of secularism and the concept of public reason proviso. The use of religious and cultural claims in the cases has been analysed against the anvil of public reason. In addition, where religious claims have been used, where appropriate, I have also analyzed their role in the case against the framework of secularism.

Before proceeding to the analysis, I reiterated the concept of public reason proviso. Public reason places a duty upon the State, which includes government officials, judges etc., to resolve constitutional questions on politically reasonable terms. The basic idea is that in any liberal society there will be pluralism of thought on various constitutional issues. As people cannot agree on the same answer if they reason from the comprehensive religious and non-religious doctrines, they must eschew their personal grounding principles in favour of public reasons. So long as State actors eventually present properly public reasons for their decisions, there is no bar in introducing comprehensive religious and non-religious doctrine in the debate. This requirement, called the public reason proviso, calls for demonstrating that the political values embedded in the constitution do support the principles that the comprehensive doctrines propose. By extension, so long as a decision is justified on proper political values, there is no bar from public reason from introducing comprehensive religious and secular doctrine to provide sociological reasons to believers to honour public reason.

Next, I discussed the normative foundations of secularism in India. I discussed the range of political thought that occupies the field of secularism in India and argued

that the secular attitude was key to understanding the Indian constitutional conception. By a review of the cases, I extrapolated then three key features of secularism: 1. absence of State religion; 2. absence of State patronage; and 3. non-interference of religion in State affairs.

The aim of this chapter has been to provide a lens to judges to weigh religious and cultural claims when they encounter them in fundamental rights cases not dealing with the freedom of religion. It is proposed that the two key measures to weigh such claims are secularism and public reason, and this chapter has provided the method that is to be employed in this analysis to produce constitutionally correct results.

CHAPTER 8- CONCLUSION

Religious and cultural claims are used freely in the determination of morally controversial fundamental rights issues. The counsels for the parties proposing and opposing the right employ these claims to further their arguments. This thesis has shown that the claims are partly or wholly responsible for the outcome of 11 cases studied herein. Is this the correct method to decide fundamental rights cases in a secular, democratic, constitutional country, one which is supposed to be guided by nothing other than the values embedded in the constitution? This is an uncomfortable question to ask because many a time one does not seek to question religious and cultural values. Being deeply embedded in society, such claims appear to be true, and beyond question, and therefore to decide in accordance with them seems like the natural thing to do.

Yet, the central point of this thesis is that there is nothing natural about using religious and cultural claims in deciding fundamental rights cases. These claims are a double-edged sword, and while in some cases, they may be used strategically to expand the scope of fundamental rights, as was done most famously in the early suicide cases of *Maruti Dubal* and *Rathinam*, it may also be used to restrict the scope of liberties, as can be seen through some of the beauty pageants cases, and sex work cases. Therefore, it is imperative that when the judiciary is confronted by such claims, it possesses a clear framework to evaluate them.

However, the judicial task is complicated by the fact that there is no clear interpretive philosophy provided by the constitution. In addition, constitutional practice suggests that the court may consider any evidence it finds relevant and there

is no legal prohibition on it to consider religious and cultural evidence. This explains the haphazard treatment of such claims by the higher courts. Immense power vests in the High Courts and the Supreme Court, and seemingly the limits of those powers are not entirely clear to the higher judiciary itself. There is a total lack of a principled framework that can advise the judges on how to tackle religious and cultural claims in such cases.

Religious and cultural claims were extracted from the cases studied in this thesis and their various attributes were codified. Two significant findings emerged from this exercise. First, judges were permitting these claims to be admitted into court without regard for constitutional theory, doctrine, and good constitutional practice, and second, that a majority of the claims (81.5%) were unsupported by evidence.

Although there are no overt limitations on the courts' power of judicial review, it must be guided by an interpretive philosophy of the constitution, the principle of reasonableness being its very first limb. The judges must employ the productive power of this principle to its fullest in their examination of State action. Reasonableness, which has now achieved the status of a unifying constitutional principle, is concerned with foreseeable justifications. It places upon the State, a duty to justify and justificatory statements help separate legitimate State interest (reasonable) from personal taste (unreasonable). For example, in the *marital rape* case, the State defended its marital rape exception by stating that child marriages were traditional and doing away with the exception will threaten the entire institution of marriage. Here, the State was clearly reflecting the personal viewpoints of some parliamentarians. When the court questioned the reasonableness of this position instead of simply adopting it, it was able to see that this cultural viewpoint did not

meet constitutional scrutiny. Therefore, as a first step, judges should subject religious and cultural claims to the test of reasonableness. Another feature of reasonableness is that it abjures fanatical viewpoints and tends toward balance and equality. As a result, inquiries into reasonableness of a religious and cultural viewpoint should be sensitive to critiques of inequality, whether they pertain to social, economic, political, or historical disadvantage. Only when the inquiry is cognisant of these critiques can it be classified as capable of producing a reasonable result. A reasonable justification is also not the same as a common one. A traditional, common, mainstream method of thinking does not ipso facto constitute a reasonable justification. Law and culture scholars have been at pains to differentiate the reasonable from the common, and have shown through their scholarship that religious and cultural views circulate freely in society and constitute our commonsensical view of the world. At the same time, culture is not singular, but a site of contested meaning. Therefore, when the State tries to justify a State action, or a private party opposes another's claim to a fundamental right on cultural grounds, what they are doing is not forwarding an incontestable truth, but advancing one side of a cultural disagreement. Judges need to apprehend these claims as distinct from reasonable claims in the first instance, and subject them to the rigours of the rule of law, before they win a place in the final outcome of the case. The final aspect of reasonableness discussed in the thesis is the duty of the judge to come to a reasonable conclusion regarding a case. This duty requires the judge to conduct a multifaceted inquiry to come to a reasonable conclusion to the case. Judges are duty bound to consider all relevant criteria to come to a decision, which includes, paying attention to the textual criteria laid down for the determination of a right (for example, morality is an appropriate ground for restricting the rights under Article 19, but not under Article 14 or 21), having regard to precedent, having regard to the basic

structure of the constitution, and also following the rules of procedure to hear and admit evidence on contestable facts.

On probing the evidentiary basis of these claims, it was further found that a majority of the religious and cultural claims were judicially noticed (75%). Further, with respect to the 11 cases which were influenced by religion and culture, 33 of the 42 religious and cultural claims made therein, i.e. 78.5% of them were judicially noticed. Judicial notice is a rule of evidence law that is meant to save the time and resources of the litigants and the court, and it applies only to matters the veracity of which is beyond question. Section 57 of the IEA identifies some of these matters, but this list is only illustrative. The underlying principle for the application of the rule is that a relevant fact or a fact in issue must be notorious. When the judicial notice rule is directly invoked in the courts, they have been conscious of its scope and narrowly applied the criteria of notoriety. However, this thesis has demonstrated that when the rule is not directly invoked, courts surreptitiously employ their powers to take judicial notice and admit religious and cultural claims, which are highly debatable and not beyond controversy. For example, in the *beauty pageant* appeal in the Karnataka High Court, the judge took judicial notice of Indian culture, which was a fact in issue in the case, and imposed restrictions on the beauty pageant accordingly. In this case, culture was at the centre of the controversy; the organisers believed that they could conduct the pageant in accordance with Indian culture, while the protestors believed that Indian culture and beauty pageants were inherently incompatible. Leaving aside for the moment the question of judicial competence to adjudicate on culture and the legitimacy of a constitutional decision made on cultural grounds, the courts, once they had realised that culture was at issue in the case, should have given both parties the opportunity to produce evidence in support of their positions. Similarly, in the right to

die case of *Rathinam*, the court took judicial notice of various religious views, which was partially responsible for the final decision that the right to die was included within the right to life.

Yet another confounding facet of the judicial notice rule is its ambiguously worded proviso, which entitles the court to look at 'appropriate books and documents of reference' while taking judicial notice of art, public history, literature and science. Perhaps empowered by this entitlement, courts refer to books of their own accord in deciding fundamental rights cases. For example, in the *Maruti Dubal* case and the *CA Thomas Master* case, the court freely referred to Dr. Kane's Dharmashastras and the *Garuda Purana,* respectively to judicially notice religious views on the right to end one's life. This is an illegal use of the 'appropriate books or documents of reference' entitlement for the reasons set out in the thesis. The court cannot refer to such books before meeting the pre-condition of the judicial notice rule, which is that the fact in question must be beyond controversy. Different religious views on suicide or euthanasia are not beyond controversy. Different theological texts of various religions may have different stances on the same topic. Different theologians may disagree over the interpretation of scripture and the like. Therefore, the court is not empowered to refer to some books it considers authoritative and take judicial notice of the facts mentioned therein before it can meet the pre-condition of notoriety.

A further problem with the entitlement is that there is no guidance provided either by the text of the section or the doctrine on the criteria a book or document must fulfil to be considered an 'appropriate book of reference.' Presently, the list comprises books mentioned in commentaries and scholastic works; a list compiled by scholars of judicial notice drawing on the practice of the courts. The list, as I have

argued, consists primarily of delocalised colonial treatises written during the colonial rule, by the colonial masters. The danger with unquestioningly referring to those books is that they might provide accounts of the subject. Further, these books are now of great antiquity and there is a need to update the list of authoritative books to which the court may refer. Judicial notice scholars have also noted that only those books that have enjoyed a certain mainstream career can qualify as appropriate books of reference. This endangers critical accounts of culture and religion, further solidifying the grasp of hegemonic religious and cultural views on the outcome of cases.

My recommendation with respect to this particular aspect of the judicial notice rule is that the category of 'appropriate books and documents of reference' must take colour from the scope of the general provision. The rule is enacted to ease the process of evidence taking for notorious facts, some of which like parliamentary law, domestic law, proceedings of the Constituent Assembly, etc. are already mentioned in the rule. Therefore, the appropriate books of reference should refer to books which are the most authentic sources on that information. For example, the Gazette publications of the Union and the State for notification on laws, SCC Online, Manupatra, and Supreme Court and High Court websites for copies of cases, Law Commission Reports for views of the law commission on contemporary matters, etc. Even so, the book or document can only go so far to establish the authenticity of a fact mentioned therein. For example, a law commission report referred to in the *marital rape* case which traced the origin of the marital rape exception to the English custom of coverture must be only be held to authenticate the commission's opinion on the origin of the exception, but not to authenticate the origin of the exception itself.

Illegal use of judicial notice deprives a party from either cross-examining the facts which have been so noticed or from producing its own evidence to counteract those facts. Such actions take away an important guarantee of the adversarial process— that both sides will be heard. The right to be heard is a core component of the principles of natural justice, and illegal judicial notice acts violate the natural justice rights of litigants, leaving them remediless against such court action. Litigants must intercept illegal uses of judicial notice and assert their right to cross-examine and present their own evidence. The *Abida Khatoon* case has presented an example of a decision being partly overturned on an illegal use of judicial notice by the lower court. This means that such uses of judicial notice can be grounds of appeal. Although no such ground has been officially recognised by codified law, and there are no recorded cases where the parties have themselves raised this as ground of appeal, the *Abida Khatoon* example presents a case in point to challenge illegal uses of judicial notice in higher court— this can be a powerful weapon to challenge the unquestioning use of religion and culture to shape fundamental rights.

Another recommendation to check the illegal usages of judicial notice is to amend section 57 or the rules of the court to signify that the record of the case present before the court, such as the submissions, transcripts, exhibit, shall represent the complete and exclusive record on which the court must rely to pass the decision, and if the court takes judicial notice of a material fact which is not present in the record, a party shall, upon request, have the opportunity to produce contrary evidence. Such a provision will provide an avenue to the party, against whose interest judicial notice has been taken have a chance to be heard. Section 556e of The Administrative Procedure Act, 1946 of the USA provides this safeguard in federal agency

proceedings.[1] The Federal Rules of Evidence also provide a similar protection to the parties.[2] As of now, no such protection exists on the law books in India. The Supreme Court Rules, 2013, for example, provide in detail how the case books are to be prepared, the stage at which evidence needs to be submitted, and how new evidence may be produced in court, but is complete silence on the obligation of the court to base its decision exclusively on the record before it. The proposed amendment will not only provide judicial accountability, but also fortify the principles of natural justice.

Once the court determines that it wants to hear religious and cultural claims on an issue in question, and both parties have presented their evidence, the court is at liberty to draw inferences from the evidence and decide as James Fitzgerald Stephen, the author of the IEA has said, in the direction of that evidence which indicates, 'a very high degree of probability.' However, before the courts do so, they have to ask the fundamental question: can religion and culture, on its own, influence the course of fundamental rights, in a secular, liberal, and democratic country? To arrive at the answer, the court has to deal with two very important concepts: secularism and public reason. Secularism is a basic feature of the constitution and any decision taken by the court cannot change the secular nature of the country. Here I have identified three basic features of secularism: 1. there is no State religion; 2. the State does not

[1] **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision** (e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

[2] Judicial Notice of Adjudicative Facts: **(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

patronise any particular religion; and 3. religion cannot interfere in the affairs of the State. Therefore, for example, as was observed in the *Rathinam* and *Maruti Dubal* case, the court decided the scope of the right to life in accordance with various religious views. This is a clear example of religion interfering in State affairs. Simply because multiple religions agree on a particular viewpoint does not make the viewpoint any less religious. The tenet of 'unity in diversity' does not empower the judiciary to convert the nation into a collaborative theocracy. However, not all uses of religion in a fundamental rights case are violative of this secular ideal. In the *abortion* case, for example, the court concluded that Section 3 of the MTP was valid, for reasons of precedent. However, once it had made its ruling, it cited religious verses from the *Atharva Veda* and the *Yajur Veda* to support its decision. By doing this, the court did not base its decision on religion, but merely offered a sociological basis to believers for honouring the decision of the court.

Secularism offers some insight into how religion should be negotiated in deciding fundamental rights cases, but its insights are not fully developed on how culture should be negotiated in handling matters of the State. For the purposes of culture, insights from public reason are invaluable. As long as independent public reasons exist for decisions made by judges, references to culture and religion are not constitutionally illegitimate. What does this mean? This means that fundamental rights cases need to be decided by the values embedded in the constitution, though they are dynamic, ever-evolving and subject to persuasion. An interpretive theory of the constitution, like the one identified in this thesis, is necessary to guide this enterprise. Owing to the constitution's commitment to secularism and liberalism of thought, religious and cultural values cannot shape these constitutional values, though as I have argued, they may promote the same message as constitutional values. For

example, if the constitution favours a substantive view of equality, which supports affirmative action, then it should not matter that the court used some religious texts or cultural views to arrive at this view of constitutional equality. An independent inquiry into the constitutional value of equality would have supported the same outcome. In other words, the religious and cultural views are supportable by independent, justifiable, and defensible constitutional conceptions and in the concerned judgment the court must show that they are. Yet, this is not the way in which the courts in many instances have used religious and cultural references. Such references and views were used to shape constitutional values. For example, in the early *right to die* cases of *CA Thomas Master*, *Rathinam*, *Gian Kaur*, and *Maruti Shripati Dubal*, most of the *sex work* cases, the *marital rape case*, to name a few, either the Court or the State justified its position on its specific religious or cultural worldview on the sanctity of life, the morality of sex work, the rights and obligations of an intimate relationship and the like. These decisions were made by force of the comprehensive religious and cultural doctrines to which the Court or the State subscribed, and not by defensible conceptions of constitutional values. Such decisions or State actions, though they may be technically legal, are constitutionally illegitimate because they flout public reason. They seek to impose upon a pluralistic society, the moral and religious of a few.

Therefore, the answer to the question raised at the beginning of this thesis is that religious and cultural claims can no doubt be admitted and considered in court, but if and only if they pass the test of reasonableness, secularism, and public reason, and follow the correct procedure identified by the IEA.

Before I conclude this thesis, a final word on the future direction of this research is apt. A total study of all the fundamental rights cases have been conducted

under each identified sub-theme, and on the particular sub-theme, the findings of this thesis are complete. In other words, with respect to the sub-themes, I have studied the entire population of cases. Even so, for reasons of feasibility, and because not having a fixed site to find cases makes this enterprise more difficult, this research has used a small sample of cases from the vast rota of the Indian higher judiciary. Future research can use this research as the basis for identifying other cases which present the same problem. That research can further develop the dataset created in this research and expand the number of cases studied. This may help to further strengthen the findings of this research, and may also help to identify other important aspects of the phenomenon which are worthy of examination. Further, this study has focused only on India, but my initial literature review had suggested that religion and culture play an influential role in determining fundamental rights outcomes in other jurisdictions as well, such as, the US, and the European Court of Human Rights, to name a few. Expanding the insights of this study to study the cases in those jurisdictions also may add to finding even more robust responses to this all too important phenomenon.

APPENDIX 1

List of Cases Studied in the Dataset

1. AC Agarwal and Ors v Ram Kali and Ors AIR 1968 SC 1 (Supreme Court of India).
2. Amitabh Bachchan Corporation v Mahila Jagran Manch and Ors Civil Appeal No 2021 of 1997 (Supreme Court of India).
3. Aruna Ramchandra Shanbaug v Union of India and Ors AIR 2011 SC 1290 (Supreme Court of India).
4. Ashaben v State of Gujarat and Others 2015 150 AIC 501 (Gujarat High Court).
5. CA Thomas Master v State of Kerala 2000 Cri LJ 3729 (Kerala High Court).
6. Chandra Rajkumari and Anr v Commissioner of Police, Hyd AIR 1998 AP 302 (Andhra Pradesh High Court).
7. Cheena Jagdeeswar and Ors v State of Andhra Pradesh Criminal Appeal No 165 of 1987 (Andhra Pradesh High Court).
8. Common Cause (A Regd Society) v Union of India (2014) 5 SCC 338 (Supreme Court of India).
9. Gian Kaur v State of Punjab AIR 1996 SC 1257 (Supreme Court of India).
10. Independent Thought v Union of India and Ors Writ Petition (Civil) No 382 of 2013 (Supreme Court of India).
11. Indian Hotel and Restaurants Association and Ors v Maharashtra and Ors 2006 (3) Bom CR 705 (Bombay High Court).
12. Indian Hotel and Restaurants Association and Ors v the State of Maharashtra and Ors AIR 2019 SC 589 (Supreme Court of India).
13. Mahila Jagran Manch v The State of Karnataka and Ors ILR 1997 Karnataka 2110.
14. Mahila Jagran Manch v The State of Karnataka and Ors WP 25747/1996 (Karnataka High Court).

15. Maruti Shripati Dubal v State of Maharashtra 1987 Cri LJ 743 (Bombay High Court).
16. Misbah Umarfaruk Tamboli v Union of India WP 187/2018 (Bombay High Court).
17. Nand Kishore Sharma and Ors v Union of India and Anr AIR 2006 Raj 166.
18. National Legal Services Authority v Union of India (2014) 1 SCC 438 (Supreme Court of India).
19. Navtej Singh Johar and Ors v Union of India and Ors Writ Petition (Criminal) No 76 of 2016 (Supreme Court of India).
20. Naz Foundation and Ors v Govt of NCT of Delhi and Ors WP(C) No 7455/2001 (Delhi High Court).
21. Nitu and Ors v The Govt of the National Capital Territory of Delhi and Ors 226 (2016) DLT 457 (Delhi High Court).
22. P Rathinam and Ors v Union of India and Ors AIR 1994 SC 1844 (Supreme Court of India).
23. PN Swamy, Labour Liberation Front, Mehaboobnagar v Station House Officer Hyderabad and Ors WP No 5736 of 1997.
24. Ram Kali v AC Agarwal and Ors AIR 1964 P&H 518 (Punjab and Haryana High Court).
25. Sahyog Mahila Mandal and Anr v State of Gujarat and Ors Special Civil Application Nos 4594 and 15195 of 2003 (Gujarat High Court).
26. Shama Bai and Ors v State of Uttar Pradesh, Lucknow and Ors AIR 1959 All 57 (Allahabad High Court).
27. Smt Kaushailiya v State AIR 1963 All 7 (Allahabad High Court).
28. State of Maharashtra and Ors v Indian Hotel and Restaurants Association AIR 2013 SC 2582 (Supreme Court of India).
29. Suresh Kumar Koushal and Anr v Naz Foundation and Ors AIR 2014 SC 563 (Supreme Court of India).

30. Tarakeshwar Chandrabanshi and Ors v The Union of India and Ors (2001 (2) PLJR 321 (Patna High Court).

31. Vanga Seetharamana v Chitta Sambasiva Rao and Ors AIR 1964 AP 400 (Andhra Pradesh High Court).

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